



Delhi Policy Group

Advancing India's Rise as a Leading Power



DPG POLICY BRIEF

Reading the USS John Paul Jones FONOP Right

Author

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Cover Photographs:

USS John Paul Jones at Hawaii. Source: Indo-Pacific Command

Ships from the Indian Navy, Japan Maritime Self Defense Force, the Royal Australian Navy and the United States Navy sail in formation during Exercise Malabar, November 17, 2020. Source: US Pacific Fleet

Secretary of Defense Lloyd Austin Meets Prime Minister Narendra Modi, March 19, 2021.

Source: @narendramodi

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Reading the USS John Paul Jones FONOP Right

By
Lalit Kapur

Contents

The UN Convention on the Law of the Sea	2
The US Freedom of Navigation Programme	4
India's Stated Position.....	6
FONOPS and Other Countries	8
Taking Stock	9

Reading the USS John Paul Jones FONOP Right

by
Lalit Kapur

One week ago, a bland announcement appeared on the official website of the Commander of the US Seventh Fleet. Its wording, which could most certainly have been better chosen, said¹, "On April 07, 2021 (local time) USS John Paul Jones (DDG 53) asserted navigational rights and freedoms approximately 130 nautical miles (nm) west of the Lakshadweep Islands, inside India's exclusive economic zone, without requesting India's prior consent, consistent with international law. India requires prior consent for military exercises or manoeuvres in its exclusive economic zone or continental shelf, a claim inconsistent with international law".

The report was picked up by 'The Diplomat' which on the next day published a commentary questioning the timing of the FONOP amidst deepening maritime collaboration between India and the US and growing enthusiasm for the Quad². This line in turn was widely disseminated by Indian commentators, who portrayed the US action as having violated India's maritime territory with intent to rub India's nose in the dirt and create a precedent for foreign ships to violate India's territorial seas at will;³ the FONOP being designed to 'prevent' excessive claims and a signal to India⁴; an act of impropriety to intimidate others by a nation that has arrogated to itself the role of 'global-cop' for implementation of UNCLOS⁵; and seeking clarification from Quad nations on which version of international law is to be jointly upheld by them⁶. A common

¹ 7th Fleet conducts Freedom of Navigation Operation,
<https://www.c7f.navy.mil/Media/News/Display/Article/2563538/7th-fleet-conducts-freedom-of-navigation-operation/>

² Abhijnan Rej, "US Destroyer Carries out FONOP in Indian EEZ",
<https://thediplomat.com/2021/04/us-destroyer-carries-out-fonop-in-indian-eez/>

³ Bharat Karnad, "Will the DDG-53 FNOP get Delhi thinking again?",
<https://bharatkarnad.com/2021/04/11/will-the-ddg-53-fnop-get-delhi-thinking-again/>

⁴ Pradeep Chauhan, "The 7th Fleet Commander Statement Shows Just One Thing – United States' Stupidity", <https://www.news18.com/news/opinion/the-7th-fleet-commander-statement-shows-just-one-thing-united-states-stupidity-3625922.html>

⁵ Arun Prakash, "US 7th Fleet's Patrol in India's EEZ was an act of Impropriety", <https://indianexpress.com/article/opinion/columns/us-navy-warship-india-eez-area-freedom-of-navigation-lakshadweep-7269343/>. The headline for the same article in the print edition of Indian Express is "Deter adversaries, don't alienate friends" Indian Express, April 12, 2021, P 9.

⁶ C Uday Bhaskar, "In the Seas, When the US and India Differ on Principle", <https://www.hindustantimes.com/india-news/in-the-seas-when-the-us-and-india-differ-on-principle-101618225957103.html>

thread in these commentaries was questioning US motives when it had itself not yet ratified UNCLOS.



Secretary of Defense Lloyd Austin Meets Prime Minister Narendra Modi, March 19, 2021. Source: @narendramodi

A press release from India's Ministry of External Affairs highlighted that India's stated position on UNCLOS "is that the Convention does not authorise other States to carry out in the Exclusive Economic Zone and on the Continental Shelf, military exercises or manoeuvres, in particular those involving the use of weapons or explosives, without the consent of the coastal state"⁷.

The UN Convention on the Law of the Sea

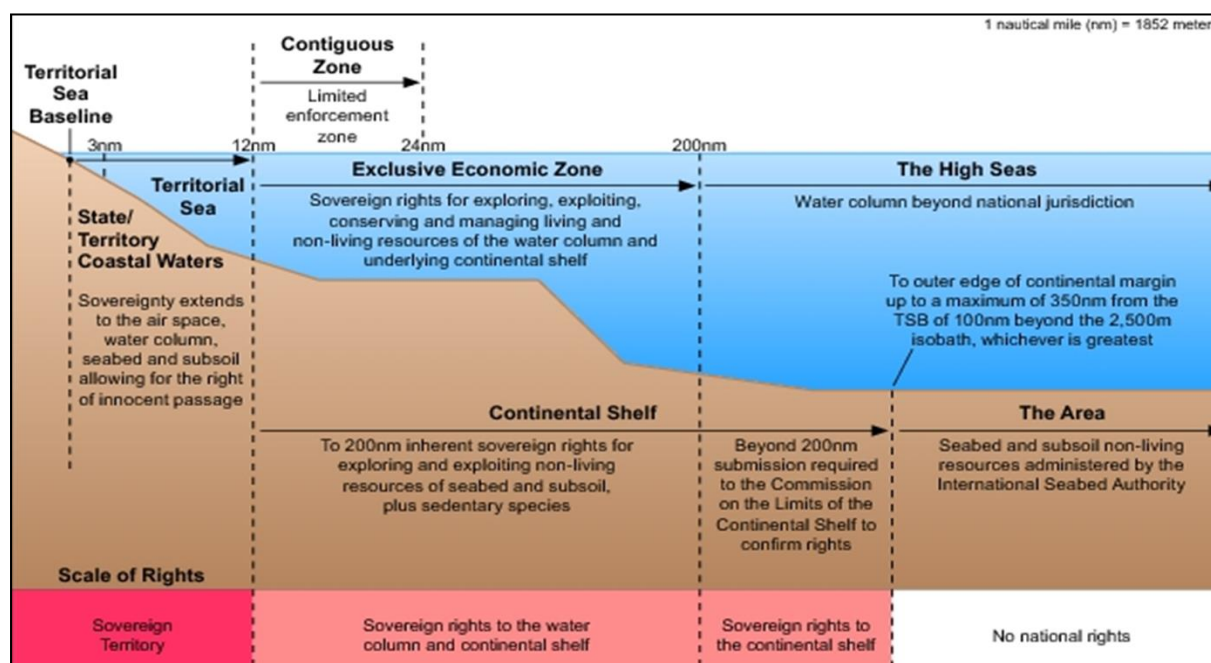
Hugo Grotius' Mare Liberum argument (based on free usage of the seas for transportation) prevailed over John Selden's Mare Clausum (based on ownership of the sea resources) in the 17th century, setting to rest attempts by Spain and Portugal to claim entire oceans and adjoining lands for themselves⁸. Generated by an incident in the Malacca Straits, Grotius' success put in place the principle of Freedom of Navigation (FON), described as "one of the oldest

⁷Passage of USS John Paul Jones Through India's EEZ", https://mea.gov.in/press-releases.htm?dtl/33787/Passage_of_USS_John_Paul_Jones_through_Indias_EEZ

⁸For a detailed exposition on this, see Lalit Kapur, in DPG Policy Brief Vol III Issue 4, "Freedom of Navigation: Different Strokes for Different Folks", https://www.delhipolicygroup.org/uploads_dpg/publication_file/freedom-of-navigation-different-strokes-for-different-folks-1083.pdf

and most recognised principles in the regime governing ocean space"⁹. By the mid 20th century, however, pressures from states seeking ownership of resources contained in and below the seas had become very strong. Among other issues, UNCLOS 1982 (the Convention) effectively brokered a compromise between the two competing arguments.

The Convention gave States rights in four geographic areas. The first was the Territorial Sea, which was expanded from the earlier three to 12 nm from the coast. States were given full sovereignty over the Territorial Sea, with the proviso that ships of all nations, including warships, retained complete freedom of passage (navigation). The only restriction was that within the Territorial Sea, passage had to be "innocent". What constituted innocent passage was clearly defined under Article 19 of the Convention. A contiguous zone was created, extending from 12 – 24 nm from the coast, within which coastal states were given jurisdiction over customs, fiscal, sanitary and immigration offences committed within the Territorial Sea, and nothing further.



Offshore extent of maritime zones recognised under international law.

Source: Geoscience, Australia

The second element was the newly created Exclusive Economic Zone (EEZ), wherein states were given exclusive rights over exploring, exploiting, conserving or managing resources in and under the sea, as well as for marine

⁹Statement by Rüdiger Wolfrum, former President of ITLOS, "Freedom of Navigation: New Challenges", https://www.itlos.org/fileadmin/itlos/documents/statements_of_president/wolfrum/freedom_navigation_080108_eng.pdf

scientific research and for protection and preservation of the environment. The rights were purely economic, hence the name EEZ. For all transportation purposes, including military, UNCLOS treated the EEZ as the High Seas.

Third was the Continental Shelf, in which States were given exclusive rights to exploit resources on or below the seabed, but not in the sea (i.e. fish). The Continental Shelf, which normally extended to 200 nm from the coast, could be extended to not more than 350 nm or 100 nm beyond the 2500 m isobath, provided this was accepted by the Commission on the Limits of the Continental Shelf, which was tasked with reconciling conflicting claims. India filed its submission on May 11, 2009¹⁰.

Finally came the high seas, which were considered Earth's shared resource. UNCLOS created a provision by which states could obtain a licence from the International Seabed Authority to prospect for resources under the seabed.

When UNCLOS opened for signature on March 10, 1983, the US, despite having actively steered negotiations, did not sign because, in the words of then President Reagan¹¹, "several major problems in the Convention's deep sea bed mining provisions were contrary to the interests and principles of industrialised nations and would not help attain the aspirations of developing countries". Reagan's policy statement contained three decisions. The first was that the US would recognise the rights of other states in the waters off their coasts, as reflected in the Convention, so long as the rights and freedoms of the US and others under international law were recognised by such coastal states. The second was that the US would not acquiesce in unilateral acts of other states designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses. The third created an EEZ of 200 nm (consistent with the Convention) for the US¹².

The US Freedom of Navigation Programme

The US Freedom of Navigation (FON) programme was formalised as an outcome of the second policy decision. Established originally by President Carter in 1979, it was reconfigured not to defend the UNCLOS and its rules, but to defend the principle of FON against unilateral assertions beyond what was granted to States by the Convention. The programme, which has now been in place for over three decades, challenges excessive claims that go beyond

¹⁰https://www.un.org/Depts/los/clcs_new/submissions_files/submission_ind_48_2009.htm#:~:text=On%2011%20May%202009%2C%20the,the%20baselines%20from%20which%20the

¹¹Statement of President Reagan on United States Ocean Policy, 10 March 1983, <https://www.reaganlibrary.gov/archives/speech/statement-united-states-oceans-policy>

¹²Ibid

UNCLOS based not on the identity of the state concerned, but on the cherished principle¹³. An annual report published by the US Department of Defense in this regard is available on its website¹⁴. Why the principle, which precedes UNCLOS by nearly two hundred years, is cherished has been elaborated upon by this author separately¹⁵. Thus, allusions to the US not having signed or ratified UNCLOS are mostly irrelevant.



USS John Paul Jones at Hawaii. Source: Indo-Pacific Command

Nevertheless, successive administrations have tried to undo President Reagan's decision and get the US Senate to approve the ratification of UNCLOS. In October 2003, the late Senator Richard Lugar, then Chairman of the Senate Foreign Relations Committee, convened two hearings on the subject resulting in the Committee voting 19-0 to endorse the Convention¹⁶. A vote, however, was not taken up by the Senate. In September /October 2007, then Senator Joseph R. Biden, as Chairman of the Senate's Foreign Relations Committee,

¹³US Dept of Defense Freedom of Navigation (FON) Program, <https://policy.defense.gov/Portals/11/DoD%20FON%20Program%20Summary%2016.pdf?ver=2017-03-03-141350-380>

¹⁴D Annual Freedom of Navigation (FON) Reports, <https://policy.defense.gov/OUSSDP-Offices/FON/>

¹⁵Lalit Kapur, "Freedom of Navigation: Different Strokes for Different Folks", https://www.delhipolicygroup.org/uploads_dpg/publication_file/freedom-of-navigation-different-strokes-for-different-folks-1083.pdf

¹⁶Prepared Statement of Hon. Joseph R Biden, Jr., US Senator from Delaware, <https://www.govinfo.gov/content/pkg/CHRG-110shrg45282/html/CHRG-110shrg45282.htm>

also convened two hearings. His prepared statement quoted President Bush as saying that the Convention, "Will serve the national security interests of the United States, including the maritime mobility of our Armed Forces worldwide. It will secure US sovereign rights over extensive marine areas, including the valuable natural resources they contain. Accession [to the Convention] will promote U.S. interests in the environmental health of the oceans. And it will give the United States a seat at the table when the rights that are vital to our interests are debated and interpreted." Despite strong support from the Chairman Joint Chiefs of Staff and the service chiefs, however, Biden was unable to get the necessary 67 votes required for Senate approval.

Was the action by USS John Paul Jones an impropriety¹⁷, or worse a transgression intended to slight India?¹⁸ Are FONOPs intended to intimidate the target country? Do they create precedent for other countries, including China, to violate India's territorial seas at will? For a fair determination, the answer to two questions becomes important. First, what has the past practice and precedent been? Second, does India contravene UNCLOS, necessitating action, howsoever routine, to defend a perceived US right and interest?

India's Stated Position

India has been the target of FONOPS time and again in the last three decades. Two reasons are cited in justification in the majority of the cases. These are the requirement of prior notification before entering the territorial sea; and the requirement of prior permission for military exercises and manoeuvres in the EEZ (as in the USS John Paul Jones case). The very same EEZ reason has been cited in 1999, every year from 2007-2015, in 2017 and in 2019.

Consider the first. Article 17 of the Convention specifies, "... ships of all states, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea". It does not differentiate between warships and commercial traffic, nor does the Convention limit the right of innocent passage for warships through any other article. On the other hand, Article 4(1) of India's 'The Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976 (MZI Act) specifically excludes warships from the right of innocent passage¹⁹. Article 4(2) goes on to say, Foreign warships including submarines and other underwater vehicles, may enter or pass

¹⁷Arun Prakash, Op Cit.

¹⁸Bharat Karnad, "Will the DDG-53 FNOP get Delhi Thinking Again", <https://bharatkarnad.com/2021/04/11/will-the-ddg-53-fnop-get-delhi-thinking-again/>

¹⁹The Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976, http://www.mea.gov.in/Uploads/PublicationDocs/143_Territorial-Waters-Continental-SEE-Zone-and-Other-Maritime-Zone-Act-1976.pdf

through the territorial waters after giving prior notice to the Central Government". Clearly, India's MZI Act goes beyond UNCLOS in seeking prior notification by warships.

India's understanding of the EEZ, as spelt out in the MEA statement²⁰, is based on its declaration at the time of accession to UNCLOS²¹. Technically, the Seventh Fleet Commander is wrong in saying that India requires prior consent for military exercises or manoeuvres in its EEZ. An understanding is not a requirement unless it is enforced. India has never sought to enforce this understanding against USN ships.

India had formally protested US intelligence and survey activities in its EEZ through USNS Bowditch and USNS Mary Sears, as well as HMS Scott, in the first decade of this century²². It was then pointed out that while UNCLOS recognised the right of the coastal state to control marine scientific research within the EEZ, it did not in any way restrict the conduct of military survey operations²³. Thereafter, India stopped protesting. There were reports of India having chased out Shiyan-1, a Chinese ship carrying out surveillance in its EEZ in the Andaman and Nicobar Island chain, as it did not have permission to operate there²⁴. The key point here is that the Chinese ship was not a military vessel. As such, it was covered by the UNCLOS requirement giving India exclusive rights to marine scientific survey within its EEZ, and India was within its rights under the Convention in asking it to leave.

Returning to the understanding cited by India in its declaration at the time of depositing the instrument of accession in 1995²⁵, it is pertinent to note that nothing in the text of UNCLOS substantiates this understanding. Moreover, Article 310 of UNCLOS specifies, "Such declarations cannot exclude or modify the legal effect of UNCLOS in their application to the state concerned". India's declaration is, therefore, meaningless, as was in fact pointed out in the

²⁰Passage of USS John Paul Jones Through India's EEZ", https://mea.gov.in/press-releases.htm?dtl/33787/Passage_of_USS_John_Paul_Jones_through_Indias_EEZ

²¹https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en#EndDec

²²Based on author's experience in service.

²³Iskander Rehman, "India, China, and differing conceptions of the maritime order", <https://www.brookings.edu/research/india-china-and-differing-conceptions-of-the-maritime-order/>

²⁴Sutirtho Patranobis, "Our research ships didn't break any law : China", <https://www.hindustantimes.com/world-news/our-research-ship-didn-t-break-any-law-china/story-1p2tT3ZorasyygF9Gw5xEJ.html#:~:text=The%20incident%20involved%20the%20Shiyan,China's%20top%20scientific%20research%20institution.>

²⁵See footnote 21.

declarations made by Russia on March 12, 1997, UK on July 25, 1997, and The Netherlands on June 28, 1996²⁶.

India's prior domestic law and declaration at the time of acceding to UNCLOS thus seek rights beyond what the Convention grants to everyone. Both were framed at a time when India's strategic outlook was different. India has since then moved towards compliance with UNCLOS, rather than contesting its provisions. When the Permanent Court of Arbitration made its award in the Bangladesh maritime border dispute, India gracefully accepted the award²⁷. It enunciated its first integrated Indian Ocean policy (SAGAR) in March 2015. It has strongly supported freedom of navigation in numerous statements since then. The time has come to amend both these positions, whose continuation probably owes more to dogma and bureaucratic inertia, and risks placing India in the same revisionist position as China in the South China Sea.

Should the recent FONOP be viewed as a violation of India's maritime territory, a slight to "rub its nose in the dirt"²⁸? Should it be viewed as a signal? To answer that premise, one must examine the usage of FONOPS against other countries as well as the usage of the Seventh Fleet Commander's website to register these FONOPs.

FONOPS and Other Countries

Over the years, FONOPs have frequently and regularly targeted US allies such as Japan, South Korea, the Philippines, Taiwan and Thailand; friends such as India, Saudi Arabia, Oman and the UAE, neutrals such as Indonesia, Malaysia, Sri Lanka, Maldives and Sweden; and adversaries like Russia (in 2019), China and Iran. The US relationship with the country concerned does not appear to have been a consideration.

Information about FONOPs is normally available only from the annual report submitted by the US Department of Defense. China's maritime transgressions have resulted in information about operations against China being published on the INDOPACOM website. At the time of writing, the USS John Paul Jones FONOP still does not find mention there, nor in the website of any higher authority.

²⁶Ibid

²⁷Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India, <https://pca-cpa.org/en/news/bay-of-bengal-maritime-boundary-arbitration-between-bangladesh-and-india-bangladesh-v-india/>

²⁸Bharat Karnad, Op Cit.

The website of the 7th Fleet Commander serves as a record of activity conducted by his ships. The content focuses on information pertaining to operational and administrative activity. It appears intended for the internal audience, mainly within INDOPACOM, and not necessarily as a means of strategic signalling.

This is, nevertheless, the first time a FONOP against India has found mention in an official USN website apart from the Annual Report by the Department of Defense. A detailed search indicates that the first the Seventh Fleet website included a FONOP was when USS John McCain conducted an operation against Russia, on November 24, 2020²⁹. A decision appears to have been made then to record all FONOPs on the website. These include operations against China, Taiwan and Vietnam on December 22 and 24, 2020; China, Taiwan and Vietnam on February 5³⁰ and 16³¹, 2021; South Korea on March 31, 2021³², Sri Lanka on April 3, 2021³³ and the Maldives on April 07, 2021³⁴. Interestingly, V Adm William Merz, Commander of the US Seventh Fleet, visited South Korea on April 01, 2021³⁵, a day after the FONOP against that country. A visit to promote preparedness and partnership just a day after an operation to “slight” the nation, or “rub its face in the dirt”, would appear irrational.

Taking Stock

Six conceptual differences cloud a common understanding on the issues arising from the FONOP by USS John Paul Jones. The first relates to what UNCLOS permits and what it doesn't. Fundamentally, UNCLOS 1982 gives ownership rights over economic resources in and under the sea up to a limited distance to coastal states. It does not, however, restrict military rights of others, including FON, in any way.

The second difference arises from the misplaced belief that FON is for commercial shipping and not for warships. FON is a long-standing and vital military interest for the US, one that was responsible for the founding of the

²⁹USS John S McCain conducts Freedom of Navigation Operation,
<https://www.c7f.navy.mil/Media/News/Display/Article/2425829/uss-john-s-mccain-conducts-freedom-of-navigation-operation/>

³⁰<https://www.c7f.navy.mil/Media/News/Display/Article/2494240/7th-fleet-destroyer-conducts-freedom-of-navigation-operation-in-south-china-sea/>

³¹<https://www.c7f.navy.mil/Media/News/Display/Article/2505035/7th-fleet-destroyer-conducts-freedom-of-navigation-operation-in-south-china-sea/>

³²<https://www.c7f.navy.mil/Media/News/Display/Article/2556084/7th-fleet-conducts-freedom-of-navigation-operation/>

³³<https://www.c7f.navy.mil/Media/News/Display/Article/2560499/7th-fleet-conducts-freedom-of-navigation-operation/>

³⁴<https://www.c7f.navy.mil/Media/News/Display/Article/2563664/7th-fleet-conducts-freedom-of-navigation-operation/>

³⁵<https://www.c7f.navy.mil/Media/News/Display/Article/2559225/us-7th-fleet-commander-visits-south-korea/>

USN and the country's entry into WW I. This aspect has been covered by this author in another article³⁶.



Ships from the Indian Navy, Japan Maritime Self Defense Force, the Royal Australian Navy and the United States Navy sail in formation during Exercise Malabar, November 17, 2020. Source: US Pacific Fleet

The third difference is the belief that the US FONOPs programme was created to police the rules-based maritime order put in place by UNCLOS. In reality, the programme was created to defend the US interest in FON and not the provisions of UNCLOS. Thus, the fact that the US itself has not signed UNCLOS is a meaningless diversion.

The fourth difference is the belief that FONOPs serve a preventive, coercive or deterrent purpose. The programme has been in existence for over three decades and targets many countries with negligible capability. Even the most dogmatic hegemon would have realised in this time frame that its so-called coercive or preventive action was not working. The reality is that the function of FONOPs is merely to register protest, so that universal acceptance of an excessive claim does not translate into international law. In that light, they are not intended as a means of coercion or preventive action.

Fifth is the belief that India's claims are in compliance with UNCLOS. They are not. It is time for India to acknowledge this and revise both the MZI Act, as well as its declaration at the time of accession to the Convention, the latter because it carries no weight under international law.

Finally there is the commonly held belief that the FONOP was a signal, perhaps intended to slight India. That belief is unsubstantiated. More likely, the

³⁶Lalit Kapur, Op Cit.

operation was a routine activity, carried out without forethought and reflected in a website meant to record of activities of the Seventh Fleet.

That said, the enhanced spread of digital media information necessitates that greater care be taken in dissemination of even routine reports that could be misconstrued. Relationship-building is also about bridging the gap between intention and perception. Dogmatic defence of established positions will serve the interests of neither. In the context of the expanding India-US defence and security relationship, this incident certainly highlights the need for both sides to take into account each other's sensitivities.



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