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National Defence University Malaysia (NDUM)  
Centre for Defence and International Security Studies (CDiSS)

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No. 8 - 23 November 2017

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### ANALYZING THE UTILITY OF FONOPS

By

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On August 3rd, the Trump administration conducted its third Freedom of Navigation Operation (FONOP). The USS John S. McCain sailed within 12 nautical miles (nm) of Mischief Reef, the site of an artificial island constructed by China. With the USS Dewey's man-overboard drill conducted within 12nm of Mischief Reef on May 24th, and the USS Stethem's passage near Triton Island in the Paracels on July 2nd, the United States has conducted FONOPs roughly every 35 days this summer. The high frequency of FONOPs begs the question, what is the goal of these operations? Are FONOPs necessary?

The FONOPs conducted by the Trump administration have shown different characteristics from Obama's. First, the Obama administration conducted its FONOPs under the auspices of exercising the right to innocent passage. This approach was frequently criticized as it "tacitly acknowledged Chinese territorial seas," which is subject to a dispute under international law. In contrast, the first FONOP conducted by the Trump administration started with a man overboard drill near Mischief Reef, a maneuver that cannot be considered "continuous and expeditious" innocent passage as defined by article 18 of the United Nations Convention on the Law of the Sea (UNCLOS). In other words, the focus of U.S. FONOP operations has shifted from demonstrating the concept of innocent passage, to directly challenging China's territorial sea claims in the South China Sea.

Second, the procedures for approving FONOPs has fundamentally changed. During the Obama administration, FONOP requests were submitted to the White House and considered on an individual basis. That is no longer the case. The Pentagon has submitted a plan to the White House that outlines the conduct of FONOPs for the whole year, with a large degree of predictability built into the system. For instance, certain events could automatically trigger a FONOP.

Third, FONOPs are no longer announced by the Pentagon. Rather than publicizing individual operations, the Pentagon will only provide an annual summary of its FONOPs around the world at the end of the year. Although U.S. FONOPs will almost certainly continue to be covered by the media as they occur, this policy shift removes a degree of tension from the political narrative that inevitably results from these operations. This shift indicates that the conduct of Freedom of Navigation Operations is returning to a semblance of normality – being conducted routinely and privately.

These policy changes are a welcome development that will help reduce tensions in the South China Sea in the near term. From a liberal and realist standpoint however, the long-term impact of U.S. FONOPs in the South China Sea remains a question mark.

Freedom of Navigation Operations is part of the triple track in the Freedom of Navigation (FON) Program, which “since 1979 has highlighted the navigation provisions of the LOS Convention to further the recognition of the vital national need to protect maritime rights throughout the world.” With the other two methods being diplomatic representation, bilateral and multilateral consultation with other governments, the military assertions are used specifically to challenge excessive claims that are inconsistent with high seas freedoms stipulated in UNCLOS. In that respect, the FON program from a liberal viewpoint plays a crucial role in upholding international law.

However, military operational assertions ought to function as secondary, rather than primary mechanism of the FON program. The major areas of contention in the South China Sea are whether the coastal states can require prior authorization or notification of innocent passage in their territorial waters, and whether marine surveillance activities are allowed in its Exclusive Economic Zone (EEZ). Both issues pose a series of legal debates. Can the “non-continuous and expeditious” passage of a armed warship be regarded as innocent? Is marine surveillance that much different from marine scientific research – the jurisdiction over which the Law of the Sea explicitly vests with the coastal state? Countries including China, Vietnam, Malaysia have all participated in these debates.

It is debatable whether FONOPs constitute the best means of resolving these issues and protect accepted international law and practice. First, while the questions are legal issues, FONOPs are military assertions. Military actions carried out unilaterally are not as compatible with the core value of the liberal world order as legal frameworks arrived-at within multilateral bodies. Given that the United States has yet to ratify UNCLOS, its military assertions to protect international navigational rights lacks a serious degree of credibility. Second, both of the FONOPs in May and in August occurred near the Mischief Reef, where neither China nor other countries have actually claimed a territorial sea. As Dutton and Kardon observed when the USS Dewey sailed near the Mischief Reef in May, it is unclear whether a FONOP actually happened, and as such was both unnecessary and unhelpful.

From a realist standpoint, the disputes involving the South China Sea are a manifestation of the opposite interests held by the maritime powers and the coastal States - the coastal states eager to have more control in their territorial sea and EEZ whilst the maritime powers' interest lie in the freedom of navigation. FONOPs are a tool to highlight disagreements in these interests. However, as the crisis on the Korean peninsula increases in urgency, some view both the 214-day break from the last FONOP under Obama's administration to the first one under Trump's and the current regime of regulated FONOPs as strategies to gain China's help in resolving the North Korean nuclear problem.

In this regard, it is unlikely that regularizing FONOPs will help the United States gain any meaningful concessions from China on North Korea. Just a few hours after the Trump administration's second FONOP on July 2, Xi Jinping and Donald Trump had a telephone conversation regarding a range of issues from North Korea to trade relations. Xi told Trump that there were some "negative factors" impacting U.S.-China relations. In response to the third FONOP, China's Foreign Ministry Spokesperson added that "the provocation by the US side has compelled the Chinese side to take measures to further enhance its capability to defend its territory". It is becoming increasingly clear that FONOPs are only serving to raise military tensions in the region. Such militarization is not what either side wants.

If the objective of FONOPs is to influence China and promote U.S. interests, they are failing from both a liberal and realist standpoint. U.S. Navy War College professors Peter Dutton and Isaac Kardon have observed that current FONOPs in the South China Sea "needlessly politicize this important program" and propose alternate methods of sending signals to China. They argue that recent moves, such as the redeployment of Third Fleet Forces from San Diego to the Western Pacific send an equally strong message, but do not carry the same political baggage as FONOPs. Reinforcing Dutton and Kardon's point, Professor Robert Farley recently noted that "FONOPs are the tool that the United States has happened upon, but they are altogether inadequate to the task". Mark Valencia too has criticized FONOPs as "anachronistic, ambiguous, unnecessarily provocative and counterproductive - and thus best discontinued or used only when definitely legal and politically necessary rather than as a matter of course."

If FONOPs are not the best way to uphold the international law of sea, or to gain more support from China in North Korea issues, what is the alternative? Military operational assertions are only one component of the Freedom of Navigation. The other two tracks, diplomatic representations and multilateral consultations with other governments could well prove to be more effective methods for resolving the many disputes in the South China Sea. A full discussion on establishing a clear legal framework for navigating these disputes should expand from academia to governments departments and be agreed upon through diplomacy, not through the fruitless flexing of military might.

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