

“China’s Maritime Rights and Interests: Organizing To Become A Maritime Power”

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by

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Introduction

When China’s leaders exhort their nation to become a “maritime power,” what exactly do they have in mind? How are the various actors, state agencies, and firms in the People’s Republic of China (PRC) organized to realize goals promoted under that broad maritime power mandate? This paper addresses those questions by examining Beijing’s *legal* methods to define, protect, and expand its so-called “maritime rights and interests” (MRIs).² A persistent trope in PRC law, policy, and diplomacy, MRIs are a fundamental component of the broader maritime power enterprise under inquiry in this volume. In assigning putatively “legal” rights to political, strategic, and economic national interests, MRIs link key functional and ideological tasks in the maritime domain, creating the domestic legal authorities that guide practical efforts to “build” PRC maritime power.

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² Much of the analysis in this paper is spun off from a dissertation chapter (under development) about how the law of the sea (the EEZ in particular) influences domestic institutions in China.

Because certain of the PRC's claimed maritime rights depart in significant ways from those prescribed under the UN Convention on the Law of the Sea (UNCLOS), MRIs are centrally implicated in the roiling regional disputes over maritime jurisdiction³ in the South and East China Seas (SCS and ECS). Prominent among these disputes is the diplomatic and operational contestation between China and the United States over exclusive economic zone (EEZ) access for foreign military vessels and aircraft. The evolution of MRIs in PRC law over the past two decades provides insights into how Beijing prosecutes its disputed claims: by converting its growing geopolitical interests in the Asian littoral into cognizable and potentially enforceable legal rights. In representing their claims in terms of capital-L "Law," PRC leaders aim to extract maximum legitimacy for Chinese claims – all without actually submitting to the legal restraints that would in fact make their actions lawful and legitimate.

The PRC's varied legal representations of its maritime rights and interests offer a privileged glimpse into Beijing's maritime playbook. While these legal instruments do not necessarily constrain PRC freedom of action, attention to MRIs as the pseudo-legal domestic basis for a variety of "assertive" PRC behaviors furnishes the analyst with substantial material to use in understanding and anticipating PRC behavior. To that end, the paper proceeds by:

- (I) Introducing the distinctive political and legal landscape in which to analyze China's maritime rights and interests;
- (II) Unpacking basic attributes of the "maritime rights and interests" concept and relating them to the maritime power objectives of the Xi Jinping administration;
- (III) Specifying the limited but politically salient role of law – especially the law of the sea – in the Chinese political-legal system;
- (IV) Analyzing selected rules that define, protect, and expand PRC maritime rights and interests, with particular attention to the ongoing reorganization of the PRC maritime bureaucracy; and

³ Disputes over island *sovereignty* are practically linked to but analytically separate from disputes over jurisdiction. Their relationship is addressed in depth below.

- (V) Exploring a banner case in which laws protecting MRIs advance maritime power goals – namely, PRC efforts to prohibit or complicate foreign military operations in China’s claimed EEZ (i.e., the freedom of navigation controversy).

A brief conclusion then summarizes the findings and suggests three ways these formal (if ambiguous and mutable) signals can be profitably utilized by U.S. policy-makers: (1) MRIs describe the scope and content of PRC maritime claims – including those it presently lacks sufficient capacity to assert – and thus can be used to anticipate future behaviors; and (2) with growing PRC capacity to enforce its claimed jurisdiction in maritime space described (vaguely) under domestic law, Chinese practices in international and disputed waters will influence regional and global maritime rules and norms. The United States is uniquely positioned to shape that process.

I. Political and Legal Context for Analysis of PRC Maritime Rights and Interests

Promotion of maritime rights and interests is a facet of Beijing’s accelerating drive to economically develop, legally regulate, and effectively control ocean areas under its claimed jurisdiction. For specialized PRC officials and legal experts, pursuing these goals entails ongoing efforts to “perfect” [完善] China’s maritime legal, regulatory, and administrative framework. This framework, or “maritime legal scheme,” can be considered a formal script for putting China’s maritime power theory into practice. Various legal documents name the organizations and actors responsible for each of the moving parts in the maritime power enterprise explored in this volume; they detail their legal authorities, and provide some clear guidelines (and many murkier signals) for actors at central, provincial, and local levels to take deliberate steps toward “safeguarding Chinese maritime rights and interests” [维护国家海洋权益] from foreign predation.

The sources. Abundant evidence of official thinking about what is necessary to achieve the PRC’s maritime power goals is available in the form of laws that define tasks and help mobilize resources for effective management of China’s vast maritime apparatus.

Such laws are produced and enacted in the form of national legislation, administrative regulation, and departmental rules⁴ that loosely cite MRIs as the source and justification for various maritime legal authorities – many of which exceed those prescribed for maritime zones under international law. These often-imprecise legal instruments provide the primary empirical fodder for this paper, and inform analytical efforts to connect China’s legally defined rights to its politically motivated actions.

The perfectly incoherent PRC political-legal system. The PRC’s legal institutions are indeed “imperfect” and “engaged in what is perhaps the most rapid development of any legal system in the history of the world;”⁵ thus, to evaluate the role and scope of maritime law in China, it is necessary to appreciate that legal processes remain profoundly compromised by political forces. Politics (and its vanguard, Party officials influencing state functions) penetrates everything from the assignment of judicial personnel to law enforcement to the (highly circumscribed) powers of regulatory agencies. Lacking even formal independence from political institutions, the Chinese political-legal system⁶ gives ample play to formal legal instruments in multifarious roles. Maritime laws, for example, serve to articulate specific jurisdictional competencies and delegate them to administrative agencies, in order to promote and regulate the development of the “blue economy” (principally oil and gas, and fishing industries), to expand and intensify the enforcement of domestic maritime laws, to supervise marine scientific research and

⁴ These are listed in order of their formal authority. National legislation is below only the Constitution in the hierarchy, followed by administrative regulations for implementing legislation formulated by the State Council, and then rules promulgated by departments. Various other legal instruments can be created at local levels within the legal authorities granted at the national level. See Guifang Xue, *China and International Fisheries Law and Policy* (Leiden: Martinus Nijhoff Publishers, 2005), p. 79, for a helpful chart and primer on the Chinese legal system, especially as it pertains to maritime laws and regulations.

⁵ Benjamin L. Liebman, “Assessing China’s Legal Reforms,” *Columbia Journal of Asian Law*, Vol. 23 (2009-2010), p. 18.

⁶ Many students of Chinese law resist the term “system” because it lacks the coherence and comprehensiveness that the term implies (e.g., Stanley B. Lubman, *Bird in a Cage: Legal Reform in China After Mao* (Stanford University Press, 1999), p. 297; Keith A. Hand, “Understanding China’s System for Addressing Legislative Conflicts: Capacity Challenges and the Search for Legislative Harmony,” *Columbia Journal of Asian Law*, Vol. 26 (2013), pp. 142-250. This paper follows Jerry Cohen, law professor at NYU Law and foremost western scholar of PRC law, in by using the modified term “political-legal system” to indicate that politics continues to systematically dominate legal processes in contemporary China.

surveillance, to protect the marine environment, and, practiced at sufficient scale, to influence the decisions of other potential users of Chinese-claimed maritime space.⁷

Affected users include the littoral states of Asia (especially those who have overlapping claims to maritime rights and jurisdiction), the United States, and other maritime powers (e.g., Japan, India) with rights to and interests in operating in the Western Pacific. The wide berth for political discretion in PRC legal affairs makes their maritime laws versatile instruments to direct China's practical efforts to "build maritime power." The incoherence in certain of its rules and practices is a function of its nebulous MRIs, which help produce what seems to be a *deliberately* incoherent set of maritime claims. Indeed, the PRC has still failed to clarify its claimed maritime boundaries and has scrupulously avoided specifying the substantive rights it seeks to exercise within that undefined maritime space.

Externalizing domestic maritime laws. Beyond playing a vital organizing role, these domestic efforts are externalized in China's international behavior, and may come to influence regional and global legal norms. The wave of Chinese "assertiveness" (or "aggressiveness" or "coercion") in the maritime domain is, in part, the product of a series of internal legal-bureaucratic steps to promote extravagant PRC maritime claims. These steps might be rendered as a corresponding *legal* assertiveness. Whereas domestically the PRC's maritime legal scheme serves to license certain enterprising behaviors by China's many maritime stakeholders,⁸ those behaviors are necessarily projected internationally because China's maritime jurisdictional claims overlap with those of neighbors and other users. When Chinese actors operate in disputed zones and enforce PRC domestic law against foreign vessels and individuals, it amounts to a bid to change commonly accepted norms governing the scope and content of coastal state authority in maritime zones (i.e., the "maritime rule-set"). While other East Asian claimants also formulate and enforce

⁷ CIMA, 中国海洋发展报告 [China's Ocean Development Report] (海洋出版社：北京，2014), written by the staff at the PRC State Oceanic Department's China Institute for Marine Affairs [海洋发展战略研究所] (or CIMA), is the principal reference used in this study to describe the various legal and administrative functions, supplemented where necessary by earlier volumes and supplementary sources. Henceforth referred to as "ODP."

⁸ Linda Jakobson, *China's Unpredictable Maritime Security Actors*, Lowy Institute for International Policy Report (December 2014), http://www.lowyinstitute.org/files/chinas-unpredictable-maritime-security-actors_3.pdf.

their domestic laws in disputed zones (as PRC Ministry of Foreign Affairs (MFA) officials are fond of shrilly reminding us), the incapacity of these weaker states to do so at sufficient scale to change normal patterns of maritime practice makes the better resourced, more strategic Chinese efforts far more consequential.

Central guidance for those efforts can be read off of PRC domestic maritime laws and regulations. Sorting through the legal evidence affords insight into how various elements of maritime power come together as Chinese policy. Greater awareness of how this process is playing out will enhance our ability to anticipate how China's state maritime apparatus will evolve, and therefore how its many maritime stakeholders are likely to behave, enabling the U.S. government to craft policy accordingly. *So what are China's maritime rights and interests, and how do they relate to becoming a maritime power? What has been done domestically to further that goal, and how do those domestic processes influence Chinese behavior in the maritime domain?*

II. China's Maritime Rights and Interests in the Struggle for Maritime Power

What, specifically, are China's maritime rights and interests? How do they bear on the wider maritime power enterprise? Nearly every public recital in the PRC about maritime power invokes China's maritime rights and interests. Then president Hu Jintao officially linked the concepts when he enshrined maritime power as a Chinese Communist Party (CCP) priority at the 18th National Party Congress, calling on cadres to "resolutely safeguard maritime rights and interests and build China into a maritime power."⁹ Current president Xi Jinping has reiterated and intensified his predecessor's call for building maritime power and, to that end, has mobilized the state to take active "countermeasures to safeguard our nation's maritime rights and interests."¹⁰

This cue from China's highest authority signals the formal end of a period of relative "restraint" [克制] and an acceleration of the move to deploy new maritime capabilities to realize MRIs that now dominate the maritime policy agenda. Since at least 1992, maritime rights and interests have played a prominent role in PRC maritime conduct, but they have emerged only over the last five years or so as a front-line political struggle.¹¹ In fall 2013, the director of the East Sea Branch of the PRC's main maritime agency, the State Oceanic Administration (SOA), reiterated their high degree of salience in the current political environment: "The most important prerequisite for the building of a maritime power is to...protect the nation's maritime rights and interests from being violated. If our nation's core maritime interests and the basic maritime rights and interests cannot be effectively protected, there is no way to talk about building a maritime power."¹²

⁹ "Full text of Hu Jintao's Report at the 18th Party Congress," Xinhua, 17 November 2012, http://news.xinhuanet.com/english/special/18cpcnc/2012-11/17/c_131981259.htm.

¹⁰ "Xi Jinping at the 8th Study Session of the Central Committee Political Bureau emphasized unceasingly making new achievements towards cultivating greater maritime consciousness and strategic management of the seas, and pushing through the construction of maritime power," *Renmin Ribao* (August 1, 2013), http://paper.people.com.cn/rmrb/html/2013-08/01/nw.D110000renmrb_20130801_2-01.htm.

¹¹ For a clear analysis of these developments and their initial associations with maritime power, see Thomas J. Bickford, Heidi A. Holz, and Frederic Vellucci, *Uncertain Waters: Thinking About China's Emergence as a Maritime Power*, CNA Research Memorandum D0025813.A1, September 2011, 23-27.

¹² Liu Kefu, "以三重保护力度推进海洋强国建设" [Push Forward the Construction of Maritime Power with Threefold Efforts], *Zhongguo Haiyangbao*, 17 September 2013: 1.

These and other authoritative formulations indicate that Chinese leaders treat the protection of MRIs as a *necessary condition* for their maritime power project. Without unpacking the concept by specifying which legal rights they mean and how those rights are connected to political interests, Chinese officials, experts, media, and semi-informed citizens routinely cite MRIs as the key component of maritime power. Defense intellectuals, such as Zhang Shiping of the Academy of Military Science, have written extensively on the connections between rights and power in the maritime domain. Yet those intellectuals resist efforts to coherently define the concept, instead wielding it as a blunt rhetorical instrument that serves more to stifle questions than to answer them. For example, Zhang alleges, “Without maritime rights, there would have been no industrial revolution,”¹³ but then he goes on to make the logically circular claim that “China needs maritime rights for safeguarding its maritime sovereignty [sic], rights and interests.”¹⁴

The combination of very broad definitional scope and imprecision make it difficult to disentangle statements of MRIs conceptually from the maritime power goal. They serve simultaneously as a justification for behavior and a goal to be realized. MRIs are never expressly defined – even in specialized official publications that expressly purport to do so, such as the SOA’s annual *Ocean Development Report (ODP)*¹⁵ – and encompass a highly disparate array of goals and activities. Even the composition of the phrase itself offers some insight into this analytical problem. The Chinese expression for “rights and interests” is “权益,” a compound word that integrates *rights* (权利) and *interests* (利益) into one catch-all term. This integration of the legal concept of rights with the political concept of interests is not accidental, and invites the conflation of two distinct concepts: the former creates property rights and jurisdictional competence for the state, while the latter announces goals to be achieved. This lax usage tracks the prevailing CCP doctrine of law as a political instrument, and signals a tight connection between the defined rights

¹³ Zhang Shiping, 中国海权 [*China's Sea Power*], (China: People's Daily Press, 2009), p. 293.

¹⁴ *Ibid.*, p. 302. “Maritime sovereignty” or 海洋主权 is not uncommon in Chinese journals and newspapers, though under the law of the sea, full maritime “sovereignty” is limited to internal waters; the state’s sovereign powers attenuate with each progressive maritime zone (i.e., territorial seas, contiguous zone, exclusive economic zone, continental shelf, and high seas, in order of most to least coastal state rights).

¹⁵ The 2014 ODP has an entire section (VI) entitled “Safeguarding National Maritime Rights and Interests” (pp. 259-315) that does not precisely define their scope or content, despite extensive discussion of the concept.

under international law that China uncontroversially possesses at present, and those rights it would like to enjoy in the future.

In fact, the vague usage of the term in official discourse makes it nearly impossible to say what *does not count* as a maritime right or interest. The 1982 Constitution makes some 11 references to various rights and interests enjoyed by citizens and firms, but never defines them as a term of art.¹⁶ MRIs may comprise notions as grand as the geographic integrity of China's claimed "blue-colored territory" [蓝色土地]¹⁷ and as obscure as China's specific jurisdiction over pollution by foreign-flagged vessels in its contiguous zone. The defense of MRIs is a patriotic duty for everyone, from fishermen plying their trade around the disputed Spratly islands, to marine scientists conducting research in the Arctic, to commercial cartographers mapping the Chinese mainland's coast. Muddying the conceptual waters still further, everyone in China – from fishermen, to netizens, to women's groups¹⁸ – appears to have their own "rights and interests" to defend. Certain inferences can nevertheless be drawn from the way that MRIs appear in legal documents and other official pronouncements. The following section identifies certain distinct characteristics of MRIs, and connects them conceptually to the wider maritime power enterprise under inquiry.

Generic Characteristics of MRIs

Generally speaking, MRIs are the nexus of legal, political, strategic, and economic elements of China's maritime ambitions. Their principal legal basis lies in international maritime law, especially UNCLOS, and a host of customary rules about ocean conduct

¹⁶ Constitution of the People's Republic of China (adopted December 4, 1982), available in English at: <http://en.people.cn/constitution/constitution.html>.

¹⁷ This is a common descriptor for the supposedly 3 million square kilometers of maritime space included under China's jurisdiction. For an especially curious account of the "territorial" qualities of these maritime zones, see 陈彩云, "蓝色国土的呼唤: 当前我国维护海洋权益的必要性和意义分析" [A Shout Out to Blue-Colored National Territory: Analysis of the Necessity of Maritime Rights Protection and its Meaning], 改革与开发 10 (2009) .

¹⁸ Indeed, the "rights and interests" formulation is frequently used generically with regard to "national rights and interests" as well as in a variety of more specialized contexts, e.g., "fishery workers' lawful rights and interests" (2004 PRC Law on Fisheries), "women's rights and interests," (<http://www.womenofchina.cn/html/womenofchina/folder/84-1.htm>), and "netizens' rights and interests" (http://news.xinhuanet.com/politics/2014-11/27/c_127258016.htm).

(collectively, the “law of the sea regime”).¹⁹ Yet as PRC maritime ambitions and capacity (i.e., interests) grow, so do Chinese estimates of the scope and content of those rights. In general, MRIs “are expanding to include legal rights and privileges related to the economic exploitation of the oceans and their use for navigation in support of trade.”²⁰ Granting that the concept does not have defined boundaries, we can nonetheless identify certain enduring characteristics or features of MRIs as framed by Chinese authorities: (1) they are *legitimate* (a broader category than strictly “lawful”); (2) they are *under threat* from internal and external sources; (3) they are *exclusive* of other states’ maritime rights and interests; and (4) they are *evolving and expanding* along with the international maritime legal regime and growing Chinese maritime capabilities.

(1) MRIs are legitimate. Legitimacy is the most important characteristic that Chinese leaders and laws attribute to MRIs. It underpins the PRC’s insistence that other states must respect Chinese claims and behaviors in the maritime domain on the basis of their putative legal, historical, and geographic validity. MFA officials routinely announce that these various sources of legitimacy are “indisputable” [无可争辩], yet refuse to recognize that these sources of validity are, in fact, in dispute. In a sense, this move amounts to demanding foreign deference to China’s maritime ambitions – regardless of what they are. Domestically, their sloppy conflation with territorial integrity, core interests, and other priorities empowers bureaucratic and administrative actors to aggressively pursue goals that can be construed as protecting MRIs, secure in the knowledge that they cannot be faulted for overzealous protection of so legitimate a cause.

Indeed, MRIs seem to be a nebulous and evolving concept by design: sufficiently precise to capture the whole gamut of maritime rights derived from international law, yet vague enough for Beijing to calibrate them to whatever present political circumstances demand. On one hand, their relationship to the law is quite direct: maritime “rights” include all of

¹⁹ For a reasonably clear statement by a Chinese law of the sea expert on the international legal origins of Chinese maritime rights, see: Liu Nanlai, “We need a global vision for protection of maritime rights and interests” [维护海洋权益要有全球视野], *China Ocean News* [中国海洋报], (14 November 2013): A1.

²⁰ The citation is from an informal memorandum written by RADM (ret) Michael McDevitt in the author’s possession. The memorandum addressed how MRIs have become an important rhetorical formulation in the definition of China’s interests at sea since the passage of China’s 1992 “PRC Territorial and Contiguous Zone Law.”

China's jurisdictional competence and sovereign rights in UNCLOS-designated zones.²¹ On the other hand, maritime law is sometimes lamented as an unwelcome constraint on MRIs.²² Chinese legal scholars familiar with the constraints on coastal state rights codified under UNCLOS cannot help but recognize that certain MRIs are not justified under the law as it is now (*lex lata*), but assert that they will be justified under desired future developments in law (*lex ferenda*).²³ The routine, practical assertion of the desired rights, set in motion by domestic laws, is the way this legitimacy is to be secured. Such practices are sometimes described as “lawfare,”²⁴ but whatever the terminology, they reflect a Chinese view of international law as fluid and capable of changing – or at least accommodating – the legitimacy of China's MRIs.

There is also a strong and quite central historical component to this claim to legitimacy, a direct connection to China's revanchist aims to restore the territory “taken by violence and greed”²⁵ by Japan and Western powers throughout China's long “century of humiliation.” To Chinese observers, such unjust historical circumstances confer blanket legitimacy to China's present campaign to “restore” lost territories – more legitimate, even, than any legal code, ratified or not. References to the sanctioned history of China's maritime humiliation appear in every official, scholarly, and popular treatment of China's maritime concerns. This attempt to propagate historical legitimacy for MRIs underpins China's invocation of undefined “historical rights” in its infamous U-shaped-line map²⁶ and its domestic legislation.²⁷ Even Chinese law of the sea scholars make it clear that China's rich “history” trumps any contemporary legal strictures and confers independent, historical legitimacy on China's maritime rights and interests. In short, law is only one of

²¹ ODP (2014).

²² To be addressed in the concluding section.

²³ Author interviews with Chinese international law specialists, Hainan, Beijing, and Taipei, April 2014 – March 2015.

²⁴ Timothy Walton, *China's Three Warfares*, Delex Systems, Inc., Special Report (January 2012).

²⁵ Cairo Declaration, 1943.

²⁶ Jia Bing Bing and Gao Zhiguo, “The Nine-dash Line in the South China Sea: History, Status and Implications,” *American Journal of International Law*, vol. 107 (January 2013): 98-124.

²⁷ Article 14 of the 1998 PRC Law on the Exclusive Economic Zone and Continental Shelf refers to 历史性权利; that is, China claims unspecified historical rights – without using the term of art from international maritime law corresponding to a recognized “historic rights” regime, which is significantly less permissive than the claims presumed to accompany the U-shaped line map. See Department of State Office of the Geographer, *Limits in the Seas*, no. 143 (December 2014) for further analysis of the historic rights regime.

the bases upon which the legitimacy of Chinese MRIs rests. International law is not the only source of legitimacy. It supports only certain of China's purported "rights," while a hodge-podge of questionable historical documentation stands up the rest of the extravagant claim to rights above and beyond those prescribed in UNCLOS.²⁸

Dubious history aside, often those bases for legitimacy remain unarticulated. An authoritative editorial by Zhong Sheng in the *People's Daily* argued that "China's construction of a maritime power has a legal basis and good reason."²⁹ This kind of "law plus [something else]" construction is frequently employed to effectively limit the scope of issues over which law is considered authoritative. The prevalence of this "law plus" approach amounts to a broad rejection of the idea that law is the exclusive source of legitimacy for maritime rights. Typically, the adjunct to law is some formulation of rights and interests derived from history or justified on the basis of economic development goals. This unsupported reasoning is analytically unsatisfying, though hardly unusual in Chinese political discourse. Attempts to parse the specific legal bases for many, even most, Chinese positions are similarly doomed exercises.

However constructed, MRIs' "legitimacy" is their essential characteristic. It renders them indisputable, and invites officials and analysts to play fast and loose with maritime rights and interests as a vehicle for all manner of political goals. Xi Jinping himself has championed this technique: "We will steadfastly follow the path of peaceful development," he told the July 2013 Politburo study session, "but China will never abandon its legitimate maritime rights and interests, and moreover, it will never sacrifice its core national interests."³⁰ Construed in this way, public debate in China is effectively

²⁸ A cottage industry of books on the "South China Sea problem" has emerged over the last decade in China, of which Wu Shicun's book 南沙争端的起源与发展 [The South China Sea Dispute: Origin and Development], (北京：中国经济出版社, 2013), Second Edition, is a representative example. See especially pp. 17-51 for the normal, scattershot approach to "international law and history" as the bases for Chinese claims. Attention is paid to international law only to reverse-engineer legal claims, not to use as the source of legal tests for China's historical evidence.

²⁹ Zhong Sheng, "China, Steadily Pushing Forward the Construction of Maritime Power," *Renmin Ribao*, 26 August 2014, p. 3.

³⁰ "习近平在中共中央政治局第八次集体学习时强调进一步关心海洋认识海洋经略海洋推动海洋强国建设不断取得新成就," *People's Daily* (August 1, 2013), http://paper.people.com.cn/rmrb/html/2013-08/01/nw.D110000renmrb_20130801_2-01.htm.

closed when it comes to evaluating the legitimacy of any specific aspect of Chinese maritime claims.

(2) MRIs Are Under Grave Threat. The urgency and intensity of the threats to MRIs is another of their key characteristics, and explains corresponding efforts to adopt “countermeasures.”³¹ Because they enjoy the highest seal of political legitimacy and are described by leadership to be under threat, tremendous domestic organizational energy can be channeled to ensure that they are “comprehensively safeguarded.” A variety of perceived internal and external threats animate the many domestic processes for protecting MRIs, and, by extension, promoting maritime power.

In terms of external threats, the prevailing view in China is that a long period of passivity and restraint (“克制”) with respect to MRIs has led to their gradual erosion due to activities of other states in China’s littoral areas. At the Politburo study session in July 2013, Xi emphasized that China’s priorities in the maritime domain should skew more towards “maintaining rights” [维权] than towards “maintaining stability” [维稳].³² His formulation is an undisguised jab at the former administration’s weakness and passivity with respect to disputed islands and zones, and an open invitation for China’s maritime law enforcement (MLE) agencies to prosecute China’s claims with less regard for diplomatic and operational repercussions.

These actions are framed as urgent responses to contingencies arising from the cluster of maritime disputes in the SCS and ECS, the banner threats to MRIs. The State Oceanic Administration’s 2014 *Oceans Development Report* makes clear how urgent MLE tasks are in light of these external threats;³³ an authoritative editorial in the *People’s Daily*

³¹ For example, see Liu Rongzi, “国际海洋斗争中的重大问题及我国的对策” [Important problems in International Maritime Struggles and China’s Countermeasures], *Guoji jingji jishu yanjiu* [Studies in International Technology and Economics] (1995), no. 2, pp. 44-49.

³² “Comprehensively plan the two overall situations of maintaining stability and safeguarding rights” [要统筹维稳和维权两个大局] were Xi’s precise words, but, as they were delivered in the context of lamenting the costly focus on stability at the expense of rights, they can be read as a clear call for more attention to the rights-protection component. For analysis of this meeting, see Taylor Fravel, “Xi Jinping’s Overlooked Revelation on China’s Maritime Disputes,” *The Diplomat* (August 15, 2013), <http://thediplomat.com/2013/08/xi-jinpings-overlooked-revelation-on-chinas-maritime-disputes/?all=true>.

³³ ODP 2014: 266.

describes these “peripheral disputes” as “insurmountable obstacles to China's efforts to build a maritime power.”³⁴ So long as rival claimants claim or use some of the maritime space disputed by China, the full extent of Chinese sovereignty and jurisdiction cannot be realized.³⁵

Beyond the territorial disputes, China sees threats from the U.S. Navy (USN) and other users of maritime space in the western Pacific. The 2015 white paper, *China's Military Strategy*, states: “Some external countries are also busy meddling in South China Sea affairs; a tiny few maintain a constant close-in air and sea surveillance and reconnaissance against China. It is thus a long-standing task for China to safeguard its maritime rights and interests.” The juxtaposition of MRIs with these varied external sources of insecurity bolsters the high level of political priority assigned to various “rights-protection” tasks that have been steadily incorporated into domestic code.

Meanwhile internally, MRIs are threatened by an ineffective maritime bureaucratic and administrative apparatus. Widely publicized criticism of the incompetence, inefficiency, lack of integration, and redundancy in this cluster of state agencies recently led to some major changes to the marine legal system that are still being worked out at organizational and operational levels (treated in detail below). Environmental degradation due to pollution, climate change, overfishing, and other problems is also a potent threat to MRIs, and is the ostensible object of much of the domestic legislative and administrative efforts addressed in this essay. The important take-away is that leaders mobilize the state to reform its maritime laws and regulations by appealing to the threat of squandering China's rich maritime entitlements and inviting foreign predation.

³⁴ Zhong, “China, Steadily Pushing Forward,” p. 3.

³⁵ Major General (ret.) Luo Yuan of the PLA Academy of Military Sciences offers a typical account of this threat in this comment: “China's maritime rights and interests are currently facing a severe challenge. Currently, our islands and reefs have been occupied, our resources have been plundered, and our national dignity has been infringed upon. Each year, Vietnam and the Philippines plunder large amounts of oil and gas resources from our South China Sea region. Some small countries were originally poor, but due to having plundered our resources, number among the ranks of the world's wealthy nations,” quoted in Huang Yingying, “How Can We Protect China's Maritime Rights and Interests Overseas?” *Guoji Xiaoqu Daobao*, 19 March 2012.

Resource scarcity also figures prominently³⁶ as an internal and external threat, with China's very low per-capita maritime resource base driving perceptions that rights need to be aggressively secured (or expanded). Zhang Shiping is committed to the urgency of the tasks generated by these threats, noting:

China must really have its share of maritime rights and interests...to solve its issues relating to large population, inadequate resources, limited job opportunities, and so on! However, “there is no savior” for China in its attempt to go to the ocean and *take back its share of maritime rights and interests*. We the Chinese people can only rely on ourselves! In order to protect maritime rights and interests of our own, we Chinese people should be ready to use all effective means. These are the freedom and rights of the Chinese people!”³⁷

This perceived need to tackle scarcity shades into a third core characteristic of MRIs: their exclusivity.

(3) MRIs Are Exclusive. The commonly cited necessity of “safeguarding” MRIs underlines their exclusive character as a kind of property right. If others are using ocean space under Chinese-claimed jurisdiction without submitting to PRC authority and paying rents, that diminishes the stock of resources available to the PRC and infringes on its maritime rights. This exclusivity is especially important in light of what the Chinese perceive as a severe scarcity problem. Experts frequently lament China's paltry allocation of ocean space in per capita terms, as well as relative to its continental landmass.³⁸ Overwhelming domestic demand for energy, protein, and seabed minerals may not be the driving force behind China's “assertiveness” in the maritime domain, but it contributes to the high political priority assigned to maritime development. Indeed, in terms of the actual government “work” associated with MRIs, promoting and regulating economic activity is probably the most resource-intensive task.

³⁶ For an example of extended discussions of the severe challenges facing China due to its small maritime entitlements (relative to its population and landmass), see the extended section in Ji Guoxing, *中国的海洋安全和海域管辖* [China's Maritime Security and Ocean Jurisdiction], (上海：上海人民出版社, 2009), esp. Chapter 1.

³⁷ Zhang Shiping, *China's Sea Power*, 169 (italics added).

³⁸ For example, 六振环, “《联合国海洋法公约》评述,” *国防* (1996), no. 10.

Exclusivity is an especially potent characteristic with respect to oil and gas exploitation, which, unlike fishing, is an economic activity that cannot be shared in a given geographic space.³⁹ The long timelines and capital intensity required to develop offshore projects (especially in deep water) produce strong incentives for China to take measures (usually rendered as 对策 or “countermeasures”) to avoid losing out on existing investments – or, more likely, to open up potentially lucrative spaces for exploration and production by state-owned energy enterprises. Overlapping leases on potentially productive hydrocarbon blocks (e.g., between China and Vietnam near the Paracels) already generate substantial friction. Despite the periodic lip service that Beijing pays to “joint development” among rival claimants, these conflicts lead to more political inflexibility and louder demands for exclusivity to China’s maritime rights.⁴⁰ Fisheries jurisdiction is a baby that can be split, and has been managed relatively diplomatically until recently (China has functioning fisheries agreements with several neighbors, including Japan and Vietnam, that cover some disputed areas). In the midst of rising domestic protein demand, the PRC’s massive fisheries industry faces collapsing fish stocks, and heightened foreign law enforcement against Chinese vessels operating in disputed zones.⁴¹ Even this relatively negotiable sector produces very strong pressures for exclusivity regarding MRI.

(4) MRIs Are Evolving & Expanding. One reason that MRIs are so difficult to positively define is simply that China’s estimate of them is evolving along with the international maritime legal regime. The legal evolution of MRIs tracks the law of the sea, which has been a story of “global enclosure” since at least the middle of the 20th century.⁴² China has been particularly ambitious in terms of “creeping jurisdiction,” or reading new substantive authority into the fast-developing body of maritime law.⁴³ A series of law of

³⁹ Of course joint development is a possibility – and a reality in many contested maritime zones across the globe. The point here is that the underlying usage rights pertain to a non-renewable resource in a specific geographic location; an underlying, exclusive property right is necessary.

⁴⁰ Author interviews in Hainan, June 2014.

⁴¹ Indonesia, in particular, has augmented fisheries law enforcement capacity and targeted Chinese fishing vessels in the EEZ surrounding the Natuna Islands since at least 2010 (November 2014 interview with Indonesian diplomat and LOS expert).

⁴² See Bernard Oxman, “The Territorial Temptation: A Siren Song at Sea,” *American Journal of International Law* 100, no. 4 (2006).

⁴³ Leading Chinese LOS scholars Gao Zhiguo (an official in the SOA and sitting judge on UNCLOS’ judicial body, the International Tribunal for the Law of the Sea) and Jia Bing Bing describe this phenomenon as follows: “While the geographical scope of the lines has been almost unchanged over the

the sea conferences under UN auspices created new zones and assigned new functional areas of state authority – most prominently in the form of the 200 nautical-mile exclusive economic zone (EEZ) codified in UNCLOS III. With the advent of this vast new zone of exclusive – but *not exhaustive* – sovereign rights and jurisdiction over economic activities, China (like all coastal states that claim this entitlement) now administers significantly more maritime real estate and possesses corresponding rights requiring legal and administrative attention.⁴⁴

The recognized legal authority of states extends even beyond these coastal zones, also covering their exclusive economic rights on the extended continental shelf (up to 350 nm from coastal baselines), deep-seabed mining rights in the high seas, and scientific research in polar regions, where legitimate concerns with climate change and commercial navigation have provided an entry point for Chinese maritime interests in this geopolitically crucial domain.⁴⁵ As former SOA director Liu Cigui informed the PRC University of Administration, “Maritime rights and interests not only include those within the waters under our country's jurisdiction, but also include those outside those sea areas.”⁴⁶ Not only does this confirm that the MRIs concept has no defined geographic scope, it also alerts us that China's claimed maritime jurisdictional competence is not limited to UNCLOS-designated zones. In Chinese legislation and regulation, references to rights in undefined “other sea areas under Chinese jurisdiction” typically follow a list of territorial sea, contiguous zone, EEZ, and continental shelf.⁴⁷ Such deliberate imprecision allows room for evolution and expansion, a process that the following analysis discovers in Chinese maritime law-making and maritime practice.

years, the content of the rights embraced by them may have evolved, with Chinese practice being informed by developments in the law of the sea, including its own ratification of UNCLOS” (Jia and Gao 2013: 103).

⁴⁴ Norms concerning extended coastal state jurisdiction developed over the course of the 20th century, and were recognized by courts and in the practice of states in various ways prior to the codification and formal effectiveness of the EEZ (which occurred, respectively, in 1982 when UNCLOS III was concluded and in 1994, when the treaty came into effect).

⁴⁵ ODP 2014, Jakobson (2014)..

⁴⁶ Liu Cigui, “海洋权益形势及维权对策探讨” [Exploring the Maritime Rights and Interests Situation and Countermeasures for Safeguarding Rights], State Oceanic Administration website http://www.soa.gov.cn/xw/ldhd/lyx/201211/t20121107_4687.html, accessed Feb. 2, 2015.

⁴⁷ Addressed in depth in Section III. A representative example can be found in the Surveying and Mapping Law of the People's Republic of China, 29 August 2002, Art 2: “All surveying and mapping activities conducted in the domain of the PRC and other sea areas under the jurisdiction of the PRC shall comply with this law.”

It should come as no surprise that as China's maritime rights multiply, its maritime interests expand in lockstep. The existence of new legal rights is itself a source of new interests: prior to UNCLOS III, China had no EEZ and thus no specific interest in controlling that precise geographic space. The exclusive resource rights and corresponding obligations to administer the zone, conserve its marine environment, regulate fishing, and so on, combine to promote a state interest in economic development and effective control that could not take shape in the absence of the law of the sea regime. Conversely, it is also unsurprising that China's *interests* (defined in terms of its power to secure those interests)⁴⁸ should be a source of recognized legal rights. A central story of the law of the sea – and perhaps international law more broadly – is that (maritime) rights will steadily accrue to great (maritime) powers.⁴⁹ Those interests naturally include a preference for other states to defer to China in the maritime spaces under its effective control. Asserting legal rights is just one, relatively cheap way to use its growing capabilities to secure that cooperation or deference – and one that Chinese leaders have consciously adopted as a way to build maritime power.

The notion that China's new interests should generate new rights is implied by the compound word itself, *rights-interests* (权益). The sequence by which China has practically claimed and attempted to exercise its maritime rights tracks its growing capacity to use the maritime areas in question. That capacity itself generates the interests, and, simultaneously, the potential for claiming and protecting various maritime rights – some of them special, non-UNCLOS rights. In the words of one Chinese defense intellectual, “Where our interests are, there the law should be. No matter whether in space, the internet, or the ocean.”⁵⁰ This sentiment, commonly expressed in conferences on maritime issues and law, reflects a prevalent (perhaps dominant) Chinese conception of international law that may be reasonably summarized as deeply cynical and unabashedly realist. China expects its international legal rights to be honored in the

⁴⁸ Hans Morgenthau, *Politics Among Nations: The Struggle for Power and Peace*, 5th ed. (New York: Alfred A. Knopf, 1978), pp. 4-15.

⁴⁹ D.P. O'Connell, *The International Law of the Sea* (London: Oxford University Press, 1982).

⁵⁰ Author's notes from academic conference in Beijing, September 2014.

breach only where Chinese power can be credibly signaled or effectively employed.⁵¹ This potent conjunction of *rising power* and *creeping jurisdiction* is among the most salient features of MRIs, and will only become more significant as Chinese maritime capabilities increase, a circumstance addressed fully in the paper's conclusion.

III. Rule by (Maritime) Law in Modern China: Head, Hands, and Feet

The PRC's maritime power enterprise depends on the protection of maritime rights and interests; the legitimacy and efficacy of those MRIs require sustained investment of official time and state resources to manage maritime development and protect Chinese maritime equities from threats, perceived and real. Building such capacity and expertise, in turn, depends on the successful implementation of China's growing body of maritime laws, regulations, and rules. Liu Cigui, former director of the SOA (and present governor of the front-line maritime province of Hainan), made the role of rules explicit in an address following Hu's official unveiling of the maritime power goal at the 18th NPC in 2012: "A 'maritime power' is a country that has great comprehensive strength in terms of the *development, use, protection, management, and control of the seas*....[W]e must aim at the long-term goal [of maritime power] through *planning and coordination* across the board to *effectively safeguard and expand our country's maritime rights and interests*."⁵²

Liu's emphasis on planning and coordination is consistent with a broad trend in post-Mao China to develop the legal system as an instrument for advancing the CCP goals.⁵³ As the Chinese political system evolves to cope with an increasingly complex society and market-oriented economy, Party leaders have mounted repeated campaigns to use legal rules to guide the central formulation and unruly local implementation of policy; to a

⁵¹ In the words of another defense intellectual, "possessing an aircraft carrier does not necessarily ensure possession of maritime rights. However, without possessing an aircraft carrier it will be absolutely impossible to possess maritime rights." (Zhang Shiping, *China's Sea Power*).

⁵² Liu Cigui, "The First-Ever Reference to 'Maritime Power' in the Political Report to the 18th Party Congress Has Important Practical and Strategic Significance" [十八大報告首提“海洋強國”具有重要的現實和戰略意義], *China Oceanology Review*, November 12, 2012. (Italics added.)

⁵³ These efforts are largely directed towards introducing markets into the planned economy and managing trade and investment with the outside world.

lesser degree, laws (and internal rules) are increasingly valued as means to exert control over powerful but fragmented central Party ministries and executive agencies. Building on efforts to develop a “socialist legal system with Chinese characteristics” initiated at the watershed Third Plenum of the 11th Party Congress in 1978, Article 5 of the 1982 PRC Constitution was revised in March 1999 to codify the practice of “*ruling the country through law*” [依法治国, sometimes rendered as “rule by law”] and building a socialist rule of law state.” The present Xi administration renewed focus on “ruling the country through law”⁵⁴ at the Fourth Party Plenum of the 18th Central Committee of the CCP in October 2014, the first such meeting to address the topic of rule of law.

Before addressing how Chinese legislation, regulations, and rules (“law” for convenience) directly abet the maritime power enterprise, a brief discussion of how law functions (and doesn’t function) in China will establish the proper context for analysis. Three observations should be carried over to the rest of the analysis: (1) Law is one of several tools of internal governance and international statecraft available to Chinese leaders; unlike in a liberal, rule-of-law system, law is substitutable for other tools. (2) China’s political-legal system is characterized by an unusually high degree of political discretion for Party-state authorities to make ad hoc changes and omissions to legal rules. (3) ambiguity, imprecision, and indeterminacy are the norm in the construction of Chinese statutes and regulations, enabling political discretion. Though considered weaknesses by some Chinese elites (explaining, in part, concerted reform efforts), these are and will remain qualities of law in the contemporary PRC.

Law in China: helping the head talk to the hands and feet

Power, according to Xi, should be “locked up within a cage of regulations.”⁵⁵ Xi’s emphasis on “ruling the country through law” as a pillar of his governance strategy

⁵⁴ The “依法治国” concept is now enshrined among Xi’s signature contributions to Party dogma (the “Four Comprehensives,” described in “People’s Daily’s First Authoritative Definition of Xi Jinping’s ‘Four Comprehensives,’” *Renmin Ribao Wang*, 24 February 2015, <http://politics.people.com.cn/n/2015/0224/c1001-26591248.html>).

⁵⁵ “Xi Jinping: 科学有效防止腐败坚定不移把反腐倡廉建设引向深入” [Scientifically and Effectively Prevent Corruption, Unwaveringly Deepen Anti-Corruption and Pro-Clean Government Construction, *Renmin Ribao* (23 January 2013), <http://cpc.people.com.cn/n/2013/0123/c64094-20292472.html>].

indicates that law is a highly valued instrument – however pale its resemblance to the independent “rule of law” desired in liberal democracies. Chinese leaders appear to believe that legal and administrative measures are the best means available to them for directing and managing a dynamic and largely unregulated economic system. At least since Deng’s mythologized “Southern Tour” [南巡] in 1992, Party leaders have moved away from decentralized, personal, unsystematic means of governance and towards the more centralized, impersonal, and systematic instrument of law.

Legal approaches are especially valued in the maritime domain, as they provide some uniformity and order to a daunting set of administrative tasks. Law satisfies an endemic demand for effective tools to cope with the staggering scale of the maritime domain and its resources, and to manage sheer diversity of maritime stakeholders in the Chinese bureaucracy, state-owned sector, and military. For a Party of some 90 million members leading a sprawling state effort to marshal China’s maritime rights and interests, law is a uniquely useful tool. It creates a standardized, transparent, and relatively predictable way for the “head” in Beijing to communicate with the “hands and feet”⁵⁶ – that is, the myriad administrative agencies and local bureaucratic offices in charge of the practical work of managing and using China’s maritime space and, by extension, building maritime power.

This hands-head-feet connection is entirely top down and primarily serves administrative ends, seeing to it that the will of the leadership is executed uniformly across functional and geographic lines, and, in the process, minimizing the local corruption, excesses, and incompetence that have long plagued the Chinese bureaucracy.⁵⁷ Recent legal reforms may be understood as the Party’s attempts to “strengthen the mechanisms for cabining and supervising the inevitable exercise of discretion by officials, judges, prosecutors and

⁵⁶ Jacques DeLisle, “Exceptional – and Ordinary – Powers in an Exceptional State: Patterns and Lessons from China’s Use of Law to Address Threats to Security and Order,” talk at Cornell Law School, October 18, 2012.

⁵⁷ Leading scholars of the Chinese legal system describe “a system of internal bureaucratic communication where the authoritativeness of particular documents was often unclear. The old system was incapable of imposing unity and order upon the process of government...[Thus] a key ambition of those promoting legal reform was to bring regularity to government operations and to policymaking as a cure for the excessive devolution of power from the center and the resultant policy inconsistencies” (Clarke et al., “The Role of Law in China’s Economic Development,” in eds. Thomas Rawski and Loren Brandt, *China’s Great Economic Transformation* (Cambridge: Cambridge University Press, 2008), p. 377.

other state actors.”⁵⁸ The law is an increasingly important component of the hierarchical pattern of governance in China in which vague formulations (such as the “maritime power” mission) are issued by the center, then passed along the chain of authority to various party organs, administrative agencies, and local governments to decipher what they mean and convert them into actionable tasks. The Fourth Plenum Decision and continuing Party emphasis on “rule by law” reflects a longstanding goal to centralize some of that rule-making to ensure that the strategic vision of the Party is “comprehensively implemented.”

In this respect, the Chinese legal system is unlike its Western counterparts, where the rule of law operates principally as a check on the coercive power of the state. Law in liberal states confers rights to individuals; law in illiberal China arrogates rights to the state. Maritime rights are a possession of the collective, not a specific manifestation of the liberties of any individual. Thus, the function of a large proportion of Chinese law is administrative, rendering law “a tool of governance and control...essentially the property of the government, not the citizenry.”⁵⁹ This is especially so in the maritime domain, where only a small percentage of the population has any direct attachment to maritime affairs, and virtually all activity (fishing, oil and gas, marine scientific research, and environmental protection) is directly controlled by the state.

The Party stands astride the legal system, unconstrained by law it finds inconvenient and free to promulgate new rules – after the fact, if necessary – to achieve desired ends. This rule-making process is increasingly “rationalized” as a body of legislation, regulation, and procedural rules develops under the close scrutiny of political leadership. Collectively, this ongoing “legal building” process does not constitute a legal “system” so much as furnish a set of instruments for officials to use in executing political goals – such as defining, protecting, and expanding MRIs. This “command and control” legal system is the indispensable method for processing the various new rights and interests created by

⁵⁸ Randall Peerenboom, *Fly High the Banner of Socialist Rule of Law with Chinese Characteristics! What does the 4th Plenum Decision Mean for Legal Reforms in China?* SSRN Working Paper Series, November 6, 2014, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2519917&partid=1728220&did=233850&eid=1619535.

⁵⁹ Clarke et al., *Role of Law*, p. 396.

China's accession to UNCLOS. It remains unclear the extent to which law can be used internally to empower one actor or agency against another, or to "punch up" within the domestic hierarchy to hold central leaders accountable. Regrettably for reformers in China (and those trying to do business within China or interact with it in the international sphere), there are no persuasive grounds on which to rule out scholar William Alford's judgment that law in China is something like a "clever facade thrown up by the leadership in an effort to restore within the ruling elite a set of rules that would enable them to play their usual games in less murderous conditions."⁶⁰

China's Law of the Sea

The bulk of Chinese maritime law emerged as China geared up to ratify UNCLOS III, which was negotiated from 1973 to 1982, and to which China formally acceded in 1996. The new set of rights and obligations created by the Convention generated new awareness in China about its maritime rights and interests, occasioning a flurry of legislative and regulatory activity to bring China up to code. Like other states with undeveloped maritime legal systems, much work was necessary to prepare for the management of a growing economic and strategic sector and to organize the enforcement of a new legal regime. To help readers fully understand this process, the following brief discussion of the role of international law in China's distinctive legal-political environment is warranted. The key items to take away are: (1) there is no fixed procedure through which China's international legal obligations become domestic law; and (2) there is also no guarantee that domestic laws implementing the UNCLOS treaty are consistent with the treaty's requirements.

The ambiguity of China's legal relationship to UNCLOS begins with the PRC Constitution, which is entirely silent on how international treaties are to take domestic effect. The Constitution also contains no language about how international treaty and customary rules relate to domestic laws in the PRC. This is a problematic omission, as acknowledged by China's sitting judge on the International Court of Justice and a leading

⁶⁰ William Alford, "On the limits of 'Grand Theory' in Comparative Law," *Washington Law Review* 61, issue 945 (1986): 954.

scholar of China and international law, who notes with her co-author that it “is obvious [that] treaties vary in terms of their status and legal effect on the domestic legal system; *not all treaties constitute part of domestic law* [in China].”⁶¹ There is also no guiding Supreme Court interpretation for relating treaties to domestic laws, as might be the case in a common law system. In effect, the paramount document in the Chinese political-legal system is more of a statement of intent than a binding code. Its language offers a “constant coupling of rights with obligations, repeated indications that procedural safeguards are subject to the overall good of the people, and the frequent message that major goal of these new legal developments is to restore China's power and prominence – none of which have exact parallels in the West.”⁶² If there are any meaningful rules regarding treaties, they must be in the weeds at the statutory or regulatory levels.

Hierarchically below the Constitution, many statutes and regulations imply or state that domestic rules are overridden by international treaties when they are in conflict – or at least that domestic statutes should not be construed in ways inconsistent with treaties; other statutes reverse that relationship. For example, the 1999 Special Maritime Procedure Law states in Article 3: “Where any provisions concerning foreign-related maritime actions contained in international conventions entered into or acceded to by the PRC are different from those contained in the [1991] Civil Procedure Law of the PRC and in this Law, *the provisions of such international conventions shall apply, except those on which the PRC has announced reservation*” (italics added). This language is replicated in other national legislation, and creates a circumstance in which the exceptions to the rule may well be more common than the rule itself. This rule is particularly troublesome vis-à-vis UNCLOS, which expressly does not permit any reservations by Party-states that conflict with treaty rules.⁶³

Below the statutory level, administrative regulations do little to remedy the Constitution’s silence on the matter; in fact, various regulations say contradictory things about whether

⁶¹ Xue Hanqin and Jin Qian, “International Treaties in the Chinese Domestic Legal System,” *Chinese Journal of International Law* 8, no. 2 (2009): 300. (Italics added.)

⁶² Alford, “On the Limits of ‘Grand Theory’”: 955.

⁶³ 1982 UNCLOS, Article 309 (“Reservations and exceptions”) states, “No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention.”

and how domestic implementing legislation should be developed once China has ratified a treaty.⁶⁴ So, lacking any formal basis, and given the well-known weakness of the PRC judiciary, it seems the only meaningful positive source of law that obliges China to respect its treaty and customary law obligations is the *jus cogens* customary norm of *pacta sunt servanda*.⁶⁵ This norm amounts to a promise to honor the contract in good faith because contracts should be honored in good faith, and is binding in the international sphere as a matter of reciprocity rather than as an enforceable sanction. Chinese diplomats in the UN and other public forums refer to what amounts to China's policy of compliance with its treaty obligations on this basis, though lacking specific, mandated domestic procedures for putting this into practice leaves foreign international legal scholars unimpressed.⁶⁶

Nonetheless, the prevailing view among legal experts in China holds that UNCLOS requires domestic legislation to accomplish the various functional duties relating to defining zones and assigning jurisdiction and administrative duties to the appropriate agencies for economic use and environmental protection.⁶⁷ On November 14, 1991, the Chinese delegate to the Third Committee of the General Assembly of the UN, while explaining China's position on the UN Convention on Torture, stated that “according to

⁶⁴ Xue and Jin (“International Treaties”) address this, indirectly, in showing that there are three sanctioned ways in which a treaty's rules and norms may enter into Chinese domestic law: direct incorporation as law, transformation of treaty rules into national legislation, and execution by administrative measures (305-306). The last-named way is the most prevalent practice, and basically gives the State Council and its subsidiary organs total discretion about when and where a treaty rule becomes domestic law and how any conflicts between treaty and domestic laws are to be resolved.

⁶⁵ It might be argued that China's generic obligations with respect to treaties are codified with its 1997 accession to the 1969 Vienna Convention on the Law of Treaties (VCT) – but logically, if not mirrored in domestic law, the source of obligation to honor the VCT remains the *pacta sunt servanda* norm.

⁶⁶ See, for example, Jonathan Odom, “A China in a Bull Shop? Comparing the Rhetoric of a Rising China with the Reality of the International Law of the Sea,” *Ocean and Coastal Law Journal*, Vol. 17, no. 2 (2012), p. 222, citing Duan Jielong, “Statement on the Rule of Law at the National and International Levels,” delivered to the 6th Committee of the the 61st Session of the UN General Assembly on 17 October 2006.

⁶⁷ UNGA Resolution 59/24 (2004) recently made this demand explicit because it “once again calls upon states to harmonise, as a matter of priority, their national legislation with the provisions of the Convention, to ensure consistent application of those provisions....” Many Chinese international lawyers and scholars prescribe a “Basic Oceans Law” to “harmonise” the many mixed messages delivered in China's body of legislation and regulation. For examples, see Liu Huirong, “Drawing Up A Basic Oceans Law: Protecting Maritime Rights and Interests in Accordance with the Law,” *China Ocean Report* [中国海洋报] (17 June 2014) or analysis in Takeda Jun'ichi, “China's Rise as a Maritime Power: Ocean Policy from Mao Zedong to Xi Jinping,” *Review of Island Studies* (Tokyo: Ocean Policy Research Foundation, 23 April 2014).

Chinese law, as soon as a treaty is ratified or acceded to by the Chinese government and comes into force, the Chinese government will fulfill its obligations arising therefrom without the necessity of transforming that treaty into municipal law.”⁶⁸ China has largely obliged in this where economic development is implicated – though many of its domestic rules take liberties with the text of UNCLOS and in many cases enact rules that are outright contrary to the treaty’s provisions. In general, the Chinese interpretation of the law of the sea tends to assign greater than normal authority to the coastal state in maritime zones, especially where Chinese security and “historical” rights are involved.⁶⁹ This practice, analyzed in detail in subsequent sections, reflects the qualities of the PRC political-legal system highlighted above – namely, its narrow effective scope, incoherence or inconsistency, and ad hoc subjugation to political demands.

This deliberate ambiguity in PRC code finds its way into China’s treatment of MRIs, a process abetted by a weak tradition of international law scholarship and practice in China. The standard “scholarly” understanding in the PRC consists of a politicized mix of hostility towards international law as a tool of imperial aggression and hegemony on the one hand, and on the other, a cynical embrace of international law as a way for China to legitimize its international behavior and market itself as a member in good standing of international society.⁷⁰ In either case, even among its practitioners, the law is not expected to generate the sort of binding constraints idealized in Western jurisprudence. The Party retains “absolute leadership” and evidently prizes its status above the law more so than any of its legal reform goals. The 2014 Fourth Plenum Decision’s 14 mentions of

⁶⁸ UN Doc A/C.3/46/SR.41 para 12.

⁶⁹ Jia and Gao (2013).

⁷⁰ Wang Tieya (1990) is the authoritative text on international law taught to Chinese law students, and though he speaks the language of Western international law, the text consistently sets China apart from the international community and renders it as an instrument of international statecraft rather than a source of independent authority to be honored regardless of political interests. Others follow this logic and explicitly describe international law as formally toothless, especially the law of the sea in its efforts to constrain strong maritime powers. See, for example, 戈华清, “我国海域使用权制度初论” [Early analysis of our maritime zone usage rights], 中国政法大学学报 14, no. 2 (2002), in which he states: “UNCLOS lacks enforcement and supervision mechanisms, meaning that its binding force is lacking: one aspect is the costs for each individual country to monitor others is too high, and further, even if the parties observe one another in breach the transaction costs of enforcing or bringing them into compliance are quite high. Thus some sort of ethical basis is the only way to implement, [there is] no way to prevent opportunistic, self-interested action... therefore, in order to achieve a Pareto optimal outcome, *China should rely on its own domestic laws* within its jurisdictional zones in order to achieve the efficient and effective use of its natural resources.” (Italics added.)

the “absolute leadership of the Chinese Communist Party” are, if anything, a resounding signal that the Party will remain unconstrained by the legal tools it uses to govern.

Nonetheless, there has been considerable energy devoted to bringing China into something like compliance with UNCLOS, positioning it to fully realize its desired maritime rights and interests. For the new regime of the EEZ alone, some 156 legal instruments – legislation, administrative regulations, and departmental and local rules – have been promulgated since the conclusion of UNCLOS.⁷¹ This flurry of activity reflects the Chinese view that the protection and expansion of the nation’s maritime rights and interests require a sturdy domestic legal architecture. In the words of one of China’s leading law of the sea scholars, “In order to protect maritime rights and interests, we must have national mechanisms that are organized according to the law – specifically, domestic law...In designing and implementing a perfect legal system for the oceans, UNCLOS will play a fundamental role.”⁷² The following section treats salient elements of that still-imperfect Chinese maritime legal system.

IV. Safeguarding China’s Maritime Rights and Interests Through Legal Work

The combination of (1) the lack of any rigorous, homegrown legal requirements for China to comply with UNCLOS and (2) the normal functions of China’s distinctive political-legal system indicate that the Chinese maritime legal scheme is best interpreted as signals of what Chinese leaders aim to accomplish in the maritime domain. The rules themselves do not function like the mandatory restraints on state power that international legal obligations may create in rule-of-law countries. Instead, they are key organizational components of China’s broader maritime power project.

In recent years, MRIs have been developed and protected by law under the broad administrative heading of developing “comprehensive management” (综合管理) of the maritime sector. Formidable official energy and resources are now devoted to the maritime legal project, and tend to address three basic political goals: (1) to coordinate and deconflict the maritime bureaucratic and regulatory apparatus; (2) to promote

⁷¹ Author’s search in the Peking University law database, pkulaw.cn.

⁷² Liu Nanlai, Conference Paper, 2013, <http://www.iolaw.org.cn/showArticle.aspx?id=3672>).

efficient, orderly, and productive use of maritime resources and development of the “blue” economy; and (3) to enhance China’s effective control over claimed maritime space (addressed in Section V as a case study). In addressing each of these goals below, the sheer volume of legal activity and documentation precludes comprehensive treatment; instead, certain clear and illustrative examples are selected for analysis.⁷³

(1) Coordinate and deconflict the maritime bureaucracy

The clearest imperative for the legislators and bureaucrats involved in developing and implementing rules in this domain is to facilitate some degree of predictability and efficacy in the national and local administration of maritime affairs. At least 17 administrative organs have some maritime responsibilities,⁷⁴ many of them redundant and contradictory. Until recently, five different agencies had maritime law enforcement responsibilities, and none had sufficient capacity to fulfill its poorly demarcated duties.⁷⁵ In consequence, a great deal of “legal work” is now devoted to streamlining the PRC maritime apparatus and making sure that lines of authority and responsibility are sufficiently clear. Accomplishing this task is considered a prerequisite for the orderly *use* and effective *control* of maritime space,⁷⁶ addressed in subsequent sections.

The urgent demands to adequately use China’s marine resources and protect MRIs have long been hindered by what is widely considered to be a poorly organized fisheries management system and inadequate legislative capacity that has tended towards ad hoc, reactive measures, “enacted to resolve urgent issues or immediate needs arising from the exploitation of fisheries resources. Thus many of the laws are sectorial, single-purpose regulations. They are adopted without systematic organization and detailed investigation,

⁷³ A comprehensive review would be excessive, given the high level of repetition in language and the many iterations of various rules at every level of the legal and administrative hierarchy. In addition to the legislation, administrative regulation, and departmental rules that constitute the bulk of the empirics in this essay, there are national and judicial interpretations, local agency regulations, government rules, industry regulations, and military regulations that include similar language.

⁷⁴ ODP (2014), p. 321.

⁷⁵ See Jakobson (2014), for detailed treatment of the “reorganization [重组].”

⁷⁶ 林英, 我国将加强海洋立法和规划, 光明日报 (January 23, 2001), p. A4.

and there is lack of harmony with other regulations.”⁷⁷ Over the past decade, PRC authorities have committed extraordinary bureaucratic, legislative, and regulatory resources to this lagging sector, matching significant investments in capacity (for example, a 25 percent increase in the number of vessels in the China Coast Guard between 2012 and 2015)⁷⁸ with a raft of maritime-facing statutes, regulations, and rules.

A set of State Council “provisions” from 1996 illustrates the feats of coordination required to delegate even the most straightforward of responsibilities regarding the law of the sea. Stakeholders from the SOA, MFA, PLA general staff, Ministry of State Security, State Secrecy Bureau, Hong Kong and Macau Affairs Office, and Taiwan Affairs Office all participated in drafting regulations on “Strictly Implementing the Administrative Provisions of the PRC on Foreign-Related Marine Scientific Research.”⁷⁹ A notice was issued by these same authorities in December 1999 announcing that “China’s foreign-related research management has embarked on the legal track” and that “these Provisions have produced benign effects since their implementation...and have played an important role in strengthening the administration of MSR [marine scientific research] activities and *safeguarding China’s sovereignty and maritime rights and interests.*”⁸⁰

The connection between banal measures for registering foreign vessels conducting hydrographic surveys in China’s EEZ and issues of sovereignty and MRIs is not made explicit here, or elsewhere; however, the composition of the organs whose input and authorization seems to have been necessary for these regulations to have any practical

⁷⁷ Xue Guifang, *China and International Fisheries Law and Policy* (Leiden: Martinus Nijhoff Publishers, 2005), p. 95. Xue cites the conflicting rules on fishing permits contained in the Administrative Law on the Use of Sea Areas and the 1986 Fisheries Law.

⁷⁸ Office of Naval Intelligence, *The PLA Navy: New Capabilities and Missions for the 21st Century*, February 2015.

⁷⁹ Marine scientific research (MSR) is a class of activity over which UNCLOS assigns specific jurisdiction to the coastal state in its EEZ. See UNCLOS Part XIII.

⁸⁰ PKU Law database, State Oceanic Administration, MFA, PLA General General Staff, Ministry of State Security, the State Secrecy Bureau, the HK and Macao Affairs Office of the State Council and the Taiwan Affairs Office of the State Council on Strictly Implementing the Administrative Provisions of the PRC on Foreign-Related Marine Scientific Research[国家海洋局，外交部，中国人民解放军总参谋部等关于严格执行《中华人民共和国涉外海洋可持续研究管理规定》的通知], available at http://www.chinalawinfo.net/fulltext_form.aspx?Db=chl&Gid=185081&keyword=&EncodingName=&Search_Mode= .

effect is telling, as is the language they use to describe the effectiveness of the legal instrument in question.

A recent round of highly visible efforts in this direction was initiated with the promulgation of a specialized Five-Year Plan (FYP) for National Maritime Development, as part of the 12th FYP rolled out by the PRC's chief executive organ, the State Council, in 2012. Accompanying this exquisitely detailed set of goals for the full exploitation and proper management of China's maritime space was a major bureaucratic overhaul put in motion at the 12th National People's Congress in March 2013, when four of the so-called "five dragons" – agencies responsible for maritime law enforcement (MLE) – were consolidated into one superagency, the China Coast Guard (CCG) under the SOA, with "operational guidance" from the People's Armed Police (which had previously administered the China maritime border patrol, which the CCG replaced).⁸¹ This move reflects the judgment of Chinese senior leadership that the MLE system was dysfunctional and had, in the words of one State Councilor, "insufficient ability to safeguard [maritime] rights."⁸²

Simultaneously, the State Council founded a National Oceanic Commission to coordinate (协调) the complex work of the still-numerous administrative organs with maritime responsibilities. The commission is thought to be endowed with some type of executive authority to streamline decision-making, and presumably oversee the broader project to "perfect" China's maritime legal system.⁸³ Yet its precise composition remains unknown, and no evidence of the organ's activities is available. Even Chinese experts with access to personnel in the Party and bureaucracy acknowledge that this process remains totally opaque and the practical extent of the reforms (collectively called the "reorganization"

⁸¹ The CCG is also under the "operational guidance" of the Ministry of Public Security, and all of its vessels and personnel will eventually be armed, reflecting a concerted effort to integrate MLE into China's broader security apparatus. Meeting with SOA officials, September 2014.

⁸² "马凯：重新组建国家海洋局 设立高层次一是协调机构国家海洋委员会", 新华社" [Ma Kai: Restructure State Oceanic Administration, establish high-level coordinating agency State Oceanic Commission, Xinhua News Agency], 10 March 2013. See also International Crisis Group (2013), "Dangerous Waters: China-Japan Relations on the Rocks," *Asia Report No. 245* (8 April 2013), <http://www.crisisgroup.org/~media/Files/asia/north-east-asia/245-dangerous-waters-china-japan-relations-on-the-rocks.pdf>.

⁸³ Author interviews with Chinese oceans policy and law experts, Hainan, PRC May 2014.

重组) remains unclear.⁸⁴ In this context, PRC leaders recognize an opportunity to leverage the standardization, transparency, and growing authority of the legal system in China to better coordinate their unwieldy maritime apparatus.

Despite continuing efforts to reform governance processes, the personalistic ties, informal hierarchical authority relationships, and resulting intrigue and corruption in the Chinese Party-state are still very much in play and producing familiar frictions. Coupled with the urgent priority to coordinate maritime work, this institutional problem inclines many Chinese experts to the view that some broadly construed, top-down national “Basic Oceans Law” should be promulgated to clarify the lines of authority and various functional responsibilities of China’s maritime administrative organs.⁸⁵ Various state agencies and semi-official research outfits are currently developing components of this possible legislation, but its content and the timeline for its promulgation remain unknown.⁸⁶

The overall thrust of this reshuffle is to “increase the effectiveness of maritime rights protection”⁸⁷ by way of a more rationalized bureaucracy. In 2012, SOA’s then director Liu Cigui called on cadres to redouble efforts towards the “constant strengthening of comprehensive ocean management,” which he characterized as the essential aim of maritime work.⁸⁸ That bureaucratic slogan reflects the high priority assigned to streamlining the legal and administrative processes – i.e., “managing and controlling the maritime domain”⁸⁹ necessary to the development of maritime power. The substantive goods Chinese officials seek to deliver with this improved administrative apparatus are principally the full development and use of China’s substantial maritime endowments,

⁸⁴ In author meetings in Beijing during the fall and winter of 2014-15, members of the reorganized agencies (specifically, the Fisheries Law Enforcement Command, General Administration of Customs, and the SOA’s Maritime Surveillance Force) wore their old uniforms (not the CCG blues) and explicitly identified themselves and their job functions with their old organizations.

⁸⁵ See Liu, “Drawing Up A Basic Oceans Law”; Xue, *China and International Fisheries Law and Policy*; and Takeda, “China’s Rise as a Maritime Power.”

⁸⁶ One PLA academic argued that the PLA would oppose any Basic Law because it is simply “not necessary” and would likely infringe on some of its existing prerogatives.

⁸⁷ 刘赐贵, “关于建设海洋去昂过的怒感思考” [Some thoughts on building maritime power], address at the 18th Party Congress (December 2012), text available at: <http://colp.sjtu.edu.cn/article/?NewsID=3510>.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

and the achievement of effective control of claimed maritime space sufficient to deter other states and unauthorized users, addressed below.

(2) Promote efficient use and development

The bulk of PRC maritime legislation, regulations, and rules were promulgated to advance and manage the development of China's growing maritime economy. It is in this economic arena that the utility of an effective, relatively transparent maritime legal system is most obvious. Such a system is intended to facilitate efficiency through the proper allocation of usage rights and the prevention of abuses that hinder the development of the massive and growing maritime sector, which already accounts for 10 percent of China's gross domestic product and as much as 16 percent in the rich coastal provinces.⁹⁰ With respect to maritime rights and interests, this section emphasizes that the maritime rules adopted by China on balance tend to expand the *content* and *scope* of China's claimed legal authority, thus maximizing the potential economic output in claimed maritime zones and supporting the broader strategic goal of effective control of claimed maritime space.

Augmented jurisdictional content of state authority. Chinese legislative and regulatory efforts to bring UNCLOS into Chinese domestic law tend to establish additional, generally unlawful, jurisdiction for the coastal state. Principally, this has been accomplished through a rejection of the comprehensive nature of the Convention in its definitions of maritime entitlements for the world's oceans. For Beijing, *history* is a superior consideration to law and can be deployed, loosely, to justify any claims and behaviors that appear to be *prima facie* illegal. This belief in Beijing's version of the maritime history of Asia is most poignantly on display in the form of the U-shaped-line map and reams of carefully curated historical materials that purport to demonstrate Chinese sovereignty over the various islands under dispute with neighbors.⁹¹ This blanket assertion that the law of the sea does not bear upon "historical" issues betrays a basic misunderstanding of the purpose and function of UNCLOS – namely to standardize and

⁹⁰ Takeda, "China's Rise as a Maritime Power."

⁹¹ See Wu 2013, and Jia and Gao, "Nine-dash Line in the South China Sea" for fairly comprehensive, if ambiguous, renderings of this claim.

coordinate global maritime claims with all manner of historical provenance. Alternatively, the assertion demonstrates a desire to play fast and loose with inconvenient rules. The latter interpretation is supported by the discourse in China on a number of other pertinent areas of the law of the sea. These questionable legal views bolster the effort to expand the substantive content of China's maritime rights.

Aspiring apparatchiks and maritime professionals learn in Chinese law schools that there is a class of "surplus rights" (剩余权利) or "vested interests" (既得利益) that must be read into the EEZ regime.⁹² These are unspecified rights that the Chinese law of the sea community believes should have survived the codification of the new EEZ in UNCLOS III – especially those rights of historical character. These rights and interests include others that are neither positively created by the law of the sea nor based on historical claims, but which are also not explicitly foreclosed (in the Chinese view). International law, in their view, accommodates evolution and adjustment according to political realities (i.e., China's maritime interests) and can produce new rights to match those circumstances.⁹³

In the words of a former leading UNCLOS scholar who served as an expert consultant to the PRC delegation to the Conference on the Law of the Sea (1973-1982):

The Convention has left ample room and space for an adjustment process of enlarging jurisdiction of the coastal states and reducing the freedom of high sea, largely due to residual rights contained in maritime law. Especially in the new area of the EEZ, the allotment of coastal countries'

⁹² For detailed and influential exposition of the vested interests thesis, see Zhao Jianwen, "UNCLOS and China's South Sea Vested Interests," *Faxue Yanjiu* 2 (2003). Based on the author's attendance at several university seminars, his interviews with UNCLOS scholars, and the proliferation of masters and Ph.D. theses that focus on the residual and vested rights (over 200 mentions in thesis abstracts found in a CNKI database search), it is now a standard theme in academic writing on the subject. For example, see Wei Dan, "On The Residual Rights in UNCLOS and Maritime Security" (海洋法上的剩餘權力與國際海洋安全), *公民与法*, 2014, no. 2.

⁹³ Author interviews with law professors and maritime law experts in Beijing, Hainan, and Taipei (April 2014 – March 2015).

sovereign rights, exclusive jurisdiction, the freedom of high seas, and other states' user rights is not very clear.⁹⁴

China's maritime laws aim to use this "adjustment process" to augment certain of its substantive rights in maritime zones. Another Chinese scholar argues that it is unwise to take direct liberties with the jurisdictional competence assigned in UNCLOS, and that China would do better to take those specified sovereign rights and jurisdictions and convert them into "management rights under domestic law, rights that are not equivalent to full sovereignty." He adds, "How to administer these international waters and expand our usage rights is a key consideration for our country."⁹⁵ Many in academia and government are of the view that the process of creating *domestic maritime law* can itself augment China's maritime rights, both by putting those rights into practice and demanding that other parties acquiesce, and through shoehorning various administrative duties and functions into the specific jurisdiction assigned by UNCLOS.

The 1998 PRC EEZ law is the highest-level and perhaps clearest example of this process. It stipulates that the legislation and UNCLOS do not infringe upon some set of unspecified "historical rights" (Article 14).⁹⁶ This language refers to undefined legal rights in Chinese EEZs and, in effect, stakes a formal claim to jurisdiction that is not expressly conferred in the Convention itself – nor even adequately specified in PRC domestic law.⁹⁷ That law further makes no distinction between commercial and sovereign

⁹⁴ Zhou Zhonghai, "Residual Rights in Maritime Law" (论海洋法中的剩余权利), *Zhengfa Luntan* 5, no. 119 (2004).

⁹⁵ 戈华清, "我国海域使用权制度初论 [An early analysis of our maritime zone usage rights]," *中国政法大学学报* [*China Law and Politics University Journal*], Vol. 4, no. 1 (2002).

⁹⁶ "The Provisions of this Law shall not affect the rights that the PRC has been enjoying ever since the days of the past" [本法的规定不影响中华人民共和国享有的历史性权利].

⁹⁷ Some experts engage with this problem; others ignore it. One common tactic is to throw together overwhelming volumes of textual references without explaining how they generate the claimed rights in question. An example is this passage [not a footnote, a paragraph in an essay] from 余民才 [Yu Mincai], "中国和联合国海洋法公约 [China and the UN Convention on the Law of the Sea]," *现代国际关系* [*Contemporary International Relations*], no. 10 (2012), pp. 55-62: "First, China's correct, lawful propositions on many aspects of marine rights and marine uses became rules of the Convention or were reflected in the rules of the Convention. This is reflected in articles regarding territorial waters including Articles 2-3, Articles 15-16, Article 19 Paragraph 1, and Article 21; in articles regarding the Exclusive Economic Zone (EEZ) and continental shelf, including Articles 55-58, Article 62 Paragraph 2, Articles 69-70, Article 73, Article 77-79, Article 74 Paragraph 1, and Article 83 Paragraph 3; in articles regarding the high seas, including Article 87, Article 92, Article 116, Articles 118-119, and Article 125; and in articles regarding the international seabed area, including Articles 136-137, Articles 141-143, Article 145, Articles

immune vessels, implicitly extending Chinese authority over the activities of military and government ships that are excluded from coastal state jurisdiction.⁹⁸ Associated rules that bear on EEZs also arrogate certain security-related rights to China that are not found in the Convention (addressed fully below in the context of effective control). The vague carve-out for unnamed rights created in this national legislation opens the gates for regulators and administrators at lower levels to accumulate new content for PRC jurisdiction. The relative newness of the EEZ regime and the indeterminacy of several critical and contentious rules that attempt to balance user state and coastal state rights have invited what might be called “creative” efforts within the PRC to augment the content of the coastal state’s EEZ rights – inevitably at the expense of user state rights in that zone.⁹⁹ As is prominently on display in the EEZ law, the favored method for augmenting the content of Chinese rights in law is through ambiguous language that often includes some formulation of MRIs (as seen in the case of “historical rights”).

Another instance of augmented content lies in the PRC’s periodic inclusion of an unspecified “security” jurisdiction in maritime zones where such competence is not authorized under international law. By tacking “security” onto what is intended to be an exhaustive account of coastal state jurisdiction specified in UNCLOS, PRC domestic maritime law is effectively whittling away the freedoms and rights of user states in its jurisdictional zones. Article 13 of the 1992 PRC Law on the Territorial Sea and Contiguous Zone assigns to the PRC “the authority to exercise powers within its

157-160, and Article 170. In addition, China's proposals on the protection of the marine environment are reflected in Article 192, Article 194, Articles 209-210, Articles 213- 218, Article 220, and Article 23. Article 143, Article 242, and Articles 244-245 acknowledge China's stance on marine scientific research, Articles 279-280 and Article 283 are consistent with China's position on negotiation to solve maritime disputes, and Articles 297-299 partially alleviate China's concerns regarding mandatory third-party settlement of maritime disputes.”

⁹⁸ See UNCLOS III, article 236.

⁹⁹ The deliberate nature of this expansion is on full display in the scholarly literature on UNCLOS. Ge 2002 offers a representative example of the underlying “reasoning” with regard to the 2001 PRC Law on Administration and Use of Sea Areas: “If the existing laws for use and management of our maritime space are not reasonable, one subjective approach would be to expand the *scope* of our laws and jurisdiction in ways that don’t comport with UNCLOS, but such a unilateral domestic use would create international disputes; another approach to deal with poor management in these areas and their high costs, etc.... Because the sovereign rights and jurisdiction prescribed under international law are not equivalent to management rights under domestic law, those domestic rights are not equivalent to full sovereignty. How to find a way to a way to administer these international waters and expand our usage rights is a key consideration for our country.”

contiguous zone for the purpose of preventing or punishing infringement of its *security*, customs, fiscal, sanitary laws and regulations or entry-exit control within its land territories, internal waters or territorial sea” (italics added). The pointed inclusion of “security” in this legislation (and in many subsidiary regulations and rules) represents a deliberate move to legislate additional rights. Not only is this an augmentation of the normal content of coastal state jurisdiction, it also is a signal that China’s subjective judgment of its security will influence the degree of control it is legitimately entitled to exercise in maritime zones.¹⁰⁰ This move is complemented by efforts to expand the scope in which China’s putative rights obtain, analyzed below.

Enlarged geographic scope of state authority. PRC maritime rules also tend to expand the geographic *scope* in which the state exercises the augmented jurisdiction described above. That is, the law of the sea contemplates only the extension of a territorial sea, a contiguous zone, an EEZ, and a continental shelf from sovereign land. China claims these entitlements, as well as other unspecified zones that evidently extend beyond the 200-nm limit fixed in EEZ rules. This amounts to what one prominent American UNCLOS scholar calls “[t]he exercise of Chinese jurisdiction in its neighbors’ EEZs.”¹⁰¹ Expressed most clearly in the U-shaped-line map, the geographic expansion of Chinese MRIs is accomplished through (1) delimiting PRC baselines and zones broader than UNCLOS permits, and (2) introducing calculated ambiguity in the laws and regulations such that the zones under Chinese jurisdiction are not expressly named and can cover geographic spaces wider than those prescribed under UNCLOS.

This scope-stretching practice begins with China’s policy of straight baselines, which were codified in the 1992 Territorial Sea law and then delimited in 1996 and 2012 State Council declarations on PRC baselines.¹⁰² The black letters of UNCLOS are

¹⁰⁰ Some Chinese legal scholars see a pattern of PRC efforts to invoke an “*ordre public*” doctrine, which means that a state may override international legal obligations on the basis of its own judgment about what constitutes a disruption to its domestic social and political order. See Xiao Yongping and Huo Zhengxin, “Ordre Public in China’s Private International Law,” *The American Journal of Comparative Law*, Vol. 53, No. 3 (Summer 2003), pp. 653-677.

¹⁰¹ James Kraska, “The Lost Dimension: Food Security and the South China Sea Disputes,” *Harvard Law School National Security Journal*, February 26, 2015.

¹⁰² A Declaration on the Territorial Sea dated 4 September 1958 was the first official claim to straight baselines. The 1992 Law of the PRC on the Territorial Sea and Contiguous Zone codified it as legislation.

unambiguous on the invalidity of such a policy: the Convention prescribes normal baselines (from the low-water line) except where “the coastline is deeply indented...or if there is a fringe of islands along the coast in its immediate vicinity.”¹⁰³ Although these conditions obtain in certain areas along the mainland coast, Chinese law makes straight baselines its *only* mode of drawing baselines. The PRC also draws straight baselines across bays and around island groups (addressed below).¹⁰⁴ These straight baselines are an unequivocal instance of unlawful expansion of the scope of PRC jurisdiction. In effect, this domestic legal maneuver leads China to claim maritime zone entitlements that begin and end farther out to sea. Meanwhile, pushing out baselines effectively cordons off large areas of water space inside those illegal straight baselines as fully sovereign internal waters (as opposed to territorial seas extending from normal baselines).

China’s legal posture on “archipelagic baselines” is similarly geared towards enclosing a larger volume of ocean space than the black letters of the law allow. Indeed, despite the unambiguous UNCLOS provisions that the entitlements of archipelagic states to straight baselines around their group of islands applies *only* to states “constituted wholly by one or more archipelagos,”¹⁰⁵ China refers to all of its disputed island groups as archipelagos that warrant status as “archipelagic states” and has drawn straight baselines enclosing them.¹⁰⁶ By creating large zones of “archipelagic waters” – equivalent to international waters in nearly all respects – PRC law assigns itself greater maritime rights in a larger geographic space than the law of the sea permits. The UNCLOS scholarly community in China is currently engaged in a collective effort to find some plausible interpretation of the law of the sea that permits mid-ocean clusters of rocks and reefs to be treated as archipelagos for the purposes of maritime delimitation.¹⁰⁷

The 1996 Declaration on the Baselines of the Territorial Sea and 2012 Statement of the Government of the PRC on the Baselines of the Territorial Sea of Diaoyu Dao and its Affiliated Islands provide the actual basepoints from which the straight baselines are generated.

¹⁰³ UNCLOS III, Part II, Section 2, Article 7, “Straight Baselines.”

¹⁰⁴ An official map displayed by an SOA official at an October 2014 workshop showed a straight baseline across the mouth of the Bohai Bay, which represents another (as yet unpublished) instance of this practice.

¹⁰⁵ UNCLOS III, Part IV, Article 46, “Use of Terms.”

¹⁰⁶ The 1996 and 2012 declarations of baselines enclose the entire island groups, rather than individual features.

¹⁰⁷ Papers and discussion at an East China University of Politics and Law conference on “Maritime Non-Traditional Security Challenges in the Asia Pacific: An Interdisciplinary and Transnational Dialogue on

Calculated ambiguity in the language used in several critical rules complements these efforts to push out China's UNCLOS zones. Perhaps the most pervasive practice of broadening the scope of Chinese MRIs is seen in the standard list of zones under Chinese jurisdiction found in virtually all of its maritime rules. For example the 2002 Marine Environmental Protection Law announces that "[t]his law shall apply to the internal waters, territorial seas and contiguous zones, exclusive economic zones and continental shelves of the PRC *and all other sea areas under the jurisdiction of the PRC.*" That "all other sea areas" construction is standardized all the way down to local regulations,¹⁰⁸ yet does not tell us which geographic areas are subject to what unspecified jurisdiction.

This deliberate imprecision extends even to a Supreme Court interpretation of the 1999 Special Maritime Procedure Law, in which declines to specify the zone in question, offering instead a tautology: "The phrase 'the sea areas under jurisdiction' as prescribed in Item 3) of Article 7 of the Special Maritime Procedure Law refers to the contiguous zones, exclusive economic zones, continental shelves, *and other sea areas that are under the jurisdiction of the People's Republic of China.*"¹⁰⁹ This tortured reasoning reflects what can only be understood as a judgment that legal clarity is inferior to the political demand facing the judiciary (and other Chinese actors) to maintain flexibility about the claimed scope of Chinese maritime entitlements. Even the SOA departmental rules on "National Maritime Functional Zones" – an exhaustive and highly specialized inventory of all the different layers of state authority in maritime space – declines to flesh out these "other sea areas"; in fact, among eight marine functional zones, there are "reserve zones" that "have not been developed and utilized for the time being due to social and economic

Reconstruction of Legal Order," November 15, 2014 attended by author. Several UNCLOS experts posed suggestions to their colleagues about how China could use the archipelagic baseline rules, or develop a new rule-set, to enclose their claimed "archipelagos" in the East and South China Seas in a single set of straight baselines rather than normal baselines around each island. The basic legal obstacles of such a move were acknowledged but disregarded by this group, as well as by several other law of the sea scholars whom the author interviewed in the period April 2014 – April 2015.

¹⁰⁸ Rendered in Chinese as "国家管辖的一切其他海域," this language appears in the 1986 Fisheries Law of the PRC (and its amendments in 2000, 2004, and 2013), the 1993 Regulations of the PRC Governing Survey of Ships and Offshore Installations, the 1983 Maritime Traffic Safety Law of the PRC, and the 1982 Marine Environment Protection Law of the PRC, as well as dozens of local and provincial instruments.

¹⁰⁹ The Supreme People's Court Interpretations on the Application of the Special Maritime Procedure Law of the People's Republic of China, effective 1 February 2003 (adopted at the 1259th meeting of the Adjudication Committee of the Supreme People's Court on December 3, 2002, No. 3 Interpretation [2003] of the Supreme People's Court).

factors, and whose basic functions *should not be clearly defined*.”¹¹⁰ These “social and economic factors” can be read as the nettlesome maritime and territorial disputes in many zones which complicate the actual exercise of Chinese jurisdiction; it appears to be the judgment of PRC authorities that specification at this stage could jeopardize the favorable settlement of complex usage issues in any future maritime delimitation.¹¹¹

The 2013 Hainan Fisheries Implementation Measures¹¹² demonstrate how this imprecision works in practice. With these measures, the Hainan provincial legislature set out specific rules for implementing the 2004 PRC Fisheries Law, including the provision that those rules apply within the alleged 2 million square kilometers of maritime space under Hainan’s jurisdiction. Yet that commonly cited figure does not in fact delimit the geographic scope of the zone in which Hainan is claiming authority. Given that the volume of water space is substantially greater than any calculation of EEZs where China exercises lawful fisheries jurisdiction,¹¹³ presumably relevant agencies are also authorized to enforce PRC fisheries laws in undefined “all other sea areas”¹¹⁴ that extend well beyond the scope allotted under UNCLOS. Hainan is, in effect, claiming *exclusive* fisheries jurisdiction in an undefined area – though one that is 2 million square kilometers, which is a rough approximation of the surface area of the U-shaped line. There is no geographic delimitation of this jurisdictional zone available in any public document or official statement, so the upshot is China pursuing its MRI in a maritime area of undefined scope.

¹¹⁰ 2012 SOA Division of National Maritime Functional Zones 2011-2020, Chapter 3, Section 8.

¹¹¹ Ge 2002; Zheng Zhihua, “The Admissibility and Competency of China’s U-shaped Line Map of the SCS,” *外交评论 [Foreign Affairs Review]*, 5 July 2013, pp. 30-44.

¹¹² Hainan Province Implementation of “PRC Fisheries Law” Measures (December 2013), available at: <http://www.hinews.cn/news/system/2013/12/07/016278991.shtml>.

¹¹³ The PRC has not specified its EEZ claims, which would necessarily be provisional due to the existence of maritime boundary delimitation disputes in the East and South China Seas. Nonetheless, even hypothetically extending EEZs from all Chinese-claimed features, the zone created would be substantially less than 2 million square kilometers. See Robert Beckman and Clive Schofield, “Defining EEZ claims from islands: A Potential South China Sea change,” *Journal of Marine and Coastal Law* 29 (2014).

¹¹⁴ Presumably the geographic space in question is an area extending from the inter-provincial maritime boundary bisecting the Qiongzhou Strait and extending to the edges of the undefined “U-shaped line,” but this is not made explicit. A Hainan Maritime Safety Administration plan that purports to define its geographic areas of responsibility plots the coordinates only of the northern tier of its zone. See the Twelfth Five-Year Plan of the Hainan Maritime Safety Administration (MSA) (Hainan Maritime Safety Administration, July 7, 2012).

The undefined and “excessive”¹¹⁵ scope and content of Chinese maritime rules are logically and practically linked. Viewed together, they provide a vivid illustration of the characteristic expansion of MRIs. Part of this is accomplished through specific claims to additional jurisdiction that is not explicitly created by any international law (i.e., “creeping jurisdiction”). Another part is accomplished through the sheer imprecision of the language employed to define the areas to be regulated. The notorious “U-shaped line” is the poster child for this practice: it does not provide any coordinates for the dashed-and-dotted lines, which appear in different places on different projections and are not connected to one another; it does not specify the jurisdiction claimed within it; and it asserts state authority beyond that contemplated in the UNCLOS treaty by which China is formally bound.¹¹⁶ The most that can be said for it is that it is a zone in which MRIs are deemed legitimate by PRC authorities, and in which Chinese rights are exclusive.

V. Consolidate Effective Control: EEZ Case Study

China’s domestic maritime legal scheme must be understood in the broader strategic context in which the PRC views protection of its MRIs as a facet of maintaining territorial integrity and supporting the maritime power project. In this context, specific legal measures for management of China’s maritime space and regulation of its economic development are also a means to (1) secure physical control necessary to operate in strategically valuable space, (2) limit access for other potential users of that space, and (3) convey to foreign users the increasing strategic and political costs for failing to acquiesce to China’s expanding posture. It is certainly debatable whether uninhabited islands and maritime zones over which China claims jurisdiction belong in the category of “territorial integrity,” but their unaccountably high status within the Chinese political arena is another upshot of the domestic processes under inquiry.

From this non-economic standpoint, various rules that facilitate the management and exploitation of maritime zones under PRC jurisdiction also contribute to the domestic

¹¹⁵ J. Ashley Roach and Robert W. Smith, *Excessive Claims* (3rd ed.) (New York: Brill, 2012).

¹¹⁶ A thorough and critical treatment to this effect is available in Department of State, Office of Ocean and Polar Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, *Limits in the Seas, No. 143, China: Maritime Claims in the South China Sea*, Dec. 5, 2014.

mobilization of personnel and resources to enhance the PRC's effective control over maritime space. Especially in disputed zones, scaling up China's use of maritime space bolsters and expands MRIs. According to a September 2010 report on China's distant water fishing industry by a task force from the State Council: "If you occupy and possess, then you have rights and interests."¹¹⁷ The implementation of China's maritime rules is where the practical problems begin for *other states'* efforts to protect their own maritime rights and interests.

Indeed, the same naval and MLE vessels that are legally authorized and operationally deployed to promote and regulate PRC economic activity play a significant role in deterring other users of Chinese-claimed maritime space, even as they protect other sanctioned economic, scientific, and strategic activities. The laws that underpin these efforts may be understood both as a means to realize those operational goals and as demonstrative or declarative elements that contribute to a deterrent posture. Because the domestic organizational means under inquiry are only one facet of this broader strategic picture, this section focuses on China's rules related to military activities in EEZs. This is a particularly salient case because China's EEZ laws and regulations impinge – or threaten to impinge – upon U.S. navigational rights and freedoms in Chinese jurisdictional waters and beyond.¹¹⁸ It is also a clear case in which the domestic maritime legal scheme remains incomplete, and thus a likely area of future legislative and regulatory efforts that will suggest some of the authority China intends to exercise in this crucial strategic zone comprising some 38% of the world's oceans.

The Chinese argue that both international law and PRC domestic code forbid foreign warships from operating in its EEZs without prior permission. They have taken various operational and diplomatic measures to restrict access, but have not yet formulated sufficiently specific legal prohibitions; nor have they attempted to stringently and consistently enforce the supposed rule. Insufficient capacity to do so effectively explains

¹¹⁷ Tabitha Mallory, "China's Distant Water Fishing Industry: Evolving policies and implications," *Marine Policy* Vol. 38 (2013), p. 105, citing the Supporting and Strengthening Distant Water Fisheries Task Force, "Support Distant Water Fisheries as a Strategic Industry," September 2010, http://www.stats.gov.cn/tjsujia/zggqgl/t20101018_402676860.htm.

¹¹⁸ For a summary of this issue, see Ronald O'Rourke, *Maritime Territorial and EEZ Disputes Involving China: Issues for Congress*, Congressional Research Service Report R42784, 24 December 2014.

the lack of uniform enforcement, but reasons for the “missing” legislation are less obvious. One explanation for this omission is that PRC experts and authorities believe that UNCLOS already grants coastal states license to regulate such military activities on the basis of the following:

- 1) The potential threat they pose to the “peace, good order and security of the coastal state”¹¹⁹
- 2) The innately non-“peaceful purposes”¹²⁰ of such activities
- 3) The status of certain military activities as “marine scientific research” (MSR) expressly regulated in the Convention¹²¹
- 4) Their potentially harmful effects on the marine environment and mammal life.

Chinese interlocutors also sometimes invoke the UN Charter’s provisions regarding the threat or use of force as the source of a norm prohibiting any military activities in China’s EEZ.¹²² These arguments are commonly rehearsed in public forums by Chinese officials and experts, but curiously were not the subject of a Chinese statement upon ratifying the Convention;¹²³ nor are they developed in any identifiable domestic rules. Prevailing international legal opinion does not support the PRC’s interpretation, if indeed these are the articles they hope to invoke in claiming that military activities in EEZs require coastal state consent. On their face, they are absurd: the “peaceful purposes” clauses apply to the high seas, which would effectively rule out all military activities in the world’s oceans.

¹¹⁹ UNCLOS III, Article 19.

¹²⁰ “Peaceful purposes” is featured as part of three regimes in UNCLOS III: high seas (Article 88), the Area (Article 141, 143, 147, 155), and MSR (Article 240, 242, 246); however, it is never defined in the Convention text.

¹²¹ UNCLOS III, Part XII “Marine Scientific Research.”

¹²² For an exhaustive account of these and related debates, see: Peter Dutton (ed.), *US-China Dialogue on Security and International Law in the Maritime Commons* (Newport: Naval War College Press, 2010); Eric Franckx, “American and Chinese Views on Navigational Rights of Warships,” *Chinese Journal of International Law* 10, no. 1 (2011): 187–206; Raul Pedrozo, “Responding to Ms. Zhang’s Talking Points on the EEZ,” *Chinese Journal of International Law* 10, no. 1 (2011): 207–223; and Zhang Haiwen, “Is It Safeguarding the Freedom of Navigation or Maritime Hegemony of the United States? – Comments on Raul (Pete) Pedrozo’s Article on Military Activities in the EEZ,” *Chinese Journal of International Law* 9, no. 1 (2010): 31–47.

¹²³ The PRC did make such a statement claiming that the military’s exercise of innocent passage through the territorial sea requires coastal state authorization, but did not declare any restrictions on military navigation or activities in EEZs. See: “Declarations and Statements,”

http://www.un.org/depts/los/convention_agreements/convention_declarations.htm.

Harping on MSR regulations is perhaps a more credible tack. Although the military purposes of USN intelligence, surveillance, and reconnaissance (ISR) operations are generally believed to exclude them from that regulated class of activity, there are at least statutory bases in UNCLOS to support regulating some types of survey. However, the perceived threats to China's MRIs and politicized character of China's legal processes (discussed in sections II and III) may throw up all manner of obstacles to effectively specifying this objection. This is illustrated vividly in the preamble to the 1999 Notice on Implementation of Administrative Procedures on Foreign-Related MSR, which rather informally and speculatively (for a regulatory document) states:

[S]ome people have given more account to the scientific aspects and less to the perspective of safeguarding national sovereignty and maritime rights and interests in their choice of regions for foreign-related marine scientific investigation and research projects and their exchange of content, samples and data, which are reflected in the fact that their cooperation with the maritime powers such as the United States and Japan without being fully aware of foreign parties' attempts to collect China's marine information or unlawfully provided classified information to foreign parties without following relevant confidentiality provisions in reviewing such information....All these problems in varying degrees have violated these Provisions and harmed China's sovereignty and maritime rights and interests.

This resistance to formulating clear-cut rules that might be exploited by foreign (and Chinese) users is the unfortunate consequence of the politicization of maritime issues within the contemporary PRC. There are few, if any, incentives for PRC law-makers to make precise rules in areas where China presently lacks the capacity to properly enforce them. Whatever the underlying reasons for omission, the pattern is unmistakable in other laws and regulations – for example, the 2002 Surveying and Mapping Law, which resists making any distinction between surveying and MSR despite the law's clear purpose as an instrument to regulate exactly those behaviors. This resistance appears to frustrate the

legal-minded experts in the competent departments, given the complications that imprecise rules generate for their various administrative tasks.¹²⁴

In sum, Chinese objections to ISR operations do not yet have a cognizable legal basis. As noted, PRC omissions in international legal practice and codified law may reflect a belief that, with some creative interpretation, UNCLOS is already sufficient to support the Chinese position.¹²⁵ But this omission may also be an instance of the calculated ambiguity observed in other aspects of Chinese law – in this case, to avoid creating a precise argument that might be exploited by foreign legal experts, and to preclude the creation of a legal regime that contradicts the practices of the PLA Navy in foreign EEZs.¹²⁶ Consistent with this interpretation, Chinese officials have recently emphasized not so much the illegality of these behaviors as their excessive frequency.¹²⁷ It remains to be seen whether this reflects a reconsideration of China’s legal stance on such operations.¹²⁸ Some Chinese experts believe a law is forthcoming, but the opaqueness of the political process prevents any reasonable prediction on this count.¹²⁹

Less speculatively, the desired restriction on military activities in EEZs is understandable as one particularly visible and therefore controversial instance of broader PRC efforts to add content to its jurisdiction, discussed generically above. Chinese EEZ law does not

¹²⁴ An illustration of this is found in a journal article by a senior legal officer in the SOA, who publicly called for implementing regulations for the 1998 EEZ Law and a variety of other laws pertaining to fisheries and artificial islands in EEZs because they would “strengthen the management” of those zones. See: 赵恩波, “关于加强我国专属经济区和大陆架管理工作的几点建议” *海洋发展与管理*, 1999 (2) , pp. 47-51.

¹²⁵ Although this interpretation of the Convention is not widely shared, some 18 coastal states have a law or policy that infringes on the rights of warships in EEZs. See James Kraska and Raul Pedrozo, *International Maritime Security Law* (Leiden: Brill Publishers, 2013), pp. 277-313. The issue of military activities was a source of disagreement during the negotiation of the Convention and resulted in deliberate silence in the treaty text on the subject. Most UNCLOS scholars agree that this silence reflects the fact that China and others supporting this view did not prevail. Indeed, the U.S. position is that the lack of a positive prohibition and its consistent practice are sufficient to make military activities in foreign EEZs lawful.

¹²⁶ This is a commonly expressed view among U.S. experts, and is even supported by several Chinese maritime experts (author interviews in Hainan and Beijing, April 2014 – December 2014), and confirmed in the Office of the Secretary of Defense, “Military and Security Developments Involving the PRC,” *Annual Report to Congress* 2014.

¹²⁷ Author’s notes and conversations with Chinese experts at workshops in Beijing and Hainan, October 2014 – December 2014.

¹²⁸ Zhou Bo, PRC Ministry of National Defense, remarks at China Institute for International Studies, September 26, 2014.

¹²⁹ Li Anmin, “Thinking through countermeasures to protect our country’s maritime rights and interests” (维护我国海洋权益之对策思考), *Zhongguo Haiyang Bao*, no. 4 (2008).

(yet) contain any direct prohibitions on military activities in EEZs, but creates both prescriptive and enforcement jurisdiction for Chinese MLE in the event that such rules are promulgated.¹³⁰

VI. Concluding Summary and Implications for Policy-Makers

The preceding discussion analyzed legal facets of the PRC's domestic organizational efforts to advance its maritime rights and interests and achieve the maritime power goal. By gradually "perfecting" its maritime legal regime, central leaders are using law as an instrument to rationalize the PRC's discombobulated maritime bureaucracy, manage the sprawling maritime economy, and enhance state capacity to effectively control maritime zones. This task is complicated on the one hand by the notorious ineffectiveness of the Chinese political-legal system. On the other, it is rendered easier because officials can override legal rules on the basis of *ad hoc* political discretion. This circumstance has produced a maritime legal scheme that is maddeningly imprecise on important points, but nonetheless, is increasingly specific (and probably more effective) with respect to the various goals to be advanced – especially maritime rights and interests.

Chinese maritime rights and interests, with their ambiguous and expanding scope and content, provide raw material that can be converted into the legislation, regulations, and rules. Domestic legal justifications, couched in objectionable interpretations of UNCLOS and international law, are increasingly available to PRC leadership as they adjust maritime policies according to prevailing political circumstances – especially necessary in the volatile context of its several maritime disputes. "Rights and interests" is not only a familiar empty trope in the tradition of stilted CCP sloganeering about "resolutely implementing" and "comprehensively undertaking" this or that "sacred mission"; it is also an important practical vehicle for elaborating the nature and specific content of the leadership's goals for maritime power.

¹³⁰ "Prescriptive" jurisdiction refers to the country's right to prescribe or legislate laws and regulations in that territorial space, whereas "enforcement" jurisdiction refers to their right to practically enforce those laws. Article 9 of the 1998 EEZ law notes that any foreign vessels conducting MSR in China's EEZ "shall comply with the laws and regulations of the PRC," while Article 12 of that law confirms the PRC's "right to take necessary measures against violations of its laws and regulations."

Attention to the characteristics and implementation of MRIs will support the U.S. government's analytical efforts to understand how China's state maritime apparatus and its many maritime stakeholders are likely to behave, enabling policy-makers to craft responses accordingly. Three tactical advantages (discussed below) can be gleaned immediately. They feed into two potentially strategic insights – one regarding the ways China develops and deploys its maritime capabilities, and the other concerning how increasing Chinese capacity enables practices that will influence various customary norms that constitute the “maritime rule-set.”

The three tactical advantages are as follows: (1) In many cases, the laws, regulations, and rules are on the books before they are put into practice. Continued and systematic study in this vein offers definite rewards as signals of PRC intent in the maritime domain that are not yet in practice due to organizational lags. (2) China has undertaken sweeping reforms and major legislative efforts, but still has numerous lacunae in its maritime code on important questions such as the actual scope of its UNCLOS-based maritime zones or the specific competence. Analysts should expect these and other rules to be rolled out in coming years, and can develop legal arguments and/or operational countermeasures accordingly. (3) By virtue of its distinctive political-legal system, UNCLOS and the domestic laws developed to implement it are simply not “binding” on Chinese conduct in the way that international legal instruments are designed to be. This does not mean, however, that UNCLOS does not shape PRC behavior in meaningful ways. If only for reasons of reputation and reciprocity, Chinese leaders are wary of radically breaching their duties under the Convention and can be shamed by effective publicity. The CNN crew on the USN P-8 in May 2015 and the ongoing Philippine UNCLOS Annex VII arbitral suit against China are examples of public diplomacy that has frustrated the Chinese and, albeit counterfactually, likely induced some restraint into subsequent plans and activities.

Strategically, these analytical observations do not necessarily solve the various problems thrown up by China's aggressive pursuit of claimed maritime rights and interests. China's rampant island-building over the last two years and willingness to gauge their coercive activities based on the present political climate are strong indications that PRC leaders

are ignorant of, immune to, or otherwise unconcerned with some of the “costs” associated with Chinese maritime behaviors that the United States and its allies and partners in the region attempt to impose. The politicized qualities of law in the PRC mean that even clear restrictions on these behaviors under UNCLOS are insufficient to constrain China’s systematic efforts to consolidate its authority in disputed maritime zones. Independent of Chinese actions to do so, however, two general insights can helpfully inform U.S. policy-making moving forward.

The first is obvious, but worth relating to the fairly narrow scope of this inquiry: China’s maritime interests are growing in lockstep with its capabilities. With respect to law, these capabilities are best understood as its effective *governance capacity*. The rights that PRC agencies and individuals try to exercise generally correspond to the rights that they can practically assert and enforce with their growing MLE fleet, and its adjuncts, the maritime militia,¹³¹ patriotic fishermen, and state-owned oil companies. The PLAN is an over-the-horizon backstop to these efforts, but, unlike the USN, the Chinese fleet is authorized (and politically incentivized) to conduct law enforcement activities.¹³²

As a great power – and one with a special chip on its shoulder with respect to international law – there is simply no natural check on the scope or content of Chinese claims. There are only prudential checks on its willingness to exercise its claimed rights. This should come as no surprise to the United States, which, as recently as the middle of the last century, was the vanguard of producing international maritime law to suit its maritime interests. As FDR said in 1939, America’s territorial sea goes out “as far as our interests need it to go out.”¹³³ Like the nationalistic Chinese leaders of today, FDR conceived of his nation’s interests as expanding with its capabilities to use ever-greater

¹³¹ Andrew Erickson and Conor Kennedy, “Tanmen Militia: ‘China’s Maritime Rights Protection’ Vanguard,” *The National Interest* (May 6, 2015), <http://www.nationalinterest.org/feature/tanmen-militia-china%E2%80%99s-maritime-rights-protection-vanguard-12816>.

¹³² The 2013 PRC National Defense White Paper states that “China’s armed forces defend and exercise jurisdiction over China’s land borders and sea areas, and the task of safeguarding border and coastal security is arduous and complicated.” This authorization appears in various guises in domestic law and regulation, and is confirmed by the SOA’s 2010 ODP: “According to regulations related to laws in China, the Navy can also participate in certain works and activities related to the invasion of China’s ocean rights” (456-7).

¹³³ Press Conference 579, Sept. 15, 1939, in *Complete Presidential Press Conferences of Franklin D. Roosevelt* (New York: Da Capo Press, 1972–), vol. 14, pp. 166-74.

swathes of maritime space, bolstered by an increasingly capable navy. Mid-century American “maritime power” to use space and resources was its own justification for what amounted to the geographic expansion of the state, and a comparable phenomenon is under way in contemporary China. One important difference, however, is the vastly different environment in which these national interests came into play: the unenclosed littoral areas on America’s Atlantic and Pacific coasts meant that this expansion did not infringe upon other states’ sovereignty or jurisdictional claims. No rule-set existed, and thus the US pushed on an open door; China’s reality in the 21st century is far more contested.

Reckoning with this blunt political reality surfaces a second, more specific, strategic insight that can inform policy-making: these growing Chinese capabilities enable a more legally significant “state practice” that is even now influencing the legal norms in the ocean spaces along the East Asian littoral.¹³⁴ Influencing Chinese practice and systematically contesting any adverse norms it generates should be a high strategic priority for the US. In general, creeping coastal state jurisdiction complicates US freedom of action in the maritime domain. This issue is well-known in the US defense community, but the attention and resources devoted thus far are insufficient to deal with a capable, focused actor, in China, with clearly expanding ambitions for its coastal state authority. China’s powerful, purposive efforts to “territorialize” or “securitize” or otherwise develop legal bases for more effective control over vital maritime space will, over time, undermine US deterrence, challenge its forward deployment, and put pressure on its ties to allies and partners.

To reinforce its preferred norms or “rule-set,” Beijing is steadily imposing greater risks of confrontation on and above disputed maritime space; its leaders are willing to use economic coercion (and attraction, in the form of investment and trade) to induce acquiescence from weaker states. These efforts complement China’s observed efforts to develop and implement the domestic legal authorities to make effective Chinese control in these disputed areas the *norm*. With sufficient practice, China’s moves to deploy and

¹³⁴ “State practice” is the behavioral element of customary international law, and, with sufficiently long-standing practice acquiesced to by other states, can ultimately be a source of international legal rules.

protect offshore rigs, conduct fisheries law enforcement, interfere with lawful military activities, and regulate various non-economic activities in disputed zones can have international legal consequences. The navigational assertions of the USN notwithstanding, this Chinese conduct may effectively change the normal operations of other users of Beijing's ambiguously defined "other sea areas."

This process of changing customary norms appears to be underway. All along the "long littoral" of the Indo-Pacific, there is even a degree of sympathy for certain Chinese views about "excessive" security jurisdiction for coastal states, and a distinct possibility that norms in EEZs will continue to evolve towards greater coastal state authority.¹³⁵ The EEZ regime is relatively new and its language is indeterminate on key points. The rule-set is not fully developed, so there are not stable, uniform norms in EEZs across the globe. Ultimately, the proof is in the practice: the content and scope of underlying rules will be determined over time through state practice. Focused US diplomacy and operational assertions should therefore discourage other states from siding with Chinese-promoted norms that formally limit their exposure to U.S. power projection.

Encouraging the PRC to conform to accepted international rules and norms *without* branding it an outlaw may ease the way, diplomatically, for the PRC to mute its more extravagant claims. If Beijing does not consider itself to be excluded from the rules, it can use enhanced capabilities to incrementally acquire more modest rights through less disruptive, more legally accountable procedures. However, because the PRC is a relative newcomer to the international legal system and is incapable, domestically, of practicing what it preaches in terms of laws and regulations, this is also an exploitable weakness. China's political-legal system limits its capacity to uniformly and consistently exercise its so-called maritime rights, while its stridency in asserting excessive claims is a growing diplomatic liability. Future analytical efforts should focus on the challenges of practical

¹³⁵ Kraska and Pedrozo estimate that some 18 states have some form of excessive claim to restrict military activities in their EEZ. See Kraska and Pedrozo, *International Maritime Security Law*, Boston: Brill Academic Publishers, 2013, pp. 277-313. Other analysts suggest that some 60 states have laws and practices designed to exert additional jurisdiction over foreign users of their EEZs, e.g., Stuart Kaye, "Chapter 14: Maritime Security in the Post-9/11 World: A New Creeping Jurisdiction in the Law of the Sea?" in Clive Schofield et al. (eds), *The Limits of Maritime Jurisdiction*, Boston: Martinus Nijhoff Publishers, 2014, pp. 327-348.

implementation of Chinese domestic maritime laws and regulations. Systematic study will offer a clear indication of how “far out” China’s maritime rights and interests will extend.