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## China's Excessive Maritime Claims

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## China's Excessive Maritime Claims

*Office of the Staff Judge Advocate, U.S. Indo-Pacific Command\**

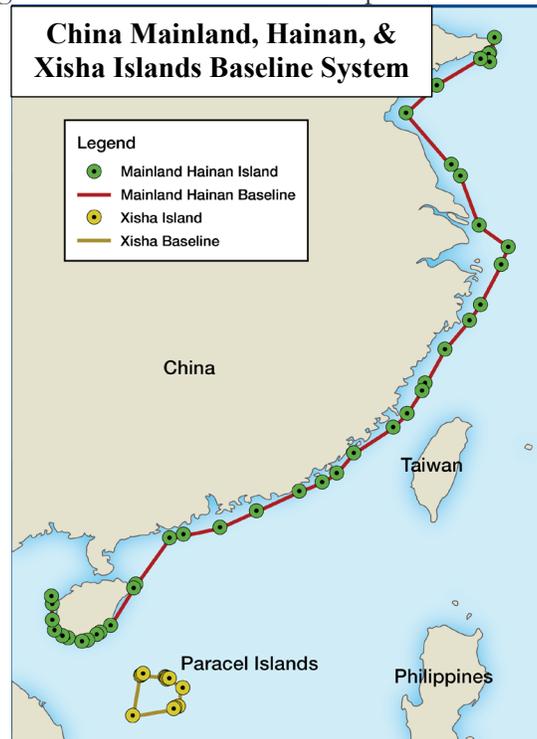
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China ratified the United Nations Convention on the Law of the Sea (UNCLOS) on June 7, 1996.<sup>1</sup> Although a party to UNCLOS, China frequently violates the Convention. China's domestic legislation implementing UNCLOS is often inconsistent with the Convention and customary international law. The United States has challenged these unlawful claims diplomatically and operationally under its Freedom of Navigation Program.

**Illegal Straight Baselines.** In 1996, China declared two sets of straight baselines, one along its mainland coast and the other around the disputed Paracel Islands (See the figure below).<sup>2</sup> In 2012, China established straight baselines around several of the disputed Senkaku Islands.<sup>3</sup> The normal baseline for measuring the breadth of the various maritime zones is the low-water line.<sup>4</sup> Straight baselines may only be used in limited circumstances.<sup>5</sup> Most of China's mainland coast does not meet these special geographic requirements. With regard to the Paracels and Senkaku Islands, China effectively drew archipelagic straight baselines around these disputed features.



As stated in the U.S. Oceans Policy (1983), the United States will exercise and assert its rights, freedoms, and uses of the sea on a worldwide basis in a manner consistent with the balance of interests reflected in the Law of the Sea Convention. Some coastal States assert excessive maritime claims – that is, claims to maritime zones or jurisdiction that are inconsistent with the international law of the sea and, if left unchallenged, could impinge on the rights, freedoms, and uses of the sea and airspace guaranteed to all States under international law. China is one of those States. The United States, however, will not acquiesce in unilateral acts of other States designed to restrict the rights and freedom of the international community. Therefore, U.S. Indo-Pacific Command will continue to challenge China’s excessive claims until such time that China revises its claims to comport with international law.

China, as a continental State, may not legally establish archipelagic straight baselines around any of its claimed island groups.<sup>6</sup> These unlawful straight baselines allow China to claim thousands of square miles of territorial seas that should remain international waters, and a significant amount of internal waters that should remain territorial seas. These expanded claims encroach on neighboring States’ exclusive economic zone (EEZ) and continental shelf claims in the Yellow Sea, East China Sea, and South China Seas, and impede freedom of navigation rights.

**Excessive Internal Waters Claims.** China claims the Gulf of Bohai and the Hainan Strait as internal waters based on historic rights.<sup>7</sup> In order to substantiate an historic bay or historic waters claim, international law requires that a State must demonstrate its open, notorious, effective, and continuous exercise of authority over the bay/waters, coupled with an actual showing of acquiescence (or absence of opposition)

by foreign States in the exercise of that authority.<sup>8</sup> The Gulf of Bohai has not been listed in standard compilations of historic bays, and both the United States and the United Kingdom protested the claim in 1958. Therefore, the claim does not appear to enjoy sufficient acquiescence by foreign governments as required by international law. The Strait of Hainan is listed as a major strait in standard collections and qualifies under UNCLOS as a strait used for international navigation where the right of transit passage applies.<sup>9</sup> China’s claim that the strait is within its internal waters has also been

protested by several States. Therefore, China may not close the Hainan Strait to international navigation claiming that it is internal waters.

**Illegal Prior Permission Requirement for Innocent Passage.** China's territorial sea law requires foreign warships and other government non-commercial vessels to obtain prior permission before engaging in innocent passage through the territorial sea.<sup>10</sup> This requirement does not comport with the innocent passage provisions of UNCLOS, which apply to "ships of all States."<sup>11</sup> On its face, Article 17 applies to all ships, including military and other government vessels. This position is supported by Article 19, which contains a list of military activities that are prohibited when ships are engaged in innocent passage, such as weapons exercises, intelligence collection and launch or recovery aircraft or other military devices. The presumption is that warships not engaged in a prohibited activity automatically enjoy the regime of innocent passage, as Article 19 would be unnecessary if warships did not have a right of innocent passage. Lack of prior notification or consent is not one of the prohibited activities listed in Article 19. During the UNCLOS negotiations, an effort to include a prior notification/consent requirement in Article 21 was not supported by a majority of the delegations.<sup>12</sup> At the conclusion of the negotiations, the President of the Third United Nations Conference on the Law of the Sea, Ambassador Tommy Koh of Singapore, confirmed, "the Convention is quite clear on this point. Warships do, like other ships, have a right of innocent passage through the territorial sea, and there is no need for warships to acquire the prior consent or even notification of the coastal State."<sup>13</sup>

**Unlawful Security Jurisdiction in the Contiguous Zone.** China claims a 12 nm contiguous zone adjacent to its territorial sea.<sup>14</sup> Within the zone, China claims authority to prevent and punish infringement of its "security, customs, fiscal, sanitary laws and regulations or entry-exit control within its land territories, internal waters or territorial sea."<sup>15</sup> UNCLOS is very clear on this issue—coastal State jurisdiction in the contiguous zone is limited to the control necessary to prevent or punish infringement of its customs, fiscal, immigration, or sanitary laws and regulations in its territory or territorial sea.<sup>16</sup> China's purported claim to exercise "security" jurisdiction in its contiguous zone violates international law.

**Illegal Restrictions on Military Activities in the EEZ.** China claimed a 200 nm EEZ in 1998.<sup>17</sup> China purports to regulate foreign military activities in the EEZ based on a series of arguments that have evolved over the past two decades, from national security and “peaceful purposes,” to regulation of marine scientific research (MSR), to arguments based on resource management and environmental protection.<sup>18</sup> More recently, some Chinese scholars have taken the unprecedented position that differentiates between freedom of navigation for commercial ships and freedom of navigation for naval vessels. China argues that naval vessels only enjoy “freedom of navigation” on the high seas. In the EEZ, warships enjoy the more limited right of “peaceful navigation.”<sup>19</sup> Thus, when operating in the EEZ, China maintains that U.S. warships may not engage in military activities and must take into consideration China’s security interests. A plain reading of UNCLOS and its negotiating history refutes China’s position and confirms long-standing state practice that all nations have an absolute right under international law to conduct military activities that are consistent with Article 2(4) of the UN Charter beyond the territorial sea of another nation.<sup>20</sup>

The EEZ was devised primarily to grant coastal States greater control over the living and non-living resources adjacent to their coasts. Apart from these limited coastal State resource rights, all States enjoy high seas freedoms of navigation and overflight, and other internationally lawful uses of the seas related to those freedoms in the EEZ. UNCLOS Articles 55, 56, 58 and 86 accommodate the various competing interests of coastal and user States in the EEZ, maximizing coastal State control over natural resources without diminishing freedom of navigation and other internationally lawful uses of the sea. Long-standing State practice confirms that the term “other internationally lawful uses” does not refer solely to navigation and overflight rights. Military operations, exercises, and activities have always been regarded as “internationally lawful uses of the sea,” and the right to conduct such activities is enjoyed by all States in the EEZ without coastal State notice or consent.<sup>21</sup> Ambassador Koh confirmed this conclusion at a conference in Singapore in 2008. The Ambassador recalled that, while some States argued that the status of the EEZ should approximate the legal status of the territorial seas, most States were of the opinion that coastal State rights in the EEZ were limited to the exploitation of resources, and that the water column should be treated much like the high seas. He went on to state, “I find a tendency on the part of some coastal States . . . to assert their sovereignty in the EEZ . . . is not consistent with . . . the correct interpretation of . . . [Part V] of the Convention.”<sup>22</sup>

**Air Defense Identification Zone.** In November 2013, China established an air defense identification zone (ADIZ) over much of the East China Sea. All aircraft entering the zone must file their flight plan and maintain communications with Chinese authorities, operate a radar transponder, and be clearly marked with their nationality and registration identification. Aircraft that do not cooperate with the identification procedures or follow the instructions of the Chinese authorities will be subject to undefined “defensive emergency measures.”<sup>23</sup> International law does not prohibit nations from establishing ADIZs in international airspace off their coast. However, the manner in which Beijing implements and enforces its ADIZ is problematic.

The legal basis for establishing an ADIZ in peacetime is that States enjoy the right to establish reasonable conditions of entry into their land territory. Aircraft approaching national airspace may be required to provide identification while in international airspace, but only as a condition of entry approval. This is analogous to imposition of conditions of port entry for ships entering a nation’s ports or traversing its internal waters. China’s ADIZ procedures, however, apply to all aircraft transiting the zone, regardless of whether they intend to enter Chinese national airspace. Beijing’s application of its ADIZ regulations to transiting aircraft that do not intend to enter Chinese national airspace is, therefore, inconsistent with international law. Aircraft of all nations are guaranteed freedom of overflight in international airspace seaward of the territorial sea.<sup>24</sup> China may not, consistent with time-honored freedoms of navigation and overflight, condition transits through international airspace on pre-notification to Chinese authorities.

**Nine-Dash Line.** China claims “indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof” encompassed by the Nine-Dash Line (9DL).<sup>25</sup> On June 21, 2013, a Tribunal was constituted under Annex VII of UNCLOS to decide an arbitration instituted by the Philippines against China. Over China’s objection, the Tribunal found on October 29, 2015, that it had jurisdiction over the dispute. On July 12, 2016, the Tribunal issued a unanimous award that is final and binding on both parties.

With regard to China’s claim of historic rights to the resources within the 9DL, the Tribunal concluded that any historic rights China may have had were extinguished to the extent the claimed rights were incompatible with the EEZ provisions of the Convention. The Tribunal further found there

was no evidence that China had historically exercised exclusive control over the waters or resources within the 9DL and there was no legal basis for China to claim historic rights to resources within the sea areas falling within the 9DL. With regard to the status of the Spratly Islands features, the Tribunal determined that none of the Spratly Islands, including the seven features occupied by China, is capable of generating an EEZ. The Tribunal also found that China had violated the Philippines' sovereign rights in its EEZ by (1) interfering with Philippine fishermen and petroleum exploration; (2) constructing artificial islands; and (3) failing to prevent Chinese fishermen from fishing in the zone. The Tribunal additionally concluded that China's large-scale land reclamation and construction of artificial islands in the South China Sea violated China's obligation under the Convention to preserve and protect fragile ecosystems and the habitat of depleted, threatened, or endangered species, and that China had failed to prevent Chinese fishermen from harvesting endangered species.<sup>26</sup>

This landmark decision soundly repudiates China's excessive claims and activities within the South China Sea and deals a death knell to China's infamous 9DL and its coercive behavior against other South China Sea claimants. Beijing's refusal to comply with the decision of the Arbitral Tribunal simply reconfirms China's disdain for the international rules-based legal order, which has directly contributed to the unprecedented growth and prosperity of the Asia-Pacific region.

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