



HOW CAN MARITIME GOOD ORDER BE MAINTAINED IN THE SOUTH CHINA SEA?

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The United Nations Convention on the Law of the Sea (UNCLOS) enshrines the concept of innocent passage through a coastal state's territorial waters. Passage is innocent so long as it is not prejudicial to the peace, maritime good order, or security of the coastal state. A vessel in innocent passage may traverse the coastal state's territorial sea expeditiously, not stopping or anchoring except in situations of *force majeure*. The underlying principle is thus to establish rules for the maintenance of maritime good order without the need for military force; it does not create or imply any freedom to perform military applications in the specified maritime domain.

Unfortunately, in the South China Sea (SCS) both China and the US are directly undermining maritime security through military activities intended to support their narrower national interests. Indeed, on Sept. 30, 2018 there was a near collision between their destroyers. China argues that it is entitled to establish exclusive identification or other zones in the SCS, such as historical fishing zones, and offers assurances that it will ensure freedom of the seas and freedom of overflight in the SCS based on international law, thus guaranteeing unrestricted sea-borne trade. The US justifies the presence of its military in the SCS to demonstrate its commitment to preserving maritime good order and to prevent China from claiming territorial rights and interests in the SCS through the use of its own military.

Both China and the US accept that UNCLOS provides the legal framework within which countries are permitted to pursue their maritime interests and develop marine resources in an ecologically sustainable and peaceful manner. They also agree that

the maritime good order of the SCS is essential for the security of shipping, and acknowledge that illegal activities or intractable fishing disputes threaten this good order. China and the US agree that the SCS should not be militarized, but each accuses the other of doing so.

China interprets the US extension of its naval operations in the SCS as an unwarranted intrusion; the US accuses China of excessive and unjustified claims to maritime jurisdiction in the SCS based on spurious historical claims, and criticizes China's recent changes to the status quo in the SCS, viz., the reclamation of uninhabited reefs and shoals to create artificial islands and the subsequent establishment of military facilities upon them.

The US Navy claims to be operating to preserve existing rules, and to this end it seeks to exercise its customary rights by conducting Freedom of Overflight Operations and Freedom of Navigation Operations (FONOPs, usage here includes overflights) in the SCS. China rebuts these claims, arguing that the purpose of such operations is simply to project US naval force in the service of US national interests or those of its allies, rather than to uphold the principles of UNCLOS or to maintain international maritime security and good order.

The contradictory interpretations by China and the US of international law, and of each other's actions, have the potential to seriously disrupt maritime security in the SCS. All interested parties, both coastal states and user states, are concerned about this situation. Maritime good order in the SCS should not be threatened by physical confrontations, nor rely upon the military use of maritime forces. On-scene commanders trying to keep their ships and crews safe face the prospect of potentially warlike conflict, and this for the abstract concept of freedom of navigation. Some might even see FONOPs as an echo of a colonialist mentality, when the actions of the great powers imperiled weaker and more fragile states.

China and US are both guilty of destabilizing behavior in the SCS. The US is justifiably cynical that China's militarized artificial islands play no useful role in necessary and appropriate maritime tasks, such as humanitarian assistance, disaster relief, or search and rescue functions. But China is also correct in observing that the US Navy's FONOPs – executed around a dozen times since 2015 – are purely symbolic and potentially coercive, and do not support UNCLOS and customary international law. Moreover, the situation has recently been exacerbated by the

participation of the UK and French navies in FONOPs, the US having invited them to do so, along with Australia and Japan.

Both the US and China are staking a claim to the moral high ground, but in practice both are disrupting maritime good order in the SCS. The sea and air lanes of communication passing through and over the SCS are too important to be threatened by a posturing contest between great powers. Both countries should step back from the brink, tone down their rhetoric, and turn instead to naval diplomacy; regional maritime security can only be resolved by applying a rules-based legal framework.

US-led FONOPs in the SCS pose a difficult problem for the states in the region. Of course, the US has a legitimate mandate to protect the maritime security of its home waters, but through FONOPs it is effectively claiming a similar mandate globally. These operations cannot be interpreted as any kind of constabulary function, as self-defense for force protection, nor as using a minimum level of force necessary to enforce international law. They are clearly coercive, and potentially a war-fighting function.

China's de facto annexation of the SCS is equally problematic for states in the region. For this issue, however, UNCLOS provides an appropriate and competent legal framework to resolve disputes, as demonstrated by the 2016 ruling by the Arbitral Tribunal at the Permanent Court of Arbitration, which determined that China has "no historical rights" based on the "nine-dash line" map. Despite this legal setback, however, China seems intent on dealing individually with other claimants in the SCS, and might ignore any such rulings in the future.

No resolution of SCS issues is possible while a variety of different interpretations of UNCLOS persist, with user states and coastal states seeking to further their own maritime interests and convenience. The application of UNCLOS principles in the SCS has been more contentious than in other seas, and there is clearly a need for a more detailed and comprehensive set of rules. Freedom of navigation and freedom of overflight should be guaranteed, but all parties should negotiate in good faith, and instead of pursuing their own agendas, they should stay focused on the purpose of UNCLOS, which is to ensure maritime good order in peacetime. A new agreement that is based on international law and on related domestic law is needed to extend and institutionalize the existing UNCLOS framework. It is time for China and the US to look beyond their saber-rattling power games; they

must work together, with all the other regional stakeholders, to maintain maritime security in the SCS.

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