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## CHINA'S MARITIME DISPUTES IN THE EAST AND SOUTH CHINA SEAS

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*Testimony by Peter A. Dutton before a Hearing of the House Foreign Affairs Committee, 14 January 2014.*

China pursues its security through interior strategies that involve the development of rings of security around central areas of national interest. The Chinese have long felt vulnerable from the sea, and their current maritime strategy seeks to reduce that vulnerability by extending a ring of maritime control around China's periphery. China pursues this control through a combination of force-structure development and legal assertions. Tensions arise because China's strategy conflicts with the territorial claims, resource interests, and security concerns of other states in East Asia. China's strategy also causes friction with the United States, which relies on freedom of navigation in maritime East Asia for American security interests and which must reassure regional allies and partners that American security guarantees are meaningful. In order to ensure the position of the United States in East Asia, American policies must focus on maintaining the region as an open, maritime system. This requires continuous development of technological advantages to ensure that the center of power in Asia does not migrate from the maritime domain to the continent. It also requires the United States to support the ability of allies, friends, and partners to resist China's non-militarized coercion, as well as to reinforce the normative structure that supports the efficacy of maritime power in the region and around the globe.

### *What Does China's Extension of Its Power over the Near Seas Gain for China?*

The extension of China's strategic power over its "near seas" through expanding military capabilities, growing law-enforcement capacity, and sweeping legal frameworks, all augmented by orchestrated civilian activities and political and economic arm-twisting, has deep strategic roots. These roots are nourished by China's historical approach to dealing with its security environment by developing continental strategies, also known as "interior strategies"—an approach China continues to take today. Interior strategies generally involve the

development of expanding rings of security around a state's territory, especially territory of fundamental strategic value. Over China's long history, the territory of critical strategic value has consistently been the Han heartland, which extends from Beijing in the north to the coastline of Guangzhou Province in the south, and from the mouths of the Yellow, Yangtze, and Pearl Rivers in the east inward to the great mountain ranges west of Sichuan Province. Around this central area Chinese dynasties for centuries employed, to enhance their own security, various techniques to exert control or influence, such as enculturation, development of an economic and political tribute system, and even conquering peripheral territories and incorporating them under Chinese sovereignty. In this way, at the historical height of Chinese power the Qing dynasty guaranteed the nation's security by incorporating under Chinese sovereignty a great arc of territory beyond the traditionally Han regions. That arc extended from Manchuria in the east (including large areas of today's Russian Far East), west through Mongolia to modern Xinjiang Province, and south to Tibet. Much of that territory remains under Chinese control today and for similar purposes—it provides a strategic buffer for the modern Chinese state, just as it did for previous dynasties.

Qing leaders failed, however, to complete a similar arc of security on their southern and eastern maritime flanks, leaving China strategically vulnerable to European advances in sea power. Thus, during the period from the British Opium War, beginning in 1840, to the Japanese invasions of the Chinese mainland that ended in 1945, China's security and sovereignty were severely compromised by its failure to develop maritime power sufficient to overcome Western naval technologies.

Chinese strategists today fully grasp that nineteenth-century European naval power fundamentally altered the nature of Asia as a strategic system. Up until that time, China dominated a relatively closed region. Security for China meant the maintenance of strong armies with the capacity to overpower threats that might invade from the north or west. No combination of states in the region could generate sufficient land power to challenge China, and none of the region's island states had naval power sufficient to pose a threat to China's fundamental security from the sea. Nearly all strategic events in East Asia prior to 1840 occurred on the continent and involved amassing strong armies, maneuvering them across land to meet potential enemies, and building layered defenses to secure the Chinese homeland. Beginning in 1840, however, the Royal Navy demonstrated to the Chinese that British naval power was superior not only to China's existing coastal defense system but to any coastal defense system that China at the time had the technological capacity to produce. Thereafter, Chinese security became much more complex.

Since the Opium War, China has been required to deal with a combination of continental and maritime strategic concerns, and it has never yet, in its own eyes, been able to deal adequately with the maritime aspect of its security equation. For nearly two centuries the dominant thrust of Asian history has involved the projection of power across the East and South China Seas, and East Asia remains a maritime strategic system today. It is a system in which strategic events are driven by technology rather than by armies, in that projection of power (or the preparation for it) is driven by advancements in the ability to maneuver sea, air, space, and cyber technologies to a regional decisive point as required. The dominant maneuver space is therefore no longer the great interior plain of Asia but rather the common sea, air, and space area of China's near seas. Thus, the introduction by the British of advanced military technology to maritime Asia marked a tectonic shift in Asia's strategic focus from continental to maritime events. Nineteenth-century China was caught unprepared for the shift in that era; today's Chinese leaders have developed national power in part to ensure their country is never again caught unprepared on its maritime flank. First and foremost, it is the failure of previous Chinese leaders to close the maritime gap in China's arc of security and the invasions that resulted that motivate China's current leaders to extend strategic power over the near seas.

What extending control over the near seas gains for China, therefore, is first the enhancement of security for the Chinese state in conjunction with the healing of a sort of psychological wound in the collective Chinese mind. Importantly, demonstrating the power to close the gap also accrues credibility for the current Chinese leadership and helps solidify the place of the Communist Party as the ruling entity of the Chinese state.

Second, as China has advanced its capacity to assert its will in the near seas, it has increasingly caused friction with its maritime neighbors and the United States. East Asian geography, with its long chain of fringing islands stretching from the Kuriles to Singapore, lends itself to the development of a maritime system if certain conditions are met. The first condition is that regional maritime technological power, generally naval power, must be sufficient to overcome the continental power's ability to sweep it from the near seas. Dominant maritime power in the region was first introduced by the British, then developed by Japan, and since the end of the Second World War it has been maintained by the United States and its allies. The second condition is that in order to remain dominant over the continental power, the maritime power must have ready access to bases and the resources necessary for sustainment. American bases in Guam and Hawaii are not enough to ensure for the United States the strategic influence of sea power over the East Asian seas. Accordingly, such access requires, and is provided by, America's allies, partners, and friends in the region.

But why do the United States and its regional partners expend the effort and pay the costs associated with maintaining East Asia as a maritime system? East Asia's maritime states—Japan, the Philippines, Malaysia, Brunei, Indonesia, and Singapore—all cooperate with the United States because they benefit politically and economically from remaining outside the arc of China's control. Should the system revert to one dominated by the continent, even if China chose not to dominate actively the peripheral states, China's capacity to do so would narrow the political and economic options available to them. Likewise, the United States benefits from the maintenance of an open, maritime regional system in East Asia because it supports American global and national security strategies, ensures American economic access to the region, and sustains American political influence there.

A fundamental cause of friction, therefore, lies in the fact that China's regional maritime strategy appears to have as its aim a reversal of the tectonic shift brought about two centuries ago by the introduction of superior foreign naval technology and a restoration of the regional system to its continental past. In other words, the aim of China's regional maritime strategy is to expand China's interior to cover the maritime domain under an umbrella of continental control. This expansion is security oriented in nature, but it also incorporates all aspects of Chinese power to advance China's aims of asserting sovereignty over near-seas islands, extending jurisdiction over the near-seas water space, and cementing political and economic relations in Asia around Chinese influence. Thus, in addition to enhancing China's security and the legitimacy of its rulers, if Beijing is successful in reverting East Asia from a maritime system to a continental system it will reap economic and political benefits from its capacity to control events throughout the region without the costs associated with competition from either a regional or an outside power.

*What Is the Connection between Chinese Activities around the Senkaku Islands and China's Larger Strategic Objectives?*

Chinese activities around the Senkaku/Diaoyu Islands have since December 2008 been designed to create circumstances that put Japanese control over the islands in doubt. Chinese activities are carefully calibrated to achieve the objective without provoking outright conflict with the United States. Accordingly, China's strategy can best be described as "nonmilitarized coercion."\* China has so far rejected most institutional approaches to dispute resolution, such as multilateral negotiation or arbitration, maintaining instead a stated preference for resolving its

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\* Peter Dutton, "Viribus Mari Victoria? Power and Law in the South China Sea" (Center for Strategic and International Studies conference, "Managing Tensions in the South China Sea," 5–6 June 2013), available at [csis.org/](http://csis.org/).

maritime disputes through bilateral negotiation. Indeed, as one leading academic puts it, the “recent growth in military, economic and other forms of China’s hard power will be put to best use in bilateral negotiations.”\* In other words, China’s leverage against other disputing states, engaged individually, is sufficiently high to ensure outcomes favorable to China. Understandably, therefore, bilateral negotiations have gone nowhere over the past two decades. China simply demands more than its negotiating counterparts are willing to give up.

On the power side of the equation, China has been deterred since the late 1980s from using armed conflict to resolve its maritime disputes. But since 2008 China’s strategic emphasis has settled into the gap between armed and institutional approaches. In this gap lies the power-based approach of nonmilitarized coercion, which involves the direct and indirect application of a broad range of national capabilities to alter the situation at sea in China’s favor. The operational aspects of the strategy have been all too apparent over the past four years: increasing development of civilian law-enforcement capacity, reorganization and streamlining of civilian agencies, increased tempo of operations by maritime law-enforcement vessels in disputed areas—all in coordination with civilian fishing vessels, in what might be termed a maritime-style “People’s War.” Maritime law-enforcement and other civilian vessels form the core of this strategy—hence *nonmilitarized* coercion—but in this strategy there is also an important indirect role for the Chinese military. It is never far from any action, its nearby presence serving to deter China’s opponent from considering escalation. The growing capabilities and regional presence of the People’s Liberation Army (PLA) Navy also serve the strategy by applying psychological and political pressure on regional leaders, limiting their freedom of action.

A well-developed legal component augments the operational aspects of China’s strategy of nonmilitarized coercion. One representative article that captures this concept well was published in the journal *China Newsweek* in November 2012, at the height of the unfolding tensions between China and Japan over the Senkaku/Diaoyu Islands. The article observes that China employs a “legal rights protection chain” to reinforce its operational efforts as part of the overall strategy to achieve control over the islands and waters of the near seas. In this case, specifically the Senkaku/Diaoyu Islands,

China’s legal behavior throughout can be divided into several levels: first was enacting law, as seen with the promulgation of the Statement on Territorial Sea Baselines; second was formulating implementation measures [to put the law into effect] . . . ; third was law enforcement, as seen with China Maritime Surveillance vessels patrolling the

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\* Han Yong, “A Maritime Legal Contest,” *China Newsweek*, 26 November 2012, pp. 29–33 [China Maritime Studies Institute translation].

waters of the Diaoyu Islands; and fourth was pursuing international validity, as seen with filing the coordinates and maps with the UN and deciding to submit a case for an extended continental shelf.\*

The first two steps in particular of this legal process are aimed at energizing the capacities of all relevant agencies of the Chinese government. As the article notes in reference to the application of this legal strategy to the South China Sea, “the significance of creating administrative zones is that it provides performance incentives for government departments.” Additionally, China’s calculations regarding how and when to move from one stage in this process to the next are carefully influenced by its assessment of power dynamics.

The article notes, “To get the upper hand, China must involve both military and administrative presence as well as nongovernmental presence. . . . Integrated military, administrative and nongovernmental presence constitutes a mutually reinforcing chain of presence.” The integrated process described above accurately depicts the approach China takes in the East China Sea to contest Japan’s control over the Senkaku/Diaoyu Islands. It also accurately describes events at Scarborough Shoal in the South China Sea, over which China wrestled full control from the Philippines. There are many other examples in various stages of development, including China’s continental-shelf claim in the East China Sea and many actions that advance China’s claim to administer the waters within a U-shaped line in the South China Sea. In short there is a steady drumbeat of combined Chinese legal and power operations throughout the near seas.

*What Is the Connection among China’s Near-Seas Strategy and Its Recent Announcement of an ADIZ over the East China Sea and the Cowpens Incident in the South China Sea?*

China’s strategy to control water and airspace is similar to its “power and law” approach to control islands in the East and South China Seas. What has been clear to many American observers since at least the 1 April 2001 EP-3 incident is that China’s strategic approach to enhancing its jurisdictional control over the near seas involves both a force-structure component and a legal component. The purpose of the force-structure component is obviously to develop the power to dominate events in the near seas according to China’s will. It extends China’s umbrella of security over its maritime periphery and is entirely consistent with the interior security strategy. The purpose of the legal component of China’s strategy is to articulate a legitimizing narrative for the development and employment of this power. There are two general audiences for this message: it is designed to persuade the Chinese people that their government’s actions are justified, and it seeks to build a favorable international environment, where possible.

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\* Ibid. The next two quotations are also from this source.

That the Chinese use the language of international law is not to say they seek at all times to *comply with* international law. Rather, they use legal language for its power to cloak in a mantle of legitimacy China's power-based actions in pursuit of its national interests.\* China's announcement of an "air-defense identification zone" (ADIZ) over the East China Sea in November 2013 was entirely consistent with this strategy to use legal language to increase Chinese jurisdictional control incrementally over the near seas. Because the announced ADIZ does not fully comport with existing international law, the announcement raised tensions with Japan, the United States, and others.

As a general matter, it is entirely normative for a coastal state to establish an ADIZ in the international airspace off its coastlines to enhance and protect its national security. Such zones are legitimate as a matter of international customary and treaty law related to airspace and national security.† But China's announcement is an excellent example of how it uses the language of international law while disregarding the actual constraints of the law. There are at least three legal problems with China's ADIZ.

The first problem is that it covers the Senkaku/Diaoyu Islands, which are administered by Japan. Even though China disputes Japanese sovereignty over these rocky outposts, Japan, as the islands' administrator, has a duty to exercise its sovereign authority over the islands, including in the national airspace above them and the territorial sea around them. Since the ADIZ asserts Chinese rights to operate within the entire zone, to control the activities of others within it, and to take unspecified "emergency measures," and because it covers the airspace over and around the Senkaku/Diaoyu Islands, the Chinese ADIZ poses a direct affront to Japanese sovereign responsibilities. If the Chinese choose to operate in the national airspace above the Senkaku/Diaoyu Islands, as their announcement implies the right to do, that act will be not only seriously provocative but an illegal violation of Japan's current administrative authority there.

The second problem is that the terms of the ADIZ announcement purport to regulate the activities of *all* aircraft in the zone. As a practical matter, an ADIZ is a sorting-out mechanism by which the coastal state determines which aircraft in the international airspace off its shores might potentially threaten its national security. As a legal matter, an ADIZ declaration confers almost no additional jurisdictional authority on the coastal state. It cannot do so—the airspace beyond twelve nautical miles from the coastline is international in character by the

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\* Jonathan Odom, "A China in the Bull Shop? Comparing the Rhetoric of a Rising China with the Reality of the International Law of the Sea," *Ocean and Coastal Law Journal* 17, no. 2 (2012), p. 201.

† Peter Dutton, "*Caelum Liberam*: Air Defense Identification Zones in Non-sovereign Airspace," *American Journal of International Law* 103, no. 4 (2009), p. 691.

terms of the Chicago Convention, and accordingly all states possess the right to operate civil or military aircraft there without the coastal state's permission. The only legitimate exercise of coastal-state jurisdiction in an offshore ADIZ is over aircraft intending to leave international airspace and enter the coastal state's fully sovereign national airspace. As it might require a visa stamp in a passport before entry, the coastal state can specify ADIZ procedures by which aircraft obtain permission before entering national airspace. Accordingly, the fact that the terms of China's ADIZ purport to bring the activities of *all* aircraft operating in or through the ADIZ under Chinese control, not just those desiring to enter China's national airspace, is an unlawful extension of Chinese jurisdiction into airspace that is international in character.

A third legal problem stems from this overbroad claim to regulate the activities of *all* aircraft in the ADIZ. Military aircraft are sovereign immune from the jurisdiction of other states when they are operating in international airspace. Chinese officials and scholars alike have long claimed—incorrectly, in my view—that the United Nations Convention on the Law of the Sea (UNCLOS) gives additional legal protection to a coastal state's security interests in *and above* the exclusive economic zone.\* There is also good reason to believe the Chinese apply legal protection for their security interests beyond the EEZ to a broader category of what they call "Chinese jurisdictional waters" and the airspace above them. Such waters appear to include China's claimed continental shelf and additional waters over which China claims historical rights. In this sense it is important to note that the eastern edge of China's ADIZ closely follows the eastern edge of China's expansive East China Sea continental-shelf claim. Taken together, China's overbroad claim to regulate the activities of all aircraft in its ADIZ, its assertion that UNCLOS protects its security interests in and above its jurisdictional waters, and its decision to align the limits of its ADIZ with the limits of its continental shelf claim suggest that China's ADIZ is part of a coordinated legal campaign. This campaign would extend maximal security jurisdiction over the East China Sea and the international airspace above it, beyond those authorities currently allowed by international law, in support of China's objectives related to security, resource control, and regional order.

It is in this context that the *Cowpens* incident should also be interpreted. On 5 December 2013, the guided-missile cruiser USS *Cowpens* was operating in the South China Sea outside sovereign waters, where high-seas freedoms apply. It was forced to maneuver to avoid a collision when a PLA Navy amphibious ship crossed its path and came to a stop. The PLA Navy's action was apparently prompted by the belief that USS *Cowpens* was monitoring the activities of China's

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\* Ibid.

new aircraft carrier, *Liaoning*, and that China has a right to prevent American ships from doing so.\*

The actions of the Chinese naval vessel were dangerous, and its failure to exercise due regard was serious. In my view, however, the most significant problem brought to light by this incident is that China asserts the right to ban any ship from entering large areas of nonsovereign waters in the near seas for long periods of time if the Chinese plan to undertake naval exercises there. This is an impermissible infringement on the rights and freedoms of all states to operate freely at sea. Specifically, in the weeks before the *Cowpens* incident, the China Maritime Safety Administration reportedly declared a “ban on entry” into certain waters in the South China Sea between the dates of 3 December 2013 and 3 January 2014—although by some accounts the purported ban was not made public by the PLA prior to the confrontation on 5 December.<sup>†</sup> Either way, the area of the purported ban was entirely outside the sovereign waters of China, in a zone where international freedoms of navigation pertain. *Cowpens* was exercising those international freedoms, and—zone or no zone, ban or no ban—the PLA Navy had no legal right to impede its progress.

China's many operational actions in the near seas and its use of the language of international law to seek legitimacy for these actions represent the steady unfolding of China's strategy to develop an arc of maritime control across those seas. Accelerated Chinese activities around the Senkaku/Diaoyu Islands, the ADIZ announcement, and the *Cowpens* incident are just the most recent “battles” in China's security campaign in the region. Unless current trends change, there is no reason to believe that China's campaign will stop short of achieving its aims.

#### *What Are the Policy Implications of the Strategic Dynamics in East Asia?*

Some American commentators have suggested China's strategy is in response to the U.S. pivot to Asia, but that view seems too self-referential. Chinese actions are about Chinese objectives, and those objectives have been consistent for decades, because they are based on China's enduring geography-driven security interests. That suggested view also ignores solid evidence that China's current strategy began to unfold as early as December 2008, before the current administration came into office and, of course, years before it announced a pivot or rebalance to Asia. I think it is fairer to say that China is undertaking its strategy *despite* the American rebalance to Asia.

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\* Anna Mulrine, “Why China Forced a Confrontation at Sea with the US Navy,” *Christian Science Monitor*, 14 December 2013; “China Paper Says US Ship Harassed China Fleet,” Associated Press, 15 December 2013.

<sup>†</sup> Sui-Lee Wee reports, “Even before the navy training, Chinese maritime authorities . . . posted a navigation notice on their website”; “China Confirms Near Miss with U.S. Ship in South China Sea,” Reuters, 19 December 2013. Others familiar with the incident suggest otherwise.

It is important to note as well that in order to mitigate American strategic dilemmas, Chinese leaders express a desire to develop a “new-type great-power relationship” with the United States. Indeed, the United States should seek to develop such a relationship with China, but it should not do so at the expense of maintaining an open, maritime system in East Asia. Unless some fundamentally new form of security architecture can be devised that makes regional geography and the tensions between interior and exterior power irrelevant—and frankly, I do not see how such an architecture could be developed, given the current state of political development in East Asia—American security interests and those of America’s regional allies, partners, and friends will continue to require that the United States bear the burden of ensuring the maritime character of the regional system. The strategic advantages of doing so are worth the expense, in that they provide

1. Security for American soil that comes from the maintenance of the American global exterior position
2. Political and economic independence of regional states in East Asia and the global credibility that accrues to the United States from its ability to support them
3. Political access for American influence in the region
4. Assured economic access and the benefits it provides to the American economy.

Accordingly, American regional objectives should continue to focus on maintaining regional stability and deterring conflict as a means of resolving disputes. To do so, first and foremost the United States must develop and deploy the naval, air, space, and cyber technologies required to ensure that East Asia remains a maritime system. It is the only way that the United States can continue to ensure that conflict as a means of regional dispute resolution remains off the table. In terms of naval power, I am especially concerned that the United States commit to investing in maintaining its advantage in undersea warfare. The undersea domain is perhaps the linchpin for preventing East Asia from reverting to a continental system in the twenty-first century. Other key areas of investment will be in maintaining American advantages in maritime domain awareness and in C4ISR.\* The United States also needs to reduce vulnerabilities to its surface fleet, to its regional bases, and to its logistics train across the Pacific.

Second, American policies should focus on allowing regional states to expend scarce resources on countercoercion capabilities. By focusing on military

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\* C4ISR is an acronym for command, control, communications, computers, intelligence, surveillance, and reconnaissance.

deterrence, the United States allows regional states to allocate more of their defense resources on developing coast-guard and other nonmilitary capabilities necessary to withstand Chinese coercive pressure at sea. Additionally, American policies should encourage other states to play supporting roles by providing financial support for building “white hull” capacity to resist Chinese pressure. Such partners might include Australia, India, NATO, and the European Union, among others. These are logical partners, inasmuch as they rely heavily on the stability of maritime trade routes through the East and South China Seas.

Third, American policy makers must realize that the contest for East Asia is one of both power and law. International law supports and legitimizes the exercise of American power. It ensures that the landscape of domestic and international opinion is favorable to American objectives, policies, and actions. International law of the sea in particular, through its assurances of freedom of navigation for security as well as commercial purposes, supports the continued nature of East Asia as a maritime system. International law regarding the free use of international airspace operates similarly. Accordingly, to ensure its future position in East Asia the United States should take specific actions to defend the international legal architecture pertaining to the maritime and aerial commons. Acceding to the United Nations Convention on the Law of the Sea and once again exercising direct leadership over the development of its rules and norms is the first and most critical step. The Department of State should also reenergize its Limits in the Seas series to reinforce, publicly and repeatedly, international law related to sea and airspace. A good place to begin the new series would be with a detailed assessment of why international law explicitly rejects China's “U-shaped line” in the South China Sea as the basis for Chinese jurisdiction there. Others could be written to describe why China's East China Sea continental-shelf claim misapplies international law and why China's ADIZ unlawfully asserts jurisdiction in the airspace. My sense is that East Asian states, indeed many states around the world, are desperate for active American leadership with regard to the norms and laws that govern legitimate international action.

Finally, the United States should accept China's outstretched hand concerning a “new-type great-power relationship” and actively engage at all levels in discussions about what it might look like. If there is some way to find a new security paradigm, the United States and China owe it to each other and to the world to find it. My strong sense is that this new, third path is already apparent. That path lies in the further advancement of the economic and security institutions, international law, and norms of acceptable behavior that arose out of the ashes of old-type great-power relationships of the nineteenth and twentieth centuries. Revitalizing and further developing these institutions with full Chinese partnership

is the pathway to strong, stable, and vibrant regional and global systems in the coming decades.

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