The Truth About US Freedom of Navigation Patrols in the South China Sea

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Last week, the U.S. Senate's Armed Services Committee held a hearing on Washington's "Maritime Security Strategy in the Asia-Pacific Region." The committee heard from Admiral Harry Harris, Jr., commander of U.S. Pacific Command, and David Shear, the assistant secretary of defense for Asian and Pacific security affairs. The discussion included a particular focus on the question of U.S. freedom of navigation (FON) patrols within 12 nautical miles of China's artificial islands – leading to headlines like this, from Associated Press: "McCain: U.S. should ignore China's claims in South China Sea."

That headline seems designed to elicit groans from Asia analysts. In fact, media coverage in general of the Senate hearing – and, more broadly, the question of FON patrols in the South China Sea – conflated the issue of challenging sovereignty and asserting freedom of navigation. That misconception comes because the actual point being made by FON patrols hinges on arcane details of international law.

If United States decides to conduct these patrols, it will not be challenging China's sovereignty claims over the Spratly Islands writ large. The U.S. has repeatedly state that it takes no position on the sovereignty of the disputed features in the South China Sea. Rather, by conducting patrols within 12 nm of some of China's artificial islands, Washington would be providing a public assertion of the American interpretation of international law (specifically the UN Convention on the Law of the Sea) regarding freedom of navigation. We'll need a primer on applicable UNCLOS sections to understand what's really at stake in the case of China's artificial islands and U.S. FON patrols.

Within a territorial sea, defined by UNCLOS as 12 nautical miles, ships from all states enjoy the right of innocent passage. But ships must meet certain conditions to conduct "innocent passage." UNCLOS provides a list of activities "considered to be prejudicial to the peace, good order or security of the coastal State" and thus not included in the right of innocent passage – including (most pertinently for U.S. operations in the South China Sea) "any act aimed at collecting information to the prejudice of the defense or security of the coastal State" (Part II, Section 3, Article 19).

That means states are not guaranteed the right to conduct surveillance within another state's territorial sea. So the question of whether a certain feature generates a territorial sea is of crucial importance to determining whether the U.S. Navy can send surveillance ships and/or aircraft to conduct surveillance within 12 nautical miles of that feature.

That question is answered by Part II, Section 2, Article 13 of UNCLOS, which reads, in full:

1. A low-tide elevation is a naturally formed area of land which is surrounded by and ***above water at low tide but submerged at high tide****. Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea.*

2. Where a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it has ***no territorial sea of its own****. [emphasis added]*

Effectively, any feature that is only above water at low tide is a low-tide elevation (LTE) and is *not* entitled to a territorial sea, unless it itself is part of another feature's territorial sea (e.g., a state's coastline or an island). In fact, LTEs are not subject to sovereignty claims at all, unless they themselves are located within an existing territorial sea. Thus under UNCLOS a state claiming an LTE has no rationale for denying even military ships the right to approach within 12 nautical miles.

UNCLOS also specifies that "artificial islands, installations and structures do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf" (Part V, Article 60). Rather than generating a territorial sea, artificial islands are allowed a "safety zone" of no more than 500 meters – a little over a quarter of a nautical mile.

So now we have a well-established body of international law that directly relates to China's artificial islands: military vessels are only explicitly banned from conducting surveillance within another state's 12 nm territorial sea; LTEs generate no territorial sea, nor do artificial islands; therefore, there is no legal reason why the U.S. Navy cannot operated with 12 nm of artificial islands *that were formerly LTEs*.

This last point is often overlooked as China has conducted land reclamation on seven features (Cuarteron, Fiery Cross, Gaven, Hughes, Johnson, Mischief, and Subi Reefs), some of which qualified for a territorial sea even before China's reclamation efforts. There is no consensus on the states of the features, but the Philippine South China Sea claim against China in the Permanent Court of Arbitration listed three of the seven features (Mischief, Subi, and Gaven Reefs) as LTEs.

U.S. officials originally told the *Wall Street Journal* that the U.S. considers some the features to have been LTEs and others to have a claim to a territorial sea; the FON patrols would only go within 12 nm of those features that were LTEs before China's reclamation and construction. In other words, the United States is not challenging China's sovereignty over the Spratly features; it is challenging the *status* of those features under international law. A patrol within 12 nm of Mischief, Subi, or Gaven Reef would signal that, despite recent construction, Washington considers these to still be LTEs under UNCLOS with no claim to a territorial sea.

That's the very narrow sense in which the U.S. would be challenging China's sovereignty by conducting FON patrols. It *does not* mean Washington is declaring China's sovereignty claims in the Spratlys as invalid, merely that the United States does not recognize territorial claims originating from LTEs, even when the feature in question has been artificially enlarged so as to be permanently above the high tide line.

The importance of setting that precedent is obvious: if any state could dredge up sand to artificially create its own 12 nm territorial zone, it could have serious repercussions for freedom of navigation, particularly in the South China Sea. According to the *Digital Gazeeter of the Spratly Islands*, there are many other LTEs occupied by China's rival claimants, including Vietnam (Alison Reef, Central Reef, and Cornwallis South Reef) Malaysia (Ardasier Reef and Dallas Reef), and the Philippines (Irving Reef). If the precedent is set that artificially enlarging LTEs grants them a territorial sea, we may see a construction boom in the already-contentious area.

Keep this all in mind the next time an article suggests that the U.S. plans to challenge China's sovereignty over the Spratlys through FON patrols. It's not strictly false, but the truth behind the headline is far more complicated.

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