

Chinese Domestic Law in the South China Sea

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IN RECENT YEARS, the different branches of the Chinese government have strategically used domestic law to put Chinese maritime claims into context, create ambiguity about the legality of Chinese claims, and expand Chinese influence over disputed maritime zones. The effect is an expansion of Chinese influence in the South China Sea and an increasing challenge to international law itself.

A fundamental issue with China's use of domestic law to challenge international rules and standards is that China's domestic legal terminology does not cohere with international legal definitions. Thus, a *note verbale* submitted to the United Nations in 2009 states: "China has indisputable sovereignty over the islands in the South China Sea and the *adjacent waters*, and enjoys sovereign rights and jurisdiction over the *relevant waters* as well as the seabed and subsoil thereof." [Emphasis added.]¹ Neither *adjacent* nor *relevant waters* are defined in international law to designate any particular maritime zone. This unique terminology serves as a foundation of China's domestic maritime law and helps the government alter domestic thinking away from the international standard. Abroad, this terminology allows China to remain ambiguous about the exact boundaries of its maritime claims.² This is helpful to China because—as it found out in absentia before the arbitral tribunal at the Permanent Court of Arbitration—precise claims with no basis in international law

fail before the courts. China tried to claim maritime areas based on historical rights rather than distance to its land territory and had its argument rejected for violating the United Nations Convention on the Law of the Sea (UNCLOS).³

The Supreme People's Court, China's highest judicial body, recently notified the National People's Congress that the court's jurisdiction extends to all areas under China's "sovereign control," including "jurisdictional seas" such as the disputed Sansha in Hainan province. Although not recognized in international law, China uses the term "jurisdictional seas" to describe inland waters, the territorial sea, its contiguous zones, its exclusive economic zone (EEZ), and continental shelf (as well as other sea areas that China claims). The term serves to justify China's claims beyond UNCLOS rules. The implications of this extension of Chinese domestic jurisdiction are unclear in practice but are potentially vast—especially in criminal law. For example, non-Chinese vessels fishing in disputed South China Sea waters may be in compliance with the international law of the sea, but may violate Chinese domestic laws, potentially exposing fishermen to imprisonment of up to one year.⁴ Similarly, foreign crew that legally engage in innocent passage under international law, but against the wishes of the Chinese government, may also face one year of jail time.⁵ In both cases, China grants its judiciary the power

to interfere in the rights granted to foreigners under international law, thereby enhancing Chinese control over international and disputed waters like the South China Sea.

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In an effort to strengthen China's maritime posture, the executive branch restructured and centralized maritime agencies in 2013. This included folding four maritime agencies into the newly constituted Chinese Coast Guard command: China Marine Surveillance,

Maritime Police (part of the Border Control department and formerly under the Ministry of Public Security), China Fisheries Law Enforcement (formerly Ministry of Agriculture), and Maritime Anti-Smuggling Police (formerly under the General Administration of Customs).⁶ The most innocent interpretation of the reorganization is that it was intended to improve administrative control and reduce redundancy. A wariar interpretation sees the reorganization as part of a bigger plan to achieve “strategic management of the sea,” which appears to mean a comprehensive state effort to achieve maritime dominance of [China’s] near seas in peacetime.”⁷

On the legislative front, the Chinese government is considering draft revisions to its Maritime Safety Law to exercise greater control over its internal and territorial waters. Some of these changes, depending on how they are implemented, are likely compatible with UNCLOS. Such measures include requiring foreign vessels to ask permission before entering ports or internal waters, and designating special marine areas where innocent passage is suspended.⁸ Some of the contemplated changes are more controversial. For example, one proposed change would require foreign military vessels to request permission to pass through China’s territorial sea—a violation of innocent passage rights under UNCLOS. Additional revisions would grant Chinese authorities the power to stop and eject foreign vessels contravening Chinese law or regulations as they transit, operate, or are anchored within the territorial sea or internal waters and extending the right of hot pursuit to China’s “jurisdictional waters.”⁹ Here again, we see Chinese domestic law supplanting international law to limit the rights of foreign vessels.

These developments are part of China’s broader efforts to use domestic law as a vehicle to further entrench its maritime claims in the South China Sea. Beijing’s effort to alter existing norms, the reach of its laws, and operational capabilities have two major implications. First, China is becoming more assertive in the region, imposing its domestic law where it should not apply. Second, the implications infringe on the relevance of international law itself, which is losing influence through self-serving reinterpretations and sidelining by domestic law. As the possible amendments to the Maritime Safety Law indicate, China continues to develop and implement this strategy.

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- 1 Paul Gewirtz, *Limits of Law in the South China Sea*, Brookings, 2016, www.brookings.edu/wp-content/uploads/2016/07/Limits-of-Law-in-the-South-China-Sea-2.pdf.
- 2 Peter Dutton, *China's Claims Are Unambiguously Ambiguous*, Center for Strategic and International Studies, June 16, 2015, <https://amti.csis.org/chinas-claims-are-unambiguously-ambiguous/>.
- 3 In the Matter of the South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China), Case No. 2013-19 (Perm. Ct. Arb. 2016).
- 4 Ben Blanchard, "China Court Warns against Illegal Fishing in Riposte to South China Sea Ruling" Reuters, August 2, 2016, www.reuters.com/article/us-southchinasea-ruling-idUSKCN10D0B1.
- 5 Ibid.
- 6 Nong Hong, *China's Maritime Law Enforcement Reform and Its Implication on the Regional Maritime Disputes*, Center for Strategic and International Studies, April 1, 2015, <https://amti.csis.org/chinas-maritime-law-enforcement-reform-and-its-implication-on-the-regional-maritime-disputes/>.
- 7 Ryan Martinson, *From Words to Actions: The Creation of the China Coast Guard*, Center for Naval Analyses, July 28–29, 2015, www.cna.org/cna_files/pdf/creation-china-coast-guard.pdf
- 8 Chris Mirasola, "Proposed Changes to China's Maritime Safety Law and Compliance with UNCLOS," February 21, 2017, www.lawfareblog.com/proposed-changes-chinas-maritime-safety-law-and-compliance-unclos.
- 9 Ibid.