

Chapter Five

The People's Republic of China and the Law of the Territorial Sea

I. Introduction

This chapter takes China's enduring geostrategic interests and approaches to maritime security developed in the previous and tests them against the legal approaches taken by the leaders of the People's Republic of China in crafting China's claims about the Territorial Sea. What security considerations were on the minds of Chinese leaders as they crafted China's Territorial Sea laws? Did these leaders choose approaches to international law that would advance a preferred set of security rules benefiting China? Do these rules reflect a defensive, interior strategy to enhance China's coastal security? Did China simultaneously seek to control offshore islands as a mechanism to ensure its maritime security? Is there evidence that China's leaders employed legal and policy devices as substitutes for maritime strength when they devised these territorial sea laws? The answers to these questions will support conclusions that China's approach to international law of the sea as regards the Territorial Sea was influenced by China's particular set of geostrategic interests and concerns.

The People's Republic of China (PRC) formally expressed its views about its territorial sea on two occasions. In 1958, the PRC issued its first official statement on the territorial sea and published it for international consumption in the Peking Review. This statement was issued in the context of three important international events. In 1958, the First United Nations Conference on the Law of the Sea concluded in Geneva and settled on the first set of international treaties to codify international law of the sea. Among these first treaties was the Convention on the Territorial Sea and Contiguous Zone of April 29, 1958.¹ China's statement was issued on September 4, 1958, and was clearly influenced by the undertakings in Geneva, although the People's Republic of China did not participate in the

¹ *Convention on the Territorial Sea and the Contiguous Zone*, Geneva (April 29, 1958), United Nations Treaty Series, Vol. 516, p. 205.

negotiations there. Second, the statement explicitly stated China's claim to the island of Taiwan and other offshore islands to sink a legal grappling hook in these territories to prevent their further drift from Beijing's sovereign control. The 1951 San Francisco Peace Treaty had been concluded without any Chinese participation—from either side of the Strait—and, alarmingly to Beijing, it left indeterminate the final status of Taiwan.² From the beginning it had been the Chinese Communists' objective to sever any security relationship between the United States and the KMT and to ensure the withdrawal of American forces from China's periphery—especially Korea, Japan, and Taiwan.³ Accordingly, Zhou Enlai lashed out at the American draft treaty, calling it 'unacceptable' and a violation of international law and of the agreements between allied parties at Cairo, Yalta, and Potsdam in that

The Draft Treaty only provides that Japan should renounce all right to Taiwan and the Pescadores...without mentioning even one word about the agreement that Taiwan and the Pescadores be returned to the People's Republic of China.⁴

A third critical event, the Second Taiwan Crisis in 1958 and the intervention of the U.S. Navy's Seventh Fleet in what the People's Republic of China considered to be a domestic matter, also affected the Territorial Sea Declaration.⁵ As Tao Wenzhao, Chinese scholar of Sino-American history from the Chinese Academy of Social Science American Research Institute, recounted,

² Frank Chiang, *The One-China Policy: State, Sovereignty, and Taiwan's International Legal Status*, (Amsterdam: Elsevier 2017) and Y. Frank Chiang, 'One-China Policy and Taiwan,' *Fordham International Law Journal*, 28:1 (2004), p. 1, 16-17.

³ Edward E. Rice, *Mao's Way*, (Berkeley: University of California Press 1974), p. 492-493.

⁴ 'PRC Foreign Minister Chou En-lai's Statement on the U.S. Proposal of the Japanese Peace Treaty (1951),' *Xinhua News Agency Daily News Releases*, No. 777, (Beijing: China Information Bureau, Press Administration, August 16, 1951), pp. 75-78.

⁵ Bruce A. Elleman, *Taiwan Straits: Crisis in Asia and the Role of the U.S. Navy*, (Lanham, MD: Rowman and Littlefield 2015), pp. 89-99.

On the evening of 3 September, following several days of artillery attacks against Jinmen, Mao Zedong decided to halt artillery attacks for three days. On 4 September the Chinese government released its statement on the territorial sea, declaring that the territorial sea of the People's Republic of China (PRC) was 12 nautical miles and prohibiting all foreign aircraft and naval vessels from entering China's territorial sea and airspace, except with the permission of the Chinese government. The territory of the PRC included Taiwan and its neighboring islands. *The chief motive behind the Chinese government's decision to widen its territorial sea was to oppose American intervention in China's internal politics.* (emphasis added).⁶

Another Chinese-American scholar, Tao Cheng, observed in a 1969 article in the American Journal of International Law

Two factors appear to have played a very important role in the development of Communist China's practice on the law of the sea. One is the periodic international tension involving Communist China, such as the 1958 crisis over the offshore islands, Quemoy and Matsu, which occasioned a major formal declaration by the Government of Communist China, the 'Declaration on China's Territorial Sea.' The other is Communist China's determination to exploit the oceans and their resources.⁷

Either way, maritime security considerations were front-and-center in the minds of China's leadership as they issued the PRC's first statement on its territorial sea claims. Those considerations and the political context from which they arose will be discussed in section II below. Finally, section III will address the second occasion on which China formally expressed its views on international law and its territorial sea. This came in 1992 with the issuance of the Law on the Territorial Sea and the Contiguous Zone of the People's Republic of China, adopted at the 24th meeting of the Standing Committee of the National People's Congress on 25 February 1992.⁸ Like the 1958 statement, this law was also issued in the wake of the prolonged

⁶ Tao Wenzhao (ed.), *A History of Sino-US Relations (1949-1972)*, (Shanghai: Shanghai People's Press 2004), p. 170. [China Maritime Studies Institute translation].

⁷ Tao Cheng, 'Communist China and the Law of the Sea,' *The American Journal of International Law*, 63:1 (Jan.1969), pp. 47-73, at 47.

⁸ http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN_1992_Law.pdf.

negotiations of the Third United Nations Conference on the Law of the Sea, which were completed in 1982. This time, the People's Republic of China participated in the negotiations, having replaced the Republic of China in China's seat at the United Nations in 1971. In 1992, the United Nations Convention on the Law of the Sea had not yet come into force since insufficient countries had ratified the document. But the handwriting was on the wall. The Convention entered into force in 1994 and China's 1992 law laid the path for China's accession to the Convention in 1996. The law also set the foundation for a series of other laws and positions that would follow and which staked out a distinctly continentalist approach to the Convention's provisions.

II. Security Interests and China's 1958 Statement on the Territorial Sea

To better understand the People's Republic of China's first pronouncement on its approach to international law of the sea, made through a pronouncement issued in September 1958, it is essential to address three preliminary events. The first, addressed in section IIA is a pair of cross-strait crises—in 1954-55 and 1958--between the Communist forces and the KMT and involving the United States Seventh Fleet. The second, addressed in section IIB, is the effect of the 1951 Treaty of San Francisco that ended World War II and its impact on the status of Taiwan, still in possession of the Nationalists under protection from the United States Seventh Fleet. And the third event, addressed in section IIC, is the First United Nations Conference on the Law of the Sea in the spring of 1958 that met in Geneva and concluded a series of treaties that represented the status of international law of the sea at the time.

IIA. The Taiwan Strait Crises

By October 1949, the People's Liberation Army had chased Chiang Kai-shek and the remnants of the Nationalist (KMT) forces to the island of Taiwan. On the 1st of that month, Mao Zedong had stood on the portico of the great Gate of Heavenly Peace at the Emperor's entrance to the Forbidden City and declared the founding of the People's Republic. As Mao spoke, the PLA was preparing an assault on the KMT

position on the island of Quemoy in what appeared to be the beginning of the final stage of the PLA's consolidation of the Chinese Communist Party's hold on power.⁹ But the Battle of Quemoy, which lasted for three days between the 25th and 27th of October, was not to be the beginning of the Communists' final victory. Rather, the KMT, determined to hold Quemoy at any cost to protect its retreat to Taiwan, stationed its finest forces there to hold the island. The battle that ensued resulted in the total rout of three PLA regiments. The Communist Army brought no meaningful naval or amphibious capability and no air power to the battle. Instead, they commandeered fishing vessels from hostile locals to support their assault on nearby Xiamen. By the time the PLA had secured control over the city of Xiamen and was ready to attack the KMT position on Quemoy it had less than 300 small, non-motorized fishing vessels at hand to get its troops across the six miles of coastal waters to the island. Predictably, instead of final Communist victory, the battle became what Mao called the PLA's greatest defeat of the civil war. It marked the beginning of decades of military and political stalemate across the Taiwan Strait.¹⁰

This incomplete victory led to American naval and political involvement concerning the status of Taiwan and the de facto independence of the Republic of China from the mainland after North Korea attacked South Korea in 1950. The North Korean attack led President Harry Truman to fear a Communist resurgence in Asia and to reverse his policy of non-involvement in the Chinese civil war in favor of guaranteeing the security of Chiang Kai-Shek's regime on Taiwan.¹¹ The United States followed this policy reversal in 1951 with a bilateral Mutual Defense Assistance Agreement between the United States and the Republic of China. Truman

⁹ Chen Jian, *Mao's China and the Cold War*, (Chapel Hill: University of North Carolina Press 2001), p. 166.

¹⁰ Maochun Miles Yu, 'The Battle of Quemoy: The Amphibious Assault That Held the Postwar Military Balance in the Taiwan Strait,' *Naval War College Review*, 69:2 (Spring 2016), pp. 91-107.

¹¹ Chen Jian, *Mao's China and the Cold War*, p. 163. Han Suyn, recounts these events from the perspective of Zhou Enlai, as recorded in a conversation with Edgar Snow in 1960, in *The Morning Deluge: Mao Tsetung & the Chinese Revolution 1893-1954*, (Boston: Little, Brown and Company 1972), p. 525.

also ordered the U.S. Seventh Fleet to patrol the Taiwan Strait and announced that the U.S. would not restrain KMT operations against the mainland. The KMT did indeed use the maritime sanctuary provided by the U.S. to resume guerilla attacks on the mainland, collect intelligence, and to broadcast anti-Communist propaganda. By 1954, the U.S. and the R.O.C. were negotiating a full-blown defense treaty as part of American attempts to organize the Southeast Asia Treaty Organization.¹² These three developments—the inability to control the island of Taiwan, the lack of final victory in the civil war, and the growing threat from the U.S. Navy--put the mainland in a vulnerable position. Given the PLA's relative lack of naval and air power, American support for the KMT left the PRC with little hope of fully securing its maritime frontier.

To begin to deal with this problem, over the summer of 1954, the CCP leadership devised a plan of controlled pressure. The plan took advantage of the proximity to the mainland of KMT troops on the island of Quemoy. Although the PLA had little naval or air power, its ground artillery could easily span the six miles between Xiamen and Quemoy. PLA shelling of the island began on September 3, 1954. The PLA antagonism was, among its several purposes, a carefully calculated effort to undermine the developing security relationship between the US and the ROC by demonstrating that an American commitment to defend Taiwan could drag it back into war in Asia just as the U.S. was extricating itself from a costly war on the Korean Peninsula. The effort failed. The U.S. became even more politically committed to defend Taiwan and completed the defense treaty with Chiang Kai-shek in December that year. Even the U.S. Congress was motivated to act, passing the Formosa Resolution in January 1955 that authorized the President employ armed force to protect the security of Taiwan. As a result of the resolution, President Dwight Eisenhower ordered three American aircraft carriers to the Taiwan Strait and a wing of air force fighter jets to be deployed to the island, thereby ending the crisis

¹² Alexander L. George and Richard Smoke, *Deterrence in American Foreign Policy: Theory and Practice*, (New York: Columbia University Press 1974), p. 268-274.

with a major show of force.¹³ Accordingly, what the CCP got for its efforts in 1954-55 was increased insecurity on its maritime periphery and a tightened KMT blockade of mainland ports.¹⁴

By the summer of 1958, Mao Zedong was ready to try to break the KMT blockade of the mainland coast in order to diversify China's trade relations away from the Soviet Union.¹⁵ The relationship between the PRC and the Soviet Union had begun to fray and Mao realized that he had two potential super power enemies to deal with.¹⁶ Chinese security would be vulnerable to both the United States and the Soviet Union's greater strength as long as China's national power remained significantly inferior to that of either potential enemy. As a result, Mao decided to launch his Great Leap Forward campaign and needed to develop the national fervor essential to get the Chinese people behind his vision.¹⁷ At the same time, Mao was faced with a maritime security situation that had deteriorated even further since the 1954-55 crisis. The United States had followed through with its pledge of security assistance, allowing the KMT armed forces to swell to 600,000. KMT coastal harassment continued, including periodic blockades of PRC ports.

The Communist government feared the potential that this maritime collaboration between the KMT and the Americans could even escalate into a full-scale KMT reinvasion of the Chinese coast.¹⁸ As historian Edward J. Marolda puts it, initially,

¹³ George and Smoke, *Deterrence in American Foreign Policy*, p. 286-288; Chen Jian, *Mao's China and the Cold War*, p. 167-170.

¹⁴ Elleman, *Taiwan Straits*, p. 89.

¹⁵ *Ibid.*, pp. 90-91.

¹⁶ *Ibid.*, p. 89-92.

¹⁷ Thomas J. Christensen, *Useful Adversaries: Grand Strategy, Domestic Mobilization, and Sino-American Conflict, 1947-1958*, (Princeton: Princeton University Press 1996), p. 195; Chen Jian, *Mao's China and the Cold War*, p. 173-175.

¹⁸ Elleman, *Taiwan Straits*, p. 92, citing Joseph F. Bouchard, *Command in Crisis: Four Case Studies*, (New York: Columbia University Press 1991), p. 59.

there were clear indications in the first half of 1950 that the United States would not oppose Mao's consolidation of power and seizure of all remaining Chinese territory.¹⁹

But since the initiation of conflict on the Korean Peninsula and the resulting shift in U.S. policies, the Chinese Civil War had been prolonged in what Marolda refers to as its 'maritime phase' throughout the 1950's.²⁰ The CCP leadership could not be sure the KMT, with American backing, would not attempt to re-establish a foothold on the Mainland. The sense of threat reached its most serious level when in May 1958 the U.S. announced it would station missiles on Taiwan capable of carrying tactical nuclear warheads. On August 23, 1958, the PLA once again began an intensive campaign of artillery bombardment against Quemoy (Jinmen) Island, this time with the purpose of attempting to blockade the island, trap nearly 100,000 KMT troops, and either annihilate them or force their surrender.²¹

In response, on September 4, President Eisenhower issued a statement reaffirming American commitment to the defense of Taiwan and Secretary of State John Foster Dulles announced that if the Communists invaded Quemoy, the U.S. would intervene including, if necessary, with tactical nuclear weapons.²² Dulles also announced that, to reinforce the defense of the KMT troops on the island, the U.S. Navy would escort

¹⁹ Edward J. Marolda, 'Invasion Patrol: The Seventh Fleet in Chinese Waters,' in *A New Equation: Chinese Intervention into the Korean War, Colloquium on Contemporary History*, No. 3, (June 20, 1990), p. 11.

²⁰ *Ibid.*, p. 11.

²¹ George and Smoke, *Deterrence in American Foreign Policy*, p. 369-372; Chen Jian, *Mao's China and the Cold War*, p. 176-177, 180-184.

²² Michael M. Sheng, 'Mao and China's Relations with the Superpowers in the 1950s: A New Look at the Taiwan Strait Crises and the Sino-Soviet Split,' *Modern China*, 34:4 (October 2008), pp. 477-507, at 492. See also Appu K. Soman, "'Whose Daddy' in the Taiwan Strait: the Offshore Islands Crisis of 1958,' *Journal of American-East Asian Relations*, 3:4 (Winter 1994), pp. 373-398, at 373 and Gordon H. Chang, 'To the Nuclear Brink: Eisenhower, Dulles, and the Quemoy-Matsu Crisis,' *International Security*, 12:4 (1988), pp. 96-123, at 97-98. President Eisenhower's address to the American people on the subject is available at Dwight D. Eisenhower, *Radio and Television Report to the American People Regarding the Situation in the Formosa Straits*, September 11, 1958, <http://www.presidency.ucsb.edu/ws/index.php?pid=11231>.

up to the three-mile territorial sea limit KMT convoys attempting to resupply Quemoy.²³ American escort operations began and the blockade was broken within a few weeks. In escorting the KMT convoys only up to the limit of the territorial sea, the United States was attempting to support Chang Kai-shek without aggravating the situation by taking part in the conflict on Chinese 'territory.' This exercise of American self-restraint did not go unnoticed by Mao Zedong. That Americans believed in international law sufficiently to be restrained by it was a tool Mao might wield against them.

As the shelling began on August 23rd, Mao had instructed members of the Foreign Ministry and the General Staff to develop a territorial sea claim as a component of the Quemoy (Jinmen) campaign.²⁴ On September 4, 1958, in the midst of the crisis, Mao called a Politburo Standing Committee Meeting at the seaside resort of *Beidaihe* where the party's senior leadership had gathered on its annual summer retreat. As one CCP official recalled,

[T]he participants decided that our next plan was not an immediate landing on Jinmen, but pulling the noose tighter and tighter—putting more pressure on America—and then looking for an opportunity to act. All participants agreed with Premier Zhou's suggestion of announcing a twelve-mile zone as our territorial waters so as to prevent America's warships from reaching Jinmen and Mazu. Chairman Mao considered it righteous for us to defend our territory if American ships entered our territorial water.²⁵

On September 9, the PRC published a Declaration on China's Territorial Seas in the *Peking Review* that claimed a 12 nautical mile territorial sea for China measured from offshore straight baselines connecting outer islands, rather than the shoreline.²⁶ This declaration significantly expanded the sovereign waters claimed by

²³ George and Smoke, *Deterrence in American Foreign Policy*, p. 364-365.

²⁴ Chen Jian, *Mao's China and the Cold War*, p. 185.

²⁵ 'Memoirs by Wu Lengxi, Insider Story of the Decision Making during the Shelling of Jinmen,' (August 23, 1958), *History and Public Policy Program Digital Archive*, (Beijing: Biographical Literature), No. 1 (1994), pp. 5-11.

²⁶ 'Declaration on China's Territorial Sea,' *Peking Review*, September 9, 1958, p. 21.

China in an effort to interrupt American blockade-busting operations. In relevant part, the declaration states:

The Government of the People's Republic of China declares:

- 1) The breadth of the territorial sea of the People's Republic of China shall be twelve nautical miles. This provision applies to all territorial of the People's Republic of China, including the Chinese mainland and its coastal islands, as well as Taiwan and its surrounding islands, the Penghu Islands, the Tungsha [Dongsha] Islands, the Hsisha [Xisha] Islands, the Chongsha [Zhongsha] Islands, the Nansha Islands and all other islands belonging to China....
- 2) China's territorial sea along the mainland and its coastal islands takes as its baseline the line composed of the straight baselines connecting base points on the mainland coast and the outermost of the coastal islands; the water area extending twelve nautical miles outward from this baseline is China's territorial sea. The water areas inside the baseline...are Chinese inland waters...
- 3) No foreign vessels for military use ... may enter China's territorial sea ... without the permission of the Government of the People's Republic of China. ...
- 4) The principles provided in paragraphs 2) and 3) likewise apply to Taiwan and its surrounding islands ... The Taiwan and Penghu areas are still occupied by the United States by armed force. This is an unlawful encroachment on the territorial integrity and sovereignty of the People's Republic of China.²⁷

The statement specified four claims that reflect a continentalist view of China's maritime security interests, its sense of vulnerability to attack from the sea, and its desire to use international law and domestic policies to mitigate China's coastal insecurity. These are the breadth of the territorial sea, the baselines used to measure it, claims to islands not yet under PRC control, and denial of a right of innocent passage to foreign warships.

The breadth of the territorial sea was the first issue the PRC chose to address. At a time when major maritime powers insisted on a three-mile territorial sea, the PRC chose in its very first policy statement about its maritime claims to advance its

²⁷ 'Declaration on China's Territorial Sea,' *Peking Review*, September 9, 1958, p. 21.

authority over its coastal waters by an additional nine miles. This fact alone demonstrates China's continentalist approach to maritime security and international law of the sea in that it seeks to use international law to expand China's security perimeter and to delegitimize foreign naval activities there. The breadth of the territorial sea that China should claim had been the subject of some debate in the days preceding the announcement. One scholar involved in the debates was Lei Yingfu, who recalled in an interview commemorating the 40th anniversary of the 1958 Taiwan Strait Crisis,

On 30 August [1958], I received notification that I was to immediately report to the Chairman [Mao] and the Premier [Zhou] at Beidaihe. Among those going with me were the assistant to the Minister of Foreign Affairs, Qiao Guanhua, and advisor Liu Zerong. There was also someone surnamed Zhou, who was not a Party member. Liu Zerong and Mr. Zhou were both senior experts on international law. China's first *Chinese-Russian Dictionary* was drafted by a team led by Mr. Liu. For two successive days on September 1st and 2nd, we held meetings in the small meeting room of Chairman Mao's residence in Beidaihe. The Chairman, Liu Shaoqi, the Premier, Peng Dehuai, and the newly-appointed PLA Chief of Staff Huang Kecheng all attended. The chief reason why Chairman Mao called this meeting was to listen to everybody's opinions before making a big policy decision. Especially on matters related to international law, he did not want to have any oversights (*pilo*). He said, "I graduated from the University of Military Affairs and the Department of War. I don't understand law. So I've invited experts here today. I hope that the discussion is frank and open." I reported on the process and conclusions of the territorial sea debates. Qiao Guanhua talked about the news report that had been prepared for release. The two elderly men [i.e., Liu Zerong and Mr. Zhou] were great scholars. They knew about international law, especially the Hague Convention, like the back of their hands (*liaoru zhizhang*), inside and out. They quoted from authoritative texts, insisting that the territorial sea should be three nautical miles. They offered only one reason: it could not be too wide, for if China declared a 12 nautical mile territorial sea, there might be war. Chairman Mao listened attentively, asking questions from time to time. There was one moment that I recall very clearly. Chairman Mao joked with the two elderly men, deadpanning a look of shock, "So what you're saying is the Hague Convention could never ever be violated?" The two elderly men wrongly believed that the Chairman agreed with their views, and repeatedly said, "Right you are, right you are, it cannot be violated, it cannot be violated!" Chairman Mao bellowed with mirthful laughter. Ultimately, Mao summarized his conclusions: "The opinions of the two elderly gentlemen are good and

valuable. They allow us to examine the issue from another angle. But, we've researched this matter to death and at the end of the day the Hague Convention is not some imperial edict. We cannot make our decision based on the Hague Convention. It is advantageous for us to expand our territorial sea. Based on our best judgment, for the time being there will not be a war. We are not willing to fight. Do the imperialists really want to fight? I think not. If there must be war, we are not afraid. We've already crossed swords in Korea. In any case, we must be prepared. Once the Chairman spoke, the two elderly men came to their senses. They were extremely excited. Liu Zerong was so ecstatic that he couldn't sleep that night. He said, I've had two great honors in this life. The first was being sent to the Soviet Union as a Chinese representative after the October Revolution, seeing Lenin and shaking his hand. Being invited by Chairman Mao to participate in the decision on the territorial sea is a matter of great importance for the state and the nation. I have not lived this life in vain. I could not be more content. The 12 nautical mile territorial sea was thus decided. I asked the Chairman for instructions, telling him that the Chief of Staff had prepared a map of China demarcating the territorial sea boundary, asking him if we should publish that together [with the statement]. The Chairman said, let's not do that. Let's keep that thing in your pocket. The Chairman had thought about this very carefully. The struggle along the southeast coast was too complex. If we issued a map, it would restrict our actions [lit. "bind our hands and feet"]. If we don't issue it, we'll be able to advance and retreat at will when handling specific issues. In terms of tactics and strategy, this approach is far more flexible and convenient.²⁸

What were the advantages Mao referred to? Fu Chu observed

In the Declaration on the Territorial Sea our government declared that the breadth of our territorial sea shall be twelve nautical miles... First, it was considered from the point of view of the national security and defense of our country. Our country's coastline is very long, and the southeastern coast is the door of our national defense. Imperialism always uses its fleets to engage in aggression and sabotage activities. Consequently we must have sufficient breadth of territorial sea so as to enable us effectively to suppress the imperialist military provocations and war threats... Particularly in the present situation, when American imperialism occupies our territory of

²⁸ Shen Weiping, 'After Ten Days of Shelling Jinmen, Why Did Mainland China Cease Fire and Propose a Territorial Sea Boundary?' *People Online*, September 14, 2011, <http://history.people.com.cn/GB/205396/15654804.html>. [China Maritime Studies Institute translation].

Taiwan by force...a 12 nautical mile breadth of territorial sea is even more advantageous to our present struggle opposing American aggression.²⁹

This is a classic interior strategy—to seek to create a ring of control around the most valuable territory to be defended. In this case, Mao and his advisors observed that in its support for the Nationalist forces on Quemoy, the American navy was acting in self-imposed restraint based on its acceptance of a three-mile territorial sea. Even as the declaration was being written and issued, the ships of the Seventh Fleet would escort ROC vessels no closer than three miles to the island of Quemoy in support of ROC forces there. In articulating a twelve-mile limit, the PRC sought to keep the US vessels at an even further distance from Quemoy and other Chinese territories if possible. Additionally, after the declaration, if the American ships came closer than twelve miles, Mao considered it ‘righteous’ to attack them, whereas before the declaration the waters beyond three miles from China’s coast were arguably high seas. Thus, pushing the breadth of China’s territorial sea seaward by an additional twelve miles can be seen as an attempt to create an expanded zone of security along China coast; an attempt to use law to assert legitimize use of force as a mechanism to increase control over China’s weakly held maritime periphery; a use of domestic laws and policies to mitigate coastal insecurity; and a defensive policy

A second aspect of China’s 1958 Statement reflects the PRC’s deep sense of maritime insecurity—the declaration of a set of straight baselines connecting China’s outermost coastal islands, rather than the more well accepted approach of using the low water line along the coast as the baseline from which to measure the territorial sea. Although China did not specifically articulate the geographic coordinates of these baselines until it issued a supplemental declaration in May 1996, the immediate effect was to create thousands of additional square miles of sea space as a law-based maritime buffer zone. It is possible that China did not immediately specify its base lines because it lacked experts with the requisite legal and technical

²⁹ Fu Chu, *Concerning the Question of our Country’s Territorial Sea*, Beijing, 1959; translated in J.A. Cohen and Hungdah Chiu, *People’s China and International Law* (Princeton: Princeton University Press, 1974), p. 473.

skills.³⁰ If that is the case, Mao may have directed the draft map to be pocketed because he did not have confidence in its accuracy. However, it is also clear that Mao felt it suited China's interests for the exact location of China's territorial sea to remain ambiguous and thereby to preserve his freedom of action in dealing with China's many pressing maritime security concerns. As Fu Chu stated,

The adoption of the straight baseline method to delimit the territorial sea declared by our government is completely based on the concrete situation of our country.

...

The opposition of imperialists countries...is motivated by their imperialist aggressive ambition. They fear that this measure adopted by our country will be disadvantageous to imperialist military aggression and economic plundering.³¹

Indeed, Mao had been concerned about British naval intervention in Chinese affairs as late as 1949, when the Royal Navy seemed poised to resume its pre-war gunboat diplomacy along the Yangtse River. In April of that year Mao chided Winston Churchill for calling upon the British government to send two aircraft carriers to the Far East to defend British interests there.³² This, after the Royal Navy appeared to intervene in the civil war, sending four warships up the Yangtze and Huangpu Rivers to look after British interests in Shanghai and Nanjing. The event ended badly for the Royal Navy as it found itself entirely outmatched by very powerful Chinese

³⁰ Interview by the author of Professor Liu Nanlai of the Chinese Academy of Social Sciences, who participated in drafting the 1958 Territorial Sea Declaration. Newport, RI, July 2009.

³¹ Fu Chu, *'Concerning the Question of our Country's Territorial Sea,'* p. 482.

³² Mao Tse-tung, *'On the Outrages by British Warships – Statement by the Spokesman of the General Headquarters of the Chinese People's Liberation Army,'* April 30, 1949, in *Selected Works IV* (Peking: Foreign language Press, 1961) pp. 401-403, in J.A. Cohen and Hungdah Chiu, *People's China and International Law* (Princeton: Princeton University Press, 1974), p. 528-529.

land forces about to make an amphibious crossing of the Yangtze River in pursuit of the retreating Nationalist Army.³³ As Eric Grove puts it

Foreign warships were certainly no longer welcome in Chinese internal waters; they could now be opposed only too effectively. The door that had been opened with the Opium Wars a hundred years before was now slammed firmly shut.³⁴

In reasserting its sovereignty, as will be seen in the next section on the 1958 negotiations at the First United Nations Convention on the Law of the Sea, the Chinese Communists were well aligned with the developing world and its anxieties about past and potential future attacks from the sea by former Colonial powers. Accordingly, Communist China's first statement on its territorial sea claims can be seen as an attempt to take a leading role in defending the maritime interests of vulnerable former colonial states. One way to look at Mao's Declaration on the Territorial Sea, therefore, is as an early attempt to use China's leading role among developing states to carve out and spread a set of rules regarding the territorial sea that gave preference to the maritime security interests of vulnerable coastal states.

Mao and his advisors had a second policy objective in issuing the Declaration on the Territorial Sea, which was to make a specific claim to China's offshore islands—none of which were under PRC control at this time. This reflects the CCP leadership's strategic concern over China's lack of control over its maritime periphery. This concern of course had to do with the American intervention in China's stalemated civil war. By mid-September 1958, the United States had stationed five aircraft carriers and their escorts near Taiwan, positioned artillery capable of delivering tactical nuclear weapons on Quemoy (Jinmen), and provided the ROC government with new and lethal Sidewinder missiles.³⁵ But issuing the Declaration also had to do with the fact that China's leaders had real fears that the United States and its

³³ Eric J. Grove, *Vanguard to Trident: British Naval Policy since World War II*, Naval Institute Press: Annapolis (1987), pp. 127-134.

³⁴ *Ibid.*, p. 134.

³⁵ Elleman, *Taiwan Straits*, p. 93.

allies might treat Taiwan as a separate country. As is discussed in further detail below, the United States under the Eisenhower administration had begun to describe the territorial status of the island of Taiwan in more ambiguous terms than had the Truman administration before the Korean War. Thus, the PRC's Territorial Sea Declaration staked a clear claim to Taiwan in opposition to American political moves.

A third purpose for issuing the Declaration was to seek to restrict the innocent passage rights of warships along China's coastline. Although the International Court of Justice, in its very first case, affirmed the right of innocent passage for warships in the 1949 Corfu Channel Case, the 1958 negotiations in Geneva demonstrated that a minority of countries continued to resist that determination.³⁶ Indeed, even the ICJ was not of one mind on the question of innocent passage for warships. As Judge Alvarez opined in a separate opinion,

The passage through the territorial sea of a State ... is not a simple tolerance but is a right possessed by merchant ships belonging to other States. For these ships are discharging a peaceful mission and are contributing to the development of good relations between peoples. The position is not the same in the case of warships. As war has been outlawed henceforward, the mission of these ships can only be to ensure the legitimate defence of the countries to which they belong. Therefore, although they may effect an innocent passage through Straits forming an international highway between two free seas, in other cases the coastal States are entitled to regulate the passage, especially with a view to the protection of their own security or interests, but they are not entitled to forbid it. Warships only enjoy an unrestricted right of passage when they are engaged in an international mission assigned to them by the United Nations.³⁷

³⁶ *The Corfu Channel Case (Merits) Judgment of April 9th, 1949*, International Court of Justice Reports of Judgments, Advisory Opinions and Orders, available at <http://www.icj-cij.org/docket/files/1/1645.pdf>.

³⁷ *The Corfu Channel Case, Individual Opinion By Judge Alvarez*, International Court of Justice Reports of Judgments, Advisory Opinions and Orders, available at <http://www.icj-cij.org/docket/files/1/1649.pdf>.

Judge Alvarez' opinion reflects a much more restrictive view of innocent passage for foreign warships, one that was quite useful for states like China that preferred to weaken the right of warships to approach their weakly guarded coastlines. Indeed, as one contemporaneous Chinese commentator stated,

The encroachment upon a state's territorial sea or the territorial air space above the territorial sea by any foreign power ... is considered to be an aggressive act in violation of international law.³⁸

Tellingly, at *Beidaihe* it was Zhou Enlai who proposed the text of the Declaration on the Territorial Sea. As both Premier and Minister of Foreign Affairs, by 1958 Zhou was an experienced diplomat, well informed of developments at the International Court of Justice and of the proceedings at the United Nations Conference on the Law of the Sea at Geneva earlier that year.³⁹ Indeed the September 16, 1958 issue of *Peking Review* contains a full treatment of the military activities in the Taiwan Strait, including American intervention there, in tandem with articles explaining the results of the Geneva negotiations on the law of the sea and explaining in detail China's justification for its twelve-mile territorial sea claim. The issue begins with the sub-heading, 'U.S. Invaders, Get Out of the Taiwan Straits Area,' and includes under that sub-heading articles entitled 'U.S. Must Halt Immediately,' '650 Million Ready to Smash U.S. Aggression,' 'The World Supports China,' and 'China's Territorial Sea.'⁴⁰ Zhou was therefore aware of what tools international law of the sea offered to help put into action Mao's desire to limit or to delegitimize American naval action around China's shores. As Zhou put it, this will 'prevent American military vessels from coming close to the Jinmen Islands.'⁴¹ He also clearly sought to

³⁸ Fu Chu, *Concerning the Question of our Country's Territorial Sea*, p. 471.

³⁹ The Chinese press was reporting on law of the sea developments in 1957 and 1958. See, e.g., Tao Cheng, 'Communist China and the Law of the Sea,' footnotes 33, 34, 48 and 49; Fu Chu, *Concerning the Question of our Country's Territorial Sea*, p. 474.

⁴⁰ *Peking Review*, No. 29, September 16, 1958.

⁴¹ Chen Jian, *Mao's China and the Cold War*, (Chapel Hill: University of North Carolina Press 2001), p. 185, citing Jin Chongji, (ed.), *A Biography of Zhou Enlai, 1898-1949, Volume 2*, (Beijing: Zhongyang Wenxian, 1998), p. 467.

connect in the minds of Chinese people the security implications of China's territorial sea claim.

Predictably, both in terms of the dynamics of the on-going crisis in the Taiwan Strait and in terms of Beijing's continentalist preferences, the Declaration purports to limit the right of foreign warships to enter the territorial sea under any circumstances without explicit approval from the Chinese government. This included the waters of offshore islands Beijing claimed but did not control—especially those under the control of the Nationalist forces. The Party leadership gathered at *Beidaihe* in 1958 had in mind the American naval operations to break the PRC blockade of the Nationalist forces on Quemoy when they chose to make it illegal for foreign warships to enter China's territorial sea without permission. If the PRC Declaration caused the American navy to impose self-limits and remain beyond twelve miles from the island out of regard for law, that would certainly work to the PLA's benefit.

Mao was right, there was no war. But the United States chose to defy China's extended claims and to only recognize a three-mile territorial sea. The only real American response was to shift its convoy operations of ROC vessels to the three-mile limit from nighttime to broad daylight to make sure its objections were not overlooked.⁴² But the Declaration was indeed useful, as Mao predicted. The PRC used the American 'invasion' of China's 'sovereign waters' as a source of both international and internal political support for continued national sacrifice to advance China's security and to achieve Mao's other political objectives.⁴³ This is evident from the Declaration's politically charged assertion that the Taiwan issue was China's 'internal affair' and Mao's explanation that for China to use force against American intervention would therefore be a 'righteous' act. In support of these

⁴² 'Quemoy Garrison Supplied Under U.S. Fleet's Escort: China Holds Fire,' *New York Times*, Sept. 8, 1958, p.1.

⁴³ 'Mass Demonstrations Reported: Red China Decries U.S. Escort Action,' *New York Times*, Sept. 8, 1958, pp. 1-2.

conclusions is Wu Lengxi's recollection about Mao's motives at *Beidaihe* when deciding to issue the territorial Sea Declaration.

Then Chairman Mao turned to Hu Qiaomu and me and said that at present our media should give wide publicity to a condemnation of America for causing tension in the Taiwan Straits...Our propaganda should emphasize that Taiwan and the offshore islands were Chinese territory, that our bombardment of Jinmen (Quemoy)-Mazu was aimed at punishing Jiang's (Chiang's) army and was purely China's internal affair, and that no foreign country should be allowed to interfere with what happened there.⁴⁴

Thus, China's 1958 Declaration on the Territorial Sea can be seen as the act of a weak coastal state with a strategic orientation reflecting interior preferences to create a measure of maritime security by delegitimizing the actions of the dominant maritime power. As Tao Cheng puts it, the statement

was undoubtedly a reflection of its timing and the immediate purpose to try to discourage the United States from sending warships to help the nationalist Chinese defend their off-shore islands.⁴⁵

Additionally, in claiming a 12-mile territorial sea the Chinese leadership saw an opportunity to simultaneously demonstrate Communist solidarity and common cause with newly emerging and developing states. As Fu Chu stated

Mutual respect of sovereignty over [the] territorial sea has already become a generally accepted principle of international law. Socialist countries have consistently and strictly observed this principle and engaged in uncompromising struggle with imperialist countries which have used various means to encroach upon the territorial sea of other countries.⁴⁶

Chu goes on to recount that the Declaration had received the support of socialist countries, including: the Soviet Union, Bulgaria, Hungary, Rumania, Czechoslovakia, the German Democratic Republic, Poland, Albania, [North] Korea, [North] Vietnam,

⁴⁴ 'Memoirs by Wu Lengxi,' pp. 5-11.

⁴⁵ Tao Cheng, 'Communist China and the Law of the Sea,' pp. 62-63.

⁴⁶ Fu Chu, *Concerning the Question of our Country's Territorial Sea*, p. 471.

and Mongolia and continues on to reflect on the ways in which China's history of encroachment by naval powers was also overcome for the first time by the Chinese Communist Party's Declaration and enforcement of its territorial sea.⁴⁷ The details of China's territorial sea statement therefore served to broaden China's security options by appealing to multiple potential partners. It was a mechanism to enhance China's pursuit of relative efficiency in securing Chinese territory from its neighbors and peer competitors by creating alternative systems of support. China was not strong enough to establish a preferential set of rules on its own, but in combination with other Communist states and with developing states, China could overcome its weak ability to secure its maritime periphery through a legal and political mechanism. Additionally, one way to analyze the Communist leadership's approach to its weak control over China's maritime periphery is that they were relying on the fundamental approach used by China's leaders for centuries. That is, they employed law and policy mechanisms to mitigate coastal insecurity when China's military forces were insufficient to do the job. Accordingly, the terms of this Declaration resonate with both China's historical approaches to maritime insecurity and with the traditional security strategies of a continental state.

But in turning to law and politics as a source of pressure, the PRC was also addressing a decade of political pressure asserted upon it by the United States through American statements about the indeterminate status of Taiwan. American policy in 1949 and early 1950 had been to refrain from intervening in the outcome of China's civil war. But when that policy changed as a result of the Korean Conflict, Chinese leaders had every reason to fear that if they did not take such measures as they could, Taiwan might be formally separated from the mainland leaving China's maritime periphery in perpetual jeopardy.

⁴⁷ Fu Chu, *Concerning the Question of our Country's Territorial Sea*, p. 472.

IIB. The San Francisco Peace Treaty and the Indeterminate Status of Taiwan

The first decade of the People's Republic of China's existence was a challenging one. In addition to attempting to consolidate China's security in both the maritime and continental directions, the Communists' inability to deal a final deathblow to the former government presented a perpetual challenge to the regime's legitimacy. The shifting American position on the status of the Republic of China and the Guomindang government on Taiwan meant that Beijing had to do everything in its power to tie the island to the mainland. This explains the explicit statement in the 1958 Declaration on China's territorial sea claiming sovereignty over the island of Taiwan and the Penghu Islands.

On the matter of the relationship between the Territorial Sea Declaration and the status of Taiwan, Fu Chu wrote shortly after the Declaration was made public,

The Declaration solemnly announced ... [t]he Taiwan and Penghu area are still occupied by the United States armed forces. This is unlawful encroachment on our territorial integrity and sovereignty...This Declaration is an important measure for protecting our country's sovereignty and territorial integrity and has rather important significance for consolidating our country's national defense and security.⁴⁸

The concern for the integrity of China's maritime periphery was twofold. The first, of course, had to do with the security guarantees extended by the United States to the KMT and the resulting presence of American armed forces on the islands. More specifically, it had to do with the mainland's lack of military capacity to dislodge them and unify the country. The second was political and had to do with the Taiwan's treatment under the 1954 San Francisco Peace Treaty.

The issue began with the 1895 Treaty of Shimonoseki, which formally ended the Sino-Japanese war that began the previous year. China was represented by the veteran Chinese diplomat Li Hongzhang and Japan was represented by Prime

⁴⁸ *Ibid.*, p. 470.

Minister Hirobumi Ito. By the terms of Article 2 of the treaty, China ceded to Japan 'full sovereignty' to Taiwan (referred to in the treaty as Formosa) 'in perpetuity.'⁴⁹ Control over the island was subsequently transferred from China to Japan. However, in December 1941, when the Republic of China formally declared war on Japan after a decade of Japanese encroachment on Chinese territory, the Chinese government proclaimed the 1895 treaty abrogated by Japanese actions and by its fundamental 'inequality.' Similarly, the United States and other Allied Powers issued the Cairo Declaration on December 1, 1943, which required 'that all the territories Japan has stolen from the Chinese, such as...Formosa and the Pescadores, shall be returned to the Republic of China.'⁵⁰ Later, at Potsdam, the Allied Powers issued a statement that limited Japanese sovereignty to its main islands and only those additional islands as the Powers would later determine.⁵¹ The Potsdam Declaration was signed by American President Harry S. Truman, who also signed for then-absent British Prime Minister Winston Churchill. Generalissimo Chiang Kai-Shek, as President of the Republic of China, wired his concurrence.⁵² The Japanese later explicitly accepted the terms of the Potsdam Declaration in the Instrument of Surrender signed by representatives of the Government of Japan and the Allied Powers in Tokyo Bay on September 2, 1945.⁵³ Clearly the original intent of the Allied Powers was to return Taiwan and the Pescadores to the Republic of China.

⁴⁹ *Treaty of Peace*, April 17, 1895, (China-Japan Treaty of Shimonoseki), Consolidated Treaty Series, Vol. 181, p. 217.

⁵⁰ The Cairo Declaration, as it is now known, was actually a Press Communiqué issued after a meeting of Chiang Kai-shek, Churchill, Roosevelt. The original text can be found at 'The Cairo Declaration, November 26, 1943,' *History and Public Policy Program Digital Archive, Foreign Relations of the United States, Diplomatic Papers, The Conferences at Cairo and Tehran, 1943* (Washington, DC: United States Government Printing Office, 1961), 448-449.

⁵¹ *Terms for Japanese Surrender, Proclamation Approved at Berlin (Potsdam), July 26, 1945*, para. 8, 1945 Foreign Relations of the United States, Diplomatic Papers, 1945, General: Political and Economic Matters, Volume II, (Conference of Berlin, Potsdam), pp. 1474-1475.

⁵² *Ibid.*, p. 1475.

⁵³ *Terms of Surrender of Japan, September 2, 1945, Instrument of Surrender*, U.S. National Archives & Records Administration, <http://www.ourdocuments.gov/doc.php?doc=80&page=transcript>

Nonetheless, in the Cold War aftermath of the World War II, the turn of events that led to the Communist takeover of the mainland, and the initiation of conflict on the Korean Peninsula, the United States changed its policy on the status of Taiwan and began looking for political and legal ways to justify the change. For instance, at a Congressional hearing in May 1951, General Douglas MacArthur stated that the island of Taiwan was of strategically key to defense of

the littoral island line...of strategic importance to the Defense of the United States and a free world ... [and it] must not fall into enemy hands. [Further, McArthur opined that since the Peace Treaty had not yet been signed] legalistically Formosa is still a part of the Empire of Japan The Allies turned over what you might call the administration and the trusteeship of Formosa to China.⁵⁴

As Frank Chiang points out, the Allied Powers may have once intended Taiwan to be returned to China, but after the Nationalist losses and the Chinese Communist intervention in Korea, the American position shifted. By 1951, Washington's policy was that when Chiang Kai-shek's forces occupied the island they simply became an occupying force on behalf of the Allied Powers, rather than resuming sovereignty on behalf of China. The British government also took a similar position.⁵⁵

This American change of heart between Cairo and San Francisco is borne out by an examination of the various drafts of the Peace Treaty. The Treaty eventually signed in San Francisco in 1951 went through a series of drafts in the preceding years as the conditions of peace in Asia were negotiated among the belligerents. Drafts in 1947 and 1948 specified 'Japan hereby cedes to China in full sovereignty the island of Taiwan (Formosa) and adjacent minor islands.'⁵⁶ However, following the

⁵⁴ 'The General Declines to Say That the U.S. Has Lost the Initiative in Foreign Policy Matters,' *New York Times*, May 5, 1951, p. A7.

⁵⁵ Chiang, 'One-China Policy and Taiwan,' pp. 16-17.

⁵⁶ Seokwoo Lee, 'The 1951 San Francisco Peace Treaty with Japan and the Territorial Disputes in East Asia,' *Pacific Rim Law and Policy Journal*, Vol. 11, (2002) p. 124.

Communist victory in China's civil war and the intervention of the Red Army on the Korean Peninsula, Article 2(b) of the final version of the treaty simply stated, 'Japan renounces all right, title and claim to Formosa and the Pescadores.'⁵⁷ The islands were not specifically assigned to China or any other state. Clearly the events of 1949 in China and early 1950 on the Korean peninsula had changed the American view concerning the final settlement of the status of Taiwan and the Penghu Islands. The United States now took the position that the status of these islands was undetermined.

This position was denounced by the Communist leadership, which held that the islands belonged to China based on historical connection, the abrogation of the Treaty of Shimonoseki, and Japan's promise to abide by the Cairo Declaration. The Cairo Declaration was issued in 1943 after the heads of state of the United States, United Kingdom, and Republic of China met to discuss war aims. There they agreed, 'All territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and the Pescadores, shall be restored to the Republic of China.' Later, at Potsdam, the leadership of the U.S., U.K., and the USSR agreed the terms of the Cairo Declaration would be carried out. The initial Japanese surrender was effectuated by exchange of cables carried by the Swiss Ambassador in Tokyo. In this correspondence, the Japanese government accepted the Potsdam Declaration as the basis of surrender and the document formally surrendering Japan to the allied powers signed on September 2, 1945 then accepted the Potsdam Declaration as the basis for peace.⁵⁸

⁵⁷ *Multilateral Treaty of Peace with Japan, September 8, 1951*, United States Treaties and Other International Agreements, Vol. 3, (1952) p. 3169, 3172.

⁵⁸ Tung-Pi Chen, 'Legal Status of Formosa,' *Philippine International Law Journal*, Vol. 4, (1965), p. 99. The text of the Potsdam Declaration can be located at: <https://history.state.gov/historicaldocuments/frus1945Berlinv02/d1382>; the full text of the correspondence can be located at <http://www.ibiblio.org/pha/policy/1945/450729a.html#6>.

In August 1950, the government of the newly-formed People's Republic of China complained to the United Nations Security Council that the United States had invaded Chinese territory by occupying the island of Taiwan,

an integral part of China...based on history and confirmed by the situation existing since the surrender of Japan. It was also stipulated in the Cairo Declaration of 1943 and the Potsdam Communiqué of 1945.⁵⁹

The United States had replied to Chinese objections that its action was 'without prejudice to the future political settlement of the status of Formosa,' but that such status awaited future international action to determine it and the only reason the forces of the Republic of China had been allowed on the island in 1945 upon Japanese surrender was on behalf of the Allied Powers and not as a matter of Chinese sovereignty.⁶⁰

Initially, the Communists' attempts to obtain international recognition as the successor state to the Republic of China and therefore the rightful representative of China in the United Nations focused on criticisms of the 'Chinese Kuomintang reactionary remnant clique.'⁶¹ But after the 1954 and 1958 Taiwan Strait Crises, Mao and the Chinese leadership saw the island of Taiwan slipping away from Mainland control. Chinese anger focused on American 'imperialism,' its 'interference in China's internal affairs,' and 'attempt to occupy permanently China's territory of Taiwan.'⁶² Thus, rather than serving as the vanguard of China's maritime defense,

⁵⁹ 'Complaint of Armed Invasion of Taiwan (Formosa): Consideration by the Security Council,' *Yearbook of the United Nations* 1950, p. 287- 288.

⁶⁰ 'Complaint of Armed Invasion of Taiwan (Formosa),' p. 287- 288.

⁶¹ 'Telegram dated 26 August 1950 from the Minister for Foreign Affairs of the Central People's Government of the People's Republic of China to the Secretary General, Peking, August 1950,' and 'Telegram dated 18 September 1950 from the Minister for Foreign Affairs of the Central People's Government of the People's Republic of China to the Secretary General, Peking, 18 September 1950,' in Jerome Alan Cohen and Hangdah Chiu (eds.), *People's China and International Law, Vol. I*, (Princeton: Princeton University Press 1974), pp. 268-271.

⁶² Chou Keng-sheng, 'China's Legitimate Rights in the United Nations Must Be Restored,' *JMJP* (Dec. 5, 1961), p. 5, in in Jerome Alan Cohen and Hangdah Chiu,

Chinese leaders had to worry that Taiwan was more likely to be the source of perpetual Chinese maritime insecurity. In addition to American military intervention to prevent the Communist forces from completing their victory over the Nationalist Army and thereby consolidate control over China's vulnerable maritime periphery, Mao and Party leaders were presented with another danger. There was a real possibility that the United States might allow Taiwan to become independent or to attain some other international status than sovereignty under the People's Republic of China. If that were to occur, it would represent a permanent threat to Chinese security and to the stability of the Communist regime. This real and present danger helps explain why China's 1958 Territorial Sea Declaration expressly refers to the status of Taiwan and the Pescadores as sovereign parts of the People's Republic of China. The Communists needed to stake their clear position that the islands were part of China's sovereign territory and if they were not peacefully returned, then sooner or later the People's Republic of China would fight for them if necessary.

What else could the Communist leaders have done? Even after nearly a decade after the Nationalist defeat on the mainland, the Communist forces remained too weak to retake the islands—especially in the face of determined American resistance. Once again, China's leaders turned to law to reinforce coastal security by signaling resolve and by seeking international support for their plight. And in the months prior to the Declaration, international legal developments seemed to provide some helpful opportunities for Chinese leaders to expand their maritime claims, delegitimize American intervention, and gain sympathy from other Communist and developing states. Beijing's ongoing sense of maritime insecurity at the hands of the United States Seventh Fleet, American intervention in what the CCP believed to be China's internal affairs as it sided with the Nationalists in the on going civil war, and the Communists' inability to secure control over the offshore islands that governed the

(eds.) *People's China and International Law, Vol. I*, Princeton: Princeton University Press 1974), p. 272, 273.

future of China's peripheral security all had a palpable effect on China's approach to its Territorial Sea Declaration.

IIC. The First United Nations Conference on the Law of the Sea

The 1958 United Nations Conference on the Law of the Sea provided the Chinese leadership an opening for China to push back against the United States, attempting to use law to supplant its weak naval capacity. From the proceedings of the 1958 negotiations at the first United Nations Conference on the Law of the Sea in Geneva⁶³ and from the preparatory documents⁶⁴ produced by various states in 1957 in anticipation of the Conference the following year it is clear that the state of international law regarding the breadth of the territorial sea was in disarray. In recognition of this general state disarray and in an attempt to bring about international agreement regarding international law of the sea, the General Assembly convened the conference of states for the purpose of examining a draft set of articles produced by the International Law Commission.⁶⁵ The collected comments amounted to a set of opening arguments, laying out the themes and perspectives that would ultimately frame the formal negotiations at Geneva.

One of the most contentious issues was the breadth of the territorial sea. Even the International Law Commission could not agree and article three of their Draft Text simply acknowledged 'international practice is not uniform' but that 'international law does not permit an extension of the territorial sea beyond twelve miles' without

⁶³ *United Nations Conference on the Law of the Sea, Official Records, Volume II: Plenary Meetings*, Geneva, February 24, 1957 – April 27, 1958, United Nations Publication A/CONF.13/38.

⁶⁴ *United Nations Conference on the Law of the Sea, Official Records, Volume I: Preparatory Documents*, Geneva, February 24, 1957 – April 27, 1958, United Nations Publication A/CONF.13/37.

⁶⁵ *Text of Articles 1 to 25 and 66 adopted by the International Law Commission at its Eighth Session*, UN Document A/3159, in *United Nations Conference on the Law of the Sea, Official Records Volume II: Plenary Meetings, Annexes*.

specifying any particular limit.⁶⁶ Strong maritime powers of course advocated for the narrowest territorial sea possible. According to the United Kingdom,

[T]he true interests of all nations are best served by the greatest possible freedom to use the seas for all legitimate activities. [And]

...

The only uniform limit which has received a wide measure of recognition ... is that of a three-mile breadth of territorial waters.⁶⁷

States with security concerns left over from their recent colonial past argued for more coastal state control over the waters on their maritime peripheries. India, for instance, advocated a twelve-mile maximum breadth of the territorial sea.⁶⁸

Meanwhile, states primarily motivated by concerns about controlling and managing coastal fisheries advocated for breadths of anywhere from twelve miles, as did Canada,⁶⁹ to the limits of the continental shelf, as did Iceland,⁷⁰ or as much as 200 miles, as it appears Chile and Peru were prepared to do.⁷¹

Matters were no better by the time formal negotiations were undertaken in the spring of 1958. The United States, with an eye toward attempting to find compromise, opened with a suggestion that a maximum breadth of six miles might be the most satisfactory, since it required all states to make some measure of compromise.⁷² But the representative of the states present were not in a compromising mood and, to clarify the state of international practice as of April 1958, the Soviet Union representative proposed that the Conference Secretariat

⁶⁶ International Law Commission Draft Text, United Nations Document A/3159.

⁶⁷ United Nations Document A/CONF.13/5 and Add. 1 to 4, in A/CONF.13/37, pp. 101-102.

⁶⁸ United Nations Document A/CONF.13/5 and Add. 1 to 4, in A/CONF.13/37, p.90.

⁶⁹ United Nations Document A/CONF.13/5 and Add. 1 to 4, in A/CONF.13/37, p. 76.

⁷⁰ United Nations Document A/CONF.13/5 and Add. 1 to 4, in A/CONF.13/37, pp. 88, 98.

⁷¹ United Nations Document A/CONF.13/5 and Add. 1 to 4, in A/CONF.13/37, pp. 78, 97-98.

⁷² United Nations Conference on the Law of the Sea Official Records, Volume II: Plenary Meetings, Document A/CONF.13/38, p. 35.

develop a synoptic table to demonstrate, its representative was sure would show, 'no obstacle [existed] to an extension of the breadth of the territorial sea to twelve miles.'⁷³

Indeed, when the synoptic table was finally completed (it was delayed because a few states were updating or formalizing their claims even as the negotiations were underway) it amply demonstrated the wide variety of state territorial sea claims that existed at the time. It demonstrated that 24 states claimed three miles, 35 states claimed something more, and an additional 13 states had made no declaration. [For details, see the Annex I to this chapter].⁷⁴ Accordingly, when China issued its territorial sea declaration claiming a twelve-mile band of maritime sovereignty it was in good company.

In addition to serving directly China's own security interests as outlined above, a twelve-mile territorial sea aligned China with Communist coastal states. Under Russian leadership Communist bloc states were asserting a twelve nautical mile territorial sea, as the chart above demonstrates. This solidarity of communist states was also in part the solidarity of the Soviet continentalist view of security, to which China ascribed during this period and from which China also derived extended security support. Indeed, even as the United Kingdom and the United States raised immediate objections to China's twelve-mile territorial sea claim, it was the Soviet Union, East Germany, and Rumania that rose to its immediate support.⁷⁵

⁷³ United Nations Conference on the Law of the Sea Official Records, Volume II: Plenary Meetings, Document A/CONF.13/38, p. 37.

⁷⁴ Fu Chu, writing in 1959, reproduced this table almost verbatim in his justification of the PRC Territorial Sea Claim. Fu Chu, *Concerning the Question of our Country's Territorial Sea*, p. 476.

⁷⁵ Tao Cheng, 'Communist China and the Law of the Sea,' pp. 53-54.

But in 1958, all was not well within the Sino-Soviet alliance. By 1958, Khrushchev was promoting a new policy of peaceful coexistence toward the West.⁷⁶ This policy reflected new advancements in the Soviet nuclear weapons program that made war between the two super powers an unthinkable option. Mao and the Chinese leadership vehemently opposed this new policy because they were not a nuclear-armed state and continued to feel deeply vulnerable to American sea power.⁷⁷ In 1957 Khrushchev promised the Chinese Communist leadership that the Soviet Union would help them to develop a nuclear program—a promise the Soviets eventually reneged in 1959. But despite the very serious policy and security differences, Mao was not ready to break China's alliance with the USSR because Soviet patronage was important to China's nuclear program. Mao's sense of vulnerability to nuclear attack only increased in 1957 when the United States deployed nuclear warheads to the island of Taiwan in defense of Chiang and his government.⁷⁸ Likewise, when Khrushchev, as part of his peaceful coexistence policy, proposed to the United States a mutual nuclear test ban, Mao became deeply concerned that the Soviets would trade Chinese security for improved relations with the Americans. Nonetheless, as of September 1958, despite the strained relations Chinese solidarity with the Soviets regarding international order and the security guarantees that came with followership was still a necessary component of Chinese security. This as Mao and Zhou announced their territorial sea claim in September 1958.⁷⁹

Much to the Soviets' irritation, in 1954 China had begun to pursue a second, more independent foreign policy avenue. This second avenue provided a hedge against a

⁷⁶ 'Khrushchev and the Twentieth Congress of the Communist Party, 1956,' *Milestones in the History of U.S. Foreign Relations*, <https://history.state.gov/milestones/1953-1960/khrushchev-20th-congress>.

⁷⁷ A.M. Halpern, 'Communist China and Peaceful Coexistence,' *China Quarterly*, No. 3 (Jul. - Sep., 1960), pp. 16-31; Michael Yahuda, *The International Politics of the Asia-Pacific, 1945-1995*, (London: Routledge 1996), p. 169.

⁷⁸ Michael M. Sheng, 'Mao and China's Relations with the Superpowers in the 1950s: A New Look at the Taiwan Strait Crises and the Sino-Soviet Split,' *Modern China*, 34:4 (October 2008), pp. 486-487.

⁷⁹ Yahuda, *The International Politics of the Asia-Pacific, 1945-1995*, pp., 169-172, 193-197.

potential future rift with the USSR and the loss of security guarantees that would come with it. That second foreign policy avenue involved positioning China as a leader among developing states and states newly emerging from colonial government. Frustrated with the continued ability of the United States and its allies to block the People's Republic from taking China's seat at the UN, in 1965 foreign minister Chen Yi went so far as to suggest that China and its friends among the newly emerging and developing states may even seek to abandon the United Nations and establish a parallel organization of their own.⁸⁰ This political avenue had lasting affect. It was to have a profound influence over China's negotiating positions at the Third United Nations Conference on the Law of the Sea when they began in 1977. But in 1954, the option of a Chinese foreign policy independent of Soviet control came as a result of Stalin's death in 1953 and the resolution of the Korean Conflict that his death enabled.⁸¹

Zhou attended the negotiations ending the Korean Conflict in Geneva and toured Eastern Europe independent of the Soviets. Additionally, on his return trip he stopped in India for a major diplomatic event where he initiated a proposal for an independent foreign policy of 'Third World' states outside the orbit of either super power. The centerpiece of Zhou's policy proposal was his 'Five Principles of Peaceful Coexistence.' development of the Southeast Asia Treaty Organization. This expanded at the Bandung Conference in 1955, which was at least in part an attempt to balance American efforts to cobble together the Southeast Asia Treaty Organization. Initially, Burma, Ceylon, India, Indonesia, and Pakistan all expressed support for this neutral third way, and in 1955 at the Bandung Conference a total of 30 developing states added their voices. Thus, in 1958, as Mao and Zhou considered how to frame China's territorial sea statement, solidarity with developing states in South and Southeast Asia—nearly all of which sought to expand their territorial sea claims--was a second

⁸⁰ Foreign Minister Chen Yi's Press Conference (Sept. 29, 1965) in Jerome Alan Cohen and Hangdah Chiu, Princeton: Princeton University Press, *People's China and International Law*, Vol. I, (1974), p. 283-284.

⁸¹ Yahuda, *The International Politics of the Asia-Pacific*, pp. 170-171.

important consideration because of the important source of political and security this solidarity provided to China.⁸² Thus, China's twelve mile claim positioned it well to exercise leadership among newly emerging states that had once been dominated by colonial powers and which now sought to use the assistance of law to protect their coastal resources and enhance their coastal security.

The PRC Territorial Sea claim gave Mao and the rest of the Communist leadership several points of leverage. First, as a strategic matter, it created opportunities to create controllable political and military pressure on the U.S. Navy. Politically, it added to China's security by uniting Chinese efforts to protect its coastline with the resentments harbored by other developing states. Similarly, it enhanced China's security by remaining in solidarity with the Communist movement led by the Soviets. Just as important, the statement reemphasized the Chinese claim to Taiwan and to the other offshore islands. This claim was more than merely symbolic. Even as the United States sought to pull Taiwan out of The PRC's control, such statements by Beijing served to shore up internal determination that the island would remain perpetually a part of China. China's leadership was using this legal and political instrument to help set the necessary conditions for the long struggle to secure China's maritime periphery.

III. China's 1992 Territorial Sea Law

By the time the Third United Nations Conference on the Law of the Sea began in 1973, the People's Republic of China had finally completed its decade long quest to assume the Chinese seat at the United Nations in the place of the Republic of China. As a member of the General Assembly and especially as a Permanent Member of the Security Council the PRC now had an important platform from which to pursue its foreign policy goals. Accordingly, the PRC sent a delegation to the Caracas, Venezuela round of negotiations in 1974 with participants from the Ministry of Foreign Affairs, the State Oceanic Administration, the National Geological Bureau,

⁸² *Ibid.*, p. 171.

and the PLA Navy.⁸³ But unlike in 1958, when China was still (barely) willing to follow Soviet Communist lead as a way to help protect China from maritime aggression, by 1973 relations between China and the Soviet Union had become outright antagonistic. Indeed, the Soviets went into the UNCLOS III negotiations with the specific aim of undermining Chinese negotiating positions. The Soviets were determined to block China's attempts to require warships to gain coastal state consent to traverse the territorial sea, to 'control naval maneuvers within the 200 mile economic zone,' and to limit naval navigation in other ways.⁸⁴ Clearly, China's negotiating positions in the 1970's reflected the insecurities of a continental state confronting now two super powers with global navies.

Accordingly, one of China's most important goals was the development of relations with the Third World as a separate power block from those that adhered to the two Cold War super powers.⁸⁵ Developing good relations with this bloc of developing countries—known as the Group of 77—was the important focus of Chinese negotiating efforts throughout the UNCLOS III sessions.⁸⁶ Churchill and Lowe note that this group of developing states grew over time to comprise approximately 120 states that frequently stood in opposition to the preferred positions of the super powers and their respective blocs. To develop a leadership position within this group, the Chinese specifically sought to develop support for resource rights to belong to all countries for the resources on the seabed under the high seas and in

⁸³ Ling Qing, *From Yan'an to the United Nations: The Diplomatic Career of Ling Qing*, (Fuzhou: Fujian People's Press, 2008), Chapter 7. (China Maritime Studies Institute Translation); 'Interview with Two Deputy Heads of the Chinese Delegations to the UNCLOS III Negotiations,' *Xinhua News Agency Outlook Oriental Weekly*, December 10, 2012, at <http://news.sina.com.cn/c/sd/2012-12-10/141125774618.shtml>.

⁸⁴ 'Memorandum for Director of Central Intelligence, Soviet Instructions Relating to the Law of the Sea Conference Scheduled for March 1981,' November 21, 1980, Approved for Release June 16, 2017, Document No. C01478987, available at <https://www.cia.gov/library/readingroom/document/0001478987>.

⁸⁵ 'Interview with Two Deputy Heads of the Chinese Delegations to the UNCLOS III Negotiations,' *Xinhua News Agency Outlook Oriental Weekly*, December 10, 2012, at <http://news.sina.com.cn/c/sd/2012-12-10/141125774618.shtml>.

⁸⁶ R.R. Churchill and A.V. Lowe, *The Law of the Sea*, 3rd ed., (Manchester, UK: Juris Publishing of Manchester University Press 1999), p. 17.

offshore fisheries. This bought China allies for its primary concern, which was to push back against the advocacy of the maritime powers for broad rights to freedom of the seas, especially for naval power.⁸⁷

China's negotiating focus on limiting freedom of action for naval power led it to support several positions that turned out to be contrary to Chinese long term interests. For instance, in order to maintain support from developing countries, China supported those that advocated the establishment of either a 200-mile territorial sea or some form of exclusive resource zone. This was an especially important goal of South and Central American countries and some African states. But some of these states had recently dropped international relations with the Republic of China in order to formally recognize the People's Republic of China and China's lead negotiator makes clear that this trade-off was part of a quid pro quo for that decision.⁸⁸ The inclusion of rules establishing a 200-mile exclusive economic zone worked against China's direct interests because the new EEZ replaced continental shelf law. Under continental shelf law there is a geography-based system of determining entitlements. This system allows a coastal state to claim resources rights to the full extent of the natural prolongation of the continental shelf off its coastline regardless of how close that shelf comes to another state's shoreline. With the establishment of the EEZ, the continental shelf's geography-based system was replaced with a distance-based approach to resource entitlements. The exchange disfavored China's resource interests, especially in the East China Sea, because it gave Japan a much wider entitlement at China's expense. This presented a conundrum for Chinese negotiators, who decided to continue to back the EEZ regime in order to retain the support and favor of developing states, to keep to expectations laid out during negotiations for diplomatic recognition, and to focus on limiting 'the maritime powers' practice of hegemony at sea' where possible.⁸⁹

⁸⁷ Ling Qing, *From Yan'an to the United Nations*, chapter 7.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

The Chinese negotiators in fact were given three guidelines in how they were to approach the UNCLOS III negotiations. They were to put ideology before national interest, focus on countering the United States and the USSR and their respective blocs, and they were to support the developing countries of the Group of 77. Only then were they to consider China's narrow national interest.⁹⁰ This demonstrates clearly the degree to which China considered geopolitics and its overarching security as its primary motivation as it helped shape and develop international law of the sea. China sought to build a bloc out of the Third World to help politically balance each of its two potential enemies. This political balancing alone gave China options that could enhance its security, but in addition this approach gave China opportunities to rein in the efficacy of sea power by limiting its legitimate use.

By the time negotiations were complete in 1982, China had made real progress at achieving its goals. As one Chinese negotiator observed about the negotiating tensions between established naval powers and developing coastal states, 'For the purpose of defense and protection of their own rights and interests, developing countries generally advocated a larger territorial sea width.'⁹¹ Ultimately, the new Convention included the twelve-nautical mile territorial sea that had eluded international consensus at the 1958 negotiations in Geneva and the second round of negotiations in 1960. The expanded territorial sea was consistently opposed by the major maritime powers and even after the conclusion of the negotiations it was still opposed by the United States under the leadership of Ronald Reagan. This negotiation victory, however, provided further legitimacy to China's twelve-mile territorial sea announced in its 1958 Declaration. China's 1958 experience remained squarely in the mind of Chinese negotiators. To explain China's negotiating

⁹⁰ Zheng Wang, 'China and UNCLOS: An Inconvenient History,' *The Diplomat*, July 11, 2016.

⁹¹ 'Interview with Two Deputy Heads of the Chinese Delegations to the UNCLOS III Negotiations.' A second negotiating victory recounted by Xu Guangjian was the insistence of the developing states that decisions at the Convention would be made by a two-thirds majority vote, rather than by consensus as the United States and USSR preferred. This prevented what would have in effect been a veto by the superpowers over legal developments and empowered China and the Group of 77.

solidarity with Latin American countries, Chen Degong observed it was not only they who felt pressure from maritime powers.

China also faced challenges from hegemonic powers. In 1958, China declared a twelve-mile territorial sea, but China's territorial waters and airspace had been subjected to foreign intrusion despite hundreds of serious warnings.⁹²

Developing countries, however, were to have their day. As more and more countries ratified the Convention, international disapproval for foreign naval operations within twelve nautical miles of another state's shores solidified. China stood with the developing states and achieved both political and security benefits from having done so.

China employed a second negotiating strategy to deal with important areas of the text that seemed to favor the rights of maritime powers to freely and effectively deploy their navies in ways that undermined China's sense of maritime security. This was the strategy of ambiguity. Chen Degong expressed the view that this ambiguity worked effectively in China's interests by allowing it 'to make flexible use of the Convention.' In defending China's continued employment of the 9-dashed line claim, for instance, Chen expressed the view that since no country raised an objection to China's claim during the negotiations that it remains valid today. Likewise, fellow negotiator Wang Shugang stated that textual ambiguity allowed countries to use domestic law to reframe UNCLOS provisions according to each state's needs and interests.⁹³ These strategies gave China sufficient protection for its security and other interests that when the negotiations ended, China was among the 119 states to sign the United Nations Convention on the Law of the Sea on December 10, 1982. Worth noting as testament to the success of China's negotiating strategy is the fact that of the 119 initial signatory states, at least 90 can clearly be counted among the developing states. Only ten were Warsaw Pact Countries and only sixteen

⁹² *Ibid.*

⁹³ *Ibid.*

were among those allied or aligned with NATO and the United States.⁹⁴ The final text of the Convention was approved by a vote of 130 to 4 with 17 abstentions. The United States voted against it and of those that abstained, seven were Western European allies of the United States and nine, including the Soviet Union, were from the Warsaw Pact plus Mongolia. Of the remaining states that voted against the Convention or abstained, only two—Venezuela and Thailand, could be considered developing states. This demonstrates the completeness of the victory of the Group of 77, including China.⁹⁵ Nonetheless, the Convention required full ratification by 60 countries to come into force. This did not occur for an additional twelve years.⁹⁶ In the interim, Chinese lawmakers set to work updating the 1958 Declaration on the Territorial Sea.

The result of this effort to update Chinese law concerning the territorial sea was the Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone. That law was adopted by the Standing Committee of the National People's Congress and promulgated by the President on February 25, 1992.⁹⁷ The 1992 law contains provisions that are very similar to the 1958 Declaration, but includes a few significant additions. [A comparison of the two laws is provided in Annex II to this chapter.]

IIIA. The Breadth of the Territorial Sea

Article 3 of China's 1992 law provides 'The breadth of the territorial sea of the People's Republic of China is twelve nautical miles.' This is obviously the same as the 1958 Declaration, although by 1992 it was no longer a provocative position. The Chinese perspective had won the day in negotiations and when the final draft of the

⁹⁴ Bernardo Zuleta, 'The Law of the Sea After Montego Bay,' *San Diego Law Review*, Vol. 20, (1982-1983), pp. 475-476.

⁹⁵ Arvid Pardo, 'The Convention on the Law of the Sea: A Preliminary Appraisal,' *San Diego Law Review*, Vol. 20, (1982-1983), p. 489.

⁹⁶ Zuleta, 'The Law of the Sea After Montego Bay,' p. 486.

⁹⁷ *Collection of the Sea Laws and Regulations of the People's Republic of China*, 4th edition, (Beijing: Department of Policy, Legislation and Planning, State Oceanic Administration 2012)(in English and Chinese), p. 301.

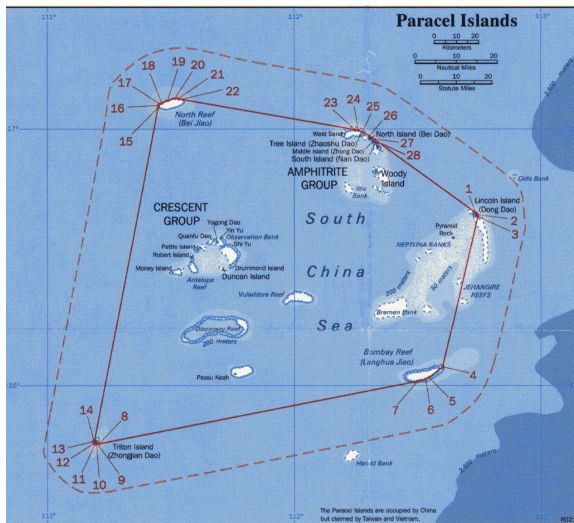
Convention was presented for signature in 1982 there was agreement that international law should authorize an outer limit of a state's territorial sea at twelve miles.⁹⁸

IIIB. China's Claimed Baselines

Article 3 of China's law also reiterates China's 1958 position that it will apply the method of straight baselines to join base points, which, according to article 15 of the law 'shall be promulgated by the Government.' However, unlike the announcement of straight baselines in the 1958 Declaration, which were never promulgated, straight baseline coordinates were issued in 1996 for all points along China's coasts from the Shandong Peninsula to the western side of Hainan Island. Somewhat alarmingly, they also show the application of straight baselines to connect the outermost points of the outermost islands of the Paracel (*Xisha*) group in the South China Sea.⁹⁹ The base points were charted and published by the U.S. State Department.

⁹⁸ Article 3, *The Law of the Sea: Official Texts of the United Nations Convention on the Law of the Sea of 10 December 1982 and of the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982*, New York: United Nations (1997), p. 23.

⁹⁹ Maritime Zone Notification 7.1996, 5 July 1996, *Deposit of Lists of Geographical Coordinates by China*, http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/mzn_s/mzn_7.pdf. A list of the actual coordinates can be found at *Limits in the Seas No. 117, Straight Baseline Claim: China*, Washington, DC: United States Department of State, Bureau of Oceans and International Environmental and Scientific Affairs (July 9, 1996), Annex I.



China's claimed straight baselines in the Paracel (*Xisha*) Islands.¹⁰⁰

This method of baselines directly contradicts the text of articles article 5 of the 1982 Convention, which requires the use of the low water-line along the coast for baselines, and article 7, which limits use of straight baselines as an exception to the low-water line only where the coast is deeply indented or fringed with islands. Not surprisingly, the United States objected to this blanket use of straight baselines and to the thousands of square miles of waters the approach enclosed as either territorial sea or internal waters that, as part of China's exclusive economic zone, should be areas of high seas freedoms.¹⁰¹ But given China's continental approach to maritime security it is equally unsurprising that China continued to use international and domestic law to attempt to hold American naval power at arms length from the Chinese shoreline.

IIIC. China's Island Claims

The text of the 1992 Law carries forward the 1958 Declaration's claim to offshore islands many of which are not under the control of the mainland government. In the South China Sea the law lays claim to the Xisha (Paracels)—which China occupied fully in 1974 after defeating the forces of the Republic of Vietnam there, the

¹⁰⁰ *Limits in the Seas No. 117*, p. 18.

¹⁰¹ *Ibid.*

Dongsha, the Zhongsha, and the Nansha (Spratly Islands). It repeats the claims to Taiwan and the Penghu Islands, but in the 1992 law China adds specific claim to the Diaoyu (Senkakus) Islands as among the 'islands appertaining to Taiwan.' It is unclear whether the omission of the Diaoyu Dao in the 1958 Declaration was due to ignorance, an oversight, or intentional. Other than the Diaoyu Dao, however, China has to date made no additional island claims that were not part of its 1958 Declaration. In any event, the 1992 law makes formal China's explicit claims to the Diaoyu Islands, which it first began to address in public in 1970 when a UN study demonstrated that oil and gas deposits were likely to be found in the waters in the vicinity of these islands.

IIID. Innocent passage and warships

As a further effort to keep foreign naval power at bay, article 6 of the 1992 law keeps China's prohibition on the exercise of innocent passage for foreign warships within China's territorial sea without 'approval by the Government of the People's Republic of China.' Furthermore, article 8 asserts the right 'to take all necessary measures to prevent and stop non-innocent passage through the territorial sea,' and article 10 asserts that the Chinese government will order foreign warships exercising innocent passage without prior permission to leave and the flag State alone shall bear responsibility for any resulting 'loss or damage.' This rather ominous set of warnings also disregards the provisions of the 1982 Convention, which make clear that the right to undertake innocent passage in the territorial sea of another state belongs to all ships without distinction as to type of vessel or its nationality.¹⁰²

¹⁰² Section 3, subsection A, and article 17, *The Law of the Sea: Official Texts of the United Nations Convention on the Law of the Sea of 10 December 1982 and of the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982*, New York: United Nations (1997), p. 26.

IIIE. The Contiguous Zone

Finally, the 1992 Law addresses another issue about which the 1958 Declaration was silent. It adds an explicit Chinese claim to a twelve-mile contiguous zone beyond the territorial sea. This was right in line with article 33 of the Convention, which allows a coastal state to extend its jurisdiction to an additional twelve-mile band of waters for the purpose of preventing ‘infringement of its customs, fiscal, immigration, and sanitary laws and regulations.’ Each of these authorities is claimed in article 13 of the 1992 Law, plus one. China also claims the right to regulate matters regarding its security interests there. This despite the fact that the recognition of a security interest in the contiguous zone subject to the coastal state’s jurisdiction and regulation was considered and rejected by the Convention’s negotiators.

IV. Conclusion

It is clear from this assessment that both in 1958 and in 1992 China employed a series of legal approaches to its domestic law regarding the territorial sea to attempt to enhance its maritime security. Rather than applying normal baselines from the low water line, China employed straight baselines along its entire coast to claim full sovereignty over thousands of square miles of water as its internal waters. This had the effect of pushing claims to all remaining zones seaward. Chinese leaders sought to further limit access to China’s waters by denying access to its territorial sea to foreign warships without explicit permission. And China essentially appended an additional twelve miles to its territorial sea by claiming a regulable security interest in its contiguous zone. These are the approaches of a state that sees naval power primarily as a threat, rather than as an instrument to wield to advance its interests. Such approaches are an attempt to undermine with national laws the trade-offs made in the negotiation of the 1982 Convention.

This result was actually foreseen by one of the Convention’s prime initiators. Arvid Pardo was the Permanent representative of Malta to the United Nations when on November 1, 1967 he rose to speak in the General Assembly about the dangers of

national appropriation of the international seabed by a few strong powers and the need for international talks to settle the status of the seabed as belonging to all mankind, not just the powerful few.¹⁰³ After the conclusion of negotiations, Pardo wrote a preliminary appraisal of the draft document that called into question whether states with divergent interests had in fact developed a clear set of compromises or had 'in fact, only carefully drafted formulations designed to mask fundamental disagreement on basic issues.'¹⁰⁴ He concluded that in many cases it was the latter. In particular, this disagreement was reflected in 'the total silence of the Convention on all military uses of the marine environment.' In his view, one of those critical issues of disagreement was whether foreign warships had a right to transit the territorial sea of another state without either prior notification or consent.¹⁰⁵ China's strategy regarding the relationship between international law of the sea and China's maritime security interests is to use the textual ambiguity of the Convention to recoup what it lost during negotiations.

China's consistent approach to its territorial sea claims has been to maximize its maritime security interests by assuming the most control over coastal water space that ambiguity in international law would allow. China's approach to its national claims about its territorial sea did not relax as a result of the compromises made in negotiating the grand bargains within the Convention. To the contrary, China's positions hardened and in some ways even expanded in their claims to control offshore waters. Expanding nationally-controlled maritime space through straight baselines, denying innocent passage rights to warships in the territorial sea, and extending a security interest to the contiguous zone reflect the consistent, centuries-old, continentally-oriented policies of Chinese leaders who must grapple with the challenges of protecting a vulnerable coastline from stronger naval powers.

¹⁰³ *Official Records of the United Nations General Assembly, Twenty-Second Session, First Committee, 1515th Meeting, Wednesday, November 1, 1967, A/C.1/PV.1515.*

¹⁰⁴ Pardo, 'The Convention on the Law of the Sea,' p. 492.

¹⁰⁵ *Ibid.*, p. 494 and n. 23.

This chapter applied the critical geostrategic considerations developed in chapters two through four and applied them to the development of the People's Republic of China's 1958 and 1992 statements on the territorial sea. In 1958, Mao was clearly concerned with marshaling limited resources efficiently to deal with potential invasion and coastal probing and harassment by KMT and American naval forces. The record demonstrates that Mao took approaches to developments in international law of the sea that he hoped would provide some measure of constraint on American actions, or at least some political support in condemning the U.S. and thereby complicating its international politics. The whole construct of Mao's 1958 declaration seeks to maximize coastal state security (and resource) interests and to delegitimize the presence of foreign naval power close to China's shores. The interests that undergirded Mao's approach were given further validation in China's 1992 Territorial Sea Law.

China's construct of rules for the territorial reflect the development of a foundation to employ Chinese land and sea power in support of a defensive, interior strategy to enhance China's coastal security. In security terms, China's approach to law of the sea can be seen as a consistent attempt to enhance its right to push further from China's shores the culminating point of any attack from the sea. To expand this right even further, Mao and those who came after him simultaneously sought to assert sovereignty, and therefore the right to control, offshore islands in the South (and eventually the East) China Sea. Such claims are simultaneously a mechanism to ensure its maritime security by preventing the permanent presence of a hostile power off China's shores and an effort to bind China's weakly held maritime periphery closer to Beijing. These are all policy devices that substitute law—and therefore moral power—for maritime strength that China did not at the time possess. But these moral markers served to preserve China's claims for a future day when its power would be sufficient to consolidate them. Accordingly, this chapter demonstrates that to a great degree, China's approach to international law of the sea regarding the territorial sea has been heavily influenced by China's particular set of geostrategic interests and concerns. Chapters six and seven will extend this analysis

to the ways in which China approached its maritime security interests in and above the newest maritime zone—the exclusive economic zone—and the continental shelf in the South China Sea and East China Sea respectively.