

Chapter Seven

The People's Republic of China and International Law in the East China Sea

I. Introduction

This chapter will demonstrate that China's approach to maritime claims in the South China Sea is not an isolated example of state policy, but part of an overall strategy to extend Chinese authority across its entire maritime periphery in order to legitimize its pursuit of enhanced maritime security. Chapter five demonstrated that China's approach to island claims, baselines, and the territorial sea, consistently favors broader application of state power deep into the maritime domain. In support of these approaches China consistently interprets international law of the sea in ways that favor a coastal state's interest in extending security against strong maritime powers. Similarly, Chapter six demonstrated that even in China's approach to international law in the non-sovereign zones—the exclusive economic zone and the continental shelf--China takes international law interpretations that both broaden and deepen its hold on these waters at the expense of other coastal states. This chapter will extend the analysis and show that in the East China Sea China repeats the patterns laid out in chapters five and six.

Taking first the example of the sovereignty dispute over the Senkaku/Diaoyu Islands, this chapter will demonstrate that initially the People's Republic of China seemed to ignore the existence of the islands or to assume that they belonged to Japan. But Chinese interest was piqued when in the late 1960's oil and gas were discovered in that region. The People's Republic of China soon claimed sovereignty over the island group and demanded that as the United States terminated its post-World War II occupation of the Ryukyu Islands it hand the islands over to China and not to Japan. Section II of this chapter will address China's sovereignty claims to the islands of the East China Sea in the context of China's drive for geostrategic advantage and maritime security. Section III will address the related approach Beijing takes to its baselines claim around the Senkaku/Diaoyu Islands. What started as a resource interest soon burgeoned into an expanded security interest

that spanned the entire East China Sea. Section IV and V will demonstrate Beijing's further pursuit of legal authority over the East China Sea through its claims to the continental shelf and an air defence identification zone. Section VI will conclude that, just as it does in the South China Sea, the People's Republic of China approaches the application of international law in the East China Sea to serve its interest in expanding its maritime security and buffer zone. Together, chapters five, six, and seven demonstrate that geostrategic concerns for maritime security are a significant driver of China's approach to international law of the sea and its related maritime claims in the near seas.

II. China's Territorial Claim

The East China Sea lies off China's eastern coast and is bounded to the north by the Korean Peninsula, to the east by the islands of Japan's Ryukyu Island chain, and to the south by the Island of Taiwan. Like the South China Sea, therefore, it is an expanse of water bounded by the geographic territory of other states. There the similarities with the South China Sea stop. Whereas much of the South China Sea is deep, the East China Sea is relatively shallow across nearly all its expanse. Whereas the South China Sea is dotted by numerous islands, rocks, reefs and atolls, the East China Sea has only one set of craggy islets known as the Senkaku to the Japanese and the Diaoyu Dao to the Chinese.¹ China disputes Japanese sovereignty over this small group of islands in the southern portion of the East China Sea. The Senkaku/Diaoyu Islands consist of five small islets and three rocky outcroppings with a total landmass of about 5.69 square kilometers.² These features lay along the outer edge of the shallow portion of the continental shelf that extends from the

¹ Richard C. Bush, *The Perils of Proximity: China-Japan Security Relations*, (Washington: Brookings Institution Press 2010), pp. 66-67.

² June Teufel Dreyer, 'Sino-Japanese Territorial and Maritime Disputes,' in Bruce Elleman, Stephen Kotkin, and Clive Schofield (eds.), *Beijing's Power and China's Borders: Twenty Neighbors in Asia*, (Armonk, NY: M.E. Sharp 2013), pp. 81-95; *Diaoyu Dao: An Inherent Territory of China*, National Marine Data and Information Service of the State Oceanic Administration, China Ocean Press: Beijing (undated), p. 2.

Chinese mainland into the central part of the East China Sea approximately 120 NM north west of Taiwan and 240 NM west of Okinawa.



Location of the Senkaku/Diaoyu Islands in the East China Sea.³

The Japanese government claims sovereignty over the Senkaku Islands in the East China Sea based on discovery and first occupation of *terra nullius*, or unclaimed territory. According to an official Japanese explanation of events that led to Japan's sovereignty over the islands,

Since 1885, investigations of the Senkaku Islands had been conducted by the Government of Japan through the agencies of Okinawa Prefecture and other means. Through these investigations, it was confirmed that the Senkaku Islands was (sic) not only uninhabited but also showed no trace of having been under the control of the Qing Dynasty (now China), or any other state. Based on this careful confirmation, the Government of Japan made a Cabinet

³ Reinhard Drifte, "The Japan-China Confrontation Over the Senkaku-Diaoyu Islands – Between "Shelving" and "Dispute Escalation,"" *Asia Pacific Journal, Japan Focus*, 12:30:3 (July 27, 2014), p. 1. [On line].

Decision in [sic] January 14, 1895 to erect markers on the islands to formally incorporate the Senkaku Islands into the territory of Japan.⁴

The Japanese treat the Senkakus as a group of separate islands, at least eight of which are distinct and substantial enough to have Japanese names.⁵ The government of the People's Republic of China, on the other hand, treats the Senkaku Islands as a single, larger island (Diaoyu Dao) with affiliated dependent land features at least five of which have been given Chinese names. One official Chinese publication describes them as follows.

Diaoyu Dao and its affiliated islands are geographically part of Taiwan Island...To the east they are separated from the Ryukyu Islands by the 200-meter deep Okinawa Trough.

...

Diaoyu Dao and its affiliated islands, which consist of Diaoyu Ddao, Huangwei Yu, Chiwei Yu, Nanxiao Dao, Nan Yu, Bei Yu, Fei Yu and other islands and reefs.

...

The surrounding waters are the traditional fishing grounds of Chinese fishermen with abundant fishery resources such as mackerel, bonito and lobster. There are also rich oil and natural gas in the area.⁶

The factors that propel this sovereignty dispute are complex. Perhaps Reinhard Drifte describes the root of these factors best when he says,

An analysis of the historical background shows that we are faced here with the amorphous transition at the end of the 19th Century from a China-dominated East Asian Order to one dominated by Western international law, with China basing its stance on the former and Japan on the latter.⁷

⁴ *The Senkaku Islands: Seeking Maritime Peace Based on the Rule of Law, Not Force or Coercion*, Ministry of Foreign Affairs of Japan, Tokyo (March 2014).

⁵ To the Japanese, the main island in the Senkaku group is known as Uotsuri Island. The others, from north to south, are Kuba, Taisho, Okinokitaiwa, Okinominamiwa, Tobise, Kitakojima, and Minamikojima.

⁶ *Diaoyu Dao: An Inherent Territory of China*, pp. 1-2.

⁷ Drifte, 'The Japan-China Confrontation Over the Senkaku-Diaoyu Islands,' p. 2.

Drifte seems to attribute the factors that propel the dispute as being a hunger for the resources that might come with possession of the islands and lingering political competition between the Chinese Communists and the authorities on Taiwan. In his view,

The government of the PRC claimed the islands only in December 1971 after a report in 1969 by an UN-related organization mentioning the possibility of substantial oil and gas reserves around the area. ... This late claim was also very much in response to the Guomintang government in Taiwan ... which had already ... publicly opposed [Japan's claim to the islands].⁸

Alessio Patalano sees the sovereignty dispute as part of the overall struggle for dominance of the maritime space between the two contenders 'and the ability to exert a degree of control there [as] becoming a tangible expression of the political competence of authorities in the two countries.'⁹ These scholars are undoubtedly correct in their judgments. But this section seeks to put the contest over the islands in a somewhat different light. Its purpose is to demonstrate China's focus on the islands as one component of its strategy to expand the authority of the Chinese state across the East China Sea in order to enhance its maritime security and its geostrategic position vis-à-vis its potential sea power antagonists. Indeed, there is a clear correlation between China's intensifying claim to this small group of islands and its interest in expanding its maritime peripheral security zone. Thus, although it is not the purpose of this section to pronounce judgment as to which state has the better claim, to understand the geostrategic aspect of this dispute requires at least a brief outline of the history of the dispute over sovereignty of these islands.

⁸ Reinhard Drifte, "The Senkaku/Diaoyu Islands Territorial Dispute Between Japan and China: Between the Materialization of the "China Threat" and Japan "Reversing the Outcome of World War II," *UNISCI Discussion Papers, No. 32* (May 2013), p. 11.

⁹ Alessio Patalano, 'Seapower and Sino-Japanese Relations in the East China Sea,' *Asian Affairs* 45:1 (February 14, 2014), p. 35.

Like the Japanese, the Chinese stake their claim to the islands based on first discovery and occupation, but date their contacts with the islands much earlier than do the Japanese. In the view of the Chinese government,

Diaoyu Dao has been China's inherent territory since ancient times. Numerous documents and historical evidence attest to the fact that Diaoyu Dao and its affiliated islands were first named, discovered, and exploited by the Chinese people. Diaoyu Dao has been part of China's territory since the Ming Dynasty.¹⁰

Each side's claim to sovereignty is imperfect. For the Chinese to claim ancient connections with the islands sufficient to amount to sovereignty over them has very little support in publicly available evidence.¹¹ Additionally, attempting to make a claim based on pre-modern notions of legal order presents legal, practical, and evidentiary challenges, especially since China resisted application of Westphalian concepts of sovereignty until quite late in the 19th century in a period when it had for all practical purposes abandoned any control over the islands it might once have had. Furthermore, the Chinese have never effectively addressed the omission of a claim over the Senkaku (Diaoyu) Islands in China's 1958 Territorial Sea Declaration.¹² As chapter 5 demonstrates, Mao and Zhou were very careful to include China's claims to all major island groups in the South China Sea and to Taiwan and the Penghus.

On the other hand, Japanese officials delayed acquisition of the islands until January 1895, during a period of belligerence between the two countries, in order to avoid unwanted Chinese attention to its actions.¹³ Furthermore, the Japanese government

¹⁰ *Diaoyu Dao: An Inherent Territory of China*, p. 4.

¹¹ June Teufel Dreyer, 'Sino-Japanese Territorial and Maritime Disputes,' in Bruce Elleman, Stephen Kotkin, and Clive Schofield (eds.), *Beijing's Power and China's Borders: Twenty Neighbors in Asia*, M.E. Sharp: Armonk, NY (2013), p. 82.

¹² Greg Austin, *China's Ocean Frontier: International Law, Military Force and National Development*, Allen & Unwin: St Leonards, NSW (1998), p. 176.

¹³ *Diaoyu Dao: An Inherent Territory of China*, p. 14; Teufel Dreyer, 'Sino-Japanese Territorial and Maritime Disputes,' p. 84.

did not make its claim immediately public. Countries that make sovereignty claims to remote territories are required under international law to give some measure of notice to other potential claimants and Japan's failure to do so suggests it was aware China had some form of prior claims to the islands.¹⁴ This is perhaps point at which the collision between the old Chinese order in Asia and the emerging order based on Western international law matters most. The law allows that if China can demonstrate it had some measure of effective administration and control over the islands prior to the Sino-Japanese War, then the islands were not *terra nullius* and Japan's claim to the islands is flawed in its inception.

The history of the dispute is even more complex in that the islands had been governed as a part of Taiwan Prefecture prior to the Sino-Japanese War of 1895. In the Chinese view, therefore, Japan ceded the islands to China as a result of the Treaty of Shimonoseki. But, China claims, the islands should have been restored to China after 1945 through the action of the Cairo and Potsdam Declarations.¹⁵ On the other hand, Japan claims that China either never had a sovereignty claim over the islands or abandoned it since for twenty-five years after the conclusion of World War II neither the ROC nor the PRC government made a claim to the islands either in relation to Taiwan or separate from it.¹⁶ Furthermore, during this period the United States administered the islands under first the Occupation of Japan and later the Okinawa Mandate. If the Chinese continued to make a sovereignty claim to the islands one or the other government would have been expected to raise the issue with either the United States or Japan. Perhaps the most damning evidence to the Chinese claim is that when the People's Republic of China issued its Declaration on the Territorial Sea in 1958 it took great care to name each of the offshore island

¹⁴ The Clipperton Island Case, *France v. Mexico*, *Cumulative Digest of International Law and Relations*, Vol. 2, p. 94 (1931-1932).

¹⁵ *Diaoyu Dao: An Inherent Territory of China*, p. 15.

¹⁶ Austin, *China's Ocean Frontier*, p. 168.

groups in the South China Sea along with Taiwan and the Penghus but failed to make any mention of the Senkaku/Diayou Islands at all, as chapter 5 demonstrates.¹⁷

Indeed, open dispute concerning sovereignty over the islands did not arise until 1970, when the Republic of China—still at that time representing China at the United Nations—declared the Senkaku Islands belonged to China.¹⁸ The People's Republic published a statement in the *Peking Review* condemning American, Japanese and South Korean cooperation in oil and gas development in the East China Sea around 'China's Taiwan Province and its appendant islands,' on December 11, 1970.¹⁹ And on December 30, 1971, the Ministry of Foreign Affairs of the People's Republic of China followed suit and issued a statement claiming

the islands of Diaoyu Island, Huangwei Island, Chiwei Island, Nanxiao Island and Beixiao Island are Taiwan's affiliated islands. Like Taiwan, they have been an inseparable part of Chinese territory since ancient times.²⁰

These statements were issued in the wake of two significant events, the first being the negotiation between the U.S. and Japan of the Okinawa Reversion Treaty. The United States administered the Senkakus as part of Japan's southern islands since the end of World War II. The U.S. made this public and explicit in 1953 when it published the coordinates of the United States Ryukyu Administration.²¹ This was

¹⁷ Additionally, a 1966 Red Guard Atlas published in Beijing 'indicates that the ocean area in which the Senkakus are located is beyond China's border' and the Ryukyus are Japanese. *The Senkaku Islands Dispute: Oil Under Troubled Waters?* CIA Intelligence Report, CIA/BGI GR 71-9, May 1971, Approved for release May 2, 2007, p. 40.

¹⁸ *The Senkaku Islands Dispute: Oil Under Troubled Waters?* p. 10; Austin, *China's Ocean Frontier*, p. 173.

¹⁹ 'US and Japanese Rectionaries Out to Plunder Chinese and Korean Seabed Resources,' *Peking Review*, 13,:50, p. 15 (December 11, 1970).

²⁰ Cohen and hiu, *People's China and International Law: A Documentary Study*, pp. 347-349. The document can also be found at, http://www.diaoyudao.org.cn/2014-12/11/content_34291910.htm (in Chinese).

²¹ *Civil Administration Proclamation No. 27, Geographical Boundaries of the Ryukyu Islands*, United States Civil Administration of the Ryukyu Islands, December 25, 1953, at <http://ryukyu-okinawa.net/pages/archive/caproc27.html>.

followed by Executive Order 10713 of 1957, which reaffirmed American jurisdiction and administration over the entire Ryukyu Islands (Nansei Shoto) South of 29' north latitude.²² The declaration and the Executive Order were never the subject of protest by either Chinese government. However, following the ROC and the PRC sovereignty claims in 1970 and 1971, the Nixon Administration, then seeking to woo the PRC into cooperation against the Soviet Union in the Cold War and to assuage relations with the ROC after its ouster from the United Nations, agreed to return only 'administration' over the Senkakus to Japan, and to leave the question of sovereignty open for future determination.²³

The second significant event was the publication in 1968 of a survey of potential energy deposits under the East China Sea.²⁴ The survey was conducted by the Committee for the Coordination of Joint Prospecting for Mineral Resources in Asian Offshore Areas under the authority of the United Nations Economic Commission for Asia and the Far East.²⁵ One key statement in the document aroused the interest of all three regional governments in the disposition of the Senkakus Islands.

A geophysical survey conducted in the East China Sea and Yellow Sea in October/November 1968 had indicated that the shallow sea floor between Japan and Taiwan might contain one of the most prolific oil and gas reservoirs in the world, possibly comparing favourably with the Persian Gulf area.²⁶

²² *Providing for the Administration of the Ryukyu Islands*, Executive Order 10713, June 5, 1957.

²³ Paul J. Smith, 'The Senkaku/Diaoyu Island Controversy: A Crisis Postponed,' *Naval War College Review*, 66:2 (Spring 2013), pp. 27-44, at 28, 33-34.

²⁴ Cohen and Chiu, *People's China and International Law*, pp. 346-347.

²⁵ *Committee for the Coordination of Joint Prospecting for Mineral Resources in Asian Offshore Areas (CCOP), Report of the Sixth Session*, Economic Commission for Asia and the Far East, Twenty-sixth Session, April 14-27, 1970, Bangkok, Thailand E/CN.11/L.239 (June 26, 1969).

²⁶ *Ibid.*, p. 5.

This came at a time China and Japan both had concerns about access to scarce resources—seafood and maritime energy sources among them.²⁷

While China's claim to the Senkaku Islands has clear connections to China's interest in controlling the living and non-living ocean resources on China's maritime periphery, there is no doubt that Chinese scholars and officials also see a geostrategic rationale for their claim. As Zhang Wenmu puts it

Is there a particular geostrategic water mass that China must control or face the prospect of being controlled?

...

Unifying Taiwan with the motherland and *recovering China's sovereign islands* is both the great historical mission that the Chinese government must shoulder and a necessary foundation for China to safeguard its national sea rights.

...

If China loses Taiwan, it will subsequently also lose the Nansha (Spratleys) (sic) and *perhaps the Diaoyu Islands*. Losing these regions implies that China will lack the basic space for ensuring national political and economic security that will be essential to China's rise as a great power. [italics added].²⁸

China's geostrategic rationale for claiming the Senkaku/Diaoyu Islands was well articulated by Yang Lei in a June 2006 article. In his view, the East China Sea and the Diaoyu Dao are essential components to China's expanding interior strategy create a wider maritime buffer between potential aggressors from the sea and China's modernizing coast line.

The East China Sea is a strategic exit for our country to advance to the Pacific Ocean...If China can control the East China Sea, it can establish a protective screen and enhance strategic defense in the east. Moreover, it can make a breakthrough in the "Island Chain Enclosure" and gain a strategic exit to advance to the ocean.

...

²⁷ Teufel Dreyer, 'Sino-Japanese Territorial and Maritime Disputes,' p. 82.

²⁸ Zhang Wenmu, 'Sea Power and China's Strategic Choices,' *China Security*, Summer 2006, pp. 17-31, at 25.

[Furthermore], geographically, Taiwan is close to Diaoyu Dao and the two can combine together in a strategic situation. Diaoyu Dao has special strategic value ... [it is] located between the US-Japanese base at Okinawa and Taiwan Island. ... If Japan controls the Diaoyu Dao it can provide strong support for the 'independence of Taiwan'... Japan will use the island as a base and bridgehead to interrupt military matters on Taiwan.²⁹

According to Fudan Professor Pan Zhongqi,

Should either China or Japan secure sovereignty over the islands, they would grant their owner an advantage in military security with a prolonged and enlarged frontier, putting the other side into a disadvantaged position.³⁰

China's Ministry of Foreign Affairs spokesman, Hong Lei, echoed concern about China's claim to the Senkaku/Diaoyu Islands in relation to the expansion of China's interior security buffer in August 2012 in what, in hindsight, is a strong warning of what was soon to come. Hong stated Diaoyu Island and the surrounding islets 'have been the inherent territory of China since ancient times...[and historically a part of] China's maritime defense sphere.'³¹ Less than three weeks after Hong's statement the Japanese government carried out its planned purchase of three of the Senkaku Islands to stave off a nationalist purchase and escalation of bilateral intentions. A serious spike in both political tensions and Chinese Coast Guard patrols around the disputed features followed the action of the Japanese government.³² In the years since September 2012, the Chinese Coast Guard has maintained a near-constant patrol of the waters around the Senkaku Islands, including regular forays into the

²⁹ Yang Lei, 'Behind the Sino-Japanese Dispute in the East Sea,' *Naval and Merchant Ships*, [in Chinese] June 2006, pp. 22-24. [China Maritime Studies Institute Translation]. See similar sentiments from Jin Yongming, 'Japan Must Honor the Law of the Sea,' *China Daily*, September 14, 2010.

³⁰ Pan Zhongqi, 'Sino-Japanese Dispute over the Diaoyu/Senkaku Islands: The Pending Controversy from the Chinese Perspective,' *Journal of Chinese Political Science*, 12:1 (2007), pp. 71-92, at 71-72.

³¹ 'China Strongly Displeased at Japan's Remark on Diaoyu Islands,' *Xinhua*, August 25, 2012.

³² Smith, 'The Senkaku/Diaoyu Island Controversy,' p. 27.

territorial sea.³³ The purpose of these patrols appears to be to change the status of the islands from sole administration by Japan to administration in relatively equal terms by both Japan and China, thus drawing the islands closer to China's orbit. This has the geostrategic effect of increasing Chinese control over its loosely held periphery in order to establish its long-desired ring of maritime security.

In fact, the term 'maritime defense sphere' in relationship to Chinese claims to the Senkakus was part of China's public discourse by at least 2010. Writing in September 2010, a legal scholar from the Shanghai Academy of Social Sciences stated in a *China Daily* editorial, 'The Diaoyu Islands have always been within the maritime defense boundary of China.'³⁴ Similarly, the PLA sees the Senkaku/Diaoyu dispute in strategic terms. Guo Yadong, a researcher at the PLA Naval Research Institute, considers 'the essence of the [Diaoyu Island] issue is a trial of strength between China and the United States.' He advocates that China wait patiently to resolve the issue until China develops and is at the same 'weight level' as the U.S. To do this, he says, China must advance politically, economically, and militarily to 'prevent and set back military interventions of foreign powers.'³⁵ Major General Peng Guangqian, who retired from the PLA to become Deputy Secretary General of the China Policy Science Research Council's National Security Policy Committee, made the point in September 2012, that China should be prepared to use force to prevent the Japanese Self Defense Forces from occupying the Diaoyu Islands since, 'as early as the Ming Dynasty, Diaoyu Islands and other islands had been under China's coastal defense jurisdiction.'³⁶

³³ 'China Coast Guard Vessels Patrol Diaoyu Islands,' *Xinhua*, January 15, 2018.

³⁴ China's White Paper on the topic also states, 'China placed Diaoyu Dao under its coastal defense to guard against ... invasion.' *Diaoyu Dao, an Inherent Territory of China*, p. 4.

³⁵ Guo Yadong, 'Chinese Navy Should Not Rush to Flex Its Muscles,' *Global Times*, February 25, 2009, p. 11. [Open Source Center translation].

³⁶ 'Major General of the People's Liberation Army: The Bottom Line is Japanese Self-Defense Force Use of Mobile Force in the Diaoyu Islands,' *Global Times*, September 15, 2012.

Accordingly, there is evidence that although the dispute over the Senkaku Islands has an important resource component to it, there is a broader geostrategic rationale to China's insistence that the islands belong to it. The Chinese claim reflects the view that China needs to possess the islands to ensure its ability to accomplish two related geostrategic objectives--expanding its maritime security buffer and ensuring Taiwan does not escape the Mainland's orbit. While a formal claim may have been overlooked in 1958, the PRC rectified the oversight in its 1971 statement and, as chapter five demonstrates, in its 1992 Territorial Sea Law. At least one key consideration in this adjustment in China's approach to domestic and international law was China's geostrategic interest.

III. Baselines

Contemporaneous to the increased Chinese Coast Guard presence around the Senkaku/Diaoyu Islands, the People's Republic of China issued a statement proclaiming its baselines around the island group.³⁷ This was a clear move to solidify and legitimize its claim to islands for both domestic and international audiences.

The Chinese government's announcement of the baselines of the territorial waters of the Diaoyu Islands and their affiliated islets is of great significance, a Chinese diplomat has explained. 'By doing so, we can proclaim to the international community our indisputable sovereignty over the Diaoyu Islands and the firm determination of our government and people to safeguard our territorial sovereignty and maritime interests.' Deng Zhonghua, head of the Department of Boundary and Ocean Affairs with the

³⁷ 'Deposit by the People's Republic of China of a Chart and a List of Geographical Coordinates of Points, Pursuant to Article 16, Paragraph 2 of the Convention,' *Maritime Zone Notification*, Circular Communication, Division for Ocean Affairs and the Law of the Sea, United Nations Office of Legal Affairs, September 21, 2012. [UN Document number MZN.89.2012.LOS]. For the specific coordinates and detailed information, see, 'Statement of the Government of the People's Republic of China On the Baselines of the Territorial Sea of Diaoyu Dao and Its Affiliated Islands,' 10 September 2012,' *Law of the Sea Bulletin*, No. 80, United Nations Division for Ocean Affairs and the Law of the Sea Office of Legal Affairs (2013).

Foreign Ministry, said in an interview with China Central Television on Thursday.³⁸

As the government later explained to the Chinese people in the International Herald Tribune,

A few days before 10 September 2012, it was inevitable that the Government of Japan would enact the so-called "nationalization" of the Diaoyu Islands. Inside the building of China's Ministry of Foreign Affairs, diplomatic officials seemed unusually busy. In a routinely scheduled meeting, a foreign affairs official with a somewhat haggard face suddenly broke out in a smile. He made a promise to the Chinese media in attendance: The countermeasures made by the Government of China will not disappoint you, so keep your eyes peeled! The subsequent series of combination punches stirred up a tempest and were impressively executed. The people of China were indeed not disappointed. On 10 September, the Government of China announced the basepoints and baseline of the territorial waters of the Diaoyu Islands. On 11 September, the National Marine Environmental Forecasting Station officially issued the marine environment forecast for the maritime areas near the Diaoyu Islands, and China's seven weather satellites in orbit started scanning the Diaoyu Islands and the nearby maritime areas once every 15 minutes. On 11 September, two ships -- China Marine Surveillance 46 and China Marine Surveillance 49 -- arrived at the maritime area around the Diaoyu Islands and waited, on standby. On 14 September, six Chinese law enforcement vessels formed into two formations and moved into the territorial waters of the Diaoyu Islands, announcing China's sovereignty over the Diaoyu Islands.³⁹

In other words, in issuing baselines for the Senkaku/Diaoyu Islands, the purpose of the Chinese government was to establish 'Chinese waters' for the Chinese Coast Guard to legitimately patrol.

After the U.S. government issued a statement criticizing China's baselines as in violation of international law, the Chinese government replied with a firm statement of its determination to control the islands and the waters around them. According to a Ministry of Foreign Affairs spokesman,

³⁸ 'Diaoyu Islands Baseline Announcement Significant: Chinese Diplomat,' *Xinhua*, September 14, 2012.

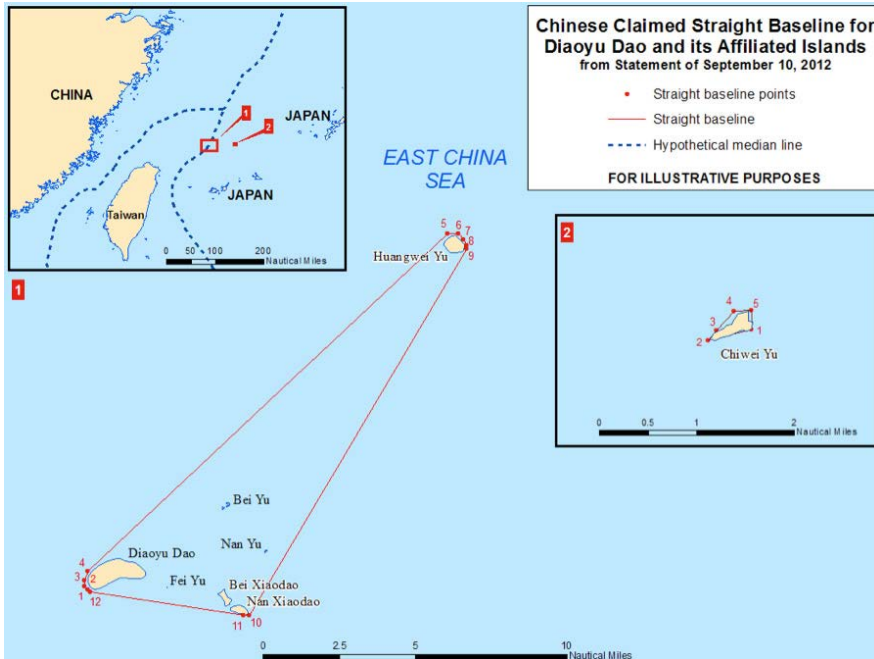
³⁹ Liang Hui, 'China's "Three Steps" To Strengthen Control of the Diaoyu Islands,' [in Chinese], *International Herald Tribune*, November 29, 2013. [OSC Translation].

The Diaoyu Island and its affiliated islands have been China's inherent territory since ancient times. China has indisputable sovereignty over them. The Chinese government established and announced base points and baselines of the territorial sea of the Diaoyu Islands according to relevant provisions of the UN Convention on the Law of the Sea (UNCLOS). This is completely in line with relevant international law and practice.⁴⁰

Clearly the baselines announcement was part of a larger strategy to consolidate Chinese control over the islands and thereby to incrementally increase Chinese control over the East China Sea. This presents an excellent example of China's use of law in its efforts to both legitimize and consolidate its control over the maritime periphery through the combination of law and national power.

Predictably, China's claimed baselines around the Senkaku/Diaoyu Islands grouped all but one of the islets to form an archipelago (or qundao). This followed the approach first announced in the 1958 Territorial Sea Declaration, the 1992 Territorial Sea Law, and the 1996 declaration of baselines for the Paracel Islands (as discussed in chapter five). A depiction of China's base lines claims for the Senkaku/Diaoyu Islands is presented below.

⁴⁰ *Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference*, Ministry of Foreign Affairs of the People's Republic of China, May 7, 2013.



Chinese claimed baselines around Diaoyu Dao and the related islands. Note the separate baselines around Chiwei Yu, which China also claims as an island affiliated with Diaoyu Dao.⁴¹

China's approach has the effect of expanding the water space it claims the right to control. Rather than simply claiming a 12 nautical mile territorial sea around each feature, China groups the islands together with the effect of creating an area of internal waters within the triangle bounded by Diaoyu Dao, Nan Xiaodao, and Huangwei Yu. Internal waters are of course fully sovereign and in them the international community retains few residual rights.⁴² As such, China's claim can be read to give it the right to exclude all vessels from these waters under all circumstances. At best, it can be read as a claim that only innocent passage is allowed in the waters that form the Diaoyu Dao-Nan Xiaodao-Huangwei Yu

⁴¹ J. Ashley Roach, 'China's Straight Baseline Claim: Senkaku (Diaoyu) Islands,' *American Society of International Law Insights*, 17:7, February 13, 2013.

⁴² UNCLOS, article 8. See also, *The Commander's Handbook on the Law of Naval Operations*, (Edition, August 2017), para. 1.5.1, p. 1-7, which provides, 'From the standpoint of international law, internal waters have the same legal character as the land itself. [Accordingly]... ships and aircraft may not enter or overfly internal waters without the permission of the coastal State.'

triangle.⁴³ Even this could be suspended in times of crisis.⁴⁴ In any event, China does not recognize a right of innocent passage for warships. As chapter five demonstrates, it conditions the exercise of innocent passage on the permission of the coastal state. Accordingly, China's baselines claims around the Senkaku/Diaoyu Island group represent a significant expansion of claimed authority to control water space. Especially if tensions between China and Japan increase, China's claim could trigger the use of force in defense' of what China claims as its own.

China's approach to claimed baselines also creates a much more extensive twelve-mile arc of territorial sea measured from these lengthy baselines. Again referring to chapter five, in these waters Chinese law prohibits the presence of foreign military vessels without China's prior permission to enter. Most states consider Coast Guard vessels as military vessels.⁴⁵ Accordingly, when China proclaimed straight baselines around the Senkaku/Diaoyu Islands it effectively announced that the mere presence of Japanese Coast Guard vessels in and around the islands is a violation of law as a matter of the interaction between international law, China's domestic law, and China's claimed rights. The implication is that China reserves the right to use force or any other measures necessary to expel them at a time of its own choosing.⁴⁶

⁴³ UNCLOS article 8, para. 2.

⁴⁴ UNCLOS is silent about the nature of innocent passage within internal waters enclosed under article 8.2. However, in the territorial sea, 'The coastal State may, without discrimination in form or in fact among foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security.' UNCLOS articles 17 and 25 (quoted). By analogy, it is reasonable to conclude that at the very least a coastal state could suspend innocent passage in internal waters on the same basis.

⁴⁵ See, e.g., *The Commander's Handbook on the Law of Naval Operations*, para. 2.2.1, p. 2-1, which states, 'U.S. Coast Guard vessels designated "USCGC" under the command of a commissioned officer are also "warships" under international law.'

⁴⁶ UNCLOS article 25.1 provides, 'The coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent.' Similarly, unpermitted entry into a fully sovereign zone, such as internal waters, can be seen as much more provocative and therefore the basis for a use of force in defence of national sovereignty.

China's proclamation of straight baselines around the Senkaku/Diaoyu represents an attempt by a coastal state to use international law to enhance its power to control water space on its maritime periphery. While the conditions may be very different from those faced by Mao Zedong and Zhou Enlai when they issued the PRC's first Declaration on the territorial Sea in 1958, the impulses behind the action remain consistent. China's international law claims warn potential adversary's of China intentions; they justify China's option to use force if the leadership determines the time is right; and they seek to limit or control an adversary's behavior in relation to China's claims and its security interests. Since Chinese strategists and officials tie the status of these small islands to the mainland's future ability to bring Taiwan under its permanent control, there is a clear link between China's baselines claim and its overall maritime security and geostrategic objectives. But the baseline proclamation did more. It set the stage for China's declaration of an Air Defence Identification Zone, which will be discussed in section V below, and the completion of China's legal construct that claims Chinese sovereignty or jurisdiction over nearly the entire East China Sea—from the shores of China's mainland to the Okinawa Trough on the doorstep of Japan's Ryukyu Island chain.

IV. Continental Shelf

The third brick in China's eastern wall at sea is its claim to the entire continental shelf from the mainland to the depth of the Okinawa Trough. At its widest part, the East China Sea measures between approximately 270 and 350 nautical miles across from China's mainland to the Japanese islands in the Ryukyu Island chain.⁴⁷ The continental shelf across the span of the East China Sea is relatively shallow, with much of the sea possessing an average depth of only approximately 500-600 feet.⁴⁸

⁴⁷ At its farthest, the Chinese mark the distance from their baselines to the deepest part of the Okinawa Trough near the Ryukyu Islands as 333 nautical miles. *Preliminary Information Indicative of the Outer Limits of the Continental Shelf Beyond 200 Nautical Miles of the People's Republic of China*, p. 8, available at, http://www.un.org/depts/los/clcs_new/submissions_files/preliminary/chn2009preliminaryinformation_english.pdf.

⁴⁸ U.S. National Oceanic and Atmospheric Administration, Chart 94016.

Chinese writings about this sometimes refer to this extension of the Chinese continent as comprised of sacred Chinese soil. This has to do with the vast amount of sediment from the mainland that settles each year on the continental shelf. As one team of scientists observed,

The Yangtze River originates from the Tuotuo River on the southwestern side of the snow-draped Geladandong Mountains on the Tibetan Plateau. It flows eastward across Qinghai, Tibet, Sichuan, Yunnan, Hubei, Hunan, Jiangxi, Anhui and Jiangsu provinces into the East China Sea at Shanghai. More than 700 tributaries join this 6300 km long river draining a 1.8-million km² basin, accounting for 19% of China's national area.⁴⁹

The mean average sediment load of the waters emanating from the Yangtze is 470 million square meters.⁵⁰ In this rich sediment, furthermore, are the makings of the oil and gas deposits under the East China Sea continental shelf that are of particular interest to the Chinese (and, of course, to the Japanese). Indeed, according to two PLA authors, the discovery of petroleum and regional geopolitics are two key reasons the area has yet to be delimited.⁵¹

On December 12, 2012, the People's Republic of China submitted its claim to the UN Commission on the Limits of the Continental Shelf.⁵² The submission was made

⁴⁹ Yang Guifang, Chen Zhongyuan, Yu Fengling, Wang Zhanghua, Zhao Yiwen, and Wang Zhangqiao, 'Sediment Rating Parameters and Their Implications: Yangtze River, China,' *Geomorphology*, Vol. 85 (2007), pp. 166-175, at 169.

⁵⁰ *Ibid.*, p. 169.

⁵¹ Zhang Dongjiang and Wu Weili, 'A Discussion of the Sino-Japanese Delimitation Issue in the East China Sea and Its Settlement,' *World Economics and Politics* [in Chinese], April 14, 2006, pp. 35-42. [OSC translation]. See also, Zhang Haiwen, 'Legal Issues Concerning the East China Sea Delimitation: A Chinese Perspective on the Sino-Japanese East China Sea Dispute,' *Japanese Yearbook of International Law*, Vol. 51 (2008), pp. 119-139, at 123, and Shigeki Sakamoto, 'Japan-China Dispute over Maritime Boundary Delimitation: From a Japanese Perspective,' *Japanese Yearbook of International Law*, Vol. 51 (2008), pp. 98-118, at 118.

⁵² *Receipt of the Submission Made by the People's Republic of China to the Commission on the Limits of the Continental Shelf*, Letter from the Secretary General of the United Nations, December 14, 2012, UN Document CLCS.63.2012.LOS (Continental Shelf Notification).

under the provisions of UNCLOS article 76, which details the law of the continental shelf, and Annex II, which establishes a Commission on the Limits of the Continental Shelf. The function of the Commission is to provide expert recommendations to states as to the extent of the continental shelf based on the scientific evidence presented. Concerning a state's entitlement to a continental shelf, article 76 provides,

The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.⁵³

The law clearly provides for two possible circumstances. The first has to do with states possessing a geomorphological (or submarine landscape) continental shelf that extends beyond 200 nautical miles from its baselines.⁵⁴ Those states may claim the full extent of the natural prolongation of such continental shelves, even beyond the 200 nautical mile mark up to at a distance of 350 nautical miles or the limit of the 2500-meter isobaths, whichever is further.⁵⁵ The second has to do with states not possessing geomorphological continental shelves extending to 200 nautical miles. Such states may nonetheless claim exclusive seabed rights up to the full extent of 200 nautical miles. These alternative approaches were taken as a matter of equity in order to allow states to maximize their claims, including states with shorter geomorphological continental shelves.⁵⁶ The purposes of the Commission on the Limits of the Continental Shelf, therefore are

⁵³ UNCLOS article 76.1.

⁵⁴ Sharveen Persand, *A Practical Overview of Article 76 of the United Nations Convention on the Law of the Sea*, United Nations Department for the Law of the Sea, United Nations Nippon Foundation Fellows Program (2005), p. 5.

⁵⁵ *Ibid.*, p. 12 and UNCLOS article 76.5.

⁵⁶ Persand, *A Practical Overview of Article 76 of the United Nations Convention on the Law of the Sea*, p. 6.

- 1) To consider the data and other material submitted by coastal States concerning the outer limits of the continental shelf in areas where those limits extend beyond 200 nautical miles and to make recommendations; [and]
- 2) To provide scientific and technical advice if so requested by the coastal State concerned during the preparation of the submission.⁵⁷

However, UNCLOS also provides, “The actions of the Commission shall not prejudice matters relating to delimitation of boundaries between States with opposite or adjacent coasts.”⁵⁸

To ensure no prejudice occurs to the interests of a state with an opposing or adjacent coastline that might be affected by the submission of its neighboring state, the Rules of Procedure of the Commission on the Limits of the Continental Shelf provide,

In cases where a land or maritime dispute exists, the Commission shall not consider and qualify a submission made by any of the States concerned in the dispute.⁵⁹

In China’s case, its East China Sea continental shelf falls into the former case. China’s submission of its claim to the Commission describes the continental shelf in the following terms (see chart below). The East China Sea,

Located to the east of the mainland of China, consists of three geomorphologic units: the shelf, the slope and the Okinawa trough. The continental shelf ... is the natural prolongation of the mainland of China. The maximal width of the shelf exceeds 500KM [approximately 270 nautical miles]. The seafloor topography is flat and inclines southeastwards. The gentle inclination ends at the shelf break where the water depth deepens sharply and the slope ... begins.

...

⁵⁷ UNCLOS, Annex II, article 3.

⁵⁸ UNCLOS, Annex II, article 9.

⁵⁹ *Rules of Procedure of the Commission on the Limits of the Continental Shelf*, United Nations Commission on the Limits of the Continental Shelf (April 17, 2008), UN Doc. CLCS/40/Rev.1, Annex I, article 5(a).

The shelf of [the East China Sea], together with the eastern part of the mainland of China, is tectonically viewed as a whole, because both of them hold the same ancient continental core.⁶⁰

Furthermore,

The geological characteristics of the Okinawa Trough basin are distinctly different from those of [the] adjacent East China Sea shelf

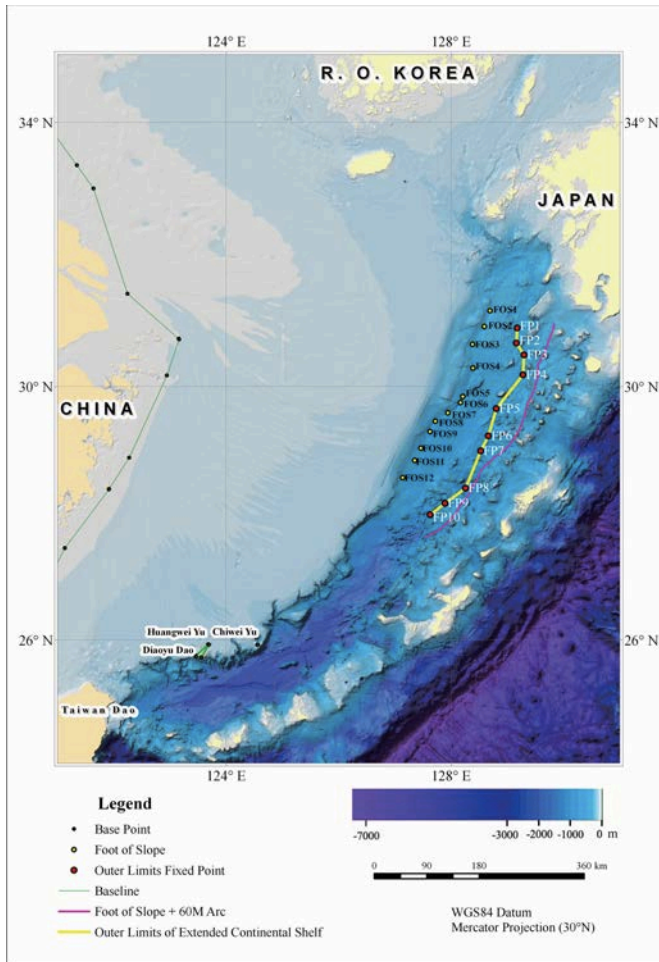
...

The Okinawa Trough is the natural termination of the continental shelf of [the East China Sea].⁶¹

Accordingly, the PRC submission to the Commission on the Limits of the Continental Shelf defined a series of points at the deepest portion of the Okinawa Trough as the proposed boundary between the Chinese continental shelf and the continental shelf extending from Japan's Ryukyu Island chain.

⁶⁰ *Receipt of the Submission made by the People's Republic of China to the Commission on the Limits of the Continental Shelf*, December 14, 2012, UN Doc. CLCS/63/2012/LOS, and *Submission by the People's Republic of China Concerning the Outer Limits of the Continental Shelf beyond 200 Nautical Miles in Part of the East China Sea, Executive Summary*, December 14, 2012, p. 3, available at http://www.un.org/depts/los/clcs_new/submissions_files/chn63_12/executive%20summary_EN.pdf.

⁶¹ *Submission by the People's Republic of China Concerning the Outer Limits of the Continental Shelf beyond 200 Nautical Miles in Part of the East China Sea, Executive Summary*, p. 5.



Map of the central portion of China's ECS continental shelf claim.⁶²

The Japanese object to China's East China Sea continental shelf claim on two bases. The first basis is that in Japan's view the proper basis for delimitation of maritime boundaries in the East China Sea is the law related to the exclusive economic zone, rather than the continental shelf. Japan's second, related objection is to China's use of the natural prolongation method, rather than to the median line method. The dispute stems from the fact that the final text of UNCLOS Part V on the Exclusive Economic Zone allocates to coastal states sovereign rights to the living and non-living resources in 'the waters superjacent to the seabed and of the seabed and its

⁶² *Submission by the People's Republic of China Concerning the Outer Limits of the Continental Shelf beyond 200 Nautical Miles in Part of the East China Sea, Executive Summary*, p. 4.

subsoil' in a zone not to exceed 200 nautical miles from its baselines.⁶³ The coastal state's right to claim an exclusive economic zone—including the seabed and subsoil—is independent of the geomorphology of the seabed. Accordingly, there appear to be two ways embedded in the provisions of UNCLOS—in articles 56 and 76—for a coastal state to claim jurisdiction over the seabed within 200 nautical miles of its coastline, neither of which relate to the physical features of the seabed itself. In Japan's view, therefore, since the distance between China and Japan's opposing baselines in the East China Sea is less than 400 nautical miles, the geomorphology of the seabed should be irrelevant to a determination of the maritime boundary between them. One Japanese professor of international law at Kobe University stated the Japanese perspective as follows.

The legal title to the EEZ is based on the standard of *distance*... . In waters where the EEZ is established, the continental shelf extending up to 200 nautical miles from the coastline is covered by the EEZ. Only any portion beyond the EEZ boundary is related to the natural prolongation. (emphasis added).⁶⁴

Thus two sets of UNCLOS provisions and two sets of standards for making claims to the seabed stand together in the final text of UNCLOS. Unfortunately, the applicable standards for delimiting disputed areas provide little additional clarity.

In UNCLOS Part VI on the continental shelf, article 83 provides

The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law ... in order to achieve an equitable solution.

In UNCLOS Part V on the exclusive economic zone, Article 74 provides the exact same language.

⁶³ UNCLOS, article 56.1(a).

⁶⁴ Shigeki Sakamoto, 'Japan-China Dispute over Maritime Boundary Delimitation: From a Japanese Perspective,' *Japanese Yearbook of International Law*, Vol. 51 (2008), pp. 103-104.

The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law ... in order to achieve an equitable solution.

Accordingly, there are generally three elements to resolution of any disputed maritime boundary—agreement, international law, and equity. The International Court of Justice developed a process for addressing these three elements in cases involving a single maritime boundary in the 1985 Libya/Malta Case. It provided

The justice of which equity is an emanation is not abstract justice, but justice according to the rule of law; which is to say that its application should display consistency and a degree of predictability; even though it looks with particularity to the peculiar circumstances of an instant case, it also looks beyond it to principles of more general application.⁶⁵

To provide legal consistency and predictability, the Court determined that delimitation should follow a three-step process.

First, make a provisional delimitation by using a criterion and a method both of which are clearly destined to play an important role in producing the final result; it will then examine this provisional solution in the light of the requirements derived from other criteria, which may call for a correction of this initial result.

The court determined that in the first step, making a provisional delimitation on the basis of the median line between opposing coastlines is appropriate. It discussed use of the median line by many states as a basis for negotiated delimitation, the introduction by UNCLOS of distance criteria and the rejection of the features of the seabed for making claims to the exclusive economic zone and continental shelf, and the negotiating history of UNCLOS, which made clear that many states favored this

⁶⁵ *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment of June 3, 1985, International Court of Justice, Reports of Judgments, Advisory Opinions and Orders, para. 45.

approach.⁶⁶ This step is followed by an adjustment for the proportional length of the relevant coasts of the two opposing states' coastlines, and any other relevant factors to achieve an equitable result.⁶⁷ Finally, the court determined it should make a final examination in light of all relevant circumstances.⁶⁸

The International Court of Justice used this approach in every delimitation case before it for more than three decades. Based on it, the Japanese would seem to have the better argument. That is, international law does not take into account the geomorphology of the seabed when delimiting opposite coastlines less than 400 nautical miles apart and the median line approach is the international law standard for such delimitations.

Nonetheless, the Chinese position remains that it has a right to claim the full natural prolongation of its continental shelf under Part VI of the Convention without reference to Part V. It also insists—correctly—that nothing requires a single delimited boundary and that states can agree to negotiate continental shelf and exclusive economic zone boundaries in different locations.⁶⁹ Why China makes these claims should be relatively clear. International law as reflected in UNCLOS is sufficiently vague to allow the Chinese to make its expansive claim to jurisdiction over virtually the entire continental shelf of the East China Sea without regard for legal developments outside the text of the Convention itself.

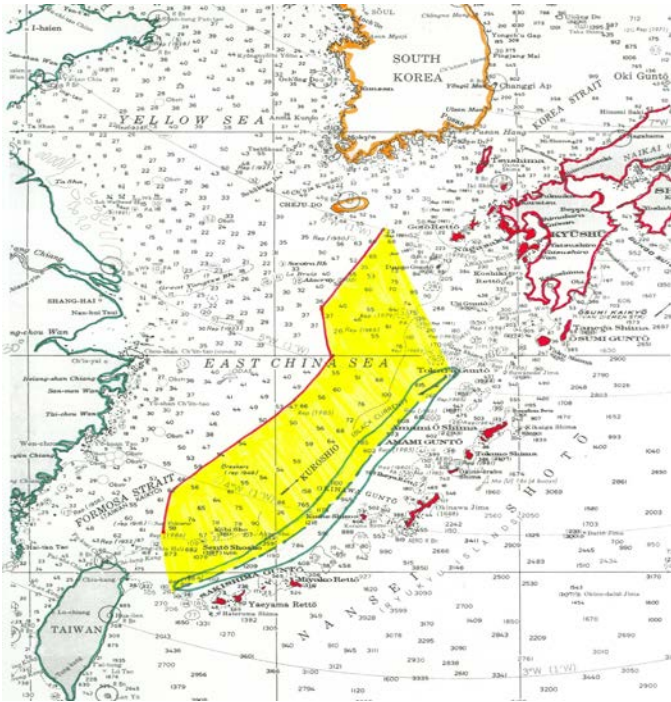
The difference between the two approaches is not trivial. As the yellow shaded area in the East China Sea in map below demonstrates, approximately half of the sea's waters are in dispute.

⁶⁶ *Ibid.*, paras. 63-66.

⁶⁷ *Ibid.*, paras. 68-74.

⁶⁸ *Ibid.*, paras. 75 and 78.

⁶⁹ See generally Jia Bingbing, 'The Notion of Natural Prolongation in the Current Regime of the Continental Shelf: An Afterlife?' *Chinese Journal of International Law*, 12:1 (2013), pp. 79-103 and Zhang Haiwen, 'Legal Issues Concerning the East China Sea Delimitation.'



Map of Median Line versus CS approaches.⁷⁰

Why would China submit such a claim to nearly the entire span of the continental shelf within the East China Sea when such a claim is weakly founded in international law? One reason is that China's submission to the Commission on the Limits of the Continental Shelf sets a very public marker without risk that its claim could be rejected. Since China openly disputes Japan's sovereignty over the Senkaku/Diaoyu Islands and the two sides agree there is a dispute concerning the proper approach to international law in making the delimitation, the Commission is constrained from acting on China's submission.⁷¹ Indeed, Japan formally registered its objection to

⁷⁰ Peter Dutton, 'Carving Up the East China Sea,' *Naval War College Review*, (Spring 2007), pp. 49-72, at 53.

⁷¹ Indeed, as it was required to do by Rule 2(a) of Annex I to the *Rules of Procedure of the Commission on the Limits of the Continental Shelf*, in its initial submission China notified the Commission, albeit obliquely, that disputes exist with Japan and the Republic of Korea in the covered area. *Submission by the People's Republic of China Concerning the Outer Limits of the Continental Shelf beyond 200 Nautical Miles in Part of the East China Sea, Executive Summary*, p. 9.

China's continental shelf submission through a series of letters to the Secretary General of the United Nations.⁷² Accordingly, China was able to make a formal claim in an international institution without fear its claim would be subjected to the actual scrutiny of international law. That the Commission could make no determination allowed China to preserve and publicize its claim without risk.

Second, the submission had the effect of extending China's strategic reach across the entire East China Sea and creating a form of strategic leverage against a regional rival. That is, China's submission had the political effect of constraining Japan from pursuing hydrocarbon development in the East China Sea and giving China strategic leverage over a significant Japanese interest.⁷³ As early as August 2003, Japan objected to China's exploration of the Chunxiao (Shirakaba) gas field just to the west of the median line in the East China Sea.⁷⁴ The dispute hardened in 2005 when China began drilling, with Japan objecting that

A part of the oil and gas field under development by China could clearly or possibly extend beyond the Japan-claimed median line into the Japanese continental shelf and that China could siphon Japanese resources.⁷⁵

To date Japan has refrained from aggravating the dispute by drilling for oil on its side of the median line.⁷⁶ This is in part because of the concern that if Japan changes

⁷² Letter from the Permanent Mission of Japan to the Secretariat of the United Nations, SC/09/246, July 23, 2009; Letter from the Permanent Mission of Japan to the Secretariat of the United Nations, SC/12/372, December 28, 2012; and Letter from the Permanent Mission of Japan to the Secretariat of the United Nations, SC/13/293, August 13, 2013.

⁷³ The Chinese were well aware of Japan's interest in developing the East China Sea hydrocarbon resources. The history of Japan and China's interaction on the matter is presented in Zhang Yaoguang and Liu Kai, 'A Study of East Sea Oil and Gas Resources and the China-Japan East Sea Continental Shelf Demarcation Dispute,' *Resources Science* [in Chinese], No. 6, (Nov. 2005), pp. 11-17. [China Maritime Studies Institute translation].

⁷⁴ Shigeki Sakamoto, 'Japan-China Dispute over Maritime Boundary Delimitation,' p. 98.

⁷⁵ *Ibid.*, p. 102.

the status quo with regard to the continental shelf, China might escalate its activities in relation to the Senkaku/Diaoyu dispute.⁷⁷ Accordingly, China's coordinated action to dispute Japan's sovereignty over the Senkaku/Diaoyu Islands and its formal claim to the continental shelf have both expanded the maritime space over which China exerts influence and forced Japan into a more passive and defensive role.

Third, China sometimes uses a very ambiguous term--jurisdictional waters—to describe the area in which its maritime laws apply. For instance, in 2017, China implemented updates to its 1984 Maritime Safety Law. One such update states China's maritime security agencies are authorized to exercise hot pursuit against vessels 'operating illegally' in China's 'jurisdictional waters.' As Chris Mirasola points out

UNCLOS ... only provides for rights and obligations in specific maritime zones, not "jurisdictional waters." Indeed, the term "jurisdictional waters" is never used in the official Chinese language version of UNCLOS. So while it is true that states enjoy the right of hot pursuit to enforce their maritime laws, this right only applies to pursuit that begins in internal waters, the territorial sea, archipelagic waters, or the contiguous zone.⁷⁸

China's use of such ambiguous language leaves open the possibility that it intends to enforce its regulatory powers over foreign activities to the full extent of its continental shelf claim in the East China Sea. This is based on UNCLOS article 56, which provides coastal states both 'sovereign rights' and 'jurisdiction' over the resources of the seabed and subsoil up to 200 nautical miles from its coast. Furthermore, article 76 provides 'sovereign rights' to the resources of a coastal state's entire continental shelf and its provisions imply the right to regulate related activities there. China's 2017 revisions to its Maritime Safety Law must be seen by

⁷⁶ This is based on personal observation of the waters of the East China Sea during a research overflight of the area on March 15, 2018.

⁷⁷ Research interviews with officials from the Japanese Ministry of Foreign Affairs on March 13-14, 2018.

⁷⁸ Chris Mirasola, 'Proposed Changes to China's Maritime Safety Law and Compliance with UNCLOS,' *Lawfare*, February 21, 2017. [On line].

its China Sea neighbors as either explicit evidence that China will attempt to enforce its authority over its continental shelf claim or at least an implicit threat that it may do so.

This conclusion is reinforced in Chinese scholarly writings. For instance, the single most authoritative writing on China's strategic thinking, *The Science of Military Strategy*, discusses China's claims to authority over water space in the broadest terms.

China has over 18,000 km of coastline, over 6,500 islands, and approximately 3 million square km of jurisdictional waters. ... Due to historical and practical reasons there exist disputes between China and many of its maritime neighbors over island and reef claims and demarcation of maritime jurisdictional boundaries. Around 1.5 million square km of China's jurisdictional waters are under the actual control of other nations.⁷⁹

This suggests that at least one of the reasons the government of China uses the term 'jurisdictional waters' is to indicate those waters China claims, but over which it has yet to consolidate control. Three PLA military officers also wrote on this topic in 2015 in a similar vein.⁸⁰ They argued China's geostrategic environment had grown increasingly 'complex' since the announcement of the American Rebalance policy and that the U.S. and Japan are 'squeezing China's strategic space.'⁸¹ They argue China requires authoritative domestic laws to enable to PLA Navy, China's Coast Guard and the maritime militia to work together to defend the country's national

⁷⁹ 'Chapter 10, Service Strategies and Theater Strategy, Section 2 - Naval Strategy,' *The Science of Military Strategy*, [in Chinese], Academy of Military Science Military Strategic Research Department: Beijing (December 2013), pp. 206-218, at 210. [China Maritime Studies Institute translation].

⁸⁰ The authors are Wu Jianhong, a PLA Navy Captain and head of the PLA Navy Headquarters Operations Department, Huang Chunyu, also a PLA Navy Captain and Deputy Director of the PLA Navy Command College's Department of Strategy, and Liu Changlong, a PLA Lieutenant Colonel.

⁸¹ Wu Jianhong, Huang Chunyu, and Liu Changlong, 'Thoughts on Advancing Ocean Defense Construction Work in the New Situation,' *National Defense* [in Chinese], No. 12 (2015), pp. 70-73. [China Maritime Studies Institute translation].

interests by ‘improving [their] ability to conduct overall planning for administrative control in each sea area.’⁸² Specifically, the believe China sea services should

Have the ability to use multiple means and comprehensive measures to ... intensify our physical presence in China’s *claimed jurisdictional waters*. ... In sea areas with rampant hostile forces activities, we should have the ability to leverage joint management and joint defense activities of the military, coast guard, and militia in order to jointly attack various types of illegal activity.

...
[This includes the ability to] patrol and administer coastal areas and *jurisdictional waters* (emphasis added).⁸³

Seen in this light, China’s 2017 revision to its Maritime Safety Law and the explicit introduction of the term ‘claimed jurisdictional waters’ in connection with suppression of unspecified ‘illegal activity’ suggests China’s intention to extend state authority from its mainland to the full extent of its East China Sea continental shelf claim. Like China’s other approaches to international and domestic laws related to the East China Sea, this has the effect of expanding the maritime space over which China asserts an interest and a right to enforce its authority. This conclusion is strongly reinforced by China’s claims related to its Air Defence Identification Zone in the air space over the East China Sea.

V. Air Defence Identification Zone

On November 23, 2013, the PRC announced it would begin enforcing an Air Defence identification Zone (ADIZ) above the East China Sea. An ADIZ is

The area of airspace over land or water, extending upward from the surface, within which the ready identification, the location, and the control of aircraft are required in the interest of national security.⁸⁴

⁸² *Ibid.*, p. 71.

⁸³ *Ibid.*, p. 72.

⁸⁴ *Flight Services, Pilot/Controller Glossary*, Federal Aviation Administration, Order JO 7110.10Z, (signed, September 1, 2017, effective, October 12, 2017), p. P/CG A-4.

There is no positive international law regarding a state's establishment of an ADIZ. Rather, establishing an ADIZ is an act of sovereignty to declare a national security interest in the airspace over the state's territory, territorial sea, or in international airspace. As such, ADIZ are creatures of customary international law. They were first established in the Cold War by the United States and Canada as an early warning system of a potential attack by the Soviet Union. Since that time, many states have employed them on either a temporary or permanent basis as the circumstances of national security require.⁸⁵ Accordingly, to the extent the ADIZ is established over the state's territory or territorial sea, where the status of the airspace is fully sovereign, the state may impose any conditions it deems necessary and appropriate.

To the extent the ADIZ extends into international airspace—that is, above the contiguous zone, exclusive economic zone, extended continental shelf, or high seas—in developing rules of procedure the establishing state may not infringe on the rights and freedoms of all states.⁸⁶ Those rights and freedoms include the right to exercise freedom of overflight in international airspace above the contiguous zone, exclusive economic zone, extended continental shelf, and the high seas.⁸⁷ Additionally, state aircraft are free to fly in international airspace without

⁸⁵ Ian E. Rinehart and Bart Elias, *China's Air Defense Identification Zone (ADIZ)*, CRS Report R43894, (January 30, 2015), pp. 1-3.

⁸⁶ I.H.Ph. Diederiks-Verschoor, *An Introduction to Air Law, eighth edition*, (Alphen aan den Rijn: Kluwer Law International 2006), pp. 38-40.

⁸⁷ See UNCLOS articles 33 (for limits of state jurisdiction related to the contiguous zone), article 58 (allowing high seas freedoms of overflight above the exclusive economic zone, as long as those activities do not impinge on the interests of the coastal states in the exploitation and preservation of natural resources), and article 87 (allowing freedom of overflight); *The Commander's Handbook on the Law of Naval Operations*, section 2.6.1 and 2.6.2, p. 2-9 and 2.6.3, p. 211; and Verschoor, *An Introduction to Air Law*, pp. 38-40; and, for the balance of rights and obligations in international airspace above the exclusive economic zone, Bernard H. Oxman, 'The Territorial Temptation: A Siren Song at Sea,' *American Journal of International Law*, Vol. 100, pp. 830, 835-46 (2006) and Robert Nadelson, 'The Exclusive Economic Zone: State Claims and the Law of the Sea Convention,' *Marine Policy*, Vol. 16, p. 463 (1992).

submitting to the positive control of air traffic controllers of any state unless the aircraft intends to enter that state's national airspace.⁸⁸ All aircraft have the right to operate in international airspace without fear of the threat or use of force against them as long as the aircraft does not pose a threat of attack against the coastal state.⁸⁹

In announcing the ADIZ, the Ministry of National Defense issued the following statement.

The government of the People's Republic of China announces the establishment of the East China Sea Air Defense Identification Zone in accordance with the Law of the People's Republic of China on National Defense (March 14, 1997), the Law of the People's Republic of China on Civil Aviation (October 30, 1995) and the Basic Rules on Flight of the People's Republic of China (July 27, 2001). The zone includes the airspace within the area enclosed by China's outer limit of the territorial sea and the following six points: 33°11'N (North Latitude) and 121°47'E (East Longitude), 33°11'N and 125°00'E, 31°00'N and 128°20'E, 25°38'N and 125°00'E, 24°45'N and 123°00'E, 26°44'N and 120°58'E.⁹⁰

The chart below was included with the official announcement.

⁸⁸ Article 3(c), *Convention on International Civil Aviation*, (Dec. 7, 1944), United Nations Treaty Series, Vol. 15, p. 295.

⁸⁹ Article 3(bis), *Convention on International Civil Aviation*. See also, Pablo Mendes de Leon, 'The Role of International Law in Safeguarding Aviation Security,' *World Bulletin*, Volume 14, p. 81 (1998).

⁹⁰ 'Statement on Establishing the East China Sea Air Defense Identification Zone,' *China Daily*, November 23, 2013, available at http://usa.chinadaily.com.cn/china/2013-11/23/content_17126579.htm

东海防空识别区划设示意图



资料来源：中华人民共和国国防部

新华社发

Map accompanying PRC official ADIZ announcement.⁹¹

What is immediately apparent is that the PRC ADIZ extends across nearly the entire East China Sea. While this is not contrary to international law—the ADIZ is entirely in international airspace—the expanse the ADIZ covers leaves the sense that one purpose for the Chinese announcement was to emphasize its claim to, and right to defend, its claimed ‘jurisdictional waters.’ At least some PLA scholars see the purpose in this light. In a 2007 article advocating China’s government establish an off-shore ADIZ, two Master’s degree candidates at the PLA Air Force Command College wrote,

Generally speaking, the specifications of national airspace take one of the two following forms. In the first form, the boundaries of national airspace are completely identical to the land borders, which applies mainly to landlocked countries. In the second form, the airspace extends to cover a state’s land territory, internal waters, territorial sea, and other maritime zones under the

⁹¹ ‘Statement on Establishing the East China Sea Air Defense Identification Zone,’ *China Daily*, November 23, 2013, available at http://usa.chinadaily.com.cn/china/2013-11/23/content_17126579.htm.

state's jurisdiction, such as the contiguous zone, the exclusive economic zone, and the continental shelf.⁹²

In other words, these PLA authors suggest the coastal state possesses some form of jurisdictional rights in the international airspace above its exclusive economic zone and continental shelf as an extension of those maritime claims. Such an approach takes the nebulous term 'jurisdictional waters' and implies the addition of the similarly amorphous concept of a 'jurisdictional airspace.' It is on this basis that the authors assert,

The identification zones are governed by domestic laws exercising powers close to sovereign powers in nature, turning such zones into the de facto 'quasi territorial airspace' of the coastal state.⁹³

This view goes beyond existing international law to advocate the extension of broad coastal state jurisdiction in the airspace over its maritime claims. The strategic rationale these authors present is directly related to the use of international law to help expand China's interior security strategy to push the culminating point of any attack further from China's shores. As these authors put it,

China's traditional approach to national defense is embodied in the garrisoning of troops at border passes in order to keep the enemy outside of China's borders, while the ocean is regarded as a natural 'Great Wall.' However, since the UN Convention on the Law of the Sea went into effect, this approach is clearly no longer adequate for the demands of new military challenges. Based on the experience of the Kosovo Conflict and the Iraq War, a model of air defense focused on the defense of important points—i.e., a traditional 'end point' air defense model in which air defense assets are deployed around important cities as the focal points of air defense—is no longer adequate for resisting high tech airborne attacks. ... Thus, only with the establishment of an ADIZ, so that we may establish the forward position

⁹² Ni Guoan and Qi Wentao, 'Establish National Air Defense Identification Zones as Quickly as Possible,' *Military Science*, [in Chinese], No. 4 (2007), pp. 55-57, at 55. [China Maritime Studies Institute translation].

⁹³ *Ibid.*, p. 56.

of our defenses over waters far beyond our coastline, can we effectively increase the depth of our defenses.⁹⁴

Other PLA scholars take a more nuanced view of international law regarding coastal state rights in an offshore ADIZ. One such author is Ren Xiaofeng, whose description of the interaction of international law and domestic law establishing an ADIZ comports much closer to the understanding of the majority of states. Ren specifically notes that some countries erroneously see their ADIZ as ‘territorial airspace.’⁹⁵ Analysis by senior Chinese legal scholars seems to reflect the ambivalence between these two views. As one Chinese law review article note,

ADIZs are areas of airspace beyond the territorial airspace of the coastal state. [However], foreign aircraft transiting the airspace above the exclusive economic zones of coastal states are obliged to respect the security of the coastal state and abide by the relevant laws and regulations of the coastal state. But at the same time, the aircraft of any nation overflying [these] international waters are also entitled to the freedom of navigation as stipulated in international law.⁹⁶

Nonetheless, as will be discussed below, the actual regulations established for the East China Sea ADIZ make clear that much of the attitude of the PLA Air Force crept into the PRC’s final policy.⁹⁷

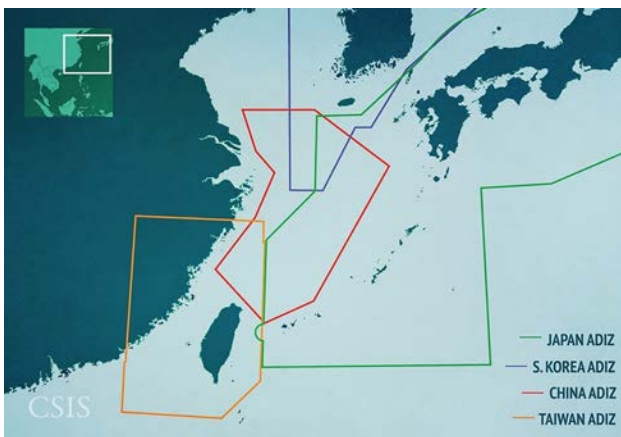
⁹⁴ *Ibid.*, p. 57.

⁹⁵ ‘PLA Maritime Security Policy official Provides “In-Depth Interpretation” of East China Sea ADIZ,’ *People’s Navy* [in Chinese], November 27, 2013, p. 4. [China Maritime Studies Institute translation].

⁹⁶ Xue Guifang and Xiong Xuyuan, ‘A Legal Analysis of the Establishment of Air Defense identification Zones,’ *Journal of Ocean University of China (Social Sciences Edition)* [in Chinese], No. 6 (2007), pp. 36-39, at 38. [China Maritime Studies Institute Translation].

⁹⁷ After the critical international reaction to China’s ADIZ announcement, even the PLA Air Force leadership seemed chastened. Two months later, one PLA Air Force Major General, a professor at the PLA Air Force Command College and China’s National Defense University, wrote, ‘Lots of people ... erroneously believe that an ADIZ is sovereign airspace.’ Qiao Liang, ‘Only by Becoming Powerful Can China Be Firm,’ *Military Digest*, [in Chinese], January 2014. [China Maritime Studies Institute translation]. The same month, PLA Air Force News (Kongjun Bao), published an article similarly walking back some of the more ambitious interpretations of the

Furthermore, whereas other regional ADIZ extend to approximately the median line between the declaring state and its neighbors (see chart below), the eastern border of China's ADIZ extends right up to the Okinawa Trough along the western edge of Japan's Ryukyu Islands. Specifically, the eastern edge of China's ADIZ appears to follow rather closely the easternmost boundary of China's continental shelf claim, reinforcing the concept of Chinese jurisdiction over the waters and the airspace above it over substantially all of the East China Sea.



Map of South Korean, Japanese, PRC and ROC ADIZ.⁹⁸

A second interesting point is that China's ADIZ exists only outside the boundaries of its territorial sea. This may explain why China published its baselines in for the Senkaku/Diaoyu Islands in advance of the ADIZ announcement. A more generous interpretation would be that China excluded the Senkaku/Diaoyu Islands to avoid further aggravating its relations with Japan. A less generous interpretation would be that the two announcements were intended to do nothing more than demonstrate

PRC rights in its ADIZ. Zhang Wenchang and Yuan Huafeng, 'Air Defense Identification Zone: A Strategic Early Warning Domain for Air Defense Security,' *PLA Air Force News*, [in Chinese] January 2, 2014, p. 4. [China Maritime Studies Institute translation].

⁹⁸ Michael Green, Kathleen Hicks, Zack Cooper, John Schaus and Jake Douglas, 'Counter-Coercion Series: East China Sea Air Defense Identification Zone,' *Asia Maritime Transparency Initiative*, June 3, 2017.

China's incrementally increasing administration over the islands at the expense of Japan's administration. Whatever may be the case, the net result of the China's baseline announcement, its continental shelf claim, and its ADIZ announcement is the public imposition of Chinese authority over the wide expanse of the East China Sea.

China's intention to increase its actual control over the East China Sea is especially evident in the *Aircraft Identification Rules for the East China Sea Air Defense Identification Zone*, which were published in the wake of the ADIZ announcement.⁹⁹ The Rules state,

First, aircraft flying in the East China Sea Air Defense Identification Zone must abide by these rules.

Second, aircraft flying in the East China Sea Air Defense Identification Zone must provide the following means of identification:

1. Flight plan identification. Aircraft flying in the East China Sea Air Defense Identification Zone should report the flight plans to the Ministry of Foreign Affairs of the People's Republic of China or the Civil Aviation Administration of China.

2. Radio identification. Aircraft flying in the East China Sea Air Defense Identification Zone must maintain the two way radio communications, and respond in a timely and accurate manner to the identification inquiries from the administrative organ of the East China Sea Air Defense Identification Zone or the unit authorized by the organ.

...

Third, aircraft flying in the East China Sea Air Defense Identification Zone should follow the instructions of the administrative organ of the East China Sea Air Defense Identification Zone or the unit authorized by the organ. China's armed forces will adopt defensive emergency measures to respond to aircraft that do not cooperate in the identification or refuse to follow the instructions.¹⁰⁰

⁹⁹ 'Announcement of the Aircraft Identification Rules for the East China Sea Air Defense Identification Zone of the Peoples Republic of China,' *China Daily*, November 23, 2013, available at http://www.chinadaily.com.cn/china/2013-11/23/content_17126618.htm.

¹⁰⁰ *Ibid.*

There are several ways in which these rules purport to extend Chinese jurisdiction over aircraft within the international airspace over the East China Sea that are contrary to the rights and freedoms granted those aircraft under international law. The most obvious is in the first paragraph. The Chinese rules for flight within its East China Sea ADIZ applies to 'all aircraft.' No distinction is made between civil aircraft and state aircraft. State aircraft, including military aircraft, are sovereign immune and, as noted above, are never subject to the rules or laws of another state while in international airspace.

A second, related, concern arises from the requirements that any aircraft present in the ADIZ *must* file a flight plan with the Chinese government and remain in radio contact with Chinese controllers. Although the 1949 Convention on International Civil Aviation (Chicago Convention) requires commercial aircraft on scheduled, point-to-point international flights to file flight plans and remain in radio contact, not all civil aircraft are commercial. Civil aircraft have the right to use international airspace freely and are not required to file flight plans or to check in with controllers unless they intend to enter the sovereign airspace of another state. Accordingly, to the extent the Chinese regulations purport to require all aircraft to file a flight plan with the Chinese government and remain in radio contact with Chinese controllers whenever they are merely present in the Chinese ADIZ, the regulations represent an over-extension of Chinese jurisdiction and an infringement of international rights and freedoms.

Finally, the requirement in the third paragraph that all aircraft should follow the instructions of Chinese air traffic controllers if they may be subject to unspecified 'emergency measures' is concerning. This paragraph also seems to assume that all aircraft present in the ADIZ have an obligation to fly under the positive control of the agencies of the Chinese state. As noted above, that is incorrect. Additionally, if the 'defensive measures' that might be employed against aircraft that exercise their rights and freedoms to fly through the airspace independent of Chinese control include the use of force, as seems to be implied, then the Chinese government's

actions seriously infringe on those freedoms. Taken as a whole, these provisions suggest an attempt by the PRC to expand its jurisdictional control over the airspace of the East China Sea.

VI. Conclusions

Since 1970, the People's Republic of China has been laying a steady foundation of domestic and international law to allow it to increase its effective control over the majority of East China Sea. Thus, as China did in the South China Sea, in the East China Sea it has built a great wall of law. China's interpretation of the historical events and related international law regarding the status of the Senkaku/Diaoyu Islands has resulted in what was once a very weak claim and strengthened it. China now patrols the territorial sea around those islands with a regularity that is nearly the same as the Japanese. And China has used this claim to restrain any Japanese development of the islands themselves. Similarly, China's straight baseline claim around the Senkaku/Diaoyu Islands provides a reason and rationale for Chinese maritime power to flow into the waters adjacent to the islands. But it is the continental shelf and ADIZ claims that seem to be an attempt to extend Chinese jurisdiction from seabed to satellite across nearly the entire expanse of the East China Sea. That Chinese warplanes now routinely fly through this airspace is evidence that China intends to flow its power into this domain as well.¹⁰¹

As Chinese power grows so will its regional influence and perhaps its ability to gain acceptance for its approach to international law of the sea and to its maritime claims. But China's interests will also stand opposed to those of its maritime neighbors, whose interests lie in more traditional readings of the United Nations Convention on the Law of the Sea. China's divided continental and maritime security

¹⁰¹ 'Chinese Air Force Carries Out Long-Range Drills in Pacific,' *Reuters*, September 12, 2016; 'China's Air Force Conducted Four Drills over the Western Pacific in 2015,' *People's Daily*, January 4, 2016. Both articles detail how PLA aircraft repeatedly flew across the East China Sea and through the Miyako Strait between the Northern and Southern Ryukyu Islands.

concerns require it to enhance its relative efficiency to secure the Chinese state from both continental threats and from maritime powers. The requirement to economize defense resources explains why China seeks to both broaden its maritime claims in the East China Sea and to deepen its jurisdictional controls there just as it does in the South China Sea. China's approach to international law as applied across its maritime periphery demonstrates a consistent attempt to assert increasing levels of control at the expense of its neighbors and in particular at the expense of strong naval powers. Thus, China's actions in claiming rights in the East China Sea present another case of an expanding interior security strategy. The particular demands of China's geography and the politics of its security environment drive China to consolidate a maritime security perimeter on its eastern flank every bit as strong as the one it is establishing through a combination of law and power on its southern flank.