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CHINA'S "PEACEFUL RISE," "HARMONIOUS" FOREIGN RELATIONS, AND LEGAL CONFRONTATION—AND LESSONS FROM THE SINO-JAPANESE DISPUTE OVER THE EAST CHINA SEA

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China's rise naturally raises concern among its neighbors about Beijing's agenda. China has emphasized that its "rise" will be "peaceful," but China also will seek to remove impediments to its rise, in part by invoking existing international rules, and shaping new international rules, to serve its interests. As a result, there will be more "legal confrontations" between China and other states. Such legal disputes are contentious but peaceful, compatible with China's ideal of a "harmonious world" and agenda of peaceful rise, and preferable to less law-governed alternatives. China's approach to territorial disputes during the last twenty years and recent developments in the Sino-Japanese dispute over the East China Sea, including a "principled consensus" between the parties in 2008, illustrate the virtues and potential—as well as the limits—of China's reliance on international law to address a chronic source of friction and instability in China's foreign relations.

China's Numerous, Long-Running Territorial Disputes

China's long land borders, numerous neighbors and long, complicated and sometimes crisis-ridden history of relations with adjacent states have generated border disputes. These have sometimes brought crisis and violence, including several armed conflicts from the 1960s to the 1980s. Especially since the 1990s, China and its continental neighbors have worked hard to reach boundary agreements, successfully settling most of the long-standing disputes with formal treaties. For example, China and Vietnam reached a comprehensive land boundary agreement in December 1999. China and Russia reached an agreement concerning the western part of the border in September 1994. With respect to the more contentious eastern part of their border, the two powers reached an initial agreement in May 1991, a supplementary agreement in October 2004, and a supplementary protocol in July 2008, which is said to be a final settlement of the 4300 kilometer frontier. China and India are engaged in ongoing talks to address China's last unsettled land boundary.

Maritime boundary issues, in contrast, have only recently emerged on China's foreign relations agenda, and there has been little progress in settling most of them. China has overlapping maritime territorial claims with three countries in the East China Sea and five countries in the South China Sea. The only formal delimitation agreement so far has been reached with Vietnam (the Beibu Gulf Delimitation Agreement, December 12, 2000, and entered into force on June 30, 2004) and addresses only part of the two states' maritime boundary. In 2002, China and ASEAN agreed on a Code of Conduct for the South China Sea—a relatively informal declaration that did not resolve territorial claims or rights to exploit resources. In 2005, China and North Korea concluded a Joint Development Agreement -- China's first joint development agreement, but the text of the agreement has not yet been made available to public. On June 18, 2008, China and Japan reached a "Principled Consensus on the East China Sea Issue," but the accord was followed immediately by sharp discrepancies in the parties' interpretations of the document, and an apparent stalling of the process for negotiating the further measures required to implement the Consensus.

China's Policy Goals and the Relevance of International Law

What lessons can be drawn from Chinese practice in the past twenty years in dealing with boundary issues? First, China sees boundary stability as vital for creating a harmonious international (and, specifically, regional) environment that is essential for China's agenda of a *peaceful* rise (and peaceful development). In Chinese diplomatic and foreign policymaking circles, references to *weiwen*—maintaining stability—are common. This policy goal is evident in Chinese efforts during the past 20 years to address disputed land boundaries. In handling those issues, China discarded the "naturalist" position which holds that territory is divine and sovereign issues (including boundary issues) is non-negotiable[1]. Most strikingly, China moved beyond two centuries of intermittent bloodshed over competing claims to territorial sovereignty on the Sino-Russian border to a conventional international legal agreement delimiting the two states' territories.

Second, the policy of peaceful *rise* requires China to develop a more comprehensive and global perspective in defining its national interests. Here, the focus is not on *weiwen* (maintaining stability) but on *weiquan* (upholding rights). China's territorial interests increasingly include traditionally slighted ones, such as hydrocarbon resources in the continental shelf and national security interests in a more extended offshore maritime area. Although such newly emphasized concerns can reduce China's focus on nettlesome maritime boundary issues, they also can pose challenges because China is rather new to these questions and has not fully assessed and articulated its interests. Still, it does seem clear that the rights China seeks to uphold are those generally accepted in the existing international order, particularly those defined by the law of the sea.

It is therefore unsurprising that China increasingly turns to international law as a policy instrument in these areas. China repeatedly highlights the importance of international law in addressing maritime issues. This is not mere lip-service; it has a foundation in serious policy considerations and Chinese approaches to foreign policy.

International legal rules and institutions, including the WTO, have been beneficial to China's national interests throughout the period of reform and opening to the outside world that began three decades ago. Even amid significant uncertainty about the future trajectory of world order, international law still promises to provide means to protect and advance China's national interests, especially as China assumes a greater role in making international law (as has been occurring, for example, in international negotiations to address climate change).
Using international law to address disputed boundaries serves China's high priority goal of maintaining domestic stability. China's modern history—including the May Fourth Movement that reacted against the Versailles Treaty's acceptance of Japanese colonial encroachment on China and that gave birth to modern Chinese nationalism and, in turn, the Chinese Revolution—teaches the danger of domestic turmoil and threats to the regime that can come from failed diplomatic efforts to address highly sensitive territorial issues in China. Although understandable in light of the historical context, the political and diplomatic compromises that characterized the U.S.-China Joint Communiques similarly failed to resolve fully crucial international legal issues and thus sowed seeds of future conflicts. Giving territorial settlements a clear basis in international law makes them easier to accept for Chinese public opinion (which is expressed today in newly strident nationalist tones via the Internet), and therefore helps prevent such agreements from triggering political crisis. A firm international legal basis also facilitates other parties' acceptance and implementation of territorial accords with China, smoothing ratification by their legislatures and other steps required by other states' constitutional structures. This in turn promotes regional stability, which is in China's interest.

China has grown more confident in relying on international law. This new confidence reflects China's growing power. China's previously suspicious attitude toward international law was based on the belief not that international law was unreasonable but that it was unreliable because China lacked national power. As one Chinese international law scholar has characterized this view, "if there is right without might, the right will not prevail."[2]In addition to acquiring more of the requisite "might," elites in China have gained international experience and perspectives and are thus more likely to perceive international law in more than a narrowly instrumentalist way. They increasingly understand the normativity of international law and thus feel less alienated from the initially Western partly law-based approach to foreign policy.

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[1] Jacques deLisle, "Sovereignty Resumed: China's Conception of Law for Hong Kong, and Its Implications for SAR and US-PRC Relations", *Harvard Asia Quarterly*, Summer 1998, p.23.

[2] Li Zhaojie, "Legacy of Modern Chinese History: Its Relevance to the Chinese Perspective of the Contemporary International Legal Order", *Singapore Journal of International and Comparative Law (2001)*, p.317.

Nevertheless, even under current conditions and against the backdrop of a broader Chinese tradition of pragmatism in foreign affairs, there are still some significant obstacles to China's employing international law in foreign policymaking. For example, China's lack of a strong legal culture and tradition domestically can make it less likely that foreign policy makers will give full consideration to international law in pursuing international dispute settlement. Traditionally in Chinese society, people were discouraged from going to court and invoking law to solve their problems because the "win or lose" result of a judicial proceeding could be devastating to a party's reputation. Instead, norms and practices favored informal conciliation outside courts, with "saving face" and ending overt conflict being primary concerns, sometimes at the cost of setting aside or papering over the issues in dispute. When aspects of this tradition carry into foreign policy, it can encourage the view that it is not important to have a basis in international law for China's positions. In maritime and territorial issues, the well-known Chinese policy of "setting aside disputes and undertaking joint-development" may illustrate this problem although the policy also can be defended as reflecting strategic thinking and calculations about what serves China's national interests.

Another factor impeding China's effective use of international law in foreign policy is China's still-insufficient study of international law. Although China's leaders have called for enhanced study of international law since the late 1970s,[3] Reform-era China started from a comparatively low baseline. It trails other big powers that have strong traditions in the study of international law and ample well-trained international lawyers. While it is uncertain how large a role international law will play in various aspects of China's foreign policy, there are signs of significant growth. One example is the recent establishment of the Department of Boundary and Ocean Affairs, which is located in the Chinese Foreign Ministry, staffed from the Ministry's Department of Treaties and Law, and reflects enhancement of international law as a consideration in managing maritime boundary and territorial issues. On balance, international law has come to be seen as a more important and necessary means for China to achieve its foreign policy ends, even though obstacles and uncertainty persist. Moreover, China's turn to international law has been uneven, and unsurprisingly so. International law is more likely to be an appealing instrument for China where the other party to a dispute is a near-peer in political, economic and military power (as is the case, for example, with Japan), or where the other parties are significantly less powerful than China (as is the case, for example, with the ASEAN countries). In the first type of case, international law is useful because there is comparatively little room for one party to prevail through simple pressure or manipulation. In the second context, using international law can help to reassure weaker parties worried about China's rise. Beijing's recent approach to the East China Sea dispute with Japan illustrates the first pattern.

International Law and the Sino-Japanese Dispute over the East China Sea

China and Japan assert overlapping claims to the East China Sea (ECS). The territorial dispute involves two questions, neither one easy. The first is sovereignty over the Diaoyu Islands (the Senkaku Islands in Japanese). The second is title to the continental shelf and maritime delimitation in an area where the maximum distance between the east (Japan) and west (China) coasts is less than the 400 nautical miles needed to give each country the full 200 nautical mile zone in which coastal states ordinarily enjoy exclusive rights over economic resources and activities.

On the issue of sovereignty over the Diaoyu/Senkaku Islands, each side has made arguments grounding its positions in international law. The strengths and defects of those arguments have been examined extensively elsewhere and will not be revisited here. In addition, China has long proposed "setting aside the [sovereignty] dispute and pursuing joint-development" of the resources adjacent to the islands. In contrast, Japan simply denies that there is a credible dispute over the islands and refuses to discuss the issue in diplomatic talks.

On the question of legal claims to the continental shelf, the relevant history begins with an international agreement to which China was not a party: the 1974 Japan-ROK Joint Development Agreement (provisional agreement) concerning the northern part of the ECS. China protested the agreement because it threatened to infringe China's rights and interest in the ECS continental shelf. Notwithstanding the Chinese protest, Japan and South Korea explored three shelf sites for energy resources between 1980 and 1986. Those explorations failed to find any economically viable fields. China began feasibility studies in the 1980s, and in the 1990s explored and developed

[3] The Chinese leader Deng Xiaoping in 1979 issued a simple but important instruction "we should also strengthen our study of international law." As a result, Chinese Society of International Law was founded in February 1980.

four groups of oil and gas fields to the Chinese side of the geometrical median line of the ECS (which was the line Japan asserted for delimitation). China's moves drew no diplomatic protest from Japan. Indeed, in the late 1990s, a project to construct pipelines to Shanghai from some of the fields received financial aid from Japan, directly through its Export-Import Bank and indirectly through Japan's contributions to the Asian Development Bank. The Sino-Japanese dispute did not emerge until a May 2004 Japanese news report on China's development of the Chunxiao oil and gas fields publicized the field's production and its location only several miles west of the median line and Japan's claimed zone.

In addressing this dispute, both sides have relied extensively on international law, and specifically on the law of the sea and its rules on the continental shelf. Both have invoked especially Article 76(1) of the 1982 Law of the Sea Convention, to which the two countries are parties, which provides:

The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the *natural prolongation* of its land territory to the outer edge of the continental margin, or to *a distance of 200 nautical miles* from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.
China has argued for application of the "natural prolongation" principle in the treaty and under the preexisting customary international legal rule articulated by the International Court of Justice in the famous 1969 *North Sea Continental Shelf Case.* On this view, China's portion of the ECS continental shelf includes its natural prolongation to the Okinawa Trough, where the 2000-meter-deep trough marks the geologic end of the shelf and, thus, the area under Chinese title.

Japan's legal arguments have been more complex and in some respects inconsistent. Japan has invoked the "200 nautical miles" portion of Article 76(1), rejecting the possibility of a claim based on natural prolongation beyond 200 nautical miles. On this view, the continental shelf in this area (which is narrower than 400 nautical miles) legally must be divided at the median (equidistance) line between the two states' coasts. At the same time, Japan also has argued that the "baseline" from which the 200 nautical mile zone should be measured is not Japan's main coast but, rather, the coast of the Ryukyu Islands (Liuqiu in Chinese), which would trump China's claim based on natural prolongation for a significant portion of the ECS continental shelf. Finally, Japan also has argued that the Okinawa Trough is a mere dent in the continental shelf, not its endpoint. This position—which invokes a factually flawed application of the natural prolongation argument and thereby rejects the 200 mile zone and equidistance principles—was Japan's central argument when negotiating with the Republic of Korea for their 1974 provisional joint-development agreement.

Against the backdrop of this largely legal confrontation, China and Japan engaged in eleven rounds of consultations from October 2004 to November 2007. Finally, after the exchange of visits of leaders resumed in the post-Koizumi era, the two countries issued Joint Communiques calling for cooperation in making the ECS a "sea of peace, cooperation and friendship." With this top-level political commitment to maintaining stability in bilateral relations, the foreign ministries of the two countries concurrently released a "Principled Consensus on the East China Sea Issue" on June 18, 2008.

The "Principled Consensus" is the product of the two sides' disputing in strikingly international legal terms, but it did not augur a legal resolution of their dispute. The Consensus is by nature an interim arrangement "in the transitional period prior to delimitation" as stipulated in the Law of the Sea Convention, Article 83, paragraph 3. According to that same article, this kind of arrangement is not to prejudice the legal positions of the parties (as the first part of the Consensus also states). The substantive provisions in the Consensus are: first, a small block, sitting astride the median line, is marked for joint development; second, the Chunxiao field, already initially developed by China, is to be open to "cooperative exploitation" pursuant to a clause stating, "Chinese enterprises welcome the participation of Japanese legal persons in the development of the existing oil and gas field in Chunxiao in accordance with the relevant laws of China."

Almost immediately, the "Principled Consensus" ran into trouble that seemed to cast doubt on the utility of an international legal approach to the dispute. Formally, the document had an uncertain status, having appeared as a pair of concurrent press releases, lacking signatures and a date, and thus inviting much doubt and speculation about its stature.

Soon after the Consensus was released, the two countries fell to quarrelling about its meaning, adopting sharply contradictory interpretations of its two substantive provisions. On the Chinese side, the Deputy Minister of Foreign Affairs (within a week after the Consensus was announced) and the Minister himself (a few days later) explained: that China never recognized the so-called "median line" that defined the joint development zone; that there was no issue of drawing any "median line"; and that the agreement on cooperative exploitation of the Chunxiao field meant that Japan accepted Chinese jurisdiction and recognized China's sovereign rights over the field. Japan's Chief Cabinet Secretary and Foreign Minister publicly rejected the Chinese interpretations.

The Utility of Legal Confrontation

Thus, it may seem that the fate of the Principled Consensus casts doubt on the usefulness of framing a political (and economic) dispute as a legal confrontation. But such a pessimistic conclusion is too simple or, at least, premature. The Consensus and the broader turn to international law can contribute to stability in China-Japan relations and regional stability more generally, provided that two further, interrelated conditions are satisfied.
First, the Consensus (and other measures) must reflect the legitimate—and legal—national interests of the both parties. Second, in implementing and moving beyond the initial Consensus, China and Japan must adhere to two overarching international legal principles: good faith and reciprocity. Good faith is especially important because the Consensus includes merely interim measures "in the transitional period prior to delimitation" and thus contemplates further negotiations in which each side will seek to advance its interests within an ongoing legal confrontation. During this process, reciprocity is also vital to maintain stability and to sustain negotiations toward a final settlement that takes adequate account of both sides' good faith legal claims and legitimate interests.

On these issues, the evidence so far is mixed. China's claim, based on the principle of natural prolongation, has sufficient legal foundation that it clears the threshold of a good faith claim. Under the doctrine of "inter-temporal law" (which holds that the applicable international law is the law as it stood at the time when the claimant purports to have acquired a right, in this case to ownership of portions of the ECS shelf), the relevant legal principle arguably is the "old" customary rule of natural prolongation, not the more "mixed" principles of Article 76(1) of the 1982 Law of the Sea Treaty. Alternatively, China's claim to the ECS is a plausible reading of Article 76(1) of the Treaty. Moreover, China's position is further reinforced by principles of estoppel, which could bar elements of Japan's competing claims on the ground that Japan has accepted the so-called median line (which stops short of 200 nautical miles from Japan's coast) and that Japan has accepted and indeed supported China's development of the Chunxiao field, which China has claimed is in its portion of the ECS.

On the other hand, Japan's invocation of the 200 nautical mile principle also has sufficient legal plausibility to meet a "good faith" standard. Post-Law of the Sea Treaty state practice and judicial decisions offer some support for the view that the natural prolongation principle is subject to interpretation and limitation under Article 76(1).
If each party accepts that other's position reflects a good faith legal argument, this can increase the likelihood that the two sides can lower the temperature of their conflict while also setting aside the fine points of their contending legal claims and moving forward with provisional arrangements for joint development. To some extent, the "joint development block" provision in the Consensus offers a concrete example of what can be achieved consistent with the principles of good faith amid unresolved, but legally framed and cabined, conflicts. The joint development arrangement does not accept the median line as the legal boundary and thus sets aside the core legal issue. At the same time, the joint development zone remains within the geographic area each side claims as its own under legal analyses consistent with good faith principles.

The Consensus fares less well in satisfying the norm of reciprocity, especially Japanese reciprocity toward China. The Consensus's interim arrangement, if made permanent, would be fully consistent with Japan's preferred principles of a 200 nautical mile limit, with equidistance in the context of seas less than 400 nautical miles wide. Yet, the Consensus is heedless of China's, as well as Japan's, claim to the Diaoyu (Senkaku) Islands and the rights to the adjacent ECS and continental shelf that sovereignty over the islands could bring. The Consensus also gives no place to China's natural prolongation-based claim to a wider swath of the ECS shelf or its claim to the Chunxiao field, where China had already begun to explore and invest. It would be a significant step for reciprocity and, in turn, stability in bilateral relations if Japan were to go beyond the language of the Consensus and acknowledge China's sovereign rights over Chunxiao—even if the operative regime remained the "cooperative exploitation" envisaged in the Consensus. Unfortunately, Japan's post-Consensus interpretations of the Consensus indicate that this is highly unlikely.

Overall, the China-Japan Principled Consensus on the East China Sea Issue is an example of how legal rules and arguments, when animated by political prudence, can help to contain and manage conflict, and foster more harmonious relations between China and a similarly powerful neighbor. To be sure, the Consensus remains limited and flawed. It is only a "first step," after which the two sides "will continue to conduct consultations in the future." It helped contain and define, but also left open, legal questions that quickly became the focus of new, if more bounded, disputes. The Consensus's potential is undermined by its failure to provide greater reciprocity.

Nonetheless, the common ground that the Consensus defined, the good faith legal arguments to which the parties mostly limited themselves, and the commitments the Consensus embodied to continuing to address a significant dispute in largely legal and cooperative terms are hopeful signs. The Consensus, and the broader effort it represents to embed or frame bilateral disputes as legal confrontations, promises to help the two parties to find firmer footholds in climbing out of the troubled waters of the East China Sea. Beyond that, it strengthens international law's potential to help an increasingly competent and confident China and its expanding international partners to stabilize their relations while they grapple with complex disputes.

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