EAST ASIA POLICY PAPER 9
JUNE 2016

Center for East Asia Policy Studies at BROOKINGS

The U.S. FON Program in the South China Sea

A lawful and necessary response to China's strategic ambiguity

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Author Acknowledgements

I would like to thank Richard Bush for his comments on this paper—a more supportive director and colleague one could not ask for.

My thanks also go out to William Alford of the Harvard Law School, where part of the research for this paper was done, and to Ashley Roach, for his careful read of an earlier draft.

Last but not least, I would like to extend my gratitude to Robert Beckman for my time at the Centre for International Law, and for his time discussing the South China Sea with me. These discussions have been invaluable.

This paper has benefited from their input. Any shortcomings are mine alone.

Executive Summary

U.S. freedom of navigation (FON) operations have recently come under scrutiny with assertions near contested features in the South China Sea. While some question whether they are necessary, there are strong legal and practical imperatives supporting their conduct. FON operations help to ensure that the hard-earned compromises reached during the Third United Nations Conference on the Law of the Sea (1973–1982) are maintained both by word and deed. The Vienna Convention on the Law of Treaties states that "subsequent practice" shall be taken into account in interpreting treaties. If the United States fails to consistently assert is maritime rights under international law, these might be lost over time. Moreover, as a practical matter, rights not used are of little real value.

FON operations are part of the broader U.S. FON Program, which proceeds on a triple track. Criticism that the United States is prioritizing physical assertions over diplomatic and multilateral efforts is unwarranted. An examination of U.S. responses to three types of excessive maritime claims that are particularly problematic in the region—the insistence on prior authorization or notification for warships to exercise innocent passage, the prohibition of military activities in the EEZ, and the drawing of straight baselines when geographic conditions for doing so are not satisfied—demonstrates that the United States has been meticulous in diplomatically protesting excessive maritime claims and in setting out its (and the majority) interpretation of international law. FON operations assert rights available to all user states and cannot validly be described as a "use of force" or even "militarization". Rather, such assertions are legitimate exercises of rights vested under international law.

In the South China Sea, FON operations have taken on additional significance given China's strategic ambiguity. In the past, FON operations were undertaken to challenge excessive maritime claims. They are now, however, arguably being conducted to pre-empt them—a course of action necessitated by China's continued refusal to clarify its claims. Such operations may, accordingly, be better framed as assertions of maritime rights (so that these rights are reinforced and not detracted from in the future), rather than as challenges to excessive maritime claims. This recasting is particularly appropriate in the Spratlys where China has been especially vague about its maritime claims.

Effectively employed, FON operations could help counter China's attempts to assert de facto control over the South China Sea. They will also raise the costs of Beijing declaring straight baselines around the Spratlys and attempting to convert the waters within these lines to internal waters.

The widely anticipated tribunal decision in the Philippines case against China will facilitate the planning, execution and messaging of FON operations by clarifying the status of features. Insofar as the conduct of FON operations is consistent with the tribunal's award, it will bolster the United States' ability to argue that its actions are in accordance with international law. Regular assertions of maritime rights in respect of features that are the subject of the tribunal's decision will give the award teeth and render it more difficult for China to ignore the ruling.

The South China Sea dispute is about much more than mere "rocks". It concerns maritime rights and the preservation of the system of international

law. More broadly, how the United States and China interact in the South China Sea has important implications for their relationship elsewhere and on other issues.

This paper recommends that the United States consider the following:

1. **Continue to regularly assert maritime rights in the South China Sea, including in the Spratlys**

In addition to operations exercising a warship's right to innocent passage in a territorial sea without seeking authorization or giving notice, the United States might want to:

- exercise high sea freedoms around features like Mischief Reef in the Spratlys, particularly if the tribunal decision in the *Philippines v China* case confirms that the feature is not entitled to a territorial sea;
- exercise high sea freedoms *through* the Paracels and Spratlys outside of potential territorial seas. The former course would reiterate that China's established baselines are without legitimacy. The latter course would warn China that any attempts to establish straight baselines around the Spratlys is likely to bring it head-to-head with the United States; and
- continue conducting "other FON-related activities", that is, activities that have, say, information collection as their primary goal but challenging excessive claims as its secondary effect.

Once the tribunal's award is made, it goes without saying that the United States should be asserting maritime rights in a manner consistent with the award.

2. **Clearly put on record the maritime right the United States is asserting at the time of a FON operation**

If the purpose of a FON operation is to signal and assert one's understanding of one's rights, lack of clarity will do little to advance this. Details such as where the operation took place, what the operation did, and what right(s) the United States was asserting should be expeditiously, clearly and consistently made public.

3. **Publish a consolidated list of all diplomatic protests made in respect of excessive maritime claims**

This can help counter criticisms that the United States has been heavy handed in its response to what it sees as excessive maritime claims. It can also more clearly set out the United States rationale for regarding certain claims as excessive.

4. **Quietly persuade other states to conduct FON operations, engage in joint patrols and/or issue diplomatic protests**

Greater regional or international involvement would bolster the majority interpretation of the balance struck during UNCLOS III. It would also help to take the edge off what is being portrayed and regarded as U.S.-China rivalry—to the detriment of all involved.

5. **Clarify that the U.S.-China MOU regarding rules of behavior for safety of air and maritime encounters applies to FON operations, and extend the agreement to apply to coast-guard**

It is not clear that China accepts that the U.S.-China MOU regarding rules of behavior for safety of air and maritime encounters applies to the entirety of the South China Sea or in the context of FON

operations. Nor does the MOU apply, at least on paper, to the coastguard and civilian vessels. To the extent that these gaps can be closed, this will be positive.

6. **Redouble diplomatic efforts to arrive at a common understanding with China of what constitutes excessive maritime claims**

Diplomatic protests and FON operations should not only be regarded as ends in themselves (for shaping international law and preventing a change of the facts on the ground), but also as means by which, coupled with diplomatic consultations, a common understanding of legitimate or excessive maritime claims may be achieved.

The U.S. FON Program in the South China Sea

A lawful and necessary response to China's strategic ambiguity

U.S. freedom of navigation (FON) operations have recently come under scrutiny with the publicity surrounding the USS Lassen, USS Curtis Wilbur and USS William P Lawrence operations in October 2015, January 2016 and May 2016, respectively. The Lassen operation marked the first time in at least three years that the United States transited within 12 nautical miles of contested features in the South China Sea.[1]

Though Beijing decried these operations as illegal, its response has been relatively restrained. With Washington confirming that there will be follow-up operations and some within China calling for a tougher response, however, most analysts believe that the matter is far from closed and Beijing might up the ante. Some thus argue that, particularly given the region's heightened tensions, FON operations are unnecessarily provocative.

This paper examines what is at stake in the United States' defense of "freedom of navigation". It provides background to FON operations and the wider FON Program, setting out the practical and legal considerations behind their initiation. While the focus has recently been on FON operations, the United States has also made diplomatic representations protesting excessive claims. These will be spotlighted. Together with FON operations, they represent the sum total of the official U.S. position and explain why the United States is asserting the rights. The paper also assesses the validity of some of the criticisms leveled against FON operations. An important but largely overlooked distinction between past assertions and the recent October 2015 and May 2016 operations in the South China Sea will be highlighted and the consequences that such operations may have on China's claims in the region considered.

[1] Testimony of Assistant Secretary of Defense for Asian and Pacific Security Affairs, David Shear, "Hearing to receive testimony on maritime security strategy in the Asia-Pacific region", September 17, 2015, Washington, D.C., p 22, http://www.armed-services.senate.gov/imo/media/doc/15-72%20-%209-17-15a.pdf

The paper argues that FON operations and the larger FON Program (along with the responses of other states and the international community)[2] are important for ensuring that the compromises reached in the Third United Nations Conference on the Law of the Sea (1973–1982, UNCLOS III) are preserved. The United States, by written record and physical assertions, is making its interpretation of the rights (and duties) conveyed under the Convention clear. In the context of the South China Sea, FON operations have taken on an added significance as a means of responding to China's strategic ambiguity. The upcoming decision in the Philippines case against China is likely to enhance Washington's ability to plan and carry out FON operations.

"Freedom of navigation": What does the FON Program defend?

Under UNCLOS, "freedom of navigation" refers (only) to the navigation rights user states enjoy in the exclusive economic zone (EEZ) and high seas, subject to the obligation to pay "due regard" to the rights and duties of the coastal states and to comply with the laws and regulations adopted by the coastal state in accordance with UNCLOS and other rules of international law.[3]

Under the U.S. FON Program, however, "freedom of navigation" refers to a broad array of navigation and overflight rights, including the freedom to:

- exercise innocent passage in the territorial sea (applicable only to ships);[4]
- exercise transit passage through straits (applicable to ships and aircraft);[5]
- exercise innocent passage through archipelagic waters (applicable only to ships);[6]
- exercise archipelagic sea lanes passage in sea lanes and air routes designated by archipelagic states or where none are designated through the routes normally used for international navigation (applicable to ships and aircraft);[7]
- exercise navigation and overflight rights in the EEZ and high seas;[8] and
- use the EEZ and high seas for military purposes (for ships and aircraft).[9]

In addition, the FON Program also guards against claims inconsistent with the legal divisions of the ocean and related airspace reflected in UNCLOS since excessive maritime claims in these respects will reduce navigation and overflight rights. These claims include:

- unrecognized historic waters claims;
- improperly drawn baselines for measuring the breadth of territorial sea and other maritime zones;
- territorial sea claims greater than 12 nautical miles;
- other claims to jurisdiction over maritime areas in excess of 12 nautical miles, such as security zones, that purport to restrict non-resource related high seas freedoms of navigation and overflight;

[2] The diplomatic responses of other states will not be dealt with in this paper, which will confine itself predominantly to the United States' response and touch briefly on illustrative responses from the international community.
[3] Articles 58 and 87 UNCLOS.
[4] Part II, Section 3 UNCLOS.
[5] Part III, Section 2 UNCLOS.
[6] Article 52 UNCLOS.
[7] Article 53 UNCLOS.
[8] Articles 58 and 87 UNCLOS.
[9] Articles 58 and 87 UNCLOS.

- EEZ claims inconsistent with Part V of UNCLOS;
- archipelagic claims inconsistent with Part IV of UNCLOS.[10]

In the context of the South China Sea, the FON Program's more expansive usage of "freedom of navigation" serves as convenient shorthand, but has allowed the nature of the dispute with Beijing over maritime rights to be obscured. Beijing insists that it does not oppose and in fact supports "freedom of navigation". Its argument is not entirely without merit insofar as it has reiterated its support for freedom of navigation (for both civilian and military vessels) in the EEZ and high seas, despite its objections to military activities, including surveillance activities on security grounds, its insistence on prior authorization for military vessels entering its territorial sea, and its drawing of straight baselines without meeting the conditions for their use over normal baselines. President Xi Jinping, for instance, has assured the international community that "[t]here has been no problem with maritime navigation or overland flights, nor will there ever be in the future."[11] In the wake of the USS William P Lawrence operation, China's Ministry of Foreign Affairs spokesperson in fact credited cooperative and concerted efforts by China and relevant coastal countries in the South China Sea with upholding freedom of navigation and overflight. The *passage* of vessels of all countries", he stated, "have never met any obstacle".[12] A Chinese diplomat expands on what Beijing sees as the underlying issue:

> The difference between China and the United States is not a difference between freedom of navigation. We are very clear that we support freedom of navigation in accordance in accordance with international law, not only in the South China Sea, but also other parts of the world. The difference is that we think the United States takes freedom of navigation as an excuse. What their ships and planes have been doing is actually a close surveillance of China's coastlines and islands and reefs.[13]

Origins and aims of the FON Program

The FON Program was prompted by U.S. concerns about the proliferation of excessive maritime claims and its impact on national security and international trade.[14] The breakup of colonial empires after World War II and the rapid expansion of coastal nations led to a proliferation of claims.[15] This phenomenon, described as "creeping jurisdiction", proceeded almost unchecked in the 1960s and 1970s,[16] with coastal states and even maritime powers who were traditionally the

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[10] See Ashley Roach and Robert Smith (2012, 3rd ed), *Excessive maritime claims* (Leiden: Martinus Nijhoff Publishers), p 17, for other claims inconsistent with the legal divisions of the ocean and related airspace.

[11] Quoted in Rachel Chang (2015), "There will never be a problem with freedom of navigation in South China Sea: Xi Jinping", *The Straits Times,* November 7, http://www.straitstimes.com/singapore/there-will-never-be-a-problem-with-freedom-of-navigation-in-south-china-sea-xi-jinping

[12] Ministry of Foreign Affairs of the People's Republic of China Spokesperson Lu Kang's regular press conference on May 10, 2016, http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2535_665405/t1362106.shtml

[13] Conversation with senior Chinese diplomat on January 28, 2016. In the same vein, Chinese analysts question whether the safeguarding of freedoms of navigation and overflight in/over the EEZ "necessarily equate to allowing the United States the liberty to conduct military surveys and reconnaissance and other military activities in the EEZ of other coastal States." See Zhang Haiwen (2010), "Is it safeguarding the freedom of navigation or maritime hegemony of the United States? Comments on Raul (Pete) Pedrozo's article on military activities in the EEZ", *Chinese Journal of International Law, 9*, pp 31-47, p 32.

[14] For a discussion on how different strands of U.S. foreign policy, which in turn link to currents in U.S. society, share a concern with freedom of navigation, see John Noyes (2005-2006), "The United States, the Law of the Sea Convention, and freedom of navigation", *Suffolk Transnational Law Review, 29*, pp 1-24, p 12.

[15] Stephen Rose (1990), "Naval activity in the EEZ—Troubled waters ahead?", *Naval Law Review, 39*, pp 67-92, p 81.

[16] George Galdorisi (1996), "The United States Freedom of Navigation Program: A bridge for international compliance with the 1982 United Nations Convention on the Law of the Sea?", *Ocean Development & International Law, 27*, pp 399-408, p 401.

defenders of freedoms of the seas beginning to "think of the oceans as a resource rather than as the world's highway."[17]

By 1978, a growing consensus emerged that the United States should be prepared to assert its navigational rights, even if the execution of such rights would conflict with the claims of some coastal states. This led to the setting up of a task force to examine the possibility of ensuring U.S. navigational freedoms without concluding a treaty,[18] and to develop a systematic approach to the regular exercise of these freedoms. The study recommended a "show of the flag" to demonstrate American resolve towards rights under international law.

In 1979, the Department of Defense was directed to develop a plan for implementing the Task Force Recommendations.[19] The FON Program was launched "to preserve [the national interest in preserving the freedom of the seas] and demonstrate a non-acquiescence to excessive maritime claims asserted by coastal states."[20] In March 1983, President Reagan confirmed that although the United States was not signing UNCLOS, it was "prepared to accept and act in accordance with the balance of interests relating to traditional uses of the oceans—such as navigation and overflight." He also reiterated that the United States would exercise and assert its navigation and overflight rights and freedoms on a worldwide basis "in a manner that is consistent with the balance of interest reflected in the convention."[21]

The FON Program had been developed against the background of debates at UNCLOS III,[22] which by the late 1970s had reached "a carefully balanced approach to oceans governance that accommodated coastal state authority and global freedom of navigation."[23] As such, when the United States conducts FON operations, it is the *balance of interests reflected in the Convention* that the United States is asserting, and not U.S. "interests above international law", as China claims.[24]

Legal and practical imperatives for the FON Program

At the root of the FON Program was a concern that a minority position could gather enough momentum to bring about establishment of a new law of the sea norm or "paradigm shift".[25] The legal basis for this concern is Article 31(3)(b) of the Vienna Convention on the Law of Treaties, which states that "subsequent practice in the application of [a] treaty" shall be taken into account in its interpretation. Article 31 reads:

Article 31. General Rule of Interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

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[17] John Negroponte, then Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs, "Who will protect freedom of the seas?", address before the Law of the Sea Institute, Miami, Florida, July 21, 1986, p 3 of transcript.
[18] The United States objected to Part XI of the Convention dealing with the "Area", that is, the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction on the basis that it was against free market principles.
[19] For a detailed account of the origins of the FON Program, see William Aceves (1995-1996), "The freedom of navigation program: A study of the relationship between law and politics", *Hastings International and Comparative Law Review, 19*, pp 259-326, pp 277-287.
[20] U.S. Department of Defense, "Freedom of Navigation Program: Fact sheet", March 2015, p 1, http://policy.defense.gov/Portals/11/Documents/gsa/cwmd/DoD%20FON%20Program%20--%20Fact%20Sheet%20(March%202015).pdf
[21] "United States ocean policy", statement by the President, March 10, 1983, http://www.state.gov/documents/organization/143224.pdf
[22] Dale Stephens (2006), "The legal efficacy of Freedom of Navigation Assertions," *International Law Studies, 80*, pp 235-256, p 241.
[23] James Kraska (2011), *Maritime power and the Law of the Sea: Expeditionary operations in world politics* (Oxford: Oxford University Press), p 99.
[24] See comments by Ministry of Foreign Affairs of the People's Republic of China Spokesperson Lu Kang, *supra* n 12.
[25] Rose (1990), *supra* n 15, p 89, citing Ken Booth (1985), *Law, force and diplomacy at sea* (Winchester, Mass: Allen & Unwin), pp 89-96.

(a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
(b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:
(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(b) *Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation* [emphasis added];
(c) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

The failure to challenge excessive maritime claims might work in favor of the state seeking to make them,[26] especially if the objecting state had the power to challenge them and did not. President Jimmy Carter, in announcing the FON Program, alluded to how the United States "[d]ue to its preeminent position in world affairs … feels compelled actively to protect its rights from unlawful encroachment by coastal states."[27] Although the Convention does not require warships exercising innocent passage to give notice or seek authorization, a court called upon to interpret the provisions on innocent passage might say that the practice of states has been to give notice and/or seek authorization and interpret the law accordingly. Similarly, despite military activities historically being regarded as "lawful uses of the sea", a court called upon to interpret Article 58 on rights and duties of other states in EEZ might say that coastal states have insisted that military activities in their EEZ are unlawful and user states have abstained from engaging in such activities. It might then conclude that this is how parties have chosen to interpret the Convention. FON operations are undertaken to avoid these outcomes and to ensure that the agreement reached at UNCLOS III is supported by actual state practice. As Ambassador Negroponte warns, "[t]he rights and freedoms of the sea will be lost over time if they are not used."[28]

In addition to maintaining legal rights, other important objectives of the FON Program are to have states *recognize and respect* legal rights and to *discourage efforts to transgress* those rights by making excessive maritime claims—the exercise of rights is significantly less costly if it is generally accepted as being lawful.[29] The U.S. Ambassador to UNCLOS III and Chairman of the National Security Council Interagency Task Force on the Law of the Sea John Norton Moore highlights in the context of straits passage:

> the costs associated with any failure to recognize freedom of navigation through straits will not necessarily be immediately manifest. Initial challenges may be subtle, plausible, and limited. Through time, however, the common interest will be eroded by unwarranted restrictions on transit, discrimination among users, uncertainty of transit rights, inefficient and inconsistent regulations, efforts at political or economic gain in return for passage, increased political tensions, and perhaps even an occasional military confrontation as in the *Corfu Channel* case.[30]

Finally, a legal right is of little practical value if one chooses to respect excessive maritime claims save

[26] Stephens (2006), *supra* n 22, p 247.
[27] Quoted in Roach and Smith (2012), *supra* n 10, p 263.
[28] Negroponte (1996), *supra* n 17, p 2 of transcript.
[29] Galdorisi (1996), *supra* n 16, p 401.
[30] John Norton Moore (1980) "The regime of straits and the Third United Nations Conference on the Law of the Sea", *American Journal of International Law, 74*, pp 77-121, p 79.

in exceptional circumstances, since it gives legal and practical legitimacy to an excessive claim.[31]

The FON Program's triple-pronged approach

Operationally, the FON Program falls under the U.S. Department of Defense and the Department of State. It proceeds on a triple track: operational assertions by military units; diplomatic protests of excessive claims or other diplomatic representations by the Department of State; and Department of State / Department of Defense consultations with representatives of other States to promote maritime stability and consistency with international law,[32] an approach which has been referred to as a "feather and hammer" approach.[33]

Diplomatic protests: An important component of the FON Program

Some have criticized the United States for prioritizing FON operations over diplomatic and multilateral efforts.[34] However, this criticism is unwarranted. The United States has used diplomatic representations to set out its (and the majority) interpretation of UNCLOS and to explain why certain claims are regarded as excessive. The FON operations it conducts are consistent with the position it takes in these diplomatic notes.

Innocent passage in the territorial sea for warships

Article 17 UNCLOS provides that ships of all states enjoy the right of "innocent passage" through the territorial sea. Article 19(1) states that passage is innocent so long as it is "not prejudicial to the peace, good order or security of the coastal State." Subsection (2) lists activities "considered to be prejudicial to the peace, good order or security of the coastal State". Article 25 sets out the rights of protection of the coastal states, such as taking the necessary steps in its territorial sea to prevent passage that is not innocent.

During the December 1982 plenary meetings of UNCLOS III, some states suggested that a coastal state may require prior notification or authorization before warships or other government ships on non-commercial service may enter the territorial sea. The United States responded in March 1983 in the following terms:

> Some speakers spoke to the right of innocent passage in the territorial sea and asserted that a coastal State may require prior notification or authorization before warships or other governmental ships on non-commercial service may enter the territorial sea. Such assertions are contrary to the clear import of the Convention's provisions on innocent passage. Those provisions, which reflect long-standing international law, are clear in denying coastal State competence to impose such restrictions. During the eleventh session of the Conference formal amendments which would have afforded such competence were withdrawn. The withdrawal was accompanied by a statement read from the Chair, and that statement clearly placed coastal State security interests within the context of articles 19 and 25. Neither of these articles permits the imposition of notification or authorization requirements on foreign ships exercising the right of innocent passage.[35]

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[31] For a discussion of this, see Galdorisi (1996), *supra* n 16, p 402; Jonathan Odom (2015) "How the U.S. FON Program is lawful and legitimate", *Asia Maritime Transparency Initiative*, October 30, http://amti.csis.org/how-the-u-s-fon-program-is-lawful-and-legitimate/

[32] Dennis Mandsager (1997), "The U.S. Freedom of Navigation Program: Policy, procedure, and future", *International Law Studies, 72*, pp 113-127, pp 113-114. See also U.S. Department of State, "Maritime security and navigation: International Navigation: Freedom of Navigation Program", http://www.state.gov/e/oes/ocns/opa/maritimesecurity/ and U.S. Department of Defense "Freedom of Navigation: Fact sheet", *supra* n 20.

[33] Rose (1990), *supra* n 15, p 84.

[34] Amitai Etzioni (2015), "Freedom of navigation assertions: The United States as the world's policeman", *Armed Forces and Society*, pp 1-17, p 1.

[35] Quoted in Roach and Smith (2012), *supra* n 10, p 242.

Thereafter, the United States also protested the individual claims of states requiring prior notice or authorization for innocent passage of warships—over 40 states required this though some have since withdrawn the requirement.[36] China passed its Law on the Territorial Sea and the Contiguous Zone in February 1992. Article 6 requires states to seek permission before warships may engage in innocent passage. The United States protested this by oral démarche delivered in August 1992 in Beijing.[37] (According to the Department of Defense's Annual Freedom of Navigation (FON) Reports (1991-2015), the United States' the first recorded FON operation challenging the requirement of authorization was in Fiscal Year 1992, which was presumably some time between October 1991 and September 1992,[38] and likely at the same time or after the oral démarche was delivered.)

That the United States' understanding is also the majority position is borne out by statements of the international community. The UN Secretary General was requested to submit a special report to the General Assembly at its 47th session (1992-1993) on the progress made in the implementation of UNCLOS, in light of the tenth anniversary in 1992 of the Convention. The report noted the requirement in some domestic legislation for prior notification or permission before exercising innocent passage with disapproval:

> [a]t the Third United Nations Conference on the Law of the Sea, the question of the right of innocent passage of warships was the subject of lengthy discussions. *Proposals to the effect that warships should give prior notification or should seek prior permission before entering the territorial sea in exercise of the right of innocent passage were not included in the Convention. None the less, the legislation of a number of States contains provisions for such notification or permission.*[39] [emphasis added]

In its declaration made upon ratification of UNCLOS in June 1996, China reaffirmed that "the provisions of the United Nations Convention on the Law of the Sea concerning innocent passage through the territorial sea shall not prejudice the right of a coastal State to request, in accordance with its laws and regulations, a foreign State to obtain advance approval from or give prior notification to the coastal State for the passage of its warships through the territorial sea of the coastal State."[40] The United States also protested this.[41]

The foregoing makes clear that even prior to the recent high profile FON operations asserting the right of warships to exercise innocent passage without prior notification or authorization, China (and other countries) was made aware of the U.S. position on this issue, which is also shared by the international community.

Military activities in the EEZ

Article 58 provides that all states enjoy the high seas freedoms referred to in article 87 (navigation and overflight and of the laying of submarine

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[36] Roach and Smith (2012), *supra* n 10, p 24. For a table setting out the list of states restricting the innocent passage of warships, and the year of U.S. protest (and assertion(s) of right), see Roach and Smith (2012), pp 250-251.

[37] Roach and Smith (2012), *supra* n 10, p 247, footnote 81.

[38] U.S. Department of Defense, *Annual Report to Congress*, January 1993, http://policy.defense.gov/Portals/11/Documents/gsa/cwmd/FY1992%20DOD%20Annual%20FON%20Report.pdf

[39] United Nations General Assembly (1992), *Law of the Sea: Report of the Secretary-General: Progress made in the implementation of the comprehensive legal regime embodied in the United Nations Convention on the Law of the Sea*, A47/512, November 5, 47th session, agenda item 32, p 6, para 19, http://www.un.org/depts/los/general_assembly/documents/a47_512.pdf

[40] China, declaration upon ratification of UNCLOS, June 7, 1996, paragraph 4, http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#China

[41] See reference to the 1992 and 1996 protest in the U.S. Navy Judge Advocate General's Corps Maritime Claims Reference Manual: http://www.jag.navy.mil/organization/documents/mcrm/China2016.pdf It is not clear whether the protest was done by oral démarche or otherwise.

cables and pipelines), and "other internationally lawful uses of the sea related to these freedoms." During UNCLOS III, some states sought to argue that military activities fell outside this ambit. The United States exercised its right of reply on March 1983, insisting that such activities were "internationally lawful uses of the sea" and therefore a right that user states enjoy under Article 58:

> Some speakers described the concept of the exclusive economic zone in a manner inconsistent with the text of the relevant provisions of the Convention adopted by the Conference.
>
> … This concept, as set forth in the Convention, recognizes the interest of the coastal State in the resources of the zone and authorizes it to assert jurisdiction over resource-related activities therein. At the same time, all States continue to enjoy in the zone traditional high seas freedoms of navigation and overflight and the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, which remain qualitatively and quantitatively the same as those freedoms when exercised seaward of the zone. *Military operations, exercises and activities have always been regarded as internationally lawful uses of the sea. The right to conduct such activities will continue to be enjoyed by all States in the exclusive economic zone*. This is the import of article 58 of the Convention. Moreover, Parts XII [Protection and Preservation of the Marine Environment] and XIII [Marine Scientific Research] of the Convention have no bearing on such activities.[42] [emphasis added]

Thereafter, the United States protested legislation, declarations made upon signature or ratification of UNCLOS, and the practice of states purporting to limit military activities in their EEZ. Neither China's 1998 Law of the People's Republic of China on the Exclusive Economic Zone and the Continental Shelf,[43] nor its statement upon ratification of UNCLOS,[44] expressly prohibits military activities. Beijing, however, has repeatedly raised objections to military survey activities in its EEZ.[45] Such objections appear to be rooted in Article 14 of its 1998 law, which states, "The provisions in this law shall not affect the historical right that the People's Republic of China enjoys."[46] They also appear to stem from Article 2 of China's 1996 Regulations on Management of Foreign-related Marine Scientific Research, which regulates "survey activities and research on the marine environment and marine resources" in sea areas under China's jurisdiction. UNCLOS vests in the coastal state the right to regulate "marine scientific research" in its EEZ and continental shelf.[47] However, China's overly broad reading of "marine scientific research" to include military surveillance is problematic.[48]

In January 2007, the United States provided an aide-mémoire to Chinese officials concerning China's assertion that military activities in the EEZ required its prior consent:

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[42] Quoted in Roach and Smith, *supra* n 10, p 381.

[43] Adopted at the third session of the Standing Committee of the Ninth National People's Congress, June 26, 1998, http://www.un.org/depts/los/LEGISLATIONAND

[44] *Supra* n 40.

[45] For a list of incidents between Chinese and U.S. ships and aircraft concerning the right to regulate the activities of foreign military forces operating within a coastal state's EEZ, see Ronald O'Rourke (2016), *Maritime territorial and exclusive economic zone (EEZ) disputes involving China: Issues for Congress*, Congressional Research Service, April 1, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjs0LDXq-DMAhXEOD4KHd2QDdEQFggdMAA&url=https%3A%2F%2Fwww.fas.org%2Fsgp%2Fcrs%2Frow%2FR42784.pdf&usg=AFQjCNEBslLLr_METYvVevVfwCrxsx-FlA

[46] *Supra* n 43. Conversation with Peter Dutton, Cambridge, Massachusetts, January 25, 2016.

[47] Article 246 UNCLOS.

[48] For a discussion of point, see Robert Beckman (2010), "UNCLOS and the Maritime Security of China", paper presented at Conference on China and East Asia Strategic Dynamics, Rajaratnam School of International Studies (RSIS), Nanyang Technological University, Singapore, 11 – 12 March, http://cil.nus.edu.sg/wp/wp-content/uploads/2010/08/Beckman-paper-RSIS-Conference-March-2010.pdf

> The United States is pleased to provide the following explanation of why military survey activities do not require either prior notification to or the consent of the coastal state. The U.S. Government exercises its high seas freedoms with respect to military survey activities in the EEZ of coastal states world wide, consistent with international law, and as described in this aide-memoire. The United States has conducted military survey activities in more than 85 different EEZs, including China's without notice to, or consent of, those coastal states.
>
> Customary international law, as it is reflected in the 1982 United Nations Convention on the Law of the Sea (LOS Convention) authorizes coastal states to claim limited rights and jurisdiction in an EEZ. The limited jurisdictional rights relate to the exploration, exploitation, and conservation of natural resources, marine scientific research (MSR), and protection and preservation of the marine environment. Furthermore, as reflected in Article 56 of the LOS Convention, customary international law requires coastal states to exercise their limited, resource-related rights in their EEZs with "due regard" for the rights of other states. Notwithstanding coastal state resource rights, high seas freedom of navigation and overflight apply seaward of the outer edge of a coastal state's lawful delimited territorial sea. Moreover, the LOS Convention does not purport in any manner to restrict the military activities of a state in the EEZ.
>
> The United States recognizes that a coastal state may require anyone seeking to conduct MSR in the coastal state's EEZ to obtain approval in advance. However, international law, as reflected in the LOS Convention, distinguishes between MSR and survey activities, and is reflected in articles 19(2)(j), 21(l)(g), 40, 54 and in article 246(1) of the LOS Convention.
>
> Beyond the territorial sea (in which the coastal state enjoys full sovereignty, subject only to the rights of transit passage, innocent passage, assistance entry, and safe harbor), all states enjoy the high seas freedoms of navigation and overflight and other related uses of the sea within the EEZ, provided that they do so with due regard to the rights of the coastal state and other states.
>
> The conduct of surveys in the EEZ is an exercise of the high seas freedoms of navigation and other internationally lawful uses of the sea related to those freedoms, such as those associated with the operation of ships, which international law, as reflected in article 58(1) of the LOS Convention, guarantees to all states. Appropriate activities including launching and landing of aircraft, operating military devices, formation steaming, intelligence collection, weapons exercises, and military surveys. Coastal states must show "due regard" for such lawful uses.
>
> The United States therefore reserves the right to engage in military surveys anywhere outside lawfully delimited foreign territorial seas, international straits, and archipelagic waters. As a high seas freedom, United States military surveys within foreign EEZs are entitled to "due regard" from coastal states under international law, as reflected in the LOS Convention, and we expect China to fulfill its obligation in this regard. Additionally, when encountering U.S. naval auxiliaries off the coast of China, PRC vessels are obligated to comply with the navigational requirements of the 1972 International Regulations for Preventing Collisions at Sea (COLREGS). The United States expects China to comply fully with the COLREGS navigational rules.[49]

(According to the Department of Defense's Annual Freedom of Navigation (FON) Reports (1991-2015), the first recorded FON operation challenging China's ban on survey activities in the EEZ was in Fiscal Year 2007, which was presumably some time between October 2006 and September 2007, and likely at the same time or after the aide mémoire was provided to China.[50])

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[49] 2007 DIGEST 647-648; State Department telegram 002129, January 8, 2008 to Embassy Beijing, quoted in Roach and Smith (2012), *supra* n 10, p 384-385. It is not clear whether an event directly triggered this aide-mémoire.

[50] Department of Defense, "Freedom of Navigation FY 07 Operational Assertions", http://policy.defense.gov/Portals/11/Documents/gsa/cwmd/FY_07_FON_Report.pdf

In addition, Deputy Assistant Secretary for the Department of State Bureau of East Asian and Pacific Affairs Scott Marciel in his July 2009 testimony on "Maritime Issues and Sovereign Disputes in East Asia" highlighted U.S. concern over Chinese fishing vessels harassing the USNS *Impeccable* as it conducted operations consistent with international law in China's EEZ:

> I would now like to discuss recent incidents involving China and the activities of U.S. vessels in international waters within that country's Exclusive Economic Zone (EEZ). In March 2009, the survey ship USNS *Impeccable* was conducting routine operations, consistent with international law, in international waters in the South China Sea. Actions taken by Chinese fishing vessels to harass the *Impeccable* put ships of both sides at risk, interfered with freedom of navigation, and were inconsistent with the obligation for ships at sea to show due regard for the safety of other ships. We immediately protested those actions to the Chinese government, and urged that our differences be resolved through established mechanisms for dialogue—not through ship-to-ship confrontations that put sailors and vessels at risk.
>
> Our concern over that incident centered on China's conception of its legal authority over other countries' vessels operating in its Exclusive Economic Zone (EEZ) and the unsafe way China sought to assert what it considers its maritime rights.
>
> China's view of its rights on this specific point is not supported by international law. We have made that point clearly in discussions with the Chinese and underscored that U.S. vessels will continue to operate lawfully in international waters as they have done in the past.[51]

A recent *China Daily* commentary suggests that the U.S. position on military activities in the EEZ is, if not unique, then at least not a commonly accepted one:

> China and more than 20 other developing countries, such as Brazil, India, Vietnam and Malaysia, believe that military activities, such as the close-in surveillance and reconnaissance by a country in another country's Exclusive Economic Zone, infringe on a coastal state's security interests and therefore cannot be simply categorized as freedom of navigation.[52]

Varying figures have been cited for the number of states seeking to regulate foreign military activities in their EEZ. The U.S. Navy enumerates 27. Joe Baggett and Pete Pedrozo in an August 2013 briefing list 18 states, with three of these—China, North Korea and Peru—directing interfering with foreign military activities in their EEZ.[53] Roach and Smith offer up a more conservative number, listing eight states: Bangladesh, Brazil, Cabo Verde, China, India, Iran, Thailand and Uruguay.[54]

Whatever the case, any suggestion in the *China Daily* that more than 20 countries object to *surveillance and reconnaissance* in its EEZ would be misleading. *Only two countries have explicitly objected to surveillance and reconnaissance in the EEZ, namely, Iran and China.* Iran's 1993 Marine Areas Act lists "[f]oreign military activities and practices, *collection of information* and any other activity inconsistent with the rights and interests

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[51] Testimony of Deputy Assistant Secretary, Bureau of East Asian and Pacific Affairs, Scot Marciel, "Maritime issues and sovereignty disputes in East Asia", statement before the Subcommittee on East Asian and Pacific Affairs, Senate Foreign Relations Committee, Washington, DC, July 15, 2009, http://www.state.gov/p/eap/rls/rm/2009/07/126076.htm

[52] Zhou Bo (2016), "Freedom of navigation: a tale of two interpretations", *China Daily USA*, February 17, http://usa.chinadaily.com.cn/epaper/2016-02/17/content_23522676.htm

[53] Numbers cited in O'Rourke (2016), *supra* n 45, p 11.

[54] Roach and Smith (2012), *supra* n 10, p 28. The difference between the upper and lower limits may arguably be accounted for by whether a state has *specifically* objected to military activities in its EEZ in its domestic legislation or otherwise (the lower limit of countries), or whether domestic legislation is broad enough to allow for future prohibitions (the higher limit).

of the Islamic Republic of Iran" [emphasis added] as prohibited activities in the EEZ and continental shelf of Iran. As mentioned above, China's domestic legislation does not expressly prohibit military activities in the EEZ, though there have been numerous instances where China has objected to them (on the basis of domestic legislation referencing "historical right" or regulating "survey activities and research on the marine environment and marine resources" in its EEZ or on its continental shelf).

In contrast to Iran and China's specific interdictions, other counties do not target military surveillance (unless it affects the economic rights of the coastal state). Thailand and Uruguay object to "military exercises or other activities *which may affect the rights or interests of the coastal State*" [emphasis added].[55] The coastal state only enjoys *economic* interests in the EEZ. Bangladesh, Brazil, Cabo Verde and India, all in roughly similar wording, make military exercises, *particularly involving weapons and explosives*, the focus of their objections.[56] This prohibition may arguably be rationalized on the basis that live firing might impact the economic, rather than security, rights of a coastal state.

The United Nations General Assembly has made clear that state practice of asserting "exclusive jurisdiction" or "exclusive rights" over non-resource activities in the EEZ goes beyond the rights provided for in the Convention:

> Most of those States which have established exclusive economic zones claim "sovereign rights", as stipulated in the Convention, with respect to natural resources of the zone, and jurisdiction over matters such as artificial islands, protection of the marine environment and marine scientific research. There are, however, several States, including India, Mauritius, Myanmar and Pakistan, which assert "exclusive jurisdiction" or "exclusive rights" with respect to non-resource activities.[57]

Specifically on the question of military activities in the EEZ, the President of UNCLOS III (1980–1982) Tommy Koh conceded that "[t]he solution in the Convention text is very complicated" and that "[n]owhere is it clearly stated whether a third state may or may not conduct military activities in the exclusive economic zone of a coastal state." However, he was also categorical that "the general understanding that the text we negotiated and agreed upon would permit such activities to be conducted."[58]

Straight baselines

The drawing of straight baselines (joining appropriate points on the coast) over normal baselines (following the low-water mark along the coast) is another particularly contentious issue in the

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[55] Thailand, declaration upon ratification of UNCLOS, May 15, 2011, paragraph 4, http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm - Thailand Upon ratification

[56] Bangladesh, declaration upon ratification of UNCLOS, July 27, 2001, para 1, http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm - Bangladesh Upon ratification
Brazil, declaration upon signature, December 10, 1982, para IV; declaration upon ratification, December 22, 1988, para II, http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm - Bangladesh Upon ratification
Cabo Verde, declaration made upon signature, December 10, 1982, and confirmed upon ratification August 19, 1987, para V, http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm - Cabo Verde Declaration made upon signature and confirmed upon ratification, "excludes any non-peaceful use without the consent of the coastal State, *such as exercises with weapons or other activities which may affect the rights or interests* of the said state". [emphasis added]
India, declaration upon ratification, June 29, 1995, http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm - India Declaration made upon ratification

[57] United Nations General Assembly (1992), *supra* n 39, p 10, para 33.

[58] Koh was speaking at "Consensus and confrontation: The United States and the Law of the Sea Convention", workshop by the Law of the Sea Institute, Hawaii, January 9-13, 1984. Quoted in Kraska (2011), *supra* n 23, p 306.

South China Sea. Many of the states in the region have implemented a straight baseline system without satisfying the geographic conditions for its use, namely, a deeply indented and cut into coastline, or a fringe of islands along the coast in its immediate vicinity.[59] The illegal use of straight baselines is problematic as it adversely affects the international community's rights to use the ocean and airspace. They create areas of internal waters, which would otherwise legally be territorial sea or areas in which high sea freedoms would apply.[60] The United States has challenged the illegal use of straight baselines both diplomatically and operationally. [61]

Amongst offenders, China and Taiwan are the only states that have established straight baselines connecting mid-ocean archipelagos in the South China Sea (the Paracel Islands and the Pratas Islands, respectively). China passed enabling legislation for the use of straight baselines in its 1958 Declaration on the Territorial Sea[62] and its 1992 Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone.[63] In May 1996, Beijing went further to promulgate geographical coordinates for straight baselines for most of the Chinese coastline (save the Gulf of Tonkin and areas near North Korea, including the Bohai Gulf) and for the Xisha (Paracel) Islands.[64] It did not, however, establish straight baselines around other islands it claims in the South China Sea.[65]

Three months later, in August 1996, the United States protested China's establishment of straight baselines. In addition to reiterating its position on when straight baselines could be drawn, the note explained why geographic conditions did not permit China to employ straight baselines as the only type of baselines from which maritime zones are measured:

> The United States notes that China's coastline is not entirely deeply indented or cut into, or fringed with islands along the coast in the immediate vicinity. Accordingly, international

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[59] Article 7 UNCLOS. For a discussion of the use of straight baselines in the region, see Ashley Roach and Robert Smith (2000), "Straight baselines: The need for a universally applied norm", *Ocean Development & International Law, 31*:1-2, pp 47-80; and Sam Bateman (2008), "State practice regarding straight baselines in East Asia—Legal, technical and political issues in a changing environment", paper prepared for international conference, "Difficulties in implementing the provisions of UNCLOS", organized by the Advisory Board on the Law of the Sea (ABLOS), Monaco, International Hydrographic Bureau, October 16-17, https://www.iho.int/mtg_docs/com_wg/ABLOS/ABLOS_Conf5/Papers/Session7-Paper1-Bateman.pdf

[60] Roach and Smith (2012), *supra* n 10, p 72.

[61] For a list of FON operations protesting states' use of straight baselines over Fiscal Years 1991-2015, see http://policy.defense.gov/OUSDPOffices/FON.aspx. For a useful table setting out countries who have made claims to (illegal) straight baselines and the year(s) of U.S. protest(s) and assertion(s) of right, see Roach and Smith (2012), *supra* n 10, p 74 -82.

[62] The 1958 Declaration on the Territorial Sea states that the baseline for measuring the breadth of China's territorial sea is "the line composed of the straight lines connecting basepoints on the mainland coast and on the outermost of the coastal islands". Text reproduced in U.S. Department of State, Bureau of Intelligence and Research (1972), *Limits in the Seas No. 43, Straight baselines: People's Republic of China*, July 1, p 2, http://www.state.gov/documents/organization/58832.pdf

[63] Article 3 of the Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone states, "The method of straight baselines composed of all the straight lines joining the adjacent base points shall be employed in drawing the baselines of the territorial sea of the People's Republic of China." English translation by Legislative Affairs Commission of the Standing Committee of the National People's Congress of the People's Republic of China, reproduced in U.S. Department of State, Bureau of Oceans and International Environmental and Scientific Affairs (1996), *Limits in the Seas No. 117, Straight baselines: People's Republic of China*, July 9, p 11, http://www.state.gov/documents/organization/57692.pdf

[64] "Declaration of the Government of the People's Republic of China on the Baselines of the Territorial Sea of the People's Republic of China", May 15, 1996, http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/chn_mzn7_1996.pdf

[65] On China, see U.S. Department of State, Bureau of Oceans and International Environmental and Scientific Affairs (1996), *Limits in the Seas No. 117*, *supra* n 63. On Taiwan, see U.S. Department of State, Bureau of Oceans and International Environmental and Scientific Affairs (2005), *Limits in the Seas No. 127, Taiwan's maritime claims, November 15*, pp 10-14, http://www.state.gov/documents/organization/57674.pdf
In 2012, China also established straight baselines in the East China Sea: "Statement of the Government of the People's Republic of China on the Baselines of the Territorial Sea of Diaoyu Dao [Senkaku Islands] and its Affiliated Islands", September 10, 2012, http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/chn_mzn89_2012_e.pdf

law does not permit the drawing of straight baselines as the only method of employing baselines along the coastline of China. Therefore the second paragraph of Article 3 of the 1992 Law is without foundation in international law.

The United States also notes that much of China's coastline does not meet either of the two geographic conditions specified in article 7(1) of the Law of the Sea Convention required for applying straight baselines; the localities between most of the basepoints identified in the Declaration on Baselines of 15 May 1996 are neither deeply indented or cut into, nor are they fringed with islands along the coast in the immediate vicinity. Further, for the most part, the waters enclosed by the new straight baseline system do not have a close relationship with the land, but rather reflect the characteristics of high seas or territorial sea, and, in some locations, the straight baselines depart to an appreciable extent from the general direction of the coast. In these areas, the United States believes use of the normal baseline, the low-water line, is required by international law.

The Declaration of 15 May 1996 identifies 48 continuous straight baseline segments connecting 49 basepoints along the mainland of China and Hainan Island which total over 1,700 nautical miles. The United States notes that over half of these segments exceed 24 nautical miles in length, and three of them are each more than 100 nautical miles long.

While the Law of the Sea Convention does not place a specific distance limit on the length of a straight baseline, the United States believes that as a general rule baseline segments should not exceed 24 nautical miles. This limit is implied from a close reading of the relevant provisions of the Law of the Sea Convention.

Article 7(1) speaks of the "immediate vicinity" of the coast. Article 7(3) states that "the sea areas lying within the line must be sufficiently closely linked to the land domain to be subject to the regime of internal waters". In both of these descriptions, the implication is strong that the waters to be internalized would otherwise be part of the territorial sea. China's coastline does not present any unusual situation where international waters (beyond 12 nautical miles from the appropriate low-water line) could be somehow "sufficiently closely linked" as to be subject to conversion to internal waters.[66]

(According to the Department of Defense's Annual Freedom of Navigation (FON) Reports (1991-2015), FON operations against China's excessive straight baselines took place in Fiscal Year 2011, that is, almost 15 years after the United States protested China's establishment of straight baselines. After that, assertions took place in Fiscal Years 2013, 2014 and 2015.[67])

The highlighting of U.S. responses to three types of excessive maritime claims that are particularly problematic in the region—the insistence on prior authorization or notification for warships to exercise innocent passage, the prohibition of military activities in the EEZ, and the drawing of straight baselines when geographic conditions for doing so are not satisfied—demonstrate how it has been meticulous in setting out its interpretation of international law (an interpretation also shared by the majority of countries) in word as well as deed. Criticism that the United States has prioritized FON operations over diplomatic efforts fail to take this broader context of detailed diplomatic protests alongside FON operations into account.

FON Operations: Legal assertions of rights, not "use of force"

A more fundamental criticism that has been leveled against FON operations is that they are

[66] State Department telegram 96 State 181478, delivered August 21, 1996, excerpted in Roach and Smith (2000), *supra* n 59, pp 62-63.
[67] See Department of Defense Annual Freedom of Navigation Reports, http://policy.defense.gov/OUSDPOffices/FON.aspx

"contrary to customary international law" [68] and are a "threat or use of force" prohibited under Article 2(4) of Charter of the United Nations. An editorial in China's official *Xinhua* news, for instance, argues:

> The Law of the Sea Treaty stipulates that any resorting to the threat or use of force against coastal sovereignty, territorial integrity or political independence, or any resorting to the threat or use of force that violates purposes and principles of the UN Charter, are all regarded as actions destabilizing the peace, order or security in coastal states.
>
> However, the United States has defied the law by sailing two warships over the past weeks, including one carrying Defense Secretary Ashton Carter through the South China Sea in what the Pentagon claimed as "freedom of navigation" operations.[69]

The International Court of Justice in the *Corfu Channel* case, however, has held that "mission[s]" to affirm a right are beyond reproach. On the facts, the ICJ found that the legality of the United Kingdom sending a warship through the Corfu Strait not only to carry out passage for the purposes of navigation, but also to test Albania's attitude, could not be disputed, provided that it was carried out in a manner consistent with the requirements of international law.[70]

There was on the facts of the *Corfu Channel* case a denial by force of the UK's right of passage of warships through Straits connecting two parts of the high seas. Some have used this to argue that there must first have been a wrongful denial *by force* of the exercise of rights and the *unwillingness to use pacific means to settle the dispute*.[71] Yet, the court in the *Corfu Channel* case did not require this, nor should these be necessary elements. As then Assistant Secretary of State for Oceans Negroponte explained in 1986, the exercise of rights "is a legitimate, peaceful assertion of a legal position and nothing more". The position that FON operations stand on solid legal grounds is reinforced by the responses of other states to the recent FON operations in the South China Sea.

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[68] From the outset, the U.S. FON Program had its detractors. The Group of Coastal States at UNCLOS III considered it "unacceptable, being contrary to customary international law"; Chile, Columbia, Ecuador and Peru, declared that the program was "seemingly based on aggressive intentions"; Angola Argentina, Brazil, China, Columbia, Costa Rica, El Salvador, the Philippines, Romania, the Soviet Union, and Vietnam also made statements criticizing it. See account in Aceves (1995-1996), *supra* n 19, pp 282-283.

[69] "Commentary: It is Washington that violates int'l law in South China Sea", November 21, 2015, http://news.xinhuanet.com/english/2015-11/21/c_134839738.htm. Aceves (1995-1996), *supra* n 19, pp 319-320, appears to support this argument:

> The notion that states must take action which may lead to a violent confrontation or lose their rights under international law is inconsistent with the most basic principles of international law. Article 2(4) of the UN Charter provides that "[a]ll Member shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations. In addition, article 2(3) of the UN Charter requires that "[a]ll Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered. The parties to such disputes are required to seek a solution by negotiation, arbitration, judicial settlement, or other peaceful means.
>
> The 1982 LOS Convention also requires the peaceful settlement of disputes. … While the *Corfu Channel* case affirms the assertion of rights doctrine, the ICJ's opinion cannot be read isolated from other principles of international law. In his analysis of the *Corfu Channel* case, JL Brierly noted that the conditions for a forcible affirmation of legal rights only exist if the other state is "wrongfully denying by force the exercise of those rights but also unwilling to use pacific means to settle the dispute."

See also Etzioni (2015). Contrast with Aceves' earlier 1993 piece, where he appears to take a more favorable approach to FON operations and credits them for first, pushing the Soviet Union into formal negotiations on the right of innocent passage; second, affirming the provisions of UNCLOS relating to the traditional uses of the oceans; and third, showing a compelling relationship between law and strategy. William Aceves (1993) "Diplomacy at sea: U.S. freedom of navigation operations in the Black Sea" in John Norton Moore and Robert Turner (eds), *Readings on International Law from the Naval War College Review 1978-1994*, pp 243-262, pp 258-259.

[70] International Court of Justice, *The Corfu Channel Case (Merits)*, Judgment of April 9, 1949, p 30.

[71] Aceves (1995-1996), *supra* n 19, citing JL Brierly (1963), *The law of nations: An introduction to the international law of peace* (6th edition by Sir Humphrey Waldock. 1984. Oxford: Clarendon Press), p 304.

Responses to recent FON operations in the South China Sea

Most countries have been supportive or at least not objected to U.S. FON operations. In the South China Sea, Beijing, unsurprisingly, expressed strong objections to the USS Lassen, the USS Curtis Wilbur and the USS William P Lawrence operations in October 2015, January 2016 and May 2016, respectively. China, however, was the lone voice in this respect (with the possible exception of Indonesia, though Jakarta's objections were likely overstated). Countries in the region have either expressed explicit support for U.S. FON operations; indirectly supported them through statements made at around the same time underlining the importance of the principle of freedom of navigation; or remained silent. Vietnam's responses to the USS Curtis Wilbur operation near Triton Island, though largely going went unnoticed, was significant.

1. USS Lassen operation (October 27, 2015)

On October 27, 2015, the U.S. Navy destroyer USS Lassen conducted a FON operation in the South China Sea by transiting inside 12 nautical miles of five maritime features in the Spratly Islands: Subi Reef (occupied by China), Northeast Cay (occupied by the Philippines), Southwest Cay (occupied by Vietnam), South Reef (occupied by Vietnam) and Sandy Cay (unoccupied), which are claimed by China, Taiwan, Vietnam, and the Philippines. No claimants were notified prior to the transit.[72]

China "expresse[d] strong dissatisfaction and oposition" on the basis that the USS Lassen had "illegally entered waters near relevant islands and reefs of China's Nansha Islands [Spratly Islands] without the permission of the Chinese government" and thereby "threatened China's sovereignty and security interests, put the personnel and facilities on the islands and reefs at risk and endangered regional peace and stability."[73] The Chinese PLA Navy dispatched a guided missile destroyer and a patrol ship to send warnings to the USS Lassen.[74]

In contrast, the Philippines strongly suppored the exercise. The Philippines president stated that he welcomed the patrol of a U.S. warship and that there was "no issue as to this U.S. naval ship traversing under international law in waters that should be free to be travelled upon by any non-belligerent country."[75]

A Vietnam spokesman told reporters that Vienam respects freedom of navigation and overflight in the East Sea consistent with relevant provisions of UNCLOS as well as its national laws. Others within Vietnam urged the government to be even more supportive of the U.S. action.[76]

As a further departure to its more low-key approach to the dispute despite it being a claimant, Malaysia's Defense Minister Hishammuddin Hussein at the ASEAN Defense Ministers Meeting Plus described the U.S. patrol as "very important" and stated that countries with a stake in the region

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[72] Secretary of Defense Ash Carter, letter to Chairman, Committee on Armed Services, United States Senate, John McCain, December 21, 2015 (in response to the latter's letter regarding U.S. military operations in the South China Sea dated November 9, 2015).

[73] "Foreign Ministry Spokesperson Lu Kang's remarks on USS Lassen's entry into waters near relevant islands and reefs of China's Nansha Islands", October 27, 2015, http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1309567.shtml

[74] "DM Spokesman: China firmly opposes U.S. warship's patrol in Nansha", *China Military Online*, October 28, 2015, http://eng.mod.gov.cn/DefenseNews/2015-10/28/content_4626256.htm

[75] Quoted in Aya Lowe (2015), "Philippines' Aquino welcomes US warship's deployment in disputed sea", *Channel NewsAsia*, October 27, http://www.channelnewsasia.com/news/asiapacific/philippines-aquino/2221382.html

[76] Tra Mi (2015), "Vietnam gives noncommittal response to US patrol in S China Sea", *Voice of America*, October 29, http://www.voanews.com/content/vietnam-gives-noncomittal-response-to-us-patrol-in-south-china-sea/3028642.html

should exercise their right to operate in "international waters". (The only caveat he raised was that China and the U.S. should work together to ensure there was no risk of escalation.)[77]

Also lending indirect support to the USS Lassen operation, were statements from Singapore, whose Minister of Foreign Affairs Vivian Balakrishnan reiterated, "Singapore supports the right of freedom of navigation and over-flight under international law, including the 1982 United Nations Convention on the Law of the Sea (UNCLOS)".[78]

Indonesia was possibly the only outlier amongst Southeast Asian countries in its response.[79] Its Coordinating Minister for Political, Legal and Security Affairs Luhut Pandjaitan criticized U.S. "power projection", stating the day after the USS Lassen operation that, "We disagree, we don't like any power projection …. Have you ever heard of power projection solving problems?"[80] His statement, and the title of the news report quoting him ("Indonesia calls for US-China to "restrain themselves", lashes US "power projection" after Spratly sail-by") was stronger than his mild response earlier that month when asked for his views on FON operations near contested features that the United States was then contemplating. At a public forum, he simply stated, "Talk is best".[81]

Outside of Southeast Asia, Japan's Defense Minister Gen Nakatani maintained that "it is critical to ensure the basic principles of international law, including freedom of navigation in the South China Sea and flight over the high seas. … *We support the actions* recently taken by the United States."[82] [emphasis added] In a similar refrain, South Korean Defense Minister Han Min-Koo declared during a news briefing with visiting U.S. Defense Secretary Ash Carter after trilateral meetings between Japan, China and South Korea that, "It is our stance that *freedom of navigation and freedom of flight should be ensured* in this area, and that any conflicts be resolved according to relevant agreements and established international norms."[83] [emphasis added] Australia's Defense Minister Marise Payne declared that "Australian vessels and aircraft will continue to exercise rights under international law to freedom of navigation and freedom of overflight"[84] and that Australia "*supports the rights of all states to exercise freedom of navigation and freedom of overflight international law*".[85] [emphasis added] Australian defense planners are also reportedly looking into the possibility of a

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[77] Trefor Moss (2015), "Support grows for U.S. approach in South China Sea", *The Wall Street Journal*, November 3, http://www.wsj.com/articles/support-grows-for-u-s-approach-in-south-china-sea-1446545714

[78] "MFA Press Statement: Introductory calls on Minister for Foreign Affairs Minister Dr Vivian Balakrishnan", October 28, 2015, http://www.mfa.gov.sg/content/mfa/media_centre/press_room/pr/2015/201510/press_20151028.html

[79] *Cf* Mark Valencia (2015) "USS Lassen incident: China's possible responses", *The Straits Times*, November 9, http://www.straitstimes.com/opinion/uss-lassen-incident-chinas-possible-responses. Valencia cites Indonesia's response as evidence of "cracks" starting to appear in ASEAN.

[80] Quoted in Daniel Moss (2015), "Indonesia calls for US-China to 'restrain themselves', lashes US 'power projection' after Spratly sail-by", *South China Morning Post*, October 28, http://www.scmp.com/news/china/diplomacy-defence/article/1873456/indonesia-calls-us-china-restrain-themselves-lashes-us?page=all

[81] Coordinating Minister for Political, Legal and Security Affairs, Republic of Indonesia, Luhut Binsar Pandjaitan, "President Joko Widodo's First Year in Office: An Assessment", distinguished lecture, RSIS-Brookings Conference, "Southeast Asia and the United States: A stable foundation in an uncertain environment?", Singapore, October 19, 2015.

[82] Press Conference by the Defense Minister Nakatani, October 30, 2015, http://www.mod.go.jp/e/pressconf/2015/10/151030.html

[83] Quoted in Jonathan Cheng and Gordon Lubold (2015), "South Korea calls for South China Sea rights: Defense minister in Seoul makes his nation's strongest remarks yet in support of freedom of navigation", *The Wall Street Journal*, November 2, http://www.wsj.com/articles/south-korea-calls-for-south-china-sea-rights-1446461006

[84] Quoted in Rob Taylor (2015), "Australia prepares option of sail-through to test China", *The Wall Street Journal*, October 28, http://www.wsj.com/articles/australia-prepares-option-of-sail-through-to-test-china-1446023112?cb=logged0.5669598125386983

[85] Quoted in Andrew Greene (2016), "South China Sea: US admiral Joseph Aucoin urges Australia to launch 'freedom of navigation' operation", *ABC News*, February 22, http://www.abc.net.au/news/2016-02-22/aus-should-challenge-claims-in-south-china-sea-says-admiral/7189598

naval sail-through close to China's artificial islands in the South China Sea,[86] though there are questions about whether Canberra had already quietly done this. In mid-December, a BBC reporter flying near disputed features in the South China Sea picked up an Australian broadcast.[87]

2. USS Curtis Wilbur Triton Island operation (January 30, 2016)

On January 30, 2016, the USS Curtis Wilbur transited in innocent passage within 12 nautical miles of Triton Island. The Department of Defense stated that the operation "challenged attempts by three claimants, China, Taiwan and Vietnam, to restrict navigation rights and freedoms around the features they claim by policies that require prior permission or notification of transit within territorial seas." No claimants were notified prior to the transit.[88]

Pundits had predicted that the second FON operation would take place within 12 nautical miles of Mischief Reef in the Spratlys, a low-tide elevation that China has turned into an artificial island.[89] Selecting Triton Island for the second FON operation near disputed features in the South China Sea allowed the United States to spotlight its objections to *excessive maritime claims*, rather than China's island building activities. This allowed more realistic expectations of what FON operations are and are not intended to achieve, namely, reinforcing maritime rights vested under international law, and not a direct pushback on China's island-building activities or militarization of features.

The contrast between Beijing's response to the FON operation around Triton Island, on the one hand, and that of Hanoi and Taipei, on the other hand, is instructive. China's 1992 Law on the Territorial Sea and the Contiguous Zone mandates *prior authorization* before military vessels can exercise innocent passage in its territorial sea. In the same vein, domestic laws in Vietnam and Taiwan require *prior notification* for warships to exercise innocent passage. Vietnam's 2012 Law of the Sea statute, however, also states, "In case there are differences between the provisions of this Law and those of an international treaty to which the Socialist Republic of Viet Nam is a party, *the provisions of the international treaty shall prevail*" [emphasis added], thereby suggesting that Hanoi might bring its practice in line with UNCLOS, which says nothing about prior notification.

After the U.S. sail-by, Beijing blustered and accused the United States of "violat[ing] the relevant Chinese law and enter[ing] China's territorial sea without authorization".[90] Hanoi, however, coolly stated that "Viet Nam *respects the right of innocent passage* through the territorial sea conducted in accordance with relevant rules of international law, in particular the UNCLOS (Article 17)."[91]

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[86] Taylor (2015), *supra* n 84.

[87] See "Flying close to Beijing's new South China Sea islands" (2015), *BBC News*, December 14, http://www.bbc.com/news/magazine-35031313; and Shannon Tiezzi (2016), "Did Australia secretly conduct its own freedom of navigation operation in the South China Sea?", *The Diplomat,* December 16, http://thediplomat.com/2015/12/did-australia-secretly-conduct-its-own-freedom-of-navigation-operation-in-the-south-china-sea/

[88] U.S. Department of Defense, Statement on USS Curtis Wilbur's freedom of navigation mission past Triton Island, January 30, 2016, available at https://seasresearch.wordpress.com/2016/01/31/full-statement-of-us-dept-defense-on-uss-curtis-wilburs-fonop-past-triton-island/

[89] See, for example, Ankit Panda (2015) "Next US Navy South China Sea freedom of navigation operation: Mischief Reef," *The Diplomat*, November 23, http://thediplomat.com/2015/11/next-us-navy-south-china-sea-freedom-of-navigation-operation-mischief-reef/

[90] "Foreign Ministry Spokesperson Hua Chunying's remarks on US navy vessel's entry into territorial waters of Zhongjian Dao of China's Xisha Islands", January 30, 2016, http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1336822.shtml

[91] "Remarks by MOFA Spokesperson Le Hai Binh on U.S. Navy's FONOP", January 31, 2016, http://www.mofa.gov.vn/en/tt_baochi/pbnfn/ns160131221102/view

Taiwan's foreign ministry stated that Taiwan has "never obstructed the freedom of other countries to navigate in the South China Sea's waters or to fly over the area in accordance with international law" and that the ROC abides by the UN Charter and UNCLOS "regarding solving disputes peacefully and regulations on navigation and flight rights."[92] In short, unlike China, neither Vietnam nor Taiwan, though both appearing on their books to require prior notification for warships to exercise innocent passage through their territorial sea, objected to U.S. FON operations near Triton Island.

3. USS William P Lawrence Fiery Cross Reef operation (May 10, 2016)

On May 10, 2016, the United States conducted a FON operation near Fiery Cross Reef in the Spratly Islands, a feature on which China is currently building a 3,000 meter airstrip.

The Department of Defense issued a statement that the USS William P Lawrence exercised the right of innocent passage while transiting inside 12 nautical miles of Fiery Cross Reef, a high-tide feature that is occupied by China, but also claimed by the Philippines, Taiwan, and Vietnam. This operation "challenged attempts by China, Taiwan, and Vietnam to restrict navigation rights around the features they claim, specifically that these three claimants purport to require prior permission or notification of transits through the territorial sea, contrary to international law. Because the Philippines' maritime claims in relation to South China Sea features do not purport to restrict the exercise of navigation rights and freedoms under the Law of the Sea by the United States and others, they were not challenged during this operation."[93]

China responded by scrambling two fighter jets and having three warships shadow the USS William P Lawrence. A spokesperson for the Ministry of Foreign Affairs accused the United States of "illegally enter[ing] waters near the relevant reef of China's Nansha Islands" and "threaten[ing] China's sovereignty and security interests, endanger[ing] safety of personnel and facilities on the reef, and jeopardize[ing] regional peace and stability."

As of this writing, neither Vietnam nor Taiwan has voiced objections to the operation. Australia's prime minister Malcolm Turnbull confirmed Australia's "strong commitment to freedom of navigation throughout the region and the importance of any territorial disputes being resolved peacefully and in accordance with international law".[94]

FON Operations in the South China Sea: A departure from previous practice

FON operations in the South China Sea are generally no different from FON exercises elsewhere: at times, they attract publicity,[95] but in most other cases, they take place under the radar. They are also employed to challenge

[92] "Taiwan no hindrance to navigation freedom in South China Sea: MOFA", February 3, 2016, Republic of China (Taiwan) Ministry of the Interior, http://www.moi.gov.tw/english/english_news/news_detail.aspx?sn=14694&type=taiwan&pages=9

[93] U.S. Department of Defense, Statement on USS William P Lawrence's FONOP past Fiery Cross Reef, May 10, 2016, https://seasresearch.wordpress.com/2016/05/10/full-statement-of-us-dept-defense-on-uss-william-p-lawrences-fonop-past-fiery-cross-reef/

[94] Quoted in "Australia defends U.S. in latest South China Sea dispute", *Reuters*, May 11, 2016, http://www.reuters.com/article/us-southchina-sea-australia-usa-idUSKCN0Y22QT

[95] Arguably the most visible FON challenges have occurred in the Gulf of Sidra where the U.S. and Libyan militaries clashed as a result of the United States operationally challenging Libya's assertion that the entire Gulf was its territory. Clashes resulted in the shooting down of Libyan aircraft (1981 and 1989) and the sinking of Libyan naval units (1986). For a brief account, see Rose (1990), *supra* n 15, footnote 63.

disagreement over the law (such as whether a warship must seek authorization or give notice before exercising innocent passage, and whether military activities are permissible in the EEZ), as well as disagreement over law *and fact* (such as the legitimate categorization of a maritime feature and therefore its maritime entitlement, and whether the conditions for drawing straight baselines are satisfied in any given case). In the Gulf of Sidra dispute, for instance, the quarrel was over whether the gulf might be regarded as Libya's internal waters, as its foreign ministry claimed in a note circulated in 1973. In that note, a closing line approximately 300 miles long defined the Gulf. The United States took the position that Libya cannot make a valid historic waters claim and meets no other international law criteria for enclosing the Gulf of Sidra, and could accordingly only validly claim a 12 nautical mile territorial sea as measured from the normal low-water line along its coast, and a 200 nautical mile exclusive economic zone in which it may exercise resource jurisdiction.[96]

Whether targeting a coastal state's interpretation of fact or law, U.S. FON operations have till recently only challenged *actual*[97] rather than *potential* claims. However, beginning with the USS Lassen and USS William P Lawrence operations, FON operations in the South China Sea are now appearing to challenge *potential* claims as well.

The difficulties posed by the ambiguity of China's claims were highlighted by the USS Lassen operation. Considerable uncertainty surrounded the exercise, but a letter from the Secretary of Defense Ashton Carter in response to the Chairman of the Committee on Armed Services' request for clarification helped to shed light on it. The letter, which forced the Department of Defense to carefully think through its justification for the exercise, is worth quoting at length:

> The FONOP involved a continuous and expeditious transit that is consistent with both the right of innocent passage, which only applies in a territorial sea, and with the high seas freedom of navigation that applies beyond any territorial sea. With respect to Subi Reef, *the claimants have not clarified whether they believe a territorial sea surrounds it*, but one thing is clear: under the law of the sea, China's land reclamation cannot create a legal entitlement to a territorial sea, and does not change our legal ability to navigate near it in this manner. *We believe that Subi Reef, before China turned it into an artificial island, was a low-tide elevation and that it therefore cannot generate its own entitlement to a territorial sea*. However, if it is located within 12 nautical miles of another geographic features that is entitled to a territorial sea—as might be the case with Sandy Cay[98]—then the low-water line on Subi Reef could be used as the baseline for measuring Sandy Cay's territorial sea. In other words, in those circumstances, Subi Reef could be surrounded by a 12-nautical mile-territorial sea despite being submerged at high tide in its natural state. *Given the factual uncertainty, we conducted the FONOP in a manner that is lawful under all possible scenarios* to preserve U.S options should the factual ambiguities be resolved, disputes settled, and clarity on maritime claims reached.
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> The specific excessive maritime claims challenged in this case are less important than the need to demonstrate that countries cannot restrict navigational rights and freedoms

[96] U.S. Department of State, Bureau of Oceans and International Environmental and Scientific Affairs (1992), *Limits in the Seas No. 112, United States responses to excessive national maritime claims*, March 9, 1992, p 17, http://www.state.gov/documents/organization/58381.pdf

[97] The U.S. Department of Defense describes the FON Program as aiming to "demonstrate a non-acquiescence to excessive maritime claims *asserted* by coastal states." [emphasis added] U.S. Department of Defense Freedom of Navigation Program, Fact Sheet, *supra* n 20.

[98] The suggestion that Subi Reef might be within 12 nautical miles of Sandy Cay is at odds with the *Philippines v China* case that Subi Reef (along with Second Thomas Shoal and Mischief Reef) is located at a distance of more than 12 nautical miles from any other high-tide feature. *Philippines v China*, Final Transcript – Day 2 – Merits Hearing, p 23, http://www.pcacases.com/web/sendAttach/1548

> around islands and reclaimed features contrary to international law. [emphasis added]

Thus, the United States was highlighting its objections to first, any claim that Subi Reef was a rock (or island) generating a territorial sea; second, any claim that land reclamation turned Subi Reef into a rock (or island) generating a territorial sea; and third, any claim that warships require prior authorization before exercising innocent passage. Given that China has not clarified its position on the status of either Subi Reef or Sandy Cay, nor made an official claim to territorial sea whether on the basis of natural or reclaimed land territory, the United States was in effect registering (pre-emptive) objections to (as yet) non-materialized claims.

The South China Sea poses several layers of difficulty for the exercise of maritime rights. The first arises from the dashed line. China (and Taiwan[99]) has not clarified the meaning of the dashed line, which may be a claim to all the waters within the dashed line or (merely) to the land features contained therein and maritime zones made from them in accordance with UNCLOS. If the former, it is also unclear whether the claim is one of historic title or "historic rights"—whatever any such claim may mean for navigation rights—and whether historical claims survive the Convention.[100]

The second layer of complexity arises from the proper characterization of the features in the South China Sea, which, together with properly constituted baselines, determine their maritime entitlements under UNCLOS. In this respect, the USS Lassen operation appeared to be the first time that the United States has taken a position (albeit still not definitively) on the *status* of a feature in the South China Sea and acted on it.

The position taken in Secretary Carter's letter on the status of Subi Reef and Sandy Cay is consistent with the classification of features in a map and accompanying gazetteer issued in 2010 by the U.S. Department of State's Office of the Geographer and Global Issues on the South China Sea,[101] which is helpful in giving us a rough idea of the U.S. position, though it is not an official statement. The map and gazette classify Subi Reef as a "reef" that is not visible at high tide, that is, a low-tide elevation (or even submerged feature). Sandy Cay is classified as an "island". No criteria for these classifications are provided in the map/gazette. The position that Subi Reef is a low-tide elevation, however, appears to be consistent with the U.S. sailing directions, which states that Subi Reef "dries" (suggesting that it is visible at high tide),[102] the United Kingdom sailing directions,[103] and the Philippines case against China.[104]

A third layer of complexity arises from whether or not the right to a territorial sea is *ab initio* (inherent form the outset; *lit*. from the beginning) or must be claimed. The view that it must

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[99] For a discussion on the evolution of Taiwan's claims, see Lynn Kuok (2015), "Tides of change: Taiwan's evolving position in the South China Sea", Brookings, Center for East Asia Policy, East Asia Policy Paper 5, http://www.brookings.edu/~/media/research/files/papers/2015/05/taiwan-south-china-sea-kuok/taiwan-south-china-sea-kuok-paper.pdf

[100] For a discussion of this, see United States Department of State, Bureau of Oceans and International Environmental and Scientific Affairs (2014), *Limits in the Seas, No. 143, China: Maritime Claims in the South China Sea*, December 5, http://www.state.gov/documents/organization/234936.pdf It is also discussed in the *Philippines v China* case (see the transcript of merits hearing available at http://www.pcacases.com/web/view/7).

[101] U.S. Government, Map No. 803425AI(G02257)1-10, January 2010. Map and gazetteer available at the website of the Centre for International Law, National University of Singapore, https://cil.nus.edu.sg/research-projects/ocean-law-policy/south-china-sea/maps/

[102] National Geospatial-Intelligence Agency (2014, 15th ed), *South China Sea and the Gulf of Thailand*, Publication 161, Sailing Directions (Enroute), Springfield, Virginia.

[103] United Kingdom Hydrographic Office, *Admiralty Sailing Directions: China Sea Pilot (NP31)*, Vol. 2 (10th ed., 2012). MP, Vol. VII, Annex 235.

[104] *Philippines v China*, Final Transcript – Day 2 – Merits Hearing, *supra* n 98, pp 29-30.

be claimed arises from the wording of the Convention maintaining that and a state has a "*right to establish*" [emphasis added] the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines "determined in accordance with this Convention".[105] (In contrast, the rights of a coastal state over the continental shelf "do not depend on occupation, effective or notional, or on any express proclamation".[106])

If the view that a state is not entitled to a territorial sea till one is claimed is correct, then the question arises as to whether the United States (or any other state) should be observing territorial seas in the Spratlys. None of the other claimant states have claimed a territorial sea in the Spratlys. Further, China has a domestic law mandating that its territorial seas shall be measured from straight, rather than normal baselines (the default position). As noted above, Beijing has not established straight baselines in the Spratlys, though it has done so for "the baselines of part of its territorial sea adjacent to the mainland and those of the territorial sea adjacent to its Xisha [Paracel] Islands"[107] (it has also established straight baselines for the Diaoyu/Senkaku Islands in the East China Sea[108]). The United States may respect an inchoate territorial sea as a policy decision, but this could have legal implications for whether the United States is said to have accepted such rights.[109]

Accordingly, some argue that the United States should be exercising all freedoms of the high seas in the Spratlys until such time as baselines are established and/or territorial seas claimed, and have criticized the Subi Reef operation from this perspective.[110] The Fiery Cross Reef operation would be open to the same criticism. The United States appears to have made the policy decision to respect territorial seas for features that appear to be entitled to one, regardless of whether territorial seas have been formally claimed.[111]

The layers of complexity outlined above and the ambiguity surrounding China's claims have posed difficulties for the United States and its objective of challenging excessive maritime claims. As one analyst perceptively notes, this strategy becomes problematic to the degree that Chinese nationalists make the same (or greater) over-inference about China's actual claims: China could then face significant pressure from domestic forces that do not appreciate the careful nuance of its official positions, which have carefully avoided claiming all the waters within the dashed line as its own.[112] China's 2009 and 2011 Notes Verbales to the United Nations (only) claim "indisputable sovereignty over the islands in the South China Sea and the adjacent waters" and "sovereign rights and jurisdiction over the relevant waters as well the seabed and subsoil thereof." If reference to "adjacent

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[105] Article 3 UNCLOS.
[106] Article 77(3) UNCLOS.
[107] "Declaration of the Government of the People's Republic of China on the Baselines of the Territorial Sea of the People's Republic of China", May 15, 1996, *supra* n 64.
[108] *Supra* n 65.
[109] Conversation with Ashley Roach, Singapore, February 11, 2016. See also Ashley Roach (2015), "China's shifting sands in the Spratlys", *American Society of International Law, 19*:15, July 15, endnote 21 and accompanying text.
[110] Conversation with Roach, *ibid*.
[111] Notwithstanding the lack of formal claim, after the USS William P Lawrence operation, China's Department of Defense referred to the United States' "unauthorized illegal entry into *Chinese waters* near China's Nansha islands by the U.S. warships and warplanes" [emphasis added] as a "serious provocation". http://eng.mod.gov.cn/TopNews/2016-05/11/content_4656352.htm
[112] Steven Stashwick (2016), "80 percent of zero: China's phantom South China Sea claims", *The Diplomat*, February 9, http://thediplomat.com/2016/02/80-percent-of-zero-chinas-phantom-south-china-sea-claims/

waters" is read to refer to the territorial sea and reference to "relevant waters" is read to refer to the EEZ, China's claims would be consistent with UNCLOS and international law.[113]

Yet, even if China does not officially claim all the water within the dashed line, the reality is that it is increasingly asserting de facto control over the area. A failure to conduct FON operations in the South China Sea would give China a free rein to dominate the space. Beijing is said to be considering declaring straight baselines around the Spratlys and claiming maritime zones from them,[114] as it did in the Paracels. Regular FON operations in the Spratlys will reduce the chances of this happening since it would put the onus on Beijing to physically defend these claims against more powerful U.S. forces.

The way forward: Policy recommendations

Flowing from the discussion above, this paper recommends that the United States take the following steps:

1. Continue to regularly assert maritime rights in the South China Sea, including in the Spratlys

FON operations have been touted as a means to *challenge* excessive maritime claims. A better way of framing it might be *assertions of maritime rights* (so that these are reinforced and not detracted from in the future). This recasting is particularly appropriate in the Spratlys where China has been intentionally vague about the maritime claims it is making.

In addition to operations exercising a warship's right to innocent passage in a territorial sea without seeking authorization or giving notice, the United States might want to:

- exercise high sea freedoms around features like Mischief Reef in the Spratlys, particularly if the tribunal decision in the *Philippines v China* case confirms that the feature is not entitled to a territorial sea;[115]
- exercise high sea freedoms *through* the Paracels and Spratlys outside of potential territorial seas. The former course would reiterate that China's established baselines are without legitimacy. The latter course would serve as a warning to China that any attempts to establish straight baselines around the Spratlys is likely to bring it head-to-head with the United States; and
- continue conducting "other FON-related activities", that is, activities that have, say, information collection as their primary goal but challenging excessive claims as its secondary effect.[116]

Once the tribunal's award is made, it goes without saying that the United States should be asserting maritime rights in a manner consistent with the award. At the very least, the tribunal will clarify the status and entitlement of Scaborough Shoal, Mischief Reef, Second Thomas Shoal, Subi Reef, Gaven Reef, McKennan Reef (including Hughes Reef), Johnson Reef, Cuarteron Reef and Fiery Cross

[113] Robert Beckman and Clive Schofield (2014), "Defining EEZ claims from islands: A potential South China Sea change," *The International Journal of Marine and Coastal Law, 29*, pp 193-243, p 209.
[114] Conversation with senior Chinese diplomat, *supra* n 13.
[115] Zack Cooper and Bonnie Glaser (2016), "How America Picks Its Next Move in the South China Sea", *The National Interest*, May 11, http://nationalinterest.org/feature/how-america-picks-its-next-move-the-south-china-sea-16153?page=2, also make the case for this.
[116] Odom (2015), *supra* n 31, provides a very useful explanation of the distinction between "FONOPS" and "FON-related activities".

Reef.[117] Indeed, the United States could choose to focus on asserting rights near these features. This will give force to the tribunal's decision and make it more difficult for China to ignore the ruling.

Successive U.S. administrations should stay the course of pursuing FON operations consistent with international law regularly during normal times. The 15-year wait before FON operations challenging China's establishment of straight baselines was less than ideal. Regular FON operations can in the longer run minimize the risk of them being seen as provocative and sparking off an incident; the political cost of an assertion during a crisis is likely to be higher.[118]

2. Clearly put on record the maritime right the United States is asserting at the time of a FON operation

If the purpose of a FON operation is to signal and assert one's understanding of one's rights, lack of clarity will do little to advance this, and might even be a step backwards if the media makes unnecessarily escalatory claims. Washington must not only carefully determine beforehand the status of a feature and its maritime entitlement prior to a FON operation, but also consistently message the rights the United States is exercising soon after the exercise. Vague references to defending "freedom of navigation", for reasons highlighted above, are unhelpful. Explicitly stating the rights being asserted will help to throw into sharper relief the nature of the dispute between the United States and China and diminish Beijing's ability to assert that it is not impeding "freedom of navigation". Details such as i. where the operation took place, ii. what the operation did, and iii. what right(s) the United States was asserting should be expeditiously, clearly and consistently made public.[119]

The messaging surrounding the USS Lassen operation, at least at the outset, lacked clarity and consistency, and was thus problematic. The best possible spin on this was that it was aimed at getting Beijing to abandon its carefully cultivated strategic ambiguity and "to force reluctant Chinese officials to put forth claims that are unlikely to find support in international law."[120] But the failure till two months after the operation (and some six weeks after Senator McCain sent a letter requesting clarification) to explain the U.S. position on the status of Subi Reef and whether it generated a territorial sea, as well as to clarify the type of FON operation conducted, undermined the United States' ability to claim the legal and moral high ground. In contrast, the messaging surrounding the USS Curtis Wilbur and the USS William P Lawrence operations were marked improvements with the Department of Defense issuing clear and sufficiently detailed statements soon after the event.

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[117] These features, which are occupied by China, were the subject of the Philippines' submissions. The tribunal found that it had jurisdiction to consider their status and maritime entitlement: see "Press release: Arbitration between the Republic of the Philippines and the People's Republic of China", October 29, 2015, p 8, http://www.pcacases.com/web/sendAttach/1503. The tribunal also heard evidence on some larger features, including Itu Aba (Taiping Island), Thitu, and West York—each of which is claimed by (but not currently occupied by) China: see "Press release: Arbitration between the Republic of the Philippines and the People's Republic of China", November 30, 2015, http://www.pcacases.com/web/sendAttach/1524. It is not clear whether the tribunal will rule on the status and entitlement of these features.

[118] Mandsager (1997), *supra* n 32, p 121; telephone conversation with John Oliver, Senior Ocean Policy Advisor, U.S. Coast Guard Headquarters, Former Chief and Senior Appellate Judge, United States Navy-Marine Corps Court of Criminal Appeals, Adjunct Professor of Law Georgetown University, January 13, 2016.

[119] *Cf* Mira Rapp-Hooper (2015), "Make no mistake: The United States should get its message straight in the South China Sea", *Foreign Affairs*, November 25, https://www.foreignaffairs.com/articles/2015-11-25/make-no-mistake. Rapp-Hooper argues, "in the future, no one should expect the Pentagon to publicly disclose the details of FONOPs, as some policymakers, such as Republican Senator John McCain, have suggested." However, she also states, "The Pentagon should also, on a quarterly basis, confirm that the operations are being conducted as promised, acknowledging in general terms the location of the operations and the nature of the excessive claims they intend to contest."

[120] Graham Webster (2015), "How China maintains strategic ambiguity in the South China Sea", *The Diplomat*, October 29, http://thediplomat.com/2015/10/how-china-maintains-strategic-ambiguity-in-the-south-china-sea/

Looking ahead, the upcoming *Philippines v China* decision will enhance the United States' ability to plan and justify FON operations insofar as light will be shed on the status of some features in the South China Sea. The decision will bolster the United States' ability to argue that its FON operations are in accordance with international law. (While the legitimacy of exercising rights under international law for no other reason than to demonstrate that those rights exist is unassailable, the ultimate legality of any *specific operation* must depend on the rights exercised being within those permitted by UNCLOS for that particular maritime zone.) Immediately following the tribunal award, the United States should publicly declare that it will exercise its maritime rights in the South China Sea in a manner that is strictly in accordance with the tribunal's decision.

3. Publish a consolidated list of all diplomatic protests made in respect of excessive maritime claims

Each year, the Department of Defense compiles an annual FON Report. These reports summarize FON operations and other FON-related activities U.S. forces conduct during the stated fiscal year. It lists the coastal states that have made excessive maritime claim(s), specifies what these excessive claim(s) are, and indicates whether multiple challenges during the reporting period were made. In the Fiscal Year 2015 (October 1, 2014, through September 30, 2015), 13 countries around the world were challenged including China, India, Indonesia, Malaysia, the Philippines, Taiwan and Vietnam.[121]

Although the Department of State has lodged diplomatic protests of excessive maritime claims and many of these are publicly available, it does not appear to have a consolidated list of these protests.[122] The Department of State should consider publishing a consolidated list of all diplomatic protests made over the years in full. This can help counter criticisms that the United States has been heavy handed in its response to what it sees as excessive maritime claims. It can also more clearly set out the United States rationale for regarding certain claims as excessive. This database can also link to statements made by other states and international organizations supporting the United States' reading of international law.

4. Quietly persuade other states to conduct FON operations, engage in joint patrols and/or issue diplomatic protests

Getting more states to become involved in asserting their rights would bolster the majority interpretation of the balance struck during UNCLOS III. Maritime powers such as Australia and the United Kingdom have obvious interests in FON operations to preserve maritime rights.

Countries in the region with less powerful navies must also play their part if they do not wish to see the waters in their backyard come under China's effective control. Greater regional or international

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[121] U.S. Department of Defense "Freedom of Navigation (FON) Report for Fiscal Year (FY) 2015", http://policy.defense.gov/Portals/11/Documents/gsa/cwmd/FON_Report_FY15.pdf

[122] Useful resources are Roach and Smith (2012), *supra* n 10, who highlight protests made by issue throughout their book, and the U.S. Navy Judge Advocate General's Corps Maritime Claims Reference Manual, which highlights (amongst other things) protests made by country: http://www.jag.navy.mil/organization/code_10_mcrm.htm. In addition, Ashley Roach, as chairman of the International Law Association's baselines committee, has also consolidated all publicly available protests by the United States and others, including the European Union, relating to excessive baselines and has set these out in full: "ILA Straight Baselines Study—Protests", draft January 2, 2016, http://www.ila-hq.org/download.cfm/docid/EAB205DC-8032-46A9-9C420D6B3A0697D4

involvement would also help to take the edge off what is being portrayed and regarded as U.S.-China rivalry—to the detriment of all involved.[123] (An exception to the desirability of "all aboard" might be Japan given its complicated history with China.)

The United States has urged countries in the region to consider engaging in patrols, jointly with the United States, or otherwise. Commander of the U.S. Pacific Command Admiral Harry Harris, Jr, has called on regional navies to patrol the South China Sea: "The more patrols we have singularly, or jointly not only in the South China Sea, but through the region, helps to decrease tensions, and helps to improve stability because it reinforces the notion of freedom of the seas, freedom of navigation."[124] But few countries in the region want to stick their necks so far. India has flatly rejected joint patrols stating that India only takes part in joint *exercises*. New Delhi is also concerned about the potential ramifications for the Indian Ocean if its ships take part in U.S.-led patrols in waters close to China.[125]

Short of FON operations or joint patrols, Washington could push for countries to consider lodging diplomatic protests of excessive maritime claims, particularly those that are pertinent to the South China Sea (the requirement of notification or authorization before a warship may exercise innocent passage in the territorial sea, the prohibition of military activities in the EEZ, the use of straight baselines where geographic conditions for their application are not met). Analysts have observed that the United States is typically the only state, or one of the few states, willing to protest excessive maritime claims.[126] An examination of the publicly available diplomatic protests relating to straight baselines compiled by the International Law Association Baselines under the International Law of the Sea,[127] for instance, reveals that excepting the United States and to a more limited extent, the European Union and its member states, most protests are driven by claims which by their geographic proximity have a *direct* impact on a state.[128] In other words, most states fail to take an adequately global view of how excessive maritime claims in one part of the world, however distant, could impact or shape international law more generally. A larger and more unified chorus in this respect could add to the mounting pressure for maritime claims to be kept in check. Already, signs that countries in the region are conforming their own claims to international law (Taiwan and Vietnam, discussed above) are positive.

Whatever the nature of the effort urged by the United States, these calls should be made discreetly and as far away from the media glare as possible. Countries in the region do not want to be publicly singled out to act. This not only puts undue pressure on them, but also makes the United States look bad when they do not (immediately or publicly) jump on board. Countries in the region are watching the United States as much as they are watching one another's responses. In this

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[123] Commander of the U.S. Seventh Fleet, Vice Admiral Joseph Aucoin, speaking in Sydney, highlighted this problematic portrayal. He stated that it would be the region's "best interests" if Australia and other nations sent warships within 12 nautical miles of disputed territory in the South China Sea, and that he "really wish[ed] it wasn't portrayed as US versus China." Quoted in Greene (2016), *supra* n 85, http://www.abc.net.au/news/2016-02-22/aus-should-challenge-claims-in-south-china-sea-says-admiral/7189598

[124] Saifulbahri Ismail (2016) "Joint naval patrols can reduce tensions in South China Sea: U.S.", *Channel NewsAsia*, February 16, http://www.channelnewsasia.com/news/asiapacific/joint-patrols-with-india/2506302.html

[125] Manoj Joshi, Observer Research Foundation, New Delhi, cited in Anjana Pasricha (2016), "India Rejects Joint Naval Patrols with US in South China Sea", *Voice of America*, March 11, http://www.voanews.com/content/india-rejects-joint-naval-patrols-with-us-in-south-china-sea/3231567.html

[126] Kraska (2011), *supra* n 23, p 398.

[127] Roach (2016), *supra* n 122.

[128] Conversation with Roach, *supra* n 109.

respect, Indian Defense Minister Manohar Parrikar's categorical statement that "[t]he question of joint patrol does not arise"[129] within days of Admiral Harris' impassioned calls for "American and Indian Navy vessels steaming together … to maintain freedom of the seas for all nations" in March 2016,[130] did little to inspire.

5. Clarify that the U.S.-China MOU regarding rules of behavior for safety of air and maritime encounters applies to FON operations, and extend the agreement to apply to coastguard

FON operations, even under the best circumstances, carry an inherent risk of incidents at sea or air, which may then escalate. The Memorandum of Understanding between the United States and China for safety of air and maritime encounters helps to reduce this risk.[131] It is not clear, however, that China accepts that it applies in the South China Sea. When asked about the scope of the MOU's application, China's defense ministry reportedly declined to comment. In the same vein, a Chinese diplomat remained non-committal about the scope of its application, stating that the militaries of both countries will follow the code of conduct in the high seas, "no problem", but "when they come very close to our islands and reefs, it will be different."[132] Even if China accepted that the MOU applied in the South China Sea, its applicability in the context of FON operations (rather than just unplanned encounters) is uncertain.[133] The MOU also does not apply on paper at least to coastguard and civilian vessels, which China relies on heavily to assert control in the South China Sea. For instance, non-naval vessels also shadowed the USS Lassen during its October 2015 FON operation.[134]

To the extent that these gaps can be closed—the United States and China are said to be in early stages of negotiations for a similar understanding with respect to the rules of behavior that would be applied by their respective coastguard vessels[135]—this will be positive. The United States should also lend its quiet support to the recent Singapore proposal for China and ASEAN to explore an expanded Code for Unplanned Encounters at Sea (CUES) that includes coast guard and civilian vessels.[136]

6. Redouble diplomatic efforts to arrive at a common understanding with China of what constitutes excessive maritime claims

Diplomatic protests and FON operations should not only be regarded as ends in themselves (for shaping international law and preventing a change of the facts on the ground), but also as means by which, coupled with diplomatic consultations, a

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[129] Quoted in Pasricha (2016), *supra* n 125.

[130] Admiral Harry Harris, Jr (2016), "Let's be ambitious together", Raisina Dialogue Remarks, New Delhi, India, March 2, http://www.pacom.mil/Media/SpeechesTestimony/tabid/6706/Article/683842/raisina-dialogue-remarks-lets-be-ambitious-together.aspx

[131] "Memorandum of Understanding between the Department of Defense of the United States of America and the Ministry of National Defense of the People's Republic of China Regarding the Rules of Behavior for Safety of Air and Maritime Encounters", November 2014.

[132] Conversation with senior Chinese diplomat, *supra* n 13.

[133] Mark Valencia (2014), "The US-China MOU on Air and Maritime Encounters", November 17, http://thediplomat.com/2014/11/the-us-china-mou-on-air-and-maritime-encounters/ However, China's Naval chief Wu Shengli's statement to U.S. chief of naval operations Admiral John Richardson that when the USS Lassen entered the disputed waters, Chinese navy ships warned the U.S. destroyer several times using CUES was encouraging: Yeganeh Torbati (2015), "Despite agreements, risks linger of U.S.-China naval mishaps", *Reuters*, October 30, http://www.reuters.com/article/us-southchinasea-usa-communications-idUSKCN0SO0E220151030

[134] http://www.bloomberg.com/news/articles/2016-02-15/u-s-concerned-by-china-using-non-navy-boats-in-south-china-sea. See also http://www.bloomberg.com/news/articles/2016-02-15/u-s-concerned-by-china-using-non-navy-boats-in-south-china-sea

[135] Email exchange, Office of Maritime and International Law, U.S. Coast Guard Headquarters, January 17, 2016.

[136] Singapore proposed this as the current country coordinator of ASEAN-China relations. Kor Kian Beng (2016), "China, ASEAN agree to examine S'pore proposal on South China Sea", *The Straits Times*, March 2, http://www.straitstimes.com/asia/east-asia/china-asean-agree-to-examine-spore-proposal-on-south-china-sea

common understanding of legitimate or excessive maritime claims may be achieved.[137] The financial and diplomatic costs of FON operations, coupled by U.S. defense budget cuts, underscore the importance of seeking consensus. Diplomatic consultations also play a role in conveying that FON operations are not aggressive or meant to embarrass China,[138] but a legitimate and necessary assertion of rights vested under international law.

FON assertions and diplomatic efforts bore fruit in 1989 when the United States and the Soviet Union reached two agreements just months apart: the Agreement on the Prevention of Dangerous Military Activities, and Uniform Interpretation of Rules of International Law Governing Innocent Passage, in the wake of the Black Sea Bumping incident. The Soviet Union agreed with the United States' interpretation of Article 19 on innocent passage, namely, that the activities listed under Article 19(2) are an "exhaustive list" of activities that "shall be considered to be prejudicial to the peace, good order or security of the coastal state".[139] This was notwithstanding differences in the Russian-language UNCLOS text, which permitted the Soviet Union, not without justification, to argue that its interpretation had merit. [140]

The Uniform Interpretation dramatically reduced if not eradicated the need for FON operations in respect of the right of innocent passage through Soviet territorial waters in the Black Sea,[141] and thus the need for the Soviet Union to respond to a superior force. But it was also more broadly in the interests of the Soviet Union, which recognized that its interests as a growing maritime power were advanced by the interpretation and agreement reached. Thus, Soviet realization that the agreement was in its broader interests, the precedent of U.S.-Soviet cooperation at UNCLOS III,[142] and operations in the Black Sea including the catalyst the Black Sea bumping incident provided paved the way for U.S.-Soviet consensus to be reached.[143]

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[137] The common understanding could include agreement on the following points: 1. innocent passage as set out in UNCLOS Article 19, in particular, whether notification and permission can be required for the exercise of innocent passage; 2. whether military activities are permitted in the EEZ and if so whether there are any legitimate restraints on its scope; 3. what falls within and outside of the purview of marine scientific research (MSR) and therefore within and outside of the jurisdiction of the coastal state.

[138] Feng Zhang (2016), "Freedom of navigation in the South China Sea: A modus vivendi between the U.S. and China?", March 10, http://ippreview.com/index.php/Home/Blog/single/id/43.html makes the important observation that:

> Given their insensitivity to international law in the South China Sea disputes, many in China have simply missed this legal message and taken FONOPs for what they appear to be—assertions of American military power bordering on gunboat diplomacy to humiliate China.

[139] With technology giving rise to new activities that might fairly be considered "prejudicial to the peace, good order or security" of a coastal state, the interpretation that Article 19(2) is exhaustive is arguably problematic today. Conversation with Robert Beckman, Director of the Centre for International Studies, March 2, 2016.

[140] Aceves (1995-1996), *supra* n 19, p 311.

[141] Five days after the joint statement was issued, the State Department notified all U.S. diplomatic posts that since Soviet border regulations had been brought into conformity with UNCLOS, the U.S. government had assured the Soviet Union that the United States had no reason or intention to exercise its right of innocent passage under the FON program in the Soviet territorial sea. Although the State Department maintained that the warships of both countries retained the right to conduct innocent passage incidental to normal navigation in the territorial sea; the United States would continue to conduct routine operations in the Black Sea; and the United States retained the right to exercise innocent passage in any territorial sea in the world, after the signing of the Uniform Interpretation, there were no further incursions by U.S. warships into Soviet territorial waters in the Black Sea. Aceves (1993), p 258, citing International Law Division of the Soviet Ministry of Foreign Affairs, 11 July 1990.

[142] Roach (2016), *supra* n 109, refers to the common understanding being the "culmination of the cooperation that the Soviet Union and the US had in the early 1970s at UNCLOS III and the consequence of the Black Sea bumping incident." During UNCLOS III, the Soviets had relaxed their position on innocent passage, but eventually promulgated internal legislation that significantly restricted the right of innocent passage: Aceves (1993), p 248. This turnabout was due to domestic pressure: conversation with President Vladimir Golitsyn, International Tribunal for the Law of the Sea, conference on "Natural resources and the Law of the Sea", Georgetown University Law Center, Washington, D.C., December 7, 2015.

[143] Aceves (1993), *supra* n 69, p 258.

Beijing has a similar incentive to reach agreement with the United States on issues that would otherwise lead to more FON operations in protest. Such assertions put pressure on Beijing to respond—Chinese citizens are said to be clamoring for a greater physical show of strength[144]—and risks Beijing being embarrassed in any head-on clash with the United States.

In the near term, China remains sensitive about warships in its territorial sea and what it perceives as close surveillance by the United States in areas just outside its territorial sea: as a senior Chinese diplomat explained, "we feel threatened, we feel our security interests are under threat'.[145] In the longer term, however, with China's modernization of its navy, dependence on the international trade, and dependence on the importation of hydrocarbons and minerals, Beijing may come to realize that it has the same interests in freedoms of the seas as other naval powers.[146] Roach observes how following World War II, the Soviet Union's maritime defense policy changed from homeland defense to ensuring freedoms of navigation and overflight for its expanded economic and defense interests in distant water or "blue water" operations. He argues that this 20th century change in policy provides a significant precedent for China to move from a homeland defense posture to one favoring freedoms of navigation and overflight.[147]

Indeed, China's 2015 White Paper on Military Strategy suggests a recognition that out-of-area operations are in China's national interests.[148] Developments in 2014 and 2015 also support the reading that China might in the longer run realize that its interests are met by supporting the majority interpretation of UNCLOS.[149] On the other hand, these developments notwithstanding, some analysts maintain that China will merely insist that a different standard applies in the waters of the South China Sea.[150]

Strategic trust between the United States and China might also gradually improve if the two superpowers manage to eke out sufficient domains of regional and international cooperation or even establish positive habits of interaction. The 2014 MOU on rules of behavior for safety of air and maritime encounters was an important step.

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[144] Conversation with China expert Li Minjiang, Singapore, March 7, 2016.

[145] Conversation with senior Chinese diplomat, *supra* n 13.

[146] Robert Beckman (2012) "Geopolitics, International Law and the South China Sea", paper prepared for Tokyo Plenary Meeting, April 21-22, p 8, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwiU9qns3IXNAhXIVz-4KHenfClQQFggdMAA&url=http%3A%2F%2Fcil.nus.edu.sg%2Fwp%2Fwp-content%2Fuploads%2F2012%2F04%2FBeckman-Geopolitics-Intl-Law-SCS-Tokyo-21-April-2012-final-rev.pdf&usg=AFQjCNG8TU1vtnr5RloRG4w_V2hv9Ds8-A. *Cf* Zhang (2010), *supra* n 13.

[147] Ashley Roach (2015) "Evolution of Soviet maritime navigation policy and China's far seas operations", draft paper dated 25 September for Zejiang Conference.

[148] The State Council Information Office of the People's Republic of China, "China's military strategy", May 2015, states:

> In line with the strategic requirement of offshore waters defense and open seas protection, the PLA Navy (PLAN) will gradually shift its focus from "offshore waters defense" to the combination of "offshore waters defense" with "open seas protection," and build a combined, multifunctional and efficient marine combat force structure. The PLAN will enhance its capabilities for strategic deterrence and counterattack, maritime maneuvers, joint operations at sea, comprehensive defense and comprehensive support.

http://eng.mod.gov.cn/Press/2015-05/26/content_4586805_4.htm

[149] In July 2014, during the U.S.-led Rim of the Pacific (RIMPAC) joint naval drills in Hawaii, an uninvited Chinese surveillance ship conducted surveillance operations in Hawaii's EEZ: Jeremy Page (2014), "Chinese ship spies on U.S.-led drills", *The Wall Street Journal*, July 19, http://www.wsj.com/articles/chinese-ship-spies-on-u-s-led-drills-1405752404. In September 2015, despite Beijing insistence that U.S. warships should request permission before exercising "innocent passage" in China's territorial waters, a Chinese flotilla reportedly travelled east from somewhere near Russia and entered the Bering Sea, navigating north of the Aleutian Islands before transiting south, where they undertook the innocent passage through U.S. waters between two islands. This was without giving any prior notification or seeking U.S. approval of their passage (though U.S. law admittedly does not require this): Jeremy Page (2015), "Chinese navy ships came within 12 nautical miles of U.S. coast", *The Wall Street Journal*, September 4, http://www.wsj.com/articles/chinese-navy-ships-off-alaska-passed-through-u-s-territorial-waters-1441350488 The United States acknowledged that both acts were in accordance with international law.

[150] Conversation with Dutton, *supra* n 46.

7. Accede to UNCLOS

The political, security and economic communities in the United States have put forward detailed and cogent arguments for why acceding to UNCLOS is in the American national interest. These enjoy bipartisan support.[151] The United States' should not be seeking to renegotiate a deal that took decades of hard work and bona fides to negotiate and conclude—it is far from clear in any event that the United States would succeed in achieving a better deal. The United States' failure to accede to UNCLOS continues to hurt it as it leaves it open to repeated charges of hypocrisy.[152]

In respect of excessive maritime claims, it also denies the United States an important tool for resolving disputes since it precludes access to the Convention's dispute resolution procedures.[153] While differences and the need for FON operations to assert rights will not cease to exist with accession to UNCLOS, it will provide the United States with more arrows in its quiver for dealing with excessive claims.

Conclusion

FON operations and the larger FON Program are imperative to ensuring that the compromises reached during UNCLOS III are maintained by word and deed. The United States must be consistent in asserting its maritime rights under international law lest these are lost over time both as a *legal* matter—as noted in this paper, the Vienna Convention allows for "subsequent practice" to be taken into account in interpreting a treaty—and as a *practical* matter since rights not used are of little practical value.

FON operations assert rights available to all user states and cannot validly be described as a "use of force" or even "militarization". Rather, such assertions are legitimate exercises of rights vested under international law. FON exercises have taken on additional significance in the South China Sea given China's strategic ambiguity. While in the past, operations were used to challenge excessive maritime claims, they are now arguably being conducted to *pre-empt* such claims—a course of action necessitated by China's deliberate ambiguity in the South China Sea and continued refusal to clarify its claims. Effectively employed, FON operations could help counter China's attempts to assert de facto control over the area. They will also raise the costs of Beijing declaring straight baselines around the Spratlys and attempting to convert the waters within these lines to internal waters.

The upcoming tribunal decision in the Philippines case against China will facilitate the planning, execution and messaging of FON operations by clarifying the status of features. Insofar as the conduct of FON operations is consistent with the tribunal's award, it will bolster the United States' ability to argue that its actions are in accordance with international law. The award could help bolster regional and international support of U.S. FON operations and even encourage other states to conduct their own by removing uncertainty over maritime entitlements. Regular assertions of rights in respect of features that are the subject

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[151] See Brian Wilson and James Kraska (2009), "American Security and Law of the Sea", *Ocean Development & International Law, 40*, pp 268-290, p 269. For an in-depth treatment of why the United States should accede to the Convention, see John Norton Moore and William Schachte Jr (undated), "The Senate should give immediate advice and consent to the Law of the Sea Convention: Why the critics are wrong", http://www.virginia.edu/colp/pdf/Moore.Schachte.final.pdf. For a summary of the arguments for and against accession, see O'Rourke (2016), p 47, *supra* n 45.

[152] Most recently by China in its response to the USS William P Lawrence operation, *supra* n 12.

[153] For a discussion of this, see Rose (1990), *supra* n 15, in particular, p 88.

of the tribunal's decision will give the award teeth and render it more difficult for China to ignore the ruling.

Successive administrations in the United States would be wise to continue with regular FON operations. The South China Sea dispute is about much more than mere "rocks". It is about maritime rights and the preservation of the system of international law. More broadly, how the United States and China interact in the South China Sea has important implications for their relationship elsewhere and on other issues.

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