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## U.S. Freedom of Navigation Patrol in the South China Sea: What Happened, What it Means, and What's Next

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**Background:** The U.S. response to China's land reclamation and construction activities on seven land features it controls in the Spratly Islands continues to evolve. Heretofore, Washington's response included statements by senior officials, a call for all claimants in the South China Sea disputes to freeze land reclamation, and the publicizing of U.S. surveillance flights near, but not within 12 nautical miles (nm) of, the land features.<sup>1</sup> In May, the *Wall Street Journal* reported that the Obama Administration was becoming more concerned about China's activities and was considering sending U.S. Navy ships and aircraft within 12 nm of China's land reclamation projects.<sup>2</sup> U.S. military ships and aircraft had not sailed or flown within 12 nm of Chinese-occupied features in the Spratly Islands since 2012.<sup>3</sup>

**What Happened?** After much deliberation by the Administration,<sup>4</sup> on October 27 a U.S. Navy guided missile destroyer conducted a freedom of navigation\* patrol within 12 nm of Subi Reef, an artificial island created from a low-tide elevation in the Spratly Islands.<sup>†5</sup> According to a U.S. official quoted by the *Washington Post*, the patrol "was completed without incident," though China's navy sent two ships to monitor and issue warnings to the U.S. destroyer and a Chinese Ministry of Foreign Affairs spokesperson warned that, "If the relevant party keeps stirring things up, it will be necessary for China to speed up its construction activities."<sup>6</sup> A spokesperson for China's Ministry of National Defense asserted that the patrol "threatened China's sovereignty and security" and "undermined the peace and stability in the region." He also said the patrol was an "action of intimidation aimed at creating militarization in the region of the South China Sea."<sup>7</sup> The U.S. ship also conducted freedom of navigation operations within 12 nm of land features occupied by Vietnam and the Philippines.<sup>8</sup>

**What the Patrol Means, and What it Does Not Mean:** The objective of the freedom of navigation patrol appears to have been to signal that the U.S. government does not consider Subi Reef to have a territorial sea,<sup>‡</sup> a 12 nm area of sea adjacent to a country's land territory over which that country has full sovereignty.<sup>§,9</sup> Under the UN

\* The U.S. government challenges what it considers to be other countries' excessive maritime claims under international law through its Freedom of Navigation program, which provides a toolkit of options ranging from diplomatic consultations and representations to military operations. U.S. Department of Defense, *U.S. Department of Defense Freedom of Navigation Program: Fact Sheet*, March 2015.

† According to the UN Convention on the Law of the Sea, low-tide elevations are land features that are submerged at high tide. UN Convention on the Law of the Sea, "Part 2: Territorial Sea and Contiguous Zone."

‡ Although China has not explicitly declared whether the land features it controls in the Spratly Islands have territorial seas, the Chinese government regularly claims sovereignty over the Spratly Islands and their "adjacent waters." China's Ministry of Foreign Affairs, *Foreign Ministry Spokesperson Lu Kang's Remarks on USS Lassen's Entry into Waters near Relevant Islands and Reefs of China's Nansha Islands*, October 27, 2015; China's Ministry of Foreign Affairs, *Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference on April 9, 2015*, April 9, 2015.

§ At the time of writing, the U.S. government has not made an official statement about the specific activities conducted by the U.S. destroyer near Subi Reef or the legal rationale for conducting the operation. Without such a statement, the exact message that the operation was intended to convey is uncertain. Adam Klein and Mira Rapp-Hooper, "What Did the Navy Do in the South China Sea?" *Lawfare* (Blog), November 4, 2015. <https://www.lawfareblog.com/what-did-navy-do-south-china-sea>.

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Convention on the Law of the Sea (UNCLOS), low-tide elevations such as Subi Reef may not generate a territorial sea unless they are located within the territorial sea of an island or mainland coastline.<sup>10</sup> In addition, transforming a low-tide elevation into an artificial island does not entitle it to a territorial sea.<sup>11</sup> This apparent message of the patrol is consistent with earlier statements by U.S. officials that “turning an underwater rock into an airfield simply does not afford the rights of sovereignty or permit restrictions on international air or maritime transit” and that the United States will “fly, sail, and operate wherever international law allows”.<sup>12</sup>

The patrol did not make a statement about the validity of China’s sovereignty claim over Subi Reef itself. The U.S. government does not take a stance on the various sovereignty claims over land features in the South China Sea.<sup>13</sup>

**What Happens Next?** Here are some key questions to keep in mind in the coming days, weeks, and months:

*What else will China do?* China’s response to the patrol has been relatively restrained so far, but if China’s past behavior is any guide, it could use the perceived “incursion” as an opportunity to take new “defensive” steps to enhance its position.<sup>14</sup> Such steps could include increasing the pace and scale of its reclamation and construction efforts, as was suggested by the Ministry of Foreign Affairs spokesperson; more frequently shadowing or engaging with U.S. Navy ships and aircraft near the reclaimed islands; or establishing or threatening to establish an air defense identification zone in the South China Sea. China could also direct maritime militia ships, which U.S. Naval War College associate professor Andrew Erickson and research fellow Conor Kennedy describe as a “dual-hatted force of specially registered fishing vessels with fisherman-soldier crews,”<sup>15</sup> to harass U.S. ships conducting future freedom of navigation patrols near the artificial islands. *Defense News* reported that, according to a U.S. Navy source, when the U.S. destroyer was conducting its patrol near Subi Reef, several Chinese merchant or fishing vessels were in the area and one crossed the U.S. destroyer’s bow at a safe distance. The source said the vessels appeared to be there “because they anticipated the [U.S. ship’s] transit.”<sup>16</sup> These vessels likely were part of China’s maritime militia.<sup>17</sup>

*What else will the United States do?* U.S. officials have indicated that the United States will conduct more freedom of navigation operations within 12 nm of China’s artificial islands in the South China Sea, though the place and nature of these future operations are uncertain.<sup>18</sup> In addition to future freedom of navigation patrols, the United States could take other diplomatic or military steps to assert its position; alternately, the United States could seek a “cooling off” period to allow relations with China to calm.

*How will the region respond?* In general, countries in the Asia Pacific reacted positively to the U.S. Navy patrol. The president of the Philippines welcomed the U.S. Navy patrol,<sup>19</sup> and Malaysia’s defense minister described the patrol as “very important.”<sup>20</sup> Australian defense officials are considering similar actions,<sup>21</sup> and South Korea’s defense minister and Singapore’s Minister of Foreign Affairs voiced support for freedom of navigation as well.<sup>22</sup> Whether and how other regional stakeholders weigh in will be important. History suggests that China is more likely to moderate its behavior when several countries in the region are united against it.<sup>23</sup>

Although not a response to the freedom of navigation operation, a few days after the U.S. Navy patrol, on October 29, an arbitral tribunal at the Permanent Court of Arbitration in The Hague announced that it has jurisdiction in a case initiated by the Philippines in 2013 over China’s claims and activities in the South China Sea. The tribunal will address such questions as: whether certain land features in the South China Sea are rocks rather than islands; whether certain features are low-tide elevations; and whether China has unlawfully prevented Filipino fishermen from fishing at Scarborough Reef, one of the disputed features which China has effectively controlled since 2012.<sup>†</sup> During the next phase of the arbitral proceedings, the tribunal will hold a hearing on the merits of the Philippines’ claims and will consider its jurisdiction to rule on the other questions, including whether China’s claims as encompassed

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\* Reuters reported that a U.S. defense official said the U.S. Navy plans to conduct patrols within 12 nm of artificial islands in the South China Sea about two times each quarter. Andrea Shalal and Idrees Ali, “U.S. Navy Plans Two or More Patrols in South China Sea per Quarter,” Reuters, November 2, 2015. <http://www.reuters.com/article/2015/11/03/us-southchinasea-usa-navy-idUSKCN0SR28W20151103#lCymgiAKjksTszBF.97>.

† In 2012, after a standoff between Philippine and Chinese ships, China effectively secured control of Scarborough Reef, a contested fishing ground approximately 500 nm from Hainan Island, China’s southernmost province, and 124 nm from the Philippines’ province of Zambales. U.S.-China Economic and Security Review Commission, *2012 Annual Report to Congress*, November 2012, 231–233.

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by the “nine-dash line”<sup>\*</sup> are contrary to UNCLOS.<sup>24</sup> China’s Ministry of Foreign Affairs issued a statement reiterating that the Chinese government, which refused to participate in the arbitral proceedings, will not accept any ruling by the tribunal and stating that the case “is in essence not an effort to settle disputes but an attempt [by the Philippines] to negate China’s territorial sovereignty and maritime rights and interests in the South China Sea.”<sup>25</sup> The tribunal said it expects to rule on the merits of the Philippines’ claims and on whether it has jurisdiction to rule on the other questions in 2016.<sup>26</sup>

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<sup>\*</sup> China delineates its claims on its South China Sea maps using a nine-dash line (and in some cases a ten-dash line), which encompasses almost all of the South China Sea.

## Endnotes

- <sup>1</sup> U.S. Department of Defense, *IISS Shangri-La Dialogue: 'A Regional Security Architecture Where Everyone Rises,'* May 30, 2015. <http://www.defense.gov/Speeches/Speech.aspx?SpeechID=1945>; CNN, "High Stakes Surveillance over the South China Sea," May 20, 2015. <http://www.cnn.com/videos/politics/2015/05/20/south-china-sea-surveillance-plane-sciutto.cnn>.
- <sup>2</sup> Adam Entous and Julian A. Barnes, "U.S. Military Proposes Challenge to China Sea Claims," *Wall Street Journal*, May 12, 2015. <http://www.wsj.com/articles/u-s-military-proposes-challenge-to-china-sea-claims-1431463920>.
- <sup>3</sup> Senate Committee on Armed Services, *Hearing on Maritime Security Strategy in the Asia-Pacific Region*, oral testimony of David Shear, September 17, 2015.
- <sup>4</sup> Austin Wright, Philip Ewing, and Bryan Bender, "Obama Team, Military at Odds over South China Sea," *Politico*, July 31, 2015. <http://www.politico.com/story/2015/07/barack-obama-administration-navy-pentagon-odds-south-china-sea-120865.html>; Dan De Luce and Paul Mcleary, "In South China Sea, a Tougher U.S. Stance," *Foreign Policy* (Blog), October 2, 2015. <http://foreignpolicy.com/2015/10/02/in-south-china-sea-a-tougher-u-s-stance/>.
- <sup>5</sup> Demetri Savastopulo and Charles Clover, "China Accuses US Navy of Illegal Incursion in South China Sea," *Financial Times*, October 27, 2015. <http://www.ft.com/intl/cms/s/0/8a05582e-7c18-11e5-98fb-5a6d4728f74e.html>.
- <sup>6</sup> Helene Cooper and Jane Perlez, "White House Moves to Reassure Allies With South China Sea Patrol, but Quietly," *New York Times*, October 27, 2015. <http://www.nytimes.com/2015/10/28/world/asia/south-china-sea-uss-lassen-spraty-islands.html>; Simon Denyer, Craig Whitlock, and Steven Mufson, "U.S. Warship Sails within 12 Miles of Chinese-Built Island in South China Sea," *Washington Post*, October 26, 2015. [https://www.washingtonpost.com/world/us-warship-sails-within-12-miles-of-chinese-built-island-in-south-china-sea/2015/10/26/a178497b-7033-4e4c-a328-0f3c980cf193\\_story.html](https://www.washingtonpost.com/world/us-warship-sails-within-12-miles-of-chinese-built-island-in-south-china-sea/2015/10/26/a178497b-7033-4e4c-a328-0f3c980cf193_story.html); Demetri Savastopulo and Charles Clover, "China Accuses US Navy of Illegal Incursion in South China Sea," *Financial Times*, October 27, 2015. <http://www.ft.com/intl/cms/s/0/8a05582e-7c18-11e5-98fb-5a6d4728f74e.html>; Open Source Center, "PRC: Defense Ministry Spokesman Speaks on USS Lassen's Entering Coastal Waters of Spratly Islands," October 27, 2015. ID: CHR2015102749772143; and China's Ministry of Foreign Affairs, *Foreign Ministry Spokesperson Lu Kang's Remarks on USS Lassen's Entry into Waters near Relevant Islands and Reefs of China's Nansha Islands*, October 27, 2015.
- <sup>7</sup> Open Source Center, "PRC: Defense Ministry Spokesman Speaks on USS Lassen's Entering Coastal Waters of Spratly Islands," October 27, 2015. ID: CHR2015102749772143.
- <sup>8</sup> Ben Blanchard and Andrea Shalal, "Angry China Shadows U.S. Warship near Man-Made Islands," *Reuters*, October 28, 2015. <http://www.reuters.com/article/2015/10/28/us-southchinasea-usa-idUSKCN0SK2AC20151028#BJqARukX3KpYvBk0.97>; Sam LaGrone, "U.S. South China Sea Freedom of Navigation Missions Included Passage near Vietnamese, Philippines Claims," *USNI News*, October 27, 2015. <http://news.usni.org/2015/10/27/u-s-south-china-sea-freedom-of-navigation-missions-included-passage-near-vietnamese-philippine-claims>.
- <sup>9</sup> Adam Klein and Mira Rapp-Hooper, "Freedom of Navigation Operations in the South China Sea: What to Watch For?" *Lawfare* (Blog), October 23, 2015. <https://www.lawfareblog.com/freedom-navigation-operations-south-china-sea-what-watch>.
- <sup>10</sup> UN Convention on the Law of the Sea, "Part 2: Territorial Sea and Contiguous Zone"; Gregory Poling, "Carter on the South China Sea: Committed and (Mostly) Clear," *Center for Strategic and International Studies*, June 3, 2015.
- <sup>11</sup> UN Convention on the Law of the Sea, "Part 5: Exclusive Economic Zone."
- <sup>12</sup> U.S. Department of Defense, *IISS Shangri-La Dialogue: 'A Regional Security Architecture Where Everyone Rises,'* May 30, 2015. <http://www.defense.gov/Speeches/Speech.aspx?SpeechID=1945>.
- <sup>13</sup> Michael Green, Bonnie Glaser, and Gregory Poling, "The U.S. Asserts Freedom of Navigation in the South China Sea," *Center for Strategic and International Studies*, October 27, 2015. <http://csis.org/publication/us-asserts-freedom-navigation-south-china-sea>.
- <sup>14</sup> U.S.-China Economic and Security Review Commission, *2014 Annual Report to Congress*, November 2014, 238-239.
- <sup>15</sup> Andrew S. Erickson and Conor M. Kennedy, "China's Island Builders," *Foreign Affairs*, April 9, 2015. <https://www.foreignaffairs.com/articles/east-asia/2015-04-09/china-s-island-builders>.
- <sup>16</sup> Christopher Cavas, "China's Little Blue Men Take Navy's Place in Disputes," *Defense News*, November 2, 2015. <http://www.defensenews.com/story/defense/naval/2015/11/02/china-lassen-destroyer-spratly-islands-south-china-sea-andrew-erickson-naval-war-college-militia-coast-guard-navy-confrontation-territorial-dispute/75070058/>.
- <sup>17</sup> Christopher Cavas, "China's Little Blue Men Take Navy's Place in Disputes," *Defense News*, November 2, 2015. <http://www.defensenews.com/story/defense/naval/2015/11/02/china-lassen-destroyer-spratly-islands-south-china-sea-andrew-erickson-naval-war-college-militia-coast-guard-navy-confrontation-territorial-dispute/75070058/>.
- <sup>18</sup> Andrea Shalal and Idrees Ali, "U.S. Navy Plans Two or More Patrols in South China Sea per Quarter," *Reuters*, November 2, 2015. <http://www.reuters.com/article/2015/11/03/us-southchinasea-usa-navy-idUSKCN0SR28W20151103#lCymgiAKjksTszBF.97>.
- <sup>19</sup> Aya Lowe, "Philippines' Aquino Welcomes US Warship's Deployment in Disputed Sea," *Channel News Asia*, October 27, 2015. <http://www.channelnewsasia.com/news/asiapacific/philippines-aquino/2221382.html>.
- <sup>20</sup> Trefor Moss, "Support Grows for U.S. Approach in South China Sea," *Wall Street Journal*, November 3, 2015. <http://www.wsj.com/articles/support-grows-for-u-s-approach-in-south-china-sea-1446545714>.
- <sup>21</sup> Rob Taylor, "Australia Prepares Option of Sail-Through to Test China," *Wall Street Journal*, October 28, 2015. <http://www.wsj.com/articles/australia-prepares-option-of-sail-through-to-test-china-1446023112>.
- <sup>22</sup> Jonathan Cheng and Gordon Lubold, "South Korea Calls for South China Sea Rights," *Wall Street Journal*, November 2, 2015. <http://www.wsj.com/articles/south-korea-calls-for-south-china-sea-rights-1446461006>; Singapore's Ministry of Foreign Affairs, *MFA Press Statement: Introductory Calls on Minister for Foreign Affairs Minister Dr. Vivian Balakrishnan*, October 28, 2015.

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- <sup>23</sup> Robert Sutter and Chin-Hao Huang, “China-Southeast Asia Relations: Beijing Sets Positive Agenda, Plays Down Disputes,” *Center for Strategic and International Studies*, January 2015; U.S.-China Economic and Security Review Commission, *Hearing on China’s Relations with Southeast Asia*, written testimony of Robert Sutter, May 13, 2015.
- <sup>24</sup> Permanent Court of Arbitration in The Hague, *Press Release: Arbitration between the Republic of the Philippines and the People’s Republic of China*, October 29, 2015.
- <sup>25</sup> China’s Ministry of Foreign Affairs, *Statement of the Ministry of Foreign Affairs of the People’s Republic of China on Jurisdiction and Admissibility of the South China Sea Arbitration by the Arbitral Tribunal Established at the Request of the Republic of the Philippines*, October 30, 2015.
- <sup>26</sup> Permanent Court of Arbitration in The Hague, *Press Release: Arbitration between the Republic of the Philippines and the People’s Republic of China*, October 29, 2015.