

*China's Air Defence Identification Zone: Building Security through Lawfare**

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Abstract

China's establishment of its Air Defence Identification Zone (ADIZ) is yet another manifestation on the strenuous development of regional security in East Asia. China by virtue of its so-called lawfare has instrumentalized international air law, the law of the sea, and law on the use force to reinforce its comprehensive security doctrine both on the military as well as economic front. Accordingly, China has advanced its sovereign interests through each of these branches of international law when extending its domestic laws in airspace above its Exclusive Economic Zone (EEZ), affirming its sovereignty over the disputed islands and being prepared to respond to imminent threats. Conversely, opponents of the zone have equally exploited those normative frameworks to defend their geopolitical and strategic interests in East Asia under the veil of the communitarian freedoms of overflight.

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1. Introduction

Two years ago, China for the first time in its history has established an Air Defence Identification Zone (ADIZ) in the airspace above its Exclusive Economic Zone (EEZ) in the East China Sea. This obscure yet controversial practice amongst coastal states to protect their airspace for national security reasons triggered outcry in the international community defaming its illegitimacy and invalidity of China's moves. The establishment of China's ADIZ on 23 November 2013 raises diverse questions on the legal nature and political implications of this decision in a region that has been plagued by territorial claims in the East China Sea. China drew its ADIZ to overlap with Japan's decades-old zone, covering the Senkaku Islands, which are also claimed by China and known as the Diaoyu Islands to the Chinese, as well as part of South Korea's ADIZ.¹ The zone also covers waters considered international by the United States² and some territorial sea beneath the airspace claimed by South Korea,³ which as a way of retaliation expanded its ADIZ on 15 December 2013 over Ieodo Island.⁴ China published the coordinates of the zone and a map showing that it stretches—at its eastern point—to about 81 miles from Kyushu, one of Japan's main islands.

In its official statement of 23 November 2013 the Chinese Ministry of National Defence announced that the ADIZ is a zone that can extend in some cases up to 300 miles beyond the territorial sea. It is established by some countries off their coasts for security reasons. When entering the zone, all aircraft are required to identify themselves, report flight plans, and inform ground control of their exact position.⁵

The Japanese foreign ministry immediately lodged a protest with the Chinese embassy in Tokyo, claiming it a very dangerous action. The United States, Japan, and South Korea flew military aircraft into the zone. Both Japan and South Korea insisted that they continue to carry out surveillance activities in the zone. One week after its official declaration, a spokesperson of the Chinese Ministry of Foreign Affairs confirmed that the freedom of overflight has never been jeopardized since the establishment of the ADIZ and denounced those countries that unfairly exploited the situation and undermined regional peace and security.⁶ Geng Yansheng, a government spokesman of the Ministry of National Defence, continued and pierced the veil on China's alleged ambition to extend territorial sovereignty over the airspace above its EEZ. While a general measure on identification and an early warning

system, these defensive acts are not divorced from the rising tension between China and Japan over the disputed islands.⁷ It has not been the first time that China has experienced tension in its troubled skies. Since its interception of an American EP-3 naval reconnaissance aircraft on 1 April 2001, China has become more assertive and cautious when policing the airspace above its EEZ. At that time, the spokesman of the Ministry of Foreign Affairs argued that free overflight—though permitted under international law—did not respect the rights of China and “posed a serious threat to the national security of China” in this particular incident.⁸

Academic scholarship as well as political commentators both within China and outside have been focusing predominantly on the (il)legality of China's ADIZ and, accordingly, have been supporting⁹ and denouncing¹⁰ China's attempts to extend its jurisdictional claims above the disputed territories.¹¹ Indeed, underneath the complexities of East Asia's realpolitik plagued by territorial claims in the East China Sea and the increased U.S. military presence, a sophisticated legal battle is unfolding. Therefore, this article makes an attempt to understand China's comprehensive security doctrine¹² in relation to its ADIZ from an international legal perspective.¹³

In this respect, China's so-called lawfare,¹⁴ namely to use international law to discredit its rivals in pursuit of its sovereign interests, will be used as the vantage point to frame China's comprehensive security doctrine affecting its national, economic and military security.¹⁵ National security entails here external security threats affecting China's national sovereignty and territorial integrity.¹⁶ Economic security concerns China's commitment to the long-term economic development of its nation and peoples by promoting economic growth, access to global markets and energy supplies. Finally, military security envisages strengthening China's military capacity against foreign and imperialist invasions, which once humiliated the nation at the end of the 19th century.¹⁷

Therefore, this article will first address the historic and contemporary use of international law in China's foreign policy; second, the article will examine—more specifically to the East China Sea—how China's national security interests are advanced through international air laws; third, it examines economic security through the laws of the sea; and fourth, it looks at military security through the laws on the use of force.

Within each legal regime, this article will expose the positions as advanced by China and its opponents within the margins of those branches of international law.

2. International Law and China's Foreign Policy

The Open-Door Policy, which China pursued since the end of the 1970s, has marked a new era for China to interact with the international economic, legal, and political world order. As a result of China's growing economic and military capabilities, it has not only served its various interests when abiding to international regulation in the economic and security field, it has also increasingly contributed to the development and construction of an international legal system that favors sovereignty equality above hegemonic powers.¹⁸ Its effective use of international law has advanced China's peaceful development—economically, militarily, and geopolitically alike—yet such soft power has not entirely been convincing to Western powers as well as those developing countries in its immediate neighborhood.¹⁹

In the economic field, China has long been characterized as a free-rider or stakeholder. The best example is the interplay between China and the World Trade Organization (WTO), which it joined in 2001. While China succeeded in transforming itself to be the largest trading power in the world after joining the WTO, it has also been a major target of the WTO's dispute settlement mechanism for its occasional failure to comply with the WTO rules.²⁰ As a result, this laid-back approach is no longer able to help China achieve its long-term agenda globally. The latest frustration China has recently experienced is its failed efforts to have its voting rights in the International Monetary Fund increased commensurate to its current world economic status. Instead of continuing its conventional strategy, China switched to a more proactive lawfare approach, namely, of being a rule-maker and institution-builder.²¹

Consequently, in 2014 China took concrete steps to set up the New Development Bank with its BRICS (Brazil, Russia, India, China, and South Africa) partners and the Asian Infrastructure Investment Bank in the Asia Pacific region. These two new development banks have largely been viewed as major institutional devices not only to foster China's ambition to reform the existing international financial governance regime but also to coincide with its long-term strategy to internationalize its

currency—the *renminbi*—with the ultimate goal of turning it into a global currency. It seems inevitable that China may rely more on this lawfare approach to legitimately package and achieve its international agenda in the years to come.

More recently—in the security field—the Chinese Ministry of Foreign Affairs unprecedentedly issued a position paper in response to the Philippines' arbitration case against it concerning the issue of maritime jurisdiction in the South China Sea. The Chinese position refuted the jurisdictional grounds of the Arbitral Tribunal and challenged the alleged claims of the Philippines against China based on a strict reading of the 1982 United Nations Convention on the Law of the Sea (UNCLOS), which China has signed yet declared not to submit its territorial disputes before a compulsory judicial proceedings as initiated in the present case by the Philippines.²² Inevitably, China is engaging increasingly with international legal arguments to strengthen its sovereign interests in its Seas.

Clearly, in addition to its pragmatism in its foreign policy, China's legal and political culture progressively relies not only on ethics, consensus and relation-building but also on international law to mainstream its economic and security objectives at home and abroad.²³ In this respect, ever since the 18th National Congress of the Communist Party of China, China has been strongly committed to building “a socialist country based on the rule of law, [establishing] a sound mechanism for conducting checks and oversight of the exercise of power, and thus [advancing] socialist political progress.”²⁴ Therefore, with the construction of a law-based and law-abiding China, the Chinese government and society will necessarily “bring the rule of law to a new stage” of its economic and social development as argued by President Xi Jinping.²⁵

This present study on China's ADIZ above the East China Sea, from a methodological perspective, will make use of international relations to study the use of and commitment to international law in China's foreign policy arrangements concerning its ADIZ. Numerous scholars have already highlighted the importance of international lawyers and international relations theorists to work together in grasping a state's behavior reverting to international legal arguments to advance its own and/or discredit its opponents' sovereign interests.²⁶ That's why, according to Hoffmann, “since every Power wants to turn its interests, ideas and gains into law, a study of the ‘legal strategies’ of the various units, i.e., of what kinds of norms they try to promote, and through what techniques, may

be as fruitful for the political scientist as a study of more purely diplomatic, military or economic strategies.”²⁷

3. National Security and International Air Law

The Convention on International Civil Aviation defines the concept of ADIZ as a “special designated airspace of defined dimensions within which aircraft are required to comply with special identification and/or reporting procedures additional to those related to the provision of air traffic services.”²⁸ The 1944 Chicago Convention, replacing the 1919 Paris Convention,²⁹ focuses on those areas where states can govern their sovereign airspace above their territory including territorial seas and on international airspace over the high seas.³⁰ A state has full jurisdictional powers over the airspace above its territorial and internal waters.³¹ It must be pointed out that, unlike the right of innocent passage according to which a foreign vessel has the right to pass through the waters of a nation,³² there is no actual right of innocent passage for aircraft, even though nations generally have granted certain rights of innocent passage. Currently, each state enjoys exclusive sovereignty over the airspace above its territory and territorial sea.³³ Accordingly, foreign aircraft can be required to land only at designated port-of-entry airports, keep to assigned air corridors, and notify the host nation of their movements by means of a flight plan.³⁴

While the Chicago Convention does not regulate state aircraft as such, it requires state aircraft to request authorization from a state to fly in its sovereign airspace.³⁵ In such circumstances they ought to respect the existing flight plans of civil aircraft and thus pay “due regard for the safety of navigation of civil aircraft.”³⁶ In the interests of national defense, a state has the right to require the aircraft to land and show its registration. The national defense concerns also justify the requirement of a filed notice even in the case of the penetration of airspace adjacent to a nation.³⁷ In addition, the Convention provides for the passage of nonscheduled aircraft—subject to certain terms—and explicitly states that scheduled aircraft may not be operated for or into a territory of another state without the special permission or authorization of that state.³⁸

On the other hand, notwithstanding the right of self-defense under Article 51 of the UN Charter, state aircraft that intercept civil aircraft in flight must not endanger “the lives of the persons on board and the

safety of the aircraft” nor shall it use force against such aircraft in flight.³⁹ The Council of the International Civil Aviation Organization (ICAO) has adopted a more detailed regime through Standards and Recommended Practices for rules applicable to the airspace over the high seas. Accordingly, it has extended the Rules of Air under Article 12 of the Chicago Convention without exception to the high seas, thus allowing states to demand compliance with “the rules and regulations relating to the flight and manoeuver of aircraft there in force.”⁴⁰

Historically, the ADIZs originated during the Second World War. After the war, a dozen of countries with maritime borders have established similar zones. Claims were made by these states over contiguous zones, extending beyond their territorial seas and thus internationally recognized boundaries. The United States, Canada, and Japan are good examples.⁴¹ Since 1950, the U.S. president has had the ability to issue an executive order to establish an ADIZ above its territories and beyond its territorial sea if he deems that such measures would serve the national interest and protect against enemy aircraft.⁴² The ADIZs established by the United States extended at some points several hundred miles beyond its territorial sea.⁴³ Canada established its ADIZs in 1951. Japan declared a similar zone in 1969. France also set up a “French zone of special responsibility” or “zone of identification” over the Mediterranean Sea extending some 80 miles from the coast of Algeria.⁴⁴

Within these ADIZs, states adopted their own domestic rules regulating their size as well as identification and reporting procedures applicable to aircraft passing through the zone. For instance, pilots of foreign aircraft intending to fly through the U.S. ADIZ must file flight plans and give periodic position reports not less than one hour nor more than two hours before expected arrival. The consequence of failure to file flight plans may entitle the U.S. government to reject the aircraft’s access to the United States.⁴⁵ Other nations have similar advance identification requirements.⁴⁶ Canada requires not only aircraft flying within the ADIZ but those flying through its ADIZ to file the flight reports.⁴⁷ Aircrafts within the French “zone of special responsibility” were required to file detailed information regarding their flight, to stay within assigned corridors, and to maintain contact with ground identification stations.⁴⁸

Japan has a long-established ADIZ that covers much of the East China Sea, including the disputed islands.⁴⁹ The west end of Japan’s ADIZ is only 130 kilometers away from China’s Zhejiang province. Part of Japan’s ADIZ overlaps Taiwan’s ADIZ.⁵⁰ Within its own zone, Japan

reserves the right to identify, communicate with and intercept approaching foreign aircraft.⁵¹ South Korea also had a defense zone since 1951, which overlaps with China's and crosses into Japan's,⁵² and which has now been extended two weeks after China's establishment of its ADIZ, cutting deeper into the latter's zone as well as that of Japan.⁵³ The United States and Japan typically exempt from identification procedures aircraft that are just passing through the area. Even with these restrictions, the existence of publicly proclaimed ADIZs did not severely affect the rights of other coastal states with respect to the freedom of overflight over the high seas. The post-9/11 attacks have also led to an increased interest in these early practices of ADIZ of the 1950s and 1960s.⁵⁴

Despite these well-established practices and national procedures, foreign aircraft entering ADIZs are often required to identify themselves and can be the subject of "misidentification," which may trigger the use of force to either force an unidentified aircraft to land or to destroy the aircraft.⁵⁵ Though there exists an obligation to "refrain from resorting to the use of weapons against civil aircraft in flight,"⁵⁶ there have been rare cases in which military actions were taken against aircraft intruding into such a zone. During the period between 1959 and 1960, Soviet military aircraft penetrated the Alaskan Coastal ADIZ and flew considerable distances within the zone, and the United States did not take any military actions.⁵⁷ The most dramatic case took place in February 1961 when a French fighter fired some warning shots at a Soviet transport plane going to Morocco with the belief that the Soviet plane had deviated from its flight plan and was flying too close to Algeria.⁵⁸ More recently, in September 1983, a Soviet fighter jet shot down the Korean civilian airline KE007 which was passing through its ADIZ.⁵⁹

In the present case, the Aircraft Identification Rules for the East China Sea ADIZ adopted unilaterally—without consultation with its neighbors—on 23 November 2013 by the Chinese Ministry of National Defence dictates that any aircraft, civil and state alike, flying in its ADIZ shall—whether in transit or with China as a destination—report their flight plans, "maintain 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 Defence Identification Zone or the unit authorized by the organ."⁶⁰ The Chinese Ministry of National Defence argued that such practice has been well established by other countries and that security reasons mandate coastal states to take such measures.⁶¹

In case of failure to identify and abide to these rules, “China’s armed forces will adopt defensive emergency measures” against such aircraft.⁶² The direct consequence of this zone would restrict flights over the high seas when imposing international commercial airlines to take these new measures into account in their flight plans and scheduling. China requires aircraft that are passing through the zone but not landing in its country to notify Chinese authorities of their presence.⁶³ Many point out that China is forcing airlines flying through the zone to file flight plans, even when their final destination is not Mainland China. The United States, by contrast, does not apply its ADIZ procedures to foreign aircraft not intending to enter U.S. national airspace. The other difference lies in the follow-up actions China may take toward unidentified airplanes. Japan makes no threats if airlines do not comply. This is the difference between Japanese and Chinese rules.

Both the Japanese and South Korean governments urged their civilian airlines not to comply with China’s demands for flight information and transponder codes over international airspace. South Korea initially objected that South Korean airlines had to report their flight plans to China but later on reversed its policy and dropped the objections. The transport ministry, due to safety concerns, abandoned the previous stance, telling airlines to freely comply if they wished. South Korean airlines are therefore to comply with China’s new air defense zone. Korean Air, Asiana, and other low-cost airlines on 12 December 2013 started submitting flight plans to China for aircraft flying through the zone.⁶⁴

Japan Airlines and All Nippon Airways—Japan’s two international carriers—started to notify the Civil Aviation Administration of China if flights to and from Taiwan or Southeast Asia planned to enter the area covered by the zone, or if weather patterns pushed aircraft into the zone en route. Later, Japan Airlines and All Nippon Airways changed course under pressure from their government. They would continue to flout the Chinese guidelines.⁶⁵ Japan’s aviation authority ordered the national airline association to disregard the Chinese demand for the flight plans of all flights over the area in dispute.⁶⁶ Japan would stick to its advice to airlines to continue their operations as they had done before China’s announcements.⁶⁷

By contrast, the U.S. State Department asked American air carriers to provide China with the requested information. The Federal Aviation Administration’s guidance to American carriers is that—as a safety

precaution—they identify themselves before entering the restricted zone—in compliance with the Chinese regulations.⁶⁸ The major affected U.S. airlines are United Continental Holdings Inc. and Delta Air Lines Inc., both of which have some flights within the region to and from locations outside China that previously would not have been required to file flight plans with China. Delta, for example, flies from Tokyo to Taipei and Tokyo to Hong Kong so it files flight plans with China on those routes.⁶⁹ Other countries have urged their airlines to submit flight plans to China even when an aircraft is not destined for China.⁷⁰ Though the U.S. operation standards concerning ADIZ have been followed by most countries in the past, China's ADIZ and the application of its national laws and operation standards within its zone are gradually transforming the U.S. model. Indeed, such attempts to govern others outside a state's jurisdiction by virtue of domestic law as applied within an ADIZ has become an instrument of international governance, which in the present case is respectively challenged and defended by China and the United States.⁷¹

In spite of the rhetoric of national governments, commercial airlines of those countries act in compliance with the practice of the Flight Information Region, which is “an airspace of defined dimensions within which flight information service and alerting service are provided” where such service is guaranteed to safeguard “efficient conduct of flights.”⁷² The overlap of ADIZs of different nations and their respective extension of jurisdictional powers in the airspace above their EEZ—even above disputed territory—renders air-traffic confusing especially given the number of authorities which require their own reporting and identification duties in the overlapping zones. While the ICAO—a UN specialized agency based in Montreal—was created to facilitate cooperation among nations in matters of civil aviation and to set standards and regulations for aviation safety and security and could play a mediating role in the East China Sea to guarantee a safe airspace,⁷³ China and Japan did reach an agreement already in 2005 on these matters.

In particular, they adopted a set of nonbinding Guidelines for Navigation and Overflight in the EEZ, creating a common understanding on intelligence gathering and military activities in the EEZ. More specially, the exercise of the freedom of overflight in each other's EEZ “should avoid activities that unreasonably prejudice the peace, good order or security of the coastal State [nor] interfere with or endanger the rights of the coastal State to protect and manage its own resources and their environment.”⁷⁴ For the sake of protecting China's national security against

terrorist attacks by civilian aircraft or military aircraft from other states, China can implement such measures accordingly but within the constraints set out by international air law and the customary practice of ADIZ by other nations.

4. Economic Security and the Law of the Sea

The establishment of China's ADIZ is inextricably linked with the dispute on the islands in the East China Sea. China's move to set up the ADIZ appears to escalate a long-standing territorial dispute with Japan and arguably with extension to the South China Sea with Brunei, Malaysia, the Philippines, and Vietnam.⁷⁵ Creating the zone reflects incremental efforts by China to assert control over the area in order to secure China's economic interests and safeguard its so-called "historic rights" in its seas.⁷⁶ China is in dire need of natural resources to sustain its economic growth.⁷⁷ Not only has political and military maneuvering between China and Japan further undermined the possible prospects to solve the dispute peacefully, it has triggered a legal battle instead on divergent stances concerning the sovereign rights and duties of the coastal state and of other states—not only Japan—as regulated by UNCLOS in China's ADIZ above its EEZ.

In the development of the EEZ—which comprises about one-third of the global marine environment—under the present UNCLOS, a traditional tension arose and continues to divide developing coastal states in favor of extensive national jurisdiction beyond their territorial waters—the so-called territorialists—and developed nations advancing freedoms of navigation of the high seas. Nonetheless, the codification of the EEZ as result of such compromise is subject to a *sui generis* regime.⁷⁸ Consequently, within that separate zone, a balance of rights of the coastal state and of the international community of states has to be struck.⁷⁹ The technological development and claims for natural resources by stronger coastal regimes—especially in the developing world—have caused a "substantial extension of qualified territoriality into the oceans"⁸⁰ and has been upsetting this balance of rights. The adoption of national legislation within the EEZ and correlative jurisdictional power beyond the purpose and nature of the EEZ has led, according to Tuerk, "to a gradual territorialisation of that area with the traditional freedoms of the seas becoming mere exceptions to coastal State sovereignty."⁸¹

Thus, the rules on EEZ are generally structured along the respective

rights of coastal states and other states and their respective obligation to pay due regard to each other in the exercise of their rights and freedoms. On the one hand, Article 56 stipulates that the sovereign rights of coastal states related to the exploration, exploitation, conservation, and managing of natural resources in their EEZ shall be exercised with “due regard to the rights and duties of other States.” On the other hand, Article 58 reserves specific rights of other states, such as the freedom of overflight granted by Article 87 (concerning the high seas) in the EEZ of a coastal state, but not exclusively,⁸² upon the condition that they shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.⁸³

That said, the apparent symmetry between the rights and duties of coastal states and other states with the former’s EEZ has different legal grounds as to the expression of the duties concerned as opposed to the right and freedoms that are clearly defined in UNCLOS and ought to be exercised in good faith.⁸⁴ While other states are bound by the international law of the sea to respect the national laws and regulations adopted by the coastal state—such as in the case of the establishment of an ADIZ—the coastal state can demand such observance only as long as its own regulations are themselves in compliance with the freedoms stipulated in this Convention and other rules of international law.

Moreover, Article 58 (2) separates the traditional freedoms of the high seas under Article 87 from the residual rights of the coastal state in their EEZ as only Articles 88–115 apply within the EEZ.⁸⁵ Even though Article 87 reaffirms the freedom of overflight—following directly from the freedom of the sea—in the high seas and *mutatis mutandis* to the EEZ by virtue of Article 58 (1),⁸⁶ the exercise of that right by other states within the airspace above the EEZ of a coastal state shall observe the legal purposes of the airspace above the high seas and *mutatis mutandis* the airspace above the EEZ, namely a reservation for peaceful purposes.⁸⁷ While serving the community of nations, the concept of the freedom of the seas does not prevent the states from conducting certain activities on or over the high seas.⁸⁸ Conversely, the freedom of the seas is neither absolute nor static.⁸⁹ The ADIZ therefore may extend far into the high seas off the coasts of some countries. On the other hand, the freedom of the seas requires all states to pay reasonable regard to the interests of other states in their exercise of the freedom of the high

seas,⁹⁰ and above all shall be exercised with respect for the peaceful purposes of the seas.⁹¹

This is not the first time either that China has extended its aerial sovereignty over its EEZ though not formally through an ADIZ. In the 1958 Declaration on China's Territorial Sea the country declared that its territorial sea extends 12 nautical miles from its baseline as determined by "straight lines connecting basepoints on the mainland coast and on the outermost of the coastal islands." Inside this baseline lies the inside waters and outside the territorial sea. It continued that "no foreign vessels for military use and no foreign aircraft may enter China's territorial seas and the air space above without the permission of the Government."⁹² These early instances did not take into account the developments on the law of the sea and the adoption in particular of later conventions such as the 1958 Geneva Convention on the High Seas and UNCLOS which limit the external scope of the territorial sea to 8 nautical miles from the baseline.

According to China's 1998 Exclusive Economic Zone and the Continental Shelf Act, China's EEZ extends up to "200 nautical miles from the baselines from which the breadth of the territorial sea is measured" and its continental shelf is measured to the outer edge of the continental margin.⁹³ The Act continues that "any State, provided that it observes international law and the laws and regulations of the People's Republic of China, shall enjoy in the exclusive economic zone and the continental shelf of the People's Republic of China freedom of navigation and overflight."⁹⁴

China is one of those few countries in the world that claims that it has the right to regulate military activities in the airspace above its EEZ.⁹⁵ Thus, on grounds of national security, it can constrain the freedoms of navigation and overflight over its EEZ when military aircraft are not paying due regard to its rights and duties in the meaning of Article 58(3) UNCLOS.⁹⁶ China asserted this right in 2000 when a U.S. navy reconnaissance aircraft was intercepted in the airspace above Hainan Island.⁹⁷ The majority of states however adheres to the view that military activities in the airspace above the high seas and *mutatis mutandis* above the EEZ of a coastal state do not infringe upon the sovereign rights of the coastal state as long as the enjoyment of their freedom of overflight respects the peaceful purposes of that airspace.⁹⁸ A minority view that requires the consent of the coastal state to any state that carries out military activities in the airspace above its EEZ is increasingly facing resistance from major maritime powers.⁹⁹

China assured though that rights other than those covered by its EEZ and Continental Shelf Act in its EEZ and continental shelf “shall be exercised in accordance with international law and the laws and regulations of the People’s Republic of China.”¹⁰⁰ According to the residual rights thesis, those other rights and duties of the coastal state mentioned under Article 56(1)(c) reserves the coastal state the right to take measures that protect their national security in the case where the freedoms of the sea and air are exercised unlawfully in the meaning of Article 58(1).¹⁰¹ However, when China is patrolling its ADIZ to protect the country and safeguard peace in times of high alertness, it reassured that “the normal flight of aircraft of other countries will be not affected [as] the measures adopted in China’s airspace will not be extended to the ADIZ.”¹⁰²

The residual rights thesis in support of China’s ADIZ granting coastal states those rights in airspace above its EEZ beyond the *sui generis* nature and purpose of the EEZ—that is, rights with respect to fish and mineral resources—needs to be seen in light of the economic realities and current confrontational situations at sea. While China and Japan had made substantial progress in managing their fisheries and hydrocarbon resources,¹⁰³ the absence of an agreement on the territorial dispute has rendered much of these well-intended efforts in vain. The increased tension over the disputed islands has impacted the implementation phases of the fishery agreement and maritime cooperation on hydrocarbon resources in the East China Sea where jurisdictional claims are overlapping.¹⁰⁴

Given the number of small incidents between coast guards of both nations with their fishermen of each other’s nations has been on the rise as well as Japan’s nationalization of the disputed islands in 2012, a crisis management scheme needs to be developed rather than wait for an overall resolution to the entire dispute.¹⁰⁵ In the event of peaceful resolution which determines the maritime boundaries between both countries, the range of their EEZs remains subject to conflict since the baselines of both countries are less than 400 nautical miles at their widest points—an overlap of 200 nautical miles for each EEZ is inevitable.¹⁰⁶

Meanwhile, the legal grounds for actions of both nations border at the margins of international law. The absence of clear rules in treaty law as well as custom that prohibit such action impossibly gives room to seek compromise based on legal principles but rather incentivizes parties to the dispute to continue to couple their sovereignty claims to economic interests.¹⁰⁷ Understandably, the establishment of China’s ADIZ—from

the China threat perspective—is seen as mere manifestation of power to secure its economic interests over the EEZ around the disputed islands. As a result, China's exercise of jurisdiction over the waters and airspace which it claims, not only consolidates its claims but also destabilizes and weakens the claims of other nations on those waters and airspace and, according to Fravel, are “viewed as threatening by other claimants, especially when such actions are undertaken by the strongest state in the dispute.”¹⁰⁸ Conversely, whenever such claims are brought before an international tribunal or arbitration panel as with the Philippines, China abstains from its lawfare and rather reaffirms its sovereignty outside the narrow confines of the courtroom.

5. Military Security and the Law on the Use of Force

The rise of its economic power has enabled China to expand its military capability and project such power in its seas to defend its territorial and economic interests alike as the China threat thesis would advance.¹⁰⁹ Moreover, the expansion of American bilateral military cooperation and alliances with China's neighbors in particular in Southeast Asia after 9/11 have warranted precaution on behalf of China to further extend collaboration through multilateral relationships such as ASEAN to avoid encirclement.¹¹⁰ In spite of China's military modernization of its air and naval forces,¹¹¹ it argues that it is rather concentrated on defense thus trying to rebut any allegations of aggressiveness. In reality however, defensive and offensive military capabilities are even harder to distinguish than such intentional process.¹¹² Its so-called strategic doctrine of active defense off its territorial seas prepares it for future maritime conflicts in the preservation of its economic and geopolitical interests vis-à-vis its immediate neighborhood with whom it shares a “strategic distrust.”¹¹³ To face Japan's navy—one of the strongest in the world and supported by the United States—thus incentivizes China to further invest in its defensive and/or offensive capabilities.¹¹⁴ In order to avoid getting involved directly, the United States has so far been reluctant to openly support any parties to the conflicts in the South China and East China Sea and rather stressed the importance of the freedom of navigation and overflight instead. These principles simultaneously justify and instrumentalize its military predominance in the Asia-Pacific as well as diffuse allegations of its military encroachment on the region.¹¹⁵

Clearly, the U.S.-China relationship is a decisive factor in the

resolution of maritime disputes in the East and South China Sea. The mutual admiration and suspicion by both parties have prevented a productive bilateral friendship that can resist external challenges and rather postponed some of the outstanding contentious disagreements that accompanied China's rising geopolitical and economic power.¹¹⁶ On the one hand, China is perceived to match its economic with political power yet it emphasizes peaceful pursuit of its ambitions in line with its foreign policy doctrine on the Five Principles of Peaceful Coexistence which fosters the respect for sovereign equality and multilateral cooperation in the fulfillment of common interests as opposed to its view on the U.S. model of unilateralism and hegemony.¹¹⁷ On the other hand, the geopolitical and regional motives of China's increased military buildup and capacity in its seas constitute a serious threat whose containment is indispensable for the future of security in the Asia-Pacific as once guaranteed by the United States.¹¹⁸

These diametrically opposed views have surfaced again since the establishment of China's ADIZ. In this regard, shortly after the announcement on the establishment of the ADIZ, the United States sent two unarmed B-52s into the zone as a mere demonstration of long-established rights of freedom of overflight and transit through international airspace.¹¹⁹ Pentagon officials said that the B-52s were on a routine training mission planned long in advance of China's declaration that established the zone over the respective area.¹²⁰ In addition, in its report to Congress, the U.S. Department of Defense asserted that "[t]he United States neither accepts nor recognizes China's requirements for operating in the newly declared ADIZ. This announcement will not change how the United States conducts military operations in the region."¹²¹

Following announcements by Japan and South Korea that their military planes had flown through the zone, China sent fighter jets on the first patrols of its new air defense zone over the disputed islands in the East China Sea on 28 November 2013.¹²² If a Chinese plane is detected in Japan's ADIZ, F-15 jets are scrambled to warn it off. One possible consequence is that Chinese aircraft may now ignore such warnings or attempts to chase them off. U.S. military planes often ignore the air defense zones of nonallied countries and frequently respond to any radio hail by asserting the right to operate in an international airspace.¹²³ However, the United States did notify Japan of the B-52s entering Japan's long-established ADIZ.¹²⁴ It is unlikely that the prevention of future incidents between China and the United States can be

resolved through bilateral arrangements since those would implicitly recognize the legitimacy of U.S. military activities in China's ADIZ.¹²⁵ Potentially, this once obscure dispute may escalate into a broader test of power in the Asia-Pacific.¹²⁶

Arguably, since China—in spite of its military buildup—cannot possibly secure a military victory on a large scale,¹²⁷ it is therefore also challenging the United States and its allies on the legal front. In this regard, power cannot longer be measured and exercised by military means and economic competition only, thus lawfare has been instrumental in defying the position of one's opponents and strengthening one's own. This strategy is manifestly used by the United States and China. The object of their legal battle is the defiance and defense of respectively the so-called U.S. hegemonic custom on self-defense. Regarding the latter, the doctrine of anticipatory self-defense has gradually shaped on a case-by-case basis the normative framework regulating use of force beyond one's boundaries—and potentially in the skies above EEZs and high seas.¹²⁸

The geopolitics of such military action infuse the legal debates concerning the conditions under which self-defense can take place.¹²⁹ In this regard, the U.S. intelligence capacity has allowed for judging future situations that constitute an imminent threat and justify anticipatory self-defense, that is, before an armed attack in the meaning of Article 51 of the UN Charter takes place.¹³⁰ Paradoxically, China—a staunch supporter of a narrow interpretation on self-defense—endorses an anticipatory stance on self-defense to justify the establishment of its own ADIZ. While it traditionally portrays itself as an opponent to unilateralism in an attempt to enjoy a larger support of other developing countries which criticize the U.S. unilateral actions, especially since the 2003 Iraq war,¹³¹ it makes use of the same defensive strategy to advance such pursuits in its ADIZ.

As a result, the establishment of China's ADIZ has predominantly been justified to ensure the protection of its territorial integrity or political independence in the meaning of Article 2(4) of the UN Charter. Even as a precautionary measure, an ADIZ can prevent and anticipate self-defense and defense of others.¹³² The imminent threats of violence present in the East China Sea by a number of regional and transpacific actors trigger such a defensive attitude toward military security. Even if states other than the coastal state want to use the high seas and *mutatis mutandis* the EEZ for military purposes, their presence remains

conditioned upon the general obligation for all states to use the high seas peacefully and by extension, pursuant to Article 58(2) and 87 UNCLOS, in the EEZ of a coastal state.¹³³ However, UNCLOS does not exclude military activities in or other military uses of either zone as long as those are consistent with the UN Charter, including the law on individual and collective self-defense, and other rules of international law.¹³⁴ In this regard, the UN Secretary-General's 1985 report on General and Complete Disarmament concluded that "[in] the exercise of the right of collective self-defense it is clear that parties to [collective] security arrangements may use force upon the high seas, within the limits prescribed by international law, to protect their armed forces, public vessels or aircraft."¹³⁵

Those limits with respect to the establishment of an ADIZ—as the exercise of a right of anticipatory self-defense—are proportionality and necessity. Regarding proportionality, the defensive measures taken to respond to unarmed civil aircraft—including firing and forced landing—which do not comply with the reporting and identification laws and regulations can be considered to be excessive. While the development of modern weaponry, including intercontinental missiles, renders the *raison d'être* of the necessity of such ADIZ in vain,¹³⁶ the events of 9/11 and suicide airplanes have dramatically changed the security landscape of nations and warrant an appropriate response that protects their airspace, its users, and the coastal state. This kind of threat however to China is unlikely to have played a dominant factor on the rationale behind the establishment of the ADIZ above its EEZ.

6. Conclusion

The stalemate between China and its neighbors of settling outstanding territorial disputes and maritime claims has driven the parties toward conflict and military readiness in the eventuality of potential outbreaks of violence. Such strategic thinking no longer limits itself to military power only; it also employs lawfare to advance one's national and economic interests—thus in line with China's new government agenda to rule by law domestically and globally alike. China's establishment of its ADIZ anticipates toward that end. Accordingly, it argues in the margins of international law and more specifically through its branches of air law, law of the sea, and law on the use of force to challenge the dominant perspective of the United States that conversely defends its

stance on the extraterritorial application of its domestic law governing the airspace beyond its territory, the freedom of overflight, and the right of anticipatory self-defense.

The divergent interpretation and application of international norms that authorize the establishment and regulate the operationalization of an ADIZ reflect a growing asymmetry between regional and global powers. On the one hand, such divide between China, its neighbors and the United States can further jeopardize collective security beyond East Asia and can risk further eroding such a normative framework. On the other hand, the indeterminacy of the rule can give enough flexibility to the parties to strike a balance between their sovereign interests and thus to move away from the debate on legality/illegality of one's actions and claims and focus on confidence- and relationship-building measures instead.¹³⁷ China's increased military capacity however will continue to impact on how China perceives its own interests but also its ability to defend those interests within its Seas.¹³⁸

Notes

1. J. Randy Forbes and Michael Auslin, "U.S. Power Loses Altitude in Asia," *Wall Street Journal*, 12 December 2013, A11.
2. Calum MacLeod, "Biden Has Tense Visit in China over Air Zone," *USA Today*, 5 December 2013, A11.
3. Jane Perlez and Martin Fackler, "China Patrols Air Zone over Disputed Islands," *New York Times*, 29 November 2013, A16.
4. Jae Woon Lee, "Tension on the Air: The Air Defense Identification Zones on the East China Sea," *Journal of East Asia and International Law*, Vol. 7 (2014), p. 276.
5. "Statement by the Government of the People's Republic of China on Establishing the East China Sea Air Defense Identification Zone," *Xinhua News*, last modified 23 November 2013, http://www.gov.cn/jrzg/201311/23/content_2533235.htm.
6. "China's ADIZ Will Not Cause Tension," *Xinhua News*, last modified 29 November 2013, http://www.gov.cn/xinwen/2013-11/29/content_2608156.htm.
7. "Statement Made by Geng Yansheng, Spokesman for the Ministry of National Defense, on China's Establishment of the East China Sea Air Defense Identification Zone," *Xinhua News*, last modified 3 December 2013, http://www.gov.cn/jrzg/2013-12/03/content_2541393.htm.
8. "Chinese FM Spokesman Gives Full Account of Air Collision," *Xinhua*

- News*, last modified 3 April 2001, <http://news.xinhuanet.com/english/20010404/393251.htm>.
9. Jinyuan Su, "The East China Sea Air Defense Identification Zone and International Law," *Chinese Journal of International Law*, Vol. 14 (2015), pp. 271–303; Juqian Li, "Air Defense Identification Zone: The Restriction on the Free Sky due to the Residual Right Principle," *China Legal Science*, Vol. 2 (2014), pp. 13–36; Bei He, "The Legal Basis and Suggestions for Establishing Air Defense Identification Zone in China," *Research on Rule of Law*, Vol. 30 (2013), pp. 30–34; Chongmin Wang and Ligang Zou, "On the Establishment of Air Defense Identification Zone in China's Exclusive Economic Zone," *Law Science Magazine*, Vol. 1 (2013), pp. 95–99; Pengcheng Zhao, "On the Legal System of Establishing Air Defense Identification Zone in China," *Legal System and Society*, Vol. 10 (2009), pp. 94–95; Guifang Xue and Xuyuan Xiong, "On the Legal Theories of Establishing Air Defense Identification Zone," *Journal of Ocean University of China* (Social Sciences), Vol. 6 (2007), pp. 37–39; Lin Zhang and Rui Zhang, "The Legal Basis of Establishing Air Defense Identification Zone," *Journal of Xi'an Politics Institute of PLA*, Vol. 6 (2007), pp. 77–78; Ivan L. Head, "Air Defense Identification Zone, International Law and Adjoining Spaces," *China Legal Science*, Vol. 6 (2001), pp. 145–158.
 10. Sukjoon Yoon, "The East China Sea ADIZ: New Flashpoint in Regional Maritime Security," *Canadian Naval Review*, last modified 10 December 2013, <http://www.navalreview.ca/2013/12/the-east-china-sea-adiz-new-flashpoint-in-regional-maritime-security/>; Jun Osawa, "China's ADIZ over the East China Sea: A 'Great Wall in the Sky'?", *Brookings*, last modified 17 December 2013, <http://www.brookings.edu/research/opinions/2013/12/17-china-air-defense-identification-zone-osawa>; Christopher K. Lamont, "Law, Conflict and Airspace: Understanding Air Defense Identification Zones," *Openasia*, last modified 17 January 2014, <http://openasia.asia/law-conflict-and-airspace-understanding-air-defense-identification-zones-1231>; Zackary Keck, "China's Drafting a South China Sea ADIZ," *Diplomat*, last modified 31 January 2014, <http://thediplomat.com/2014/01/chinas-drafting-a-south-china-sea-adiz/>; Jaemin Lee, "China's Declaration of an Air Defense Identification Zone in the East China Sea: Implications for Public International Law," *Proceedings American Society of International Law*, Vol. 18 (19 August 2014); Eric Heginbotham, "China's ADIZ in the East China Sea," *Lawfareblog*, last modified 24 August 2014, <http://www.lawfareblog.com/2014/08/the-foreign-policy-essay-chinas-adiz-in-the-east-china-sea/>.
 11. See more on the China threat theory: Chen Jian, "China's Prolonged Rise: Legitimacy Challenges and Dilemmas in the Reform and Opening-up Era," in *International Relations since the End of the Cold War: New and Old*

- Dimensions*, edited by Geir Lundestad (Oxford: Oxford University Press, 2012), p. 248; Jian Yang, *The Pacific Islands in China's Grand Strategy, Small States, Big Games* (London: Palgrave, 2011), p. 40; Thomas J. Christensen, "Windows and War: Trend Analysis and Beijing's Use of Force," in *New Directions in the Study of China's Foreign Policy*, edited by Alastair Iain Johnston and Robert S. Ross (Stanford: Stanford University Press, 2006), pp. 50–85; Andrew Scobell, *China's Use of Military Force: Beyond the Great Wall and the Long March* (Cambridge: Cambridge University Press, 2003), p. 198. See more on Chinese nationalism and chauvinism: Michael Cox, "New China, New Cold War," in *Statecraft and Security: The Cold War and Beyond*, edited by Ken Booth (Cambridge: Cambridge University Press, 1998), p. 236; Robert S. Ross, "China's Naval Nationalism: Sources, Prospects, and the U.S. Response," *International Security*, Vol. 34 (2009), pp. 46–81; James Manicom, "Growing Nationalism and Maritime Jurisdiction in the East China Sea," *China Brief: A Journal of Analysis and Information*, Vol. 10 (2010), pp. 9–11. See more on China's fear of regional security initiatives by the United States and Japan in its seas and attempts to counter the China threat theory, Victor D. Cha, "The Security Dilemma in Asian Architecture: United States, Japan, and China," in *The U.S.-Japan Security Alliance: Regional Multilateralism*, edited by Takashi Inoguchi, G. John Ikenberry, and Yoichiro Sato (Basingstoke: Palgrave Macmillan, 2011), p. 160; Chih-yu Shih, *Sinicizing International Relations: Self, Civilization, and Intellectual Politics in Subaltern East Asia* (Basingstoke: Palgrave Macmillan, 2013), p. 20.
12. The comprehensive security doctrine incorporates the same elements of China's Five Principles of Peaceful Coexistence—including mutual respect for territorial integrity and sovereignty, nonaggression, noninterference in each other's internal affairs, equality and mutual benefit, and peaceful coexistence—once established in 1955 by the Chinese Premier Zhou Enlai and reendorsed by the current Chinese President Xi Jinping. See Jinping Xi, "Five Principles of Peaceful Coexistence Are Not Outdated," last modified 28 June 2014, http://big5.xinhuanet.com/gate/big5/news.xinhuanet.com/english/china/2014-06/28/c_133445548.htm; see also Russell Ong, *China's Security Interests in the 21st Century* (London: Routledge, 2007), p. 12.
 13. Few scholars have given a comprehensive analysis on the development and practice of ADIZ. See, e.g., Peter A. Dutton, "Caelum Liberam: Air Defense Identification Zones Outside Sovereign Airspace," *American Journal of International Law*, Vol. 103 (2009), pp. 1–19; Elizabeth Cuadra, "Air Defense Identification Zones: Creeping Jurisdiction in the Airspace," *Virginia Journal of International Law*, Vol. 18 (1978), pp. 485–512. Only one scholar has attempted an international law analysis on the establish-

- ment of ADIZs in the East China Sea. See Lee, “Tension on the Air,” pp. 274–281.
14. James Kraska, *Maritime Power and the Law of the Sea: Expeditionary Operations in World Politics* (Oxford: Oxford University Press, 2011), p. 321. U.S. Colonel Charles J. Dunlap coined this term for the first time in 2001 in the aftermath of U.S.-led military intervention in Afghanistan. In that context, the term refers to the “use of law as a weapon of war” potentially undermining U.S. interventions and leadership globally. See Charles J. Dunlap, “Law and Military Interventions: Preserving Humanitarian Values in the 21st Century,” paper presented at the Humanitarian Challenges in Military Intervention Conference, Carr Center for Human Rights Policy Kennedy School of Government, Harvard University, Washington, DC, 29 November 2001. Unsurprisingly, the U.S. Department of Defense reported in 2007 to the U.S. Congress that “recently, PRC military strategists have taken an increasing interest in international law as an instrument to deter adversaries prior to combat. ... China ... is shaping international opinion in favor of a distorted interpretation of the UN Convention on the Law of the Sea by moving scholarly opinion and national perspectives away from long-accepted norms of freedom of navigation and toward interpretations of increased sovereign authority over the EEZ, the airspace above it, and possibly outer space.” See “Annual Report to Congress on the Military Power of the People’s Republic of China 2007,” U.S. Department of Defense, 13, last accessed 23 December 2015, <http://www.defense.gov/pubs/pdfs/070523-China-Military-Power-final.pdf>.
 15. Sam Bateman, “Security and the Law of the Sea in East Asia: Navigational Regimes and Exclusive Economic Zones,” in *The Law of the Sea: Progress and Prospects*, edited by David Freestone, Richard Barnes, and David Ong (Oxford: Oxford University Press, 2006), p. 367.
 16. Yun Sun, *Chinese National Security Decision-making: Processes and Challenges* (Washington, DC: Brookings Institution, 2013), p. 2.
 17. See Ong, *China’s Security Interests*, pp. 12–19.
 18. Zonglai Wang and Bin Hu, “China’s Reform and Opening-up and International Law,” *Chinese Journal of International Law*, Vol. 9 (2010), pp. 201–202.
 19. Yongnian Zheng and Chi Zhang, “‘Soft Power’ and Chinese Soft Power,” in *China’s Soft Power and International Relations*, edited by Hongyi Lai and Yiyi Lu (New York: Routledge, 2012), 21; see also Francis Synder, “China, Regional Trade Agreements and WTO Law,” *Journal of World Trade*, Vol. 43 (2009), p. 54; Jacques deLisle, “China’s Approach to International Law: A Historical Perspective,” *ASIL Proceedings*, Vol. 94 (2000), pp. 267–275.

20. Manjiao Chi, "China's Participation in WTO Dispute Settlement over the Past Decade: Experiences and Impacts," *Journal of International Economic Law*, Vol. 15, No. 1 (2015), pp. 29–49.
21. Wei Shen, "Is Brics' New Development Bank New?," *Butterworths Journal of International Banking and Financial Law*, Vol. 29, No. 10 (2014), pp. 655–656.
22. Ministry of Foreign Affairs of the People's Republic of China, "Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China," last modified 7 December 2014, http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml.
23. Jisi Wang, "International Relations Theory and the Study of Chinese Foreign Policy: A Chinese Perspective," in *Chinese Foreign Policy: Theory and Practice*, edited by Thomas W. Robinson and David Shambaugh (Oxford: Clarendon Press, 2006), pp. 488–492.
24. "Resolution of the Eighteenth National Congress of the Communist Party of China on the Report of its Seventeenth Central Committee adopted at the Eighteenth National Congress of the Communist Party of China," last modified 14 November 2012, http://news.xinhuanet.com/english/special/18cpcnc/2012-11/14/c_131973742.htm.
25. Jinping Xi, *The Governance of China* (Beijing: Foreign Languages Press, 2014), pp. 160–161.
26. See, for example, Stanley Hoffmann, "The Study of International Law and the Theory of International Relations," *American Society of International Law Proceedings*, Vol. 57 (1963), pp. 26–35; Anne-Marie Slaughter Burley, "International Law and International Relations Theory: A Dual Agenda," *American Journal of International Law*, Vol. 87 (1993), pp. 205–239; Shirley V. Scott, "International Law as Ideology: Theorizing the Relationship between International Law and International Politics," *European Journal of International Law*, Vol. 5 (1994), pp. 313–325; John K. Setear, "An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law," *Harvard International Law Journal*, Vol. 37 (1996), pp. 139–329; Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge: Cambridge University Press, 2004), pp. 21–34; Michael Byers, "International Law," in *The Oxford Handbook of International Relations*, edited by Christian Reus-Smit and Duncan Snidal (Oxford: Oxford University Press, 2010), pp. 612–631.
27. Hoffmann, "Study of International Law," p. 33.
28. Convention on International Civil Aviation (hereinafter Chicago Convention), annex 15, Dec. 7, 1944, 61 Stat. 1180, 15 UNTS 295.
29. Convention on International Civil Aviation, art. 32, Oct. 13, 1919, 11 LNTS 174 (hereinafter Paris Convention).

30. Chicago Convention, art. 12.
31. *Ibid.*, arts. 1, 2; I. H. Ph. Diedericks-Verschoor, *An Introduction to Air Law* (Alphen aan den Rijn: Kluwer, 2006), p. 38.
32. Sean D. Murphy, *Principles of International Law* (St. Paul: Thomas/West, 2006), p. 344; Haijiang Yang, *Jurisdiction of the Coastal State over Foreign Merchant Ships in Internal Waters and the Territorial Sea* (Berlin: Springer, 2006), pt. 3.
33. Antonio Cassese, *International Law* (Oxford: Oxford University Press, 2001), p. 63.
34. Anthony Aust, *Handbook of International Law* (Cambridge: Cambridge University Press, 2010), pp. 325–326.
35. Chicago Convention, art. 3(c).
36. *Ibid.*, art. 3(d). See also Ruwantissa Abeyratne, *Convention on International Civil Aviation: A Commentary* (Berlin: Springer, 2014).
37. Vera A. Foster Rollo, *Aviation Law: An Introduction* (Fruitland: Maryland Historical Pr, 1985), p. 282.
38. Chicago Convention, annex 15.
39. *Ibid.*, art. 3bis(a).
40. *Ibid.*, art. 12, annex 2, Rules of the Air, 2.1.1 Note; see also Michael Milde, *International Air Law and ICAO* (Utrecht: Eleven, 2008), p. 69.
41. Brunson MacChesney, *International Law Situation and Documents 1956: Situation, Documents and Commentary on Recent Developments in the International Law of the Sea* (Newport: U.S. Naval War College, 1957), pp. 577–600.
42. Act of Sept. 9, 1950, Pub. L. 81-778, 64 Stat. 825 (1950), para. 1203; Security Control of Air Traffic, 14 C.F.R., Part 99.
43. 14 C.F.R. §99 (2000); 49 U.S.C.A. §§40103(b)(3); 46307 (1997).
44. “Soviet Gets Apology by France for Jet’s Shots,” *Schenectady Gazette*, 11 February 1961, p. 1.
45. Xue and Xiong, “On the Legal Theories,” p. 36.
46. Paul B. Larsen, Joseph C. Sweeney, and John E. Gillick, *Aviation Law: Cases, Laws and Related Sources* (Leiden: Martinus Nijhoff, 2006), p. 44.
47. Xue and Xiong, “On the Legal Theories,” p. 36.
48. Myres S. McDougal, Harold D. Lasswell, and Ivan A. Vlasic, *Law and Public Order in Space* (New Haven, CT: Yale University Press, 1963), pp. 307–311.
49. Mark Landler and Jane Perlez, “Biden Backs Ally Japan but Avoids Roiling China,” *New York Times*, 4 December 2013, A6.
50. Xue and Xiong, “On the Legal Theories,” p. 39.
51. Yuka Hayashi and Jeremy Page, “U.S., Japan Rebuke China in Islands Dispute,” *Wall Street Journal*, 25 November 2013, A8.
52. Forbes and Auslin, “U.S. Power Loses Altitude,” p. 11.

53. Chico Harlan, "South Korea Will Expand Its Air Defense Zone, Defense Ministry Says," *Washington Post*, 8 December 2013.
54. Natalie Klein, *Maritime Security and the Law of the Sea* (Oxford: Oxford University Press, 2011), p. 61.
55. Jordan J. Paust, Joan M. Fitzpatrick, and Jon M. Van Dyke, *International Law and Litigation in the US* (St. Paul: Thomson/West, 2000), p. 847.
56. Chicago Convention, art. 3bis.
57. Oliver J. Lissitzyn, "Some Legal Implication of the U-2 and RB-47 Incidents," *American Journal of International Law*, Vol. 56 (1962), p. 141.
58. *Ibid.*
59. Bin Cheng, "The Destruction of KAL Flight KE007, and Article 3 Bis of the Chicago Convention," in *Air Worthy. Liber Amicorum Honouring Professor Dr. I. H. Ph. Diederiks-Verschoor*, edited by J. W. E. Storm van's Gravensande and A. van der Veen Vonk (Deventer: Kluwer Law & Taxation, 1985), pp. 47–74.
60. "Announcement of the Aircraft Identification Rules for the East China Sea Air Defense Identification Zone of the People's Republic of China," *Xinhua News*, last modified 23 November 2013, http://www.gov.cn/jrzg/2013-11/23/content_2533101.htm.
61. "Statement by the Government of the People's Republic of China on Establishing the East China Sea Air Defense Identification Zone," *Xinhua News*, last modified 23 November 2013, http://www.gov.cn/jrzg/201311/23/content_2533235.htm.
62. *Ibid.*
63. MacLeod, "Biden Has Tense Visit," A11.
64. Simon Mundy, Song Jung-a, and Demetri Sevastopulo, "S Korea Airlines Give Data to China," *Financial Times*, 13 December 2013, p. 3.
65. *Ibid.*
66. Landler and Perlez, "China Patrols Air Zone," A6.
67. Agencies, "Summit Calls for 'Freedom of the Air and Sea'," *South China Morning Post*, 15 December 2013, A3.
68. Forbes and Auslin, "U.S. Power Loses Altitude," p. 11.
69. Yuka Hayashi and Andy Pasztor, "Japan, U.S. at Odds over China's Air Zone," *The Wall Street Journal*, 2 December 2013, A16.
70. Mundy, Jung-a, and Sevastopulo, "S Korea Airlines Give Data to China," 3.
71. Nico Krisch, "International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order," *European Journal of International Law*, Vol. 16 (2005), p. 400.
72. Chicago Convention, annex 2 "Rules of the Air."
73. *Ibid.*, art. 44.
74. Guidelines for Navigation and Overflight in the Exclusive Economic Zone, EEZ Group 21 (15–16 September 2005), III a), b).

75. On 22 January 2013, the Philippines had instituted arbitral proceedings against China before the Permanent Court of Arbitration (PCA). The Philippines is challenging the validity of the nine-dash line that China uses on maps to justify its claim to almost the entire South China Sea. China however refused to take part despite being a party to UNCLOS and may not comply with the decision of the arbitration panel. See “The Republic of the Philippines v. The People’s Republic of China,” PCA, last accessed 14 December 2015, http://www.pca-cpa.org/showpage65f2.html?pag_id=1529. On 5 February 2014, the United States has rejected China’s nine-dash line given the latter’s absence of land features in its maritime claims. See “Testimony of Daniel Russel Assistant Secretary of State Bureau of East Asian and Pacific Affairs U.S. Department of State,” House Committee on Foreign Affairs Subcommittee on Asia and the Pacific Wednesday, 5, last modified 5 February 2014, <http://docs.house.gov/meetings/FA/FA05/20140205/101715/HRG-113-FA05-Wstate-RusselD-20140205.pdf>; see also Jeffrey A. Bader, “The U.S. and China’s Nine-Dash Line: Ending the Ambiguity,” last modified 6 February 2014, <http://www.brookings.edu/research/opinions/2014/02/06-us-china-nine-dash-line-bader>.
76. “Exclusive Economic Zone and the Continental Shelf Act,” last modified 26 June 1998, http://www.un.org/depts/los/LEGISLATIOANDTREATIES/PDFFILES/chn_1998_eez_act.pdf. See also Jia Yu, “International Perspective on the Dotted Line in the South China Sea,” *China Legal Science*, Vol. 1 (2013), p. 53.
77. Richard Rosecrance, “Power and International Relations: The Rise of China and Its Effects,” *International Studies Perspectives*, Vol. 7 (2006), p. 33; Ben Saul, “China, Natural Resources, Sovereignty and International Law,” *Asian Studies Review*, Vol. 37 (2013), p. 205.
78. Bateman, “Security and the Law of the Sea,” p. 380.
79. Helmut Tuerk, *Reflections on the Contemporary Law of the Sea* (Leiden: Brill, 2012), p. 161.
80. Miles Kahler, “Territoriality and Conflict in an Era of Globalization,” in *Territoriality and Conflict in an Era of Globalization*, edited by Miles Kahler and Barbara F. Walter (Cambridge: Cambridge University Press, 2009), p. 17.
81. Tuerk, *Reflections on the Contemporary Law*, p. 161.
82. UNCLOS, art. 86, Dec. 10, 1982, 1833 UNTS 397 stating that “this article does not entail any abridgement of the freedoms enjoyed by all States in the exclusive economic zone in accordance with article 58.”
83. *Ibid.*, art. 58(3).
84. Vienna Convention on the Law of Treaties, art. 31(1), 6 May 1969, 1155 UNTS 331. See also David Anderson, “Freedoms of the High Seas in the Modern Law of the Sea,” in Freestone, Barnes, and Ong, *Law of the Sea*, pp. 323–333.

85. Myron H. Nordquist, Satya N. Nandan, and Shabtai Rosenne, eds., *United Nations Convention on the Law of the Sea 1982—A Commentary*, vol. 3 (Leiden: Brill, 2011), p. 80.
86. Donald R. Rothwell and Tim Stephens, *The International Law of the Sea* (Oxford: Hart, 2010), p. 93.
87. See UNCLOS, art. 88; Geneva Convention on the High Sea, art. 2, Apr. 29, 1958, 450 UNTS 82.
88. Geneva Convention on the High Seas, art. 2(2).
89. Daniel P. O'Connell, *The International Law of the Sea* (Oxford: Clarendon, 1984), p. 796.
90. Geneva Convention on the High Seas, art. 2.2; UNCLOS, art. 87(2).
91. Stuart Kaye, "Freedom of Navigation in a Post 9/11 World: Security and Creeping Jurisdiction," in Freestone, Barnes, and Ong, *Law of the Sea*, pp. 353–354.
92. "Declaration on China's Territorial Sea," last modified 9 September 1958, <http://www.state.gov/documents/organization/58832.pdf>; see also "Law of the PRC on the Territorial Sea and Contiguous Zone," art. 12, last modified 25 February 1992, http://english.chinamil.com.cn/site2/special-reports/2006-04/20/content_460094.htm.
93. Exclusive Economic Zone and the Continental Shelf Act, art. 2.
94. *Ibid.*, art. 11.
95. *Ibid.*
96. Raul Pedrozo argues that China's failure to include security interests in the negotiation process towards the adoption of UNCLOS explains why it is now pursuing to expand such coastal state competency unilaterally. See Raul (Pete) Pedrozo, "Preserving Navigational Rights and Freedoms: The Right to Conduct Military Activities in China's Exclusive Economic Zone," *Chinese Journal of International Law*, Vol. 9 (2010), p. 11.
97. Eric Donnelly, "The United States-China EP-3 Incident: Legality and Realpolitik," *Journal of Conflict & Security*, Vol. 9 (2004), p. 30.
98. The general rule is that the military aircraft of one state is not permitted to fly over the territory of the other state without a special invitation. In case of necessity, entry is not to be refused but it has to give a distress signal and land as soon as possible. See Oliver J. Lissitzyn, "The Treatment of Aerial Intruders in Recent Practice and International Law," *American Journal of International Law*, Vol. 47 (1953), pp. 586–589.
99. Dutton, "Caelum Liberam," 7; see also Haiwen Zhang, "Is It Safeguarding the Freedom of Navigation or Maritime Hegemony of the United States? Comments on Raul (Pete) Pedrozo's Article on Military Activities in the EEZ," *Chinese Journal of International Law*, Vol. 9 (2010), p. 37.
100. Exclusive Economic Zone and the Continental Shelf Act, art. 13.
101. Li, "Air Defense Identification Zone", pp. 13–36.

102. "Air Force Patrols of China's ADIZ Legitimate: Spokesman," *Xinhua News*, last modified 29 November 2013, http://www.gov.cn/xwfb/2013-11/29/content_2538624.htm.
103. China and Japan signed on 11 November 1997 a bilateral fishery agreement that entered into force on 1 June 2000. Japan and Taiwan also concluded their own fishery agreement on 10 April 2013 in the midst of rising tensions between China and Japan. See Keyuan Zou, "Sino-Japanese Joint Fishery Management in the East China Sea," *Marine Policy*, Vol. 27 (2003), pp. 125–142. On 18 June 2008, China and Japan reached a consensus to jointly develop gas deposits in the East China Sea thus transform their sea into a sea of "peace, cooperation and friendship" but left maritime boundary delimitation out of the discussion. Ultimately the agreement was not implemented. See Ralf Emmers, *Resource Management and Contested Territories in East Asia* (Basingstoke: Palgrave Macmillan, 2013), p. 42.
104. Ching-Hsiewn Ou and Huan-Sheng Tseng, "The Fishery Agreements and Management Systems in the East China Sea," *Ocean & Coastal Management*, Vol. 53 (2010), pp. 279–288; Clive H. Schofield and Ian Townsend-Gault, "Choppy Waters Ahead in 'A Sea of Peace Cooperation and Friendship'? Slow Progress towards the Application of Maritime Joint Development to the East China Sea," *Marine Policy*, Vol. 35 (2011), pp. 25–33.
105. See Sheila A. Smith, "Japan and the East China Dispute," *Orbis*, Vol. 56 (2012), pp. 370–390.
106. Emmers, *Resource Management and Contested Territories*, p. 36.
107. Carlos Ramos-Mrosovsky, "International Law's Unhelpful Role in the Senkaku Islands," *University of Pennsylvania Journal of International Law*, Vol. 29 (2008), p. 933. See also Wendy N. Duong, "Following the Path of Oil: The Law of the Sea or Realpolitik—What Good Does Law Do in the South China Sea Territorial Conflicts?," *Fordham International Law Journal*, Vol. 30 (2006–2007), pp. 1098–1208.
108. M. Taylor Fravel, "China's Strategy in the South China Sea," *Contemporary Southeast Asia*, Vol. 33 (2011), pp. 299–300.
109. Ehsan M. Ahrari, *The Great Powers versus the Hegemon* (Basingstoke: Palgrave Macmillan, 2011), pp. 36–37.
110. Thomas J. Christensen, "Fostering Stability or Creating a Monster? The Rise of China and U.S. Policy toward East Asia," *International Security*, Vol. 31 (2006), p. 120.
111. Martin Kleiber, "The Chinese Military on a Long March into the 21st Century," in *China: The Rising Power*, edited by Gunther Hauser and Franz Kernic (Frankfurt am Main: Peter Lang, 2009), p. 198.

112. John J. Mearsheimer, "The Gathering Storm: China's Challenge to US Power in Asia," *Chinese Journal of International Politics*, Vol. 3 (2010), p. 383; see also Lyle Goldstein, "Chinese Naval Strategy in the South China Sea: An Abundance of Noise and Smoke, but Little Fire," *Contemporary Southeast Asia*, Vol. 33 (2011), pp. 320–347.
113. "Annual Report to Congress, Military Power of the People's Republic of China 2009," U.S. Department of Defense, at 48 and 18, last accessed 23 December 2015, http://www.defense.gov/pubs/pdfs/China_Military_Power_Report_2009.pdf; "2015 China Defense White Paper," State Council Information Office of the People's Republic of China, last accessed 23 December 2015, <http://eng.mod.gov.cn/Database/WhitePapers/>; Gilbert Rozman, *Chinese Strategic Thought towards Asia* (New York: Palgrave, 2010), p. 263; see also Sun, *Chinese National Security*, p. 22.
114. M. Taylor Fravel, "Power Shifts and Escalation: Explaining China's Use of Force in Territorial Disputes," *International Security*, Vol. 32 (2007–2008), p. 82.
115. Mikael Weissmann, *The East Asian Peace: Conflict Prevention and Informal Peacebuilding* (Basingstoke: Palgrave Macmillan, 2012), p. 112.
116. Xueting Yan and Haixia Qi, "Football Game Rather Than Boxing Match: China-US Intensifying Rivalry Does Not Amount to Cold War," *Chinese Journal of International Politics*, Vol. 5 (2012), p. 109.
117. Barry Buzan, "China in International Society: Is 'Peaceful Rise' Possible?," *Chinese Journal of International Politics*, Vol. 3 (2010), pp. 5–36; see also Srikanth Kondapalli, "Chinese Perceptions of India-Russia-China Triangle: A Preliminary Assessment," *Contemporary India*, Vol. 4 (2005), pp. 75–91.
118. Denny Roy, "The China Threat Issue: Major Arguments," *Asian Survey*, Vol. 36 (1996), pp. 759–764; David Shambaugh, "Containment or Engagement of China: Calculating Beijing's Responses," *International Security*, Vol. 21 (1996), pp. 180–209; Alastair Iain Johnston and Robert S. Ross, eds., *Engaging China: The Management of An Emerging Power* (London: Routledge, 1999); David Shambaugh, "Sino-American Strategic Relations: From Partners to Competitors," *Survival*, Vol. 42 (2000), pp. 97–115; John J. Mearsheimer, "Why China's Rise Will Not Be Peaceful," last modified 17 September 2004, <http://mearsheimer.uchicago.edu/pdfs/A0034b.pdf>; Robert Kagan, *Asia's Cauldron: The South China Sea and the End of a Stable Pacific* (New York: Random House, 2014).
119. David E. Sanger, "In the East China Sea, a Far Bigger Test of Power Looms," *New York Times*, 2 December 2013, A3; Thom Shanker, "U.S. Sends Two B-52 Bombers into Air Zone Claimed by China," *New York Times*, 27 November 2013, A1.
120. Ibid.

121. "Annual Report to Congress: Military and Security Developments Involving the People's Republic of China 2014," U.S. Department of Defense, 5, last accessed 23 December 2015, http://www.defense.gov/pubs/2014_DoD_China_Report.pdf.
122. Landler and Perlez, "China Patrols Air Zone," A16.
123. Kirk Spitzer, "U.S. Flies B-52s to Test China over New Claims to Air Zone," *Wall Street Journal*, 27 November 2013, A8.
124. Ibid.
125. Margaret K. Lewis, "An Analysis of State Responsibility for the Chinese-American Airplane Collision Incident," *New York University Law Review*, Vol. 77 (2002), pp. 1437–1441.
126. Charles Clover and Demetri Sevastopulo, "Beijing Issues Regional Security Plea," *Financial Times*, 5 March 2014, A6.
127. Ong, *China's Security Interests*, p. 14.
128. Achilles Skordas, "Hegemonic Custom?," in *United States Hegemony and the Foundations of International Law*, edited by Michael Byers and Georg Nolte (Cambridge: Cambridge University Press, 2003), p. 344.
129. See also Ken Booth, *Law, Force and Diplomacy at Sea* (New York: Routledge, 2014), p. 191.
130. James E. Baker, *In the Common Defense: National Security Law for Perilous Times* (Cambridge: Cambridge University Press, 2014), p. 206.
131. Heiko Meiertöns, *The Doctrines of US Security Policy: An Evaluation under International Law* (Cambridge: Cambridge University Press, 2010), p. 236.
132. Ruwantissa Abeyratne, "In Search of Theoretical Justification for Air Defence Identification Zones," *Journal of Transportation Security*, Vol. 1 (2011), p. 3.
133. UNCLOS, arts. 88, 301, preamble.
134. See UN Charter, arts. 2(4), 51; *Id.*, art. 301.
135. UN Secretary-General, "General and Complete Disarmament: Study on the Naval Arms Race, Report of the Secretary-General," UN Doc. A/40/535, para. 188 (1985). Reproduced in *NILOS Yearbook 1* (Leiden: Brill, 1985), 11.
136. Cuadra, "Air Defense Identification Zones," p. 503.
137. Mel Gurtov and Byong-Moo Hwang, *China's Security: The New Roles of the Military* (Boulder, CO: Lynne Rienner, 1998), p. 133.
138. Byers, *Custom, Power and the Power of Rules*, p. 152.

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