

## REGIONAL FOCUS & CONTROVERSIES

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# Lessons from Lassen: Plotting a Proper Course for Freedom of Navigation Operations in the South China Sea

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*The USS Lassen's October 2015 South China Sea freedom of navigation operation was exemplary in some respects and cautionary in others. This article argues the Lassen's mission to sail within 12 nautical miles of one of China's artificial islands was a successful albeit exploratory challenge because the operation has helped to clarify maritime claims in the region and garnered international support for continued operations. This paper examines the US Freedom of Navigation Program's broader goals of benefiting the international community with a rules-based system. It also argues that increased transparency is essential if these goals are to be achieved. This article analyzes China's unclarified claims in the South China Sea and explores the concept of "psycho-legal boundaries" in relation to the so-called nine-dash line. It concludes by presenting suggestions for plotting a proper path forward for FONOPs in the region with an emphasis on protecting the marine environment.*

### Keywords

Freedom of navigation, South China Sea, law of the sea, artificial islands, marine environment, China, FONOP, UNCLOS

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# 1. Introduction

On October 27, 2015, the USS Lassen, a US Navy destroyer, conducted a 72-nautical mile (“nm”) transit in ‘innocent passage’ through the Spratly Islands in the South China Sea – literally on ‘dangerous ground’<sup>1</sup>– completing one of the most publicized freedom of navigation operations (“FONOP”) on record.<sup>2</sup> FONOPs generally receive little public scrutiny. The Lassen FONOP was especially unique in that the majority of attention it received came before the operation had even begun. Indeed, there were six months of public debate about the mission and its objective to pass within 12 nm of one of China’s artificial islands – so much publicity that some legal experts suggested it may have amounted to “*de facto* notice”<sup>3</sup> of the operation to the Chinese.

In this article, however, the author argues that the unprecedented level of transparency surrounding the Lassen FONOP, though not always intended by the US administration, was a positive development since it helped make the goals of the US Freedom of Navigation (“FON”) Program clearer to the international community. Greater transparency also helped to expose the rapacious pace of Chinese island building in the region and the subsequent damage to the marine environment. Nevertheless, while the US has made more information on its FONOPs in the South China Sea publicly available than usual, there are still lessons from the Lassen mission. Accurate and up-to-date information was lacking at crucial phases of the Lassen FONOP, which undermined its effectiveness. Increased transparency is essential for future missions of this nature.

This paper is composed of eight parts including a short Introduction and Conclusion. Part two will discuss how increased transparency is in line with the goals of the FON Program. Part three will examine the role of images in the public debate over FONOPs. Part four will look at how the US has promoted freedom of navigation in the South China Sea as a benefit for the international community. Part five will discuss China’s ambiguous claims in the South China Sea. Part six will

<sup>1</sup> The area has long been known as ‘dangerous ground’ because of the difficulty and danger in navigating among the region’s many low islands, rocks, and submerged reefs. See generally D. Hancox & V. Prescott, *A Geographical Description of the Spratly Islands and an Account of Hydrographic Surveys Amongst Those Islands*, 1:6 MARITIME BRIEFING (1995).

<sup>2</sup> J. Odom, *FONOPs to preserve the right of innocent passage?*, DIPLOMAT, Feb. 25, 2016, available at <http://thediplomat.com/2016/02/foonops-to-preserve-the-right-of-innocent-passage> (last visited on May 5, 2016).

<sup>3</sup> J. Kraska & R. Pedrozo, *Can’t anybody play this game? US FON operations and law of the sea*, LAWFARE, Nov. 17, 2015, available at <https://www.lawfareblog.com/cant-anybody-play-game-us-fon-operations-and-law-sea> (last visited on May 5, 2016).

explore the concept of “psycho-legal boundaries” in relation to the nine-dash line. Part seven will analyze the difficulties of using FONOPs to challenge China’s claims to sovereignty over its artificial islands and the maritime areas surrounding them.

## 2. Increased Transparency and the Goals of the FON Program

The US FON Program is reflected in a series of classified White House directives.<sup>4</sup> FON assertions are designed to physically challenge excessive maritime claims, which may be understood as “claims by coastal States to sovereignty, sovereign rights or jurisdiction over ocean areas that are inconsistent with the terms of the [United Nations Convention on the Law of the Sea]” (“UNCLOS”).<sup>5</sup> Despite the FON Program’s relatively secretive nature, its purpose is to protect “the rights and freedoms of the *international community* in navigation” by “stressing the need for and obligation of *all States* to adhere to the customary international law rules and practices reflected in the [UNCLOS].”<sup>6</sup> The nature of FON Program in promoting these *erga omnes* goals should become more central to future missions and bring greater levels of disclosure for the benefit of the international community and the marine environment.

Notably, the most assertive action the US could make in support of FON Program goals would be to join the UNCLOS.<sup>7</sup> Despite words in support of the Convention, the lack of action from the US in becoming a party to treaty<sup>8</sup> continues to undermine US efforts in the South China Sea. As President Obama has succinctly remarked:

It’s a lot harder to call on China to resolve its maritime disputes under the Law of the Sea Convention when the United States Senate has refused to ratify it -despite the

<sup>4</sup> J. KRASKA & R. PEDROZO, *INTERNATIONAL MARITIME SECURITY LAW* 202 (2013).

<sup>5</sup> J. ROACH & R. SMITH, *EXCESSIVE MARITIME CLAIMS* 17 (3d. ed. 2012).

<sup>6</sup> US State Department, Freedom of Navigation Program, *available at* <http://www.state.gov/e/oes/ocns/opa/maritimesecurity> (last visited on May 5, 2016). [Emphasis added]

<sup>7</sup> Ironically, it is the US absence from the UNCLOS that makes FONOPs all the more necessary. Since the US views the UNCLOS as a reflection of customary international law, FONOPs help to solidify ‘international custom’ by acting as “evidence of a general practice accepted as law.” *See* I.C.J. Statute art. 38(1)(b), June 26, 1945, 59. Stat. 1055, T.S. No. 993, 3 Bevens 1179.

<sup>8</sup> *See, e.g.,* T. Wright, *Outlaw of the sea: The Senate Republicans’ UNCLOS blunder*, *FOREIGN AFF.*, Aug. 7, 2012, *available at* <https://www.foreignaffairs.com/articles/oceans/2012-08-07/outlaw-sea> (last visited on May 5, 2016).

repeated insistence of our top military leaders that the treaty advances our national security.<sup>9</sup>

The current absence from the UNCLOS<sup>10</sup> is all the more reason that the US should strive to be more transparent with its FON Program. The secrecy surrounding US FONOPs has long resulted in the valid criticism that by not “loudly and clearly”<sup>11</sup> demonstrating non-acquiescence to excessive maritime claims in an “open and notorious”<sup>12</sup> manner, the US was defeating the purpose of the FON Program. In the 1990s, US Navy legal experts began to call for more transparency. Stephen Rose observed that: “So long as [FON] challenges ... go undetected or are left unpublished, they have little impact on ... coastal nation expectations or influencing any rollback of excessive claims.”<sup>13</sup> James Greene, a US Navy lieutenant commander, argued for “lifting the veil of secrecy surrounding the program.”<sup>14</sup> Greene also called for “[e]ducation of the public” in order to remove the “misunderstanding of what the FON Program is trying to accomplish.”<sup>15</sup> Rose also emphasized that the US should “increase the tempo of its visible FON operations ... and make public those challenges.”<sup>16</sup>

In 1992 and 1994, largely through the works of J. Ashley Roach and Robert W. Smith who “succeeded in having declassified much of the US practice,”<sup>17</sup> the US began “to publicize efforts” undertaken by the FON Program “to preserve and enhance navigation freedoms worldwide.”<sup>18</sup> Currently, the Department of Defense

<sup>9</sup> S. Stearns, *Obama pushes law of the sea to help settle S. China Sea Claims*, VOA NEWS, June 2, 2014, available at <http://www.voanews.com/content/obama-pushing-un-law-of-the-sea-to-help-settle-south-china-sea-claims/1928052.html> (last visited on May 5, 2016).

<sup>10</sup> Efforts continue to be made for the US to join the UNCLOS. See, e.g., J. Courtney, *Courtney introduces bipartisan resolution urging Senate to ratify UNCLOS*, Mar. 1, 2016, available at <https://courtney.house.gov/media-center/press-releases/courtney-introduces-bipartisan-resolution-urging-senate-ratify-united> (last visited on May 5, 2016).

<sup>11</sup> A. Coll, *International Law and US Foreign Policy: Present Challenges and Opportunities*, 11 WASH. Q. 116 (1988), available at <http://www.tandfonline.com/doi/pdf/10.1080/01636608809477505> (last visited on May 5, 2016).

<sup>12</sup> J. Rolph, *Freedom of Navigation and the Black Sea Bumping Incident: How ‘Innocent’ Must Innocent Passage Be?* 135 MILITARY L. REV. 150 (1992), available at <http://heinonline.org/HOL/LandingPage?handle=hein.journals/milrv135&div=8&id=&page=> (last visited on May 5, 2016).

<sup>13</sup> S. Rose, *Naval Activity in the EEZ-Troubled Waters Ahead*, 20 NAVAL L. REV. 134 (1990), available at <http://heinonline.org/HOL/LandingPage?handle=hein.journals/naul39&div=9&id=&page=> (last visited on May 5, 2016).

<sup>14</sup> J. Greene, *Freedom of Navigation: New Strategy for the Navy’s FON Program*, Naval War College Working Paper, ii (Feb. 1992), available at <http://oai.dtic.mil/oai/oai?verb=getRecord&metadataPrefix=html&identifier=ADA249849> (last visited on May 5, 2016).

<sup>15</sup> *Id.*

<sup>16</sup> *Supra* note 13, at 134-5.

<sup>17</sup> A. Roach & R. Smith, *Excessive Maritime Claims*, 66 INT’L L. STUDIES xiv (1994), available at [https://archive.org/stream/internationallaw66roac/internationallaw66roac\\_djvu.txt](https://archive.org/stream/internationallaw66roac/internationallaw66roac_djvu.txt) (last visited on May 5, 2016).

<sup>18</sup> US Department of State, *United States Responses to Excessive National Maritime Claims*, No. 112 LIMITS IN THE SEAS, Mar. 9, 1992, available at <http://www.state.gov/documents/organization/58381.pdf> (last visited on May 5, 2016).

publishes annual FON reports with unclassified summaries of the assertions listing the type of claim challenged and the identity of the nation concerned.<sup>19</sup> These summaries provide some information, but they are quite limited.

The Department of Defense plans and administers FON assertions with the intent of tangibly manifesting US determination not to acquiesce to the excessive maritime claims of foreign States. The Department of State, however, runs a separate diplomatic track of the FON Program which involves filing formal protests (*démarches*) against such excessive claims as well as engaging informally with foreign governments in order to encourage them to amend their claims in accordance with the UNCLOS.<sup>20</sup> The Department of State has generally sought to limit the number of physical assertions in order to ease foreign relations, while the Department of Defense has pushed for a more robust operational program.<sup>21</sup>

Annual FON assertions reached a peak of 35-40 during the 1980s and dropped as low as 5-8 during the 2000s.<sup>22</sup> In 2015, the Department of Defense reported that “in concert with the Department of State” efforts were being made “to reinvigorate [the] Freedom of Navigation Program.”<sup>23</sup> The report notes that there were 35 FONOPs in 2014, an 84 percent increase from the previous year.<sup>24</sup> It further states that 19 of those assertions were in the US Pacific Command’s area of responsibility, which includes “numerous countries across the Asia-Pacific region [with] excessive maritime claims.”<sup>25</sup> Rose has pointed out that “contending pressures end up shaping the FON Program” including “policy crosscurrents within the US government itself.”<sup>26</sup> Such was the case with the Lassen FONOP, which led to extensive debate, delay and even some muddled messaging.<sup>27</sup> However, the debate also provided the public with more information about the FON Program and a better understanding of its goals.

<sup>19</sup> US Department of Defense, Annual Freedom of Navigation (FON) Reports (1991-2014), available at <http://policy.defense.gov/OUSDPOffices/FON.aspx> (last visited on May 5, 2016).

<sup>20</sup> US Department of Defense, FON Program Fact Sheet, Mar. 2015, available at <http://policy.defense.gov/Portals/11/Documents/gsa/cwmd/DoD%20FON%20Program%20--%20Fact%20Sheet%20%28March%202015%29.pdf> (last visited on May 5, 2016).

<sup>21</sup> *Supra* note 4, at 203.

<sup>22</sup> *Id.*

<sup>23</sup> US Department of Defense, *Asia-Pacific Maritime Security Strategy*, Aug. 2015, at 23-4, available at [http://www.defense.gov/Portals/1/Documents/pubs/NDAA%20A-P\\_Maritime\\_Security\\_Strategy-08142015-1300-FINALFORMAT.PDF](http://www.defense.gov/Portals/1/Documents/pubs/NDAA%20A-P_Maritime_Security_Strategy-08142015-1300-FINALFORMAT.PDF) (last visited on May 5, 2016).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Supra* note 13, at 135.

<sup>27</sup> A. Wright, B. Bender & P. Ewing, *Obama team, military at odds over South China Sea*, POLITICO, July 31, 2015, available at <http://www.politico.com/story/2015/07/barack-obama-administration-navy-pentagon-odds-south-china-sea-120865#ixzz3lp3fUeC> (last visited on May 5, 2016).

FONOPs are intended to be routine and frequent with challenges against “friendly states, inimical powers, and neutral states alike.”<sup>28</sup> While FONOPs are confrontational by design, they are not intended to be provocative. “Rather, in the framework of customary international law, [a FONOP] is a legitimate, peaceful assertion of a legal position and nothing more.”<sup>29</sup> Despite the non-provocative intent of FONOPs, a FON strategy can bring the escalation of risk.<sup>30</sup> In particularly sensitive cases, as with the Lassen mission, approval must come directly from the White House.<sup>31</sup>

Traditionally, FONOPs are kept secret until after the mission has been completed and even then publicity is limited to a brief summary published in the annual reports mentioned above.<sup>32</sup> As noted, the Lassen FONOP broke with this precedent and many observers felt that the extra attention was counterproductive. Some, however, recognized the benefits gained by the increased transparency. Professor James Kraska remarked that while the prolonged debate signaled apparent indecision on the part of the US, “the weeks of discussion and media speculation attracted greater attention regionally, including eliciting statements of support from Australia, Japan, and the Philippines and others.”<sup>33</sup> A more coordinated effort by the

<sup>28</sup> US National Security Decision, Directive Number 265: Freedom of Navigation Program, The White House, Mar. 16, 1987, available at <https://fas.org/irp/offdocs/nsdd/nsdd-265.htm>. The Lassen FONOP included challenges to claimants in the region besides China, i.e. Taiwan, Vietnam, and the Philippines. Secretary of Defense Ashton Carter stated that none of the “claimants were notified prior to the [Lassen] transit, which is consistent with our normal processes and with international law.” See *infra* note 54. In 2015, US FONOPs targeted 13 countries with excessive maritime claims, including China, Taiwan, Vietnam, Malaysia, Indonesia, and the Philippines. See US Department of Defense, Freedom of Navigation Report 2015, Apr. 19, 2016, available at [http://policy.defense.gov/Portals/11/Documents/gsa/cwmd/FON\\_Report\\_FY15.pdf](http://policy.defense.gov/Portals/11/Documents/gsa/cwmd/FON_Report_FY15.pdf) (all last visited May 5, 2016).

<sup>29</sup> J. Negroponte, *Who Will Protect Freedom of the Seas*, 855 CURRENT POL’Y 3 (July 1986).

<sup>30</sup> US FONOPs have not always met the proper standard of being purely non-provocative in intent. US operations on March 1986 across Muammar Qaddafi’s so-called “line of death” in the Gulf of Sidra provide an example. While the White House officially stated that the FONOPs were solely to demonstrate freedom of navigation rights, officials privately acknowledged that President Reagan’s had decided on a “get tough attitude” in reaction to Libyan sponsored terrorist activities and the freedom of navigation assertions provided the opportunity for the US to underscore its determination to deal firmly with terrorism. See D. Hoffman & L. Cannon, *Terrorism provided catalyst*, WASH. POST, Mar. 25, 1986, available at <https://www.washingtonpost.com/archive/politics/1986/03/25/terrorism-provided-catalyst/50232909-5a52-417b-84e7-a30a890130b8> (last visited on Mar. 30, 2016). US FONOPs on March 23-24, 1986 against Libya’s claim to historic waters in the Gulf of Sidra resulted in a military clash between the two countries, a declaration of ‘war’ by Qaddafi and terrorist reprisals by Libyan operatives. On April 15, 1986, the US responded with Operation El Dorado Canyon, a bombing campaign that resulted in civilian casualties.

<sup>31</sup> W. Aceves, *Diplomacy at Sea: US Freedom of Navigation Operations in the Black Sea*, 46 NAVAL WAR COLL. REV. 246 (Spring 1993).

<sup>32</sup> *Supra* note 19.

<sup>33</sup> S. LaGrone, *US destroyer made an ‘innocent passage’ near Chinese South China Sea artificial island in recent mission*, USNI NEWS, Nov. 2, 2015, available at <http://news.usni.org/2015/11/02/u-s-destroyer-made-an-innocent-passage-near-chinese-south-chia-sea-artificial-island-in-recent-mission> (last visited on May 5, 2016).

US government with increased transparency as a goal, rather than as an unintended benefit, would be in line with the goals of the FON Program in protecting navigation freedoms worldwide.

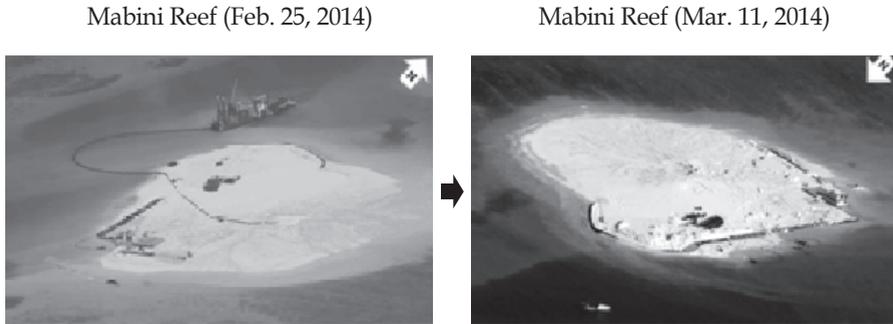
### 3. The Role of Images in the Public Debate over FONOPs in the South China Sea

Images played an important role in the lead-up to the Lassen mission and should be an integral part of future missions, as well. Yet, the US was late to make use of images from the South China Sea in helping to build support for its FONOPs in the region. In 1996, US intelligence experts admitted that they had been caught unaware by China's rapid build-up in the region. "We missed it because our satellites and interests were pointed to other places," remarked a US intelligence official at the time, adding, "[t]hat's no longer the case."<sup>34</sup> Nevertheless, it was not the US that provided the public with the first detailed imagery of the region. In 2014, the Philippine government released aerial photographs of island construction activity at Johnson South Reef, a feature within 200 nm of the Philippines' Palawan coast.<sup>35</sup> (Figure 1) The photos showed the transformation of a previously submerged reef filled in by dredging vessels to create an artificial island supporting several Chinese installations. Numerous articles on China's island building operations subsequently appeared in the international media.<sup>36</sup>

<sup>34</sup> Staff reporter, *Check Chinese expansionism*, STANDARD-SPEAKER, Aug. 16, 1996, at 18, available at <https://www.newspapers.com/newspage/61134820> (last visited on May 5, 2016).

<sup>35</sup> Republic of the Philippines Department of Foreign Affairs, *China's reclamation on Mabini Reef*, May 15, 2014, available at <http://www.dfa.gov.ph/index.php/newsroom/dfa-releases/2871-china-s-reclamation-on-mabini-reef> (last visited on May 5, 2016).

<sup>36</sup> See, e.g., R. Wingfield-Hayes, *China's Island Factory*, BBC NEWS, Sept. 9, 2014, available at <http://www.bbc.co.uk/news/resources/idt-1446c419-fc55-4a07-9527-a6199f5dc0e2> (last visited on May 5, 2016).

Figure 1: Photos of Johnson South Reef from the Philippine Intelligence Sources<sup>37</sup>

Reports included images of a pristine marine environment contrasted with scenes of massive dredging and construction operations,<sup>38</sup> ‘prop chopping’ ships<sup>39</sup> and the Chinese military warning foreigners to keep away.<sup>40</sup>

In November 2014, the Center for Strategic and International Studies launched the Asia Maritime Transparency Initiative (“AMTI”) website, providing in-depth analysis of the region.<sup>41</sup> AMTI’s ‘Island Tracker’ webpage provided the “latest developments on island reclamation activities [with] new satellite imagery ... added on a regular basis.”<sup>42</sup> (Figure 2) AMTI images were often featured in interactive media offerings by the press, providing the public with an appreciation of the scope of China’s projects in the region and their effect on the marine environment.<sup>43</sup> Against this backdrop, the US naval operations in the region, while already occurring

<sup>37</sup> *Supra* note 35.

<sup>38</sup> T. Thornhill, *Advance of the “Great Wall of Sand”: new aerial photographs show incredible scale of construction on man-made islands in disputed area of South China Sea*, DAILY MAIL (online), May 20, 2015, available at <http://www.dailymail.co.uk/news/article-3046619/Philippines-seeks-Southeast-Asian-unity-denouncing-China-reclamation.html#ixzz3yuQkCCKw> (last visited on May 5, 2016).

<sup>39</sup> V. R. Lee, *Satellite imagery shows ecocide in the South China Sea*, DIPLOMAT, Jan. 15, 2016, available at <http://thediplomat.com/2016/01/satellite-images-show-ecocide-in-the-south-china-sea> (last visited on Mar. 30, 2016). (displaying “time sequence of satellite images of a portion of the Thitu Reef’s shows [intentional] prop chopping” of coral reefs by Chinese fishing vessels).

<sup>40</sup> *Supra* note 36 (describing a “volley of flares” launched as ‘Chinese warning’ to stay away).

<sup>41</sup> See Asia Maritime Transparency Initiative (“AMTI”), available at <http://amti.csis.org> (last visited on May 5, 2016).

<sup>42</sup> AMTI, *Island Tracker*, available at <http://amti.csis.org/island-tracker> (last visited on May 5, 2016).

<sup>43</sup> J. Chin, *South China sea: Satellite images show China’s continued island building*, China Real Time Blog, WALL ST. J., Sept. 16, 2015, available at <http://blogs.wsj.com/chinarealtime/2015/09/16/south-china-see-satellite-images-show-chinas-continued-island-building/> (last visited on May 5, 2016). See also *supra* note 39.

on a 'daily basis,'<sup>44</sup> began to be highlighted in mainstream press.

Figure 2: Asia Maritime Transparency Initiative: Island Tracker<sup>45</sup>

Cuarteron Reef



Fiery Cross Reef



On May 11, 2015, the US Navy provided photos and video of the USS Fort Worth on a FONOP<sup>46</sup> in the Spratly Islands. There, the vessel was reported to have sailed close to but not within 12 nm of Spratly Island proper, a Vietnamese-occupied but Chinese-claimed feature.<sup>47</sup> The images showed the Fort Worth being closely trailed by the Yancheng, a Chinese Navy guided-missile frigate.<sup>48</sup> On May 12, THE WALL STREET JOURNAL reported:

Growing momentum within the Pentagon and the White House ... to send a signal [to China] that the recent build up in the Spratlys went too far. [...] The US Navy regularly conducts freedom of navigation transits in the region ... [but] has yet to receive explicit authorization from the administration to do so within 12 nautical miles of the artificial islands.<sup>49</sup>

<sup>44</sup> S. J. Freedberg, *US hasn't challenged Chinese 'islands' since 2012*, BREAKING DEFENSE, Sept. 17, 2015, available at <http://breakingdefense.com/2015/09/us-has-steered-clear-of-chinese-artificial-islands-in-south-china-sea> (last visited on May 5, 2016). (quoting Assistant Secretary of Defense David Shear)

<sup>45</sup> *Supra* note 42.

<sup>46</sup> B. Gertz, *The looming military showdown in the South China Sea*, ASIA TIMES, Oct. 19, 2015, available at <http://atimes.com/2015/10/the-looming-military-showdown-in-the-south-china-sea-gertz> (last visited on May 5, 2016).

<sup>47</sup> Z. Keck, *Face Off: China's Navy Stalks US Ship in South China Sea*, NAT'L INTEREST, May 13, 2015, available at <http://nationalinterest.org/blog/the-buzz/face-chinas-navy-stalks-us-ship-south-china-sea-12882> (last visited on May 5, 2016).

<sup>48</sup> A. Johnson, *USS Fort Worth conducts routine operations in South China Sea*, US Navy, May 12, 2015, available at <https://youtu.be/06pbN8uEzDE> (last visited on May 5, 2016).

<sup>49</sup> A. Entous, G. Lubold & J. E. Barnes, *US military proposes challenge to China sea claims*, WALL ST. J., May 12, 2015, available at <http://www.wsj.com/articles/u-s-military-proposes-challenge-to-china-sea-claims-1431463920> (last visited on May 5, 2016).

On May 13, Senator Bob Corker mentioned the article while questioning Assistant Secretary of Defense for Asian and Pacific Security Affairs David Shear about “piloting a boat within 12 nautical miles of one of these islands.”<sup>50</sup> “Are we actually going to do that?” asked Corker.<sup>51</sup> Shear said he was “not at liberty to discuss the details of [the] operations in an unclassified setting.”<sup>52</sup> Corker asked, “Should I call the author of the article to find more detail [because] it’s kind of out there.” Pressed for details, Shear stated:

Many of the features in the Spratlys including those claimed by China are submerged features. *They do not generate a legal territorial claim. We claim the right of innocent passage in such areas[.]*<sup>53</sup>

The statement from Shear is noteworthy in that it presents an incomplete understanding of the law of the sea and foreshadows the muddled messaging of the Lassen FONOP. The right of ‘innocent passage’ is exercised in a coastal State’s territorial waters. Since, as Shear correctly notes, “submerged features ... do not generate a legal territorial claim,” they also have no claim to territorial waters and thus for Shear to state that the US “claim[s] the right of innocent passage in such areas” creates confusion. As discussed below, this confusion would attract international attention when the Lassen sailed in ‘innocent passage’ within 12 nm of Subi Reef, a submerged feature with no territorial sea of its own.<sup>54</sup>

Images continued to be significant to the FONOP debate when on May 20, 2015 the US Navy invited a CNN News team on a fly-by of several of China’s artificial islands in the South China Sea.<sup>55</sup> This release of previously classified information by the Department of Defense was extensive and unprecedented. International audiences witnessed striking footage of Chinese dredgers engaged in massive construction and development.<sup>56</sup> The broadcast also featured dramatic audio of the

<sup>50</sup> US Senate Committee on Foreign Relations, *Safeguarding American Interests in the East and South China Seas*, May 13, 2015, available at <https://www.foreign.senate.gov/hearings/safeguarding-american-interests-in-the-east-and-south-china-seas> (last visited on May 5, 2016).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* [Emphasis added]

<sup>54</sup> Document: SECDEF Carter letter [of Dec. 22, 2015] to McCain on South China Sea freedom of navigation operation, USNI NEWS, Jan. 5, 2016, available at <http://news.usni.org/2016/01/05/document-secdef-carter-letter-to-mccain-on-south-china-sea-freedom-of-navigation-operation> (last visited on May 5, 2016).

<sup>55</sup> J. Sciutto, *China warns US surveillance plane*, CNN NEWS, Sept. 15, 2015, available at <http://edition.cnn.com/2015/05/20/politics/south-china-sea-navy-flight> (last visited on May 5, 2016). [Emphasis added]

<sup>56</sup> *Id.*

Chinese military shouting out demands for the Americans to leave the area: “This is the Chinese Navy ... you go!”<sup>57</sup> During the broadcast, the US aircraft was warned multiple times: “You are approaching our military alert zone, leave immediately to avoid misjudgment.”<sup>58</sup> A CNN correspondent told viewers the warnings were severe enough that a commercial airliner transiting the area “piped in to ask, ‘what’s going on?’”<sup>59</sup>

On May 21, 2015, Senator John McCain commented on the unprecedented release, stating: “Images can be powerful tools.”<sup>60</sup> He added that: “The release of unclassified US intelligence material,” including “public video,” helps to “demonstrate the extent of China’s land reclamation project” and “shows clearly the alarming scope of Beijing’s efforts to assert its vast territorial claims.”<sup>61</sup> Senator McCain said he had long called for the release of such imagery.<sup>62</sup> The same day, McCain joined Senators David Schatz and Dan Sullivan in introducing a Senate resolution condemning “China’s unilateral construction of artificial land formations in the disputed Spratly Islands” and calling for “the continuation of operations by the United States Armed Forces in support of freedom of navigation rights” “as provided for by customary principles of international law.”<sup>63</sup>

## 4. Promoting Freedom of Navigation as a Benefit for the International Community

At the Shangri-La Dialogue on May 30, 2015, Secretary of Defense Ashton Carter drew attention to China’s artificial islands, stating that: “China is out of step with ... international rules.”<sup>64</sup> ‘After all,’ Carter told regional leaders, “turning an underwater

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* BBC News also documented a “civilian single-engine aircraft” being warned away from “military alert zones” at several features in the Spratlys and captured audio of an Australian naval aircraft receiving the same warning. See R. Wingfield-Hayes, *Flying close to Beijing’s new South China Sea islands*, BBC NEWS, Dec. 14, 2015, available at <http://www.bbc.com/news/magazine-35031313> (last visited on May 5, 2016).

<sup>59</sup> *Id.*

<sup>60</sup> C. Clark, *China challenges P-8 crew, on video; top senators condemn PRC*, BREAKING DEFENSE, May 21, 2015, available at <http://breakingdefense.com/2015/05/rubber-hits-road-china-challenges-p-8-crew-on-video-top-senators-condemn-prc> (last visited on May 5, 2016).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> US Senate Resolution 183, 114th Congress, 2015-2016, available at <https://www.congress.gov/bill/114th-congress/senate-resolution/183/text> (last visited on May 5, 2016).

<sup>64</sup> Secretary of Defense Carter, *A Regional Security Where Everyone Rises*, IISS Shangri-La Dialogue, May 30, 2015,

rock into an airfield simply does not afford the rights of sovereignty or permit restrictions on international air or maritime transit.”<sup>65</sup> Carter went on to state:

All countries should have the right to freedom of navigation ... so global commerce can continue unimpeded. ... America, alongside its allies and partners in the [region] will not be deterred from exercising these rights ... [which] continue to help all our nations rise.<sup>66</sup>

Carter’s community-based theme is in line with points emphasized by Tommy Koh of Singapore, President of the Third United Nations Conference on the Law of the Sea; namely that freedom of navigation is the “lifeblood of the shipping industry” and represents a “global public good” and “an enabler of globalization.”<sup>67</sup>

Admiral Jianguo Sun spoke on behalf of China at the event. He said Chinese island “construction projects fall well within the scope of China’s sovereignty” and that “there has never been an issue with the freedom of navigation in the South China Sea.”<sup>68</sup> This comment was repeated by Chinese Foreign Minister Wang Yi at the ASEAN summit on August 6, 2015 where he stated: “There has not been a single case in which freedom of navigation in the South China Sea is impeded.”<sup>69</sup> Notably, however, US Secretary of State John Kerry made a point of correcting the minister while alluding to the images released by the US to support his case. Kerry said: “Despite assurances [from Foreign Minister Wang] ... that freedoms [of navigation] will be respected, *we have seen* warnings issued and restrictions attempted in recent months.”<sup>70</sup>

On September 17, 2015 at a Senate hearing on maritime security, Admiral Harry Harris stood beside a large photograph of Fiery Cross Reef and took questions. (Figure 3)

available at <https://www.iiss.org/-/media/Documents/Events/Shangri-La%20Dialogue/SLD15/Carter.pdf> (last visited on May 5, 2016).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> M. NORDQUIST ET AL., FREEDOM OF NAVIGATION AND GLOBALIZATION 4-5 (2014).

<sup>68</sup> Jianguo Sun, *Strengthening Regional Order in the Asia-Pacific*, IISS Shangri-La Dialogue, May 30, 2015, available at <https://www.iiss.org/en/events/shangri%20la%20dialogue/archive/shangri-la-dialogue-2015-862b/plenary4-b8e3/sun-0dfc> (last visited on May 5, 2016).

<sup>69</sup> Staff reporter, *Wang Yi on South China Sea at ASEAN Regional Forum*, CHINA DAILY, Aug. 7, 2015, available at [http://usa.chinadaily.com.cn/china/2015-08/07/content\\_21532990.htm](http://usa.chinadaily.com.cn/china/2015-08/07/content_21532990.htm) (last visited on May 5, 2016).

<sup>70</sup> US Department of State, Remarks by Secretary of State John Kerry at the East Asia Summit, Kuala Lumpur, Malaysia Aug. 6, 2015, available at <http://www.state.gov/secretary/remarks/2015/08/245758.htm> (last visited on May 5, 2016). [Emphasis added]

Figure 3: Admiral Harris beside a Photograph of Fiery Cross Reef<sup>71</sup>

Senator Sullivan pointed at the photograph and asked, “[i]n your professional opinion ... should we sail or fly inside the 12-mile area?”<sup>72</sup> “That one, yes,” Harris replied, “I believe that we should be allowed to exercise freedom of navigation ... in the South China Sea, *against those ‘islands’ that are not islands.*”<sup>73</sup>

The debate had heated up over whether a US FONOP should pass within 12 nm of one of China’s artificial islands. Senators McCain and Sullivan, who had recently introduced a resolution calling for support of more assertive FONOPs, were both anxious to point out that the Chinese had recently completed a passage through US territorial waters in Alaska off the Aleutian Islands –the transit coincidentally took place as President Obama was visiting Alaska.<sup>74</sup> McCain argued that the US should be “asserting [its] rights just as forcefully” as the Chinese.<sup>75</sup> He added that “the most visible assertion of freedom of the seas [would be] to *peacefully sail* inside the 12-mile limit of artificial islands.”<sup>76</sup>

<sup>71</sup> Staff reporter, *China navy carries out more drills in disputed South China Sea*, JAPAN TIMES, Dec. 14, 2015, available at <http://www.japantimes.co.jp/news/2015/12/14/asia-pacific/china-navy-carries-out-more-drills-in-disputed-south-china-sea/#.Vsqzhxj73eR> (last visited on May 5, 2016).

<sup>72</sup> *Supra* note 44.

<sup>73</sup> *Id.* [Emphasis added].

<sup>74</sup> J. Page & G. Lubold, *Chinese Navy ships are operating in Bering Sea off Alaska Chinese naval presence off Alaskan coast appears to be a first*, WALL ST. J., Sept. 2, 2015, available at <http://www.wsj.com/articles/pentagon-watches-as-chinese-navy-ships-sail-in-bering-sea-1441216258> (last visited on May 5, 2016).

<sup>75</sup> K. Demirjian, *McCain pushes defense officials toward game of chicken in South China Sea*, WASH. POST, Sept. 17, 2015, available at <https://www.washingtonpost.com/news/powerpost/wp/2015/09/17/mccain-pushes-defense-officials-toward-game-of-chicken-in-south-china-sea> (last visited on May 5, 2016).

<sup>76</sup> P. Goodenough, *US Warships haven’t entered waters near China-claimed islands since 2012*, CNS NEWS, Sept. 17, 2015, available at <http://cnsnews.com/news/article/patrick-goodenough/us-warships-havent-entered-waters-near-china-claimed-islands-2012> (last visited on May 5, 2016). [Emphasis added] McCain seems to be suggesting the US engage

At the close of the hearing, 29 US House Representatives issued a letter to the Obama administration stating that they were “concerned to read media reports that the US Navy has been prohibited from conducting freedom of navigation patrols ... in close proximity to China’s artificial formations.”<sup>77</sup> They called on the administration to send a “firm response ... including a highly symbolic passage ... through the waters and airspace illegitimately claimed by China [in order] to reinforce and sustain the international community’s opposition to extralegal claims.”<sup>78</sup>

On September 18, 2015 the Chinese Foreign Ministry said it was ‘seriously concerned’ about the Senate hearing.<sup>79</sup> The Foreign Ministry added: “China, like the US, champions navigation freedom in the South China Sea, but opposes any country’s attempt to challenge China’s territorial sovereignty ... under the pretext of safeguarding navigation freedom.”<sup>80</sup>

When Chinese President Xi Jinping visited the US on September 25, President Obama expressed ‘significant concerns’ over continued island construction, “reiterated the right of all countries to freedom of navigation,” and emphasized the need “to make sure that the rules of the road are upheld.”<sup>81</sup> Xi rejoined that ‘construction activities’ on the islands did not affect freedom of navigation and emphasized China’s “right to uphold our own territorial sovereignty and lawful and legitimate maritime rights.”<sup>82</sup>

On September 28, President Obama addressed the UN General Assembly linking “freedom of navigation and the free flow of commerce.”<sup>83</sup> Obama said that while the US “makes no claim on territory” in the South China Sea, “[I]ike every nation here, we have an interest in upholding the basic principles of freedom of navigation.”<sup>84</sup>

in an ‘innocent passage’ FONOP yet McCain would criticize the Lassen’s ‘innocent passage’ by Subi Reef. *See infra* note 98.

<sup>77</sup> US House Representatives, Letter to President Obama and Secretary of Defense Carter, Sept. 17, 2015, *available at* [http://forbes.house.gov/uploadedfiles/09.17.15\\_letter\\_to\\_obama\\_and\\_kerry.pdf](http://forbes.house.gov/uploadedfiles/09.17.15_letter_to_obama_and_kerry.pdf) (last visited on May 5, 2016).

<sup>78</sup> *Id.*

<sup>79</sup> PRC Foreign Ministry, Foreign Ministry spokesperson Hong Lei’s regular press conference, Sept. 18, 2015, *available at* [http://www.fmprc.gov.cn/mfa\\_eng/xwfw\\_665399/s2510\\_665401/t1298026.shtml](http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1298026.shtml) (last visited on May 5, 2016).

<sup>80</sup> *Id.*

<sup>81</sup> Remarks by President Obama and President Xi of the PRC in Joint Press Conference, The White House, Sept. 25, 2015, *available at* <https://www.whitehouse.gov/the-press-office/2015/09/25/remarks-president-obama-and-president-xi-peoples-republic-china-joint> (last visited on May 5, 2016).

<sup>82</sup> *Id.*

<sup>83</sup> The White House, Remarks by President Obama to the UN General Assembly, Sept. 28, 2015, *available at* <https://www.whitehouse.gov/the-press-office/2015/09/28/remarks-president-obama-united-nations-general-assembly> (last visited on May 5, 2016).

<sup>84</sup> *Id.*

By October statements to the press from the Department of Defense made it clear that a FONOP within 12 nm of one of China's artificial islands was "not a question of if, but when."<sup>85</sup> By mid-October US officials were saying a FONOP was expected 'within days.'<sup>86</sup> Unfortunately, however, while plenty of information was available in the lead-up to the mission, once the Lassen was underway information was extremely limited and largely inaccurate.

On October 26, 2015, a Department of Defense official told the press that the Lassen was "nearing Subi and Mischief reefs" and would be loitering there for 'several hours.'<sup>87</sup> The official indicated that Navy aircraft would also be involved in the FONOP.<sup>88</sup> In fact, however, the Lassen had only sailed within 12 nm of Subi Reef in 'innocent passage,' which precludes any loitering or the use of aircraft.<sup>89</sup>

On October 27, 2015, the White House instructed the Department of Defense not to release any information to the public concerning the Lassen FONOP.<sup>90</sup> The same day, however, Defense Secretary Carter was before a Senate hearing facing questions from Senators McCain and Sullivan on the Lassen mission which had passed Subi Reef just hours earlier.<sup>91</sup> The Defense Secretary refused at first to comment on the mission. Senator Sullivan protested: "It's all over the press right now."<sup>92</sup> Senator McCain pressed further: "The news reports – all day – are about a US destroyer, naming the destroyer, going within the 12 mile zone around these islands. Why would you not confirm or deny that that happened?"<sup>93</sup> Carter finally replied: "What

<sup>85</sup> D. De Luce & P. McLeary, *In South China Sea, a tougher US stance*, FOREIGN POL'Y, Oct. 2, 2015, available at <https://foreignpolicy.com/2015/10/02/in-south-china-sea-a-tougher-u-s-stance> (last visited on May 5, 2016).

<sup>86</sup> D. Feith, *What lies in the South China Sea*, WALL ST. J., Oct. 13, 2015, available at <http://www.wsj.com/articles/what-lies-in-the-south-china-sea-1444756962> (last visited on May 5, 2016).

<sup>87</sup> A. Shalal & D. Brunnstrom, *US Navy destroyer nears islands built by China in South China Sea*, REUTERS, Oct. 26, 2015, available at <http://www.reuters.com/article/us-southchinasea-usa-idUSKCN0SK2AC20151026> (last visited on May 5, 2016).

<sup>88</sup> *Id.*

<sup>89</sup> UNCLOS art.19, 1833 U.N.T.S. 3; 21 I.L.M. 1261 (1982).

<sup>90</sup> H. Cooper & J. Perlez, *White House moves to reassure allies with South China Sea patrol, but quietly*, N. Y. TIMES, Oct. 28, 2015, available at [http://www.nytimes.com/2015/10/28/world/asia/south-china-sea-uss-lassen-spraty-islands.html?\\_r=1](http://www.nytimes.com/2015/10/28/world/asia/south-china-sea-uss-lassen-spraty-islands.html?_r=1) The media blackout by the White House was inappropriate and disturbingly similar to China's attempt to control coverage in the South China Sea. See e.g. C. Brummitt, *Frantic Phone Call Failed to Halt China-Indonesia Sea Spat*, BLOOMBERG, Mar. 23, 2016, available at <http://www.bloomberg.com/news/articles/2016-03-22/frantic-phone-call-failed-to-contain-china-indonesia-sea-spat> ("a top Chinese diplomat called an Indonesian government official with a plea: Don't tell the media") (all last visited on May 5, 2016).

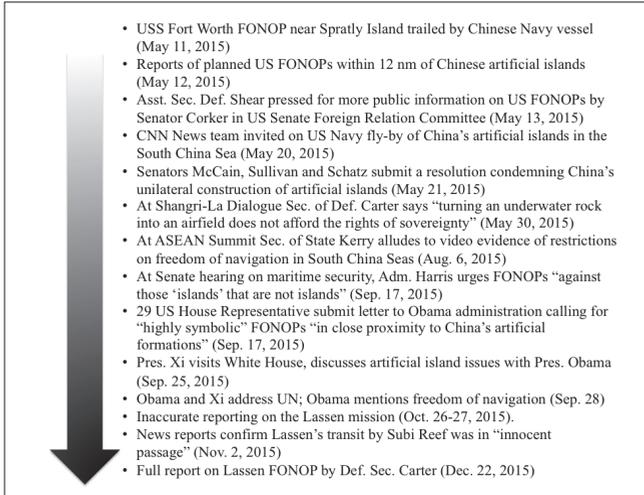
<sup>91</sup> *Id.*

<sup>92</sup> T. Phillips, *South China Sea: Beijing 'not frightened to fight a war' after US move*, GUARDIAN, Oct. 28, 2015, available at <http://www.theguardian.com/world/2015/oct/28/china-not-frightened-fight-war-south-china-sea-uss-lassen> (last visited on May 5, 2016).

<sup>93</sup> S. LaGrone, *US South China Sea freedom of navigation missions included passage near Vietnamese, Philippine Claims*, USNI NEWS, Oct. 27, 2015, available at <http://news.usni.org/2015/10/27/u-s-south-china-sea-freedom-of>

you read in the newspaper is accurate but I don't want to say more than that."<sup>94</sup>

Figure 4: Timeline of Events surrounding Lassen FONOP



Source: Compiled by the author

Newspaper reports, however, were not accurate which meant that experts working with bad information from the US government sources were now providing faulty analysis to the international community.<sup>95</sup> It was not until November 2, 2015 that information on Lassen's transit in 'innocent passage' was made publicly available, which as noted created enormous confusion since Subi Reef was considered a previously-submerged feature with no territorial sea of its own and therefore incapable of being transited in 'innocent passage.'<sup>96</sup> Many questioned if the Lassen FONOP had just willy-nilly granted recognition of a territorial sea surrounding Subi Reef.<sup>97</sup> If so, the mission had accomplished the opposite of what it set out to do.

Compounding the problem, the US kept up its media blackout on the issue while

navigation-missions-included-passage-near-vietnamese-philippine-claims (last visited on May 5, 2016).

<sup>94</sup> *Id.*

<sup>95</sup> Staff reporter, *Interview with Bonnie Glaser Director of the China Power Project at the Center for Strategic and International Studies*, INSIDE ASIA, Oct. 28, 2015, available at <http://www3.nhk.or.jp/nhkworld/english/news/insideasia/2015102801.html> (last visited on May 5, 2016).

<sup>96</sup> *Supra* note 33.

<sup>97</sup> Julian Ku, *The US Navy's 'innocent passage' in the South China Sea may have actually strengthened China's sketchy territorial claims*, Nov. 4, 2015, available at <https://www.lawfareblog.com/us-navys-innocent-passage-south-china-sea-may-have-actually-strengthened-chinas-sketchy-territorial> (last visited on May 5, 2016).

public speculation ran rife. Upset with the lack of transparency, Senator McCain issued a letter urging “the Department of Defense [to] *publicly clarify* ... the legal intent behind this [FON] operation and any future operations of a similar nature.”<sup>98</sup> Unfortunately, it would be another eight weeks before the Defense Secretary finally provided a public response with appropriately detailed information on the Lassen FONOP.<sup>99</sup>

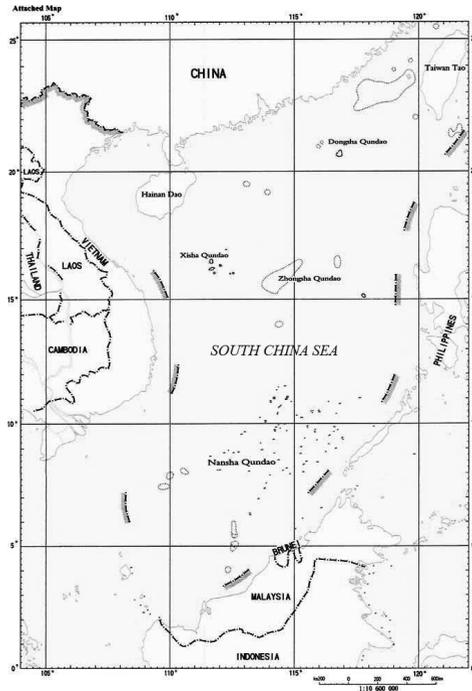
## 5. China’s Unclarified Claims to the South China Sea

Legal scholars have long expressed frustration with China’s ambiguous claims in the South China Sea. Central to this ambiguity is China’s infamous nine-dash line encircling nearly the entire South China Sea and its claim to ‘indisputable sovereignty’ over everything inside of it.<sup>100</sup> Despite the concerns of countries in the region, many of which have competing claims, China has refused to clarify its nine-dash line claim in conformity with the language of the UNCLOS. (Figure 5)

<sup>98</sup> D. Brunstrom, *McCain calls on Pentagon to clarify South China Sea patrol*, REUTERS, Nov. 11, 2015, available at <http://www.reuters.com/article/us-southchinasea-usa-passage-idUSKCN0T02DQ20151111> (last visited on May 5, 2016). [Emphasis added].

<sup>99</sup> *Supra* note 54. The Defense Secretary would explain that ‘innocent passage’ was undertaken because Subi Reef may be “located within 12 nautical miles of another geographic feature that is entitled to a territorial sea – as might be the case with Sandy Cay.” If such were the case, “the low-water line on Subi Reef could be used as the baseline for measuring Sandy Cay’s territorial sea [meaning] 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.” For details, see UNCLOS art. 13(1).

<sup>100</sup> *Note Verbale* from the Permanent Mission of the People’s Republic of China (CML/17/2009), May 7, 2009, available at [http://www.un.org/depts/los/clcs\\_new/submissions\\_files/vnm37\\_09/chn\\_2009re\\_vnm.pdf](http://www.un.org/depts/los/clcs_new/submissions_files/vnm37_09/chn_2009re_vnm.pdf) (last visited on May 5, 2016).

Figure 5: China's Nine Dashed-Line Map from Notes *Verbales* of 2009<sup>101</sup>

Much of the ambiguity seems to have been officially encouraged by the use of non-UNCLOS terms like ‘blue soil’ and ‘blue territory’ which, ironically, were introduced by China’s ‘ocean consciousness’ campaign launched to coincide with the ratification of the UNCLOS.<sup>102</sup>

Such a skewed perspective often shows itself in China’s words and actions inside the nine-dash line. For instance, in patriotic pledges made by Chinese sailors to defend “the country’s sovereignty with their services on the South China Sea” at “oath-taking ceremon[ies]” near James Shoal, a submerged feature some 20 meters beneath the sea yet considered China’s “southernmost ... *territory*.”<sup>103</sup> Mark J. Valencia notes a similar claim, “border[ing] on the ridiculous,” to Macclesfield

<sup>101</sup> *Id.*

<sup>102</sup> Staff reporter, *Seas of Troubles: China expands its South China Sea island claims*, *ECONOMIST*, May 25, 1996, at 36-7, available at <https://www.highbeam.com/doc/1G1-18316941.html> (last visited on May 5, 2016).

<sup>103</sup> Staff reporter, *Navy fleet reaches southernmost Chinese territory*, *XINHUANET*, Mar. 26, 2013, available at <http://en.people.cn/90786/8183686.html> (last visited on May 5, 2016). [Emphasis added]

Bank, another submerged feature inside the nine-dash line which “at its shallowest is covered by some 30 feet of water.”<sup>104</sup>

Recently, a claim was made to Jackson Shoal (*Wufang Jiao* 五方礁 in Chinese), another submerged feature inside the nine-dash line yet just 140 nm from the Philippine island of Palawan and well within the Philippines’ exclusive economic zone (“EEZ”).<sup>105</sup> After acknowledging the expulsion of several Philippine fishing vessels from the area, the Chinese Foreign Ministry issued a statement “stress[ing] that China has *indisputable sovereignty* over the Nansha [Spratly] Islands *including Wufang Jiao*.”<sup>106</sup> Under the UNCLOS, however, submerged features (which include “low-tide elevations”<sup>107</sup>) are not subject to sovereignty claims since claims to sovereignty can only be made to land territory and islands.<sup>108</sup>

## 6. The Nine-dash Line Claim as a Psycho-legal Boundary

Although China’s claims inside the nine-dash line often appear problematic, outside of the nine-dash line China seems generally prepared to resolve its maritime disputes in accordance with international law—even when the substance of those disputes are the same as those China finds impossible to resolve when they occur inside the nine-dash line. Take Socotra Rock as example, a submerged feature in the Yellow Sea straddling overlapping EEZ claims of China and South Korea. Like James

<sup>104</sup> M. Valencia, *China’s maritime machinations: The good, the bad, and the ugly*, DIPLOMAT, Dec. 10, 2014, available at <http://thediplomat.com/2014/12/chinas-maritime-machinations-the-good-the-bad-and-the-ugly> (last visited on May 5, 2016).

<sup>105</sup> C. Diola, *What we know about Jackson Atoll in disputed sea*, PHILSTAR, Mar. 2, 2016, available at <http://www.philstar.com:8080/news-feature/2016/03/02/1558763/what-we-know-about-jackson-atoll-disputed-sea> (last visited on May 5, 2016).

<sup>106</sup> PRC Foreign Ministry, Foreign Ministry spokesperson Hong Lei’s regular press conference, Mar. 2, 2016, available at [http://www.fmprc.gov.cn/mfa\\_eng/xwfw\\_665399/s2510\\_665401/2511\\_665403/t1344679.shtml](http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1344679.shtml) (last visited on May 5, 2016). [Emphasis added]

<sup>107</sup> A “low-tide elevation” is defined as “a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide.” See UNCLOS art. 13(1).

<sup>108</sup> US Department of State, *China: Maritime Claims in the South China Sea*, 143 LIMITS IN THE SEAS, Dec. 5, 2014, available at <http://www.state.gov/documents/organization/234936.pdf> (“Submerged features, namely those that are not above water at high tide [which includes low-tide elevations], are not subject to sovereignty claims and generate no maritime zones of their own.”). See also R. Beckman, *Legal Status of Low-Tide Elevations and Submerged Features*, International Seminar on “Geographical Features in the East Asian Seas and the Law of the Sea,” Taipei, Sept. 20-21, 2012, at 16, available at <http://cil.nus.edu.sg/wp/wp-content/uploads/2012/09/Beckman-LTE-submerged-features-Taipei-20-21-Sep1.pdf> (“Under UNCLOS, low-tide elevations and submerged features are not subject to a claim to sovereignty because sovereignty can only be claimed over land territory and islands.”). (all last visited on May 5, 2016).

or Jackson Shoals or Macclesfield Bank, Socotra Rock (called *Suyan* Rock in Chinese and *leodo* in Korean) lies meters below the ocean's surface. Significantly, however, China has made no territorial claim to the feature even when disputes have arisen over the submerged rock.

China protested South Korea's construction of an ocean research station on Socotra Rock because it claimed the station was located within its EEZ. The South Korean President responded by explaining, "the leodo issue is not a territorial matter ... because it is 4-5 meters under the sea."<sup>109</sup> Remarkably, China's Foreign Ministry stated that: "People's Republic of China and the Republic of Korea have a consensus on Suyan Rock, that is, the rock does not have territorial status, and the two sides have no territorial disputes."<sup>110</sup> How is that China can have such a different perspective when it comes to similar features in the South China Sea?

Chinese legal analysis within the nine-dash line appears to begin with the notion of 'indisputable sovereignty' and proceed from there. If international law fails to recognize such claims, China would then believe, it is international law that is considered problematic, not China's 'indisputable' claims.<sup>111</sup> One explanation for China's unique perspective on its South China Sea claims may be that the nine-dash line represents a "psycho-legal boundary" rather than a purely legal one. In the 1980s, Ken Booth introduced the concept of "psycho-legal boundaries at sea."<sup>112</sup> Booth explained that:

In the study of animals, 'territoriality' refers to an area in which one group is dominant and believes that it has rightful possession. Consequently that group will resist intrusion by others. The 'territorial' sense has existed in relation to patches of land ever since human groups became settled farmers. In modern times it has been expressed politically in the concept of sovereignty, and by the creation of armed forces as badges of that sovereignty, as well as its defenders. There is now a growing trend

<sup>109</sup> J. S. Chang, *Lee: leodo will remain under S. Korea's control*, YONHAP NEWS, Mar. 12, 2012, available at <http://english.yonhapnews.co.kr/fullstory/2012/03/12/75/4500000000AEN20120312007551315F.HTML> (last visited on May 5, 2016).

<sup>110</sup> PRC Foreign Ministry, Spokesperson Liu Weimin's Regular Press Conference, Mar. 12, 2012, available at <http://www.fmprc.gov.cn/eng/xwfw/s2510/2511/t913936.htm> (last visited on May 5, 2016). See also Beckman, *supra* note 108.

<sup>111</sup> Valencia suggest China may be "ready to challenge the existing world system and contemporary interpretations of international law ... to protect its interests" in the South China Sea. See M. Valencia, *The South China Sea: What China could say*, NAPSNET POL'Y F., May 7, 2013, available at <http://nautilus.org/napsnet/napsnet-policy-forum/the-south-china-sea-what-china-could-say> (last visited on May 5, 2016). In defense of China's South China Sea claims, Chinese legal scholar Zihua Zheng states problems with the "so-called ambiguity in China's Nine-Dash Line map ... mainly stems from the imperfection of the UNCLOS." See *infra* note 133.

<sup>112</sup> K. Booth, *Naval Strategy and the Spread of Psycho-Legal Boundaries at Sea*, 38 INT'L J. OCEAN POLITICS 373-96 (1983).

for nations to project that territorial sense over adjoining patches of water.<sup>113</sup>

Booth remarked on the psycho-legal boundaries at issue for Americans in 1983 when two Soviet warships sailed close by the US coastline— coming within 50 nm of the Mississippi Delta at one point.<sup>114</sup> Booth notes that while there was nothing illegal about the Russian vessels' transit, "their very presence jarred the American sense of whose warships should be where on the world map."<sup>115</sup> One can still find the same visceral reactions today within the US government regarding warships from Russia<sup>116</sup> and of course from China, as well.<sup>117</sup> A similar attitude of 'territoriality' exists regarding to China's claims to the South China Sea. A Chinese Navy admiral, *e.g.*, recently remarked that the name, "South China Sea" itself clearly indicates that it is "a sea area [that] *belongs to China*."<sup>118</sup> Kerry Brown has observed that:

The infamous nine-dash line ... marks not only an asserted (albeit vague) territorial border, but also a deeply emotional one. ... *It touches raw emotions, and relates profoundly to the sense of who the Chinese are and how they see their new role in the world as a reborn and resurrected nation.*<sup>119</sup>

Valencia has also emphasized the significance of Chinese national identity as it relates to the South China Sea; Valencia believes that the US has "underestimate[d] the zeal

<sup>113</sup> K. BOOTH, *LAW, FORCE AND DIPLOMACY AT SEA* 40 (1985)

<sup>114</sup> *Id.* at 41.

<sup>115</sup> *Id.* at 41-2.

<sup>116</sup> D. E. Sanger & E. Schmitt, *Russian ships near data cables are too close for US comfort*, N.Y. TIMES, Oct. 25, 2015, available at [http://www.nytimes.com/2015/10/26/world/europe/russian-presence-near-undersea-cables-concerns-us.html?\\_r=0](http://www.nytimes.com/2015/10/26/world/europe/russian-presence-near-undersea-cables-concerns-us.html?_r=0) (last visited on May 5, 2016). (quoting US Navy Admiral Frederick J. Roegge on Russian ships and submarines operating "closer to American shores" but well beyond US territorial seas: "I'm worried every day about what the Russians may be doing.")

<sup>117</sup> When Chinese Navy ships sailed with 12 nm of US territorial waters off the Alaskan coast during a President Obama visit, Alaska Senator Dan Sullivan insisted the passage was a provocation, adding: "I'm not sure [the Obama] administration would recognize provocation if it were slapped in the face." The Pentagon, however, kept its cool stating that the transit was made in 'innocent passage' consistent with the UNCLOS. See D. Riechmann & L. C. Baldor, *McCain: US should ignore China's claims in South China Sea*, AP NEWS, Sept. 17, 2015, available at <http://bigstory.ap.org/article/cb4ed69e7c34baa8386c024974c63ff/mccain-navy-should-ignore-chinas-claims-south-china-sea> (last visited on May 5, 2016).

<sup>118</sup> M. Weisgerber, *Defiant Chinese admiral's message: South China Sea 'belongs to China'*, DEFENSE ONE, Dec. Sept. 14, 2015, available at <http://www.defenseone.com/threats/2015/09/defiant-chinese-admirals-message-south-china-sea-belongs-china/120989> (last visited on May 5, 2016). [Emphasis added]

<sup>119</sup> K. Brown, *Foreign Policy Making under Xi Jinping: The Case of the South China Sea*, 4 J. POL. RISK, Feb. 10, 2016, available at <http://www.jpolorisk.com/foreign-policy-making-under-xi-jinping-the-case-of-the-south-china-sea> (last visited on May 5, 2016). [Emphasis added]

of China's nationalist movement and the leadership's need to accommodate it."<sup>120</sup> Arguing against US FONOPs inside the nine-dash line, Valencia explained:

China has publicly positioned its sovereignty and claims in the South China Sea as a matter of national dignity and redemption for its "century of humiliation." This makes it very difficult for China's leadership to back down on these issues.<sup>121</sup>

Valencia's point seems supported by Chinese commentators such as Admiral Yang Yi who reacted to the Lassen FONOP by stating: "The US has sought an excuse to disrupt our progress, but our pace must not stop, and *we must not submit ourselves to humiliation*."<sup>122</sup>

Brown notes the Chinese leadership's "utter commitment to observing China's sovereignty, ensuring it never suffers humiliation again, and guarding its dignity."<sup>123</sup> Appeals to the public's 'raw emotions,' particularly the threat of humiliation, in order to inspire defense of national dignity is a consistent theme in Chinese foreign policy. Speaking of past foreign aggression, General Yimin Chu has remarked that

The victory of the aggressors was a humiliation for the Chinese nation. ... The wounds are increasingly healed over, but the scars remain, and what *we need most of all nowadays is to awaken an intense sense of humiliation*, so that we never forget the humiliation of our country and military, and turn knowledge of this into courage.<sup>124</sup>

Chinese commentators frequently appeal to the need to defend China's "three-million-square kilometers of *blue territory*."<sup>125</sup> A recent Chinese Navy recruitment video makes the same appeal that China "will not yield an inch of our territory to

<sup>120</sup> M. Valencia, *US South China Sea patrols are ill-advised and dangerous*, EAST ASIA F., Oct. 14, 2015, available at <http://www.eastasiaforum.org/2015/10/14/us-south-china-sea-patrols-are-ill-advised-and-dangerous> (last visited on May 5, 2016).

<sup>121</sup> *Id.*

<sup>122</sup> J. Kwok, 'Harassment' and 'provocation': China's media reacts to the US action in the South China Sea, LOWY INTERPRETER, Oct. 28, 2015, available at <http://www.lowyinterpreter.org/post/2015/10/28/Harassment-and-provocation-Chinas-media-reacts-to-the-US-action-in-the-South-China-Sea.aspx> (last visited on May 5, 2016). [Emphasis added]

<sup>123</sup> *Supra* note 120.

<sup>124</sup> C. Buckley, *China's leaders draw lessons from war of 'humiliation'*, N.Y. TIMES, July 28, 2014, available at <http://mobile.nytimes.com/blogs/sinosphere/2014/07/28/chinas-leaders-draw-lessons-from-war-of-humiliation/> last visited on May 5, 2016) [Emphasis added]

<sup>125</sup> US Office of Naval Intelligence, *The PLA Navy: New Capabilities and Missions for the 21st Century*, US Navy, Apr. 9, 2015, at 37, available at [http://www.oni.navy.mil/Portals/12/Intel%20agencies/China\\_Media/2015\\_PLA\\_NAVY\\_PUB\\_Interactive.pdf?ver=2015-12-02-081058-483](http://www.oni.navy.mil/Portals/12/Intel%20agencies/China_Media/2015_PLA_NAVY_PUB_Interactive.pdf?ver=2015-12-02-081058-483) (last visited on May 5, 2016). (quoting Chinese sources) [Emphasis added]

foreigners.”<sup>126</sup>

Booth astutely noted in 1985 that as “[f]eelings about national sovereignty ... are directed seaward” governments “will feel protective and sensitive – indeed patriotic – about ... patches of ocean.”<sup>127</sup> Booth said states would increasingly insist on the “trappings of sovereignty which are so important to the self-respect and authority of governments.”<sup>128</sup> Booth had in mind ‘warships’ which, he explained, could be used to “symbolize a nation’s possession over a claimed area of sea.”<sup>129</sup> However, China’s artificial islands are perhaps even more effective as Chinese “badges of sovereignty” in the nine-dash line, especially in the context of an ‘ocean consciousness’ campaign that produces concepts like ‘blue territory’ and, consequently, feels justified in producing artificial islands out of nothing but coral fragments and seabed floor.<sup>130</sup>

## 7. The Challenge of Using FONOPs to Challenge China’s Artificial Islands

Booth has cautioned that when examining psycho-legal boundaries at sea “we should conceive of ‘territory’ in the sense in which it has been employed by ethnologists” rather than as legal scholars.<sup>131</sup> It is certainly the case that academic exchanges between Chinese and foreign legal scholars over China’s nine-dash line claims in the South China Sea can become opaque. A recent exchange provides an example.<sup>132</sup>

Chinese scholar Zihua Zheng seeks to defend China from those who would accuse it of “deliberately obscuring its *territorial claims* in the South China Sea by using terms not found in the UNCLOS, such as ‘adjacent waters’ and ‘relevant waters.’<sup>133</sup>

<sup>126</sup> J. Cole, *China’s shocking new military recruitment video*, NAT’L INTEREST, Aug. 13, 2015, available at <http://nationalinterest.org/blog/the-buzz/watch-chinas-shocking-new-military-recruitment-video-13573> (last visited on May 5, 2016).

<sup>127</sup> *Supra* note 113, at 42.

<sup>128</sup> *Id.* at 45.

<sup>129</sup> *Id.* [Emphasis added]

<sup>130</sup> See generally C. Thayer, *No, China is not reclaiming land in the South China Sea*, DIPLOMAT, June 7, 2015, available at <http://thediplomat.com/2015/06/no-china-is-not-reclaiming-land-in-the-south-china-sea> (last visited on May 5, 2016).

<sup>131</sup> *Supra* note 113, at 42.

<sup>132</sup> P. Dutton, *China’s claims are unambiguously ambiguous*, ASIA MARITIME TRANSPARENCY INITIATIVE, June 16, 2015, available at <http://amti.csis.org/chinas-claims-are-unambiguously-ambiguous> (last visited on May 5, 2016).

<sup>133</sup> Z. Zheng, *Why does China’s maritime claim remain ambiguous?*, ASIA MARITIME TRANSPARENCY INITIATIVE, June 12, 2015, available at <http://amti.csis.org/why-does-chinas-maritime-claim-remain-ambiguous> (last visited on May 5, 2016). [Emphasis added]

As Peter Dutton points out in his reply, however, the very language of Zheng's defense perpetuates the same type of obfuscation Zheng claims to be addressing. As Dutton explains:

'Territorial claims' are about island and land features in this context, and are not governed by UNCLOS[...] ... Criticism of the use of 'adjacent waters' and 'relevant waters' is well justified, because these refer not to the land but to the waters and the boundary claims China makes. [Zheng] mixes the two concepts[.]<sup>134</sup>

Dutton correctly observes that Zheng 'conflates' two very different areas of international law: "questions of sovereignty over islands and questions of jurisdiction over ... the [maritime] boundaries delimiting them."<sup>135</sup> The same type of error can be found in China's legal analysis of the US FON Program.

Although claims to land features and those to maritime zones are interrelated since maritime rights derive from sovereignty over land, they represent two distinct bodies of international law.<sup>136</sup> The law of sovereignty, as reflected in a series of judicial and arbitral decisions, governs competing claims to territory. The law of the sea, as reflected by the UNCLOS, governs competing maritime boundary claims including those excessive maritime claims that FONOPs were designed to challenge.

FONOPs are never intended (nor able) to challenge claims to territorial sovereignty. Unfortunately, however, numerous newspaper articles on the proposed Lassen mission reported just that.<sup>137</sup> Indeed, the error was so common that it caught the attention of academic commentators.<sup>138</sup> Chinese commentators, however, have sought to perpetuate this error calling the Lassen FONOP a 'pretext' used "to challenge China's territorial sovereignty."<sup>139</sup>

Chinese lawyer Bo Hu has similarly accused the US of "violating China's territorial

<sup>134</sup> *Supra* note 132.

<sup>135</sup> *Id.*

<sup>136</sup> For details, see M. VALENCIA, J. VAN DYKE & N. LUDWIG, *SHARING THE RESOURCES OF THE SOUTH CHINA SEA* ch. 3 (1999).

<sup>137</sup> *Supra* note 86 (reporting: "US officials say that within days the US military will conduct 'freedom of navigation' patrols to challenge Beijing's territorial claims in the South China Sea's strategic Spratly archipelago.").

<sup>138</sup> J. Ku, *Dear world media: The US is NOT challenging China's territorial claims in the South China Sea (yet)*, *OPINIO JURIS*, May 27, 2015, available at <http://opiniojuris.org/2015/05/27/dear-world-media-the-u-s-is-not-challenging-chinas-territorial-claims-in-the-south-china-sea-yet> ("Contrary to some media reports, the US Navy plans do NOT intend to challenge China's 'sovereignty' claims in the South China Sea."). See also M. Rapp-Hooper, *All in good FON: Why freedom of navigation is business as usual in the South China Sea*, *FOREIGN AFF.*, Oct. 12, 2015, available at <https://www.foreignaffairs.com/articles/United-States/2015-10-12/all-good-fon> (explaining that incorrect "reporting has consistently suggested that FONOPS would be used to push back against China's claims to territory.") (all last visited on May 5, 2016).

<sup>139</sup> *Supra* note 79.

sovereignty” “under the cloak ... of safeguarding freedom of navigation” with the Lassen mission.<sup>140</sup> Hu reasons that the US must be engaged in ‘sheer hypocrisy’ since it has professed to hold “no position on the sovereignty of the Nansha islands and reefs” and yet conducts “so-called freedom-of-navigation operations ... intended to negate China’s sovereignty and maritime interests over its long-garrisoned islands and reefs where extension projects were carried out recently.”<sup>141</sup>

Nevertheless, while consistently maintaining that it “takes no position on ... competing claims to sovereignty” in the region, the US has equally taken “serious concerns any maritime claim or restriction on maritime activity in the South China Sea that [is] not consistent with international law, including the [UNCLOS].”<sup>142</sup> The US State Department has published a detailed study on China’s maritime claims in the South China Sea in which it has stated that under the UNLCOS “[s]ubmerged features [which include low-tide elevations] are not subject to sovereignty claims and generate no maritime zones of their own.”<sup>143</sup> The same study, citing Article 60(8) of the UNCLOS, also makes clear that “[a]rtificial islands, installations, and structures likewise do not generate any territorial sea or maritime zones.”<sup>144</sup>

Thus, from the US perspective, a FONOP could legitimately be used to demonstrate that artificial islands built on submerged reefs or low-tide elevations without any territorial seas of their own (such as installations at Subi and Mischief Reefs) never had any sovereignty or jurisdiction over the ocean areas surrounding them since they were built up from the seabed, subsoil and bits of broken coral reefs – ‘blue soil’ perhaps in the Chinese parlance, but without any *bona fide* territorial claim on which to base a legitimate maritime claim under the UNCLOS.

Yet, despite the justification, the US decided not to make such a bold challenge with the Lassen FONOP. Instead, it relied upon a milder assertion of the right of innocent passage without prior authorization. From a purely legal perspective, this choice was awkward and disappointing for challenging the status of China’s artificial islands. From a psycho-legal perspective, however, the Lassen FONOP was effective and tactful enough to both challenge China’s excessive maritime claims around Subi Reef and avoid unduly provoking nationalist sentiment, respectively.

<sup>140</sup> Bo Hu, *The hypocrisy of US freedom of navigation operations in the South China Sea*, DIPLOMAT, Nov. 17, 2015, available at <http://thediplomat.com/2015/11/the-hypocrisy-of-us-freedom-of-navigation-operations-in-the-south-china-sea> (last visited on May 5, 2016).

<sup>141</sup> *Id.*

<sup>142</sup> US Department of State, Press Briefing, May 10, 1995, available at [http://dosfan.lib.uic.edu/ERC/briefing/daily\\_briefings/1995/9505/950510db.html](http://dosfan.lib.uic.edu/ERC/briefing/daily_briefings/1995/9505/950510db.html) (last visited Mar. 30, 2016). [Emphasis added]

<sup>143</sup> *Supra* note 108, at 13.

<sup>144</sup> *Id.*

It is likely that the Department of Defense favored a bolder assertion “against those ‘islands’ that are not islands,”<sup>145</sup> while the White House decided on a more subtle challenge. The Department of Defense had indicated that Mischief Reef was earmarked for the next FONOP in the region.<sup>146</sup> Mischief Reef would be an ideal location for a direct challenge to an artificial island since, like Subi Reef, it was built on a low-tide elevation. Unlike Subi Reef, however, there are no other features in the vicinity capable of generating territorial seas that might affect its status (i.e., as a parasitic basepoint). Nevertheless, plans for a challenge to Mischief Reef were cancelled and the US again opted for a standard innocent passage FONOP, which it undertook with an assertion at Triton Island in the Paracels on January 30, 2016.<sup>147</sup> Triton Island is different from Subi Reef in that the former is not a previously-submerged feature so that it is likely entitled to a territorial sea. China has also published basepoints for the islands in the Paracels (although its straight baseline claims do not appear to be in accord with the UNCLOS), and has claimed a territorial sea for Triton.<sup>148</sup>

Even in criticizing the Lassen FONOP, China avoided the use of the term ‘territorial sea.’ Instead, the Chinese Foreign Ministry said the US had “illegally entered waters near relevant islands and reefs of China’s Nansha Islands without the permission of the Chinese government.”<sup>149</sup> In the case of the FONOP at Triton, however, China maintained: “The US navy vessel had violated the relevant Chinese law and entered China’s *territorial sea* without authorization.”<sup>150</sup> Such a distinction indicates that the

<sup>145</sup> *Supra* note 44.

<sup>146</sup> B. Gertz, *Navy warships to sail by Mischief Reef*, WASH. FREE BEACON, Nov. 20, 2015, available at <http://freebeacon.com/national-security/navy-warships-to-sail-by-mischief-reef>. At the beginning of April 2016, US officials indicated that Mischief Reef was again targeted for a FONOP. See Staff reporter, *US plans third patrol near disputed South China Sea islands: source*, REUTERS, Apr. 2, 2016, available at <http://www.reuters.com/article/us-southchinasea-usa-idUSKCN0WZ018>. By the end of the month, however, the US officials signaled that the challenge had again been cancelled. See G. Lubold & J. Page, *US Sees New Flashpoint in South China Sea Dispute*, WALL ST. J., Apr. 26, 2016, available at <http://www.wsj.com/articles/u-s-sees-new-flashpoint-in-south-china-sea-1461714183> (all last visited on May 5, 2016).

<sup>147</sup> A. Panda, *Return of the FONOP: US Navy destroyer asserts freedom of navigation in Parcel Islands*, DIPLOMAT, Jan. 31, 2016, available at <http://thediplomat.com/2016/01/return-of-the-fonop-us-navy-destroyer-asserts-freedom-of-navigation-in-parcel-islands> (last visited on May 5, 2016).

<sup>148</sup> US Department of State, *Straight Baselines Claim: China*, 117, LIMITS IN THE SEAS, July 9, 1996, available at <http://www.state.gov/documents/organization/57692.pdf> (last visited on May 5, 2016).

<sup>149</sup> PRC Foreign Ministry, Foreign Ministry spokesperson Lu Kang’s remarks on USS Lassen’s entry into waters near relevant islands and reefs of China’s Nansha Islands, Oct. 27, 2015, available at [http://www.fmprc.gov.cn/mfa\\_eng/xwfw\\_665399/s2510\\_665401/2535\\_665405/t1309567.shtml](http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2535_665405/t1309567.shtml) (last visited on May 5, 2016).

<sup>150</sup> PRC Foreign Ministry, Foreign Ministry spokesperson Hua Chunying’s remarks on US Navy vessel’s entry into territorial waters of Zhongjian Dao of China’s Xisha Islands, Jan. 30, 2015, available at [http://www.fmprc.gov.cn/mfa\\_eng/xwfw\\_665399/s2510\\_665401/t1336822.shtml](http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1336822.shtml) (last visited on May 5, 2016). [Emphasis added]

FONOPs have had some effect in clarifying China's claims in the region.

South China Sea expert Bill Hayton was encouraged at seeing China's GLOBAL TIMES react to the Lassen mission by providing its readers "an explanation of the meaning of the UNCLOS's provisions on territorial waters and, remarkably, inform[ing] them that China's holding in the Spratlys are not habitable islands and therefore do not qualify for a 200 nm EEZ around them."<sup>151</sup> Hayton sees this as an indication that China "may be prepared to bring its maritime claims in line with the [UNCLOS]."<sup>152</sup>

Graham Webster also opined that, as a result of the Lassen mission, "[s]ome ambiguity [in China's position] has been surrendered."<sup>153</sup> Webster argues that while "careful Chinese officials have denied opponents specific grounds on which to argue,"<sup>154</sup> the Foreign Ministry's declaration that the Lassen FONOP had "violate[d] the UN Convention on the Law of the Sea"<sup>155</sup> permits a line of questioning on the UNCLOS grounds:

What kind of jurisdiction does China's government claim in which waters? Does China assert a territorial sea surrounding Subi Reef? If so, how did the ship violate the rules of innocent passage, as set out in UNCLOS?<sup>156</sup>

Webster's reasoning is sound. Nevertheless, such questioning has not always provided further clarity. In March 2009, *e.g.*, China accused the USNS Impeccable of violating the UNCLOS by conducting surveillance activity in its EEZ.<sup>157</sup> A Chinese reporter politely requested clarification from the Foreign Ministry on "what specific parts of the UN Convention on the Law of the Sea" the US vessel had violated.<sup>158</sup> Instead

<sup>151</sup> B. Hayton, *Is China moving towards compromise in the South China Sea?*, CHATHAM HOUSE, Oct. 31, 2015, available at <https://www.chathamhouse.org/expert/comment/china-moving-towards-compromise-south-china-sea#sthash.5jNYzZud.dpuf>. For the article discussed by Hayton see *After the show, it's time for US destroyer to leave*, GLOBAL TIMES, Oct. 27, 2015, available at <http://www.globaltimes.cn/content/949261.shtml> (all last visited on May 5, 2016).

<sup>152</sup> *Id.*

<sup>153</sup> G. Webster, *How China maintains strategic ambiguity in the South China Sea*, DIPLOMAT, Oct. 29, 2015, available at <http://thediplomat.com/2015/10/how-china-maintains-strategic-ambiguity-in-the-south-china-sea> (last visited on May 5, 2016).

<sup>154</sup> *Id.*

<sup>155</sup> PRC Foreign Ministry, Foreign Ministry spokesperson Lu Kang's regular press conference, Oct. 28, 2015, available at [http://www.fmprc.gov.cn/mfa\\_eng/xwfw\\_665399/s2510\\_665401/t1309900.shtml](http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1309900.shtml) (last visited on May 5, 2016).

<sup>156</sup> *Supra* note 153.

<sup>157</sup> PRC Foreign Ministry, Foreign Ministry spokesperson Ma Zhaoxu's regular press conference on March 10, 2009, China Embassy in the US, Mar. 11, 2015, available at <http://www.china-embassy.org/eng/fyrth/t541713.htm> (last visited on May 5, 2016).

<sup>158</sup> *Id.*

of receiving any clarification, the reporter was scolded by the Foreign Ministry spokesperson: “Go back to do some homework, reading these laws carefully, and you will thereby find the answer you want.”<sup>159</sup> Recent policy changes make such questioning by the Chinese media more unlikely.<sup>160</sup> The onus is on the international community to ask the questions and persuade China to clarify its claims rather than making obscure accusations.

Prior to the specific complaints of violating the UNCLOS, the US received vague charges of “stirring up trouble ... regarding China’s appropriate and rational construction activities on its islands” in the South China Sea.<sup>161</sup> The proposed Lassen mission was similarly accused of being an attempt to “stir up trouble where there is none.”<sup>162</sup> The international community has noted the same type of vague charges of “stirring up trouble” being applied to China’s own citizens.<sup>163</sup> The US has also expressed its concern over “China’s commitment to the rule of law” in such cases.<sup>164</sup> Similar concerns exist in the South China Sea.

Whether at sea or otherwise, lack of clarity is harmful to the rule of law. Valencia has observed that China’s “ambiguous claim [to the South China Sea] is perceived by some to be reminiscent of China’s imperial rule over much of the region.”<sup>165</sup> Valencia rightly remarks that “China’s most problematic behavior for other countries and for regional peace and stability is *its refusal to clarify its claims in the South China Sea* in a manner all can understand.”<sup>166</sup>

The US should continue to work with its partners in the region to persuade China to further clarify its claims. FONOPs can help to achieve that goal.

<sup>159</sup> *Id.*

<sup>160</sup> E. Wong, *Xi Jinping’s news alert: Chinese media must serve the party*, N.Y. TIMES, Feb. 22, 2016, available at [http://www.nytimes.com/2016/02/23/world/asia/china-media-policy-xi-jinping.html?\\_r=0](http://www.nytimes.com/2016/02/23/world/asia/china-media-policy-xi-jinping.html?_r=0) (last visited on May 5, 2016).

<sup>161</sup> Staff reporter, *China accuses US of ‘absurd remarks’ over island-building in South China Sea*, GUARDIAN, May 30, 2015, available at <http://www.theguardian.com/us-news/2015/may/30/us-defense-chief-ash-carter-says-chinas-island-building-erodes-security> (last visited on May 5, 2016). (quoting Chunying Hua, a Chinese foreign ministry spokeswoman)

<sup>162</sup> D. Hewitt, *China warns US to think again and not stir trouble as US Navy sails close to disputed islands in South China Sea*, INT’L BUS. TIMES, Oct. 27, 2015, available at <http://www.ibtimes.com/china-warns-us-think-again-not-stir-trouble-us-navy-sails-close-disputed-islands-2157651> (last visited on May 5, 2016).

<sup>163</sup> S. Lubman, *‘Picking quarrels’ casts shadow over Chinese law*, WALL ST. J., June 30, 2014, available at <http://blogs.wsj.com/chinarealtime/2014/06/30/picking-quarrels-casts-shadow-over-chinese-law> (last visited on May 5, 2016). (quoting Chinese Foreign Minister Wang Yi)

<sup>164</sup> W. Ide, *US: Detained China lawyers ‘partners, not enemies’*, VOA NEWS, Dec. 10, 2015, available at <http://www.voanews.com/content/us-detained-china-lawyers-partners-not-enemies/3096839.html> (last visited on May 5, 2016).

<sup>165</sup> *Supra* note 104.

<sup>166</sup> *Id.* [Emphasis added].

## 8. Conclusion

Despite the muddled messaging and failure to promptly share information on the mission for the benefit of the international community, the Lassen mission was successful as an exploratory FONOP in the South China Sea. Importantly, the operation was able to demonstrate US non-acquiescence to excessive Chinese jurisdictional claims without causing any serious provocation. The Lassen FONOP also helped in some measure to clarify Chinese claims to its artificial islands and to prepare for future challenges. More importantly, it has helped to galvanize support among regional partners for continuing missions and future cooperation. Increased transparency and disclosure for the Lassen FONOP were helpful in building mutual trust in the region— this trend should continue.

Moving forward, more attention should be paid to the environmental damage that has resulted from China’s artificial island construction. China has put itself forward as a champion of environmental causes. In addressing the UN, President Xi Jinping stressed the importance of “put[ting] mother nature and green development first.”<sup>167</sup> China has pledged that artificial island “projects will not damage the ecological environment of the South China Sea.”<sup>168</sup> Indeed, the Foreign Ministry has claimed, “China’s construction on islands and reefs of the Nansha ... will be conducive to ... *protecting the ecological environment*.”<sup>169</sup> China’s ambassador to the US has similarly remarked that artificial islands in the South China Sea will ensure “marine environment protection.”<sup>170</sup> Unfortunately, however, the evidence<sup>171</sup>

<sup>167</sup> M. Segar, *Read the full text of Xi Jinping’s first UN address*, QUARTZ, Sept. 29, 2015, available at <http://qz.com/512886/read-the-full-text-of-xi-jinpings-first-un-address> (last visited on May 5, 2016).

<sup>168</sup> PRC Foreign Ministry, Foreign Ministry spokesperson Hong Lei’s regular press conference, Apr. 28, 2015, available at [http://www.fmprc.gov.cn/mfa\\_eng/xwfw\\_665399/s2510\\_665401/t1258874.shtml](http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1258874.shtml) (last visited on May 5, 2016).

<sup>169</sup> PRC Foreign Ministry, Foreign Ministry Spokesperson Hong Lei’s Regular Press Conference, Apr. 27, 2015, available at [http://www.fmprc.gov.cn/mfa\\_eng/xwfw\\_665399/s2510\\_665401/t1258242.shtml](http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1258242.shtml) (last visited on May 5, 2016). [Emphasis added]

<sup>170</sup> PRC Foreign Ministry, Building-up of China’s capabilities in the South China Sea serves the security, stability and freedom of navigation, Apr. 17, 2015, available at [http://www.fmprc.gov.cn/mfa\\_eng/wjwb\\_663304/zwjg\\_665342/zwbd\\_665378/t1255466.shtml](http://www.fmprc.gov.cn/mfa_eng/wjwb_663304/zwjg_665342/zwbd_665378/t1255466.shtml) (last visited on May 5, 2016).

<sup>171</sup> *Supra* note 39. (reporting on “[e]vidence from news reports, aerial photos, videos [linking] reef destruction to fishermen from China” and “abundant evidence that China’s navy and coast guard have been aware of the [Chinese] fishermen’s practice of chopping reefs, and tolerated or condoned it.”) See also C. Larsen, *Shell trade pushes giant clams to the brink*, 351:6271 *Sci.* 323-4 (Jan. 2016), available at <http://science.sciencemag.org/content/351/6271/323>; R. Wingfield-Hayes, *Why are China’s fisherman destroying reef*, BBC NEWS, Dec. 15, 2015, available at <http://www.bbc.com/news/magazine-35106631>; J. Batongbacal, *Environmental aggression in the South China Sea*, ASIA MARITIME TRANSPARENCY INITIATIVE, May 7, 2015, available at <http://amti.csis.org/environmental-aggression-in-the-south-china-sea> (all last visited on May 5, 2016).

indicates that these pledges have not been upheld and China is in breach of its obligation under the UNCLOS “to protect and preserve the marine environment.”<sup>172</sup>

The international community should make more efforts to document and share with the world the environmental destruction that has resulted from Chinese activities in the region including high-quality satellite imagery.<sup>173</sup> Psycho-legal boundaries at sea might be easier to overcome and offense to national dignity might be more easily avoided if the Chinese people were aware of the destruction to the marine environment that the artificial island projects have caused.

Studies in 2013 by Chinese and regional scientists found that “China’s coastal reefs could be improved by increasing public awareness of declining ecosystem services” in the region.<sup>174</sup> The scientists found that: “Cooperation among neighboring countries [is] urgently needed” “[b]efore the loss of corals becomes irreversible.”<sup>175</sup> Massive artificial island construction projects have been even undertaken since the study was published. Scientists have found that a ‘substantial amount’ of environmental damage in some areas of the South China Sea is ‘irrecoverable.’<sup>176</sup> The need for increased public awareness and cooperation in the region is more pressing than ever. The US and its regional partners should undertake operations that not only secure the navigation freedoms and free flow of global commerce, but also seek to actively protect the marine environment.

<sup>172</sup> UNCLOS art. 192. While Article 192 reflects a general duty, Article 145 contains specific obligations in areas beyond national jurisdiction for the “prevention of damage to the flora and fauna of the marine environment” with “particular attention being paid to ... harmful effects of such activities as ... dredging [and the] construction ... of installations.”

<sup>173</sup> O. Holmes, *South China Sea images reveal impact on coral of Beijing's military bases*, GUARDIAN, Sept. 17, 2015, available at <http://www.theguardian.com/world/ng-interactive/2015/sep/17/south-china-sea-images-reveal-impact-on-coral-of-beijings-military-bases> (documenting the “quickest rate of permanent loss of coral reef area in human history” with damage that is “irrecoverable and irreplaceable”). Satellite images have already been effective in prompting the response of Shicun Wu, president of the National Institute for South China Sea Studies, who has acknowledged but downplayed the damage, calling it ‘recoverable.’ In the face of evidence to the contrary, Wu has maintained China’s “green construction ethos” of the artificial island projects. See B. Birtles, *South China Sea coral reef destruction ‘recoverable,’ Chinese think-tank chief says*, ABC NEWS (Australia), Jan. 25, 2016, available at <http://www.abc.net.au/news/2016-01-25/south-china-sea-coral-reef-destruction-recoverable/7110878> (all last visited on May 5, 2016).

<sup>174</sup> T. Hughes, H. Huang & Young Ma, *The wicked problem of China's disappearing coral reefs*, 27:2 CONSERVATION BIOLOGY 261 (Apr. 2013).

<sup>175</sup> *Id.*

<sup>176</sup> Holmes, *supra* note 173.