



**RESPONSE TO PACNET #71, “HOW
CAN MARITIME GOOD ORDER BE
MAINTAINED IN THE SOUTH CHINA
SEA?”**

**BY SUKJOON YOON AND JOSEPH
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Joseph Bosco responds to Sukjoon Yoon:

In PacNet 71, “How Can Maritime Good Order Be Maintained in the South China Sea,” Sukjoon Yoon examines the respective responsibilities of the United States and China to maintain stability in the waters of Southeast Asia.

With appreciation for his 30 years of service with the Republic of Korea Navy, this article is deeply flawed. It accepts China’s position as the moral and legal equivalent to that asserted by the United States and the international community:

[I]n the South China Sea (SCS) both China and the US are directly undermining maritime security through military activities intended to support their narrower national interests . . . It is time for China and the US to look beyond their saber-rattling power games.

The opening sentence sets the stage for the faulty argument that follows:

The United Nations Convention on the Law of the Sea (UNCLOS) enshrines the concept of innocent passage through a coastal state’s *territorial waters*.” (my emphasis)

From that point on, the article’s operating premise is that China’s manmade islands of dredged sand and coral are indeed part of the sovereign territory of the People’s Republic.

But Article 60 of UNCLOS allows the construction of artificial islands only within an already-existing 200-mile economic exclusion zone (EEZ) of a coastal state. China’s coast is hundreds of miles from the disputed area of the South China Sea. And even where artificial islands are legally permitted in a recognized EEZ, they are entitled to surrounding safety zones of 500 meters, not the 12 nautical miles of territorial seas that China claims in the SCS.

Continuing with the artificial-islands-as-Chinese-territory false narrative, the author correctly defines the innocent passage usage:

A vessel in innocent passage may traverse the coastal state’s territorial sea expeditiously, not stopping or anchoring except in [emergency] situations . . . The underlying principle . . . does not create or imply any freedom to perform military applications in the *specified maritime domain*. (my emphasis)

Since, under both UNCLOS and customary international law, the waters around the artificial islands are the high seas, the U.S. Navy and ships of any other nation are free to conduct normal operations in them. That is what Freedom of Navigation Operations transits are intended to establish. (Indeed, to the extent governments declare they are merely engaged in “innocent passage” while traversing those waters--as the U.S. Navy repeatedly did under the Obama administration--they are gratuitously conceding that the waters *are* part of Chinese territory, the same mistaken assumption the article makes.)

The author, however, takes a very different and more jaundiced view of FONOPS:

On-scene commanders trying to keep their ships and crews safe face the prospect of potentially warlike conflict, and this for *the abstract concept of freedom of navigation*. Some might even see FONOPs as an echo of a colonialist mentality, when the actions of the great powers imperiled weaker and more fragile states.

Yet, that “abstract” concept of free navigation (and overflight) has for seven decades preserved the peace, assured the open flow of global commerce, and enabled the development and prosperity of hundreds of millions in China and around the world.

The author rejects that picture as too rosy and too presumptuous:

Of course, the US has a legitimate mandate to protect the maritime security of its *home waters*, but through FONOPs it is effectively claiming a similar mandate globally. These operations cannot be interpreted as any kind of constabulary function, as self-defense for force protection, nor as using a minimum level of force necessary to enforce international law. They are clearly coercive, and potentially a war-fighting function. (my emphasis)

As for China's role in creating the growing danger of confrontation, the author makes a telling observation:

China's de facto annexation of the SCS is equally problematic for states in the region. For this issue, however, UNCLOS provides an appropriate and competent legal framework to resolve disputes, as demonstrated by the 2016 ruling by the Arbitral Tribunal at the Permanent Court of Arbitration, which determined that China has "no historical rights" based on the "nine-dash line" map. *Despite this legal setback, however, China seems intent on dealing individually with other claimants in the SCS, and might ignore any such rulings in the future.* (my emphasis)

So, with a Chinese government that flagrantly refuses to abide by international law and impartial dispute resolution, what is to be done? The author's answer is to set up a straw man that spreads the blame universally:

No resolution of SCS issues is possible while *a variety of different interpretations* of UNCLOS persist, with user states and coastal states seeking to further their own maritime interests and convenience. (my emphasis)

Having absolved the primary wrongdoer of its responsibility for disrupting the international order, the article offers a "solution" that would surely please China.:

[T]here is clearly a need for a more detailed and comprehensive set of rules . . . A new agreement that is based on international law *and on related domestic law* is needed to extend and institutionalize the existing UNCLOS framework.

Put another way, the author recommends that the international community simply throw in the sponge on protecting the existing maritime order and accommodate the lawbreaker with laws more to its

liking. Therein lies the path to a new level of international conflict.

Sukjoon Yoon's response to Joseph Bosco:

I really appreciate Dr. Bosco's close reading of my article, and thank him for his comments, albeit in a critical vein. My concern about the possibility of unwanted naval skirmishes in the South China Sea originate from my own experience as an on-scene-commander in the vicinity of the Korean Northern Limit Line, though there are, of course, many differences with the situation in the SCS, and the arguments in my PacNet Commentary were entirely concerned with how to prevent such destabilizing clashes in the near future.

I reject the assertion that my article takes a pro-China stance. In fact, the Chinese creation of artificial islands through reclamation of reefs and shoals is not without precedent: significant construction projects have also taken place at other contested locations, notably at the Okinotori Islands, by Japan, and at Dokdo, by the ROK. At Okinotori the Japanese actually lay claim to a 200nm EEZ, not merely to 12nm of territorial waters, but FONOPs are not happening in these cases, and surely this is because they are not critically relevant to SLOCs. I raise these comparisons to shed some light upon US motives in the SCS: clearly the purpose of the current FONOPs is fundamentally military in character.

The aggressive and disruptive stance taken by the US incurs significant risks of serious naval conflict, but does little or nothing to benefit any other parties. The Chinese government, despite its militarization of seven artificial islands, with limited operational naval value, earnestly wants the SCS issues to be contained within the legal domain, rather than spilling over into the military one, even though it is still smarting from its legal setback with the PCA ruling of 2016. And obviously the other Asian nations, all members of UNCLOS except North Korea, get absolutely nothing out of replacing the legal approach with a military-to-military confrontation.

Although the US argues that it is acting in defense of customary international law, it is, in practice, implementing a military solution in SCS. To repeatedly order a naval task force to pass through sensitive waters without any naval operational purpose is a blatant provocation. Far from maintaining maritime good order by ensuring freedom of navigation and overflight, these operations actually destabilize the whole region. Bosco refers to "seven

decades” of US dominance in East Asian Seas, but ignores the deeper history of the region: he seems unaware of any reasons why China’s perspective might be different from his own. Again, I am not arguing in support of China’s stance, and in the article I make clear that China’s effective annexation of the SCS is as least as unwelcome as the futile and dangerous US response to it. But the current US policy seems designed to exacerbate the situation: it gifts China the opportunity to represent the US as indistinguishable from the 19th-century colonial powers!

I note that the Japanese Maritime Self-Defense Force has not dispatched a naval task force to the seas around Dokdo, nor have South Korea or China sent their navies to Okinotori. If they did, it would be dangerously provocative, distract from any possibility of a legal resolution of these issues, and be profoundly unsubtle, whatever rhetorical arguments were used to justify such an action.

China should be credited with the good sense to prefer a legal framework to resolve the difficulties of the SCS. And, UNCLOS in its current form is clearly not adequate. Instead of sniping from the sidelines, the US should have the grace to finally ratify UNCLOS (instead of pretending, as it often does, that it is somehow better than other nations, and so does not need to bother with international treaties, and then work to extend its provisions. After 12 FONOPs, has China moved toward accepting the US position? On the contrary, the danger of physical conflict is only increasing, as demonstrated by the near collision on September 30. The US may be feeling “great” about it, but the rest of the region does not agree.

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