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The Bull in the China Shop: Raising Tensions in the Asia-Pacific Region

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*When you see a rattlesnake poised to strike,
you do not wait until he has struck before you crush him.*
President Franklin Delano Roosevelt (1941)**

I. INTRODUCTION

Within the span of six weeks, the People's Republic of China (PRC) took a series of illegal and provocative actions in the East and South China Seas that raised eyebrows in capitals around the world and further contributed to the deteriorating security situation in the Asia-Pacific region. On November 23, 2013, China unexpectedly declared an air defense identification zone (ADIZ) over a large portion of the East China Sea that overlaps portions of the South Korean and Japanese ADIZs. Both ADIZs have been in existence since 1951.¹ Two weeks later, on December 5, 2013, a

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**President Franklin Delano Roosevelt, *Fireside Chat to the Nation*, Sept. 11, 1941.

People's Liberation Army Navy (PLAN) warship intentionally crossed the bow of the USS *Compens* (CG-63) and came to a full stop, forcing the U.S. warship to take evasive action to avoid a collision. The following month, China began enforcing new regulations that purport to require foreign fishing vessels to obtain prior approval from Chinese authorities to operate in over 2 million square kilometers of ocean space in the South China Sea over which Hainan Province asserts jurisdiction.

Each of these measures is designed to alter the status quo in the East and South China Seas and bring China one step closer to achieving its “salami-slicing”² campaign to gain effective control over events in what it calls the “Near Seas.” These acts also demonstrate Beijing’s long-standing disdain for the post-war international system—a system it had no role in shaping. In addition, they show a need to upset what China views as a Western-dominated legal system in order to bolster its anti-access/area denial (A2/AD) strategy,³ and to provide a firmer legal basis to challenge U.S. military activities in and over its exclusive economic zone (EEZ).

Although the nations most directly affected by the new measures—Japan, the Philippines, South Korea (ROK) and Vietnam—have strongly condemned China’s provocative actions, reactions by the United States and other regional States have been mixed. This paper examines the legality of China’s recent endeavors to change the status quo through threats and in-

1. The zone includes the airspace within the area enclosed by China’s outer limit of the territorial sea and the following six points: 33°11’N (North Latitude) and 121°47’E (East Longitude), 33°11’N and 125°00’E, 31°00’N and 128°20’E, 25°38’N and 125°00’E, 24°45’N and 123°00’E, 26°44’N and 120°58’E. Statement by the Government of the People’s Republic of China on Establishing the East China Sea Air Defense Identification Zone (Nov. 23, 2013), http://news.xinhuanet.com/english/china/2013-11/23/c_132911635.htm [hereinafter Chinese Government Statement on Identification].

2. China’s “salami-slicing” campaign “involves a steady progression of small actions, none of which serves as a *casus belli* by itself, yet which over time lead cumulatively to a strategic transformation in China’s favor.” Brahma Chellaney, *China’s Salami-Slicing Strategy*, THE JAPAN TIMES (July 25, 2013), <http://www.japantimes.co.jp/opinion/2013/07/25/commentary/chinas-salami-slice-strategy/#.UwzIDvldV8F>.

3. Adm. Jonathan Greener, *Projecting Power, Assuring Access*, THE OFFICIAL BLOG OF THE CHIEF OF NAVAL OPERATIONS (May 10, 2012) <http://cno.navylive.dodlive.mil/2012/05/10/projecting-power-assuring-access/> (“A goal of an A2AD strategy is to make others believe it can close off international airspace or waterways and that U.S. military forces will not be able (or willing to pay the cost) to reopen those areas or come to the aid of our allies and partners. In peacetime, this gives the country with the A2AD weapons leverage over their neighbors and reduces U.S. influence. In wartime, A2AD capabilities can make U.S. power projection more difficult.”).

timidation. It concludes with recommendations of responses that the United States and other States can employ to resist China's destabilizing activities in the region.

II. AIR DEFENSE IDENTIFICATION ZONES

According to the Ministry of National Defense (MND), China's new ADIZ over the East China Sea was established to protect PRC sovereignty and territorial and airspace security, as well as maintain flying order.⁴ All aircraft entering the zone purportedly must comply with the *Aircraft Identification Rules* and provide the following information:

1. Flight plan identification. Aircraft flying in the East China Sea Air Defense Identification Zone should report the flight plans to the Ministry of Foreign Affairs of the People's Republic of China or the Civil Aviation Administration of China.
2. Radio identification. Aircraft flying in the East China Sea Air Defense Identification Zone must maintain the two-way radio communications, and respond in a timely and accurate manner to the identification inquiries from the administrative organ of the East China Sea Air Defense Identification Zone or the unit authorized by the organ.
3. Transponder identification. Aircraft flying in the East China Sea Air Defense Identification Zone, if equipped with the secondary radar transponder, should keep the transponder working throughout the entire course.
4. Logo identification. Aircraft flying in the East China Sea Air Defense Identification Zone must clearly mark their nationalities and the logo of their registration identification in accordance with related international treaties.⁵

Additionally, aircraft operating in the ADIZ are required to follow the instructions of the administrative organ of the zone—the PRC MND. Aircraft that do not cooperate with the identification procedures or follow the

4. *China Exclusive: Defense Ministry Spokesman Responds to Air Defense Identification Zone Questions*, XINHUA NEWS AGENCY (Nov. 23, 2013), http://news.xinhuanet.com/english/china/2013-11/23/c_132912145.htm [hereinafter *China Exclusive*].

5. *Announcement of the Aircraft Identification Rules for the East China Sea Air Defense Identification Zone of the P.R.C.*, XINHUA NEWS AGENCY (Nov. 23, 2013), http://news.xinhuanet.com/english/china/2013-11/23/c_132911634.htm.

instructions of the MND will be subject to undefined “defensive emergency measures.”⁶ The MND spokesman stated, however, that the establishment of the zone does not change the “legal nature of relevant airspace” and that “normal flight of international flights in the zone” would not be affected.⁷

The PRC declaration drew an immediate and sharp protest from the Japanese Ministry of Foreign Affairs (MOFA). The protest emphasized that the ADIZ was “totally unacceptable as it included the Japanese territorial airspace over the Senkaku Islands” and that “China’s unilateral establishment of . . . [the zone] was extremely dangerous as it could unilaterally escalate the situation surrounding the Senkaku Islands and lead to an unexpected occurrence of accidents in the airspace.”⁸ The following day, Japan’s Minister of Foreign Affairs, Fumio Kishida, issued a strongly worded statement condemning the PRC declaration, indicating that the establishment of the zone unilaterally changes the status quo and “may cause unintended consequences in the East China Sea.”⁹ The Foreign Minister further emphasized that the new zone unduly infringes “freedom of flight in international airspace, which . . . will have serious impacts . . . on the order and safety of civil aviation.”¹⁰ The Minister’s statement also rejected any implication that the airspace over the Senkaku Islands was Chinese territorial airspace, and demanded that China “revoke any measures that could infringe upon the freedom of flight in international airspace.”¹¹ Minister Kishida concluded by stating that Japan would “respond firmly, but in a calm manner against China’s attempt to unilaterally alter the status quo by coercive measures with determination to defend resolutely its territorial land, sea and airspace.”¹²

6. *Id.*

7. *China Exclusive*, *supra* note 4.

8. Protest by Mr. Junichi Ihara, Director-General of the Asian and Oceanian Affairs Bureau, MOFA, to Mr. Han Zhongqing, Minister of the Chinese Embassy in Japan, China’s Establishment of an Air Defense Identification Zone in the East China Sea (Nov. 23, 2013), http://www.mofa.go.jp/press/release/press4e_000100.html.

9. Statement by the Japanese Minister for Foreign Affairs on the Announcement on the “East China Sea Air Defense Identification Zone” by the Ministry of National Defense of the People’s Republic of China (Nov. 24, 2013), http://www.mofa.go.jp/press/release/press4e_000098.html.

10. *Id.*

11. *Id.*

12. *Id.*

The PRC declaration prompted a similar reaction from South Korea. The ROK Ministry of Defense (MOD) “expressed concern that China’s latest move was heightening military tension in the region.”¹³ ROK Vice Defense Minister Baek Seung-joo also conveyed Seoul’s “strong regret” that the Chinese ADIZ included airspace over Socotra Rock (Jeodo/Suyan Rock), which is controlled by South Korea, and the Japanese-administered Senkaku (Diaoyu) Islands.¹⁴ Vice Minister Baek emphasized that South Korea did not recognize the zone and demanded that China amend its boundaries, particularly the area that overlaps the ROK ADIZ west of Jeju Island.¹⁵ Two weeks later, on December 8, South Korea extended its ADIZ 186 miles to the south to correspond with the boundaries of the pre-existing ROK flight information region.¹⁶

Unlike China, however, ROK authorities consulted with China, Japan and the United States before announcing the ADIZ expansion.¹⁷ The United States commended South Korea for speaking with its neighbors prior to adjusting its ADIZ and for its commitment to implementing the zone “in a manner consistent with international practice and respect for the freedom of overflight and other internationally lawful uses of international airspace.”¹⁸

13. *S Korea Protests against China Air Identification Zone* (Press TV broadcast Nov. 28, 2013), <http://www.presstv.com/detail/2013/11/28/337125/s-korea-protests-at-china-air-zone/>.

14. Both China and South Korea claim jurisdiction over the sea area and sea bed around Socotra Rock. *Id.*

15. *Id.*

16. Choe Sang-Hun, *South Korea Announces Expansion of its Air Defense Zone*, THE NEW YORK TIMES (Dec. 9, 2013), http://www.nytimes.com/2013/12/09/world/asia/east-china-sea-air-defense-zone.html?_r=0.

17. *Id.* The expanded zone took effect on December 15, 2013. Japan indicated that it does not object to the ROK expansion. *Japan OKs South Korea’s Expanded Air Defense Zone*, JAPAN DAILY PRESS (Dec. 9, 2013), <http://japandailynews.com/japan-oks-south-koreas-expanded-air-defense-zone-0940672/>. China, on the other hand, expressed “regret” over the ROK’s decision. Hong Lei, Foreign Ministry Spokesperson, Hong Lei’s Regular Press Conference (Dec. 9, 2013), <http://www.fmprc.gov.cn/eng/xwfw/s2510/2511/t1107035.shtml>. See also *China Regrets ROK Air Zone Expansion*, PEOPLE’S DAILY (Dec. 9, 2013), <http://english.peopledaily.com.cn/90883/8479206.html>.

18. Jen Psaki, Spokesperson, U.S. Department of State Daily Press Briefing, Dec. 9, 2013, <http://www.state.gov/r/pa/prs/dpb/2013/12/218531.htm#CHINA>. See also Chico Harlan, *South Korea will Expand its Air Defense Zone, Defense Ministry Says*, THE WASHINGTON POST (Dec. 8, 2013), http://www.washingtonpost.com/world/south-korea-will-expand-its-air-defense-zone-defense-ministry-says/2013/12/08/ead68fa-5fd8-11e3-8d24-31c016b976b2_story.html.

In further defiance of the Chinese declaration, Japanese and South Korea military aircraft conducted a series of operational challenges of the newly established ADIZ several days after the PRC announcement. On November 26, a ROK reconnaissance aircraft penetrated the PRC ADIZ in the vicinity of Socotra Rock without providing prior notification to Chinese authorities.¹⁹ That same day, Japanese Self Defense Force (JSDF) aircraft conducted an unannounced reconnaissance mission over the contested Senkaku Islands.²⁰ A week later, the ROK Navy carried out a search and rescue (SAR) exercise in the waters around Socotra Rock—two P-3C maritime patrol aircraft and an Aegis-class destroyer (*Yulgok Yi I* (DDG 992)) participated in the operation.²¹ Then on December 12, the ROK Navy and the Japanese Maritime Self Defense Force (JMSDF) conducted a joint maritime SAR exercise within the PRC ADIZ. The exercise included the use of helicopters in the ADIZ without notice to Chinese authorities.²² Both Seoul and Tokyo have also instructed Korean and Japanese civil aircraft to not file flight plans with Chinese authorities as required by the new regulations.²³

International law does not prohibit nations from establishing an ADIZ in international airspace adjacent to their national airspace.²⁴ In fact, as China correctly points out, a number of nations, including the United

19. *Japanese and South Korean Aircraft Enter Chinese ADIZ*, WANT CHINA TIMES (Nov. 29, 2013), <http://www.wantchinatimes.com/news-subclass-cnt.aspx?id=20131129000064&cid=1101>.

20. *Id.*

21. Of note, South Korea requested permission from Japan for the two P-3C aircraft to cross into the Japanese ADIZ. Zachary Keck, *South Korea Conducts Military Drill in China's ADIZ*, THE DIPLOMAT (Dec. 4, 2013), <http://thediplomat.com/2013/12/south-korea-conducts-military-drill-in-chinas-adiz/>.

22. *Japan, S. Korea Hold Joint Sea Drill in China Air Zone*, AGENCE FRANCE-PRESSE (Dec. 12, 2013), <http://www.ndtv.com/article/world/japan-south-korea-hold-joint-sea-drill-in-china-air-zone-457933>.

23. Thom Shanker, *U.S. Sends Two B-52 Bombers Into Air Zone Claimed by China*, THE NEW YORK TIMES (Nov. 26, 2013), http://www.nytimes.com/2013/11/27/world/asia/us-flies-b-52s-into-chinas-expanded-air-defense-zone.html?_r=0; Julian Barnes, Yuka Hayashi & Jeremy Page, *Stakes Escalate For Biden in Beijing*, THE WALL STREET JOURNAL (Dec. 4, 2013), <http://online.wsj.com/news/articles/SB1000142405270230457940457923665294784406>.

24. JAMES KRASKA & RAUL PEDROZO, INTERNATIONAL MARITIME SECURITY LAW, § 6.4.2.1 (2013); U.S. DEPARTMENT OF THE NAVY & DEPARTMENT OF HOMELAND SECURITY, NWP 1-14M/MCWP 5-12/COMDTPUB P5800.7A, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 2.7.2.3 (2007) [hereinafter NWP 1-14M].

States,²⁵ Japan²⁶ and South Korea,²⁷ have established ADIZs in international airspace off their coasts.²⁸ Even the International Civil Aviation Organization (ICAO) recognizes the existence of such zones, describing the term in Annex 15 of the Chicago Convention.²⁹

The United States defines an ADIZ as “an area of airspace over land or water in which the ready identification, location, and control of all aircraft (except for Department of Defense and law enforcement aircraft) is required in the interest of national security.”³⁰ The legal basis for creating such zones is that States enjoy the right to establish reasonable conditions of entry into their land territory.³¹ Thus, the legal theory for an ADIZ is analogous to imposition of conditions of port entry for ships entering into

25. The United States established the first ADIZ (in conjunction with Canada) in 1950 and currently maintains four such zones: Contiguous U.S. ADIZ (14 C.F.R. § 99.43 (2004)), Alaska ADIZ (14 C.F.R. § 99.45 (2004)), Guam ADIZ (14 C.F.R. § 99.47 (2004)), and Hawaii ADIZ (14 C.F.R. § 99.49 (2004)). See Directing the Secretary of Commerce to Exercise Security Control Over Aircraft In Flight, Exec. Order No. 10197, *reprinted in* 15 Fed. Reg. 9180 (Dec. 22, 1950).

26. The Japanese ADIZ was originally established by the United States in 1951 during its post-war occupation of Japan. Management of the zone was transferred to Japan in 1969. The zone was expanded in 1972 and in 2010. MARK MANYIN, CONG. RESEARCH SERVICE, R42761, SENKAKU (DIAOYU/DIAOYUTAI) ISLANDS DISPUTE: U.S. TREATY OBLIGATIONS, 4-5 (2013); Shih Hsiu-chuan, *Japan Extends ADIZ into Taiwan Space*, TAIPEI TIMES (June 26, 2010), <http://www.taipetimes.com/News/front/archives/2010/06/26/2003476438>.

27. The United States also established the South Korean ADIZ in 1951 during the Korean War.

28. Hua Chunying, Spokesperson, People’s Republic of China, Ministry of Foreign Affairs, Regular Press Conference, Dec. 18, 2013, <http://www.fmprc.gov.cn/eng/xwfw/s2510/2511/t1110094.shtml>.

29. An ADIZ is defined “as a special designated airspace of defined dimensions within which aircraft are required to comply with special identification and/or reporting procedures that supplement those related to civil air traffic services (ATS).” Convention on International Civil Aviation, Dec. 7, 1944, 15 U.N.T.S. 295, Annex 15, International Standards and Recommended Practices, Aeronautical Information Services, § 1.1 (14th ed. July 2013) [hereinafter Chicago Convention].

30. Definitions 14 C.F.R. § 99.3 (2004).

31. Chicago Convention, *supra* note 29, art. 1 (providing that “every State has complete and exclusive sovereignty over the airspace above its territory.”). For purposes of the Convention the territory of a State includes the “land area and territorial waters adjacent thereto under the sovereignty . . . of such State.” *Id.*, art. 2. See also United Nations Convention on the Law of the Sea art. 2, Dec. 10, 1982, 1883 U.N.T.S. 397 [hereinafter UNCLOS] (“The sovereignty of a coastal State . . . extends to the air space over the territorial sea.”).

port or traversing internal waters.³² An aircraft approaching national airspace may therefore be required to identify itself even while in international airspace, but only as a condition of entry approval.

U.S. domestic rules implementing ADIZ requirements are contained in Chapter 5 of the *Federal Aviation Administration's Aeronautical Information Manual* (AIM).³³ The ADIZ regulations call for aircraft intending³⁴ to enter U.S. national airspace to file flight plans and provide periodic reports.³⁵ Civil aircraft operating within a U.S. ADIZ must also “have a functioning two-way radio, and the pilot must maintain a continuous listening watch on the appropriate aeronautical facility's frequency.”³⁶ Foreign civil aircraft may not enter the United States through an ADIZ unless the pilot makes the required reports or “reports the position of the aircraft when it is not less than one hour and not more than 2 hours average direct cruising distance from the United States.”³⁷

If nations may legally establish an ADIZ under international law, then why is there so much fuss over the Chinese declaration? Clearly, China's establishment of an ADIZ in international airspace is not in and of itself illegal. The manner in which Beijing made its announcement, and the way in which it intends to implement and enforce the new zone, however, are problematic.

To begin, the new Chinese zone overlaps with the pre-existing Japanese and the ROK ADIZs. Prior to Beijing's unprecedented declaration, no other ADIZ has crossed over into that of another nation.³⁸ The Chinese ADIZ also encompasses the airspace over Socotra Rock and the Senkakus, both of which are in dispute with South Korea and Japan, respectively.

32. KRASKA & PEDROZO, *supra* note 24, § 6.4.2.1. *See also* UNCLOS, *supra* note 31, art. 25(2).

33. 14 C.F.R. §§ 99.1–99.49 (2004); Department of Transportation, Federal Aviation Administration, *Aeronautical Information Manual* (2010), chap. 5, sec. 6 (current as of Nov. 29, 2013) [hereinafter AIM].

34. AIM, *supra* note 33, sec. 5-6-1(b) (“All aircraft entering domestic U.S. airspace from points outside must provide for identification prior to entry.” *Emphasis added*).

35. ADIZ flight plan requirements 14 C.F.R. §§ 99.11 (2004) and Position Reports 14 C.F.R. § 99.15 (2004); AIM, *supra* note 33, sec. 5-6-1(c)(1) & 5-6-1(1)(c)(4).

36. 14 C.F.R. §§ 99.9 and 99.13; AIM, *supra* note 33, sec. 5-6-1(c)(2) & 5-6-1(1)(c)(3).

37. 14 C.F.R. §§ 99.15(c) (2004); AIM, *supra* note 33, sec. 5-6-1(c)(4)(c).

38. Japan extended its ADIZ in 2010 to include its national airspace around Yonaguni Island, plus a two mile buffer zone. The result is a small overlap with Taiwan's Flight Information Region (FIR). Hsiu-chuan, *supra* note 26.

Normally, States do not establish ADIZs over contested territory.³⁹ Given the heightened tensions between China, Japan and South Korea over these contested features, a responsible State actor, particularly one that aspires to be a regional (if not a world) power, should at the very least have consulted with its neighbors prior to making the declaration. By failing to consult with Tokyo and Seoul, China's unilateral and escalatory action was perceived by Japan and the ROK (and others) as further evidence of PRC efforts to change the status quo in the East China Sea through coercion, thereby increasing tensions in the region and the risk of miscalculation.⁴⁰

Most egregiously, the new Chinese ADIZ procedures apply to all aircraft transiting the zone, regardless of whether they intend to enter Chinese national airspace. Nations, including Japan and South Korea, may only apply their ADIZ procedures to aircraft that intend to enter national airspace.⁴¹ The United States does not "support efforts by any State to apply its ADIZ procedures to foreign aircraft not intending to enter its national airspace" nor does the United States apply "its ADIZ procedures to for-

39. Japan, for example, did not extend its ADIZ to include the airspace over the Kuril Islands, which are claimed by Japan, but have been controlled by Russia since the end of World War II. Reiji Yoshida, *Tokyo has no Gripe with Seoul's Expanded ADIZ*, THE JAPAN TIMES (Dec. 10, 2013), http://www.japantimes.co.jp/news/2013/12/09/national/tokyo-has-no-gripe-with-seouls-expanded-adiz/#.Uv022_lDV8E. Japan has also not established an ADIZ in the airspace around Tokdo/Takeshima Island, which is claimed by both Japan and South Korea. *Biden's Pacific 'Status Quo'*, THE WALL STREET JOURNAL, Dec. 5, 2013.

40. John Kerry, Secretary of State, Statement on the East China Sea Air Defense Identification Zone (Nov. 23, 2013), <http://www.state.gov/secretary/remarks/2013/11/218013.htm> [hereinafter Kerry Statement] ("China's . . . unilateral action constitutes an attempt to change the status quo in the East China Sea. Escalatory action will only increase tensions in the region and create risks of an incident."). See also Chuck Hagel, Secretary of Defense, Statement on the East China Sea air Defense Identification Zone (Nov. 23, 2013), <http://www.defense.gov/releases/release.aspx?releaseid=16392> [hereinafter Hagel Statement on East China Sea] ("The United States . . . view this development as a destabilizing attempt to alter the status quo in the region. The unilateral action increases the risk of misunderstanding and miscalculations.").

41. Jeremy Page, *How the North American Air Defense Identification Zone Works*, THE WALL STREET JOURNAL (Nov. 27, 2013), <http://blogs.wsj.com/chinarealtime/2013/11/27/how-the-north-american-air-defense-identification-zone-works/>; Tetsushi Kajimoto & Ju-Min Park, *Japan, South Korean Military Planes Defy China's New Defence Zone*, REUTERS (Nov. 28, 2013), <http://www.reuters.com/article/2013/11/28/us-japan-china-idUSBRE9AR0AH20131128>.

eign aircraft not intending to enter U.S. national airspace.”⁴² U.S. military aircraft not planning to enter foreign national airspace are specifically instructed not to identify themselves or otherwise comply with ADIZ procedures established by other nations.⁴³ To that end, Secretary of Defense Hagel stated on November 23, 2013, that the PRC announcement would “not in any way change how the United States conducts military operations in the region.”⁴⁴ Three days later, two U.S. B-52 long-range bombers stationed in Guam flew through the PRC ADIZ without filing a flight plan or providing prior notification to Chinese authorities. The mission “was a demonstration of long-established international rights to freedom of navigation and transit through international airspace.”⁴⁵ The United States has additionally increased its surveillance operations in the newly declared ADIZ.⁴⁶

42. Kerry Statement, *supra* note 40; Chuck Hagel & Martin Dempsey, Secretary of Defense and Chairman of the Joint Chief of Staff, U.S. Department of Defense Press Briefing by Secretary Hagel and General Dempsey in the Pentagon Briefing Room (Dec. 4, 2013), <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=5335> (SEC. HAGEL: “[I]t’s not that the ADIZ itself is new or unique. The biggest concern that we have is how it was done so unilaterally and so immediately without any consultation or international consultation. That’s not a wise course of action to take for any country.” GEN. DEMPSEY: “[I]t wasn’t the declaration of the ADIZ that actually was destabilizing. It was their assertion that they would cause all aircraft entering the ADIZ to report regardless of whether they were intending to enter into the sovereign airspace of China. And that is destabilizing.”). See also KRASKA & PEDROZO, *supra* note 24, § 6.4.2.1 (“For example, in March and May 2008, U.S. F-15 fighter aircraft intercepted Russian Tu-95 Bear heavy bombers in the Alaska ADIZ. After a fifteen-year lapse, Russia restarted its bomber surveillance flights in the Arctic in 2007. In the representative cases that occurred in 2008, when it was determined that the Russian bombers were on a training flight and did not intend to enter U.S. national airspace, they were allowed to continue on their mission without harassment or interference from the U.S. aircraft.”). Rowan Scarborough, *Russian Flights Smack of Cold War*, WASHINGTON TIMES (June 26, 2008), <http://www.washingtontimes.com/news/2008/jun/26/russian-flights-smack-of-cold-war/?page=all>; NWP 1-14M, *supra* note 24, § 2.7.2.3.

43. U.S. Department of Defense, DOD Instruction, 4540.01, Use of International Airspace by U.S. Military Aircraft and for Missile/Projectile Firings, ¶ 6.4 (2007), available at <http://www.dtic.mil/whs/directives/corres/pdf/454001p.pdf> (Department of Defense guidance states that U.S. “military aircraft transiting through a foreign ADIZ without intending to penetrate foreign sovereign airspace are not required to follow . . . [ADIZ] procedures.”).

44. Hagel Statement on East China Sea, *supra* note 40.

45. Shanker, *supra* note 23.

46. *U.S. Navy Increasing Surveillance In China’s ADIZ*, NHK (JAPAN BROADCASTING CORPORATION), Jan. 11, 2014.

Despite statements by the PRC that it has “followed common international practices in the establishment of the zone” and that the zone “will not affect the freedom of flight in relevant airspace,”⁴⁷ China’s application of its ADIZ regulations to transiting aircraft that do not intend to enter Chinese national airspace violates international law. All nations are guaranteed freedom of overflight in international airspace seaward of the territorial sea.⁴⁸ China may not, consistent with time-honored freedoms of navigation and overflight, condition transits through international airspace on pre-notification to PRC authorities.

Although the initial U.S. response to China’s declaration was firm and timely, subsequent actions by the United States demonstrate that Washington does not have a cohesive strategy to respond to China’s increasing aggressiveness in the Near Seas. Despite stating that the United States does not support efforts by any nation to apply its ADIZ procedures to foreign aircraft not intending to enter its national airspace, on November 29, 2013, the Federal Aviation Administration (FAA) issued a notice to airmen (NOTAM) instructing U.S. civil aircraft to comply with China’s ADIZ reporting requirements.⁴⁹

The Administration attempted (albeit unconvincingly) to explain away the inconsistency in U.S. policy as a safety precaution, reaffirming that the FAA’s decision to issue the NOTAM should not be construed as U.S. acceptance of the PRC ADIZ.⁵⁰ The White House Press Secretary even went so far as to say that “contrary to prior reporting, the FAA did not issue

47. Chinese Government Statement on Identification, *supra* note 1.

48. UNCLOS, *supra* note 31, arts. 58(1) & 87(1)(b).

49. U.S. Department of Transportation, Federal Aviation Administration, Notice to Airmen (NOTAM), A1916/13 [hereinafter NOTAM A1916/13], <https://pilotweb.nas.faa.gov/PilotWeb/notamRetrievalByICAOAction.do?method=displayByICAOs&reportType=RAW&formatType=DOMESTIC&retrieveLocId=UKFB&actionType=notamRetrievalByICAOs>.

50. Jen Psaki, Spokesperson, U.S. Department of State Daily Press Briefing, Dec. 2, 2013, <http://www.state.gov/r/pa/prs/dpb/2013/12/218178.htm#CHINA> (“for safety and security of passengers, U.S. carriers operate . . . consistently . . . with the notices to airmen issued by foreign countries, as is the case in this case. Their concerns are about the safety and security of passengers. That is different from what the U.S. government policy is. It . . . in no way indicates U.S. Government acceptance of China’s requirements in the newly declared ADIZ and has absolutely no bearing on the firm and consistent U.S. Government position that we do not accept the legitimacy of China’s requirements.”). *See also* Jay Carney, Press Secretary, The White House, Press Briefing (Dec. 2, 2013), <http://www.whitehouse.gov/the-press-office/2013/12/02/press-briefing-press-secretary-jay-carney-1222013>.

guidance to U.S. carriers with regard to the specific Chinese notice to air-
men.”⁵¹ This statement was either an intentional attempt by the Admin-
istration to mislead the American public or a complete failure in communi-
cation and coordination within the Interagency—the FAA NOTAM spe-
cifically refers to the “Regulations Regarding Flight Plan Submission in the
East China Sea . . . ADIZ of People’s Republic of China” and instructs
U.S. carriers to submit the required flight plans to the “Air Traffic Control
Department of CAAC [Civil Aviation Administration of China].”⁵²

In any event, the decision to require U.S. civilian airlines to comply
with the PRC ADIZ reporting procedures, for whatever reason, under-
mines Japanese and South Korean efforts to defy China’s illegal require-
ments and emboldens Beijing’s increasingly coercive and provocative ef-
forts to change the status quo in the East China Sea. Rather than taking an
opportunity to strengthen international law of freedom of overflight in the
oceans, the United States blinked. The U.S. decision is perceived (rightly or
wrongly) by others as a tacit recognition of China’s claim. In this regard, as
of December 2013, 55 civilian airlines from 19 countries, including Austral-
ia, Singapore and Thailand, have followed the U.S. lead and are complying
with China’s illegal ADIZ requirements.⁵³ Game, set, match to China.

III. MILITARY ACTIVITIES BEYOND THE TERRITORIAL SEA⁵⁴

On December 5, 2013, the USS *Compens* (CG-63) was lawfully conducting
surveillance of the PLAN aircraft carrier *Liaoning* in international waters in

51. Jay Carney, Press Secretary, The White House, Press Briefing (Dec. 3, 2013),
<http://www.whitehouse.gov/the-press-office/2013/12/04/press-briefing-press-secretary-1232013>.

52. NOTAM A1916/13, *supra* note 49.

53. R. S. Kalha, *China’s ADIZ: A Case of an Overreach?* (Institute of Defence Studies
and Analyses, IDSA Comment, Dec. 10, 2013), http://www.idsa.in/idsacomments/ChinaasADIZOverreach_rskalha_101213; Dylan Loh Ming Hui, *China’s ADIZ over East China
Sea: Implications for ASEAN*, RSIS COMMENTARIES, No. 232/2013, Dec. 19, 2013; Mark
Landler, *Biden Urges Restraint by China in Airspace Dispute*, THE NEW YORK TIMES, Dec. 4,
2013), http://www.nytimes.com/2013/12/05/world/asia/biden-arrives-in-china-seeking-restraint-from-beijing.html?_r=0.

54. For a detailed discussion on the right to conduct military activities in the EEZ, see
Raul Pedrozo, *Preserving Navigational Rights and Freedoms: The Right to Conduct Military Activi-
ties in China’s Exclusive Economic Zone*, 9 CHINESE JOURNAL OF INTERNATIONAL LAW 9–29
(2010); Raul Pedrozo, *Responding to Ms. Zhang’s Talking Points on the EEZ*, 10 CHINESE
JOURNAL OF INTERNATIONAL LAW 207–23 (2011) [hereinafter Pedrozo, *Responding to Ms.
Zhang*].

the South China Sea. When *Compens* was within 45 kilometers (km)/28 miles of the carrier, it was hailed by a PLAN warship and asked to leave the area. After *Compens* ignored the warning, a PLAN Amphibious Dock Ship intentionally crossed the bow of the U.S. warship at a distance of less than 100 yards and came to a full stop, forcing *Compens* to take evasive action to avoid a collision.⁵⁵ The matter was ultimately resolved without further incident after the Commanding Officer of the *Compens* spoke directly with the Commanding Officer of the *Liaoning* through bridge-to-bridge communications.⁵⁶ After a brief conversation, the PLAN warship and the *Compens* departed the area.⁵⁷

Several days later, both sides confirmed that the event occurred, but initially downplayed the significance of the incident. A short statement issued by the U.S. Pacific Fleet (PACFLT) on December 12 indicated that the *Compens* was “lawfully operating in international waters in the South China Sea” when it encountered the PLAN vessel and was forced to maneuver “to avoid a collision.”⁵⁸ The statement also highlighted “the need to ensure the highest standards of professional seamanship, including communications between vessels, to mitigate the risk of an unintended incident or mishap.”⁵⁹ The State Department additionally confirmed that a diplomatic protest had been filed at the highest level with the Chinese government.⁶⁰ Surprisingly, other DOD officials indicated that the occurrence was not immediately reported because “DOD didn’t view it as an incident that warranted making an announcement” and praised the manner in which the encounter was resolved as “a testament to the mil-to-mil relationships that

55. Carl Thayer, *USS Compens Incident Reveals Strategic Mistrust Between U.S. and China*, THE DIPLOMAT (Dec. 17, 2013), <http://thediplomat.com/2013/12/uss-cowpens-incident-reveals-strategic-mistrust-between-u-s-and-china/>.

56. Jon Harper, *DOD Downplays South China Sea Incident Involving USS Compens and Chinese Warship*, STARS AND STRIPES (Dec. 16, 2013), <http://www.stripes.com/news/pacific/dod-downplays-south-china-sea-incident-involving-uss-cowpens-and-chinese-warship-1.257958> [hereinafter Harper, *DOD Downplays*].

57. *Captains’ Radio Chat Averted Near-Collision between Liaoning, USS Compens*, SOUTH CHINA MORNING POST (Dec. 17, 2013), http://article.wn.com/view/2013/12/17/Captains_radio_chat_averted_nearcollision_between_Liaoning_U/.

58. Jon Harper, *Chinese Warship Nearly Collided with USS Compens*, STARS AND STRIPES (Dec. 13, 2013), <http://www.stripes.com/news/pacific/chinese-warship-nearly-collided-with-uss-cowpens-1.257478>.

59. *Id.*

60. *Id.*

we've begun to develop with the Chinese over the last several years.”⁶¹ Even Admiral Samuel Locklear, Commander, U.S. Pacific Command, was hesitant to label the Chinese behavior as “dangerous,” choosing instead to characterize the incident as “unnecessary and probably more unprofessional.”⁶² The Admiral added that lack of experience on the part of the PLAN captain and the obvious language barrier between the two crews were contributing factors in the incident.

Chinese officials echoed U.S. statements, indicating that the captains of the *Liaoning* and *Compens* spoke “professionally” on the radio during the encounter to peacefully resolve the issue and that both sides had discussed the matter “through normal channels and carried out effective communications.”⁶³ The Defense Ministry (MND) statement also praised U.S.-China mil-to-mil relations, asserting that “relations between the Chinese and US militaries enjoy excellent prospects for development and both sides are willing to boost communication, coordinate closely, and work to maintain regional peace and stability.”⁶⁴ Chinese media additionally reported that the PLAN would still participate in the annual U.S.-led Rim of the Pacific (RIMPAC) exercise off the Hawaiian Islands despite the December 5 confrontation.⁶⁵

Although the MND (like DOD) downplayed the incident, Chinese officials were quick to defend the actions of their warship, stating that the captain “appropriately handled the matter in strict accordance with operational procedures.”⁶⁶ Similarly, a spokeswoman for the Foreign Ministry (MFA) made the incredulous statement that the PLAN’s actions were con-

61. Harper, *DOD Downplays*, *supra* note 56 (Pentagon spokesman Colonel Steve Warren stated that “I don’t think it was a crisis-level incident by any stretch . . . I don’t believe tensions have heightened.”).

62. Admiral Samuel J. Locklear III, U.S. Department of Defense Press Briefing by Admiral Locklear in the Pentagon Briefing Room (Jan. 23, 2013), <http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=5354>.

63. Zhuang Pinghui, *Carrier Commander Spoke to US Ship Captain after Near Collision*, SOUTH CHINA MORNING POST (Dec. 17, 2013), <http://www.scmp.com/news/china/article/1384040/carrier-commander-spoke-us-ship-captain-after-near-collision>; *After Sea Incident, China Praises Ties with US*, ASSOCIATED PRESS (Dec. 18, 2013), <http://bigstory.ap.org/article/after-sea-incident-china-praises-ties-us> [hereinafter *After Sea Incident*].

64. *After Sea Incident*, *supra* note 63.

65. *PLA Will Take Part in RIMPAC Despite Naval Confrontation with US*, WANT CHINA TIMES (Dec. 18, 2013), <http://www.wantchinatimes.com/news-subclass-cnt.aspx?id=20131218000147&cid=1101>.

66. *After Sea Incident*, *supra* note 63.

sistent with “international law and the freedoms of normal navigation and overflight.”⁶⁷

The MND justified the PLAN warship’s actions on several grounds. First, *Compens* should have been aware that it was entering a restricted navigation zone because the China Maritime Safety Administration (MSA) had previously issued a notice to mariners (NOTMAR) announcing the exercise area between December 3 and January 3. Second, when *Compens* entered the exercise area, it ignored warnings from the PLAN warship to leave the restricted zone. Third, after *Compens* crossed into the 45 km inner defense layer of the Chinese formation, it was determined that *Compens* posed a threat to the security of the carrier, prompting the PLAN warship to maneuver to prevent further penetration of the defensive perimeter by the U.S. warship.⁶⁸ Finally, Chinese media additionally charged that *Compens* was “tailing” and “harassing” the Chinese formation and that it took “offensive actions” towards the *Liaoning*.⁶⁹

A careful analysis of China’s justifications for its aggressive, unsafe and unprofessional behavior during the *Compens* incident, however, clearly indicates that the PLAN’s actions were inconsistent with international law and long-standing State practice. Moreover, they unlawfully restricted *Compens*’ freedom of navigation (and other internationally lawful uses of the sea related to that freedom) in international waters.⁷⁰

First, MSA did not issue the NOTMAR advising of the PLAN exercise from December 3, 2013, to January 3, 2014, until December 6, one day after the *Compens* incident occurred.⁷¹ Therefore, the U.S. warship was unaware that a restricted zone had been declared by the Chinese government. China’s half-truth about the promulgation date of the NOTMAR may explain why U.S. Defense Secretary Chuck Hagel changed his tune about the naval confrontation. Speaking at a press conference two weeks after the

67. Zhuang Pinghui, *Carrier Commander Spoke to US Ship Captain after Near Collision*, SOUTH CHINA MORNING POST (Dec. 17, 2013), <http://www.scmp.com/news/china/article/1384040/carrier-commander-spoke-us-ship-captain-after-near-collision>.

68. *Id.*

69. Qiu Yongzheng & Yang He, *US ‘Plays Innocent’ after Near Collision at Sea*, GLOBAL TIMES (Dec. 16, 2013), <http://www.globaltimes.cn/NEWS/tabid/99/ID/832320/US-plays-innocent-after-near-collision-at-sea.aspx>.

70. For purposes of this paper, the term “international waters” includes all maritime zones seaward of the territorial sea, including the contiguous zone, the exclusive economic zone, and the high seas.

71. Bill Gertz, *Chinese Warning a Day Late*, THE WASHINGTON TIMES, Jan. 16, 2014, at p. A-10.

incident occurred, Secretary Hagel stated “that action by the Chinese . . . was not a responsible action. It was . . . unhelpful . . . [and] irresponsible.”⁷² The Secretary added that the Cowpens incident is “the kind of thing that’s very incendiary, that could trigger or . . . set off some eventual miscalculation. And so this has been a very unhelpful event.”⁷³ China’s deceptive statement about the NOTMAR also begs the question whether China actually intended to issue the notice prior to the exercise or whether the warning was issued after the fact as “damage control” to bolster its legal argument.

Second, even if a NOTMAR had been issued in time, the establishment of a warning zone for the purpose of conducting a military exercise may not be used as an exclusion zone. Foreign ships and aircraft are not prohibited from entering the area; rather, they are simply required to avoid unduly interfering with the declarant State’s lawful operations within the zone.⁷⁴ Moreover, the declarant State may not use force against a foreign ship or aircraft merely because it has entered the zone; force may only be used against foreign ships and aircraft in the zone to defend against a hostile act or demonstrated hostile intent. Thus, it was legally permissible for *Compens* to operate within the warning area, including surveillance of the *Liaoning* formation. The U.S. warship was subject only to the requirement of due regard for China’s lawful activities within the zone.

Third, the MND alleges that *Compens*’ entry into the 45 km defensive perimeter of the *Liaoning* formation posed a security threat to the carrier and therefore justified a firm response. This argument is, not only legally inaccurate, but also disingenuous. In November 2013, a PLAN frigate was observed conducting surveillance of the USS *George Washington* Strike

72. Chuck Hagel & Martin Dempsey, Secretary of Defense and Chairman of the Joint Chief of Staff, U.S. Department of Defense Press Briefing by Secretary Hagel and General Dempsey in the Pentagon Briefing Room (Dec. 19, 2013), <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=5345> [hereinafter Hagel & Dempsey Briefing].

73. *Id.*

74. Secretary of State, U.S. Department of State, SECSTATE WASHDC 010044Z NOV 96 MSG to AMEMBASSY VILNIUS, Subject: Naval Vessels in Baltic Economic Zones, ¶¶ 5 & 6 (Nov. 1, 1996) (“The United States Navy has frequently conducted naval activities, including live firing exercises, [on the high seas and] in the EEZ of other nations. Normally, the method of notification is by Notice to Mariners (NOTMAR). The publication of a Notice to Mariners, however, does not relieve the state conducting potentially hazardous activities, from liability. Typically, when our government conducts these exercises, we assume responsibility for range clearance and if a possibility exists of interference with another vessel or aircraft, we suspend our exercises until they can be safely completed.”).

Group at a distance of 30 km/19 miles from the U.S. carrier—the U.S. ships were conducting a naval exercise in the South China Sea.⁷⁵ The commander of the carrier strike group, Rear Admiral Mark Montgomery, indicated that it was a “natural conclusion” that a PLAN warship would be operating in the vicinity of the U.S. aircraft carrier and that communications with the PLAN frigate had been “professional.”⁷⁶ There is no evidence that the U.S. warships demanded that the Chinese frigate depart the exercise area. Nor should China forget the incident that occurred in 2006 when a PLAN Song-class attack submarine shadowed the USS Kitty Hawk and surfaced within five miles of the carrier, well within the submarine’s firing range of its torpedoes and missiles.⁷⁷ Under other circumstances, the U.S. warships could have taken defensive measures in response to such a provocative act, but they did not.

More importantly, the PLAN warship’s action to block *Compens* from continuing on its intended course was not only unsafe and unprofessional, but also a clear violation of China’s legal obligations under the *International Regulations for Preventing Collisions at Sea* (COLREGS).⁷⁸ COLREGS are published by the International Maritime Organization (IMO) and prescribe the navigation rules that ships must follow at sea in order to prevent a collision or risk of collision between two or more vessels. At the very least, the acts of deliberately crossing within 100 yards of the bow of the *Compens* and coming to a full stop in front of the U.S. warship unmistakably violate a number of the “rules of the road” contained in the COLREGS, including Rule 8 (Action to Avoid Collision), Rule 13 (Overtaking), and Rule 15 (Crossing Situation). As the flag State, China has an obligation to ensure that Chinese-flagged vessels operate in accordance with the COLREGS.

China’s final justification appears to regard U.S. surveillance of the *Liaoning* formation as a *per se* threat to the security of the Chinese carrier, and therefore prohibited under UNCLOS and the UN Charter. Such a position is not only untenable under international law, but is also inconsistent with long-standing State practice that recognizes the right of all nations to

75. Greg Torode, *China, U.S. Need ‘Cold War Rulebook’ to Avoid Air, Sea Mishap*, REUTERS (Dec. 18, 2013), <http://in.reuters.com/article/2013/12/18/china-usa-military-idINDEE9BH07L20131218>.

76. *Id.*

77. *China Sub Stalked U.S. Fleet*, THE WASHINGTON TIMES (Nov. 13, 2006), <http://www.washingtontimes.com/news/2006/nov/13/20061113-121539-3317r/?page=all>.

78. Convention on International Regulations for Preventing Collisions at Sea, Oct. 20, 1972, 28 UST 3459, TIAS 8587, 1050 U.N.T.S. 17 [hereinafter COLREGS].

conduct surveillance and reconnaissance operations beyond the territorial sea of any nation.

UNCLOS addresses intelligence collection in only one article—Article 19(2)(c), which prohibits ships transiting the territorial sea in innocent passage to engage in “any act aimed at collecting information to the prejudice of the defense or security of the coastal State.” A similar prohibition does not appear in Part V of the Convention regarding the EEZ or in Part VII regarding the high seas. Under generally accepted principles of international law, any act that is not specifically prohibited in a treaty is permitted. Consequently, intelligence collection in the EEZ is permitted under Article 58 and Article 87 of UNLOS as a high seas freedom.

China’s argument that intelligence collection activities are *per se* a “threat or use of force” in violation of UNCLOS and the UN Charter is equally misplaced. UNCLOS Article 301 simply calls on States to “refrain from any threat or use of force against the territorial integrity or political independence of any State” Identical language is contained in Article 2(4) of the UN Charter.⁷⁹ UNCLOS, moreover, makes a clear distinction between “threat or use of force” on the one hand, and other military activities (including intelligence collection) on the other. Article 19(2)(a) governing innocent passage mirrors the language of UNCLOS Article 301 and Article 2(4) of the UN Charter, prohibiting ships in innocent passage from engaging in “any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State” The remaining subparagraphs of Article 19(2) go on to restrict other military activities in the territorial sea, including the limitations on intelligence collection in subparagraph 2(c) discussed above.⁸⁰

The separation of the two concepts—the use of force and intelligence collection—demonstrates that UNCLOS does not automatically equate one with the other. Intelligence collection, however else it may be characterized, is not necessarily a threat or use of force” under UNCLOS or the UN Charter.

79. “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” Charter of the United Nations art. 2(4), Oct. 24, 1945, 1 U.N.T.S. XVI.

80. Note that a similar restriction applies to ships engaged in transit passage and archipelagic sea lanes passage. Articles 39 and 54 call on ships exercising the right of transit passage and archipelagic sea lanes passage to “refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of States bordering the strait [or the archipelagic State]” UNCLOS, *supra* note 31, arts. 39 & 54.

This issue was considered by the UN Security Council following the shoot down of a U.S. U-2 spy plane by Soviet Air Defense Forces near Sverdlovsk in 1960.⁸¹ An effort by the Kremlin to have the UN body adopt a resolution that would have labeled all U.S. U-2 flights over Soviet territory as acts of aggression under the Charter was soundly defeated in the Security Council by a vote of 7 to 2 (with 2 abstentions), thereby confirming that peacetime intelligence collection is consistent with the UN Charter.⁸²

Most commentators would therefore agree that, based on various provisions of UNCLOS, it is logical,

to interpret the peaceful uses/purposes clauses as prohibiting only those activities which are not consistent with the UN Charter. It may be concluded accordingly that the peaceful purposes/uses clauses in Articles 88 and 301 do not prohibit all military activities [including intelligence collection] on the high seas and in EEZs, but only those that threaten or use force in a manner inconsistent with the UN Charter.⁸³

Accordingly, *Compens'* surveillance of the *Liaoning* on the 5th of December was a lawful, non-aggressive military activity that is consistent with international law, including UNCLOS and the UN Charter.

State practice similarly supports the conclusion that *Compens'* surveillance of the Chinese carrier was lawful. Historically, military ships and aircraft have conducted intelligence, surveillance and reconnaissance (ISR) operations at sea as a matter of routine. During the Cold War, for example, Soviet surveillance ships (AGI) regularly collected intelligence on U.S. and NATO warships. Such surveillance activities were considered lawful and acceptable to the United States so long as they occurred seaward of the U.S. territorial sea, and provided that the AGIs complied with their COLREGS obligations and the *U.S.–U.S.S.R. Agreement on the Prevention of Incidents on the High Seas* (INCSEA).⁸⁴

81. S.C. Res 4328, U.N. Doc. S/4328 (May 27, 1960).

82. O.J. Lissitzyn, *The Role of International Law and an Evolving Oceans Law*, in *ELECTRONIC RECONNAISSANCE FROM THE HIGH SEAS AND INTERNATIONAL LAW* 566 (R. Lillich & J. Moore eds. 1980) (Vol. 61, U.S. Naval War College International Law Studies).

83. Moritaka Hayashi, *Military and Intelligence Gathering Activities in the EEZ: Definition of Key Terms*, 29 *MARINE POLICY* 123–37 (2005). See also Pedrozo, *Responding to Ms. Zhang*, *supra* note 54, at 207–23.

84. Agreement on the Prevention of Incidents On and Over the High Seas, U.S.–U.S.S.R., May 25, 1972, 23 U.S.T. 1168, T.I.A.S. No. 7379, 852 U.N.T.S. 151 [hereinafter INCSEA]; Protocol to the Agreement on the Prevention of Incidents On and Over the High Seas, May 22, 1973, 24 U.S.T. 1063, T.I.A.S. No. 7624. Article III specifically recog-

Although the Cold War is over, a number of nations, including Australia, Japan, Russia, South Africa, the United Kingdom and the United States, continue to conduct ISR operations in foreign EEZs and the high seas as a matter of routine.⁸⁵ Even China has admitted to carrying out such operations in U.S. waters; at the annual Shangri La Dialogue in Singapore, Senior Colonel Zhou Bo informed the maritime security panel that the PLAN had conducted reconnaissance operations in the U.S. EEZ without America's consent.⁸⁶ A U.S. Defense Department report subsequently confirmed that PLAN vessels have been observed operating in the EEZ around Guam and Hawaii collecting intelligence against the United States, including during the 2012 RIMPAC exercise.⁸⁷ Although Washington considers the Chinese surveillance activities in the U.S. EEZ to be lawful, "the activity undercuts China's decades-old position that similar foreign military activities in China's EEZ are unlawful."⁸⁸

Finally, Chinese media reports alleging that the *Compens* harassed and took offensive action against the *Liaoning* are a deliberate fabrication. China has presented no evidence that *Compens* was engaged in any measures, other than mere surveillance of the Chinese formation, that were harassing or

nizes the right to engage in surveillance of a foreign warship provided the surveillant ship or aircraft does so in a safe and professional manner:

Ships engaged in surveillance of other ships shall stay at a distance which avoids the risk of collision and also shall avoid executing maneuvers embarrassing or endangering the ships under surveillance. Except when required to maintain course and speed under the Rules of the Road, a surveillant shall take positive early action so as, in the exercise of good seamanship, not to embarrass or endanger ships under surveillance."

Id., art. III(4). Similar language can be found in INCSEA agreements between Russia and the United Kingdom, Canada, Germany, France, Italy, the Netherlands, Norway, Spain, Greece, Japan and the Republic of Korea. OCEANS LAW AND POLICY, ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, ¶¶ 2.8, 2–36 (A.R. Thomas & James C. Duncan eds., 1999) (Vol. 73, U.S. Naval War College International Law Studies); David F. Winkler, *Soviet Motivations to Negotiate* (Naval Historical Center, Colloquium on Contemporary History Project, Seminar 10, Sept. 23, 2003), www.history.navy.mil/colloquia/cch10d.html.

85. See Pedrozo, *Responding to Ms. Zhang*, *supra* note 54, at 209.

86. Michael Richardson, *Claiming China's Maritime Bounty*, THE STRAITS TIMES (June 17, 2013), <http://www.straitstimes.com/the-big-story/asia-report/opinion/story/claiming-chinas-maritime-bounty-20130617>.

87. U.S. DEPARTMENT OF DEFENSE, OFFICE OF THE SECRETARY OF DEFENSE, ANNUAL REPORT TO CONGRESS: MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE'S REPUBLIC OF CHINA (2013), http://www.defense.gov/pubs/2013_china_report_final.pdf [hereinafter DOD China Report to Congress 2013].

88. *Id.*

that rose to the level of a hostile act or demonstrated hostile intent, thereby justifying a more aggressive response by the PLAN. These false allegations are a good example of how China uses “legal warfare” as part of a coordinated strategy to shape international opinion and interpretation of UNCLOS away from the time-honored principles of freedom of navigation and overflight and toward increased coastal State sovereign authority in the EEZ and airspace above it.⁸⁹

IV. COASTAL STATE RESOURCE JURISDICTION

On November 29, 2013, the 5th Meeting of the Standing Committee of the 5th Hainan People’s Congress adopted the *Hainan Province’s Measures to Implement the Fisheries Law of the PRC*.⁹⁰ These new regulations, which took effect on January 1, 2014, require foreign fishing vessels to obtain prior approval from Chinese authorities to operate in the sea areas administered by Hainan Province—an area that includes over 2 million square kilometers of

89. The Chinese Communists Party (CCP) Central Committee and the Central Military Committee (CMC) approved the concept of “Three Warfares,” (*san zhong zhanfa*) in 2003 for use in conjunction with other military and non-military operations. This PLA information warfare concept is aimed at influencing the psychological dimensions of military activity:

- Psychological Warfare seeks to undermine an enemy’s ability to conduct combat operations through psychological operations aimed at deterring, shocking, and demoralizing enemy military personnel and supporting civilian populations.
- Media Warfare is aimed at influencing domestic and international public opinion to build public and international support for China’s military actions and to dissuade an adversary from pursuing policies perceived to be adverse to China’s interests.
- Legal Warfare uses international and domestic laws to gain international support and manage possible political repercussions of China’s military actions.

U.S. DEPARTMENT OF DEFENSE, OFFICE OF THE SECRETARY OF DEFENSE, ANNUAL REPORT TO CONGRESS: MILITARY POWER OF THE PEOPLE’S REPUBLIC OF CHINA (2009), http://www.defense.gov/pubs/pdfs/China_Military_Power_Report_2009.pdf.

90. Xinhua Wang, *PRC Approves Measures Requiring Approval of Foreign Fishing in Hainan-Administered Waters*, December 1, 2013, cited in CRAIG MURRAY & KIMBERLY HSU, U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION STAFF REPORT, CHINA’S NEW FISHING REGULATIONS SEEK TO JUSTIFY AND CONSOLIDATE CONTROL IN THE SOUTH CHINA SEA 1 n.1 (Jan. 27, 2014). For the fisheries law, see Fisheries Law Of the People’s Republic of China (2004 Amendment) (promulgated by the Standing Comm. Nat’l People’s Cong. by Order No. 34 of the President of the People’s Republic of China, Jan. 20, 1986; Amended for the second time by the Standing Comm. Nat’l People’s Cong., Aug. 28, 2004), available at <http://www.lawinfochina.com/display.aspx?id=3663&lib=law> [hereinafter PRC Fisheries Law].

ocean space in the South China Sea (i.e., the waters contained within China's infamous "nine-dash line").⁹¹ Ships that fail to comply with the new regulations will be forced out of the area, will have their catch and equipment confiscated, and can be fined up to ¥500,000 (about \$82,000); in more serious cases, the vessel may also be confiscated.⁹²

As expected, both the Philippines and Vietnam condemned the new regulations, which encroach on traditional Philippine and Vietnamese fishing grounds, not only within their respective 200 nm EEZs, but also on the high seas. The Vietnamese Foreign Ministry labelled the new fisheries rules "illegal and invalid."⁹³ Officials from the Vietnam Fisheries Society (VINAFIS) likewise condemned China's action as an "unreasonable and unacceptable ruling."⁹⁴ VINAFIS President, Nguyen Viet Thang, charged that the new rules "clearly violate . . . UNCLOS [and Vietnam's Law of the Sea and its sovereignty over the Parcel and Spratly Islands,] and do not conform to the [2002 ASEAN-PRC] Declaration of the Conduct . . . (DOC)."⁹⁵

Philippine Foreign Ministry (MFA) officials called the regulations a "gross violation of international law," emphasizing that the new rules seri-

91. PRC Fisheries Law, *supra* note 90, art. 35 (providing that "[f]oreign persons and foreign fishing vessels entering waters under this province's administration to conduct fisheries production or fisheries resource surveys shall receive approval through the appropriate State Council department. Foreign persons and foreign fishing vessels conducting fisheries production or fisheries resource surveys shall respect relevant national [level] fisheries, environmental protection, and exit/entry laws and regulations, and this province's relevant rules.").

92. *Id.*, art. 46 (providing that "[w]here a foreigner or a foreign fishing vessel violates the provisions in this Law by entering the jurisdictional water areas of the People's Republic of China to be engaged in fishery production or activities for investigation of fishery resources, he/it shall be ordered to leave or be banished, the fishing gains and fishing facilities may be confiscated, and a fine of 500,000 yuan or less may also be imposed; if the case is serious, the fishing vessel may be confiscated; if such acts constitute an offence, criminal liabilities shall be investigated in accordance with the law.").

93. *Palace: Pbl Won't Accept China Sea Law*, THE PHILIPPINE STAR (Jan. 12, 2014), <http://www.philstar.com/headlines/2014/01/12/1277811/palace-phl-wont-accept-china-sea-law>.

94. *China Fishing Restrictions in East Sea under Fire*, VIETNAMNET BRIDGE (Jan. 14, 2014), <http://english.vietnamnet.vn/fms/government/93696/china-fishing-restrictions-in-east-sea-under-fire.html> [hereinafter *China Fishing Restrictions*].

95. *Id.* For the Declaration of Conduct, see Association of South Asian Nations (ASEAN), Declaration on the Conduct of Parties in the South China Sea, Nov. 4, 2002, <http://www.asean.org/asean/external-relations/china/item/declaration-on-the-conduct-of-parties-in-the-south-china-sea> [hereinafter ASEAN DOC].

ously contravene “the freedom of navigation and the right to fish of all states in the high seas” and that “under customary international law, no state can subject the high seas to its sovereignty.”⁹⁶ MFA officials likewise alleged that the new regulations were contrary to the ASEAN Declaration on the Conduct of Parties in the South China Sea (ASEAN DOC) and warned that China’s action “escalates tensions, unnecessarily complicates the situation in the South China Sea, and threatens the peace and stability in the region.”⁹⁷ Local fishermen were also assured that they would be protected by the government if they fish in high seas areas covered by the new regulations. In this regard, Defense Secretary Voltaire Gazmin stated that the government would escort Filipino fishing vessels if necessary.⁹⁸

The U.S. State Department also raised concerns, albeit tempered, stating that the restrictions were a “provocative and potentially dangerous act” and calling on China to clarify the legal basis under international law for its “extensive maritime claims” in the South China Sea [i.e., the “nine-dash line”].⁹⁹ It is lamentable that the State Department did not take the opportunity to declare, once and for all, that China’s “nine-dash line” has no basis in international law. A similarly weak statement from the U.S. Ambassador to the Philippines, Philip Goldberg, expressed concerns that the new Chinese regulations were unilaterally imposed without consulting other countries and were done outside the context of the ASEAN DOC. The Ambassador additionally stressed that, although the United States does not have any territorial claims in the region, the United States does “have a deep interest in free navigation in the air and in the sea” and that all nations should be “concerned about miscalculations and unilateral actions in sea and air around the entire part of East Asia . . . that will lead to any escalations.” Albeit well-intended, the U.S. statements demonstrate Washington’s aversion to firmly confronting Chinese indiscretions in the region and fall well short of addressing one of the critical issues in the South China Sea

96. Republic of the Philippines, Department of Foreign Affairs, Statement of the Department of Foreign Affairs on the New Hainan Fisheries Law, Jan. 10, 2014, <https://www.dfa.gov.ph/index.php/2013-06-27-21-50-36/dfa-releases/1900-statement-of-the-department-of-foreign-affairs-on-the-new-hainan-fisheries-law>.

97. *Id.*

98. *China Fishing Restrictions, supra* note 94; *Philippines to Defy Beijing’s South China Sea Fishing Rule, Defence Chief Says*, AGENCE FRANCE-PRESSE (Jan. 17, 2014), <http://www.scmp.com/news/asia/article/1407482/philippines-defy-beijings-south-china-sea-fishing-rule-defence-chief-says>.

99. Jen Psaki, Spokesperson, U.S. Department of State Daily Press Briefing, Jan. 9, 2014, <http://www.state.gov/r/pa/prs/dpb/2014/01/219509.htm>.

dispute—the validity of the “nine-dash line”—thereby feeding into China’s legal warfare strategy of using its domestic laws to solidify its territorial claims.

China responded to the various protestations stating that the new regulations were merely a technical revision of existing Chinese laws and that China had a right and obligation under international law, domestic law and State practice “to manage the living and non-living resources on relevant islands and reefs and in relevant waters.”¹⁰⁰ Moreover, the new measures were aimed at protecting, proliferating, developing and making “rational use of fishery resources,” safeguarding “the legitimate rights and interests of producers of the fishery industry,” ensuring “the quality and safety of aquatic products,” promoting “the sustainable and sound development of the fishery industry” and protecting “fishery resources and the ecological environment.”¹⁰¹ A more pointed statement directed at the United States indicated that the U.S. accusations were “unreasonable,” and that the new regulations were similar to U.S. fisheries regulations and “in line with international practice and aimed at strengthening the protection of fishery resources and the marine environment.”¹⁰²

Although China has the authority to adopt regulations to exploit, conserve and manage the living resources within its 200 nm EEZ¹⁰³ and may “take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with . . . [its] laws and regulations” applicable to the EEZ,¹⁰⁴ it does not have authority to regulate foreign fishing vessels operating on the high seas. “The high seas are open to all States”¹⁰⁵ and “no State may validly purport to subject any

100. Hua Chunying, Spokesperson, People’s Republic of China, Ministry of Foreign Affairs, Regular Press Conference, Jan. 10, 2014, <http://www.fmprc.gov.cn/eng/xwfw/s2510/t1117700.shtml>.

101. Hua Chunying, Spokesperson, People’s Republic of China, Ministry of Foreign Affairs, Regular Press Conference, Jan. 9, 2014, <http://www.fmprc.gov.cn/eng/xwfw/s2510/t1117017.shtml>.

102. *US Accusations Groundless*, CHINA DAILY (updated Jan. 13, 2014), http://usa.china-daily.com.cn/epaper/2014-01/13/content_17232658.htm.

103. UNCLOS, *supra* note 31, art. 56(1)(a) (“In the exclusive economic zone, the coastal State has sovereign rights for the purpose of . . . exploiting, conserving and managing the natural resources . . . of the waters superjacent to the seabed and of the seabed and its subsoil”); *id.*, art. 61(1) (“The coastal State shall determine the allowable catch of the living resources in its exclusive economic zone.”).

104. *Id.*, art. 73(1).

105. *Id.*, art. 87(1).

part of the high seas to its sovereignty.”¹⁰⁶ Freedom of the high seas includes, *inter alia*, “freedom of fishing”¹⁰⁷ Thus, “all States have the right for their nationals to engage in fishing on the high seas”¹⁰⁸ and “shall cooperate with each other in the conservation and management of living resources in the areas of the high seas.”¹⁰⁹ Similarly, with regard to straddling fish stocks¹¹⁰ and highly migratory species,¹¹¹ UNCLOS and the UN Fish Stocks Agreement call on States to cooperate on appropriate measures to conserve and manage such stocks.¹¹²

To the extent that China’s new fisheries regulations apply in the high seas, they are clearly inconsistent with international law and completely invalid. Furthermore, to the degree they apply to disputed waters, the new regulations are at odds with China’s commitment under the ASEAN DOC to exercise self-restraint in the conduct of activities that would complicate or escalate disputes in the South China Sea, unnecessarily raise tensions in the region, and further threaten peace and security in Southeast Asia.

V. CONCLUSION

Freedom of the seas has been a central element of U.S. foreign policy since the founding of the Republic.¹¹³ Indeed, the Colonial Americans inherited this concept from the English, and before them, the Dutch, as an expression of the freedom of all States to trade and use the global commons

106. *Id.*, art. 89.

107. *Id.*, art. 87(1)(e).

108. *Id.*, art. 116.

109. *Id.*, art. 118.

110. Straddling stocks are stocks of fish that migrate between, or occur in both, the EEZ of one or more States and the high seas. United Nations Environment Programme, United Nations Atlas of the Oceans, <http://www.oceansatlas.org/servlet/CDSServlet?status=ND0xOTk0MSZjdG5faW5mb192aWV3X3NpemU9Y3RuX2luZm9fdmld19mdWxsJjY9ZW4mMzM9KiYzNz1rb3M~> (last visited Feb. 20, 2014).

111. Highly migratory species are fish species with wide geographic distribution, both inside and outside the EEZ, and which undertake migrations on significant but variable distances across oceans for feeding or reproduction. Food and Agriculture Organization of the United Nations, Fisheries and Aquaculture Department, <http://www.fao.org/fishery/topic/13686/en> (last visited Feb. 20, 2014).

112. *See* UNCLOS, *supra* note 31, arts. 63 & 64; Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks art. 5, Aug. 4, 1995, 2167 U.N.T.S. 3.

113. KRASKA & PEDROZO, *supra* note 24, § 7.1.3–7.1.4.

without encumbrance. Throughout our history, Americans have gone to war to preserve that freedom, recognizing that, without it, U.S. economic and national security interests are jeopardized.¹¹⁴ Thus, the risk of conflict arising from events in the South China Sea is becoming particularly acute. The region is home to some of the world's busiest and most strategic sea lines of communication (SLOC). More than \$5 trillion in commerce, including over half of the world's oil tanker traffic and more than half of the world's merchant fleet by tonnage, flows through the region's SLOCs on an annual basis; this includes over \$1 trillion in U.S. trade.¹¹⁵ Freedom of

114. The United States fought two wars against the Barbary Pirates (1802–04 and 1815) to preserve freedom of the seas for U.S. merchant ships in the Mediterranean. Freedom of the seas was also one of the impetuses for the Quasi-War with France (1798–1800) and the War of 1812. A hundred years later, the United States would enter the First World War, in part, as a result of Germany's unrestricted submarine warfare against U.S. merchant ships trading with the Allies. During his "peace without victory" speech in 1917, President Woodrow Wilson indicated that "the freedom of the seas is the sine qua non of peace, equality and cooperation." Woodrow Wilson, *Address of the President to the Senate of the United States*, 11 AMERICAN JOURNAL OF INTERNATIONAL LAW. SUPP. 318, 322 (1917). Years later, freedom of navigation was one of the non-negotiable elements included in President Wilson's Fourteen Points: "II. Absolute freedom of navigation upon the seas, outside territorial waters, alike in peace and in war, except as the seas may be closed in whole or in part by international action for the enforcement of international covenants." WOODROW WILSON & HOWARD SEAVOY LEACH, THE PUBLIC PAPERS OF WOODROW WILSON: WAR AND PEACE: PRESIDENTIAL MESSAGES, ADDRESSES, AND PUBLIC PAPERS (1917–1924) 159 (1927). America was once again drawn into a world war, in part, as a result of German unrestricted submarine warfare during World War II:

Generation after generation, America has battled for the general policy of the freedom of the seas. . . . Unrestricted submarine warfare in 1941 constitutes a defiance . . . against that historic American policy. . . . Hitler has begun his campaign to control the seas by ruthless force and by wiping out every vestige of international law . . .

President Franklin Delano Roosevelt, *Fireside Chat to the Nation*, Sept. 11, 1941. The importance of high seas freedoms was subsequently stressed in point seven of the *Atlantic Charter*: "peace [after WWII] should enable all men to traverse the high seas and oceans without hindrance." Atlantic Charter, Declaration of Principles issued by the President of the United States and the Prime Minister of the United Kingdom, Aug. 14, 1941, 55 Stat. 1603, <http://avalon.law.yale.edu/wwii/atlantic.asp>. More recently, the U.S. Department of State emphasized that "freedom of [navigation] and overflight and other internationally lawful uses of the sea and airspace are essential to prosperity, stability, and security in the Pacific." Kerry Statement, *supra* note 40.

115. This traffic includes almost one third of global crude oil and over half of global LNG trade. U.S. ENERGY INFORMATION ADMINISTRATION, SOUTH CHINA SEA REPORT, (*last updated* Feb. 7, 2013), http://www.eia.gov/countries/analysisbriefs/South_China_Sea/south_china_sea.pdf.

navigation and overflight, however, like glory and superpower status, can be fleeting.

Unless the United States takes immediate and affirmative action to firmly demonstrate its non-acquiescence with China's aggressiveness in Asia-Pacific, and encourages U.S. friends and allies in the region to do the same, China will be one step closer to achieving its goal of bringing to fruition its "salami-slicing" campaign and changing the international legal system to accommodate its A2/AD strategy in the Near Seas.

A. China's ADIZ

Rumors that China may be preparing to declare an ADIZ over the South China Sea prompted the United States to issue a surprisingly stern warning to Beijing on January 31, 2014:

We have seen unconfirmed reports of Chinese preparations to declare a new ADIZ over portions of the South China Sea. We would consider such an ADIZ over portions of the South China Sea as a provocative and unilateral act that would raise tensions and call into serious question China's commitment to diplomatically managing territorial disputes in the South China Sea. We've made very clear that parties must refrain from announcing an ADIZ or any other administrative regulation restraining activity of others in disputed territories. And we would of course urge China not to do so.¹¹⁶

That same day, Evan Medeiros, Senior Director for Asian Affairs at the National Security Council, stated that the United States is opposed to "China's establishment of an ADIZ in other areas, including the South China Sea" and that the United States had "been very clear with the Chinese that we would see that . . . as a provocative and destabilizing development that would result in changes in our presence and military posture in the region."¹¹⁷

While encouraging, these U.S. admonitions leave unanswered how the United States will respond to China's new ADIZ in the East China Sea. In fact, it could be argued that these statements implicitly reflect U.S. ac-

116. Marie Harf, Deputy Spokesperson, U.S. Department of State, Daily Press Briefing, Jan. 31, 2014, <http://www.state.gov/r/pa/prs/dpb/2014/01/221118.htm#CHINA>.

117. Jun Kaminishikawara, *U.S. Could Change Military Posture if China Expands Air Defense Zone*, KYODO NEWS (Feb. 1, 2014), <http://english.kyodonews.jp/news/2014/02/269068.html>.

ceptance of China's ADIZ in the East China Sea as a *fait accompli*. If that is not the intention, then Washington must be equally insistent in challenging China's new zone in the East China Sea.

As a first step, the Administration should direct the FAA to immediately rescind the November 29 NOTAM and instruct U.S. air carriers not to comply with the ADIZ reporting procedures unless they intend to enter Chinese national airspace. China has an international legal obligation under Article 3*bis* of the Chicago Convention to "refrain from resorting to the use of weapons against civil aircraft in flight." Therefore, stating that the U.S. NOTAM was issued as a safety precaution was a bit of a red herring—does anyone in the Administration really believe that the Chinese are so politically unsavvy as to shoot down an unarmed civilian airline? The political and economic fallout for China would be staggering, certainly resulting in economic sanctions from the Western powers, and a renewed call by the United States to regional nations to stand up to further Chinese aggression.

Secondly, the Administration should direct DOD to significantly increase the number of surveillance, reconnaissance and observation (SRO) flights into the region. China is extremely sensitive to U.S. SRO flights in its EEZ; increasing the number of such flights will send a clear message to Beijing that the United States does not recognize the validity of the East China Sea ADIZ as currently enforced, and that there are costs associated with China's failure to roll back the excessive zone.

Lastly, China abhors the thought of addressing disputes in a multilateral forum. The Administration should therefore internationalize the ADIZ issue at ICAO. China is illegally interfering with freedom of overflight in international airspace, and the United States should work with other member States of ICAO to demand that China issue written procedures clarifying how the zone will be implemented and how intercepts will be conducted by the PLA Air Force (PLAAF). Annex 2 of the Chicago Convention provides that "interception of civil aircraft shall be governed by appropriate regulations and administrative directives issued by Contracting States in compliance with the . . ." Convention.¹¹⁸ Thus, the onus is on China to promulgate the intercept procedures that will apply in the ADIZ. U.S. domestic rules implementing U.S. ADIZ requirements, including air intercept procedures, are clearly articulated in Chapter 5 of the AIM.¹¹⁹ Similar pro-

118. Chicago Convention, *supra* note 29, Annex 2, Rules of the Road, sec. 3.8.1 (10th ed. July 2005).

119. 14 C.F.R. §§ 99.1–99.49; AIM, *supra* note 33, chap. 5, sec. 6.

cedures have been adopted by Australia and Canada, and can be found in the Australian *Visual Flight Rules Guide*¹²⁰ and the *Canadian Aviation Regulations*.¹²¹ China should be encouraged at ICAO to follow suit.

B. Military Activities beyond the Territorial Sea

It is puzzling that some U.S. defense officials and academics continue to insist that the United States and China need to develop new rules of behavior to manage U.S.-China encounters at sea and in the air.¹²² Former Chief of Naval Operations Admiral Gary Roughead was correct when he said that the COLREGS and other existing norms of the international structure were adequate for the United States and China to ensure safe and cooperative interaction at sea: “In my mind, we don’t have to have a set of separate rules for a country [*i.e.*, China] and how navies operate together.”¹²³

The Chinese want to “negotiate” a new rule set so that they can slow-roll the process to gain time to further solidify their military posture in the Near Seas. China’s tactics with ASEAN are illustrative. In 2002, China and ASEAN agreed to develop a Code of Conduct for the South China Sea that “would further promote peace and stability in the region.”¹²⁴ Twelve years later, the negotiations to develop a binding Code are no further along than they were in 2002. The same can be said about U.S. efforts to encour-

120. Visual Flight Rules Guide, Civil Aviation Safety Authority, ver. 4, May 2010 (Austl.).

121. Canadian Aviation Regulations, SOR/96-433, Minister of Justice, last amended July 4, 2012 (Can.).

122. In response to the USS *Compens* incident, Secretary of Defense Hagel said the United States and China “need to work toward putting in place some kind of a mechanism in the Asia Pacific . . . to defuse some of these issues as they occur” to avoid a potential miscalculation. Similarly, Chairman of the Joint Chiefs of Staff General Martin Dempsey added that the United States and China agreed in 2012 to develop “rules of behavior when we encounter each other in three particular domains—air, sea, and cyber, and those working groups have actually been meeting and making some progress.” Hagel & Dempsey Briefing, *supra* note 72.

123. *Interview Transcript: Admiral Gary Roughead*, FINANCIAL TIMES (Jan. 18, 2011), <http://www.ft.com/intl/cms/s/0/993b0ca4-234d-11e0-8389-00144feab49a.html#axzz2uMZWS87a>.

124. ASEAN DOC, *supra* note 95, ¶ 10 (providing “[t]he Parties concerned reaffirm that the adoption of a code of conduct in the South China Sea would further promote peace and stability in the region and agree to work, on the basis of consensus, towards the eventual attainment of this objective.”).

age China to agree on procedures to ensure safe and professional encounters at sea. China will employ a similar approach to any negotiation with the United States to develop safety measures for unplanned air and sea encounters. As Professor Carl Thayer has correctly observed:

The USS Cowpens incident reveals that after sixteen years of efforts to negotiate an agreement on maritime and air safety there is little evidence that military-to-military consultations and strategic dialogue have reduced strategic mistrust and raised transparency. A wide gulf continues to separate China and the United States¹²⁵

The *U.S.-China Military Maritime Consultative Agreement* (MMCA) was specifically established to facilitate consultations between DOD and the PRC MND for the “purpose of promoting common understandings regarding activities undertaken by their respective maritime and air forces.”¹²⁶ The only reason that the consultative mechanism has not lived up to its expectations is because the PRC delegation has repeatedly refused to discuss maritime and aviation safety measures, preferring instead to use MMCA as a platform to espouse their government’s opposition to U.S. arms sales to Taiwan, the mil-to-mil restrictions in section 1201 of the *National Defense Authorization Act of 2000*,¹²⁷ and the presence of U.S. SRO flights over China’s EEZ.

125. Thayer, *supra* note 55.

126. Agreement on Establishing a Consultation Mechanism To Strengthen Military Maritime Safety, U.S.-China, Jan. 19, 1998, T.I.A.S. No. 12,924.

127. Section 1201 of the National Defense Authorization Act (NDAA) for Fiscal Year 2000 prohibits mil-to-mil contacts with the PLA if that contact would “create a national security risk due to an inappropriate exposure” of the PLA to any of the following areas:

- (1) Force projection operations.
- (2) Nuclear operations.
- (3) Advanced combined-arms and joint combat operations.
- (4) Advanced logistical operations.
- (5) Chemical and biological defense and other capabilities related to weapons of mass destruction.
- (6) Surveillance and reconnaissance operations.
- (7) Joint warfighting experiments and other activities related to a transformation in warfare.
- (8) Military space operations.
- (9) Other advanced capabilities of the Armed Forces.
- (10) Arms sales or military-related technology transfers.
- (11) Release of classified or restricted information.
- (12) Access to a Department of Defense laboratory.

The Western Pacific Naval Symposium (WPNS) similarly aims to increase naval cooperation among the region's navies by providing a forum for discussion of maritime issues, and in the process generate a flow of information and opinion between naval professionals leading to common understanding and possibly agreement.¹²⁸ In furtherance of this goal, WPNS developed the *Code for Unalerted Encounters at Sea* (CUES). The Code contains safety measures to limit mutual interference and uncertainty and facilitate communication when foreign military ships and aircraft make contact at sea, and could be used to guide U.S.-China encounters at sea and in the air.

Some government officials and academics have argued that the United States should negotiate an INCSEA-like agreement with China to defuse tensions during encounters at sea.¹²⁹ An INCSEA-like arrangement, patterned after the U.S.-U.S.S.R. agreement, however would clearly be counter-productive to long-term U.S.-China relations.¹³⁰ COLREGS, MMCA and CUES already provide a solid foundation to guide interactions between

National Defense Authorization Act (NDAA) for Fiscal Year 2000, Pub. L. No. 106-65, 113 Stat 512, sec. 1201 (1999). An exception applies to search-and-rescue and humanitarian operations or exercises.

128. Both China and the United States are members of the Western Pacific Naval Symposium (WPNS). For information on WPNS 2013, see, <http://www.navy.mi.th/wpns2013/> (last visited Feb. 19, 2014).

129. See Eric A. McVadon, *The Reckless and the Resolute: Confrontation in the South China Sea*, 5 CHINA SECURITY 1 (2009); SHIRLEY A. KAN, CONG. RESEARCH SERVICE, RL 32496, U.S.-CHINA MILITARY CONTACTS: ISSUES FOR CONGRESS, 26 (2012); Sam Bateman, *Solving the "Wicked Problems" of Maritime Security: Are Regional Forums Up to the Task?*, 33 CONTEMPORARY SOUTHEAST ASIA 1-28 (2011); Yang Fang, *Exclusive Economic Zone (EEZ) Regime in East Asian Waters: Military and Intelligence Gathering Activities, Marine Scientific Research (MSR) and Hydrographic Surveys in the EEZ* (RSIS, Working Paper No. 198, May 21, 2010), <http://www.rsis.edu.sg/publications/WorkingPapers/WP198.pdf>; Mark J. Valencia, *The South China Sea: Back To Future?* EAST SEA (SOUTH CHINA SEA) STUDIES (Jul. 15, 2011), <http://www.nghiencuubiendong.vn/en/conferences-and-seminars-/second-international-workshop/582-the-south-china-sea-back-tofuture-by-mark-j-valencia>; Craig Allen, *Team Obama Should Take the Reagan Approach to Rising Tensions in Western Pacific*, FOXNEWS.COM (Dec. 27, 2013), <http://www.foxnews.com/opinion/2013/12/27/team-obama-should-take-reagan-approach-to-rising-tensions-in-western-pacific/>; EAST-WEST CENTER, MILITARY AND INTELLIGENCE GATHERING ACTIVITIES IN THE EXCLUSIVE ECONOMIC ZONE: CONSENSUS AND DISAGREEMENT, A SUMMARY OF THE BALI DIALOGUE (June 27-28, 2002), <http://www.eastwestcenter.org/sites/default/files/private/BaliDialogue.pdf>.

130. See Raul Pedrozo, *The U.S.-China Incidents at Sea Agreement: A Recipe for Disaster*, 6 JOURNAL OF NATIONAL SECURITY LAW & POLICY 207 (2012).

U.S. and PRC ships and aircraft operating in proximity of one another. There is simply no need to develop something special or unique for such encounters. Moreover, if China currently does not abide by its legal obligations under COLREGS, UNCLOS and the Chicago Convention, what makes the proponents of an INCSEA-like agreement believe that China would comply with its legal obligations under a new bilateral agreement with the United States? And do the proponents of an INCSEA-like agreement really believe that China is going to consent in writing to recognize the right of the United States to engage in surveillance and reconnaissance activities against PLAN warships at sea?¹³¹ The prospect that such an agreement would preserve high seas freedoms of navigation and overflight is highly unlikely.

As with the ADIZ declaration, the United States should internationalize China's unsafe and unprofessional seamanship at the IMO. China's repeated and deliberate violations of the COLREGS are inconsistent with the international rules of the road, and the United States and other IMO member States should insist that China refrain from acts that endanger ships of other nations operating in the Near Seas.

Finally, China should be disinclined from further participation in the U.S.-hosted "Rim of the Pacific" (RIMPAC) naval exercises. RIMPAC is the world's largest international naval exercise, with naval forces from 22 nations taking part in this year's exercise. Chinese participation in the exercise could inadvertently run afoul of the NDAA restrictions on mil-to-mil contacts with the PLA. Additionally, it is time for U.S. officials to stop being deluded by the romantic notion that "engagement fosters understanding of each other's military institutions in ways that dispel misconceptions and encourage common ground for dialogue."¹³² Improving the PLA's warfighting capabilities by engaging in one-sided mil-to-mil contacts will not nurture mutual trust and help prevent misunderstanding. On the contrary, such contacts play into China's "salami-slicing" strategy and are detrimental to long-term U.S. national security interests.

131. Recall that Article III.4 of INCSEA specifically recognizes the right to engage in surveillance of a foreign warship provided the surveillant ship or aircraft does so in a safe and professional manner. INCSEA, *supra* note 84, art. III.4.

132. DOD China Report to Congress 2013, *supra* note 87, at 62.

C. Coastal State Resource Rights

China's new fishing regulations apply to over 2 million square kilometers of ocean space contained within the notorious "nine-dash line." The regulations clearly encroach on the resource rights of the other South China Sea littoral States within their respective EEZs, as well as on high seas fisheries beyond the 200-mile limit, and are therefore inconsistent with international law, including UNCLOS. It is thus incredulous that the Department of State would call on China to "clarify" the legal basis of its excessive maritime claims under international law! The "nine-dash line" has no legal basis under international law—providing China an opportunity to "clarify" its position plays into China's legal warfare strategy of using its domestic laws to modify the existing international legal system and solidify its maritime expansionism in the South China Sea.

Assistant Secretary of State Daniel Russel came close to refuting the "nine-dash line" when he testified before the House Committee on Foreign Affairs on February 5, 2014.¹³³ However, the Assistant Secretary's statement fell short in two respects. First, it does not represent the official position of the U.S. Government. If the United States is going to object to the "nine-dash line," it must do so publicly in the form of a diplomatic note—preferably to the United Nations. Second, Mr. Russel left the door open for Beijing to employ legal warfare to explain away its position by encouraging China to "clarify or adjust its . . . claim"¹³⁴ The "nine-dash line" is illegal, period—there is nothing to "clarify or adjust."

If a nation like Indonesia, which has a lot more to lose than the United States by going against the Mandarins in Beijing, can stand up to China and declare that "the so called nine-dotted-line map . . . clearly lacks interna-

133. During his testimony, Assistant Secretary of State Russel indicated that, under international law, maritime claims in the South China Sea must be derived from land features. Any use of the 'nine-dash line' by China to claim maritime rights not based on claimed land features would be inconsistent with international law. The international community would welcome China to clarify or adjust its nine-dash line claim to bring it in accordance with the international law of the sea.

Daniel R. Russel, Assistant Secretary, Bureau of East Asian and Pacific Affairs, Testimony Before the House Committee on Foreign Affairs Subcommittee on Asia and the Pacific (Washington, DC), *Maritime Disputes in East Asia*, Feb. 5, 2014, <http://www.state.gov/p/eap/rls/rm/2014/02/221293.htm>.

134. *Id.*

tional legal basis and is tantamount to upset the UNCLOS,”¹³⁵ certainly the United States—the preeminent naval power and guarantor of freedom of the seas around the world—should be able to muster the courage to do the same. This can be accomplished without taking sides on the underlying territorial disputes over the South China Sea islands.

The United States and Japan should encourage Vietnam to follow the Philippines’ lead and file a case for compulsory dispute settlement under Part XV of UNCLOS. China’s interference with Vietnam’s resource rights within its EEZ is clearly grounds for compulsory dispute settlement under Article 297 of UNCLOS.

D. Concluding Thoughts

Henry Kissinger once observed that “China never lived in a world of equal states. It was always the most powerful state in its region until it became a subject of foreigners in the nineteenth century. China never had to live in a system of equilibrium with its neighbors”¹³⁶ China’s behavior since 2010 demonstrates that it has not changed its mindset. The mistaken belief that China is now willing to coexist on an equal footing with the United States and our allies in Asia-Pacific is wishful thinking, at best. It is time that Washington “accept the reality that China has chosen to initiate a new Cold War against the United States and its Asian friends and allies” and that “failure to muster the resolve and policy clarity to cope with it only heightens the prospects of a hot war with unforeseeable regional and global consequences.”¹³⁷

At the end of the day, America did not defeat the Soviet Union during the Cold War by becoming their friends or acquiescing to Soviet demands. It won through a long-term, patient, bipartisan effort to stand up to Soviet aggression around the world. Beijing is betting that the United States now is so concerned over maintaining good relations with the PRC that Wash-

135. United Nation Commission of Limits on the Continental Shelf, Note Verbale dated July 8, 2010 from the Permanent Mission of the Republic of Indonesia to the United Nations, No. 480/POL-703/VII/10.

136. Henry Kissinger, Former U.S. Secretary of State, Expanded Version of Delivery at the Pontifical Academy of Social Sciences (Vatican City): Current International Trends and World Peace (Apr. 28, 2007), <http://www.henrykissinger.com/speeches/042807.html>.

137. Joseph Bosco, *Dumb Like a Fox*, POLITICO MAGAZINE (Dec. 5, 2013), http://www.politico.com/magazine/story/2013/12/dumb-like-a-fox-china-adiz-100732.html#_Uv08ZfldV8E.

ington will do everything it can to restrain its friends and allies in Asia-Pacific from antagonizing China. After all, such a strategy succeeded in 2012 when Washington failed to stand up to Chinese coercion after China wrestled *de facto* control of Scarborough Shoal away from the Philippines. The United States cannot allow a similar fate to befall the Senkaku or the Spratly Islands.

China, in defiance of the international law of the sea and the rules governing aviation since the origin of flight, and with disregard for the recognized rights and freedoms of all other nations to use the world's oceans, has attempted to expropriate large areas of the seas and international airspace to advance its expansionist goals and A2/AD strategy. China seeks to abolish the freedom of the seas in order to acquire absolute control and domination of the Near Seas for themselves. Once these freedoms are lost, they will be gone forever. By controlling the Near Seas, China is one step closer to dominating the Asia-Pacific region, along with its strategic SLOCs and abundant resources, by force of arms. America can stand by and allow China to incrementally solidify its maritime claims in the region through threats and coercion, or we can, together with our allies, stand up to Chinese brinkmanship before it is too late.