

# The “Freedom of Navigation” Debate Between China and the US: Retrospect and Prospect<sup>\*</sup>

*Zhang Wei*<sup>†</sup>

With rising tensions over the South China Sea since 2015, the China-US relationship has been affected and the freedom of navigation has become an extensively discussed topic. The intensive maritime military operations performed by US airplanes and ships in areas close to Chinese islands and reefs have added new uncertainties to the future development of the China-US relationship. This paper attempts to deepen the understanding of the risk factors in the China-US relationship by tracking and interpreting the evolution of the dispute from the perspective of the China-US maritime military relationship.

## I. ORIGIN: MILITARY USE OF THE EXCLUSIVE ECONOMIC ZONE

At the third UN Conference on the Law of the Sea, the exclusive economic zone system turned out to be one of the hotly debated issues and the focus of the debate was the relationship between “freedom of navigation” and “jurisdiction of the coastal countries”.

---

\* This article is originally written in Chinese.

† Zhang Wei is Guest Researcher at the Collaborative Innovation Center of South China Sea Studies, Nanjing University.

The countries participating in the debate were roughly divided into two camps: the developing countries and the maritime powers. The reason is simple: the maritime powers had the naval power and hoped to enjoy as much freedom of navigation and minimize the jurisdiction of the coastal countries. On the contrary, the developing countries, with limited naval technology and forces, would seek to increase their jurisdiction over the seas and limit the freedom of navigation, holding that it may endanger national security. After ten years of negotiations, both camps reached a compromise and concluded a package deal, eventually having the exclusive economic zone system written into the United Nations Convention on the Law of the Sea (hereinafter the Convention).

The establishment of the exclusive economic zone system is one of the most important achievements of the Convention. It assigns the exclusive jurisdiction of the areas that extend 200 nautical miles from the baselines from which the breadth of the territorial sea is measured to the coastal states. These areas include related waters, seabed and subsoil (but not the space above them). The Convention sets forth the rights and obligations of the coastal states. On the other hand, the Convention also grants other countries the freedoms of navigation and overflight<sup>1</sup> and sets forth the principle of mutual “due regard” to rights and duties between the coastal states and other states in the exclusive economic zone.<sup>2</sup> This system is a product of mutual rivalry and compromise among various international forces, resulting in the fact that the Convention provides many principles but few details; it has defects and less provisions regarding military usage, thus leaving some grey areas that are open to free interpretation on whether the freedoms of navigation and overflight of the military ships and aircraft are subject to additional conditions, whether military surveillance is subject to the jurisdiction of the coastal states, and how to determine the peaceful purpose of military uses and how to grasp the measure of “due regard”. As a matter of fact, over the past decades following the passage of the Convention, many countries have issued statements or enacted domestic laws to strengthen jurisdiction and the US has kept claiming the domestic laws of these countries in this regard as “excessive claims”.<sup>3</sup> These debates have revealed the defects

inherent in the exclusive economic zone system and indicated that it was established on the basis of the development of international practice, and entails further development and improvement as new problems emerge in the subsequent practice.

Following the *Kitty Hawk* aircraft carrier incident in which the military aircraft of China and the US squared off over the Yellow Sea in October 1994, the two sides initiated the maritime security dialogues. In October 1997, the top leaders of China and the US reached a consensus over avoidance of accidents, misunderstandings or miscalculations. The defense ministries of the two countries signed the China-US Military Maritime Consultative Agreement (MMCA) the next year.<sup>4</sup> Yet, in the third year following the signing of the Agreement, while tracking and monitoring an US EP-3 electronic surveillance aircraft on a close-in surveillance mission over the South China Sea, a Chinese J-8 jet fighter collided with the EP-3 and crashed, resulting in the death of the Chinese pilot 70 nautical miles southeast of the Hainan Island and the landing of the damaged EP-3 on Hainan. The incident froze the China-US relationship, unveiling the conflicts and rivalry between the two countries over the military use of the exclusive economic zone.

Between 2001 and 2002, the Chinese government issued diplomatic protests regarding the long-term surveillance and survey activities of the USNS *Bowditch* survey ship in China's exclusive economic zone in the Yellow Sea. In September 2002, at a time when the China-US relationship began to warm up, the *Bowditch* came to the Yellow Sea again, in disregard of the Chinese side's persuasion and warning, and Chinese ships drove it off. At the time of the incident, the *Bowditch* was mapping the seabed topography in the sea areas of the Yellow Sea some 60 miles off the Chinese coast and monitoring the underwater conditions with its towed sonar array. NBC, AP, CNN and other major US news agencies reported that the Chinese fishing boats damaged the towed sonar array on the US ship.<sup>5</sup> Zhang Qiyue, the spokesperson of the Chinese Ministry of Foreign Affairs, said, "A US navy ship carried out activities in China's exclusive economic zone without the consent of China and we think that such activities violated the principles of international law and infringed upon China's rights and interests

in the exclusive economic zone as well as China’s jurisdiction over the exclusive economic zone. We require the US to comply with applicable provisions of the international law and hope that the US ship will end the activities in China’s exclusive economic zone.”<sup>6</sup> A Pentagon official admitted that the *Bowditch* was indeed carrying out information gathering activities in China’s exclusive economic zone at the time and the activities had lasted for some time, not just for one or two days, he also claimed that the areas were international waters and the US ship had the right to stay there.<sup>7</sup>

In March 2009, the USNS *Impeccable*, an ocean surveillance ship, carried out activities in the South China Sea 120 km south of the Hainan Island, and the US Navy dispatched the USS *Chung-Hoon*, an *Arleigh Burke*-class Aegis destroyer with a displacement of over 9,000 tons, on an escort mission in response to the Chinese ships that were deployed to execute the evidence collection, monitoring and expelling missions. A serious face-off took place between the two sides again. In May and June, two dangerous close encounters took place in succession.<sup>8</sup> The US criticized the Chinese ships for following and tracking the *Impeccable* in the South China Sea. Mike Mullen, chairman of US Joint Chiefs of Staff, said that the Chinese side believed that the incident occurred in China’s exclusive economic zone, but the US military ships had the freedom of navigation in the high seas. Timothy J. Keating, commander of the US Pacific Command, said that the *Impeccable* incident was a “troubling indicator” that China was “behaving in an aggressive, troublesome manner” and was “not willing to abide by acceptable standards of behavior or ‘rules of the road’”.<sup>9</sup> Ma Zhaoxu, the spokesperson of the Ministry of Foreign Affairs of China, counterclaimed that the *Impeccable* carried out activities in China’s exclusive economic zone in the South China Sea without the consent of China in violation of both applicable international and Chinese laws and regulations. He said that the US accusations were groundless, and unacceptable to China. Huang Xueping, the spokesperson of the Ministry of National Defense of China, said US illegal activities occurred in the exclusive economic zone of China and China required the US to respect its lawful rights and interests and security concerns and take effective actions to prevent

reoccurrence of such incidents.<sup>10</sup> The USNS *Impeccable* pushed the dispute between China and the US over the military use of the exclusive economic zone to a new height and resulted in tensions in the China-US military relationship as well as maritime security. In August the same year, China and the US held a special meeting under the MMCA, at which the US accused China of endangering the safety of navigation through intercepting maritime activities. China responded that the frequent ocean/air surveillance and survey activities conducted by the US in China's exclusive economic zone and the space above it is the root cause of the China-US maritime and air security issue.<sup>11</sup>

During this period of time, there were numerous incidents of maritime and air friction between China and the US, which even led to the widespread belief that the China-US military relationship lagged behind the China-US relationship as a whole. At the 2010 Asia Security Conference held at the Shangri-La Hotel in Singapore, senior officials of China and the US engaged in a battle of words, blaming each other for hindering the development of the China-US military relationship. Ma Xiaotian, head of the Chinese delegation and deputy chief of the General Staff said, "There are mainly three obstacles to the development of the China-US military relationship: 1) US arm sales to Taiwan; 2) frequent close-in surveillance activities conducted by US ships and aircraft in the South China Sea and East China Sea; and 3) the adoption of the 2000 National Defense Authorization Act by the US Congress and the subsequent Tom Delay's amendment". Hence, it is not China that creates barriers for exchanges between the two militaries.<sup>12</sup> By listing the close-in surveillance by US ships and aircraft together with arm sales to Taiwan and the National Defense Authorization Act 2000 and Tom Delay's amendment as the top three barriers, it indicates that China cares about it very much. Also, it gives expression to the fact that the debate between China and the US over the military use of the exclusive economic zone has evolved into one of the key factors affecting the relationship between the two militaries and even the two countries. To sum up, the differences of opinion between the two mainly concern two aspects:

One, the legitimacy of US military surveillance activities. In the

opinion of China, the surveillance and survey activities conducted by US ships and aircraft in China's exclusive economic zone seriously endanger China's national security, and violate the objective of peace in the Charter of the United Nations as well as the basic principle set forth in the Convention that the exclusive economic zone may be used for peaceful purposes only.<sup>13</sup> Moreover, they violate the domestic law of China which provides that an application shall be made and approved before carrying out maritime scientific research and survey activities in China's exclusive economic zone and are therefore illegal. On the part of the US, it considers that the Convention provides that other states have the freedoms of navigation and overflight in the exclusive economic zone of the coastal countries and the activities of the US in China's exclusive economic zone are therefore lawful. The interception activities carried out by Chinese military ships and aircraft in an unprofessional and dangerous manner violated international law, including the International Regulations for Preventing Collisions at Sea.

Two, the coastal countries' jurisdiction over foreign military activities. In the opinion of China, the exclusive economic zones are not part of the high seas and the coastal countries have exclusive jurisdiction over such zones. US military surveillance and survey activities are not for peaceful purposes, not normal navigation and overflight, have impact on China's marine environment and resources and are scientific research in nature, and therefore China has the right to exercise jurisdiction over them. In the opinion of the US, the exclusive economic zones are international waters in which the US has equal freedoms of navigation and overflight as on the high seas. US military surveillance and survey activities are military activities rather than marine scientific research and the coastal states have no jurisdiction over them.

Here, it is necessary to discuss a little about the backdrop against which the above disputes arose. Upon the advent of the 1990s, the US-Soviet bipolar system collapsed and the main rivalry of the US ceased to exist. The US waged the Gulf War, during which the IT-based military revolution shocked the world. On the part of China, preliminary results achieved in its reform and opening-up drive expedited its endeavor to modernize its navy and build a

blue-water navy. At the same time, a growing tendency towards the so-called independence of Taiwan appeared on the part of the Taiwan authorities, prompting the mainland side of China to test-fire missiles in the Taiwan Straits in 1996 to show its resolution against Taiwan independence. These factors resulted in changes in the China-US relationship. The purpose of gathering information and data turned increasingly obvious of the marine geological environment survey by the *Bowditch* in the Yellow Sea and East China Sea, the *Impeccable* in the South China Sea, and frequent close-in espionage by the EP-3 and P-3C surveillance aircraft. They are espionage activities associated with the Taiwan issue and

---

The US, reluctant to face up to the essence of the problem, talked about the so-called “safety of navigation” rather than national security, resulting in endless legal disputes over the military use of the exclusive economic zone.

targeting at China’s efforts of military modernization. The conclusion is not hard to be drawn on the basis of the performance and areas of activities of the surveillance ships and aircraft. Hence, despite the hot debate between the two sides on the legality of the freedom of navigation, the essence lies in both sides’ security interest. From the very beginning, China made it clear that “the surveillance activities of US ships and aircraft seriously endangered China’s national security.” The US, reluctant to face up to the essence of the problem, talked about the so-called “safety of navigation” rather than national security, resulting in endless legal disputes over the military use of the exclusive economic zone.

## II. ESCALATION: ABOUT THE FREEDOM OF NAVIGATION IN THE SOUTH CHINA SEA

In 2010, two major events captured worldwide attention: 1) the US came up with the strategy of rebalancing towards the Asia-Pacific region to shift its strategic focus to the Asia-Pacific; and 2) the GDP of China surpassed that of Japan for the first time, coming

second only to that of the US. The US is a country with a strong sense of strategy and risk and the rising trend of China obviously went beyond the limit that the US could tolerate. In 2010, the US expressed the intention to change the policy towards the South China Sea for the first time and US Secretary of State Hillary Clinton presented the “overarching set of goals” of the US strategy towards the Asia-Pacific: to sustain and strengthen America’s leadership in the Asia-Pacific region and to improve security, heighten prosperity, and promote American values. Subsequently, the US announced it would dispatch 60% of its advanced ships and combat aircraft to the Asia-Pacific region and openly intervened in the South China Sea issue. As a result, the friction between Chinese and US navies and air forces obviously shifted to the South China Sea.

In April 2012, tensions flared up over the Huangyan Island as the Philippines used military ships to arrest and seize Chinese fishing boats and fishermen in the sea areas around the Huangyan Island. In March 2014, the Philippines filed an arbitration case over the South China Sea against China to an arbitral tribunal. In April, Philippine furnished supplies to the military ships on the beach of Ren’ai Reef. In May, Vietnam intervened in the oil/gas exploration of China’s Haiyang Shiyou 981 Oil Platform. As the US had overlapping interests in the South China Sea with some countries, it further complicated the situation by taking sides. In December 2014, the US Department of State published the first official research report on China’s nine-dash line in the South China Sea, titled “Limits in the Seas: China’s Maritime Claims in the South China Sea”. The report conveys some important messages. On the one hand, it fully denies the legality of the nine-dash line in the South China Sea and China’s claim to historical rights. On the other, it demonstrates the limits on China’s sovereignty and jurisdiction over islands and reefs in the South China Sea, further solidifying the theoretical base for US freedom of navigation in the south China Sea.<sup>14</sup> Since the beginning of 2015, the land reclamation projects carried out by China on seven islands and reefs in the South China Sea were repeatedly reported by the media, becoming the immediate factor that led to the escalation of the debate between China and the US



over the freedom of navigation in the South China Sea as well as new military frictions. According to media reports, between May 2015 and May 2016, US military ships and aircraft cruised ten times in the waters near Chinese islands and reefs in the South China Sea, and entered the ocean and air space within twelve nautical miles adjacent to the Chinese islands and reefs four times. Furthermore, they squared off the Chinese ships and aircraft dispatched to execute the evidence collection, monitoring and expelling mission multiple times. Diplomatic protests between both parties were frequently covered by the newspapers and the conflicts and rivalries over the right of the freedom of navigation escalated rapidly.

**Activities of US Military Ships and Aircraft Within and Near the  
12-Nautical-Mile Territorial Limit of Chinese Islands and Reefs in the  
South China Sea, May 2015-May 2016**

Year	Date	Ship / aircraft type	Maritime activities	Air activities	Notes
2015	May 11	<i>Fort Worth</i> littoral combat ship	Sailed near waters within 12 sea miles of Chinese islands and reefs in the South China Sea		
	May 18	P-8A anti-submarine surveillance aircraft		Flew near air space within 12 sea miles of Chinese islands and reefs in the South China Sea	
	October 28	<i>Lassen</i> guided missile destroyer	Entered waters within 12 sea miles of Zhubi Reef of China's Nansha Islands		

*The “Freedom of Navigation” Debate Between China and the US*

Year	Date	Ship / aircraft type	Maritime activities	Air activities	Notes
2015	November 8	two B-52 strategic bombers		Flew near air space within 12 sea miles of islands and reefs of China’s Nansha Islands	
	December 10	B-52 strategic bomber		Entered air space within 12 sea miles of islands and reefs of China’s Nansha Islands	
2016	January 30	<i>Curtis Wilbur</i> guided missile destroyer	Entered waters within 12 sea miles of Zhongjian Island of China’s Xisha Islands		
	March 1	<i>John C. Stennis</i> aircraft carrier group	Sailed near China’s Huangyan Island in the northern part of the South China Sea	Flew across the South China Sea, conducted exercises and takeoffs	Activities have lasted more than three months so far
	April 23	four A-10 attackers, two HH-60 helicopters		Took off from Clark Air Base in the Philippines and flew near air space over Huangyan Island	Exact location not reported

Year	Date	Ship / aircraft type	Maritime activities	Air activities	Notes
2016	May 10	<i>William P. Lawrence</i> guided missile destroyer	Entered waters within 12 sea miles of Yongshu Reef of China's Nansha Islands		
	May 17	EP-3 electronic surveillance aircraft		Flew near air space within 12 sea miles of Hainan Island	

Source: Data collected from public media reports.

The US did not expect the scale and speed of China's land reclamation activities. It is obvious that there are loopholes and strategic misjudgements in its surveillance and intelligence warning system. What worries the US is that the construction of the islands and reefs effectively extends China's maritime strategic depth, and reflects China's comprehensive strength and military powers as well as uncertainties of China's future strategic intentions. This round of debate over the freedom of navigation in the South China Sea is an escalation of the debate between China and the US over the military use of the exclusive economic zone, which was triggered by the US through both words and actions to implement its ruthless, comprehensive and normalized program for "freedom of navigation" in the South China Sea. The following three characteristics have been observed:

First, its activities covered all the waters and air space in question. In May 2015, the spokesperson of the US Department of Defense revealed that the US military was considering sending ships and aircraft within 12 nautical miles of the islands and reefs reclaimed by China in the South China Sea to highlight the freedom of navigation.<sup>15</sup> Soon afterwards, US military ships and aircraft entered air space within 12 nautical miles of the islands and reefs of China's Nansha Islands. Prior to this, US military activities concentrated in the international waters and air space

beyond 12 nautical miles defined by the US. On January 30, 2016 the USS *Curtis Wilbur* destroyer entered waters within 12 nautical miles of the Zhongjian Island of China’s Xisha Islands, indicating the intention to challenge China’s territorial sea system and domestic laws.<sup>16</sup> By doing so, the US “freedom of navigation program” in the South China Sea covered all the waters and air space that the US holds China has asserted “excessive” claims.

Second, the US uses any military equipment without hesitation. The US military ships and aircraft that have executed missions of freedom of navigation in the South China Sea and have sailed/flew to areas within 12 nautical miles of Chinese islands and reefs in the South China Sea since 2015 are of different models. The majority are the most advanced offensive military equipment of the US in service, including the littoral combat ships, B-52 strategic bombers and A-10 attackers. Also included was the *John C. Stennis* nuclear-powered aircraft carrier group, which has stayed in the South China Sea for several months and kept holding sea/air military drills and exercises of considerable size. During the implementation process, the US military had no regard for the negative impact on the China-US relationship, which was rarely seen since the establishment of the diplomatic relations between the two countries.

Third, the US has made its political intention clear. While taking military actions, senior US government and military officials launched verbal attacks against China, openly accusing China of unilaterally changing the status quo of the South China Sea, aggravating the militarization of the area and challenging the international order. The US also announced that it would force China to end the construction around the islands and reefs and military deployments by fully exercising the freedoms of navigation and overflight. David Shear, Assistant Secretary of Defense for Asian and Pacific Security Affairs said that the US Department of Defense would adopt a powerful strategy to support the US diplomacy and maintain the most powerful military presence of the US in the region to make sure that the US can take necessary actions.<sup>17</sup> This differs from the old practice of the US that only talked about safety.

China made a strong response and counter-attack towards the entry of US ships and aircraft within 12 nautical miles of Chinese islands and reefs in the South China Sea and military activities that intruded into the territorial sea of Xisha Islands. The main arguments are: China's sovereignty and relevant claims over the South China Sea are supported by sufficient historical and legal evidence; the construction of islands and reefs at China's Nansha Islands is lawful, reasonable and intended primarily to improve the working and living conditions of the soldiers on them and better perform China's international responsibilities and obligations; the so-called freedom of navigation issue over the South China Sea is a problem that does not exist and China has always stood for the freedom of navigation in the South China Sea and opposed to the abuse of the freedom of navigation; the acts of US ships and aircraft are provocative and violate international law, and China requires the US to reduce and ultimately cease close-in surveillance activities, and will take all measures available to safeguard China's territorial sovereignty, lawful rights and security. As a military response, the Chinese Navy and Air Force monitored closely and expelled the US ships and aircraft that sailed/flew close to the territorial waters/air space and lodged solemn protests against the US through the diplomatic channel. Wu Shengli, Commander of the Chinese Navy, held a video teleconference with the US Chief of Naval Operations and expressed China's position and demonstrated the resolve of China to safeguard its sovereignty and maritime rights and interests in the South China Sea.

In spite of China's response, the US reiterated that it will continue with the surveillance activities near the islands and reefs of China's Nansha Islands, continue to cruise in areas within 12 nautical miles adjacent to the islands and reefs of China's Nansha Islands, fully exercise the rights of navigation and overflight in international water/air space, and challenge the "excessive" maritime claims that limit the rights and freedom of navigation of the US and other countries. Although in the guise of international law issues such as the "freedom of navigation", such intensive military actions that touch on the red line of sovereignty have gone

beyond the legal issues and evolved into a new round of geopolitical rivalry between China and the US due to different social systems, values and national interests under particular circumstances.

### III. PROSPECTS: CONFRONTATION OR COOPERATION?

With the entry of US ships and aircraft into areas within 12 nautical miles of the islands and shoals in the South China Sea since 2015 to highlight the “freedom of navigation”, the China-US relationship, especially the China-US military relationship, has stepped into a new period of tension and both sides are moving on the edges of confrontation and cooperation and close to the “quasi-confrontation” state. The verdict of the South China Sea arbitration case, the US presidential election and the US-Taiwan relationship after the Democratic Progressive Party came into power have added new uncertainties to the relationship between China and the US. On the issue of the “freedom of navigation”, will the rivalry between China and the US lead to military confrontation and how should the China-US military relationship and even the China-US relationship as a whole be positioned? In the view of the author, there are three basic points that need to be interpreted:

First, the political game between China and the US is antagonistic in nature. From the jurisprudential perspective, the freedom of navigation is a problem that arises within the scope of international maritime law since the geographical discoveries of the 15th century. In ancient times, the ocean, like the air, was shared by all. In the Middle Ages, the claim of Western emperors over land began to extend to the seas and the drawing of the Papal Meridian in 1494 by Portugal and Spain over the Atlantic became the earliest practice of division of the seas. In 1609, Dutch jurist Hugo Grotius came up with the “free sea theory” and opposed the division and monopoly of the seas by countries. In 1702, Dutch jurist Cornelius van Bynkershoek came up with the maritime sovereignty theory, asserting that the control of the adjoining seas by the coastal countries shall correspond to the range of their weapons. Since then, there has been the division of the “free sea” school and the “maritime sovereignty” school in the jurisprudential circle. Then, the three

nautical-mile territorial sea system was developed and the seas were divided into two parts: high seas and territorial seas. Following the publication of the Continental Shelf Proclamation by US President Harry Truman in 1945, many coastal countries asserted new claims of maritime sovereignty and rights and interests before the United Nations would hold three conferences on the law of the sea. The 1982 United Nations Convention on the Law of the Sea divides the seas into nine areas and assigns nearly two thirds of the seas around the world to the exclusive jurisdiction of the coastal countries. Free seas and maritime sovereignty are legal issues that are closely related to national interest, which determines that the new conflicts will emerge before the old conflicts are compromised and resolved.

As the home of Alfred Thayer Mahan who came up with the “sea power” theory, the US has been upholding the global sea strategy following its rise. However, although the US acts as the pioneer in claiming more maritime rights and interests, it has not joined the United Nations Convention on the Law of the Sea. In 1979 and 1983, before and after the adoption of the Convention, US President Ronald Reagan issued two oceans policy statements regarding the freedom of navigation, and launched the Freedom of Navigation Program officially in December 1988, making it clear that the US will be committed to protecting and expanding the rights and freedoms of navigation and overflight guaranteed by international law to each country. One of the ways by which the US protects these maritime rights is the adoption of the Freedom of Navigation Program. The program includes statements of diplomatic actions and military actions. The latter aims to “thwart national claims that violate international law, by exercising the rights of navigation and overflight and therefore demonstrate the resolve of the US to protect the freedom of navigation”.<sup>18</sup> Subsequently, the US carried out global activities of military use of the seas outside the Convention, claiming to implement the Freedom of Navigation Program in over 100 countries and recording these military activities through the yearly Freedom of Navigation Report. It can be learned that the freedom of navigation is US national maritime policy, embodying the country’s basic values and hegemony concept. To the US, it is essentially a game of international politics

and geographics rather than a legal issue.

China is a country with a long history and strong national character, different from the US in terms of social system, ideology and values. Amidst its endeavor of reform and opening up over the previous three decades and more, China has summed up its historical experiences of backwardness in recent history, weak maritime strength, and repeated maritime aggression by colonialists, and come to the decision of further reform and opening up and building up its maritime power. In accordance with the US logic of realistic politics, a rising power and an established power will surely encounter an awkward situation known as the Thucydides Trap, and it is inevitable for China to compete for and share maritime power with the US when China sets its own goal to become a maritime power. This is the background of the game between China and the US over the freedom of navigation. As the two countries differ from each other in interests and values, the game between the two is antagonistic and inevitable.

Second, the political game between China and the US over the freedom of navigation carries significant military risks. Since May 2015, in the nearly 10 entries of US military ships and aircraft sailing/flying into adjacent water/air space of Chinese islands and reefs in the South China Sea reported by the media, the US has prepared various pretexts to defend the legality of its military operations within 12 nautical miles of Chinese islands and reefs in the South China Sea and even the territorial sea of China’s Xisha Islands. For example, the US asserts that the Chinese islands and reefs of the Nansha Islands are “low-tide elevations” over which no 12-nautical-mile territorial sea/air space can be claimed,<sup>19</sup> their adjacent areas are “international waters”, and the marking of the territorial sea by China using the low tide line rather than the straight baseline in the Xisha Islands is an “excessive claim”.<sup>20</sup> All these are to prove that the implementation of the US Freedom of Navigation Program is legal. It is in this way that the US denies China’s claim of sovereignty over the maritime and air space, and other corresponding maritime rights and interests.

It goes without saying that China had done little in weaving a legal net to protect itself regarding the South China Sea issue over



the previous decades and had had a very weak sense of sea power. China has stated that it has undisputable sovereignty over the Nansha Islands and their adjacent waters and had this written into its domestic laws. But, it did not take any effective actions against repeated infringements of sovereignty by other countries. China has marked the baseline of the territorial sea around the Xisha Islands, but has not marked the baseline of the territorial sea of the Nansha Islands. It has stipulated in domestic laws its historical rights, but has not further specified the claims within the dashed line in the South China Sea. In the opinion of the author, the South China Sea enjoyed long-term peace and stability precisely because China had said and done little. The Chinese government still does and says little now because it desires to maintain peace and stability in the South China Sea and to reduce the current tension. Such goodwill should be appropriately understood. It should also be noted that, in this round of wrangling, despite the fact China has said and done no more than before, it has remained clear, confident and resolved in identifying and reiterating its basic positions: China is the first to discover, name and exercise continuous jurisdiction over the islands in the South China Sea and it has undisputable sovereignty over the islands and their adjacent waters in the region; China has full confidence in the historical evidence it holds; It is lawful and reasonable for China to carry out development activities on its own islands and reefs and the US has no right to interfere. While insisting on its historical rights over the South China Sea islands, China has kept its promise in relation to the freedoms of navigation and overflight in the region, and entered into agreements with countries concerned on the peaceful solution of disputes and objected to any other means, such as intimidation. The implementation of the US Freedom of Navigation Program in the adjacent waters of the islands and reefs of China's Nansha Islands is a serious provocative action and China will take any means available to safeguard its sovereignty and maritime rights and interests.

Hence, the two sides make their own interpretations of international law in an attempt to find the basis for legality of their own action. More importantly, both them have the national will and military determination to safeguard their own national

sovereignty and rights and interests. US Secretary of Defense Ash Carter claimed that China had taken measures that challenged the international order and indicated that the Pentagon would dispatch its “most advanced capabilities” to the Asia-Pacific region, such as F-35 stealth fighters, P-8 anti-submarine surveillance aircraft and the cutting-edge stealth destroyers.<sup>21</sup> Harry Harris, Commander of the US Pacific Command, said that the US would increase the frequency, scale and scope of freedom of navigation operations in the South China Sea and even threatened that the US would choose to fight if it has to.<sup>22</sup> Amidst the waves of increasingly strong statements made by US political and military officials regarding the incidents of close contacts of military ships and aircraft of both countries equipped with advanced weaponry, it is only natural for the world to feel the coming of a very negative trend of “quasi-confrontation”, which no doubt carries significant military risks. With the US B-52 strategic bomber entering the 12-nautical-mile zone and even flying to air space less than three nautical miles away from the islands and reefs of China’s Nansha Islands, China had every reason to believe that there was an immediate major threat and it was necessary to make a strong response. With the unauthorized entry of the US *Curtis Wilbur* into the territorial sea of the Xisha Islands, China had good reasons to track and expel it and take even stronger countermeasures. The US said that there was a high possibility of a “crash” again as the Chinese J-11 fighter flew only 15 meters away from the US EP-3 surveillance aircraft. The time for dealing with the matter on the site is generally very short and there are many uncontrollable factors. The situation is very dangerous and if not dealt with properly, may result in major incidents and unimaginable consequences.

Third, cooperation is better than confrontation for China and the US. Any direct confrontation and military conflict between China and the US would be catastrophic for the two countries themselves, countries in the Asia-Pacific region and even the whole world. Judging by the moves of both sides so far, neither side has been well prepared to become enemies of each other. Following the entry of the US B-52 strategic bomber into the air space within 12 nautical miles of Chinese islands and shoals in the South China

Sea, China lodged a solemn representation to the US, which first expressed it was a mistaken entry and then informed China of the results of an investigation shortly afterwards, claiming that the acts of the US military aircraft were unintentional and not in conformity with relevant flight rules of the US military. The US Department of Defense and the US Pacific Command would take measures to prevent such incidents and defined the flight as not part of the “freedom of navigation operation”.<sup>23</sup> The response from the Chinese military was also restrained, indicating that neither side desired to trigger any dangerous military actions that might further aggravate the tension. During that time, the China-US MMCA mechanism operated normally as usual, the US invited the Chinese Navy to participate in the Rim of the Pacific Joint Exercise 2016 as planned and the China-US Strategic and Economic Dialogue 2016 was held normally in 2016, which possibly consoled to a certain extent the people who were worried about the conflicts between China and the US over the South China Sea.

However, the consequences of the China-US military “quasi-confrontation” during the period may not fade off in a short time. It is unlikely that the US ends its “freedom of navigation operation” soon and it is impossible for people to pin any hope on the rapid development of the China-US military relationship. Will the two countries choose confrontation or cooperation in the future? In the opinion of the author, China fears no confrontation, but will not take the initiative to choose confrontation. China tends to transform potential “quasi-confrontational” situation that persists for a certain period of time into one of “cooperation”. The reason is simple: the development of China calls for a stable China-US relationship and China does not have the strength and necessity to choose confrontation with the US. On the part of the US, unless the leader that comes to power after the 2016 presidential election is incredibly unreasonable, he/she will also believe that cooperation is a better option than confrontation. The reasons here are also simple: 1) the shared political and economic interests of both countries on which the US builds partnership with China remain unchanged and the US needs the cooperation from China for economic recovery, anti-terrorism, anti-pirate and the North Korea nuclear issue; 2)

the South China Sea is not the immediate core interest of the US and it requires careful calculation of how much to pay. Another reason is that the China-US military cooperation has reached a certain level of development and its momentum sustains. In particular, China and the US worked together to foster the adoption of the Code for Unplanned Encounters at Sea (CUES) in Qingdao, China in 2014 and inked the China-US Memorandum of Understanding on the Rules of Behavior for Safety of Air and Maritime Encounters in 2015, forming two bilateral rules of behavior for maritime and air encounters, which provide technical specifications for preventing maritime and air accidents. This is critical for preventing the escalation of military confrontation in and over the South China Sea, and occurrence of military conflicts and national confrontation. Furthermore, if both sides have the intention for cooperation, it will be very easy for them to find a solution for alleviating the tension over the South China Sea. At least, there are methods for reversing the trend of “quasi-confrontation” in the China-US military relationship by improving risk control.

The China-US military relationship shall not stumble over the South China Sea issue and both sides shall at least maintain a “quasi-cooperation” trend, which is in the best interests of both countries.

---

There are methods for reversing the trend of “quasi-confrontation” in the China-US military relationship by improving risk control.

---

<sup>1</sup> Article 56 of the Convention provides that the coastal states have the sovereign rights of exploring, exploiting, conserving and managing the natural resources and engaging in economic exploitation and exploration activities in their exclusive economic zones, and have jurisdiction over the establishment and use of artificial islands, installations and structures, marine scientific research, marine environment protection and preservation. Article 58 provides that all states in the exclusive economic zone enjoy the freedoms of navigation and overflight and of laying the submarine cables and pipelines.

<sup>2</sup> Article 56 through 58 of the Convention provides for the principle of “due regard” while setting forth the rights and duties of the coastal states and other states.

<sup>3</sup> Edited by the US Navy Military Law Division and US Naval Academy, translated by Yu Shijing et al., *The Commander's Handbook on the Law of the Sea*, Beijing: Naval Research Institute, 1993, pp. 367-371.

<sup>4</sup> On October 29, 1997, Chinese President Jiang Zemin and US President Bill Clinton inked a joint statement in Washington, announcing that China and the US would establish a constructive strategic partnership and that the two countries had reached an agreement on establishing a consultation mechanism to strengthen military maritime safety. The agreement would help the naval and air forces of both countries avoid unexpected accidents, misunderstandings or miscalculations. The contents are cited from China-US Joint Statement, front page of the *People's Daily* dated October 31, 1997. On January 19, 1998, Chinese Defense Minister Chi Haotian and US Defense Minister William S. Cohen inked the Agreement on Establishing a Consultation Mechanism to Strengthen Military Maritime Safety in Beijing. The contents are cited from the Agreement, the 4th page of the *People's Daily* dated January 20, 1998.

<sup>5</sup> Chinese Fishing Boat Collided with the US Spy Ship that Sailed into the Yellow Sea, September 25, 2002, <http://www.people.com.cn/GB/junshi/60/20020925/831024.html>, accessed June 10, 2016.

<sup>6</sup> China Requires the US Ship to End Its Activities in the Chinese Exclusive Economic Zone, September 26, 2002, <http://news.sina.com.cn/c/2002-09-26/1621745621.html>, accessed June 10, 2016.

<sup>7</sup> *Ibid.*

<sup>8</sup> China and the US Decided to Talk About the Squareoff Between the Military Ships of the Two Countries (source: Chinanews), July 11, 2009, <http://war.news.163.com/09/0701/11/5D4ONG0T0011MTO.html>, accessed June 10, 2016.

<sup>9</sup> The Commander of US Pacific Command Again Says that the USNS *Impeccable* Is Provocation by China, March 20, 2009, <http://news.sinovision.net/portal.php?aid=76142&mod=view/2009-3-20>, accessed June 10, 2016.

<sup>10</sup> The Spokesperson of the Ministry of National Defense of China Answers Questions from Reporters on Activities of the US Navy Surveillance Ship in China's Exclusive Economic Zone, March 11, 2009, [http://news.xinhuanet.com/mil/2009-03/11/content\\_10995832.htm](http://news.xinhuanet.com/mil/2009-03/11/content_10995832.htm), accessed June 10, 2016.

<sup>11</sup> Special Meeting of the China-US Military Maritime Security Consultation Mechanism, August 28, 2009, <http://military.people.com.cn/GB/9942854.html>, accessed June 10, 2016.

<sup>12</sup> The Rivalry Between Senior Chinese and US Military Leaders at the Asia Security Conference Catches Attention (source: CCTV *Global Watch*), June 8, 2010, <http://news.sina.com.cn/c/2010-06-08/021820429745.shtml>, accessed June 10, 2016.

<sup>13</sup> Paragraph 2, Article 58 of the Convention provides that Article 88 to 115 and other relevant rules of international law apply to the exclusive economic zone so long as they do not contradict Part V of the Convention. Article 88 provides that “The high seas shall be reserved for peaceful purpose.”

<sup>14</sup> United States Department of State Bureau of Oceans and International Environmental and Sci-

## *The “Freedom of Navigation” Debate Between China and the US*

entific Affairs, Limits in the Seas No. 143 China’s Maritime Claims in the South China Sea, December 5, 2014, <http://www.state.gov/e/oes/ocns/opa/c16065.htm>, accessed June 10, 2016.

<sup>15</sup> The US Mentions 12 Sea Miles Again (source: *Global Times*), May 23, 2015, <http://finance.china.com.cn/roll/20150523/3134565.shtml>, accessed June 10, 2016.

<sup>16</sup> The 1992 Law of the PRC on the Territorial Sea and the Contiguous Zone provides that foreign military ships must obtain permission from the Chinese government before entering the territorial sea of China. On May 15, 1996, the Chinese government issued the Declaration on the Baselines of the Territorial Sea of the People’s Republic of China, announcing the baselines of part of the territorial sea adjacent to the mainland and those of the territorial sea adjacent to the Xisha Islands. Over the years, although the US regarded the claims of China as “excessive claims”, it had never deliberately violated China’s domestic laws in practice.

<sup>17</sup> Kerry Visits China to Promote Freedom of Navigation in the South China Sea (source: *Global Times*), May 25, 2016, <http://www.baiyintouzi.com/bysp/20160525-53014.html>, accessed June 10, 2016

<sup>18</sup> Translated by Yu Shijing et al.: *The Commander’s Handbook on the Law of the Sea*, p. 371.

<sup>19</sup> United States Department of State Bureau of Oceans and International Environmental and Scientific Affairs, Limits in the Seas No. 143 China’s Maritime Claims in the South China Sea, December 5, 2014, <http://www.state.gov/e/oes/ocns/opa/c16065.htm>, accessed June 10, 2016.

<sup>20</sup> United States Department of State Bureau of Oceans and International Environmental and Scientific Affairs, Limits in the Seas No. 117 Straight Baselines Claim: China, July 9, 1996, <http://www.state.gov/e/oes/ocns/opa/c16065.htm>, accessed June 10, 2016.

<sup>21</sup> Carter Issued the Most Serious Threat Towards China Since the End of the Cold War, May 30, 2016, <http://mil.huanqiu.com/observation/2016-05/8988063.html>, accessed June 10, 2016.

<sup>22</sup> The US Commander Responds to Inception by the Chinese Fighter: Will Choose to Fight When Forced to Do So (source: Huanqiu), May 20, 2016, <http://news.china.com/focus/nan-hai/11156618/20160520/22698180.html>, accessed June 10, 2016.

<sup>23</sup> US B-52 Strategic Bomber’s “Mistaken Entry” into Cuarteron Reef in the South China Sea (source: *Global Times*), December 21, 2015, <http://news.sina.com.cn/o/2015-12-21/doc-ifxm-szek7459387.shtml>, accessed June 10, 2016.