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Differing Interpretations of International Law Could Spark Major Naval Conflict Between The US and China

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Differing interpretations of international law could spark major naval conflict between the US and China





📷 A photo taken from a military plane shows China's alleged on-going reclamation of Mischief Reef in the Spratly Islands in the South China Sea. (AP Photo/Ritchie B. Tongo)

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The United States and China seem to be edging closer to a naval showdown over freedom of navigation in the South China Sea.

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OBSESSION

The Sea

5 hours ago

The US has announced it plans to conduct naval patrols within 12 nautical miles of China's controversial "artificial islands" in order to uphold the principle of "freedom of navigation" under international law. China's state-run English-language newspaper has called such plans "provocative" with one Chinese admiral even threatening to deliver a "head on blow" to any foreign forces threatening Chinese sovereignty of the disputed islands.

It is tempting to frame this dispute as the US upholding international law, and China ignoring it. But solving this brewing conflict requires more than simply demanding China "follow" international law. Instead, because the US and China have fundamentally different interpretations of what international law requires, both sides will find it difficult to avoid continuing their conflict over maritime and navigation rights in the region for the foreseeable future.

The US definition of freedom of navigation means all ships (including warships) are allowed to traverse both the 200-nautical mile exclusive economic zones (EEZs) and the 12-nautical mile territorial seas without obtaining the permission of the coastal state. Inside the 200-nautical mile EEZ, the US believes that military ships may conduct any activity, including surveillance of the coastal state (e.g., "spying"). Within 12

nautical miles, the US believes military ships must abide by the rules of “innocent passage” which precludes any overt military-related activity.

The Chinese definition of freedom of navigation is quite different. Essentially, the Chinese argue that military ships should have to follow rules of innocent passage even in the 200-nautical mile EEZ, and that military ships must get permission to enter the 12-nautical mile territorial sea, even if those ships are planning to make an innocent passage.

Why does this difference in the definition of freedom of navigation matter? Because it allows both sides to say that they are abiding by the rules for freedom of navigation set forth in United Nations Convention on the Law of the Sea (UNCLOS), while disagreeing dramatically on what each side is allowed to do.

From the US perspective, its navy should be allowed to enter the 12 nautical mile territorial seas around China’s “islands” as long as its navy abides by the rules of innocent passage. But the Chinese will say that even though they also support the “freedom of navigation,” international law does not permit this activity.

Most states agree with the US definition of freedom of navigation. But some states, including some neighboring South China Sea coastal states, agree with the Chinese view on the EEZ (like Malaysia) and others follow the Chinese view on the territorial sea (like Vietnam). So although the US reading of UNCLOS is the majority view, the Chinese are not alone in their interpretation of the law.

To be sure, the interpretive nature of this legal dispute does suggest a way for both sides to de-escalate tensions without losing face. China could quietly abandon its view that military ships can never enter territorial seas. Indeed, the Chinese Navy recently entered US territorial seas off Alaska on an “innocent passage” that the U.S. did not protest.

Meanwhile, the US could quietly transit within 12 nautical miles of China’s artificial islands without conducting any military activities, which would allow the Chinese to claim they are simply allowing the US Navy “innocent passage.”

Although this “legal” solution seems attractive, it probably remains out of reach. China has long adhered to its reading of international law because it feels vulnerable to foreign navies

operating close off its long coastline. At the same time, the US may not want to concede that China's artificial islands are entitled to a 12 nautical mile territorial sea at all.

In any event, although international law is important to understanding this confrontation, "following" international law will not resolve this festering US-China dispute until both sides agree on what international law actually requires. And because legal consensus is unlikely, expect the US-China conflict over maritime rights in and around the South China Sea region to get worse before it gets better.

A version of this post originally appeared at Opinio Juris. We welcome your comments at ideas@qz.com.

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