

Report on the Japan-China Dialogue on the Safety of Airspace in the East China Sea

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This document is an English version of "Report on the Japan-China Dialogue on the Safety of Airspace in the East China Sea", the contents of the original report were written in Japanese and Chinese. This paper is prepared for our partners and those who concerned with the project.

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1. Executive Summary

Japan and China are the two major powers of East Asia.. Japan-Chinese relations are incredibly important from political, economic and cultural perspectives. Peace and prosperity in Japan and China along with the rest of Asia are depended on maintaining and developing a strong and mutually beneficial relationship between these two countries. Since September of 2012, a tense situation developed between the two countries due to the Senkaku Islands (known as Diaoyu Islands in China) and the surrounding sea area (hereafter called the relevant sea area) exacerbated the political foreign relationship between the two countries, and the conflicts between the maritime law enforcement authorities coming from both sides are very likely to endanger the entire relationship between Japan and China.

In order to respond to a situation like this without escalating into further conflict, the Sasakawa Peace Foundation, the Collaborative Innovation Center of South China Sea Studies at Nanjing University and Peking University School of International Studies, began the "Japan-China Maritime Navigation Safety Dialogue" project in 2013 which was directed by the general public and non-governmental institutions. The project invites professionals from both countries who specialize in the fields international law, maritime law, general security issues and navigation safety. In August and October of 2013, and January of 2014 there were 3 different joint-conferences held by the Dialogue Project in order to have serious discussion regarding sea and air security as well as crisis control. Based on the results of the conferences, professionals from both countries collaboratively wrote the research report, "Japan-China Dialogue on Navigation Safety Report" (hereafter the Navigation Report), which includes the following: (1) The legal problems involved in enforcing the law in the relevant sea area; (2) The safety countermeasures that can be taken to enforce laws in the relevant sea area; (3) Suggestions about establishing Confidence Building Measures (CBM) and Crisis Control.

The dialogue's organisers and attendees brought up suggestions for both countries'

governments' respective departments based on the contents of the Navigation Report. Through public forums, lectures and seminars etc. in China, Japan and U.S.A, they tried to share the results with as many security experts, frontline personnel, and relevant Chinese and Japanese media outlets as possible, so that people in both countries could have a better understanding of the information gained from the discussions. At the same time, the organisers decided to focus on the space over the sea in the relevant sea area.

During this period of time, the Chinese government set up an Air Defense Identification Zone (ADIZ) in the East China Sea. The military aircrafts of both sides had many dangerous encounters which caused the emergent security situation in the East China Sea. This situation had negative effects on the populace of both countries and may exacerbate the tenuously diplomatic relations, and in the case of any accidental provocation from either side would certainly lead to the further abysmal decline of Japan-China relations.

Based on the mutual understandings of this kind of crisis, The Sasakawa Peace Foundation and the Collaborative Innovation Center of South China Sea Studies at Nanjing University worked in cooperation to start "The Japan-China Dialogue on the Safety of Airspace in the East China Sea" , which is an extension of the original dialogue, "Japan-China Maritime Navigation Safety Dialogue". The two institutions brought together Chinese and Japanese experts from fields such as international law, aerospace law, maritime law, general security, navigation security and so on. After both sides started seminar activities nationally, they called together four joint symposiums respectively in Beijing, October 2014, in Tokyo, February 2015, in Nanjing, May 2015, and in Tokyo, July 2015, in order to ensure that they could delve into deeper discussion about security measures to be taken in the East China Sea airspace. Many retired officers from the People's Liberation Army and the Japanese Self-Defense Forces participated in this dialogue on their own accord.

In the dialog's course of events, professionals from both sides came to recognise that the dispute over the Senkaku Islands left a lack of trust between the Chinese and the Japanese governments. Contextually this creates a situation where any sort of misdemeanor

or inappropriate action that is carried out by either sides' military could cause an incident. Furthermore, such incidents could possibly spur nationalist sentiments in the hearts of people in each country, which could be the cause of even more worry because this could further escalate the severity of the countermeasures taken by each countries' respective defense departments. Experts from both sides show justifiable concern about this, and unanimously agree that China and Japan should meet this problem head on, and immediately take the appropriate course of action in order to reduce the severity of military security incidents, and efficiently control the crisis at hand.

When talking about specific measures to ensure safety in the relevant airspace, experts from both sides started to discuss the appropriateness or necessity and the legality of the Chinese-operated East China Sea ADIZ which was announced since November of 2013. They presented their own understandings and interpretations of having ADIZ by domestic laws and international laws, and strived to understand the views of the opposing side. Experts recognised their own differences of opinion, and the necessity for continued debate on this topic.

Next, experts from both sides unanimously agreed that in order to guarantee the safety of both countries aircraft and air force personnel from possible encounters or incidents that would exacerbate the tenuous relations between Japan and China, drawing up a set of military airspace regulations or guidelines for both countries would probably be one of the most effective ways of doing so. In order to provide reference for the negotiations between the two governments, researchers from both sides made the "Japan-China East China Sea Air Security Conduct Regulations and Suggestions File" and called on both governments to construct an air security regulations draft and come to some sort of agreement on legislation as soon as possible.

Additionally, experts from both sides unanimously consider introducing other relevant Confidence Building Measures (CBMs) as another effective way of ensuring airspace security. Although they have distinct perspectives of problems such as the current progress made in terms of establishing a foundation for CBMs and so on, experts from both sides also unanimously consider that CBMs can not only alleviate airspace tensions, it can also

make improvements to the relationship between the two countries in the long term. Taking these benefits into consideration, experts from both sides provided suggestions for relevant CBMs in terms of airspace security. Suggestions indicate that front line airspace and maritime security personnel have been instructed by the government to establish an emergency contact mechanism as soon as possible; getting direct contact with and clarifying the intentions of the opposite side are extremely important to eliminate the suspicions of malice between each other. At the same time, experts also suggested that when direct communications between the front line personnel are influenced by the political climate or cannot take place, the Japan-China Middle-level Military Officer Communication Program and other similar programs which are directed by the general public should be reinstated so that they can create the conditions for necessary communication between the two governments.

Since the conversation about the East China Sea and Japan-Chinese airspace security led by the non-government institutions was initiated in October of 2014, experts from both sides had a limited time to hold an open and rational discussion from a practical angle in terms of the complicated problem of airspace security, and made some decent headway. Also, throughout the conversation, experts from both sides received a deepened understanding of the opposing side. Experts hope this marks a new beginning in Japan-Chinese relations, and a new period in which many other topics of importance to both countries can also be discussed.

What this report summarizes is the feasible countermeasures established to avoid the exacerbation of the conflicts spurred by incidents and accidental events that happen in the airspace between China and Japan. Experts from both sides eagerly look forward to inviting airspace security experts and front-line personnel to join in the process of the conversation between governments, so that they can negotiate the specific measures which should be taken to preserve airspace security, and especially how to enforce conduct that ensures airspace security and other relevant CBMs. We will feel very honored if the result of this conversation can have some value as a reference during the negotiation.

During this conversation, experts from both sides meticulously abide by the standpoints that follow: Never violate each governments' respective sovereignty over specific islands; start professional discussion that revolves around how to eliminate problems concerning the relevancy, practicality, and technology of the incidents and accidental events that happen in this airspace. The report shows respect to explanations for the current discernment and legal problems concerning this airspace, as well as the dispute of airspace and maritime security. This report documents various disagreeing views side by side.

This report summarises the opinions of the individual experts that have met with us; it is not a complete reflection of the views of the institutions that these experts belong to.

The contents of the original report were written in Chinese and Japanese, both of which were official academic documents.

The Japanese experts who participated in the dialogue are listed in Appendix 1, and the Chinese experts are listed in Appendix 2.

2. Evaluation of the Situation in the Airspace above the East China Sea

The experts from both Japan and China participating in the dialogue analyzed video footage and other materials provided by both sides in order to evaluate the abnormal approaches between the military aircraft of both sides and other incidents that have occurred since May 2014 above the East China Sea. Although the experts did not necessarily agree as to the cause of the safety breach or the responsible party in each case, they did agree that safety of aircraft is currently not adequately secured when the military aircraft of Japan and China approach each other. This conclusion was reached for the following reasons.

(1) It is assumed that the military aircraft of one side are approaching those of the other side for the purpose of identification. Because of the manner in which the approaches

are being made, or of the position of the approaching military aircraft and its actions following the approach, situations have arisen where regular flight of the approached aircraft is obstructed, or where the pilot of the aircraft being approached is intimidated.

(2) When a military aircraft approaches another military aircraft for the purpose of identification, it is necessary that the intention and mode of execution of the approach are made clear to the approached military aircraft. However, there have been cases where such information has not been made sufficiently clear.

(3) Just as good seamanship is to be practiced by the captain of a ship when a ship approaches another ship, good airmanship ought to be practiced by pilots when they approach another aircraft, taking into account the capabilities, characteristics and response capacity of the other aircraft. However, there have been cases where such piloting has not been performed.

In such circumstances, it is highly likely that an unplanned contact or accidental collision may occur between military aircraft. Given the characteristics of aircraft, the danger of a serious incident, possibly involving loss of life, is particularly high when the incident occurs at sea. Any such incident would further worsen relations between Japan and China. Accordingly, the experts of both countries agreed that it is necessary to take immediate measures to prevent accidents between military aircraft and to manage crisis.

The experts of both countries have put together their views, to serve as reference for future inter-governmental consultations, on the following two points which they consider to be of great urgency for accident prevention and crisis management: (1) The defense authorities of both sides should produce a safety code to be complied with by involved persons in the event of an encounter between military aircraft, and (2) For the purpose of reducing the possibility of misinterpreting or misjudging the actions of the other side, the Japan Self Defense Force and the People's Liberation Army of China should build a crisis management mechanism centered on exchange of information and carry out confidence building measures. Although the experts of the both sides did not share the same opinions regarding reconnaissance activities during exercises, they did agree that safety should be

secured wherever possible, and accordingly endeavored to incorporate this viewpoint into the suggestions for a safety code to the extent they were able to agree. Furthermore, it was decided that further discussions would take place on the ADIZ after first clarifying each other's understanding regarding the background to the introduction of the ADIZ, its nature, and its operation in actual practice.

3. Legal Opinions of the Japanese Side on Air Defense Identification

Zones

(1) The legal basis for ADIZ

An ADIZ is an area of airspace established by a State from the viewpoint of national security. Since the 1950s, such zones have been established by States including the US and Canada. States that have established an ADIZ generally request aircraft flying within the ADIZ to identify itself. States usually include airspace adjacent to their territorial airspace in their designation of ADIZs, to allow for identification of aircraft before they enter territorial airspace. The ADIZs of both Japan and China extend beyond the territorial airspace.

There are no established rules governing ADIZs under international law, and there are no specific procedures for its establishment. The act of establishing an ADIZ that extend beyond territorial airspace is *per se* not prohibited under international law. However, whether measures taken in the ADIZ outside territorial airspace are permissible under international law must be determined according to the specific measure in question.

A particular issue concerning an ADIZ established beyond territorial airspace is its relationship with the freedom of over flight over the high seas and Exclusive Economic Zone (EEZ) as established under international law. The exercise of rights and freedoms without giving due regard to the freedom of over flight of other States constitutes an infringement of that freedom and is not permitted under international law (see Article 56(3) and 87(2) of the United Nations Convention on the Law of the Sea (hereinafter

‘UNCLOS’)). Moreover, depending on the impact on the aircraft concerned, the measures taken in the ADIZ outside territorial airspace may contravene the principle of freedom of over flight over the high seas and the EEZ and may thus constitute an internationally wrongful act.

The basis under international law for establishment of an ADIZ beyond territorial airspace and for taking certain measures against an aircraft beyond territorial airspace may be grounded in the right of a State to determine the conditions for entry into its territorial airspace. Under international law, a State has the right to determine the conditions for entry into its territory, and other States must give due regard to this right when exercising their freedom of over flight (see Article 58(3) of UNCLOS). In light of national security, it is imperative for States to ensure that the conditions for entry into its territory are met, especially with respect to aircraft. However, given the speed and the characteristics of aircraft, it is not possible to determine, at the time of its entry, whether a particular aircraft meets the conditions for entry into territorial airspace. Accordingly, it is accepted under international law that States may require flight plans in advance from aircraft scheduled to enter into its territorial airspace, require such aircraft to report their position, or intercept incoming unknown aircraft for identification outside the territorial airspace. States should also be allowed, for operational purposes, to designate a specific area of airspace in which to exercise these rights, provided that the area is confined to what is necessary for the exercise of the rights. In contrast, requiring flight plans in advance from aircraft not planning to enter into territorial airspace and is only in transit outside that airspace may not be justified based on the right of States to set conditions for entrance into their territory. Such measures also lack due regard that must be given to the freedom of over flight and is impermissible under international law.

Intercepting an aircraft over the high seas or the EEZ for identification has been recognized as an exercise of the freedom of over flight, provided that due regard is given to the freedom of over flight of the other State and the interception is carried out in a safe and reasonable manner. Consequently, intercepting an unknown aircraft in an ADIZ outside the territorial airspace for identification is permissible when fulfilling the above conditions, not

only for incoming aircraft but also for all other aircraft. However, States obviously may not compromise the flight safety of the aircraft, or unnecessarily interfere with its flight when identifying the aircraft. Such acts may not be considered as giving due regard to the freedom of other States, and constitutes an infringement of the freedom of over flight.

In light of the above, it may be said that international law allows territorial States to require flight plans in advance and to require notification of positional information from an incoming aircraft transiting the ADIZ towards its territorial airspace. However, States are not allowed to impose such obligations to aircraft merely transiting the ADIZ beyond territorial airspace. Intercepting an unknown aircraft in an ADIZ beyond the airspace of the territorial State should be considered to be permissible under international law with respect to all aircraft and not only with respect to incoming aircraft, provided that due regard is given to the freedom of over flight and it is carried out in a safe and reasonable manner.

(2) Legal assessment of the Japanese ADIZ

The ADIZ of Japan does not raise any issues under international law since, firstly, Japan only makes requests to aircraft flying in the zone that are legally non-binding, and secondly, aircraft subject to identification are limited to those that are incoming towards Japanese territory.

First, Japan's ADIZ was established under a Ministry of Defense Directive, and the conditions specified for flight through the ADIZ are only applicable to the aircraft of Japan Self-Defense Force. The Aeronautical Information Publication (AIP) of Japan, requests aircraft flying under the visual flight rules (VFR) in Japan's ADIZ to send their flight plan in advance, when they plan to fly into Japanese territory from abroad through Japan's ADIZ. However, this is only a request and is not a legally binding obligation. Moreover, Japan's ADIZ does not provide for additional measures against aircraft that fails to provide its flight plan, and there are no penalties for non-compliance. The measures taken by Japan against aircraft in its ADIZ are requests, which do not constitute the exercise of jurisdiction, and do not violate the freedom of over flight above the high seas or the EEZ.

Second, according to the AIP, Japan has limited its request for flight plans to 'VFR

aircraft flying within the ADIZ', and 'in case of flying into Japanese territory from abroad through ADIZ'. Moreover, Japan only carries out 'in-flight interception for visual confirmation' only for aircraft 'approaching Japanese territorial airspace through the ADIZ from abroad' which 'may not be verified by a flight plan'. All these acts are permitted under international law, as they give due regard to the freedom of over flight of other States and are the exercise of the rights of a coastal State to set conditions for entrance into its territory or the exercise of its freedom of over flight.

(3) Legal assessment of the Chinese ADIZ

In contrast, the establishment and operation of the ADIZ above the East China Sea by the People's Republic of China is in conflict with the principle of freedom of overflight over the high seas and the EEZ with respect to the following three points, and should be considered impermissible under international law.

First, the 'Aircraft Identification Rules for the East China Sea Air Defense Identification Zone' is a domestic regulation with legally binding force, and obliges all aircraft flying in the ADIZ to provide flight plans. If these provisions were to apply only to certain categories of aircraft, it would be expected that the Rules explicitly specify them. However, the Rules do not contain such provisions, and may only be understood as applying to all aircraft. These provisions make it obligatory for all aircraft, even for those merely transiting the ADIZ which do not enter or fly towards the territorial airspace of China, to provide flight plans. This cannot be justified on the right of States to set conditions for entrance into their territory, and is not allowed under international law as this contradicts the freedom of overflight over the high seas and the EEZ. The practice of obligating all aircraft to submit their flight plans does not conform to State practice with regard to ADIZs to date, and has been widely criticized.

Even if in actual practice the Rules are only applied to certain categories of aircraft, this is not clear from the wording of the Rules. Coupled with the provision that 'China's armed forces will adopt defensive emergency measures to respond to aircraft that do not cooperate in the identification', to be discussed later, aircraft merely transiting the relevant

airspace are forced to provide flight plans which are usually unnecessary, and are forced to fly in a strained atmosphere. The enactment of a provision with such effects is in itself unjustifiable on the right of States to set conditions for entrance into their territory, and may be considered to be in conflict with the freedom of overflight over the high seas and the EEZ.

Second, the Rules for the ECS ADIZ provide that aircraft flying within the ADIZ 'should follow the instructions of the administrative organ of the East China Sea Air Defense Identification Zone or the unit authorized by the organ'. As stated above, if this provision were to apply only to certain categories of aircraft, it would be expected that the Rules explicitly specify them. However, this provision also has no limitations with respect to its application, and can only be understood as applying to all aircraft. The requirement that all aircraft, even those merely in transit through the ADIZ, must follow the instructions of the relevant authorities while in the ADIZ beyond territorial airspace, cannot be justified on the right of States to set conditions for entrance into their territory, and is in conflict with the freedom of overflight over the high seas and the EEZ. Moreover, instructing foreign aircraft beyond the territorial airspace may be considered as an exercise of enforcement of jurisdiction outside of the territory of the State, prohibited under international law.

Even if aircraft are not required to follow instructions in practice, this is not clear from the wording of the text. Coupled with the provision that 'China's armed forces will adopt defensive emergency measures to respond to aircraft that refuse to follow the instructions given', these rules in itself create tensions even for aircraft merely in transit, and creates unnecessary burdens. The enactment of a provision with such effects is in itself unjustifiable on the right of States to set conditions for entrance into their territory, and is impermissible under international law as it is in conflict with the freedom of overflight over the high seas and the EEZ.

Third, the Rules for the ECS ADIZ provide that 'China's armed forces will adopt defensive emergency measures to respond to aircraft that do not cooperate in identification or refuse to follow instructions'. Furthermore, the rules do not specify the area where the

measures may be applied, the procedures for taking the measures, nor the specific content of the measure. Regardless of how the provision is actually put into practice, this provision, as a rule of domestic law with legally binding force, in itself has the effect of discouraging and suppressing flight in the ADIZ. The enactment of this provision is unjustifiable on the right of States to set conditions for entrance into their territory, and is impermissible under international law as it is in conflict with the freedom of overflight over the high seas and the EEZ.

Moreover, the abnormal approach of a Chinese fighter aircraft to an aircraft of the Japanese Self-Defense Forces in May and June 2014 endangered the safety of flight of the Self-Defense Forces aircraft and was not a permissible act under international law. Article 3 *bis* of the Chicago Convention on International Civil Aviation requires that 'every State must refrain from resorting to the use of weapons against civil aircraft in flight' and 'in case of interception, the lives of persons on board and the safety of aircraft must not be endangered'. Depending on how the Rules are put into practice, the Rules may also violate this provision.

In light of the above considerations, the establishment and operation of the ECS ADIZ by the People's Republic of China based on the Rules for the ECS ADIZ cannot be justified on the right of the States to set conditions for entrance into their territory, and is in conflict with the principle of freedom of overflight over the high seas and the EEZ and is therefore not permissible under international law.

4. The Chinese Perspective on Collision Prevention in the East China Sea Airspace: Laws and Opinions.

(1) The establishment of China's Air Defense Identification Zone in the East China Sea

An ADIZ by definition is an airspace established outside a country's territorial airspace for security purposes, allowing the declaring state to identify, pinpoint, and control aircrafts that enter the airspace. This airspace is located outside the country's

territorial airspace, usually in the airspace above the country's Exclusive Economic Zone (hereafter the EEZ) or over the high seas. According to customary international law, countries have the right to establish an ADIZ. It is a common practice carried out by members of the international community, including China, Japan and so on, in order to maintain their own national security. An ADIZ is usually set up in accordance with domestic legislation. For example, the United States established an ADIZ in 1950 based on the regulations of U.S. Federal Aviation Administration following a presidential decree. That presidential decree was exercised in accordance with the 1938 *Civil Aviation Law of the United States*.

The Chinese government established the East China Sea ADIZ on November 23, 2013, a move in accordance with both international law and domestic legislation, which includes *the 1995 Civil Aviation Law*, the *1997 Law on National Defence*, and the *2007 General Flight Rules*. In particular, Article 30 of the *2007 General Flight Rules* stipulates that the People's Republic of China partitions several Flight Information Regions in the airspace above the contiguous zone, the EEZ as well as over the high seas contiguous to the EEZ. The establishment of the Chinese ADIZ in the East China Sea is a legal exercise in accordance with Article 30 of the *2007 General Flight Rules*.

(2) The Implementation of Aircraft Identification Rules in China's ADIZ in the East China Sea

In November of 2013, based on the *Statement by the Government of the People's Republic of China on Establishing the East China Sea Air Defense Identification Zone* (hereafter the Statement), the Chinese Ministry of National Defense promulgated the *Announcement of the Aircraft Identification Rules for the East China Sea Air Defense Identification Zone of the People's Republic* (hereafter the Announcement). The Announcement applies to all aircrafts operated in Chinese ADIZs. The implementation of the rules consists of two parts: means of identification and defensive emergency measures. Means of identification includes flight plan identification, radio identification, transponder identification and logo identification. Aircraft flying in the East China Sea ADIZ should follow the instructions of the administrative organ of the East China Sea ADIZ or the unit

authorized by the organ. Chinese armed forces will adopt defensive emergency measures to respond to aircrafts that do not cooperate in identification procedures or refuse to follow the instructions.

The Aircraft Identification Rules of China's East China Sea ADIZ are basically similar to those adopted by other countries. For example, regulations of the ADIZs of the United States are formulated in accordance with the 2003 *Code of Federal Regulations*, Title 14, Chapter 1, Subchapter F—Air Traffic and General Operating Rules. The Rules stipulate that civil aircrafts entering the U.S. ADIZs should be identified, pinpointed, and controlled. Means of identification includes flight plan identification, radio identification, radar identification and location identification. The American armed forces will respond to aircrafts that do not abide by these rules in accordance with *The Commander's Handbook on the Law of Naval Operations*.

The Statement and the Announcement together provide the legal basis for China to conduct identification operations for all aircrafts in the East China Sea ADIZ for purpose of safeguarding national airspace security. What procedures would be deployed depends on the flight intention of foreign aircrafts. Foreign aircrafts flying in directions parallel to territorial airspace usually do not encounter any identification problem as they enjoy freedom of overflight in airspace beyond territorial airspace. Only those intended for entering or flying over China's territorial airspace will be identified by the Chinese authority.

Identification rules in ADIZ are not formally codified in international law and are practiced in very similar manner by different countries. Therefore, implementing identification regulations within a state's own ADIZ is not an issue that raises legal disputes. In the meantime, when conducting identification operations on civil aircrafts, a country must observe international aviation regulations, especially Article 3bis of "the *Convention on International Civil Aviation*" in 1944 which stipulates that "every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered."

The Air Force of China (along with other countries that have established ADIZs) only performs "investigation and identification" measures on foreign aircrafts that enter China's ADIZ without prior notification. These measures are defensive and non-violent in nature, and involve no offenses. The measures also include sending military aircraft to make visual observation. Approaching aircrafts will not be interrupted as long as they are not hostile. Based on what has been analyzed, an ADIZ, regardless of what country it belongs to, is an international airspace shared by the international community where aircrafts enjoy freedom of overflight. The Chinese military aircrafts do not interrupt the freedom of foreign civil aircrafts in the Chinese ADIZ, do not demand the modification of flight plan and route, nor request the aircrafts to obtain prior authorization before flying over the Chinese ADIZ.

(3) Regulations in the East China Sea ADIZ do not impede the principles of "freedom to fly over the high seas".

Rules and regulations of the East China Sea ADIZ do not violate international laws, nor do they impede the freedom, safety and innocent passage of other countries' aircrafts. The identification rules implemented in the Chinese ADIZ are in compliance with general international practice. Requesting foreign aircrafts who wish to enter the Chinese ADIZ to display "aircraft insignia" or accept "identification" does not violate freedom of navigation and freedom to fly over the high seas. As the East China Sea airspace covers a vast area and is closely connected to the Chinese coastal economic belt, the establishment of identification rules may help the Chinese government to clarify and determine the intention of foreign aircrafts which wish to enter the Chinese territorial airspace. This practice is consistent with the general goals of the other countries when setting up ADIZs. There has never been a case where the identification rules of an ADIZ are considered violating freedom to fly over the high seas.

The Chinese government stipulates that when "identification rules" are neglected intentionally, it is possible for China to take "defensive emergency measures" and other actions as a result. This stipulation does not contradict the customary international law and most countries would do the same.. China clearly outlines the scope of possible actions when dealing with potential threats in the ADIZ, it is conducive to strengthening

understanding of the Chinese ADIZ by relevant countries, and it is also conducive to eliminating ambiguity. Such efforts demonstrate the "seriousness" of the Chinese government establishing the ADIZ. This interpretation also applies to why civilian aircrafts are required "prior notification" to the Chinese government when flying across the East China Sea ADIZ. The time and background of establishing an ADIZ are very important aspects to China and Japan. The regulations of the Japanese ADIZ which was established fifty years ago are very different from the Chinese ADIZ regulations which were newly established in 2013. The main reason is how the situation in the East China Sea has changed over time, not legal conditions and norms. Once again, China calls on Japan to accept and recognize the East China Sea ADIZ; this is a necessary condition to reducing the tension between Japan and China in the East China Sea.

(4) Overlapping between the Japanese and Chinese ADIZs and Crisis Management / Prevention

A part of the newly established Chinese ADIZ overlaps with a part of the Japanese ADIZ in the East China Sea. Both countries execute identification, positioning, tracking and even interception by themselves in the overlapped zone. Implementation of such measures which are used against each other, particularly when one side's aircraft requires identification of the other side's aircraft often will be taken as a provocation and lead to more incidents. Therefore, in order to ease tensions in the East China Sea, both sides need to cooperate to avoid and prevent such incidents. This kind of action must be taken by both sides to maintain stable Japan-Chinese relations, and to seek a workable solution for both countries in the sovereignty issue of the Senkaku Islands (Diaoyu Islands).

The Statement and the Announcement released by China in 2013 did not include the issue of aircraft collision prevention in the East China Sea ADIZ, and still currently lacks these kind of regulations. Thus, according to the relevant domestic and international laws, both sides should take the necessary measures to prevent close encounters in the overlapping ADIZ and any sort of behavior that could be misconstrued by the opposing side as a provocation. The preventive measures could be as follows: avoid provocative actions during flight, open a mutual international universal communication channel, and

keep proper distance or fly at different altitudes during overlapping flights.

Establishing effective safety flight rules in the overlapping zone in the East China Sea ADIZ, along with both countries' governments and defense departments restarting negotiations are crucial for reducing tension in the East China Sea airspace. The resumption of negotiations will show that both governments have mutual respect for each other's legitimate rights, and are able to keep an active position on dispute control and management of a potential airspace crisis.

Nevertheless, the Japanese government refused to accept the relevant provisions of China's East China Sea ADIZ after the Chinese government announced the "Statement" and "Announcement" of the ADIZ. Tokyo explicitly refused to let Japanese civil aviation companies submit flight plans to Chinese authorities, and repeatedly questioned the need to accept the requirement by the Chinese government to submit flight information for planes designated to fly in the ADIZ, and fiercely criticized the stipulation about defensive emergency measures for uncooperative foreign aircraft in the "Announcement" proposed by the Chinese defense department. China hopes that the Japanese government will not continue to exaggerate and make inaccurate speculation about the three provisions in the East China Sea ADIZ Announcement; they should pay more attention to specific issues regarding ADIZ regulation. As for the ADIZs, the attitude and cooperation of both sides are crucial.

5. Proposal for a Code of Conduct between Japan and China on the Safety of Airspace in the East China Sea

Preamble

Experts on international law, security, and civil aviation in Japan and the People's Republic of China have been greatly concerned with maintaining flight safety, preventing incidental accidents, and preventing the escalation of tension between the two countries as a result of such accidents, in the event of air-to-air encounters over the East China Sea

(outside the territorial airspace of both countries), mainly between military aircraft. The experts from both countries recently took part in a private-sector-led dialogue, called the 'Japan-China Dialogue on the Safety of Airspace in the East China Sea'. After a thorough discussion of the necessary measures, the experts developed the 'Proposal for a Code of Conduct between Japan and China on the Safety of Airspace in the East China Sea' based on their findings.

The experts from both countries who participated in the development of this proposal hope that the governments of Japan and China will recognize the necessity of rapidly developing a Code of Conduct, based on the above considerations. It is hoped that this proposal would promote intergovernmental consultations and serve as reference to the discussions.

What follows is a Proposal for a Code of Conduct between Japan and China on the Safety of Airspace in the East China Sea, created through the dialogue to be presented to the defense authorities of the both countries.

Article 1 Definition of terms

1. For the purposes of this Code of Conduct,

(a) 'Aircraft' means any apparatus used for flight with a person on board.

(b) 'Military aircraft' means any aircraft belonging to the Japan Self-Defense Force or the People's Liberation Army of the People's Republic of China.

(b) 'Auxiliary military aircraft' means any aircraft other than a military aircraft, which is under the exclusive control of the Japan Self-Defense Force or the People's Liberation Army of the People's Republic of China and is operated for non-commercial purposes.

(d) 'Government aircraft' means any aircraft owned or operated by Japan or the People's Republic of China, other than military aircraft or auxiliary military

aircraft which is operated for non-commercial purposes.

(e) 'Civil aircraft' means any aircraft subject to the Convention on International Civil Aviation and is registered in Japan or the People's Republic of China.

(f) 'Military and other aircraft' means any aircraft of either country other than defined in (e).

Article 2 Application

1. This Code of Conduct applies to encounters outside the territorial airspace of Japan and the People's Republic of China, between military aircraft of both countries or between a military aircraft and an aircraft other than a military aircraft of the other country.

2 This Code of Conduct is not legally binding for both countries. The involved parties from both countries are expected to voluntarily comply with the Code.

Article 3 Principles

1. Military aircraft of both countries should take maximum care not to obstruct the safe flight of the aircraft of both countries. Moreover, aircraft of both countries other than military aircraft shall take maximum care not to obstruct the safe flight of the military aircraft of the other country.

2. Both countries confirm to comply with applicable treaties and customary international law, and to comply with domestic laws consistent with the rules of international law.

3. Both countries confirm that military and other aircraft are entitled to sovereign immunity.

4. Both countries, as contracting parties to the United Nations Convention on the Law of the Sea, confirm that aircraft of both countries enjoy freedom of overflight

outside the territorial sea. Both countries shall have due regard to the rights and duties of the coastal State under the Convention.

5. Both countries recognize the significance of the safety procedures stipulated in the Code for Unplanned Encounters at Sea (CUES), which was agreed on April 22, 2014 at the 14th Western Pacific Naval Symposium (WPNS) in Qingdao, People's Republic of China, to which both the Japan Maritime Self-Defense Force and the Chinese People's Liberation Army Navy participated, and confirm to respect the spirit of that Code.

Article 4 Standard of Conduct

1. The principle of risk avoidance

Military aircraft of both countries should comply with the following:

In order to avoid an unforeseen incident, military aircraft must be operated in a calm manner, fully aware of the duty to ensure safety.

Maneuvers to avoid incidents and collisions must be made without hesitation and sufficiently in advance as circumstances permit, based on professionalism in flight operations (Good Airmanship).

As contracting parties to the Convention on International Civil Aviation, both countries should respect the Convention, and its provisions in Chapter 3.2 (Avoidance of Collision) of Annex 2 (Rules of the Air).

When approaching an unidentified aircraft for identification, the approach should be conducted in a manner that is clear to the unidentified aircraft that it is being approached solely for the purpose of identification, and the approaching aircraft should not act in any manner that would be perceived by the unidentified aircraft as endangering in terms of course, speed or distance between the aircrafts.

When approaching other aircraft, if it is clear that the approaching aircraft has a

higher level of maneuverability than the aircraft being approached, the approach should be conducted in a manner that takes into consideration the lesser maneuverability of the target aircraft.

2. When a military aircraft of either country approaches an aircraft of the other country, sufficient regard should be given to each other's safety, and the following acts should not be performed against military aircraft of the other country.

Simulating attack maneuvers

Carrying out aerobatic flight in close proximity to the other aircraft

Firing objects in the direction of the other aircraft in a manner which may cause danger to the safety of flight

Use of lasers in a manner that is harmful to crew or equipment

Use of a searchlight or other lighting device to illuminate the cockpit of the other aircraft

Firing of signal flares and other such devices in a manner dangerous to the safety of flight

Intentionally cause radio jamming and other forms of disruption to communication systems, radar systems and other like systems

3. Military aircraft of both countries should display navigation lights when flying in darkness or in instrument meteorological conditions.

4. When a military aircraft of either country is flying in proximity to the territorial airspace of the other country, or when the aircraft approaches or may approach the military or other aircraft of the other country, the approaching military aircraft shall listen for radio communications on the VHF 121.5 MHz and UHF 243.0 MHz, and where necessary shall communicate on these frequencies. The call signs,

language, and other communication parameters for use in such situation shall be specified elsewhere.

Article 5 Acts against civil aircraft

1. Military aircraft of both countries should not engage in any of the acts prohibited in the previous article against civil aircraft of the other country.
2. The defense authorities of both countries should take appropriate steps to ensure that the persons concerned with the operation of their military aircraft comply with this Code of Conduct.

Article 6 Prior notification

1. When the Self-Defense Force of Japan or People's Liberation Army of the People's Republic of China engages in activity that may endanger traffic in the airspace above the East China Sea (which lies outside the territorial airspace of either country), prior notification shall be provided, sufficiently in advance, through established international systems of radio broadcasts of information and warning to mariners and aviators.
2. When such notification has been given, military aircraft should not intentionally interfere with the activities of the other country described in the former paragraph that are in accordance with international law.

Article 7 Air rescue

1. When a collision or other accident involving the military aircraft of either country and an aircraft of the other country, both countries should immediately exchange the information necessary to carry out air rescue operations. In such event, emergency response should be undertaken using all available channels, including hotlines between diplomatic missions, governments, and defense authorities.
2. In cases where a military aircraft of either country is involved in an accident, both

countries should provide, where possible, necessary assistance to the aircraft whose safety of flight has been compromised.

Article 8 Regular meetings

The representatives of the defense authorities of both countries should meet every year alternately in Japan and China in order to review the status of implementation of this Code of Conduct and to ensure the safety of aircraft of the both countries in the airspace above the East China Sea (which lies outside the territorial airspace of either country).

This Code of Conduct was drawn up in the Japanese and Chinese languages, both texts being equally authentic.

6. Suggestions on Confidence Building Measures in the East China Sea Airspace

Since September 2012, the political and diplomatic relations between Japan and China were quickly deteriorating due to the dispute over the Senkaku Islands (Diaoyu Islands) and the surrounding area. In November 2013, China established the ADIZ in the East China Sea, which caused many close encounters between both countries' military aircrafts, and caused Japan-Chinese relations to decline even further.

Experts from both sides did not have consistent full understanding of the causes of the tension in the East China Sea. However, they agreed that if military vessels or aircrafts had run into incidents with the other side's military, it would lead to further confrontation between the two countries, and even cause local military conflicts in the region and so on. This kind of conflict would not only threaten Japan-Chinese relations, but would also affect regional security throughout the entirety of East Asia, thus preventative measures had to be taken against all possible threats or incidents. Experts from both sides also believed that both countries should develop a safety conduct regulation of military vessels and aircrafts as soon as possible, and in addition relevant Confidence Building Measures

(CBMs) should be introduced into the East China Sea region. It should be noted that military aircraft are faster and more difficult to operate, and the possibilities of unexpected accidents among them are greater than anything else. In this situation, it is imperative for each countries' respective defense departments and maritime law enforcement authorities to take measures immediately, promote the establishment of the CBMs, and begin the restoration of a stable relationship between Japan and China gradually over time.

Based on the analysis above, the experts of both sides reached a consensus on the following propositions:

(1) Based on the Four-Point Principled Agreement on handling and improving bilateral relations, the two governments should promote multi-dimensional and cross-field contacts and cooperation.

The Summit Meeting is an important foundation for easing tensions between Japan and China and stabilizing the current tenuous situation. On the 10th of November 2014, Chinese President Xi Jinping met Japanese Prime Minister Abe Shinzo during the Beijing APEC summit. Before the summit two countries managed to agree on the "*Four Point Principled Agreement*" of managing and improving China-Japanese relations. These principles are the fundamental elements to guide and manage future Japan-Chinese relations, including the issues of territorial disputes.

Under the guidance of these principles, both governments should keep communication and engagement, continue senior level negotiations on maritime affairs, and suggest feasible solutions on crisis control and management, and prevent accidental collision in the sea and airspace of the East China Sea. These efforts will effectively promote the establishment of CBMs between China and Japan.

At the same time, Japan and China should continue to maintain and expand dialogues and joint research of relevant issues amongst private think tanks, experts and scholars from both countries. This will help both countries' people to understand and trust each other, and promote the development of a more cooperative relationship.

(2) Promote compromise between governments, establish a more effective and practical "Japan-Chinese" Airspace and Maritime Communication Mechanism"

Through the institutionalized negotiations between the Japanese Self Defense Force and the People's Liberation Army, three mechanisms should be implemented: 1) regular meetings between the two defense authorities; 2) a hotline between the defense departments should be established; 3) direct on-site radio contact among the military vessels and aircrafts of both countries.

History has proven that when two countries are cooperatively building "Maritime and Airspace Communication Mechanisms", it will simultaneously increase the amount of activities and meetings in order to increase mutual understanding of each others' defense departments. This will surely prove to be an advantage for building future CBMs. We suggest that the Japanese and Chinese respective defense departments should continuously expand the means of communication, and enhance the level and depth of communication as well.

(3) In addition to improving aviation management procedures in ADIZs, both sides should establish channels to circulate flight information so as to increase the level of transparency of flight information in the East China Sea

To avoid unintended incidents or accidents in the East China Sea, the two countries need to take measures to prevent risky encounters between aircrafts and negotiate on how to clearly signal intention and what identification procedures should be taken in each one's ADIZ.

At the same time, in order to prevent close encounters or misperception, the two defense departments should exchange the flight information of their military aircrafts and develop standard communication procedures to facilitate direct communication between military aircrafts on duty.

(3) To improve the Japan-Chinese Air Defense Identification Zone Aviation and management process, both sides should establish a corresponding channel to inform their own flight information, and improve the openness of flight information in the East China

Sea.

In order to avoid incidents in the East China Sea, specifically taking measures to avoid possible close encounters between both countries' aircraft, it is necessary for both sides to agree on how to identify the intention of each aircraft and how to employ this recognition process before taking decisive actions in each ADIZ. Meanwhile, in order to prevent the occasional close encounter between both countries' aircraft, the defense departments of two countries should exchange their flight information of their military aircrafts. They should try to establish a standard communication procedure to facilitate communications between military aircraft on duty.

(4) The two governments should encourage the Chinese Coast Guard and Japanese Coast Guard to have direct contact and communication.

It is an unfortunate reality that there are frequent tensions between the maritime law enforcement authorities of Japan and China in the East China Sea, and it also causes tensions in the East China Sea airspace. Thus, better trust and communication between two countries' maritime law enforcement authorities will soften and stabilize the issues over the disputed area, which will reduce the tension in the East China Sea airspace. In order to establish CBMs in the air, it needs to start in the sea.

Therefore, we propose establishing a visiting mechanism between the Japanese Coast Guard and the Chinese Coast Guard, and gradually establishing a dialogue between the relevant maritime law enforcement staff of two countries. In order to understand each other even better, exchange programs of staff where participants participate each other's training sessions and so forth, ultimately to establish a direct hotline between both countries' cost guards.

(5) Promoting public diplomacy and "two-track" dialog

As the situation stands now, the Japanese and Chinese governments will not be able to have a direct conversation about the sovereignty dispute of the Senkaku Islands (Diaoyu Islands). In spite of this, it is possible for the two countries' experts to establish the relevant "two-track" dialogue mechanisms, like this project. Through dialogues and joint

research, experts from both countries can give significant advice and policy proposals to their governments about how to manage and end the crisis. In addition, this kind of effort will eventually increase the mutual understanding between two countries and will be conducive to restoring trust in each other.

At the same time, in order to build a hospitable environment for direct dialogue and communication between front-line law enforcement staff of both countries, Japan and China should resume the exchange program between the two countries' middle-level military officers, which was initiated by civilians, and generally was considered to have positive effect for both countries. The resumption of this project will be the foundation of expanding direct contact between both countries' respective military academies, as well as creating an opportunity for establishing a communication channel between both sides' maritime law enforcement authorities.

In addition, it is very important to develop a good relationship between Japan and China's people. Therefore, both the Japanese and the Chinese need to get to know each other better through diversified channels. In this case, the media will play an important role, and we are looking forward to seeing the media promote communication between both countries' people, in order to let the Japanese and Chinese people understand each other objectively, as human beings.

7. Future Issues

(1) As of the present, July 2015, it is to be appreciated that the relations between Japan and China have shown some signs of improvement from the severely damaged state. Yet, things are just beginning to change, and it will probably take some time before the defense authorities of both sides enter into a concrete discussion on the safety measures in the relevant airspace. Regrettably, there still remains a high possibility of an accident occurring during an unplanned encounter between two military aircraft in the airspace above the East China Sea.

This report, which was drafted by individuals in the private sector in Japan and China, shows that even in cases where relations between Japan and China have deteriorated, it is still possible to introduce measures to prevent accidents without prejudice to the position adopted by each country. The participants in this dialogue from both sides hope that the defense authorities of Japan and China will agree to and speedily implement a code of conduct for the safety of airspace as well as other confidence building measures. It is hoped that this document can be of some use in the discussions.

(2) Although a code of conduct on safety and other confidence building measures help to prevent collisions and reduce tension, they do not resolve the root of a given conflict or settle disputes. They are, rather, emergency measures taken to prevent the current situation from becoming worse. Those involved in security issues in Japan and China, whether in the public or private sector, must do more than just take emergency measures. They must work to build a more stable relationship between the two countries through mutual understanding of the security policies of the opposing side and by respecting the other side's position. The participants on both sides of this dialogue hope to expand the sphere of mutual understanding between them regarding the problems that exist between Japan and China through active discussions.

(3) In order to realize the above, the Sasakawa Peace Foundation and the Collaborative Innovation Center of South China Sea Studies at Nanjing University have decided to collaborate with regard to the following three points. Firstly, in order to obtain understanding and support for the content of this dialogue from the relevant persons in Japan and China, meetings will be held at various locations in both countries on the theme of safety of airspace in the East China Sea. Secondly, making use of the network formed in the course of this dialogue, the scope of the dialogue will be widened to include issues in international law including the law of the sea and air law, as well as broader issues relevant to security. Thirdly, all the participants of the dialogue will make efforts to restart, in a new format, the project for exchange between field officers of Japan and China.

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