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FREEDOM OF NAVIGATION OPERATIONS IN SOUTH CHINA SEA – WHY INNOCENT PASSAGE?

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On October 27, 2015 USS Lassen, an Arleigh Burke class missile destroyer equipped with the Aegis defence system and Tomahawk missiles, sailed past close to Subi Reef in the South China Sea initiating a big debate on interpretation of maritime laws. China, of course, accused the US of making an illegal maritime intrusion into their waters thereby threatening their sovereignty. What was so different about this voyage by a US Naval ship which created the misunderstanding?

US Navy had dispatched one of the most powerful destroyers within 12 nm of the Chinese occupied Subi Reef, to demonstrate the much publicized freedom of navigation operations (FONOP) in the Spratly Islands. The FONOP is an integral part of US policy since 1983 to assert its navigation and over flight rights on a worldwide basis in a manner that is consistent with the balance of interests reflected in the Laws of the Sea Convention¹. In the past, U.S. armed forces have conducted such operations in the [Gulf of](#)

[Sidra](#), [Strait of Hormuz](#), [Straits of Malacca](#) and in the [Black Sea](#). Their declaration made in respect of the ongoing South China Sea disputes that “US will fly, sail and operate anywhere in the world that international law allows” is also an assertive step in this direction. With this agenda in mind the US government decided to send USS Lassen deep into the waters surrounding China’s artificial islands and reefs turned into military infrastructures.

Subi Reef was chosen for this operation firstly because it is a low tide elevation (LTE) which remains submerged during high tides and more importantly it is one of the features in the Spratly group that China has converted into a man-made island with dual use infrastructure, including a possible 3000 meter airstrip and a helipad². Further, being an LTE, China is not entitled to a territorial sea around Subi Reef. The US objective was to give a clear signal to China that their ships have freedom to operate in

waters around these low tide elevations. The so called freedom of navigation operation was to be demonstrated under various clauses of the United Nations Convention on the Laws of the Sea which relate to high seas freedom or innocent passage. As per UNCLOS, any ship, civil or military, has the legal right to navigate in these waters without giving any notice or taking approval from Chinese authorities, or for that matter any other state laying claim to these features. Even otherwise, article 19 of UNCLOS gives the right to transit for every ship on an innocent passage through territorial sea of a country. The only difference is that the passage has to be innocent if lying within territorial waters of a country. Once outside these limits a ship can carry out all military exercises and evolutions, including aircraft flying.

USS Lassen did carry out her task as planned and passed the reef within 12 nm in an innocent manner without operating any military equipment or carrying out any naval manoeuvre. To keep the operation neutral, the warship had also sailed within 12 nm zones around other features claimed by the Philippines and Vietnam. It is also understood that a P-8A maritime surveillance aircraft of US Navy was accompanying the ship, but stayed outside the 12 nm range. Here lies the confusion about the true motive behind the FONOP. It is not very clear whether the US Navy ship operated within 12 nm of the disputed Subi Reef demonstrating high seas freedom or using the privilege of innocent

passage inside territorial waters of a country. Because, if the ship made an innocent passage (without carrying out any military manoeuvres, as it actually happened), than it inadvertently recognizes those waters as the territorial sea of a country. As portrayed by the media, it can be interpreted that USS Lassen made an innocent passage thereby accepting China's illegal maritime boundary/ territorial claims. However, it may not be a correct deduction.

Quite a few defence commentators have endorsed the view that the US Navy move was not a FONOP in true sense because the ship did not behave in a manner expected at high seas³. They feel that the ship should have carry out some military activities and used its fire control radars etc to demonstrate American resolve. By resorting to the innocent passage, US Navy has legitimized the Chinese claim that Subi Reef has a 12 nm territorial sea. Even, Mr John McCain, Chairman United States Senate Committee on Armed Services has brought up this issue in his letter to Mr Ashton B Carter, US Secretary of Defence ⁴ . He has highlighted the misunderstandings and questioned the legal intent behind this operation. He has further asked the Secretary of Defence to clarify whether the ship operated under the rules of innocent passage? If so, why?

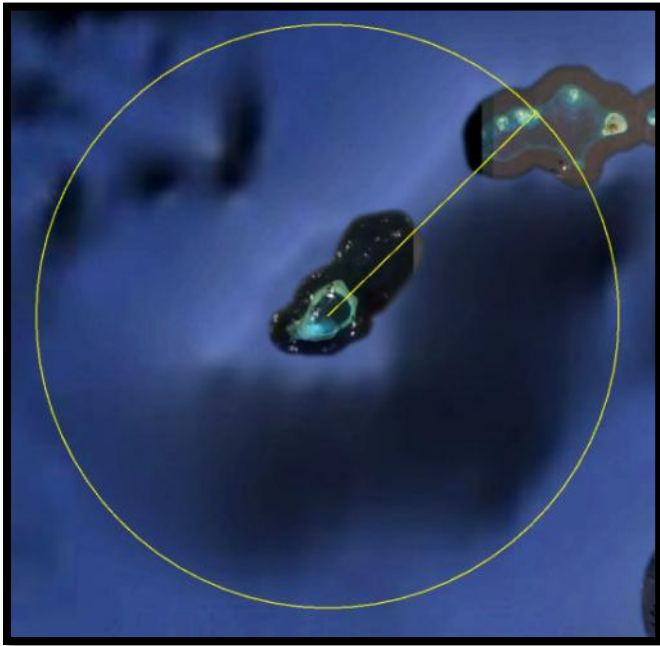


Fig 1: Subi Reef in center with a 12 nm radius drawn. The feature toward the northeast is Sandy Cay that is above sea-level at low-tide.

Source: Google Maps

The confusion about the status of US operation can be cleared to some extent after understanding the legal position and the geography of the Spratly Islands in the South China Sea. The Subi Reef itself may not qualify for any maritime zone around it but Sandy Cay; a rocky feature (above water line at all times) in close vicinity could lay claims to have a 12 nm territorial sea.⁵ The maritime zone around Sandy Cay can be further expanded, as per the provisions of UNCLOS, to cater for the Subi Reef since it lies within a distance of 12 nm of Sandy Cay, which is also a disputed feature and claimed by many states. If this justification is valid than the US government is correct in its approach to have ordered the ship to follow principles of innocent passage and not to operate its military equipment or carry out any naval manoeuvres. In any case, by not giving any notification to China,

or for that matter to any other claimant country, US warship has fulfilled the objective of a freedom of navigation operation since the ship has not violated any provisions under article 19 of the UNCLOS. China, on the other hand may not be satisfied by this justification as their perception of FON principle under the UNCLOS is different. Their stand is that foreign navies will have to obey rules of innocent passage even in the 200 nm EEZ, and require prior permission to enter the 12 nm territorial sea⁶. The recent Bering Sea passage by PLAN ships, without taking any permission, however, gives the impression that they are well aware of the concept of innocent passage under UNCLOS.

It is evident that the US government FONOP was never aimed at showing their assertion of high seas freedom. If they were really keen to demonstrate the assertive option, USS Lassen would have carried out normal naval manoeuvres and operated fire control radars. That move would have been potentially provocative. The option of following innocent passage has not only served the purpose of freedom of navigation but also gave the impression that the US authorities accept the existence of legitimate territorial sea around Sandy Cay, to whom so it may belong. It is understood that the U.S. Navy plans to make at least two trips per quarter in the South China Sea that China claims as its own, to remind China about the freedom of navigation⁷. With this operation, the US Navy has tested the waters and

it is expected that the target for next FONOP may be Mischief Reef⁸, which is also an LTE like Subi Reef, but does not have any rock etc within 12 nm radius to confuse the issue. It will be interesting to observe whether the FONOP voyage near Mischief Reef will include naval manoeuvres befitting high seas assertive operations or not.

(Disclaimer: The views and opinions expressed in this article are those of the author and do not necessarily reflect the position of the Centre for Air Power Studies [CAPS])

Notes

¹ US Department of State, maritime Security and Navigation, <http://www.state.gov/e/oes/ocns/opa/maritimesecurity>, accessed on 16 Nov 2015.

² Ankit Panda, Setting the Record Straight on US Freedom of Navigation Operations in the South China Sea, <http://thediplomat.com/2015/11/setting-the-record-straight-on-us-freedom-of-navigation-operations-in-the-south-china-sea/>, 11 Nov 2015.

³ Timothy Choi, The Diplomat, 04 Nov 2015, <http://thediplomat.com/2015/11/why-the-us-navys-first-south-china-sea-fonop-wasnt-a-fonop/>, accessed on 17 Nov 2015

⁴ <http://news.usni.org/wp-content/uploads/2015/11/11.9.15-McCain-to-Carter-Freedom-of-Navigation-in-SCS.pdf#viewer.action>, November 10, 2015, accessed on 15 Nov 15

⁵ Bonnie S Glaser & Peter A Dutton, <http://nationalinterest.org/feature/the-us-navy%E2%80%99s-freedom-navigation-operation-around-sub-reef-14272>, 06 Nov 2015.

⁶ D S Rajan, China-US: Naval Confrontation Imminent in South China Sea? C3S Paper No 0191/2015, 23 Oct 2015,

⁷ Coco Alcuaz, <http://www.ibtimes.com/south-china-sea-us-conduct-two-patrols-every-quarter-press-freedom-navigation-2166075>, 02 Nov 2015.

⁸ Ibid, Note 5.