

The Legal Status of Taiwan Strait and Potential Maritime Disputes in China-US Relations

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The passage of *USS Kitty Hawk* aircraft carrier battle group through the Taiwan Strait on its return to Japan after being barred by China from entering Hong Kong for a Thanksgiving port call last November gives rise to a number of political, military, and legal questions that not only have the potential to affect the situation of the Taiwan Strait but also the U.S.-China relations in the near future. China expressed “grave concern” over the aircraft battle group’s passage; it can be expected to see the rise of potential maritime disputes between Beijing and Washington in the Taiwan Strait, since the two countries have different interpretations on the articles provided in the 1982 United Nations Convention on the Law of the Sea (UNCLOS) dealing with the right of passage in a coastal state’s territorial sea, and the freedom of navigation and over flight in a coastal state’s exclusive economic zone (EEZ). There exist both territorial sea and EEZ that are established respectively by mainland China and Taiwan in the Taiwan Strait.

At present, while the United States is not a party to the UNCLOS, it is in the process of considering ratification of the convention. In May 2007, the White House released a statement from President Bush, urging the U.S. Senate to act favorably on U.S. accession to UNCLOS during the first session of the 110th U.S. Congress. On October 31, 2007, the U.S. Senate Foreign Relations Committee (SFRC) approved the convention by a vote of 17-4, sending it to the full Senate for ratification. On December 21, 2007, Senator Joseph R. Biden submitted the Report on Convention on the Law of the Sea of the SFRC as well as the resolution of advice and consent to the full Senate. Accordingly, it is likely to see the U.S. becoming the 156th contracting

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party to the UNCLOS in the year 2008. However, it is also likely to see the rise of maritime disputes between the United States and China in the Yellow Sea, East China Sea, South China Sea, and the Taiwan Strait.

The purpose of this essay is to discuss or attempt to answer the following questions related to the *Kitty Hawk* passage incident: Why did China deny U.S. request for a port call in Hong Kong and then later express “grave concern” over the aircraft battle group’s passage? Under the existing international law, what is actually the international maritime status of the Taiwan Strait? Is it true that the Taiwan Strait is international waters, as stated recently by Admiral Timothy Keating who heads the U.S. Pacific Command? Or, as claimed by some Chinese commentators that the strait is China’s “internal sea,” and therefore vessels of foreign countries are subject to the Chinese rules when passing through the strait? According to the international law, what kinds of rights and duties for countries such as the United States, Japan, and Australia are entitled to or must fulfill when their ships and aircraft cross the Taiwan Strait? If Taiwan is indeed politically integrated with mainland China, is it legal for China to enclose the Taiwan Strait and request foreign countries to obtain permission or give prior notification before their warships navigating through or aircraft flying over the strait? Will foreign countries’ right of over flight be affected, if China establishes a new air route along the invisible median line (the so-called Davis Line) and an Air Defense Identification Zone (ADIZ) in the Taiwan Strait? And finally, why is it likely to see the rise of maritime disputes between China and the United States in the Taiwan Strait after U.S. accession to the UNCLOS?

Why did the *Kitty Hawk* aircraft carrier battle group sail through the politically sensitive Taiwan Strait in November last year, instead of taking the route in the waters outside Taiwan’s eastern coast as U.S. warships normally did in the past? Was it a political signal sent by the U.S. government to remind China of its security concern over the peace and stability in the Taiwan Strait, or to re-affirm the U.S. position that the strait is international waters and American vessels, in particular, warships can exercise the right of passage in the Taiwan Strait if they choose to do so? Or as stated by U.S. officials, it was because of safety concerns when a typhoon was in the South China Sea at the time and the battle group was in a hurry to return to its home base in Japan. However, according to the news reports, the battle group chose to

navigate through the strait as a gesture of protest against China's rejection of its application for the port call. Both bad weather and a gesture of protest can be considered reasonable explanation. According to Bonnie S. Glaser, a senior associate at Center for Strategic and International Studies (CSIS), the aircraft battle group's passage was not a political signal sent by the U.S. government to remind China of its concern over the use of force by China against Taiwan if President Chen insists to tie the UN referendum to the March presidential election this year. However, it could be a possible intent for the U.S. to re-assert its right of passage in the Taiwan Strait, which is considered international waters, as Admiral Keating reiterated in Beijing during his visit to mainland China in January 2008.

During the battle group's passage, there was a 28-hour standoff between U.S. warships and Chinese attack submarine and destroyer, as reported by a Taiwan daily on January 15, 2008. The report, however, was refuted by Admiral Keating to days later, who attended a news conference during his stopover in Hong Kong, shortly after his visit to mainland China. Was there really a 28-hour U.S.-China military standoff in the Taiwan Strait? The Taiwanese military did not issue any official statement on the incident. However, it is assumed that the passage of U.S. aircraft battle group through the Strait should have been under Taiwan's and China's close surveillance. Both the Taiwanese and Chinese sides should have known when the battle group entered and left the Taiwan Strait, even though both Taiwan and China are silent on this confrontation. The puzzle could not be solved unless further information is disclosed in the future.

Now, let me turn to the second question: Why did China reject U.S. request for a port call in Hong Kong? According to an analysis done by Andrei Chang and published in UPI Energy last December, it was because of China's displeasure over a recent U.S. decision to sell Taiwan upgraded Patriot II ground-to-air missiles, which was announced by the U.S. government right after Defense Secretary Robert Gate's visit to Beijing in early November last year. To Beijing, the U.S. decision was "a serious betrayal and a huge loss of face." In addition, U.S. arms sale to Taiwan has always been a sensitive issue in U.S.-China relations. China worried that the decision to sell Taiwan the upgraded Patriot II technology would boost Taiwan's capability to intercept ballistic missiles and undermine strategic stability in the Taiwan

Strait. Another reported reason is the October 2007 meeting between President Bush and exiled Tibetan spiritual leader the Dalai Lama, who is considered a separatist by Chinese leaders. At this point, there is no way to confirm if U.S. arms sale to Taiwan and the October meeting were the main reasons for China's rejection to the U.S. port call request. However, during Admiral Keating's visit in Beijing in January 2008, General Chen Bingde, chief of China's General Staff Department, PLA, told reports on the sidelines of a meeting with Admiral Keating that "[i]f your ship wants to stop by Hong Kong, you have to follow international rules and go through some procedures." In response, the Admiral said that the Kitty Hawk had followed appropriate protocols for the visit and that General Chen had never mentioned any procedural issues to him during the visit. At any rate, it would help solve the puzzle, if the Chinese side makes it clear with regard to what exactly "international rule" and "procedures" mean.

The Kitty Hawk incident also highlights a number of question related to the international legal status of the Taiwan Strait as well as the rights and duties of non-strait countries' vessels, in particular warships and aircraft when navigating through or flying over the strait.

The Taiwan Strait is a strait between mainland China and the island of Taiwan. It is part of the South China Sea and connects to East China Sea to the northeast. The length of the strait is 205 nautical mile (1 n.m. equals to 1.852 km), with an average width of 102 n.m. The narrowest part of the Taiwan Strait is 70.7 n.m., measuring from Taiwan's Hsinchu to mainland China's Fujian Quanzhou. The strait has been the theatre for several military confrontations between China (the People's Republic of China) and Taiwan (the Republic of China) since the last days of the Chinese Civil War in 1949, when the Kuomintang (KMT) forces led by Chiang Kai-shek retreated across the Taiwan Strait and relocated its government on the island.

This strait is one of the busiest international straits in the world. Over 400 ships and 350 airplanes from many countries pass through the strait each day. While it is clear that the Taiwan Strait is an international strait, it is not a strait used for international navigation between one part of the high seas, or an EEZ and another part of the high seas, or an EEZ as defined in Article 37 of the UNCLOS. Since there

exists a route through the overlapping EEZs between China and Taiwan of similar convenience with respect to navigational and hydrographical characteristics in the Taiwan Strait, the regulations contained in Part III (Straits Used for International Navigation) of the UNCLOS does not apply to the Taiwan Strait, which include the right of transit passage. In other words, ships and aircraft of non-strait countries, such as the United States, Japan, and Australia, do not enjoy the right of transit passage in the Taiwan Strait.

However, the provisions regarding the freedoms of navigation and overflight provided in the UNCLOS apply to the Taiwan Strait. This means that U.S. warships and aircraft are entitled to the rights of navigation and overflight in and over the waters beyond the outer limit of Chinese as well as Taiwanese 12 n.m. territorial sea in the Taiwan Strait. Given the fact that the narrowest part of the strait is 70.7 n.m., there exists at least a route with a width of 46.7 n.m. where foreign vessels and aircraft enjoy the freedoms of navigation and overflight as they do in the high seas. Therefore, legally speaking, it is not incorrect when Admiral Keating said that “[w]e don’t need China’s permission to go through the Taiwan Strait, its international water” and that “[w]e will exercise our free right of passage whenever and wherever we choose.”

Having said this, however, it should be noted that U.S. aircraft do not have the right to fly over the Chinese and Taiwanese territorial sea in the Taiwan Strait, that is, 12 n.m. seaward from the Chinese and Taiwanese coast respectively. As far as vessels are concerned, the U.S. position is that all vessels enjoy the right of innocent passage, including warships. However, the Chinese territorial sea law requires foreign countries obtain permission and the Taiwanese territorial sea law asks foreign countries to give prior notification. This could be a source of conflict between China and the United States, since one of the declarations made by the Senate in its advice and consent resolution is that “all ships, including warships, regardless of, for example, cargo, armament, means of propulsion, flag, origin, destination, or purpose, enjoy the right of innocent passage.”

In addition, it is also U.S. position that UNCLOS “does not authorize a coastal State to condition the exercise of the right of innocent passage by any ships, including

warships, on the giving of prior notification to or the receipt of prior permission from the coastal State.” Another potential source of maritime dispute between the United States and China in the Taiwan Strait is the U.S. position that the term “used for international navigation” includes all straits capable of being used for international navigation. Based on this understanding, the U.S. claims that “all ships and aircraft, including warships and military aircraft, regardless of, for example, cargo, armament, means of propulsion, flag, origin, destination, or purpose, are entitled to transit passage...in their “normal mode.” In U.S. views, “normal mode” includes (1) submerged transit of submarines; (2) over flight by military aircraft, including in military formation; (3) activities necessary for the security of surface warships, such as formation steaming and other force protection measures; (4) underway replenishment; and (5) the launching and recovery of aircraft.

Even though the U.S. does not claim that the Taiwan Strait is a strait “used for international navigation” as regulated by Part III of the UNCLOS, the U.S. will still claim high seas freedoms of navigation and over flight and all other internationally lawful uses of the sea related to these freedoms, including inter alia and military activities such as anchoring, launching and landing of aircraft and other military devices, launching and recovering water-borne craft, operating military devices, intelligence collection, surveillance and reconnaissance activities, exercises, operations, and conducting military surveys. The conflict between the U.S. and China over the rights in the Chinese EEZ was already demonstrated in the April 2001 EP-3 incident that occurred in the Chinese EEZ in South China Sea near Hainan Island. It is important to note that the Senate advice and consent to the U.S. accession to the UNCLOS is subject to the declarations and understandings that include the aforementioned positions. Accordingly, it is very likely to see the rise of maritime disputes between Washington and Beijing, if indeed the U.S. ratified the UNCLOS this year.

China expressed “grave concern” over the *USS Kitty Hawk* aircraft carrier battle group’s passage through the Taiwan Strait because of political and military consideration. It did not claim that the U.S. had violated the international law of the sea on the grounds of U.S. warships’ passing through the Taiwan Strait. However, if China insists on establishing a new air route and an ADIZ in the Taiwan Strait or

impose rules affecting the exercise of freedoms of navigation and over flight by foreign countries vessels and aircraft (including both warships and military aircraft) in the Taiwan Strait, while the U.S. unilaterally claims that the Taiwan Strait is a strait “used for international navigation” and both its warships and military aircrafts are entitled to the right of transit passage in the Taiwan Strait, it can be expected to see the occurrence of maritime disputes between the two counties, particularly after the U.S. becoming the contracting party to the UNLCOS considered to be a “ Constitution for the Oceans.”