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The United States, China and the Freedom of the Seas

Washington's FONOPs Conflict with Beijing

Michael Paul

After several years of restraint, the United States conducted its latest freedom of navigation operation in the South China Sea on 22 January 2016. Three weeks later President Barack Obama hosted a conference of the ASEAN heads of state and government in California to discuss the opportunities for reducing tensions in the region, which is witnessing spiralling conflicts between China and its East Asian neighbours over island territories and their resources. Rather than contributing to a deescalation, China fanned the flames by stationing missile batteries on Woody Island, which is also claimed by Taiwan and Vietnam. Alongside that regional conflict, the South China Sea is also turning into an arena of conflict between Beijing and Washington. Amidst different interpretations of maritime law and the Convention on the Law of the Sea (UNCLOS), the question of whether the “freedom of the seas” is upheld or curtailed will have considerable geopolitical and strategic military consequences.

On 27 October 2015 the guided missile destroyer *USS Lassen* (DDG-82) passed less than twelve nautical miles from a Chinese-built outpost on Subi Reef in the South China Sea. The reef has been occupied by China since 1988 and forms its northernmost outpost in the Spratly Islands, close to the Philippines. Since July 2014 the Chinese have transformed Subi Reef into a base measuring almost four square kilometres. The Americans officially described their operation as a routine move in accordance with international law, and denied that they were taking sides in the competing territorial claims in the South China Sea. None-

theless, this freedom of navigation operation (FONOP) was intended to demonstrate Washington's determination to accept no restrictions on its freedom of navigation in this region.

Months of controversy preceded the naval manoeuvre. High-ranking representatives of both parties in Congress, including Senator John McCain, Chairman of the Senate Armed Services Committee, and Bob Corker, Chairman of the Senate Committee on Foreign Relations, had called on Secretary of Defence Ashton Carter and Secretary of State John Kerry to respond to shifts in the status quo in the region. A policy of re-

strait could be a “dangerous mistake”, said McCain: “If you respect the twelve-mile limit, then that’s de facto sovereignty, agreed to tacitly.”

Washington had in fact for years ignored the implications of Chinese expansionism in the South China Sea. The *USS Lassen*’s patrol was the first FONOP in this region since 2012 but there was great controversy over what message it was actually supposed to convey. Subi Reef is a “low-tide elevation” under Article 13 of the Convention on the Law of the Seas (UNCLOS), generating no claim to territorial sea in the sense of a twelve-mile zone. To that extent the course of the US warship was no “innocent passage”, as that applies only in territorial waters, which these were not. Some argued, however, that the *USS Lassen*’s passage within twelve miles implied American recognition of China’s claims. That assertion is contradicted by maritime law and geography, because Subi Reef is located close to Sand Cay, a small island (claimed by China, Taiwan, the Philippines and Vietnam) that does possess a twelve-mile zone.

The passage of the *USS Lassen* was intended to underline that China’s base-building activities had not altered the status quo concerning free navigation. Consequently, the Americans treated the outpost erected on a “low-tide elevation” as an artificial island, which may have a safety zone but no territorial waters. The patrol by the *USS Curtis Wilbur* (DDG-54) close to Triton Island in January 2016 was directed against “excessive claims” by China and Vietnam. Here too, the passage occurred without the prior notification demanded by China and Vietnam.

By ignoring artificial outposts and the associated claims to territorial sea, the United States is acting to prevent the Chinese acquiring possession by default. While the creation of artificial islands cannot be undone, the claim to sovereignty, the associated right to establish exclusive zones and the ensuing restriction of freedom of navigation can certainly be denied. Given the rival territorial claims, recognition of diverse

exclusive zones would leave the South China Sea looking like a Swiss cheese, gravely obstructing freedom of navigation in one of the world’s most important sea routes. The same would apply if China had its way and up to 90 percent of the South China Sea came under Chinese control. Such a development would call into question the existing liberal order.

Opposing Principles: “Mare liberum” vs. “Mare clausum”

Under UNCLOS, the “high seas” comprise all waters where no coastal state exercises sovereign rights. That does not, however, give the coastal states a free hand to define their own territorial waters. Clear limits are set on the seaward extent: territorial sea is restricted to twelve nautical miles at most, the exclusive economic zone (EEZ) to no more than two hundred.

Unlike China, which joined in 1996, the United States has never signed UNCLOS. On 10 March 1983, President Ronald Reagan declared that: “the United States will recognize the rights of other states in the waters off their coasts, as reflected in the Convention, so long as the rights and freedoms of the United States and others under international law are recognized by such coastal states.” Under its Oceans Policy, the United States insists on exercising global navigation and overflight rights and rejects unilateral measures restricting them.

The fundamental principle upon which maritime law is constructed is the “freedom of the seas” (*mare liberum*) as defined by Hugo Grotius, who regarded the sea as a common good for all humanity. By its very nature, he argued, the sea was open to use by all. John Selden, on the other hand, proposed in his book published in 1635 that claims to exclusive rights existed in the sense of a “*mare clausum*”. It was certainly possible, he argued, to achieve and enforce state authority over parts of the seas by military means.

Ultimately the principle of freedom won the day, as it lined up with the maritime in-

terests of the most important European naval powers of the age. To this day, however, there is a counter-current, presently supported by China, that seeks to place more extensive maritime areas (and their resources) under the control of the coastal states. Such calls for a “terranisation of the sea” are acknowledged in UNCLOS, which does not exclude the possibility of change; the initiative for this lies with the states.

From the US perspective, the sea, as a global commons, is subject to all the rights and liberties according to international law. This also applies to the “right of innocent passage”: Since ancient times coastal states have subjected the strip of sea along their coasts to their own jurisdiction. But because all seafaring states share an interest in accessing these coastal waters, both merchant vessels and warships enjoy the right of innocent passage – whether to pass through or to enter or leave the internal waters of a coastal state. The arrangement also avoids international shipping being forced to take long and potentially dangerous detours.

In this context, freedom of navigation means that it is permissible to pass through the twelve-mile zone and the two-hundred-mile EEZ of a coastal state without obtaining prior permission (UNCLOS Art. 58). The rules of innocent passage, under which military activities are prohibited (submarines must surface and show their flag), apply only within territorial waters (UNCLOS Art. 17). That rule strongly implies that the right to conduct military activities such as exercises, manoeuvres and intelligence-gathering in the exclusive economic zone is the same as on the high seas (UNCLOS Art. 87).

China both interprets the rules more narrowly and goes beyond existing maritime law. It permits warships to enter the twelve-mile zone only with prior permission, even if the rules of innocent passage are observed and military activities are avoided. Furthermore, China also seeks to apply the rules of innocent passage to the EEZ, although under maritime law they

apply only in territorial waters. The Chinese justify this expansion on the grounds that the matter is not explicitly regulated in the Convention on the Law of the Sea.

Other states also claim exclusive rights. Vietnam wishes to be informed before warships enter its territorial waters. Like China and a string of other states (including Malaysia, India, Iran and Sri Lanka), Vietnam believes that coastal states are entitled to regulate military activities in their EEZs. Three of these states – China, North Korea and Peru – have already intervened directly (leading in the Chinese case to incidents with American and Indian ships and aircraft). Altogether the EEZs account for more than 30 percent of worldwide seas and oceans (and almost 40 percent in the Asia-Pacific region). As well as parts of the Pacific, waters such as the Persian Gulf and the Mediterranean could be affected if coastal states restricted access.

Acceptance of restricted access to formerly freely accessible waters would not only call into question existing maritime law based on the principle of the “freedom of the seas”, but also create hairline fractures in the global order. Ultimately “free seas” cannot be taken for granted. For many centuries “closed” areas existed, as for example the Persian Gulf or the South China Sea could become in future.

The US Navy has since 1945 borne the costs and burdens of keeping shipping routes open and secure in the interests of free trade. But that requires a corresponding freedom of navigation. To that extent using international law to restrict freedom of navigation could be effective as an anti-access/area denial tactic (A2/AD). In the event of an intervention to protect an ally, for example in East Asia or the Mediterranean, the freedom of movement of air and sea forces would be heavily curtailed. This would affect shipboard sensors and weapons, as well as submarines which would no longer be permitted to enter such waters submerged. Ultimately such a change would have significant repercussions on the foreign and security policy of the United

States and its allies and on operational aspects of military strategy and technology.

Freedom of Navigation Operations

Washington reacts to the global proliferation of “excessive” maritime claims by actively demanding freedom of navigation. The FONOPs programme established in 1979 contains a broad catalogue of measures ranging from diplomatic notes with the request for clarification or withdrawal of claims to military action. In operations directed explicitly against “excessive maritime claims”, for example, US warships pass through contested areas. The deliberate violation of coastal states’ claims ensures that they cannot acquire possession by default. The Pentagon’s FON report for fiscal 2014 lists activities against nineteen countries including China. Issues over which Washington took action against China included excessive straight baselines (from which the limits of territorial waters and EEZs are calculated), jurisdiction over airspace above the EEZ, and restrictions on foreign air traffic passing through an Air Defence Identification Zone (ADIZ) without intent to enter national airspace. During the same period, US FONOPs also targeted Ecuador, Iran, Nicaragua, South Korea, Taiwan and Vietnam for excessive baselines. But most of the activities affected countries restricting third states within their EEZs. While the measures used to assert the rules during the past thirty-five years have been unspectacular, they ultimately represent modern gunboat diplomacy. Operations in the western Pacific in connection with the Sino-American dispute thus always also involve a risk of incidents at sea or in the air.

The Commander of the US Pacific Command has announced that FON operations will grow in frequency, complexity, and scope. Indeed, one US maritime law expert believes that the freedom of navigation is currently as strongly threatened as it was during Imperial Germany’s unrestricted submarine campaign of 1915. At stake are not just a couple of outcrops, but elemen-

tary principles and historic claims, over which the United States and China disagree. That is what makes it so difficult to resolve the disputes, or even simply to prevent crisis escalation.

Given that China is sticking to its claims and the US Navy intends to step up its FON operations, latent escalation potential is the new normal in the South China Sea.

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