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South China Sea Series

Necessity, Reality: Maintaining Freedom and Peace at Sea

By Andrew S. Erickson

Synopsis

The morning of 27 October witnessed the latest of what is likely to be multiple future Freedom of Navigation Operations (FONOPS) by the United States in the South China Sea. The destroyer USS Lassen sailed within 12 nautical miles of Subi Reef, one of seven Spratly features which China has turned into artificial islands. The event underscores US commitment to maintaining an open global system with global commons that are free for all to use.

Commentary

THE USS LASSEN's move on 27 October 2015 to sail within 12 nautical miles of the Subi Reef in the disputed waters of the South China Sea is neither the first, nor the last, of what is known as Freedom of Navigation Operations (FONOPS) by the United States. In so doing, Washington is signaling that the open, 21st century global system that allows unprecedented prosperity for all is enabled by important rules and norms, including international maritime law. These must be upheld, with no political constraints.

Unlike rocks or islands, under international law, low-tide elevations (LTEs)—features naturally below water at high tide, such as Subi Reef—are not entitled to 12 nautical miles' territorial waters or airspace. Rather, beyond a 500-metre safety zone, all high seas freedoms apply. Foreign ships and aircraft are free to operate at will without consultation or permission, as USS Lassen has just done.

The global commons and maritime law

The US has helped underwrite this system of international maritime law, and will continue to do so in cooperation with allies, as well as with partners from around the world, including China. The global commons are common to all; 19th century “spheres of influence” are antiquated and inappropriate in today’s 21st century integrated world. It is important to situate the South China Sea in this broader context.

The maritime commons may be divided into two major geographical categories: the first is the roughly 62% of the world’s oceans not claimable as coastal states’ territorial waters or Exclusive Economic Zones (EEZs); the second is the 38% claimable by coastal states as territorial waters or EEZs.

The broader maritime commons – the 62%

First, the 62%. Unlike in the Cold War, there is virtually no prospect of great power naval warfare in these waters. There is likewise little activity by non-state actors. In the case of any such activity, international cooperation is typically forthcoming. Here, there is great truth in the sailors’ saying: “The waters that divide us, unite us.”

Gulf of Aden anti-piracy is an excellent example: many nations, including the United States, China, and Japan, have cooperated to further collective interests. Since the true origin of piracy is on land, Beijing’s long-time support of UN peacekeeping, and recent announcement to increase its financial and personnel contributions, is likewise an extremely positive public good. It has rightly received warm welcome from the vast majority of the international community, including the US.

The complex 38% and the four governing principles

Second, the 38%. Geopolitically, this is a far more complex and difficult area. At the state level, it is the location of all unresolved island and maritime claims. The prospect of warfare is low, but has not been eliminated. Tensions and even occasional crises are likely. At the non-state level, there is also more activity by various actors, including terrorists. To keep all sea lanes open for all, it is therefore important to honour the following four principles:

1. Sea lanes are part of the maritime commons, a key element of the global system on which all our nations depend for communications and commerce.
2. The world’s oceans and the airspace above them must be used and governed according to the prevailing international legal principles agreed to in crafting the Law of the Sea.
3. Non-legal approaches that might limit or even thwart their effective use and governance must be avoided.
4. Neither force, nor the threat of force, may be used to resolve outstanding island and maritime claims, or to impede the use of the sea and air in accordance with international law.

Implications

As stated earlier, Washington expects Beijing to express its policies and concerns in terms of 21st century mainstream international law, not 19th century “spheres of influence”. Accordingly, it expects Beijing to honour reciprocity in bilateral relations. This is based not on coining and invoking phrases to characterise the overall relationship, or special negotiations excluding other regional stakeholders, but by actions for which explicit agreement may not even be necessary.

China recently sent warships within 12 nautical miles of undisputed US territory (naturally above water at all times) in the Aleutian Islands. In recent years, China has repeatedly sent dedicated Dongdiao-class intelligence collection vessels inside undisputed US EEZs surrounding Guam and Hawaii. The US tolerates similar actions (and much more) from Russia. Washington publicly accepts such activities, in addition to engaging in them. The reality is that both the US and China will have to live with such activities by the other, even as they cooperate where they can.

The larger context

The Asia-Pacific is a generally peaceful, prosperous maritime theatre where Washington seeks to preserve the existing global system and oppose the use of force, or threat of force, to resolve outstanding island and maritime claims disputes. It has the alliances and capabilities to preserve peace and stability by deterring actions that risk undermining them. Maintaining such deterrence is easier to do than challenging the existing system by using force, or the threat of force, to seize territory occupied and claimed by others.

US policymakers believe that upholding stability, peaceful processes, and the majority interpretation of existing international law is vital to the effective functioning of an open global commons, and with it the functioning of the global system that offers the opportunity for all participating countries to thrive—not the least of which China, its neighbours, and the US.

For all these reasons, Beijing’s actions will likely be measured even as its rhetoric expresses frustration. It will find ways to express displeasure without using military force. At a minimum, US vessels should expect surveillance, shadowing, and even harassment from China’s maritime militia. Washington must make it clear to the world that these are government-controlled irregular forces, not random fishermen.

As with Sino-American relations more broadly, we will witness a combination of cooperation and competition that I term “competitive coexistence,” with the possibility of tensions, occasional incidents, and even potentially a crisis or two. But, thankfully, not war. As can be seen from the peaceful, unimpeded nature of USS Lassen’s operation, Beijing and Washington—however they may disagree on specifics—in fact share an interest in keeping the South China Sea’s vital sea lanes secure and open.

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