

From Clash of Vision to Power Struggle: The US, China, and Freedom of Navigation

Written by Trang Pham and Truong-Minh Vu

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TRANG PHAM AND TRUONG-MINH VU, OCT 31 2014

The system of law of the sea was fundamentally established and operated based on the principle of *mare liberum*, freedom of the sea, which meant that the sea was open for states to freely navigate and fish (Klein, 2005: 05). The idea was generated by Grotius in the 17th century (Churchill & Lowe 1999) and is still being respected. More importantly, the freedom of navigation can be considered as “one of the pillars of the law of the seas and was at the origins of modern international law” (Wolfrum 2014). The scope of the norm, however, usually provokes controversy.

This article indicates that, based on examining their practice encountering with recent disputes in the South China Sea [1], the two major maritime powers of the world, China and the U.S., are unlikely to share the same view on the issue. Indeed, on the one hand, China and the U.S. both claim their consistent respect to the freedom of navigation on the sea of all states in the sea. The U.S., on the other hand, is likely to take a wider view on the scope of such norm than China, as China has historically never recognized such a thing called “the absolute freedom”.

The clash in the U.S. and China’s interpreting the norm is likely to alter the regional status quo in the South China Sea. Yet, it is not just the disputes among China and Southeast Asian states. The clash of vision regarding the freedom of navigation in the South China Sea is a huge challenge to the “rule of games” pertaining to freedom of movement of the ships and navigation in the region. Its potential reshaping of new rules is really a question about who will exert influence over the South China Sea, both in *de facto* and *de jure* terms.

The Legal Principle of Freedom of Navigation and Its Interpretation and Application by China and the U.S.

According to Rüdiger Wolfrum (2014), the President of the International tribunal for the Law of the Sea from 2005 to 2008, navigation amounts to the movement of the ships; therefore, freedom of navigation can be understood as the ships’ rights sailing across the sea. The closer ships are to the territorial land of coastal states, the more limitations are there on such rights. This situation reflects the conflict between the wish of maritime states to freely send their ships over the sea and the desire of coastal states to extend their jurisdiction on the sea. The harmony for those two schools of thoughts is found in *The 1982 United Nations Convention on the Law of the Sea* (hereafter, the Convention), which wisely divides the sea into different zones, from territorial sea to the high seas, and imposes different regulations on navigational rights accordingly [2].

Innocent Passage in Territorial Seas and Archipelagic Waters

The Convention sets out that foreign ships can travel across territorial seas of coastal states as long as they do not commit any activities listed in Art.19(2) of the Convention or, in other words, they are considered as “innocent”. As for coastal states, they enjoy full jurisdiction over those ships stepping outside the scope of “innocent passage”, and even the right to suspend temporarily in specific areas for the purpose of its essential security (Art. 25 of the Convention). Those rules are generally accepted and viewed as some of the most important rules of customary international law (Churchill & Lowe, 1999: 87). Similarly, the right of innocent passage of foreign vessels through archipelagic states is recognized by Art.52(1) of the Convention, and the right of coastal states to temporarily close

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certain parts of their archipelagic waters owing to security necessity is also read in Art. 52(2).

The trigger of major debates between states during the three Conferences of the United Nations for the Law of the Sea, and even until now, has been usually the legal status of warships and whether they need prior permission of coastal states to enter their territorial seas or archipelagic waters, or not. The language of the Convention is not clear on these issues as it only uses the word “ship” and does not specify a certain kind of such vehicles. On the one hand, there are states arguing that the rules of innocent passage are applicable for all ships with no prejudice to civil ships or warships. The justification of the argument is that under the regime of innocent passage, Art. 20 requires submarines to navigate on the surface and, at that time, all submarines were warships, so it should be read that warships could also have the same right of innocent passage as other kinds of ships (Churchill & Lowe, 1999: 89). On the other hand, there were a number of coastal states demanding prior authorizations for warships before entering their territorial waters [3]. The conflict between those different views on the issues remains today.

Contiguous Zone

According to Art. 33 of the 1982 Sea Convention, foreign vessels are put under the control (prevention and punishment) of coastal states only when they violate any (1) custom, (2) fiscal, (3) immigration, or (4) sanitary rules of the concerning state in its territory or territorial sea. This exception of the navigational rights of vessels in the contiguous zone is conceptualized on the basis of the hot pursuit principle (Donald & Stephens, 2010: 78). It provides that if a foreign ship were found committing infringement of local laws in the territorial sea of the coastal state, this ship could be pursued and arrested on the high seas (Churchill & Lowe, 1999: 133). This principle grants the coastal states enforcement jurisdiction beyond their 12-mile limit. However, such power is constrained from comparatively strict conditions. Indeed, coastal states can only exercise their enforcement measures when they can provide good reasons for a violation of four subjects listed in Art. 33, and the violation must be committed in their territory or territorial sea.

Exclusive Economic Zone (EEZ)

Under the light of Art. 58, on the one hand, foreign ships shall enjoy the freedom they are provided in Art. 87, referred to as the navigational rights in the high seas. However, when exercising their rights, foreign ships need to take into account coastal states’ rights and duties (the “due regard” principle). On the other hand, coastal states’ jurisdiction is limited on activities relating to pollution, scientific research, and economic exploitation and exploration of the zone. In addition, their artificial islands and installations must respect recognized sea-lanes essential to international navigation (Art. 56).

High Seas

The peak of freedom of navigation principles is set out on the high seas where that are totally out of the reach of coastal states’ jurisdiction [4]. The limits of such freedom include the due regards of other ships’ freedom (Art. 87) and universal jurisdiction on, *inter alia*, piracy and other illegal acts such as using force against foreign ships (the case of the S. S. Lotus, 1927; Brownlie, 2003: 228, 230).

To some certain extent, it could be argued that what is set out in the Convention is that there is no intention of distinguishing the rules applicable to civil ships and those applicable to military vessels. By using the words “ships” for all the provisions mentioned above, the language of the Convention makes it quite clear that the laws shall be applied for all ships as a whole. Therefore, following such way of thinking, it could be understood that the Convention was not intentionally established in order to directly deal with the security issues of states on the contiguous zones and EEZ (Zou, 2008: 275; Francioni, 1985: 216).

More importantly, it should be noted that the navigational rights of foreign ships in the contiguous zones and the EEZ are only put under regulations provided in the Convention, as well as other rules of international law. The laws or rules imposed by coastal states do not directly regulate the acts of foreign ships in those areas; such laws and rules are restricted in several subject matters, such as fishing, environment, and maritime scientific research. However, the

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practice of China and the U.S. in interpreting and applying those provisions of the Convention can be called a clash of vision between those two maritime powers.

China's Perspective

One could hardly point out the differences in China's perspective towards the regulations on freedom of navigation or the rights of foreign ships travelling in and adjacent to its territorial sea from the United Nations Conferences on Law of the Sea till now. Indeed, at the Third Conference, China took the position that

military vessels and merchant ships should be treated differently... It is an infringement of the sovereignty of the coastal State and constitutes a threat to its independence and security if a warships does not comply with the laws and regulations of the coastal State requiring prior notification or prior approval from that State in order to pass through its territorial sea (Zou, 2008: 71).

This way of thinking remains in China's policy today, as it is among more than 60 countries in the world requiring prior authorization for warships before travelling to its territorial sea [5].

In terms of enforcing its jurisdiction, China is trying to extend its domestic laws over the contiguous zone. Art. 13 of the 1992 Law of the People's Republic of China Concerning the Territorial Sea and the Contiguous Zone added the element of "security" into the conditions for China's exercising its sovereignty rights in the contiguous zone.

With respect to the scope of the norm freedom of navigation, taking the 2009 Impeccable case into account, it is easy to say that China has never judged military activities, such as collecting military surveys and reconnaissance, in the EEZ of other states in the light of freedom of navigation. Indeed, after finding that the Impeccable vessel of the U.S. was exercising activities relating to intelligence collection on the EEZ of China, the Chinese government almost immediately sent their navy ships to halt such operation [6].

Their justifications for the action could be generally summarized into two points. The first argument was that the navigational right provided in Art. 58 of the 1982 Sea Convention was no longer seen as the same as the freedom of navigation in the high sea regime. The notion of national security of coastal states should be seriously taken into consideration when employing the "due regard" rule in the EEZ of coastal states. Therefore, military activities in other states' EEZ could not be deemed as legally accepted. On the other hand, China believed that, with the significant development of technologies, the differences between scientific research and military activities such as collecting military surveys and reconnaissance were unable to be distinguished. Hence, the U.S.'s naval exercises could fall into the scope of scientific activities that were prohibited in the EEZ regime of the Convention. To put it in a nutshell, in the mindset of China, freedom of navigation has never been absolute.

The U.S.'s Perspectives

Although it has not been a party to the 1982 Sea Convention yet, the U.S. enjoys the legal effect of the norm since it is considered as customary international law. In terms of interpreting the norm, the U.S. takes the seemingly opposite view in comparison with that of China. According to the U.S., the navigational rights of ships in the EEZ amount to those in the high sea (see Commentary on the Law of the Sea, Article 58, para. 58.9: 563). Military vessels should be treated as equal as civil ships, which means that there is no obligation of providing prior notice and obtaining approval of coastal states before entering their EEZ.

Furthermore, the U.S. stresses on the issue that there is a clear line between military activities and scientific research; therefore, those exercises carried out by the U.S. in China's EEZ in 2009 (the Impeccable case) could not be deemed as a violation of the customary rules relating to freedom of navigation in the EEZ, which is also established in the Convention. Besides, according to the U.S., the act of unilaterally enlarging the scope of provisions in a multilateral treaty should be treated as unlawfully accepted. Therefore, Art. 13 of the 1992 Law of the People's Republic of China Concerning the Territorial Sea and the Contiguous Zone could have no legal effect on American ships.

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It should be taken into account that the focal point of U.S. policy during its history is protecting the freedom of the American people. Freedom of navigation undoubtedly plays a vital point in such a policy. For the U.S., the right to send ships across the ocean with limited exceptions in a coastal state's marine zones is of key importance, which the U.S. has been standing for throughout its existence (the announcement of U.S. Supreme Court in 1947). Against the China's attempt to recreate new interpretation of the norm, the U.S. is trying its best to protect the original meaning of the freedom of navigation norm. It even considers the possibility of ratifying the 1982 Sea Convention.

The New Great Powers Contest

The clash of vision between China and the U.S. can be summarized into one aspect, which is security. Indeed, the significance in China's interpretation and application of the principle of freedom of navigation is its stress on national security because of the feelings of being vulnerable to the development and advancement of technology. On the other hand, what the concept of security means to the U.S. is the freedom of sending its ships, no matter what kinds of ships they are, across the ocean to carry out merchant activities as well as military exercises. By forming the new "rule of game" relied on limiting the scope of the freedom of navigation of foreign vessels, China is attempting to build its own de facto "Monroe Doctrine" at sea. This is a pronouncement of two challenges.

The first challenge issued by China's interpretation of the norm is to the United States. At the July 2010 ASEAN Regional Forum, Secretary of State Hillary Clinton proclaimed that the South China Sea is one of the U.S.'s national interests [7]. Since then, this viewpoint has been reiterated several times and proven by the actual increase in U.S. involvement in the South China Sea. In all the official (and also semi-official) documents, maintaining freedom of navigation is always one of the most important priorities. Meanwhile, identifying itself as a neutral player, the U.S. tried to hold neutrality in the legal merits of overlapping sovereignty claims in the South China Sea disputes. China's assertiveness has rendered the U.S. to a situation where it has no other choice than to redefine and rethink its approaches. Since 2009, the U.S. is stuck between focusing on upholding freedom of navigation and remaining neutral in sovereignty dispute issues. China's increasingly assertive behaviors since 2012 have pointed out that these two tasks are hardly unrelated. Photographic evidence of China's recent actions in the Chinese-occupied Johnson South Reef and Fiery Cross Reef has shown that China is physically expanding territories (reefs, atolls, etc.) by establishing artificial island for the purposes of military control [8]. Once the South China Sea is in the palm of its hand, China would make use of the EEZ claim and military forces to contain the U.S. military involvement, which would apparently threaten American freedom of navigation and communication in the region.

The second challenge is to international norms. It is generally accepted that in order to change a rule of customary international law, the combination of one of the two following factors is strictly required: *state practice* and *opinio juris sive necessitatis* (opinion as to law or necessity, hereafter *opinio juris*) (Thirlway, 2010: 102). At first, taking the element of *state practice* into account, one should know that the requirement for a settled practice contributing a new custom does not rely on the fact that every single state in the world carry out the same action, but the widespread acceptance and the consistency of such practice are the key. As for the practice on limitations of freedom of navigation, China does not single-handedly attempt to put more limits on the navigational rights of vessels on the sea. Table 1 shows the number of states that share the same view with China on the subject of broadening the control of coastal states over the sea on the basis of security. Although the number of states listed in the table does not make up half of the state parties of the Law of the Sea Convention, the fact that there have been a seemingly large and potentially increasing portion of states which have been currently restricting the navigational rights and possibly considering such action may helpfully contribute to the establishment of a new custom governing navigational activities of vessel on the sea.

In addition, through the table, it is pretty clear that most countries in the South China Sea appear to agree with China on the subject of security over the sea and that most developing countries also share the same view (see the table below). Therefore, if such a phenomenon is growing strong, it can be said that China is one step ahead the U.S. in a run for controlling the sea or, at least, the South China Sea.

In terms of the element of *opinio juris*, the Court in the North Sea Continental Shelf case indicated that "Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be

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evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it” (ICJ Report, 1969: 3). In order to achieve this requirement, China is actively employing several methods. Initially, one could see that China is strongly enforcing its national laws concerning the navigational issues. The 1992 China Law mentioned above is one of the prime examples. However, domestic laws can hardly be seen as evidences of the so-called *opinio juris*. Therefore, drawing up more multinational treaties governing such issue could be seen as another option. The ratification of the 2002 Declaration on the Conduct of Parties in the South China Sea could be seen as the first move of China. Besides, China might take advantage of its role in the United Nations to urge the Organization to adopt navigation-related Resolutions. Nonetheless, the U.S. and their representatives at the Security Council do not seem to let such scenario happen.

Table 1: State Practice on Limitations to Navigation [9]

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State	Type of Rights Asserted
Albania	Warships require prior special authorization
Algeria	Authorization must be obtained for warships 15 days prior to their passage; exception: force majeure
Antigua and Barbuda	Warships require prior authorization
Bangladesh	Warships require prior authorization; CZ 18 nm Security interests
Barbados	Warships require prior authorization
Brazil	Prohibition of the boarding, searching and of the exclusive economic zone and enact and capturing of vessels in the exclusive economic zone; military exercises and manoeuvres may be conducted in the exclusive economic zone only with the consent of Brazil
Bulgaria	24 nm ("Control rights")
Cambodia	Control of all foreign activities on the continental shelf, irrespective of their purpose; CZ 24nm Security interests
Cape Verde	Warships require prior authorization; Prohibition of "non-innocent use" of the exclusive economic zone, including weapons exercises
China	Requires prior notice for transports of waste in TS and EEZ; warships require prior authorization; CZ 24nm Security interests
Congo	All ships require prior authorization
Costa Rica	Fishing vessels must announce their passage through the exclusive economic zone beforehand
Croatia	Warships must announce their passage; the number of warships is limited
Denmark	Warships and governmental ships are required to notify the Danish authorities prior to their passage through territorial waters if that involves passage through the Great Belt, the Samsø Belt or the Øresund; prior authorization is required for more than 3 warships passing through at the same time
Djibouti	Prior notice required of any passage of nuclear-powered ships and ships carrying nuclear or other radioactive material
Ecuador	"Special area to be avoided"
Egypt	Warships have to announce their passage in advance; ships carrying nuclear material or other hazardous substances require prior authorization; CZ 24cm Security interests
El Salvador	Expressed concern at UNCLOS III in respect of military activities in the EEZ
Estonia	Warships and research vessels must announce their passage 48 hours in advance; authorization must be applied for nuclear-powered ships 30 days prior to their passage
Finland	Warships and governmental ships have to announce their passage in advance
Gambia	Asserts the right to prohibit navigation in certain areas of its continental shelf
Greece	Claims only a 6-nm territorial sea but 10 nm of airspace for air traffic control purposes
Grenada	Warships require prior authorization
Guinea	Taking photographs and transporting toxic or hazardous material are considered a criminal offence
Guyana	Warships have to announce their passage in advance
Haiti	Passage prohibited to ships carrying waste or materials with an inherent health or environmental hazard; Prohibition of the passage of all vessels carrying waste or materials that are environmentally harmful or detrimental to health; furthermore claims the right to exercise the control required in the exclusive economic zone in order to ensure navigational safety and prevent violations of financial, customs, health and environmental protection regulations; CZ 24nm Security interests
India	Warships have to announce their passage in advance; Prior consent to military exercises and manoeuvres in the exclusive economic zone and on the continental shelf; CZ 24 nm Security interests
Indonesia	Warships and all vessels other than merchant ships must announce their passage in advance; 100 nm Ships are not allowed to stop, anchor or cruise "without legitimate cause"
Iran	Warships, submarines, nuclear-powered ships as well as ships carrying nuclear or other hazardous materials require authorization; Prohibition of "military activities and practices" in the exclusive economic zone and on the continental shelf; CZ 24nm Security interests
Latvia	Reserves the right to regulate the passage of warships
Libya	Innocent passage to be announced in advance and allowed during daylight hours only; four exclusion zones
Lituania	Warships require prior authorization if this is required by the flag state
Malaysia	Prior consent to military exercises and manoeuvres in the exclusive economic zone and on the continental shelf
Maldives	Warships require prior authorization; With regard to the EEZ, acknowledge only the right of innocent passage; make entry of fishing and research vessels into the exclusive economic zone conditional upon prior consent
Malta	Asserts the claim for warships to obtain prior authorization
Mauritania	Reserves the right to restrict navigation and aviation in or above the exclusive economic zone if this is necessary for reasons of national security
Mauritius	Warships must announce their passage; Apparently makes the passage of warships and submarines through the EEZ conditional upon prior approval
Myanmar	Warships require prior authorization; Claims the right to restrict the freedom of navigation and overflight in its exclusive economic zone; CZ 24cm Security interests
Namibia	Claims sovereign rights with regard to financial, customs, immigration and health regulations in the exclusive economic zone as well
Nicaragua	25 nm Security interests; 15 days advance notification for warships and military aircraft; seven days for civilian traffic
North Korea	62 nm Military zone 50 nm seaward of the territorial sea. All ships and aircraft require prior approval
Oman	Warships, nuclear-powered ships, submarines and ships carrying hazardous loads require prior authorization
Pakistan	Warships require prior authorization; supertankers, nuclear-powered ships and ships carrying nuclear materials are required to announce their passage in advance; Claims authority to regulate transit through parts of the exclusive economic zone and enact and enforce all regulations required for controlling activities in the exclusive economic zone; CZ 24cm Security interests
Peru	Prior consent to military exercises and manoeuvres in the exclusive economic zone and on the continental shelf
Philippines	Expressed concern at UNCLOS III in respect of military activities in the EEZ
Poland	Reserves the right to regulate the passage of warships
Portugal	With regard to the exclusive economic zone, acknowledges only the right of innocent passage
Romania	Reserves the right to regulate the passage of warships
São Tomé and Príncipe	Reserves the right to regulate the passage of warships
Saudi Arabia	Reserves the right to regulate the passage of nuclear-powered ships; CZ 18 nm Security interests and navigation
Senegal	Expressed concern at UNCLOS III in respect of military activities in the EEZ
Seychelles	Warships are required to announce their passage in advance
Slovenia	Reserves the right to regulate the passage of warships
Somalia	Warships require prior authorization
South Korea	Warships and government ships have to announce their passage three days in advance
Sri Lanka	Warships require prior authorization; CZ 24cm Security interests
St. Vincent and Grenadines	Warships require prior authorization
Sudan	Warships require prior authorization; the right of innocent passage may be suspended for security reasons; CZ 18 nm Security interests
Syria	Warships require prior authorization; 41 nm Security interests
United Arab Emirates	Warships require prior authorization; nuclear-powered ships and ships with nuclear or hazardous loads must announce their passage in advance; CZ 24cm Security interests
Uruguay	Asserts the right to prohibit military exercises in the EEZ
Venezuela	15 nm National and security interests
Vietnam	Warships require authorization to be applied for at least 30 days prior to passage; passage restricted to 3 warships at a time; CZ 24 nm Security interests Submarines are required to navigate on the surface and to show their flag; aircraft are not allowed to land on board ships or be launched from them; on-board weapons have to be set in "non-operational" mode prior to the entry into the zone.
Yemen	Warships require prior authorization; nuclear-powered ships or ships carrying nuclear materials must announce their passage in advance; CZ 24cm Security interests
Yugoslavia	Warships must announce their passage 24 hours in advance

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Notes

[1] It should be noted that there are many names depended on each view of the claimant. China calls it “Southern Sea” (Nan Hai), Vietnam calls it the “Eastern Sea” (Biển Đông), and the Philippines calls it the “West Philippines Sea” (Dagat Kanlurang Pilipinas).

[2] Although the U.S. is not a party to the Convention, the well-established norm “freedom of navigation” is considered as customary international law which is applicable to all States. In addition, some regulations in the Convention concerning the norm are also seen as customary law, which will be stated respectively in the paper.

[3] Commander’s Handbook: Legal Bases for the Operations of Naval Forces of Germany, see Table 1.

[4] The Permanent Court of Justice (hereafter, the PICJ) in the Lotus case made it clear that: “Vessels on the high seas are subject to no authority except that of the State whose flag they fly. In virtue of the principle of the freedom of the seas, that is to say, the absence of any territorial sovereignty upon the high seas, no State may exercise any kind of jurisdiction over foreign vessels upon them” (see The case of the S. S. Lotus, 1927; Brownlie, 2003: 278).

[5] See Table 1

[6] Pentagon Statement on Chinese incident with U.S. navy, access on 07/09/2014.

[7] Lander, M. (2013). “Offering to Aid Talks, U.S. Challenges China on Disputed Islands”, *The New York Times*, 23.07.2010, accessed on 07/09/2014.

[8] Wingfield-Hayes, R. (2014) “China Island Factory”, *BBC*, 09.09.2014, accessed on 07/09/2014.

[9] Derived principally from a number of tables contained in Germany, *Commander’s Handbook: Legal Bases for the Operations of Naval Forces*; additional material added by Professor Stuart Kaye Dean Faculty of Law University of Wollongong “Freedom of Navigation in a post 9/11 World: Security and Creeping Jurisdiction” – permission for quoting granted.

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