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International Law Implications



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Scouting, Signaling, and Gatekeeping

Chinese Naval Operations in Japanese Waters and the International Law Implications

In October 2008, a month after Prime Minister Shinzo Abe of Japan stepped down and the more hawkish Taro Aso took office, a Chinese flotilla of four People's Liberation Army Navy (PLAN) ships transited from west to east through Japan's narrow Tsugaru Strait en route to the Pacific Ocean.¹ The vessels were observed together in the Sea of Japan, headed east toward the strait, by a Japan Maritime Self-Defense Force (JMSDF) P-3C patrol aircraft; they were about twenty-five nautical miles west-southwest of Tappizaki, the cape at the northern tip of the Tsugaru Peninsula, where the Sea of Japan enters the Tsugaru Strait between the islands of Honshu and Hokkaido. The flotilla consisted of a *Sovremennyy*-class missile destroyer—one of four China bought from Russia between 1996 and 2002—a supply ship, and two Jiangkai frigates, one of which was a newly commissioned Jiangkai II.² Apparently the *Sovremennyy* and one of the frigates had recently “paid a friendly visit to a naval base in the Russian Far East” before joining the other two Chinese naval vessels in the Sea of Japan and proceeding on through the strait to the Pacific Ocean (see figure 1).³

The Jiangkai II is the newest and one of the most advanced surface combatants in the Chinese fleet, with a vertical launch system, C-802 surface-to-surface missiles, and the capacity to employ advanced Yu-6 and -7 torpedoes.⁴ Although Chinese navy ships and submarines have occasionally transited Japanese straits in the past, this appears to have been the first instance of an armed surface combatant passing between two of Japan's main islands.⁵ Almost immediately, the Japanese Ministry of Defense began analyzing “the real purpose of their activity,” but it acknowledged that despite the close passage of the PLAN warships to Japanese shores, as they made passage through the Tsugaru Strait the Chinese vessels had remained in “international waters and . . . did not infringe upon Japan's territorial waters.”⁶ Thus, although perhaps politically and militarily troubling, the passage was entirely lawful in terms of international law of the sea and Japan's domestic law.

The Tsugaru Strait is a narrow choke point between the Sea of Japan and the Pacific Ocean; it is roughly eight nautical miles wide at its narrowest point, between the islands of Hokkaido to the north and Honshu to the south. It is one of only five straits

Figure 1. *The two groups of ships joined west of Honshu in the Sea of Japan before heading east for the Tsugaru Strait transit.*

Source: *Strong Country Forum* (Qiang Guo Luntan), a popular Web forum managed by the *People's Daily On-Line*.

Notes:

11 October: Group 1, consisting of a Chinese *Sovremenny*-class destroyer (hull 138) and a Jiangkai-class frigate (hull 525), departed Zhoushan Naval Base, location of China's East Sea Fleet Headquarters, bound for Vladivostok.

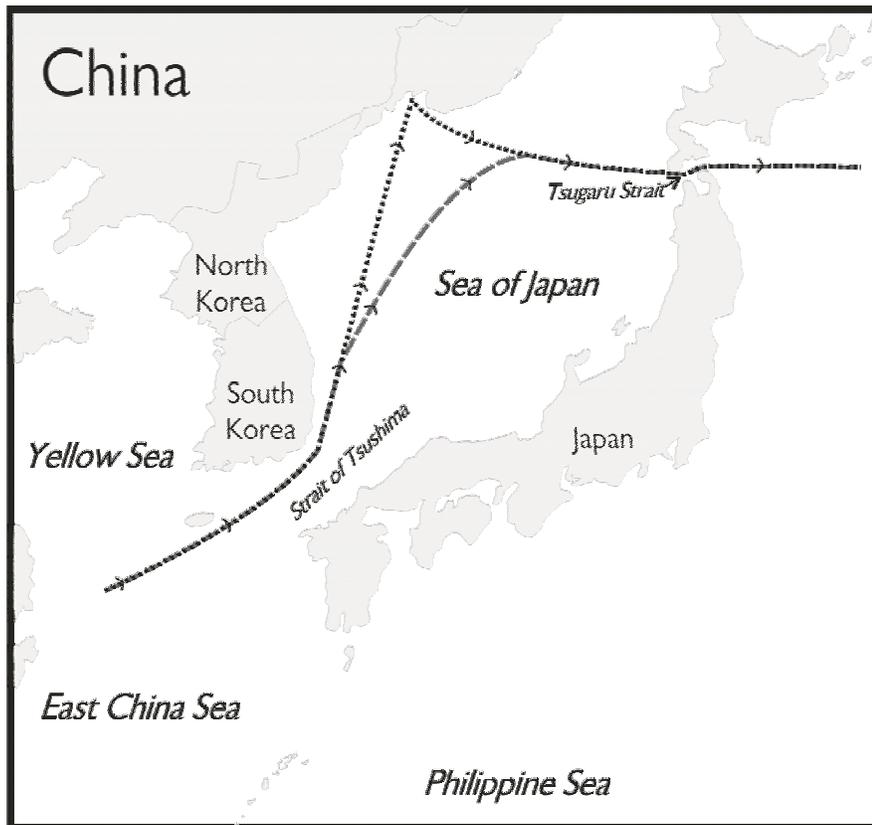
14 October: Group 1 arrived in Vladivostok.

16 October: Group 2, consisting of a Jiangkai II frigate (hull 529) and an unidentified supply ship, is believed to have departed Zhoushan Naval Base heading north from the East China Sea to the Sea of Japan.

17 October: The Group 2 ships were reported sighted by a JMSDF ASW aircraft in the Strait of Tsushima.

18 October: The Group 1 ships departed Vladivostok. The two groups met in the Sea of Japan sometime during the night of 18 October or early morning of 19 October.

19 October: At approximately 5:00 PM local time, the four ships were observed by a JMSDF ASW aircraft in the Tsugaru Strait.



among its many islands that Japan recognizes as international straits under the terms of the United Nations Convention on the Law of the Sea (UNCLOS) Part III, “Straits Used for International Navigation.”⁷ Normally, since Japan is a party to UNCLOS, this would mean that Japan must allow the right of transit passage through its straits to all vessels in their normal mode of operation, including the warships of other states, even states such as China, with which its military and political relations can at times be tense. Under transit passage rules, even though the waters of a strait are within the territorial sea, submarines may pass through the strait submerged and aircraft may overfly the strait without coastal-state permission. In other parts of a coastal state’s territorial seas, the more restrictive rules of innocent passage apply.⁸

However, this flotilla’s movement through the narrow waters between two of Japan’s main islands was not a case of transit passage. Nor was it a case of innocent passage, because under its territorial-sea law Japan had chosen not to enclose this strait within its sovereign waters, although the strait is certainly narrow enough to have done so.⁹ UNCLOS allows coastal states to claim territorial seas *up to* twelve nautical miles in breadth. Some states claim lesser waters, for reasons of their own, as did Japan in the Tsugaru Strait (see figure 2). By claiming less than the full twelve nautical mile sea from each shore, Japan left in the Tsugaru Strait what is often referred to as a “high seas corridor” about three nautical miles wide.¹⁰ Technically, the narrow corridor of waters is not part of the high seas, since it is covered by Japan’s exclusive economic zone.¹¹ Nonetheless, since under UNCLOS, high-seas navigational and overflight freedoms apply in the exclusive economic zone, the shorthand reference to the narrow lane in the channel in the Tsugaru Strait as a “high seas corridor” points to the freedoms of navigation that international law affords all ships, including warships, in this narrow belt and the fact that the aircraft of all states are also free to overfly the waters of the corridor in the strait.

The flotilla’s passage through the Tsugaru Strait was not the first passage of Chinese navy vessels through Japanese straits in recent years. The first observed passage occurred in May 2000, when a Yanbing-class Chinese icebreaker and intelligence-gathering ship, capable of mapping the seabed, passed through the Tsushima and Tsugaru straits on its way to open waters in the Pacific.¹² As the first-ever transit of a PLAN warship through Japanese straits, and presumably also because the PLAN vessel was intelligence-capable, it was shadowed by a JMSDF P-3C aircraft and a surface escort, the *Sawayuki* (DD 125), a *Hatsuyuki*-class destroyer. The Japanese Defense Agency released a statement about the incident that acknowledged that the Tsugaru Strait is “an international strait, through which any foreign ships can pass,” but also noted that the event “seems to aim to demonstrate that the PRC Navy is becoming a blue water navy from a brown water one.”¹³

Also, in November 2003 a Japanese P-3C observed a Ming-class submarine transiting due west as it exited the Osumi Strait between southern Japan's Kyushu and Tanega islands, the latter a particularly sensitive area, since it is home to the Japanese space center and rocket launch site from which Japan has over the years launched its intelligence satellites (see figure 2).¹⁴ On this occasion, however, the Chinese submarine was reportedly on scene to perform surveillance of a joint American-Japanese exercise in the waters off Kyushu Island; a spokesman for the Chinese Ministry of Foreign Affairs said that the vessel was performing "normal training" and denied that its presence posed a threat to Japan. Additionally, all sides agreed that the Ming's passage through the Osumi Strait was both lawful and lawfully conducted.¹⁵

In stark contrast to the lawfulness of these incidents, however, stands the 2004 passage of a Chinese Han-class nuclear-powered attack submarine through the Ishigaki Strait in Japan's southern Ryukyu island chain, close to the island of Taiwan. During the early morning hours of 10 November 2004, a Han entered Japanese territorial waters while submerged, at approximately one hundred meters, and remained for about two hours before exiting into international waters.¹⁶ Moving from south to north, the submarine passed through the Ishigaki Strait, which separates the islands of Ishigaki and Miyako at the southwestern edge of Japan's Sakishima island chain, on its return from an operating area in the Philippine Sea to its home port near Qingdao, on China's Shandong Peninsula.¹⁷

While the submarine was still operating well south of Japanese waters, the JMSDF, apparently informed of its presence by U.S. Navy intelligence sources, began passive tracking of the submarine and monitoring its activities.¹⁸ The Japanese continued to monitor the Han passively as it operated outside Japan's territorial sea south of Ishigaki Island, but when the submarine turned north toward Japanese waters the JMSDF aircraft switched to active sonar—which uses echoes from an emitted signal to provide trackers with a more precise location of their target.

As a result of the sub's incursion, the JMSDF was put on an unusually high-level alert by order of the Defense Agency director, General Yoshinori Ono, for only the second time since the end of World War II.¹⁹ The JMSDF maintained track of the Han as it passed through the strait and, once the alert order was issued, began more aggressive tracking after the submarine's exit from Japan's territorial sea and until it had passed well beyond the Japanese coastline.²⁰ During this period the JMSDF tracked the submarine for more than two days with P-3C patrol planes, AWACS aircraft, antisubmarine warfare (ASW) destroyers, and SH-60J helicopters.²¹

The Han incident was not the first (or last) incursion to cause the JMSDF to exercise its submarine-hunting and -tracking capabilities. Over the past decade, the Japanese have observed more frequent submarine operations activities in the western and northern

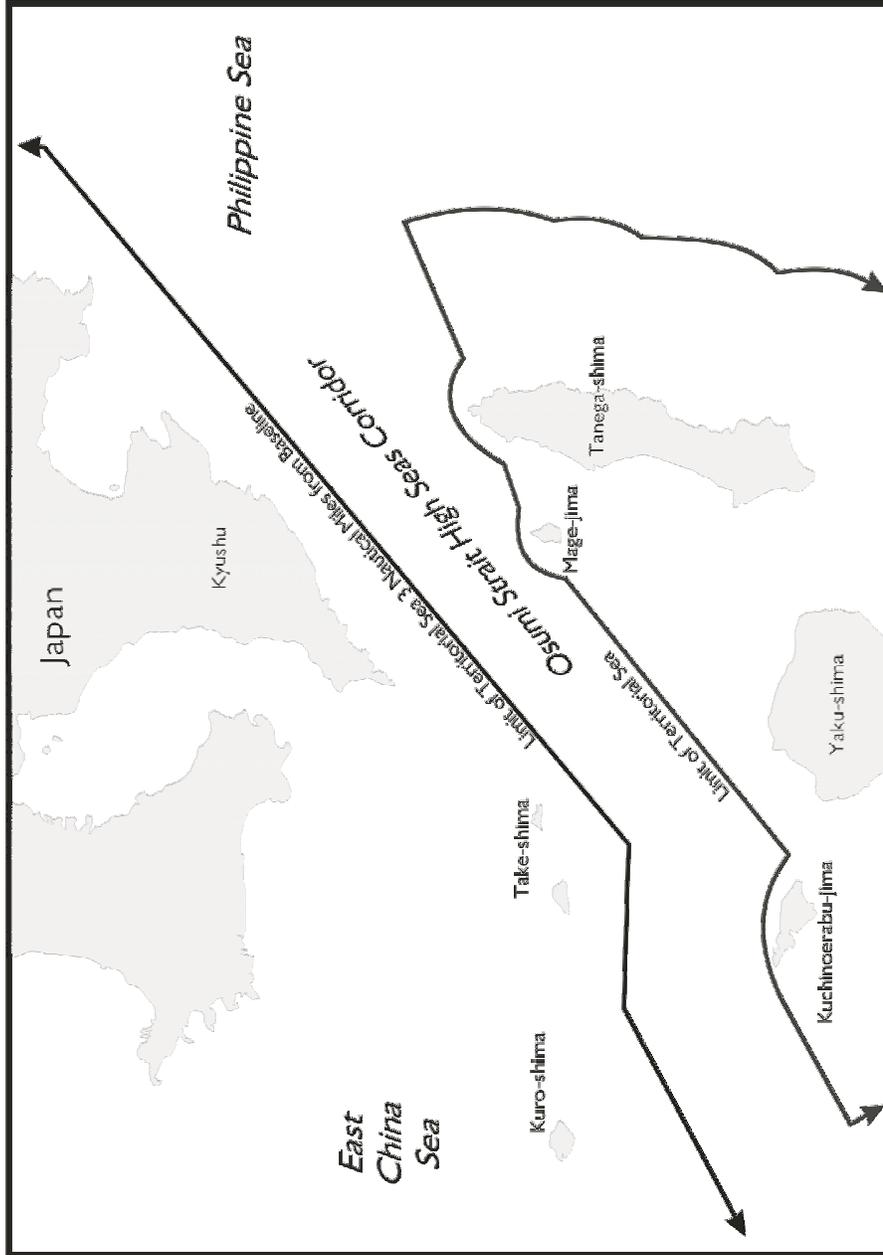


Figure 2. The Osumi Strait runs between the islands of Kyushu and Tanega. Source: Limits in the Seas: No. 120, Straight Baselines and Territorial Sea Claims: Japan.

reaches of the East China Sea by China's increasingly capable submarine force. As recently as October 2008, for instance, several news reports and abundant Internet chatter reported that the JMSDF had detected two Chinese submarines—a Han and a Song—waiting for the aircraft carrier USS *George Washington*, newly based in Japan as the replacement for the USS *Kitty Hawk*, as it transited from its home port at Yokosuka Naval Base near Tokyo en route to a routine port visit in Pusan, South Korea.²² Reportedly the Chinese submarines remained outside Japanese territorial waters, but reports also suggest that the missions of the PLAN vessels may have been to gather intelligence on the acoustic and electronic signatures of the carrier and to signal China's keen interest in American naval presence in the region.²³ Perhaps the Han, relatively noisy and certain to be detected, accompanied the quieter, diesel-driven Song attack submarine to make sure this strategic signal was received. In any case, these operations appear to have been designed to detect and monitor American fleet movements from Japanese bases, and perhaps to remind the United States and Japan of the increasing strength of China's submarine-borne antiaccess capabilities.²⁴

Each of China's naval activities discussed above appears to have had intelligence collection or political signaling as a core purpose (see table 1), but a key difference between most Chinese naval operations and the Han's passage through the Ishigaki Strait is that the Han clearly passed submerged through an area of Japanese territorial seas in which both the Chinese and Japanese perspectives on international law of the sea appear to agree that, in order to pass lawfully, submarines must be on the surface and flying their flag—if they pass at all. In the remaining cases of Chinese naval activity in Japanese straits, the existence of a corridor in which high seas freedoms apply provides a channel that the vessels of all states may pass through in whatever mode they desire. Thus, whereas both the Japanese and Chinese governments viewed the 2004 submerged passage of the Han through the Ishigaki Strait as a violation of coastal-state rights, all parties agree that the passage of ships and submarines through the “high seas corridor” routes in the Tsushima, Tsugaru, and Osumi straits were fully in compliance with international law—even if those ships were accompanied by a submerged submarine.

Chinese surface and submarine fleet activities in Japanese waters over the last decade suggest that China is maximizing its use of lawful operations—and even some operations that it appears to view as contrary to international law—to send strategic messages, to scout avenues for operations in the Pacific Ocean, and perhaps to find methods to control access to the littoral waters of East Asia during times of crisis. Accordingly, this study examines the current state of the Chinese submarine fleet and looks through the lens of international law at recent Chinese naval activities—primarily submarine—in and around the Japanese Archipelago. The study places special emphasis on legal analysis of the 2004 passage of a Chinese Han-class submarine on an

Date	Ship/Submarine Class	Activity
May 2000	Confirmed: Yanbing icebreaker/ intelligence-collection vessel	Passes through Tsushima and Tsugaru straits
Nov. 2003	Confirmed: Ming-class diesel attack submarine	Passes through the Osumi Strait on the surface and flies the PRC flag
Nov. 2004	Confirmed: Han-class nuclear attack submarine	Passes submerged through the Ishigaki Strait
Oct. 2006	Confirmed: Song-class diesel attack submarine	Surfaces within torpedo range of USS <i>Kitty Hawk</i> during exercises in the Pacific east of the Japan
Sept. 2008	Unconfirmed: PLAN submarine, un- known class	Passes submerged in Japanese territorial sea in the vicinity of Shikoku and Kyushu islands
Oct. 2008	Unconfirmed: Han- and Song-class attack submarines	Sit submerged in Japanese exclusive economic zone as USS <i>George Washington</i> passes en route to Pusan

Table 1. Chinese submarine and surface combatant activities in the vicinity of Japanese islands. Confirmed status means that multiple, independent open-source reports confirm the occurrence of the event.

underwater excursion through the Ishigaki Strait as the counterexample to Chinese operations that appear largely to have been planned to ensure consistency with international law, in order to assess the importance of the November 2004 event in the overall scheme of China's regional operations and to draw conclusions about the impact of this event on international law.

The Chinese Submarine Fleet

To understand the natures and purposes of Chinese submarine operations and the messages they may be intended to convey, a brief survey of the status of the Chinese submarine force is in order. Between 1995 and 2008, the PLAN commissioned approximately thirty-eight new submarines into service, an average of 2.9 submarines per year, leaving the Chinese navy flush with a concentrated, modernized submarine fighting force estimated at approximately sixty-four vessels.²⁵ This substantial force is focused largely on missions related to the defense of China's own coastline and the denial of access to U.S. naval strike groups and the warships of other navies that might seek to intervene in a regional military crisis.²⁶

Of particular concern to these latter navies is China's increasingly lethal fleet of attack submarines, led by the relatively new Type 041 Yuan-class diesel-electric guided-missile submarine, the third of which was launched in May 2008. The Yuan is reputed to be exceptionally quiet and to be able to employ some of China's latest wake-homing torpedoes.²⁷ If so, the Yuan is a potent threat to both surface and subsurface combatants. Supplementing its three Yuan-class vessels, the PLAN attack submarine fleet includes thirteen Song-class diesel submarines—another capable attack platform, especially when operating on its quiet battery system. Indeed, an undetected Song-class submarine surfaced within torpedo range of *Kitty Hawk* during exercises in the Pacific east of Japan near the island of Okinawa in October 2006.²⁸ The Chinese also maintain nineteen older, less-capable Ming-class patrol submarines (used largely for coastal patrol) and seven indigenously built Romeo-class submarines. However, perhaps China's most potent diesel attack submarines are its twelve Kilo-class submarines, purchased from Russia between 1995 and 2006.²⁹ These vessels are reported to be equipped with enhanced sound quieting and lethal torpedo and antiship missile technology, including the supersonic SS-N-27 Sizzler antiship cruise missile, reputedly capable of defeating U.S. naval air defenses.³⁰

In order to extend the range and sustainability of the PLAN's already potent diesel attack submarine fleet, China also maintains a nuclear-powered attack fleet consisting of two Type 093 Shang-class and four Type 091 Han-class submarines. The Hans are the result of an indigenous building project during the 1960s and '70s, although the first was not commissioned until January 1980.³¹ However, the PLAN recognized that

the platform suffers from several design flaws, not the least of which is its excessive noise, which allows potential opponents to track it with relative ease.³² Accordingly, the Shang was developed as a follow-on platform, reportedly with Russian assistance in underwater noise-reduction measures; two of these enhanced nuclear-powered attack submarines were commissioned in 2006 and 2007, respectively.³³

Rounding out its submarine force, the PLAN maintains two classes of nuclear-powered ballistic-missile submarines. Although ostensibly designed for a nuclear deterrent role, the Type 092 Xia, of which China built only one, has to date apparently never ventured beyond Chinese regional waters. In fact, China's underwater nuclear deterrent capability was until recently largely theoretical. This is because the Xia, as an older submarine reportedly based on the design of the Han class, has been beset with technical difficulties, including, predictably, excessively noisy operation.³⁴ However, the design of China's two (or perhaps three) newer Type 094 Jin-class submarines appears to be based on the Shang hull design and accordingly is assessed as "a dramatic improvement" over the Xia. The Jin's emergence may therefore mark the beginning of a meaningful Chinese underwater nuclear deterrence program. In any case, China's submarine fleet clearly poses a serious challenge to American strategic interests in the East Asian region, especially the security of the Japanese waters surrounding the many islands that constitute its sovereign territory.³⁵

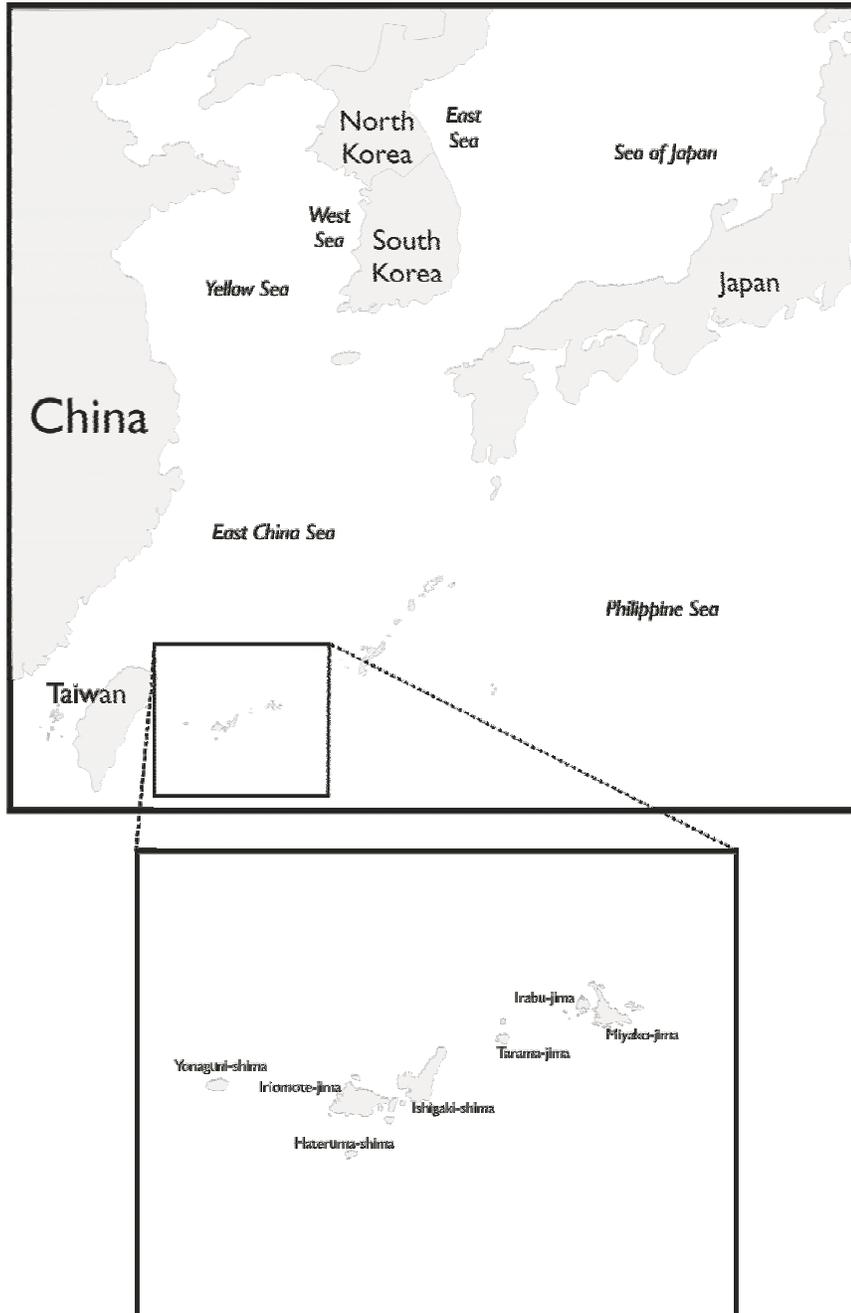
Japanese Geography and the Law of the Sea

One such area of critical strategic importance to Japan comprises its southwest Ryukyu Islands—collectively Japan's westernmost outpost, well positioned to protect Japan's maritime economic interests in the East China Sea from Chinese encroachment. The islands of Ishigaki and Miyako lie at approximately 24°30' north latitude between approximately 124° and 125° east longitude (see figure 3). They are relatively small islands, situated approximately a hundred nautical miles off the northeast coast of Taiwan and 1,200 nautical miles southwest of Tokyo, and they have a combined land mass of less than three hundred square miles.

The water between the islands is bisected by tiny Tarama Island, which lies 18.2 nautical miles from Ishigaki Island and just under twenty-four nautical miles from Miyako Island, in waters in which small coral islands and reefs abound.³⁶ It was through a relatively deepwater trench of Japanese waters between Ishigaki and Tarama that the Han passed in November 2004. By one account, "there is a V-shaped notch that exists underwater between Ishigaki and Miyako islands around which there are shallow waters and complicated narrow terrain in which a sub can easily be grounded. However, the Chinese sub was found to have sailed through at a high speed."³⁷

Figure 3. *The Ishigaki Strait in the southwesternmost reaches of the Ryukyu island chain runs between the tiny islands of Ishigaki and Miyako.*

Source: U.S. Defense Mapping Agency Chart WOPGN522.



Under UNCLOS, of which both China and Japan are members, coastal states have the right to establish sovereignty over adjacent waters out to a maximum of twelve nautical miles from their coastlines, including the coastlines of offshore islands.³⁸ These enclosed waters are known as the coastal state's territorial sea.³⁹ In 1996, the Japanese government enacted its territorial-sea law, establishing its claim of sovereignty to the twelve-nautical-mile band of coastal waters around most of its shoreline—including the Ishigaki, Tarama, and Miyako islands—but claiming a lesser breadth, for strategic reasons, in five other key straits.⁴⁰

In return for the expansion of coastal states' sovereign control over waters that had formerly been open to use by all states, UNCLOS negotiators ensured that seagoing states would maintain certain rights of access to the newly enclosed waters.⁴¹ For instance, ships retained the right of innocent passage throughout the expanded territorial seas. Innocent passage is defined as the continuous and expeditious transit by any vessel of another state's territorial sea, for the purpose of passage, in a manner that is "*not prejudicial to the peace, good order or security of the coastal State.*"⁴² These broad terms are, of course, subject to significant variations of interpretation from one coastal state to the next, but UNCLOS does provide some specificity: without the permission of the coastal state, collection of intelligence and the conduct of research or survey activities within the territorial sea are express violations of innocent passage.⁴³ Additionally, submarines exercising innocent passage are required to navigate on the surface and to show their flags.⁴⁴

As mentioned above, another navigation regime, known as "transit passage," applies where opposing coastlines are twenty-four nautical miles or less apart and the coastal states involved (or a single coastal state with sovereignty over both opposing coastlines) have exercised their right to enclose the waters between the opposing coastlines within territorial seas of the full legal breadth of twelve nautical miles. An additional requirement for the application of transit passage is that the strait connects "one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone."⁴⁵ In such waters, known as "international straits," the territorial-sea claims of the coastal state or states overlap or abut and so "close off" the strait of water between them, such that no corridor of waters with high seas freedoms remains between the opposing coasts.⁴⁶ In international straits, unlike in other parts of the territorial sea, all ships have the right to continuous and expeditious transit in the normal mode of operation. The normal mode of operation provides ships with much broader operating rights than in innocent passage and includes the right of submarines to pass through the strait submerged.⁴⁷ Since the waters of the Ishigaki Strait between Ishigaki and Tarama islands connect to areas of high seas freedoms in the exclusive economic

zone of Japan to the east and west of the islands, the dominant view is that transit passage applies in this strait.⁴⁸

In addition to the requirement that a strait connect two areas of high seas freedoms, some states—Japan is one of them—apply additional legal restrictions to further limit the right of transit passage, which of course has the effect of placing additional limits on the right of submarines to pass through the strait submerged.⁴⁹ These countries, looking to language in UNCLOS specifying that transit passage “applies to straits which are used for international navigation,” limit the right of transit passage only to those straits *routinely* used for international navigation or perhaps *necessary* for international navigation, rather than applying it more broadly to all straits *capable* of use for international navigation.⁵⁰ Additionally, these countries broadly construe language in UNCLOS that disallows the application of transit passage in straits where there is a seaward route of “similar convenience” through the coastal state’s exclusive economic zone that does not require passage through the strait.⁵¹ These distinctions are critical in puzzling out the assertive nature of the Japanese response to the presence of a submerged Chinese submarine in the Ishigaki Strait. The Japanese view is that a route of similar convenience in international waters applies to the west, between Ishigaki and Taiwan (see figure 3), making international transit through Japanese waters unnecessary and thereby nullifying the route between Ishigaki and Miyako as an international strait with rights of submerged passage for submarines.

The only definitive international law guidance concerning the rights of passage in an international strait is the 1949 Corfu Channel case, involving a dispute between the United Kingdom and Albania over the right of British warships to pass unhindered through the narrow waters between the island of Corfu and the Albanian coastline.⁵² The case was the first ever heard before the International Court of Justice (ICJ), which determined that Albania could not hinder the passage of the British warships through the Corfu Channel. Using language that is now echoed in UNCLOS, the court stated that the decisive criteria for the application of international navigational freedoms through a strait are its “geographical situation as connecting two parts of the high seas and the fact of its being used for international navigation.” The court decided that when these two circumstances are present, all ships—including warships in a nonthreatening posture—have a right to pass as a matter of customary international law.⁵³ However, adding some confusion to its ruling, in determining that the Corfu Channel was a “useful route for international navigation” the court went on to detail the routine transit of the channel over several years by ships of various regional states.⁵⁴ This detailing of *actual* use of the strait by the international community had the effect of giving succor to coastal states that desire to read the law restrictively in order to limit transit passage access to their less frequently used straits.

In developing its policy concerning transit passage, the Japanese government apparently took advantage of the opening provided in the Corfu Channel case and reasoned that only if a strait is routinely used for international navigation should the transit passage regime apply. Accordingly, from Japan's perspective, since the Ishigaki Strait is not routinely used for international navigation, the Chinese Han submarine had no right to claim transit passage and its submerged passage between Ishigaki and Tarama islands was a violation of Japan's sovereignty.

Typically, maritime powers favor a broad interpretation of the term "useful route" and apply a right of transit passage to any qualifying strait "*capable* of navigation" by any international shipping, merchant or military, since the widest possible freedom of action is in the interest of such maritime powers. Contrarily, coastal states with a sense of vulnerability from the sea naturally favor a much more restrictive view and acknowledge transit passage rights only in the relatively few world straits through which international shipping is routine and for which no other route of similar convenience is available, such as the straits of Gibraltar and Hormuz.

Japan, though a maritime power, is atypical in this regard. This is because, although the JMSDF arguably continues to be the most powerful naval force possessed by any Asian state, its use remains constitutionally constrained to defensive purposes.⁵⁵ However, Japan as an island state has widely dispersed territory and maritime interests to defend and relies on peaceful sea lines of communication for its connection to the global system that sustains the Japanese economy and food supply. Japan fought three major wars at sea between 1895 and 1945, ultimately with disastrous results, and today its independence from Chinese domination relies at least in part on the balancing presence of the American fleet and the ability of international law to constrain rising Chinese power. For these reasons, some of Japan's policies on international law of the sea reflect the concerns of a vulnerable coastal state rather than the perspectives of a stronger maritime power.

As evidence of Japan's attempt to avoid a robust international right to transit passage between its islands, when the Japanese government extended sovereignty over its coastal waters it took great pains to avoid creating international straits in areas where transit passage would apply under either the expansive or restrictive definition. In the five international straits clearly affected by even the restrictive approach—the Tsushima Strait (in the waters between the southern island of Kyushu and the Korean Peninsula, depicted in figure 4), the Osumi Strait (between Kyushu and smaller islands off Kyushu's southern coast), La Perouse or Soya Strait (the northernmost strait between Hokkaido and Russia's Sakhalin Island), and Tsugaru Strait (between Hokkaido and Honshu)—Japan took the unusual step of limiting its territorial sea claims to less than twelve nautical miles in order to leave a band of international waters

with high seas freedoms sufficient for ships to pass without having to rely on the right of transit passage.⁵⁶ These are the “high seas corridors” discussed above, and they have the effect of using international law to force a foreign, potentially hostile submarine to make a choice: if it desires to exercise high seas freedoms and pass submerged it must use the narrow midstrait channel away from Japanese shores; if it desires to pass close to Japanese shores, it must accept vulnerability and abide by the limitations of innocent passage, sailing on the surface with its national flag flying.

It is worth noting that the United States does not accept the Japanese perspective that there are only five potential international straits through Japanese territorial waters. As a state with extensive maritime interests, and for which access to the world’s oceans is critical to maintaining its national security, the United States has long interpreted UNCLOS and the Corfu Channel case to mean that transit passage applies in all straits *susceptible* of international navigation.⁵⁷ This is a crucial distinction, in that under the U.S. definition *every* strait that connects two areas of high seas freedoms and is enclosed in territorial waters is fair game for transit passage by American merchant vessels and warships in their normal modes of operation—including submerged submarines. This vastly increases access to and through the world’s littorals, compared with the restrictive Japanese views.

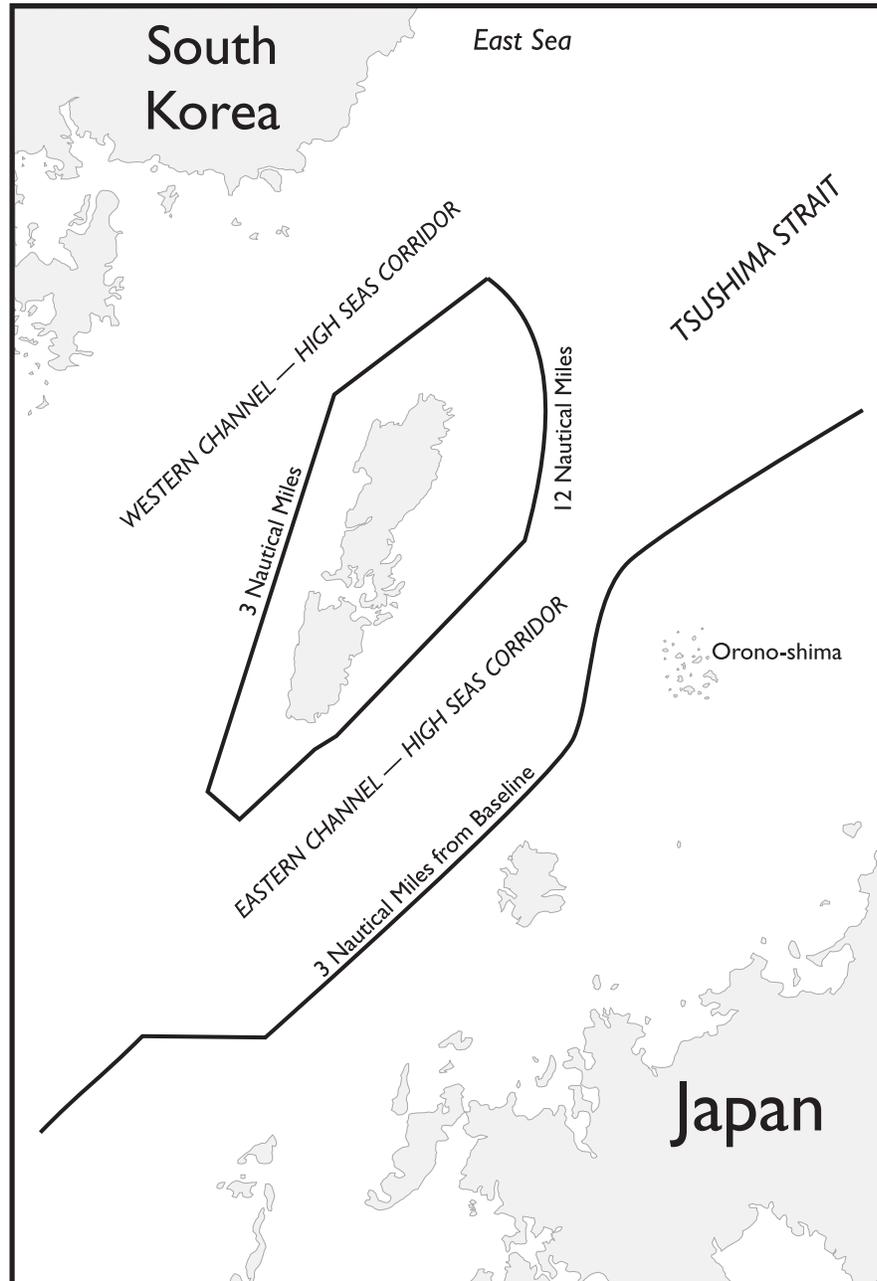
Chinese Legal Perspectives

Like the Japanese, the People’s Republic of China (PRC) has long held the position that transit passage rights apply in only a very few international straits worldwide, none of which are in Chinese waters. This view is articulated, for instance, in a People’s Liberation Army (PLA) publication on international law for military officers. This document says that the category of “straits for international navigation” includes only “those that straddle important international sea lanes” and that, through historical use or as evidenced by international treaties, have “important implications for the national interests of certain countries.”⁵⁸ Indeed, the language of this section of PRC military guidance, while acknowledging that some straits are “open to international navigation,” glosses over the UNCLOS right of transit passage and instead emphasizes the importance of coastal state sovereignty and jurisdiction over the waters in an international strait.⁵⁹

Additionally, in direct opposition to the clear language of UNCLOS, China’s territorial-sea statute specifies that innocent passage throughout the PRC’s territorial seas for the warships of other states is forbidden without the express permission of the Chinese government.⁶⁰ Even China’s accession to UNCLOS is accompanied by a strong statement of coastal state control over territorial waters: attached to its accession documents China included a declaration that highlights its limitations on the right of innocent passage in its territorial sea.⁶¹ Additionally, China’s government officials and

Figure 4. The Eastern and Western channels of the Tsushima Strait. The Western Channel is bounded to the northwest by the territorial waters of the Republic of Korea.

Source: *Limits in the Seas: No. 120, Straight Baselines and Territorial Sea Claims: Japan.*



scholars have publicly made the case that foreign military activities other than mere passage in or above the exclusive economic zone of another country are unlawful.⁶² Perhaps to maintain the government's freedom of action on the point, China's relevant statute simply but ambiguously states that international freedoms of navigation and overflight in its exclusive economic zone are "subject to international laws and the laws and regulations of the People's Republic of China . . . [and to] the historical right that the People's Republic of China enjoys."⁶³

The submerged passage of the Han could have marked an opportunity for China to signal its ascension to maritime-power status, and the government could have altered its restrictive policies concerning the right of ships to pass through its own waters. However, despite China's steady rise as a maritime power with substantial commercial and military interests at sea, during and after the diplomatic furor over the discovery of the submerged Han in Japanese waters the PRC remained officially wedded to its restrictive views on the authority of foreign warships to operate in another state's coastal zones. Accordingly, in response to the Japanese demands for a Chinese apology, the Chinese government had no other alternative than to express official "regret" over the submarine's intrusion.

Given the international law and policy implications, it is intriguing that the PLAN's activities in Japanese waters do not appear to be well coordinated with the Chinese Ministry of Foreign Affairs or, by implication, the leadership of the Chinese Communist Party. The PRC's government's delay in responding to Japan's official queries about the identity of the Han submarine in 2004 and the purpose of its passage is telling. Having initially denied any knowledge of the developing situation, the PRC's government remained silent about the incident for five days after reports of the submarine's presence in Japanese territorial waters were made public.⁶⁴ The PRC vice foreign minister eventually met with the Japanese ambassador and declared that the submarine had been on "routine maneuvers" at the time of the incursion and that it had "accidentally strayed," for a "technical reason," into Japanese territorial waters, for which he "expressed regret."⁶⁵ The five-day delay suggests that the ministry was genuinely unaware of what the PLAN was doing and suggests that the naval leadership may have been acting on its own initiative to make an independent point to Japan (and possibly to other organs of the PRC government as well).⁶⁶

China has taken great care to ensure that all of its other naval activities in and around the Japanese Archipelago have been carried out with sensitivity to the international law expectations and perspectives of Japan. Accordingly, if the PRC never intended to use the Han's passage to signal a shift in its official position on the right of transit passage, why would the PLAN send an easily detected submerged submarine through waters in which by China's own doctrine, legal interpretations, and policy it had no right to be?

As mentioned above, Han-class submarines are known to be fairly noisy and therefore easily detectable, and this one passed through Japanese waters at the relatively shallow depth of less than a hundred meters.⁶⁷ Additionally, President Hu Jintao and then–Prime Minister Junichiro Koizumi were scheduled to meet for a one-on-one side-summit after the Asia-Pacific Economic Cooperation Forum in Chile just days after the incident; why provoke the Japanese during the important weeks before the meetings?⁶⁸ Several possibilities suggest themselves—all of them instructive of the strategic implications of China’s rise as a naval power.

The Strategic Implications of the Han Incident

The Incursion May Indeed Have Been Unauthorized or Due to a “Technical Reason”

As noted above, the official explanation for the incident was that the submarine was returning from a routine patrol and blundered through the strait because of poor navigation stemming from a “technical reason.” However, the explanation of navigational error, although officially accepted by Japan in order to diffuse political tensions, is implausible on its face. A glance at any chart of these waters makes clear that to pass through the Ishigaki Strait the Han would have had to be fully seventy-five to a hundred nautical miles off a course that would take it either between the islands of Taiwan and Ishigaki or into the corridor of water southwest of Okinawa that is beyond the Japanese territorial sea. On the contrary, the JMSDF tracking of the Han indicated it passed through the strait cleanly, without noticeable navigational difficulty, as if piloted by someone familiar with the waters in that area.⁶⁹

Additionally, all submarines operating in littoral waters use fathometers to measure depth. In this area there are ample underwater features that, were the submarine seriously off course, would alert the submarine commander to the danger. The applicable navigation chart, for instance, shows that the distance between the two-thousand-meter and one-thousand-meter depth curves in the region of the strait is substantially shorter than in other waters through which the submarine might have intended to pass—the distance between curves is approximately ten nautical miles in the vicinity of the strait, as opposed to nearly fifty nautical miles elsewhere (see figure 5). This unexpectedly rapid loss of water depth would have caused the commander to suspect that his plotted position and course were off and would have raised concerns of possible grounding among the islands and their many coral reefs.⁷⁰ Had the submarine actually been concerned about its location or ability to navigate safely, it would have made a wide course correction well out to sea—certainly before it crossed the thousand-meter curve, just off Ishigaki Island.

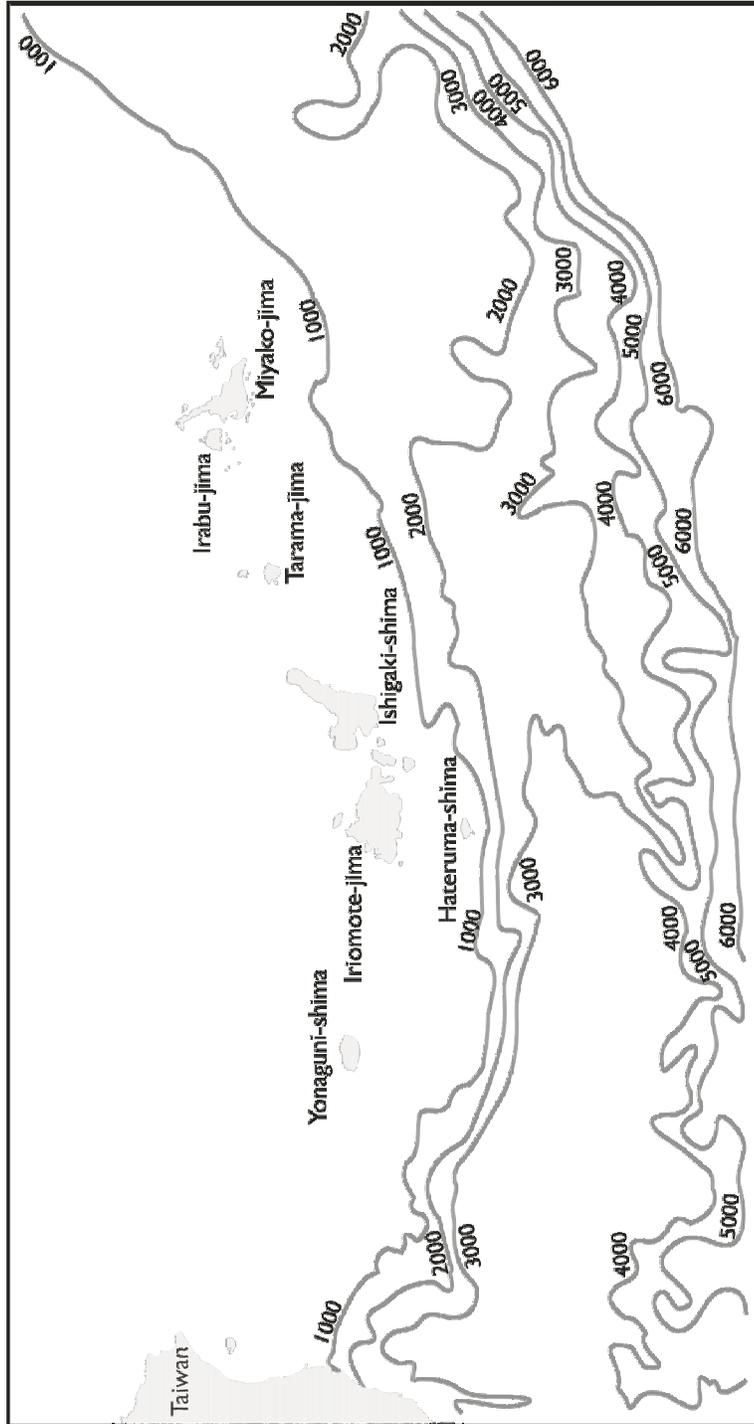


Figure 5. The 1000- through 6000-meter curves are depicted. The wide variation in the seabed gradient east and west of the Ishigaki Strait would have alerted a submarine navigator that the vessel was off course well before it reached the channel.
Source: U.S. Defense Mapping Agency, Chart INT 509.

Clearly, therefore, the PRC story about navigational error and technical difficulties was a face-saving cover. Other, more likely, reasons for the submarine's decision to make passage through the Ishigaki Strait have both legal and strategic significance.

Scouting: The Action Could Have Been a Covert Mapping Exercise

For years the United States has been aware that the PLAN has been exploring various submarine routes through which to move its submarines into the central Pacific in the event of regional conflict.⁷¹ Some observers have suggested that relaxations in trade and technology restrictions in the 1990s allowed China to purchase advanced oceanographic mapping systems that enable it to make sophisticated maps of the ocean floor.⁷² These maps could be very useful to the PRC submarine force in the event of war. Additionally, the maps could be useful in exploring the seabed for suitable locations to drill and explore for gas and oil. On these bases, some have suggested that the Han's passage was the latest excursion in a sustained effort to map the seafloor in the East China Sea and the approaches to it.

If the submarine was in fact collecting intelligence, mapping Japanese territorial waters without Japan's permission, or performing economic research in a disputed area, the PRC has some explaining to do. UNCLOS provides that "coastal states, in the exercise of their sovereignty, have the exclusive right to regulate, authorize and conduct marine scientific research in their territorial sea."⁷³ Furthermore, UNCLOS provides that "during transit passage, foreign ships . . . may not carry out any research or survey activities without the prior consent of the coastal State," including hydrographic surveys.⁷⁴

UNCLOS takes an equally stern stance regarding intelligence collection activities during either innocent passage or transit passage. Concerning innocent passage, UNCLOS provides that "passage of a foreign ship shall be considered prejudicial to the peace, good order or security of the coastal state if in the territorial sea it engages in any act aimed at collecting information to the prejudice of the defense of the coastal state or the carrying out of research or survey activities."⁷⁵ UNCLOS extends these prohibitions to the territorial waters covered by international straits, stating that "any activity which is not an exercise of the right of transit passage through a strait remains subject to the other applicable provisions of the Convention."⁷⁶

Indeed, China itself gets rather prickly over just this issue—even in waters well away from its territorial sea, as its legal perspectives on foreign military activities in the exclusive economic zones of other states demonstrate. In March 2000 and again in September 2002, PLAN warships directed the USNS *Bowditch*—an unarmed oceanographic research vessel manned by twenty-five civilians—to exit an area in China's exclusive economic zone in the Yellow Sea, well outside Chinese territorial waters, in which the ship had been performing hydrographic performance acoustic data tests.⁷⁷

Such tests are performed using sonarlike equipment to determine the salinity, temperature, existence of currents, and other water characteristics that affect the movement of sound under the surface. The collected data is useful in tracking submarines, but it is just as useful to submarines intent on avoiding detection. While these tests would have been contrary to international law if performed in China's territorial sea, the waters in which the tests were being performed were within the PRC exclusive economic zone, where international law provides all states the right to exercise high seas freedoms, including conducting scientific research, such as hydrographic surveys, not related to the natural resources of the zone.⁷⁸ China's Foreign Ministry spokeswoman at the time refused to specify her country's specific basis for requiring *Bowditch* to depart, citing only her state's "relevant rights" in the exclusive economic zone as a basis for the PLAN's actions.⁷⁹

Thus, comparing the two incidents, if indeed the Han's passage through the Ishigaki Strait was for the purpose of collecting hydrographic or intelligence data, China's decision to send a submarine submerged through Japan's territorial waters is especially surprising. That is, the submarine performed in the sovereign waters of Japan activities that by its own interpretation of international law China does not countenance even in the nonsovereign waters of its exclusive economic zone, much farther from China's own shores.

International law does not leave states without legitimate remedies for true violations. UNCLOS provides that a coastal state has the right to "take the necessary steps in its territorial sea to prevent passage which is not innocent."⁸⁰ It also specifies that coastal states discovering warships in noncompliance with coastal-state laws and regulations concerning passage through the territorial sea can request that the ship come into compliance; if the ship does not, the coastal state may require it to leave the territorial sea immediately.⁸¹ Additionally, the right of diplomatic protest preserves the coastal state's position on the state of the law. These remedies must, of course, be interpreted in light of the coastal state's right to use force in self-defense in response to an armed attack, but the clear intent of international law as reflected in UNCLOS is to avoid escalatory actions by coastal states toward nonhostile warships in their waters.⁸²

Put in this light, the JMSDF's tracking activities were a proportionate and legitimate response to what the Japanese government perceived was a Chinese violation of Japan's maritime sovereignty. Additionally, the submerged passage of the Han through the Ishigaki Strait, where it stood a reasonable chance of being detected by the Japanese, was counterproductive to the PRC's efforts to gain acceptance for its position that a coastal state has "relevant rights" that it may enforce by excluding others from information gathering in the exclusive economic zone off its coasts. Further, since state practice is a primary source of international law, if China's purpose for this Han was to

gather intelligence about the waters and seabed in the Ishigaki Strait, its own naval practices have defeated China's larger strategic purpose of advancing and shaping the law in favor of coastal-state control over foreign military and research activities in their coastal waters.

Signaling: The PLAN May Have Been Demonstrating Its Sea Power

It is conceivable that the submarine's submerged passage through Japanese waters was an intentional provocation to demonstrate to Japan and the United States the extent of the PRC's sea power and its blue-water capability, and possibly to test the military capabilities of the Japanese.⁸³ To the United States, China's message has consistently been that it should refrain from military support for Taiwan.⁸⁴ To Japan, China's message may be related to ongoing maritime boundary and resource disputes, making the Han incident one among the string of such messages over the past decade designed to demonstrate China's growing naval power.⁸⁵

For instance, in addition to the incidents listed in table 1, China increased its fleet activity significantly in the international waters within the Japanese exclusive economic zone in the East China Sea in the year before the Han incident. The submarine's passage through that area was reportedly the thirty-fourth such instance in 2004, up from only seven in 2003.⁸⁶ This increase could be attributed to a number of factors, including the need for new and deeper operations areas as the PRC submarine fleet's deepwater capabilities improved. However, the most plausible explanation is that China is using its navy to signal its growing ability to resolve military disputes in its favor if neighbors or competitors should consider resorting to force.⁸⁷

One of the reasons China may have taken this particular opportunity to demonstrate its naval capabilities may have been to strengthen its negotiating position in its dispute with Japan over delimitation of their respective exclusive economic zones in the East China Sea. The Han incursion occurred during a period of tense disagreement between China and Japan over the PRC's gas exploration projects bordering an area in the East China Sea that Japan claims as its exclusive economic zone.⁸⁸ Japan protests the existing Chinese gas fields because of concern that wells so near the median line will inevitably take natural gas from the Japanese side should the median line form the basis for an eventual maritime boundary.⁸⁹ After the submarine passed out of the Ishigaki Strait, it was tracked near the Chinese offshore gas projects, which remain controversial notwithstanding a June 2008 agreement between China and Japan to explore jointly a very small portion of the disputed zone and allowing Japanese companies to participate in Chinese extractions of natural gas from at least one disputed site.⁹⁰

In the days just after the Han's passage through this sensitive region, Japan's trade minister openly questioned whether the presence of the sub in those waters was meant by

the PRC as a not-so-veiled signal.⁹¹ This is entirely plausible, given that these waters remain a cyclical source of tension between China and Japan. For instance, and though relations have more recently been on the mend, in September 2005 a group of five PLAN ships was spotted operating for the first time in the area of the Chun Xiao gas field, which is situated near the border of the disputed area of the exclusive economic zones between China and Japan.⁹² In order to make sure the message was clearly understood, one of the Chinese ships reportedly aimed its 100 mm bow gun at a JMSDF P-3C patrol plane and maintained a track as the aircraft patrolled in international airspace.⁹³ During this period, such acts of intimidation were meant to reinforce China's claim to the resources under the entire continental shelf and to "encourage" Japan not to interfere with operation of the Chinese gas field, which is only about two kilometers from the boundary of the Japanese-claimed exclusive economic zone.⁹⁴

Gatekeeping: Access and Antiaccess during an East Asian Crisis

In a military crisis over the status of Taiwan, one role for China's potent submarine force would be to support a PRC blockade of the island and to prevent the United States and Japan from using the choke points created by Japanese islands to deny Chinese vessels access to and from the Sea of Japan and the East China Sea during the period of crisis.⁹⁵

The Chinese are aware, for instance, of blockading exercises held by the JMSDF in 1983 in the narrow Suo Nada Sea, east of the islands of Honshu and Kyushu. During those exercises the JMSDF reportedly laid dummy mines to simulate a strait closure, demonstrating the capability to prevent hostile submarines from passing through the Japanese islands to the Pacific and from returning home for resupply.⁹⁶ One Chinese military scholar more recently observed, "The Sakishima Islands and the Ryukyu Islands . . . are the Pacific gateway for the exit and entry of China's North Sea Fleet and East Sea Fleet."⁹⁷ Viewing Japanese control of the ring of islands between the Asian continent and the open Pacific Ocean, another observer noted that "the geographic conditions arising from the westward extension of the Japanese islands also confers to this 'aircraft carrier' a combat range that virtually covers . . . all of China's oceanic exits and sea lines of communication."⁹⁸ This condition has caused other Chinese military observers to note, "At the strategic level, the westward and southward emphasis of Japan's maritime expansion could contain China's march to the ocean."⁹⁹ Avoiding such a "trap" during times of crisis would require PLAN commanders to have detailed knowledge of alternative undersea routes in and out of the region.

Alternatively, in preparation for the possibility that the PLAN may itself have to use its submarine force to block Japan or the United States from supporting Taiwan, it is possible that the PLAN sent the Han through sensitive Japanese waters in order to test the

strength of JMSDF ASW operations.¹⁰⁰ Such probing could help the PLAN to understand better the capacity of Japanese ASW forces to prevent Chinese submarines from slipping through Japan's island "gates" into the Pacific to meet a U.S. fleet during a crisis in the East Asian littorals. The slow speed and erratic course of the submarine as it passed through Japanese waters north of the strait certainly suggest that it was in fact testing the JMSDF patrol and tracking capabilities.¹⁰¹

Ironically, similarly to its stance against research and intelligence-gathering activities without coastal state consent, the PRC has expressed a clear and consistent policy that innocent passage within the territorial waters of a coastal state is not a matter of right for warships. Article 6 of the Territorial Waters and Adjoining Areas Act of the People's Republic of China authorizes merchant vessels to exercise the right of innocent passage through Chinese waters without prior permission but specifically requires foreign military vessels to seek permission of the Chinese government before entering territorial waters.¹⁰² Thus, in addition to weakening Chinese ability to limit research and intelligence gathering off its coasts, the passage of the Han through the Ishigaki Strait without Japan's consent also undermined China's efforts to shape international law in favor of a coastal state's authority to prohibit the movement of warships in the territorial seas off its coasts.

In light of the political tensions in the East China Sea and China's strict stance regarding passage by warships into its own territorial waters, the Japanese obviously followed the Han's path with particular interest. In fact, some sources reported that the PRC submarine was initially detected leaving its home port, either by an American satellite or through Taiwanese intelligence channels, then tracked by a U.S. Navy submarine and P-3C patrol planes off Guam.¹⁰³ The submarine continued to be tracked for more than four days south of the Ryukyus near the politically sensitive Japanese Okinotori Island. The Japanese stepped up monitoring as the submarine passed through its territorial waters in the ocean trench between Ishigaki and Miyako on its return trip.¹⁰⁴

That the Han submarine was operating off Guam before it transited north through the Ishigaki Strait is of particular interest to the United States, because the Han's noisy movement through waters east of Taiwan and the Japanese island chain was another open demonstration that the PLAN is able to operate outside what it calls the "first defensive island chain" into the waters of the outer defensive perimeter, or "second island chain" (see figure 6). These island chains are perceived ideally as defensive spheres within which the PLAN must achieve sea supremacy to deny the United States and its allies freedom of action should armed conflict over Taiwan erupt.¹⁰⁵ However, to use the water space within the first island chain as a defensive sphere the PLAN must prevent the island chain from becoming a wall inhibiting the freedom of action of its own vessels. This obviously requires the PLAN in times of crisis to get its submarines

Figure 6. *The first island chain runs southward from the Kurils through the Japanese Archipelago and the Ryukyu island chain, east of Taiwan, through the Philippine Archipelago, westward through the Indonesian Archipelago before curving northward to the Indochinese Peninsula. The second island chain runs south from Japan through Micronesia and southwestward to the island of New Guinea.*

Source: Ye Xinrong and Zuo Liping, "On the Strategic Thinking of the Navy of the People's Liberation Army Moving from Offshore Operations to Open-Ocean Operations," p. 30.



quickly through the island chain to the blue-water operating areas beyond. Otherwise, China will have committed the critical strategic mistake of allowing naval forces to be trapped in coastal waters and rendered useless during conflict, as occurred when Japan systematically destroyed a strong Chinese naval force in coastal battles during the 1894–95 Sino-Japanese War.¹⁰⁶

One pair of Chinese strategic thinkers from the Chinese Naval Research Institute of the People's Liberation Army Navy articulated the strategic imperative to operate between the first and second island chains as follows:

If we develop some weapons and equipment suitable for open-ocean operations in a planned manner and enable the PLAN to possess a certain open-ocean operational capability and comprehensive domination power, we can then deploy offensive operations and sabotage operations outside the first island chain and on the broad maritime battlefield, and this will effectively deter our enemy. Looking at the strategic situation, China's sea area is semi-enclosed, and its exit into the Pacific Ocean is controlled by others. If the motherland's reunification issue can be solved smoothly, we will have an ideal exit to the sea. . . . However, we cannot sit around and wait until the motherland's reunification issue is resolved before we move toward the open ocean, but rather, we should . . . break through the bonds of the island chain, actively build up open-ocean operational strength, and strive to raise our operational capability in the sea area outside the island chain.¹⁰⁷

Not surprisingly, therefore, there has been a gradual increase in PLAN missions into waters disputed by China and Japan in the East China Sea, and now into Japanese waters themselves. As these Chinese strategists suggest, the mounting military activities may be part of an effort to deter intervention in a cross-strait scenario—perhaps most especially attempts to block the exits needed by Chinese naval vessels to reach the open ocean. Additionally, these incursions may be signals that China considers its navy to possess both the technology and operational ability to disrupt any efforts the United States and Japan might undertake on Taiwan's behalf. Under either scenario, the increased Chinese naval activity deserves the careful attention of the Japanese and American security communities.

Conclusions

The overall status and interpretation of the international law relevant to the right of all vessels of all states to pass through international straits remain unchanged as a result of Chinese naval operations in and around the choke points in the Japanese Archipelago, including the Han's passage through the Ishigaki Strait. Both China and Japan continue to challenge the prevailing understanding that international straits include all "useful routes" for international navigation, and each seeks to establish the position that only straits that are "necessary routes" for international navigation qualify as international straits.

Additionally, despite the fact that the Han's submerged passage through the Ishigaki Strait represents a direct contradiction to China's clearly and repeatedly expressed position that foreign naval vessels may not enter another country's territorial sea without consent, and that even when consent is given submarines must be on the surface and flying their flags, China did not alter its official legal policies on these points. Only if China had followed the Han's underwater passage through the Ishigaki Strait with a political assertion that the submarine had an international-law right to do so, rather than expressing regret about the alleged navigational and technical errors, would the passage have qualified as the sort of state conduct on which changes in international law perspectives are based.

But in at least one sense the landscape of international law has changed nonetheless. The Chinese spent at least a decade prior to the 2004 incident attempting to build the case for increased jurisdiction and control of coastal states over the maritime zones off their shores. By preventing *Bowditch's* survey activities in their exclusive economic zone, for instance, the Chinese staked a position consistent with coastal-state control. However, with one submarine's submerged passage through a neighbor's territorial sea in a manner that could not plausibly have been accidental, the Chinese undercut the legitimacy of their restrictive position on international law of the sea. This could have a profound effect on the development of international law of the sea as a whole. At a minimum, it strengthens the hand of those states, such as the United States, that recognize international law as imposing only minimal restrictions on the freedom of maritime navigation. Certainly, this incident will serve as a benchmark when in the future states seek to interpret acceptable practices in the coastal zones of other states in light of international law of the sea. Thus, whether the Chinese navy was undertaking in this incident a scouting expedition to map covertly the seabed through the strait, signaling the extent of its modern sea power, or testing continental Asia's gates to the open ocean by exploring Japanese antisubmarine detection and response capabilities, the Chinese may have lost more than they gained. If the PLAN gathered some new knowledge of the underwater avenue through the strait, it made a short-term tactical gain. However, it did so at the price of a significant loss in the credibility of its advocacy against routine U.S. military operations off its own coasts.

In sharp contrast, Japan quickly saw a strategic opportunity to put the Chinese on the defensive and took advantage of it. The Japanese forced the Chinese to express public regret over the incident and thereby strengthened their own strategic position that Chinese submarines have no right to pass submerged through those waters. By choosing to pursue the submarine actively rather than relying solely on the de-escalatory measures contemplated by UNCLOS, Japan clearly signaled to China that it is willing to flex military muscles of its own.¹⁰⁸ Japan strengthened its strategic position by demonstrating

the ability to respond quickly to an emergent crisis, grasp strategic opportunity, and take bold action.

In any event, China's increasingly modern submarine fleet is a force that deserves respect. It is well designed to support the PLA's antiaccess strategy and to support the interests of the national leadership in signaling China's arrival as a maritime power. Additionally, as they scout the depths of the strategic narrows that form the gates in Asia's wall of littoral islands, Chinese naval commanders are gaining valuable insights into the most effective means to close off their coastal seas from outside interference.

And yet, taken as a whole, Chinese naval operations in Japanese waters reveal an underlying tension between China's advancing naval capabilities and its protective perspectives on international law of the sea. It remains to be seen whether China's next step will be to align its policies on international law of the sea with its growing maritime capabilities. Perhaps the recent Chinese decision to send a small flotilla to join the antipiracy operations off the coast of Somalia is the first signal that China's perspectives on international law of the sea will soon be coming into greater alignment with its interests as a rising maritime power.¹⁰⁹ China's insistence on gaining formal Somali consent for its antipiracy operations in the Gulf of Aden, however, suggests the opposite. Either way, the growing Chinese naval presence in and around the Japanese Archipelago has made clear that the Chinese navy sees its submarine fleet as an important deterrent to American and Japanese military intervention during an East Asian crisis, and as long as such deterrence remains a strategic priority for China, its policies on law of the sea will continue to be focused on delegitimizing U.S. naval presence in East Asian waters. That such policies also limit the activities of China's growing fleet must then be accepted as the cost of pursuing its antiaccess objectives.

Notes

1. Minnie Chan, "Chinese Ships in Japanese Strait Raises Concerns about Regional Role," *South China Morning Post*, 22 October 2008.
2. Ken Sato, "PLA Naval Activities Becoming Brisker; Going from Coastal Waters into the Pacific; Missions Becoming Diversified, Including Disaster Relief," *Nihon Keizai Shimbun* (Tokyo), Nikkei Telecom 21Database version, 17 November 2008 [in Japanese], OSC-JPP20081117045002, Open Source Center, www.opensource.gov; Craig S. Smith, "Taiwan Is Likely to Ask the U.S. to Sell It 4 Destroyers," *New York Times*, 8 January 2001; "Project 956/EM Sovremenny Class Destroyer," SinoDefence.com, 22 March 2008.
3. Shigeo Hiramatsu, "What the Tsugaru Passage by a Chinese Fleet Means," *Sankei Shimbun* (Tokyo), no. 12, 2008; "Chinese Destroyer Sailed through Tsugaru Strait," *Yomiuri Shimbun*, 22 October 2008, available at www.yomiuri.co.jp/dy/national/20081022TDY02307.htm. Apparently, the JMSDF located the Jiangkai II in the Sea of Japan two days before the transit but was unaware that it planned to join the other PLAN ships that had previously been in the Russian port of Vladivostok to make the transit through the strait.
4. Chan, "Chinese Ships in Japanese Strait Raises Concerns about Regional Role; *Jane's Fighting Ships* (online), jdet.janes.com.

5. Sato, "PLA Naval Activities Becoming Brisker."
6. "Chinese Destroyer Sailed through Tsugaru Strait."
7. "United Nations Convention on the Law of the Sea (10 December 1982)" [hereafter UNCLOS], United Nations *Treaty Series*, vol. 1833, p. 3.
8. *Ibid.*, arts. 38 and 39 (for transit passage) and 17–19 (for innocent passage).
9. Additional details about Japan's law and practice related to its straits can be found on the State Department's website, at www.state.gov/documents/organization/57684.pdf.
10. *Limits in the Seas No. 120, Straight Baselines and Territorial Sea Claims: Japan* (Washington, D.C.: U.S. State Dept., 30 April 1998), p. 12, for instance, uses the term "channel of high seas."
11. *Law on the Exclusive Economic Zone and Continental Shelf* (Law No. 74 of 1996), available at www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/JPN_1996_Law74.pdf.
12. The vessel was probably the *Haidiao 723*, a Yanbing-class icebreaker converted for intelligence gathering as a fourth intelligence ship in the series, also known as the Yanha class. Eric Wertheim, ed., *The Naval Institute Guide to Combat Fleets of the World*, 15th ed. (Annapolis, Md.: Naval Institute Press, 2007), p. 129; "PRC Intelligence-Gathering Ship Passes Tsugaru Strait," *Yomiuri Shimbun*, 25 May 2000; "Japan Voices Concern over Chinese Naval Activities around Japan," *Kyodo News International*, 20 June 2000; Masayuki Masuda, "Japan's Changing ODA Policy towards China," *China Perspectives* 47 (May–June 2003), available at chinaperspectives.revues.org/document358.html.
13. "PRC Intelligence-Gathering Ship Passes Tsugaru Strait."
14. Jyh-Perng Wang and Ing-Chyi Jan, "On the Event of PRC Han-Class Sub Intruding Japan and Conferring the Proper Thoughts of Taiwan Defense," *Taiwan Defense Affairs* [open-source translation], 1 June 2005; "Satellite Successfully Placed in Orbit," *Los Angeles Times*, 27 February 2005, p. A15, available at articles.latimes.com/2005/feb/27/world/fg-briefs27.2. In November 2003, the Japanese attempted to launch a satellite from the Tanega Island space facility, but the rocket had to be remotely detonated when a booster section failed to detach.
15. "China's Submarine Poses No Threat to Japan," *People's Daily On-Line*, 19 November 2003, english.peopledaily.com.cn/200311/18/print20031118_128518.html.
16. "Japan Continues Tracking Mystery Sub," *Japan Times*, 12 November 2004; "MSDF Ships Tracked Chinese Sub Cautiously Due to 'Possibility' of Attack," Kyodo World Service, 20 November 2004.
17. Melody Chen, "Japan and US 'Dissuade' China," *Taipei Times*, 23 March 2005, p. 2; "China Admits Sub Entered Japan Waters, Expresses Regret," *Asian Political News*, 24 November 2004; "China Sub Tracked by U.S. off Guam before Japan Intrusion," *Japan Times*, 17 November 2004; "MSDF Alert over Mystery Sub in Waters off Okinawa," *Asahi Shimbun*, 11 November 2004; "'Intentional' or 'Navigational Error?'" *Japanese Defense Monthly*, 1 February 2005.
18. "Chinese Sub Tracked by U.S. off Guam before Entering Japanese Waters," Kyodo News, 16 November 2004; "'Intentional' or 'Navigational Error?'"
19. "China Admits Sub Entered Japan Waters, Expresses Regret"; "Hosoda Says Japan Can't Identify Sub Because It 'Stays under Water,'" *Japan Today*, 11 November 2004. The Japanese first raised the military alert level to its highest state in 1999, when two North Korean vessels approached the Noto Peninsula in the Sea of Japan.
20. "'Intentional' or 'Navigational Error?'"
21. "Hosoda Says Japan Can't Identify Sub Because It 'Stays under Water'"; "Japan Demands Apology over Chinese Submarine Intrusion," *Sydney Morning Herald*, 14 November 2004; Yoso Furumoto, "Suspicious Submarine: Intrusion of Territorial Waters; JDA Sends AWACS to Surrounding Ocean; Watch Out for Chinese Fighter Jets," *Mainichi Shimbun* (Tokyo), 13 November 2004.
22. See, e.g., "MSDF Detected Two Chinese Submarines in East China Sea That Aimed to Threaten U.S. Aircraft Carrier," *Sankei Shimbun*, 17 October 2008 [in Japanese]; "Japan Concerned over Chinese Submarines near Maritime Borders," Russian Information Agency Novosti, 17 October 2008, available at en.rian.ru/world/20081017/117793498-print.html; and "China: Reports of Increased Naval Activity," Stratfor.com, 22 October 2008.

23. "MSDF Detected Two Chinese Submarines in East China Sea That Aimed to Threaten U.S. Aircraft Carrier."
24. See, e.g., Bernard D. Cole, "Beijing's Strategy of Sea Denial," Jamestown Institute *China Brief* 6, no. 23 (23 November 2006), pp. 2–4, in which the author suggests that other similar incidents were intended to send a signal to the United States and Japan about the growing capability of the Chinese submarine fleet and to warn against military intervention should a Taiwan Strait crisis erupt.
25. Ronald O'Rourke, *China Naval Modernization: Implications for U.S. Navy Capabilities—Background and Issues for Congress*, CRS Report for Congress (Washington, D.C.: Congressional Research Service, 8 October 2008), p. 12. Estimates vary on the number of active submarines; the figure of sixty-four is tabulated from the most current data available from *Jane's Fighting Ships*, and includes only the warfare-capable Yuan, Song, Ming, Romeo, Kilo, Shang, Han, Xia, and Jin classes.
26. *Ibid.*, pp. 8–17.
27. *Jane's Fighting Ships*.
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32. Jon Rosamond, "Model and Photographs of Chinese Shang-Class Submarine Go on Display," *Jane's Navy International*, 1 October 2007. See also a classic study of Chinese sea power, John Wilson Lewis and Xue Litai, *China's Strategic Seapower: The Politics of Force Modernization in the Nuclear Age* (Stanford, Calif.: Stanford Univ. Press, 1994); and Andrew S. Erickson et al., *China's Future Nuclear Submarine Force* (Annapolis, Md.: Naval Institute Press, 2007).
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35. House Armed Services Committee, "China: Recent Security Developments," prepared statement of the Honorable Richard P. Lawless, Deputy Under Secretary of Defense for Asian and Pacific Security Affairs, 13 June 2007, available at armedservices.house.gov/pdfs/FC061307/Lawless_Testimony061307.pdf.
36. This information is derived from the Defense Mapping Agency's Tactical Pilotage Chart (TPC) H-12C, January 1996 edition. The distances referred to were measured by the author from TPC H-12C.
37. Jyh-Perng Wang and Ing-Chyi Jan, "On the Event of PRC Han-Class Sub Intruding Japan and Conferring the Proper Thoughts of Taiwan Defense."
38. China joined the Convention on 7 June 1996, and Japan joined on 20 June of that same year. See the United Nations online listing, at www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm.
39. UNCLOS, art. 3.
40. *Law to Partially Amend the Law on the Territorial Sea* (Law No. 73 of 1996), which entered into force on 20 July 1996.
41. Bernard H. Oxman, "The Third United Nations Conference on the Law of the Sea: The 1977 New York Session," *American Journal of International Law* 72, no. 1 (January 1978), p. 57.
42. UNCLOS, arts. 18.1 and 18.2, 19.1 [italics added].
43. *Ibid.*, arts. 19.2(c) and (j).
44. *Ibid.*, art. 20.
45. *Ibid.*, art. 37.

46. *Ibid.*, arts. 34.1 and 36.
47. *Ibid.*, arts. 38.2 and 39.1(c).
48. *Ibid.*, art. 37.
49. Although UNCLOS does not further specify what the term “normal mode” means in reference to a submarine’s passage through an international strait, this issue was clarified in the 1995 *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, in which the roundtable of scholars and officials expressed general agreement that the right of transit passage for submarines included subsurface passage (p. 105).
50. Japan’s Law No. 30, of 1977, as amended by Law No. 73 of 1996, reprinted and discussed in U.S. State Dept., *Limits in the Seas No. 120*, p. 13, extended the Japanese territorial sea to twelve miles and designated five international straits: the Eastern and Western channels of the Tsushima Strait, the Osumi Strait, La Perouse (Soya) Strait, and Tsugaru Strait. The position of the Japan Maritime Self-Defense Force is that these straits are the only international straits within Japanese territorial waters. Capt. Nakamura Susumu, JMSDF, e-mail of 10 May 2004 on file with the author. See also J. Ashley Roach and Robert W. Smith, *United States Responses to Excessive Maritime Claims*, 2nd ed. (Leiden, Neth.: Martinus Nijhoff, 1996), discussion on p. 282 note 3; and UNCLOS, art. 37.
51. UNCLOS, art. 36.
52. *Corfu Channel Case*, 1949 ICJ 4, reprinted in *International Law Documents 1948–1949*, International Law Studies (Newport, R.I.: Naval War College, 1950), vol. 46, p. 108. This case involved two British ships that struck naval mines in the Corfu Channel in 1946, leading to the deaths of forty-five British sailors. Albania was adjudged responsible for ensuring that its territorial waters in the strait were safe for international navigation.
53. *Ibid.*, p. 28.
54. *Ibid.*
55. Constitution of Japan, 3 November 1946, art. 9.
56. U.S. State Dept., *Limits in the Seas No. 120*.
57. A. R. Thomas and James C. Duncan, eds., *Annotated Supplement to the Commander’s Handbook on the Law of Naval Operations*, International Law Studies (Newport, R.I.: Naval War College, 1999), vol. 73, p. 122 note 36, citing Richard J. Grunawalt, “United States Policy on International Straits,” *Ocean Development and International Law: Journal of Marine Affairs* 18 (1987), p. 456.
58. Zhao Peiyang, ed., *The Basis of International Law for Modern Soldiers* (Beijing: PLA Press, 1996), p. 90.
59. *Ibid.*, pp. 90–91.
60. Arts. 2, 3, 6, and 7 of the PRC’s *Law on the Territorial Sea and Contiguous Zone of 25 February 1992* collectively create a twelve-nautical-mile territorial sea, including in the numerous offshore islands China claims, and allow for no other passage regime within the territorial seas except innocent passage. Since numerous areas in the Spratlys, Penghus, and other island groups that China specifically includes in its territorial sea claims would qualify for transit passage under the broader definition of international straits and the passage regime in them, China’s very specific statement that only innocent passage applies in its territorial waters is a clear indication that it does not accept the broad interpretation of access rights.
61. See “Declarations or Statements upon UNCLOS Ratification, China,” *United Nations*, www.un.org/Depts/los/convention_agreements/convention_declarations.htm.
62. “Chinese Spokesman Gives Full Account on US-China Air Collision,” *Xinhua*, 3 April 2001, published online by the British Broadcasting Service and available at web.lexis-nexis.com; “U.S. Seriously Violates International Law: Signed Article,” *Xinhua*, 16 April 2001, available on the PRC embassy website, at www.china-embassy.org/eng/zt/zjsj/t36383.htm; and especially Ren Xiaofeng and Senior Col. Cheng Xizhong, “A Chinese Perspective,” *Marine Policy* 29 (2005), p. 139.
63. *Law of the People’s Republic of China on the Exclusive Economic Zone and Continental Shelf*, adopted at the third meeting of the Standing Committee of the Ninth National People’s Congress and promulgated on 26 June 1998, arts. 11 and 14.
64. “China Denies Knowledge of Suspect Submarine in Japan,” *Manila Times*, 12 November 2004; “Japan Demands Apology over Chinese Submarine Intrusion.”
65. J. Sean Curtin, “Submarine Puts Japan-China Ties into a Dive,” *Asia Times Online*, 17 November 2004; “China Sub Tracked by U.S. off Guam before Japan Intrusion”; “Defense Official Doubts China’s Explanation for Sub’s Intrusion,” *Nihon Keizai Shimbun* (Tokyo), 7 November 2004.

66. See Peter Dutton, "Confusion and the USS *Kitty Hawk*: What Do Unexpected PLA Actions Mean for the U.S. Maritime Strategy?" U.S. Naval Institute *Proceedings* [publication pending].
67. Lyle Goldstein, "Undersea Dragons: China's Maturing Submarine Force," *International Security* 28, no. 4 (Spring 2004), pp. 161–96.
68. Reiji Yoshida and Kanako Takahara, "China's Sub Intrusion Sparks Tokyo Protest," *Japan Times*, 13 November 2004. The Koizumi and Hu meeting in Chile occurred as scheduled. President Hu Jintao raised the predictable objections to Koizumi's repeated visits to the Yasukuni "war shrine," but because of Japan's discovery of the Han, Koizumi was able to counter the Chinese complaint with one of his own. ("Koizumi Warned over War Shrine," BBC News, 22 November 2004, available at news.bbc.co.uk/2/hi/asia-pacific/4031567.stm.) This suggests that the Chinese provocation of the Japanese was not intentional, at least not by the inner circles of Hu's government, since it produced a weaker public-relations position for the Chinese president at his meeting with Premier Koizumi.
69. "HK Phoenix TV Discusses PRC Submarine Intrusion, Japan's Reaction," 19 November 2004, FBIS CPP20041122000100; "MSDF Ships Tracked Chinese Sub Cautiously Due to 'Possibility' of Attack"; "What the PRC Submarine Force Is Aiming For," *Japanese Defense Monthly*, 1 July 2005.
70. "Intentional' or 'Navigational Error?'"
71. "China Sub Tracked by U.S. off Guam before Japan Intrusion."
72. See, e.g., Su Jilan, Chen Bangyan, and Jin Xianglong, "Development in Precision Seafloor Survey and Mapping in China," *Marine Geodesy* 25 (February 2002), pp. 79–86; Mark Valencia, "The East China Sea Dispute: Context, Claims, Issues, and Possible Solutions," *Asian Perspective* 31, no. 1 (2007), pp. 127–67; Tien P'ing, "Koizumi's Order to Sink Mysterious Submarine an Excuse for Military Expansion," *Hong Kong Hsiang Kang Shang Pao*, 12 November 2004, p. A2.
73. UNCLOS, art. 245.
74. *Ibid.*, art. 40. See also art. 21(1)(g).
75. *Ibid.*, arts. 19.2(c) and (j).
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81. *Ibid.*, art. 30.
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88. Yoshida and Takahara, "China's Sub Intrusion Sparks Tokyo Protest."
89. See Peter Dutton, "Carving Up the East China Sea," *Naval War College Review* 60, no. 2 (Spring 2007), esp. pp. 53–54.
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Abbreviations and Definitions

A	ASW	antisubmarine warfare
	AWACS	Airborne Warning and Control System
F	FBIS	Foreign Broadcast Information Service
I	ICJ	International Court of Justice
J	JMSDF	Japan Maritime Self-Defense Force
P	PLA	People's Liberation Army
	PLAN	People's Liberation Army Navy
	PRC	People's Republic of China
U	UNCLOS	United Nations Convention on the Law of the Sea

About the Author

Peter Dutton is an associate professor of strategic studies in the China Maritime Studies Institute at the U.S. Naval War College. His current research focuses on American and Chinese views on sovereignty and international law of the sea and the strategic implications to the United States and the U.S. Navy of Chinese international law and maritime policy choices. Recently completed research projects include “Caelum Liberum: Air Defense Identification Zones in International Airspace” (publication forthcoming); “Carving Up the East China Sea” (*Naval War College Review*, Spring 2007); “International Law Implications of the November 2004 ‘Han Incident’” (*Asian Security*, June 2006); “Chinese Perspectives on Sovereignty and Access Control” (February 2008, available at www.uscc.gov), a paper produced in support of testimony before the congressional U.S.-China Economic and Security Review Commission; and *Collision Course: Conflicts between Coastal State Control and International Military Uses of the EEZ* (publication forthcoming). Professor Dutton is a retired Navy judge advocate and aviator. He was legal adviser to Commander, *John F. Kennedy* Battle Group during its 1999–2000 Middle East deployment and to Commander, Seventh Fleet for international exercises in 2005. Upon retirement from active duty in 2006 with the rank of commander, Professor Dutton joined the permanent faculty of the Naval War College. He also researches and lectures on topics related to international law of the sea issues in the Arctic, the Proliferation Security Initiative, and maritime strategy. He is an adjunct professor of law in the Marine Affairs Institute at Roger Williams University School of Law. Professor Dutton holds a juris doctor from the College of William and Mary, a master of arts degree (with distinction) from the Naval War College, and a bachelor of science (cum laude) from Boston University.