

Legal Issues and Countermeasures of Sino-US Maritime Conflicts Triggered by Freedom of Navigation Operations

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Abstract: In recent years, with the continuous progress of the "Freedom of Navigation (FON)" plan of the US government, the US Navy has carried out Freedom of Navigation Operations (FONOPs) in the surrounding waters of China, resulting in the intensification of Sino-US maritime friction and the occurrence of Sino-US maritime conflicts. According to statistics, since the "Galaxy" incident in 1993, there have been dozens of Sea-Air Sino-US incidents every year. These maritime conflicts have had a significant negative impact on Sino-US relations. This paper intends to sort out the Sino-US Maritime Conflict Operations (MCOs) triggered by FONOPs, and summarize the characteristics and laws of Sino-US MCOs; On this basis, analyze the legal issues of Sino-US MCOs; Assess the future development trend of Sino-US MCOs, and propose corresponding countermeasures and suggestions.

Keywords: FONOPs, Maritime Conflict Operations, Legal Issues, Countermeasures

1. Overview of Sino-US MCOs

In October 1994, to track a Chinese Navy Han-class attack nuclear submarine that had just completed sea training, the US Navy's Eagle aircraft carrier sailed into Chinese territorial sea without prior notice, causing confrontation between the two navies. Afterwards, China protested to the US, pointing out that American ships and aircraft endangered China's sovereignty and national security, but the US believed that FONOPs in China's Territorial Sea (TS) enjoyed the right of "Innocent Passage", which was in line with international law and did not need China's permission in advance. Since then, China has gradually paid more attention to the Sino-US MCOs triggered by FONOPs.

The paper with technically unsuitable form will be suggested to make complete modification before acceptance.

1.1. Definition of the Concept of Sino-US MCOs

1.1.1. FONOPs

Since FON program was formally implemented in 1983, the State Department and the Department of Defense of the US have taken three types of actions with increasing intensity, respectively or jointly, as appropriate: first, the State Department and the Department of Defense jointly seek "Consultation" with the target country; Second, the State Council is responsible for initiating "Diplomatic Protests" against the target country; Third, the Ministry of National Defense is responsible for conducting "Action Announcements" on the target country. The US Navy documents usually refer to this action as FONOPs. According to the US Department of Defense, FONOPs^[1] is aimed at the excessive nature of maritime claims, rather than the identity of the country that made these claims. Therefore, the US Navy not only challenges potential enemies and competitors, but also includes excessive claims from allies, partners, and other countries.

The inclusion of China in FON program can be traced back to 1986. Due to the ambiguity of the provisions of the United Nations Convention on the Law of the Sea (UNCLOS), which is mainly reflected in the differences in the interpretation of the "innocent passage" rule in TS, China advocates that "the innocent passage of foreign military vessels through territorial waters requires prior permission", However, the US Navy ships entered China's territorial waters within 12 nm without China's permission to carry out FONOPs to express their disapproval. Since then, the US Navy has continuously sent ships

and aircraft to carry out FONOPs in response to its assumption that China has "Excessive Maritime Claims (EMC)". The sea area range, mode and frequency of action will inevitably lead to a series of Sea-Air frictions and even crisis conflicts.

1.1.2. MCOs

Maritime Conflict Operations (MCOs) refer to small-scale, low-intensity confrontations or engagements between the armed forces of countries in maritime conflicts, using maritime law enforcement measures or military forces to safeguard their respective maritime rights and interests. MCOs place greater emphasis on violent or confrontational behavior between countries that occur at sea. The Sino-US MCOs refers to the operations caused by differences and frictions between China and the US regarding the operational authority of military vessels and aircraft in the surrounding Sea-Air of China.

1.2. Sorting out the Sino-US MCOs

1.2.1. Phase 1

The Sino-US relationship went from the "Galaxy" incident in 1993 to the establishment of a Sino-US MMCA in 1998. At this stage, the sea area of Sino-US MCOs was distributed from the Yellow Sea and Bo Sea to the sea area near the Nansha Islands; The US Navy mainly sends aircraft carrier formations to approach in all directions. The FONOPs is mainly aimed at the challenge of "prior permission is required for Innocent Passage". At this stage, the main mode of MCOs is confrontation. Chinese response to US is relatively fierce, rising directly from low-level friction to high-level confrontation, which can easily lead to a crisis situation of "brush fire".

1.2.2. Phase 2

From the establishment of a Sino-US Military Maritime Consultative Agreement (MMCA) in 1998 to the US government's "Hanoi Address" in 2010. At this stage, due to the signing of the Sino-US MMCA by both sides, the Sino-US MCOs were effectively suppressed. At this stage, the Sino-US MCOs occurred in EEZs of North China Sea and South China Sea. The US Navy mainly dispatched survey ships, electronic reconnaissance aircraft, and other reconnaissance, patrol, and surveillance operations. The actions taken mainly address the challenges of "jurisdiction over EEZ" and "criminalizing foreign survey vessel activities within EEZ". Under the framework of the signing of the Agreement, the Sino-US attitudes towards responding to MCOs are tending to ease, but each is also testing the bottom line.

1.2.3. Phase 3

Since 2010, the US government has implemented the "Asia Pacific Rebalance" strategy. FONOPs has become an important starting point. In this stage, the projects challenging the action have added such contents as "TS straight-line baseline drawing", "excessive security authority in Contiguous Zone (CZ)", and "restrictions on foreign aircraft flying over the airspace but not intending to enter China's airspace". The frequency of MCOs has gradually increased until the COVID-19 broke out in the world in 2020, The number of MCOs has decreased. At this stage, the Sino-US MCOs takes various forms, including surface, underwater, and air forces conducting reconnaissance, intelligence gathering, or provocative actions, mainly concentrated South China Sea, and occasionally accompanied by military joint exercises and other actions.

1.3. The Laws and Characteristics of Sino-US MCOs

The sea areas where the Sino-US MCOs triggered by FONOPS are mainly concentrated in South China Sea, accounting for 63.2% of the total number of MCOs. The MCOS in North Sea and East China Sea account for respectively 26.3% and 10.5%. There are various types of actions that trigger Sino-US MCOs, which can be summarized into three types: tracking and monitoring of our military targets, approaching reconnaissance and detection, and conducting military exercises. These three actions account for 33.3%, 61.2%, and 5.5% of all.

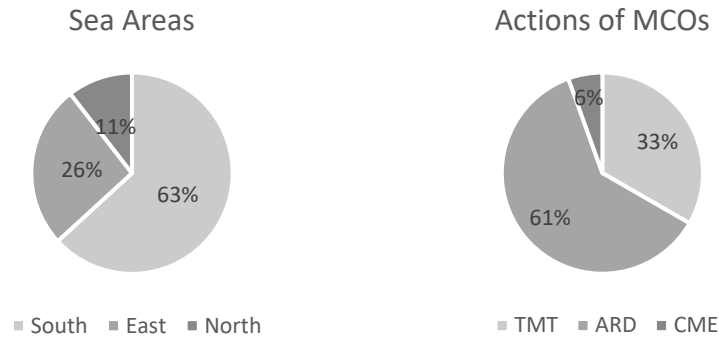


Figure 1: Sea areas and Actions of MCOs of FONOPs.

The overall trend of the manifestation of Sino-US MCOs is gradually moving towards low intensity, small scope, and multi frequency. Although Sino-US have no intention of resorting to large-scale hot wars, neither side is willing to compromise first; Our approach to responding to maritime conflicts is becoming increasingly flexible and proactive. The US mainly adopts a low-intensity conflict mode of demonstration and confrontation, which is also the most commonly used mode in MCOs. The continuous implementation of FONOPs by the US Navy will lead to further escalation of MCOs, and the possible sea areas for escalation of MCOs are concentrated in the disputed areas around China.

The Sino-US MCOs triggered by FONOPs have become increasingly prominent, which deeply reflects the changes in the military forces of China and the US and the confrontation between their respective maritime strategies, and is fundamentally a contradiction in the strategic interests of the two countries (Table 1). The Sino-US MCOS covers the TS, CZ, EEZ, the continental shelf and other sea areas, as well as the TS baseline, historical rights, island construction, marine environmental protection, security jurisdiction, oceanographic survey and information collection, Air Defense Identification Zone (ADIZ) and other aspects.

2. Legal Issues of Sino-US MCOs triggered by FONOPs

By sorting out the MCOs triggered by FONOPs taken by the US against China's maritime claims over the years, it is summarized that the legal issues of the current Sino-US MCOs are mainly reflected in the following three aspects: first, whether the foreign military ships need prior notice or permission to pass through the territorial waters innocuously; The second issue is whether foreign military vessels and aircraft have the freedom to engage in military activities within EEZ; The third is whether the coastal states have security jurisdiction over navigation in CZ, and whether AIDZ can conduct security control over flights only in the international airspace without entering the airspace.

2.1. Prior notice or permit of innocent passage in territorial waters

The waters in which the Sino-US MCOS was triggered by FONOPs occurred within TS accounted for 72.3% of the total number of MCOs. The internal reason was that the two sides had different views on the issue of "prior notice or permission for innocent passage in TS".

2.1.1. The US

The main basis for the US to advocate innocent passage of military ships through TS without prior notice or approval is the innocent passage clause of UNCLOS on TS and CZ and the International Convention on the Law of the Sea, as well as customary international law. The US believes that Article 17 of UNCLOS has clearly stipulated that "ships of all countries, whether coastal or land locked, enjoy the right of innocent passage through TS", and that innocent passage of ships (including warships) through TS is also a rule of customary international law, so prior notification or approval is not required.

2.1.2. The Chinese

Article 17 of UNCLOS does not clearly stipulate the right of innocent passage of military ships, and innocent passage of military ships without notice or permission has not become a rule of customary international law. In the absence of treaties and international customary law prohibitions, coastal states naturally have the right to exercise security jurisdiction over foreign warships, and may also require

foreign warships to obtain prior approval when passing through territorial waters.

2.1.3. Divergence

The main differences between the two sides actually focus on two aspects: first, whether foreign ships passing through TS innocuously as stipulated in UNCLOS can be interpreted as including military ships; Second, whether it has become customary international law for foreign military ships to pass through TS without notice or permission. Although Article 17 of UNCLOS does not specify whether ships are all ships including commercial ships and military ships, according to the rules of treaty interpretation, in the absence of a clear distinction between the nature of ships, the term "ships" should be understood according to its usual meaning, naturally referring to ships of all natures, so innocent passage should apply to all ships, regardless of their flag, type, cargo, destination, equipment Navigation purpose, etc. The terminology of ships in UNCLOS is ambiguous, avoiding the distinction between warships and merchant ships, and cannot be understood as including all ships. TS belongs to the sovereign territory of a country, and warships, as a tool of national force, should undoubtedly obtain permission from other countries if they navigate within their sovereign territorial waters.

Table 1: Comparison of interests between China and the US in the "FON" initiative.

	China	US
Interests in FONOPs	Territorial sovereignty and maritime rights and interests	National tradition and maritime hegemony
	National Defense and Security	Global Mobility of Military Forces
	Strategic security space	Protection and commitment to allies

2.2. On the Freedom of Military Activities in Exclusive Economic Zone

The sea areas where FONOPs triggered the Sino-US MCOS took place in EEZ accounted for 15.8% of the total number of MCOS. The internal reason was that the two sides had different views on the issue of "freedom of military activities in EEZ".

2.2.1. The US

The UNCLOS grants coastal countries sovereignty over natural resources, as well as jurisdiction over artificial facilities, scientific research, and environmental protection. It also grants other countries FON and overflight stipulated in Article 87 of UNCLOS, the freedom to lay submarine cables and pipelines, and other legitimate marine uses related to these freedoms, such as those related to the operation of ships, aircraft, cables, and pipelines. According to this, the US side claims that warships and military aircraft have the right to navigate and fly over the EEZ freely, and can carry out relevant military activities such as military exercises, anchoring, launching and landing military devices, weapon tests, intelligence collection, military survey, military reconnaissance, military surveillance.^[2] The military survey and other activities in EEZ as the content of FON on High Sea (HS) also comply with international customary law.

2.2.2. The Chinese

Article 55 of UNCLOS defines an EEZ as a sea area with a special legal system, which is different from HS and TS. Although FON and overflight in HS, as well as the freedom to lay submarine cables and pipelines, applies to EEZ, it is subject to the exclusive rights of coastal countries, especially the activities of military ships and aircraft, which should be restricted.

2.2.3. Divergence

The focus of the debate between the two sides mainly focuses on three aspects: firstly, whether the rules of UNCLOS on "due regard" for the rights of coastal states restrict military activities of non coastal states in EEZs of other countries; The second is whether the purpose and principles of the peaceful use of the ocean and the obligation of good faith limit the military activities of non coastal countries in EEZs of other countries; The third question is whether marine scientific research includes hydrological survey activities.

2.3. Security control of CZ and AIDZ

The waters where FONOPs triggered the Sino-US MCOS occurred in CZ and AIDZ accounted for 11.9% of the total number of MCOS. The internal reason was that the two sides had different understandings of the issue of "security control of CZ and AIDZ".

2.3.1. The US

Article 33 of UNCLOS stipulates CZ system, which makes it clear that coastal States may exercise control in CZ. The US advocates that this provision only grants four jurisdictional powers to coastal countries, including customs, finance, immigration, and health, and this listing is exhaustive and closed. It should be noted that although the US advocates opposing coastal countries to increase security jurisdiction in CZ, its domestic judicial practice clearly supports open interpretation, and international practice also begins to agree with security jurisdiction.

2.3.2. The Chinese

UNCLOS is only a general enumeration of jurisdictional matters in CZ, and the word "may" should be understood as permissive rather than restrictive and exhaustive. Coastal States can increase jurisdictional matters for important national security interests. As for the security control of AIDZ, the US believes that aircraft that only pass through AIDZ and do not fly into or out of the airspace should not be controlled, while China's claim does not make a difference.

2.3.3. Divergence

To date, there is no clear international law prohibiting or permitting the establishment of AIDZ by a country. Whether the identification of aircraft is limited to entering and exiting the airspace of coastal countries has not yet formed clear rules of international law. According to the claim of the US on CZ and EEZ, the country should not set up a security jurisdiction over CZ and EEZ that impedes FON and overflight of foreign ships and aircraft. According to the understanding of the US, the country has only customs, financial, immigration and health jurisdiction in and over CZ, but no security jurisdiction; In EEZ and its airspace, there are only rights to resources, environmental protection, artificial facilities, scientific research, and no other security jurisdiction rights. However, AIDZ^[3] originated in the US, and its delimitation of AIDZ is completely a security measure. After the establishment of AIDZ by itself, it has become a disagreement between the two sides to force other countries to act according to their standards and propositions.

3. Response to Sino-US MCOs triggered by FONOPs

The US Navy has implemented FONOPs in the surrounding waters with high density, and its confrontation, Sea-Air reconnaissance and military exercises are very likely to lead to MCOs. From data analysis, it can be concluded that Sino-US MCOs often occurs every few years, and ultimately do not escalate into larger conflicts. However, "aircraft collision" incident in 2001, the situation was once in danger of losing control, so how to deal with Sino-US MCOs triggered by FONOPs has become the focus of maritime safety.

3.1. On the legal path, it is necessary to clearly promote the legitimacy of China's maritime rights claims

For the Sino-US MCOs triggered by FONOPs, China should not be totally bound by UNCLOS. After all, the US is not a party to UNCLOS, but it cannot fully agree with the so-called international customary law proposition of the US. ^[4]Therefore, on the legal path, China needs to take a clear stance and fully promote the legitimacy and rationality of its maritime rights claims, and actively take measures to promote international consensus on UNCLOS.

As for FONOPs in EEZ, China clearly does not oppose the general passage of military ships and aircraft, but if it is accompanied by military activities, it can be classified and restricted. China's claims and their basis and reasons are determined by the unique legal status of EEZ, as well as the harm and threat of military ships and aircraft themselves. Examining the harm of sonar methods used in military surveys to marine life, the harm of military exercises and weapon testing to the marine environment and living resources, and the threat of ocean control to coastal countries. Although UNCLOS does not specify FON of military ships and aircraft in EEZ, in order to protect resources, environment and security, it can also restrict navigation activities that endanger the sovereignty and jurisdiction of EEZ. Many coastal countries internationally have also announced restrictions on navigation activities that endanger the sovereign rights and jurisdiction of EEZs. For example, after the 2002 oil spill accident of the "Prestige" oil tanker, Spain and France also announced that they would inspect single hull oil tankers that had been sailing in their EEZ for over 15 years, and those who were not seaworthy would be prohibited from sailing. These events demonstrate that even for non-military activities, in order to protect resources, the

environment, and security, restrictions can be imposed on ships that endanger EEZ.

We should actively advocate for maritime claims, work together with other coastal countries to clarify their understanding of UNCLOS, and further enrich its legal basis and reasons. For example, we can learn from the practice of the "Guidelines for Navigation and overflight in EEZ" and organize experts and scholars from various countries to collaborate and sort out the provisions of UNCLOS, in order to increase or promote understanding that is conducive to China's claims; At the same time, we support relevant international organizations such as the International Maritime Organization, UNESCO, and the Intergovernmental Oceanographic Commission to provide more fair explanations on relevant issues.

3.2. On the political path, it is necessary to confidently expose the purpose of American hegemony over the sea

On the political path, China needs to confidently expose the US' intention to dominate the sea and strive to gain more support from the international community.

The US promotes FONOPs, takes the banner of maintaining the freedom of HS, and adheres to FON and overflight of warships and military aircraft in territorial waters, CZ and EEZ, because it has become the strongest maritime power in the world, and can rely on its powerful military force to pursue the strategic goal of global power; The military activities advocated by the US in other countries' EEZs include "intelligence, monitoring, reconnaissance, military data collection, naval ocean surveys, war exercises, military exercises, supply during navigation, weapon testing and use, carrier based aircraft takeoff and landing, and so on." Such extensive and unwavering military activities fully demonstrate the US' strong intention to exercise maritime control in the coastal waters of other countries. In addition, the US has been dominant in negotiating UNCLOS, but has not yet joined the Convention itself; Although not a party to the Convention, coastal countries are accused under UNCLOS.^[5] This reflects the extreme utilitarianism of the US in its international political philosophy, and fully exposes its hegemonic ideology of binding and restricting other countries by virtue of UNCLOS, while at the same time making itself free from any constraints and restrictions.

We should use all available diplomatic platforms to expose such deceptive behavior of the US, and counter its FONOPS in a reasonable way through diplomatic statements and protests.

3.3. On the military path, it is necessary to establish a practical and feasible mechanism for Sino-US maritime security cooperation

The high risk of Sino-US MCOs caused by FONOPs and the negative Sino-US relations are also "forcing" the US and China to take practical measures to prevent conflicts and control risks. Although the differences between China and the US on FONOPs are very obvious, there is basically no intention of deliberately provoking friction or even conflict between the two countries. So, in terms of military channels, both China and the US have a strong willingness to establish a maritime security cooperation mechanism, strengthen conflict prevention and crisis management.

After the "Yellow Sea standoff" in October 1994, the military and political circles of China and the US began to explore and develop maritime crisis management measures, ultimately leading to the signing of the "Agreement on Establishing and Strengthening Maritime Military Security Consultation Mechanism" between China and the US in January 1998, establishing the MMCA consisting of annual meetings, working group consultations, and special meetings. This is the first confidence-building measure in the military field between China and the US. Under the MMCA, China and the US have held 9 annual meetings, 3 special meetings, and 17 working group meetings, which have played a positive role in formulating warship safety operation procedures, resolving doubts, and preventing MCOs. They have also served as practical exchanges and Sino-US Naval cooperation. In April 2014, during the Western Pacific Naval Forum, 25 countries, including China and the US, reached the "The Code for Unplanned Encounters at Sea (CUES)" aimed at taking security measures to reduce mutual interference and Sino-US Naval ships and aircraft uncertainty. In November of the same year, on the basis of MMCA and CUES, China and the US signed the "Safety Code of Conduct for Sea-Air Encounters", adding three annexes: the "Safety Code of Conduct for Sea-Air Encounters" and the "Safety Code of Conduct for Air Encounters", clarifying the safety operation rules and communication and liaison principles for military ships and aircraft during encounters.^[6]

Through the military established MMCA, China and the US have basically completed dialogue and established a complete set of professional and practical crisis management and trust measures system.

The security cooperation mechanism has also forced both parties to adjust their struggle strategies, demonstrating a certain degree of restraint in their actions, and placing more emphasis on the value of communication and cooperation.

References

- [1] Amitai Etzioni, "Freedom of Navigation Assertions: The United States as the World's Policeman", *Armed Forces & Society*, Vol. 42, Issue 3, July 2016, pp. 501-517.
- [2] U. S. Department of Defense, "Freedom of Navigation Program: Fact Sheet", March 2015, [https://policy.defense.gov/Portals/11/Documents/gsa/cwmd/DoD%20FON%20Program%20-%20Fact%20Sheet%20\(March%202015\).pdf](https://policy.defense.gov/Portals/11/Documents/gsa/cwmd/DoD%20FON%20Program%20-%20Fact%20Sheet%20(March%202015).pdf).
- [3] Donald R. Rothwell, "Navigational Rights and Freedoms in the Asia Pacific Following Entry into Force of the Law of the Sea Convention", *Virginia Journal of International Law*, Vol. 35, 1995, p. 588.
- [4] Sally J. Cummins eds., *Office of the Legal Adviser, United States Department of State, Digest of U.S. Practice in International Law*, Co-published by Oxford University Press and the International Law Institute, 2004, p.703, <http://www.state.gov/documents/organization/139391.pdf>.
- [5] The Report of the US Senate Committee on Foreign Relations, "Message from the President of the United States", *Protocols of 2005 to the Convention Concerning Safety of Maritime Navigation and to the Protocol Concerning Safety of Fixed Platforms on the Continental Shelf*, October 2007, https://www.foreign.senate.gov/imo/media/doc/treaty_110-8.Pdf.
- [6] Jon M. Van Dyke, "Military Ships and Planes Operating in the Exclusive Economic Zone of Another Country", *Marine Policy*, Vol. 28, Issue 1, January 2004, pp. 29-39.