



ICAS Issue Primer

Topics in US-China Relations

Freedom of Navigation Operations in the South China Sea

On October 21, 2016, the United States completed its fourth Freedom of Navigation Operation (FONOP) in the South China Sea since 2015. By sending the USS *Decatur* within the baselines of the Paracel islands, the US [sought](#) to “protect the rights, freedoms and lawful uses” of the sea and airspace. China views such FONOPs as violations of its sovereignty and security interests, calling US actions “illegal.”

Freedom of Navigation Under UNCLOS

Freedom of navigation (FON) is a principle enshrined in the [United Nations Convention on the Law of the Sea](#) (UNCLOS, or “the Convention”) and customary international law. It dictates that ships flying the flag of any sovereign state shall not suffer interference from other states on the high seas and shall enjoy lesser freedoms in exclusive economic zones (EEZs) and in territorial seas. The nature of these limits in EEZs and territorial seas, especially regarding military vessels, is a point of contention between different countries. While all states accept the right of foreign military vessels to enter another state’s exclusive economic zone (EEZ), which extends 200 nautical miles from a state’s territorial sea, there is some disagreement between states regarding the legality of military exercises or surveillance in foreign EEZs. This issue is one [source of disagreement](#) between the US and China, but is not directly related to the recent FONOPs. In cases where a vessel passes within the territorial sea of another state (a zone extending 12 nautical miles from the coast), UNCLOS in most cases requires that such passages be conducted as “innocent passages.” Innocent passage is [defined under UNCLOS](#) as “continuous and expeditious” navigation that is “not prejudicial to the peace, good order, or security of the coastal State.” This means that vessels navigating through these waters may not engage in any activity beyond passing through, such as fishing, surveillance, or military exercises. The US Navy complies with these requirements by, among other things, turning off fire-control radars and refraining from operating helicopters while inside another state’s territorial sea. Whether or not military vessels have a right to engage in innocent passage without obtaining prior permission is

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at the heart of the FONOP issue. UNCLOS itself is silent on the permissibility of prior notification or prior authorization requirements. More generally, the US believes UNCLOS makes no distinction between military and civilian vessels regarding the right of innocent passage, whereas Chinese law and policy treat military vessels differently.

The American FONOP Program

While the US has not ratified UNCLOS, US policy treats most of the Convention as customary international law and the US Navy operates according to its interpretation of UNCLOS’s FON rights and obligations. The US envisions its navy to be an important guarantor of FON norms, which in turn are often presented as critical parts of a “rules based international order.”



US Navy Arleigh Burke-Class Destroyer

The Pentagon’s Freedom of Navigation program aims to preserve FON by conducting FONOPs around the world that challenge “excessive claims” by states. It does this by operating in areas subject to what it considers to be illegal restrictions, in overt “non-acquiescence” with those restrictions. China was among [13 states challenged in 2015](#). These efforts are typically not publicized at the time. “Excessive claims” *does not* refer to sovereign claims, but to restrictions on freedom of navigation or improperly defined maritime zones. For example, the US objects to the Maldives’ requirement that nuclear powered ships obtain permission prior to entering its territorial sea, and has challenged it in the past. US officials persistently announce that the US will “fly, sail, and operate anywhere international law allows.”

The US has conducted four FONOPs in the South China Sea in since October 2015, sailing unannounced and without prior permission within 12NM of Subi and Fiery Cross Reefs—both reclaimed features in the Spratly

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Islands—and Triton and Woody Islands in the Paracel Islands twice. The primary “excessive claim” [the US means to challenge](#) is [China’s requirement](#) that military vessels obtain authorization prior to entering its territorial seas. All three features subject to FONOPs are claimed by multiple countries, so the operations were conducted without regard to the issue of which country was sovereign.

Chinese Concerns about FONOPs in the South China Sea

Chinese officials contend that the US FONOPs threaten China’s sovereignty and security interests. In May 2016, Spokesperson for the Chinese foreign ministry Lu Kang [noted](#) that the US has “endangered [the] safety of personnel and facilities on the reef and jeopardized regional peace and stability” by “illegally” entering the waters.

China is a signatory to UNCLOS. Chinese interpretations of UNCLOS differ from those of the US on a number of issues, including on the right of innocent passage. Chinese scholars often emphasize that there is no “absolute” right to innocent passage, and that the coastal state may appropriately regulate foreign vessels in the interests of security. China requires prior approval for warships to enter its territorial sea. [Approximately 60 countries](#) require some form of prior approval or notification for military vessels. China sought different treatment for civilian and military vessels during the third UNCLOS conference, but the final wording of the treaty neither affirms this distinction nor explicitly grants the right of innocent passage to warships. Critics of China’s interpretation note that UNCLOS does discuss obligations regarding weapons, nuclear powered ships, and submarines during innocent passage, all of which might imply its applicability to military vessels.

Chinese scholars also point to requirement in UNCLOS that all parties must have “due regard for the rights and duties of the coastal state” and comply with its laws so long as they comport with the Convention. Many Chinese observers simply question the “innocence” of American activities within China’s claimed territorial seas, given that each US FONOP in the South China Sea has been conducted by a well-armed *Arleigh Burke*-class guided missile destroyer. They note the requirement that innocent passage is “not prejudicial to the peace, good order, or security of the coastal State.” This includes refraining from making “threats.” They contend that these perceived military shows of force cannot meet this test. Other observers [have doubted](#) whether US FONOPs meet the requirement that innocent passages be

“continuous and expeditious” insofar as they are not simple passages from one location to another.

Background Issues

[The US FON program has been conducted globally since 1979](#), and US-China tensions in the South China Sea are nothing new, particularly regarding issues of surveillance in EEZs. However, the recent innocent passage FONOPs are clearly a response to China’s land reclamation activities in the Spratly Islands. One reason the US may have responded to China’s activities in this way is that many US officials are unsure of the meaning of Chinese maritime claims in the South China Sea, and fear they are intended to inhibit military FON. A major source of this is China’s reluctance to give a firm definition of the nine-dash-line claim. This ambiguity leads some in the US to imagine a worst-case scenario in which China attempts to restrict military navigation within the entire nine-dash-line as though it were an EEZ or even territorial sea. This would create significant problems for US Navy operations and greatly increase tensions. The US is concerned with the prospect of negative precedents regarding FON issues and believes that military access to the South China Sea is necessary to maintain its security and that of its allies in the region. From the Chinese perspective, the US has itself been ambiguous by persistently combining the issues of military and commercial navigation, using the critical importance of commercial FON to shore up arguments about the necessity of preserving military FON. Chinese observers frequently affirm that (commercial) FON is not and never will be challenged by China. American FONOPs also play into a narrative in China that the US is seizing the opportunity to intervene and “militarize” the South China Sea disputes between China and its neighbors. Many Chinese fear that the long-term US strategy is to encircle or contain China, and that it is intruding as an extra-regional power in order to facilitate this agenda. US military activities in the South China Sea have in fact increased dramatically in the last two years, with military aircraft making significantly more reconnaissance flights in recent years and US Navy ships on course for spending [1000 days at sea there in 2016](#).

- *Alek Chance and Annie Kowalewski*

Recommended Resources

[Amitai Etzioni criticizes FONOP program](#)
[Bonnie Glaser and Peter Dutton explain *Lassen* FONOP](#)
[Haiwen Zhang, China Institute for Maritime Affairs](#)
[Letter from Ashton Carter to Congress on FONOPs](#)
[Zeiwei Yang in *Beijing Law Review*](#)

