The Latest Developments of the US Freedom of Navigation Programs in the South China Sea: Deregulation or Re-balance?

Xinjun Zhang

Regarding warships, customary rules on innocent passage and freedom of navigation codified in the UNCLOS are far from being settled among State Parties. FONOPs impose the US understanding of rules on passage and navigation in each and every sea area, forcefully implementing deregulation in order for the US to create a navy-friendly environment for its worldwide mission. By implementing another agenda of carrying out the new US policy of “Pivot to Asia,” the FONOPs in the South China Sea challenge the very heart of China’s sovereignty, and may bring about adverse effect to the process of peaceful settlement of territorial issues and maritime disputes in the South China Sea region. China believes the US FONOPs in the South China Sea are offensive to its sovereignty. Moreover, their adverse effect to the process of peaceful settlement of territorial issues and maritime disputes in the South China Sea region cannot be ignored.

Keywords
FONOP, South China Sea, UNCLOS, Passage and Navigation, Low Tide Elevation, Artificial Island

The author may be contacted at: zxinjun@mail.tsinghua.edu.cn/
Address: School of Law, Tsinghua University, Beijing 100084, China.
DOI: http://dx.doi.org/10.14330/jeail.2016.9.1.08
1. Introduction

The South China Sea is one of the most troubled waters in the globe recently. Despite the fragility of the situation there, the US proceeded to send its Naval vessels to carry out the so-called Freedom of Navigation Programs (“FONOPs”)\(^1\) to pass within 12 nautical miles (“nm”) of several islands and reefs in the South China Sea. On October 26, 2015, the USS Lassen navigated near Zhubi (Subi) Reef in the Nansha (Spratly) Islands, where China launched a land reclamation project for the possible airstrip on it. Three months later, on January 30, 2016, the USS Curtis Wilbur transited within 12 nm of Zhongjian (Triton) Island, the south-western basepoint in the straight baseline of the Xisha (Paracel) Islands.\(^2\) In both cases, the Chinese naval vessels monitored, followed and warned US naval vessels on-site. In particular, after the USS Lassen incident the Chinese government immediately lodged protest.\(^3\)

In the USS Curtis Wilbur incident, the issue is centered on war-ships’ right of innocent passage, a long-standing question since the United Nations the Law of the Sea Convention (“UNCLOS”) was adopted in 1982.\(^4\) Because the US is not a party of the UNCLOS, the innocent passage should be interpreted in accordance with customary international law, reflecting current State practices, as well. This issue, however, was complicated by the calculation (or miscalculation) of the US Defense Department in the USS Lassen incident, because the Subi reef, in the view of the US, is merely a low tide elevation (“LTE”) that has no territorial sea of its own, whereas China has undertaken land reclamation activity for the purpose, allegedly, to turn it into an island.\(^5\)

---


