

China's Coast Guard Law: Japan's Legal Approach

China announced its new Coast Guard Law containing worrisome provisions that need further clarification. Japan, a prominent claimant in the East China Sea, feels threatened by this law.

On 22nd January 2021, the 25th Session of the Standing Committee of the 13th National People's Congress, People's Republic of China, [passed](#) a new Coast Guard Law for the first time entitling its maritime law enforcement to fire against foreign vessels. The enacted law escalates the risks of conflicts in the East and South China Sea, possibly driving the entire region into further turbulence. Accordingly, China's neighboring countries, including [Japan](#), have recently expressed their [concerns](#) over this move.

The worry is not unreasonable, especially for Japan. The new law was promulgated in the context of China [maintaining near constant coast guard presence](#) in the territorial sea and contiguous zone of Senkaku/Diaoyu islands and aggravating tensions through provocative actions such as [harassing](#) and [approaching](#) Japanese fishing trawlers near the disputed waters. Japan thereby has reasonable grounds to believe that this law empowers China maritime enforcement forces to take more aggressive actions against it in the contested waters.

Ambiguous provisions

Japan's [Prime Minister](#) and [Foreign Minister](#) affirm some problematic articles under the Chinese new law in violation of international law, including the 1982 United Nations on the Law of the Sea (hereinafter UNCLOS). At the same time, [Prof. Kawashima Shin](#) demonstrates that the newly-enacted law does [not define](#) the China's jurisdictional waters (????), causing confusion for foreign countries about enforcement operations of Chinese "White Hulls". Another notorious point in this law is that [Articles 21 and 22](#) authorize Chinese coastguard to take necessary and coercive measures against foreign military vessels (?????) or foreign governmental vessels for non-commercial purposes (?????????) found infringing Chinese 'sovereignty, sovereign rights and jurisdictional rights'. These provisions could be incompatible with UNCLOS, as these two kinds of ships are entitled to immunities in pursuant to [Articles 32 and 236](#) of UNCLOS.

The concept of “risk of serious harm” (????) embedded in Articles 21 and 49 of the Chinese law has not yet been clarified clearly, leaving a large loophole that endangers the peace and security in the region because other regional and non-regional nations are unable to predict what China Coast Guard’s responses are when foreign governmental or military vessels operate within China-claimed jurisdictional waters.

Moreover, Article 25 of the new Coast Guard Law draws attention to a maritime temporary alert zone which can be established within Chinese jurisdictional waters for several reasons including maritime safety, security, maritime collision incidents, and environment. If China unilaterally sets up this sort of zone overlapping with other countries’ jurisdictional waters, namely territorial sea, contiguous zone, or Exclusive Economic Zone, this move will be highly likely to contravene international law, including the UNCLOS, said [Prof. Shigeki Sakamoto](#), because a sovereign state can not exercise jurisdiction over the other states.

Debatable pre-emptive use of force

Under the China’s newly-adopted law, Article 22 (use of force against infringements or almost certain infringements of Chinese sovereignty, sovereign rights and jurisdiction) and Article 49 (use of force without prior warning in cases where coastguard soldiers face with attack by weapons and other dangerous methods, and where there is either no time for warning or a risk of serious harm after giving warning) together imply the principle of [pre-emptive use of force](#), which justifies the use of force even if there is no armed attack yet. In hindsight, these provisions are highly controversial under international law because of some reasons.

Firstly, the United Nations Charter, in its literal meaning, possibly prevails this preemptive use of force principle. In particular, the right of self-defense under Article 51 requires the existence of an armed attack, as explained in the [Military and Paramilitary Activities in and against Nicaragua judgment](#). Furthermore, [the Court](#) also narrowed down the meaning of the term “armed attack”: Only most grave forms of the use of force would constitute an “armed attack” and thereby entitle states to invoke self-defense as justification for their action. Thus, this pre-emptive use of force without an armed attack qualified under recognized standards of international law could breach the Charter. However, [some scholars](#) noted that the Article 51 referred to only one circumstance of use of force, not ruling out the existence of others.

Secondly, practices of states are inconsistent as to the legality of this principle under international law. For example, the preemptive attack launched by Israel against Egypt and other Arab states in 1967 was condemned by the [General Assembly](#) of the United Nations. On the contrary, some experts demonstrate the implicit support of the United States to this principle as evidenced by [statements of President Bush](#) during the 2003 Iraq Operation and the preparation for conducting air strikes in [Cuba missile crisis in 1962](#).

Finally, [a number of legal precedents](#) consider use of force as a last resort after ineffectiveness of peaceful means such as warning, shooting into the air, speech and radio communication. State practices such as Japan and Vietnam also follow this tendency. Nonetheless, assessing whether the use of force is a last measure or not is case-by-case basis.

Comparison with Japan's regulations

One primary disparity between Japan Coast Guard and Chinese counterpart is that no pre-emptive action is explicitly allowed under Japanese laws. Japan's [Police Enforcement Law](#) (?????) provides no indication of resorting to force given an imminent threat takes place. [Article 9](#) of its Constitution also precludes Japanese maritime enforcement forces from using weapons for offensive purposes. On the other hands, the China Coast Guard is given some leeway to conduct preemptive attacks against foreigners and oversea vessels as mentioned above.

The second distinction between China and Japan is conditions for the use of force. [Article 7](#) of Japan Police Enforcement Law imposes stringent regulations of launching attacks against foreign vessels, compelling Japan's maritime enforcement officers to ensure the exhaustion of peaceful measures prior to resorting to weapons in case where the use of force could be a menace to human life, with consideration given to principle of necessity and proportionality. To the contrary, China seems to be less restrictive on allowing the use of force in its new law, placing the right to use weapons at the discretion of its coast guard officers without clarifying specifically some ambiguous terms such as "China's Jurisdictional waters" which determines the scope of operations of China Coast Guard and "risks of serious harm" which decides the authorization to use of force.

Thirdly, Japan concentrates on the ways of using weapons, while China focuses on the kinds of weapons used. Japan Police Law prescribes [two circumstances](#) allowing its forces to use weapons: Threatening and non-threatening to human life. If it is the former situation, then the use of force will be subjected to stricter requirements than the latter one. Meanwhile, China lays down two types of weapons including hand weapons (????) and shipborne weapons (????????) for its forces to use in different circumstances.

Apart from the divergences, both Japan and China share the same view on applying principle of necessity and proportionality in the course of using weapons as provided by Article 7 of Japan Police Enforcement Law and [Article 50](#) of China's Coast Guard Law.

Tough responses

The enactment of new law plunges the already sour relation between China and Japan into confrontation, thus deteriorating the regional affairs. After China's Coast Guard Law had entered into force, Japan's [Prime Minister](#), [Foreign Minister](#) and [Defense Minister](#) were repeatedly conveying their serious concerns over this law. Thus, Japan is signaling its preparation for counter-measures in term of diplomatic and security fronts. "China is undoubtedly putting pressure on Japan, and hence it must respond without escalating tensions", said a [High-ranking Japan Coast Guard official](#). [The Liberal Democratic Party](#), a party in power in Japan, called on amending provisions on using weapons to counter the China's move. Additionally, [some Japanese scholars](#) argue that this new law is not in line with international law, [urging](#) the government to take actions to prevent China from attacking Japan. Noticeably, more than 90% of Japanese respondents in [a survey](#) show that they feel threatened by the Chinese law.

Besides strong diplomatic protests, Japan strengthens its Japan Self-Defense Force by providing three [transport vessels](#) by 2024 to cope with China's rise, amid the continuous [intrusions](#) by Chinese coast guards into Japan's territorial sea and contiguous zone in the disputed area. Furthermore, a [Japanese government official](#) confirms that Japan Coast Guard is permitted to fire against foreign vessel for defensive purposes. The [majority of Japanese scholars](#) also uphold the defensive use of force through police and militia. In the South China Sea, since China passed its new Coast Guard Law, Japan has stepped up its presence through [sending](#) its ship and patrol aircraft and [signing deals](#) enabling the transfer of Japanese – made defense technology and equipment to

Southeast Asian nations.

Conclusion

The adoption of China's Coast Guard Law has had adverse implications on regional stability, peace and order, distancing Japan further from China. To allay growing nervousness from neighboring countries, China should as soon as possible clarify and interpret the vague points in its new law such as the geographic scope and risks of serious harm. Instead of escalating tensions or showing confrontational attitude, the current primary task of Japan and littoral countries in the region is to work with China to seek joint perceptions on law enforcement activities at sea in compliance with international law, including the UNCLOS, to prevent future conflicts. Claimants in the South China Sea, including Vietnam, will closely observe practices and responses of Japan as valuable references to deal with the China's new law implementation in the future.

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