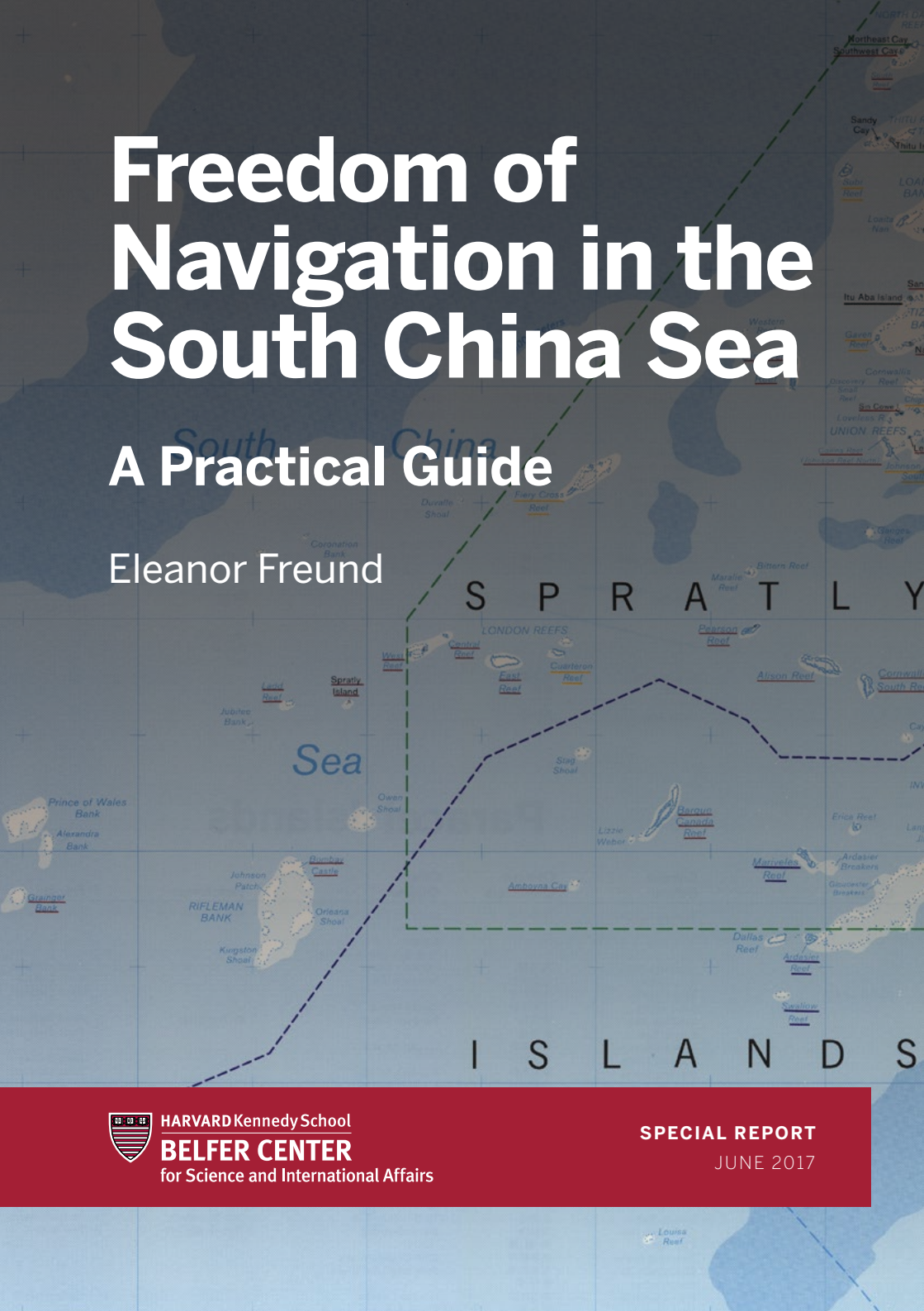


Freedom of Navigation in the South China Sea

A Practical Guide

Eleanor Freund



HARVARD Kennedy School

BELFER CENTER

for Science and International Affairs

SPECIAL REPORT

JUNE 2017



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All errors or omissions are the author's own.

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Central Intelligence Agency. *The Spratly Islands and Paracel Islands*. Scale 1:8,500,000. Washington, D.C.: Central Intelligence Agency, 1992.

What is the UN Convention on the Law of the Sea (UNCLOS)?

The UN Convention on the Law of the Sea (UNCLOS) is the international agreement that defines the rights and responsibilities of nations with respect to their use of the world's oceans. It entered into force in 1994. Although the United States has not ratified UNCLOS, it adheres to many of its provisions, and strong support exists within the U.S. foreign policy community for ratifying it.

What are maritime features?

A maritime feature is a part of the earth's surface occurring in the ocean that is not covered by water. UNCLOS defines three kinds of maritime features:

1. **islands**
2. **rocks**
3. **low-tide elevations**

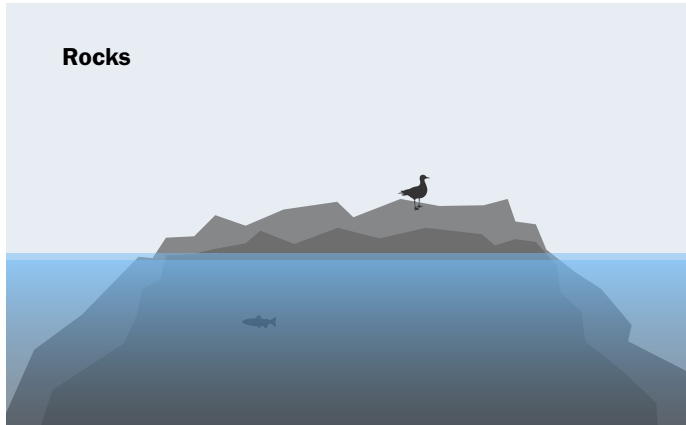
An **island** is a naturally formed area of land, surrounded by water, which is always above water and capable of sustaining human habitation or economic activity.

A **rock** is also a naturally formed area of land surrounded by water, which is always above water, but unlike an island it is not capable of sustaining human habitation or economic activity.

Finally, a **low-tide elevation** is above water at low tide, but submerged at high tide.

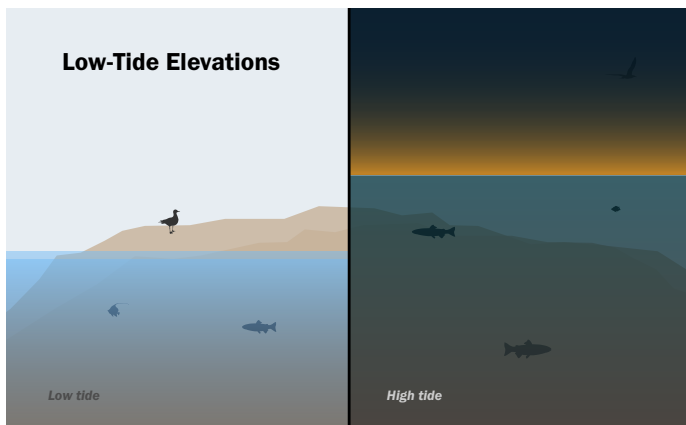


- Naturally formed area of land
- Surrounded by water
- Always above water
- Can sustain human habitation or economic activity



Rocks

- Naturally formed area of land
- Surrounded by water
- Always above water
- Cannot sustain human habitation or economic activity



Low-Tide Elevations

- Naturally formed area of land
- Surrounded by water
- Above water at low tide
- Submerged at high tide

Why is the distinction between different maritime features important?

The distinction between **maritime features** (i.e. islands, rocks, and low-tide elevations) is important because each of these three features generates different **maritime zones**. There are three basic maritime zones:

1. the **territorial sea**
2. the **contiguous zone**
3. the **exclusive economic zone** (EEZ)¹

¹ The author is grateful to **James Kraska** for pointing out that maritime features only generate these zones if they are under the sovereignty of a coastal state. Antarctica, for example, does not generate any such maritime zones. For more on this point, see: James Kraska, "Dewey Freedom of Navigation Operation Challenges China's Sovereignty to Mischief Reef," *Lawfare*, May 25, 2017.

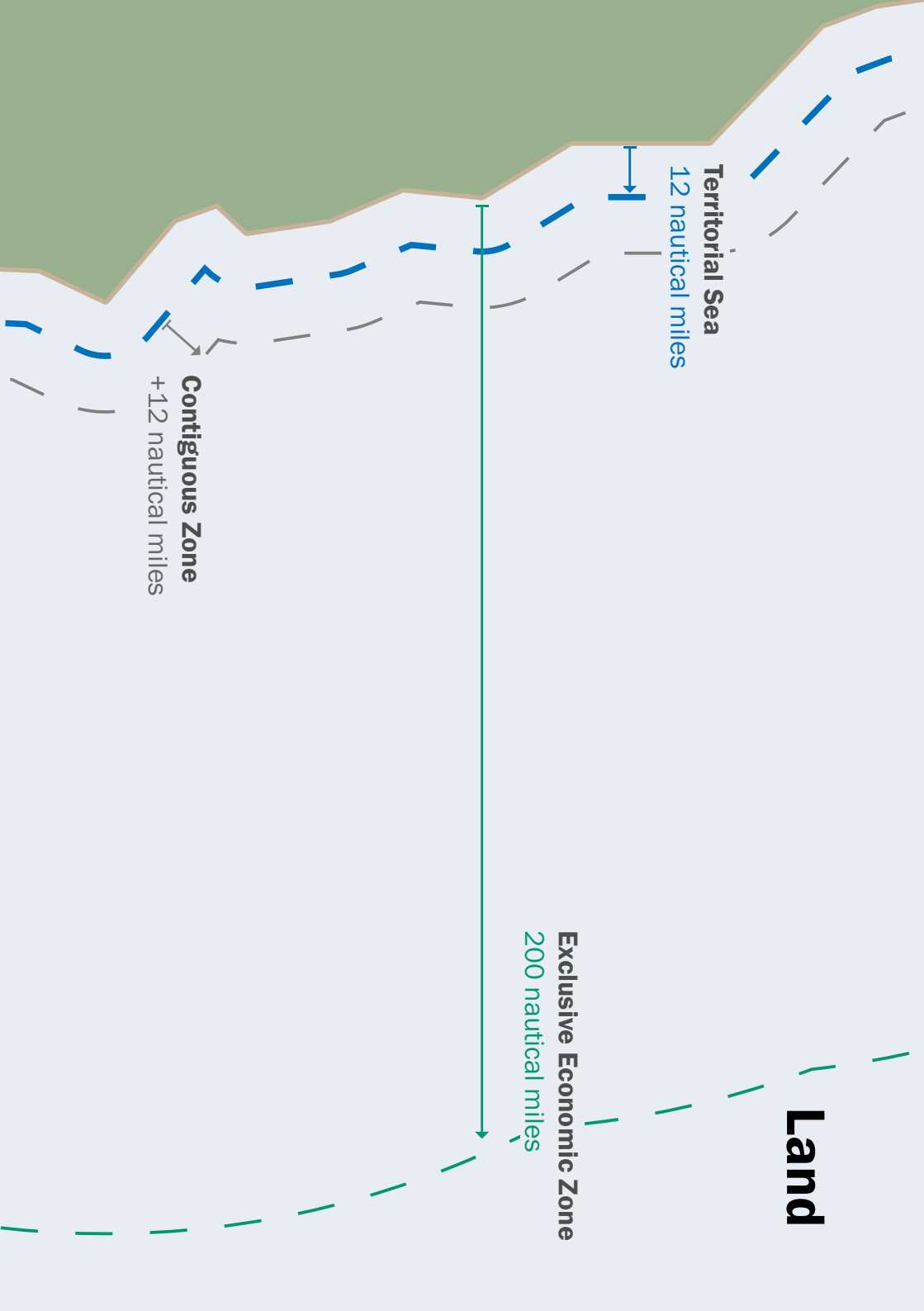
What are the territorial sea, the contiguous zone, and the exclusive economic zone?

The **territorial sea** extends 12 nautical miles from land and is considered the sovereign territory of a state; this sovereignty extends to the airspace over and seabed below the territorial sea.

The **contiguous zone** begins where the territorial sea ends—12 nautical miles from land—and extends another 12 nautical miles, ending 24 nautical miles from land. The contiguous zone is not the sovereign territory of a state; it is considered part of international waters.

Finally, the **exclusive economic zone** extends 200 nautical miles from land and encompasses both the territorial sea and the contiguous zone. Within this 200 nautical miles, the state has special rights to the exploration and exploitation of natural resources.

*Maritime features also generate a **continental shelf**, which is composed of the seabed extending beyond a state's territorial sea. However, the rights of the state over its continental shelf may not infringe upon the navigation rights of other states. As such, the continental shelf will not be discussed here.*



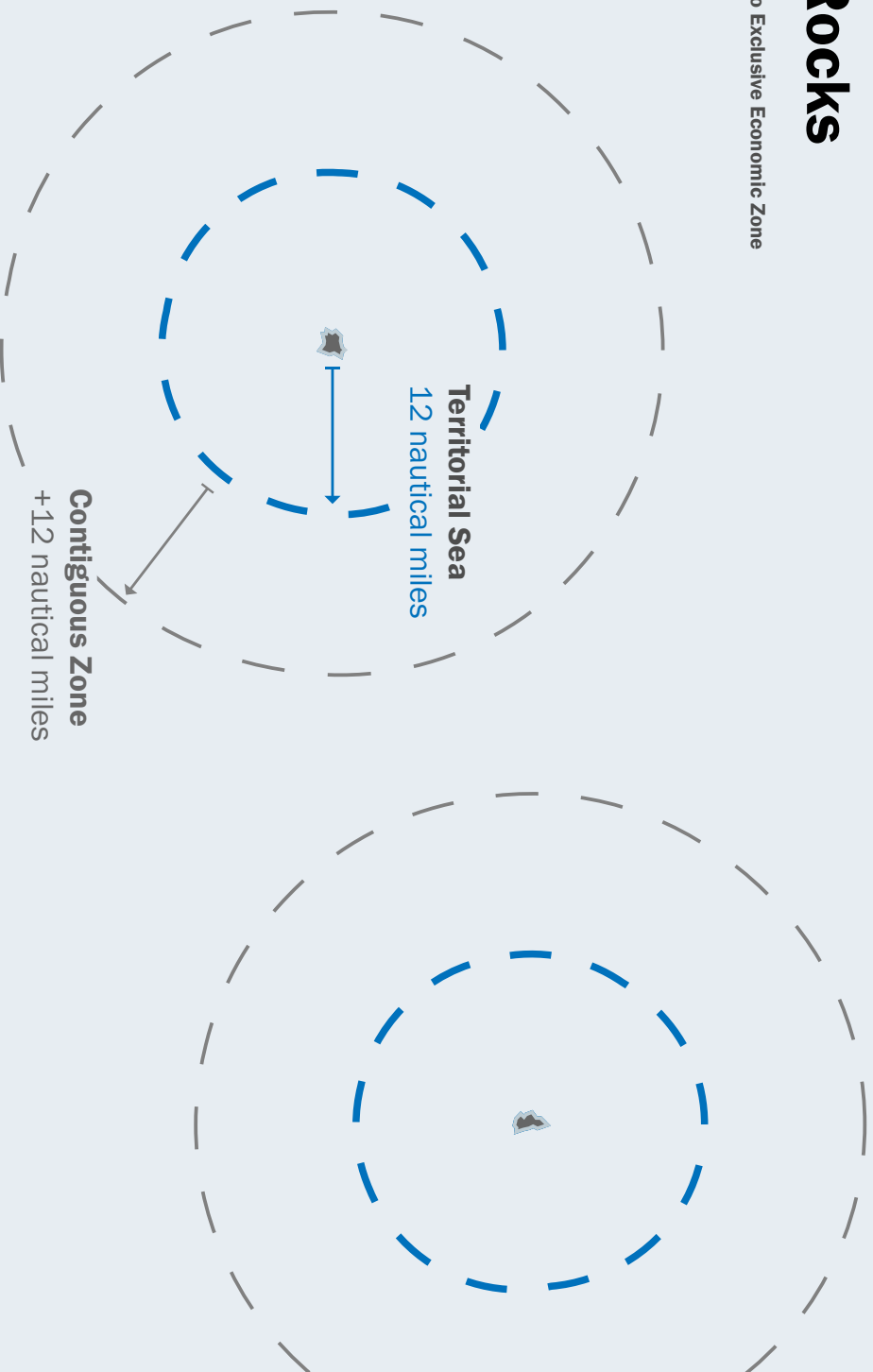
What maritime zones do islands, rocks, and low-tide elevations generate?

As mentioned previously, UNCLOS defines three kinds of maritime features: (1) islands; (2) rocks; and (3) low-tide elevations. Each of these three features generates different maritime zones:

1. **islands** generate a **territorial sea**, a contiguous zone, and an **exclusive economic zone**
2. **rocks** generate a **territorial sea** and a contiguous zone, but no exclusive economic zone
3. **low-tide elevations** generate **nothing**, *unless they are within 12 nautical miles of land or an island*, in which case they can be used as starting points from which the **territorial sea**, the contiguous zone, and **exclusive economic zone** can be measured

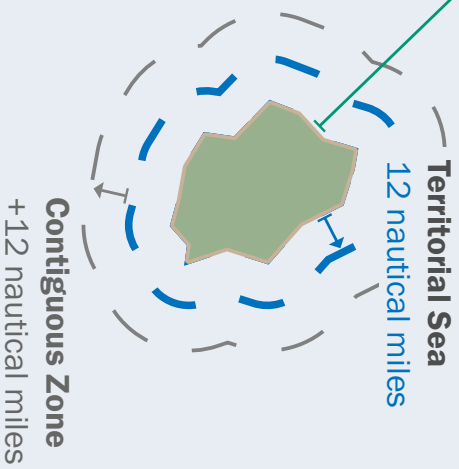
Rocks

* No Exclusive Economic Zone

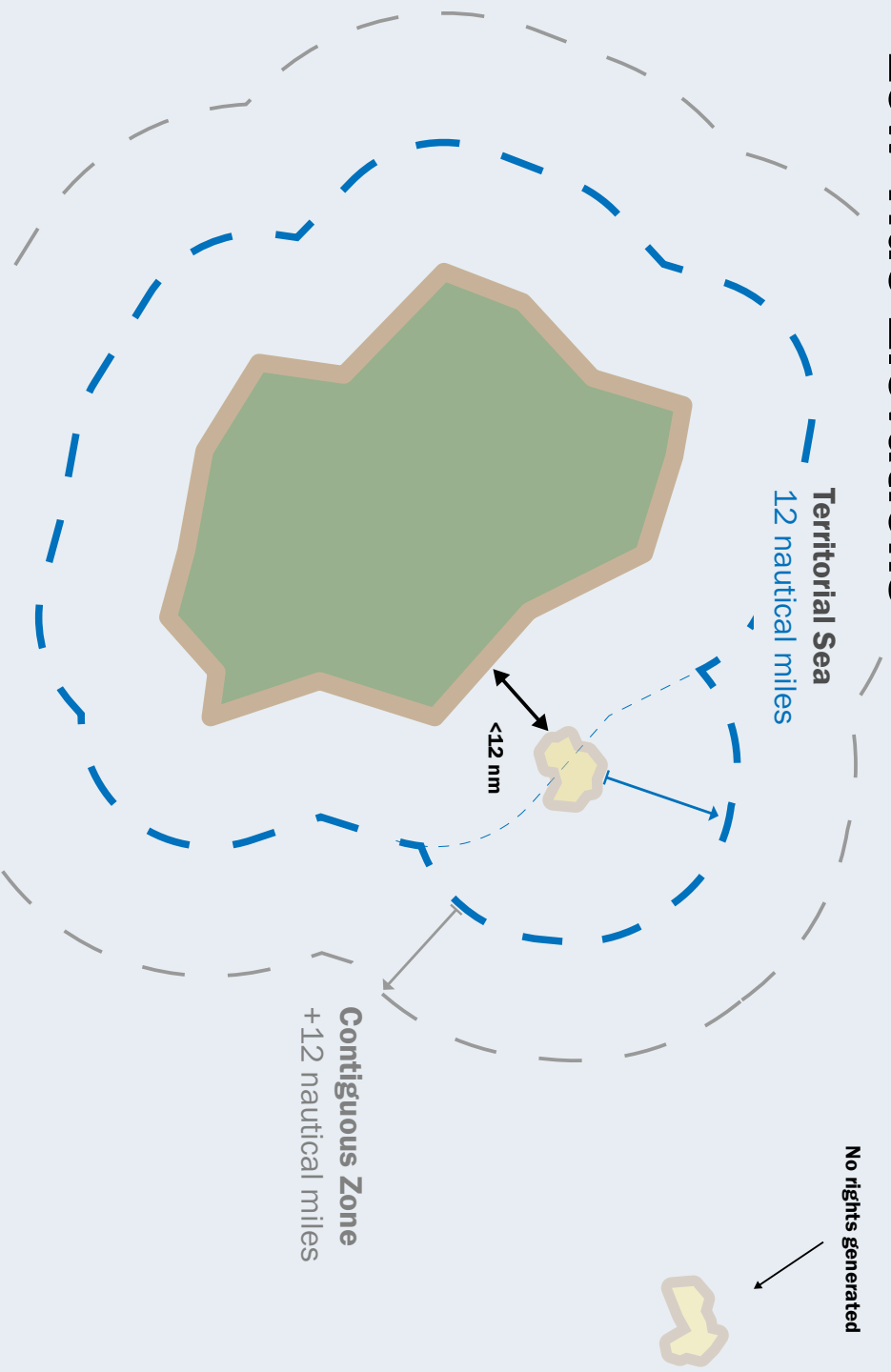


Islands

Exclusive Economic Zone
200 nautical miles



Low-Tide Elevations



What maritime zones do artificially constructed islands generate?

UNCLOS accords these rights to **naturally formed** features. The rights accorded to an artificial island would depend on what feature existed prior to the construction of the artificial island.

If, for example, an artificial island was constructed on top of a low-tide elevation, the new feature would not be entitled to the rights of an island. In the eyes of the law, it would still be a low-tide elevation and granted only those rights accorded to low-tide elevations.

What are the restrictions on navigation in the territorial sea, contiguous zone, and exclusive economic zone?

Territorial Sea

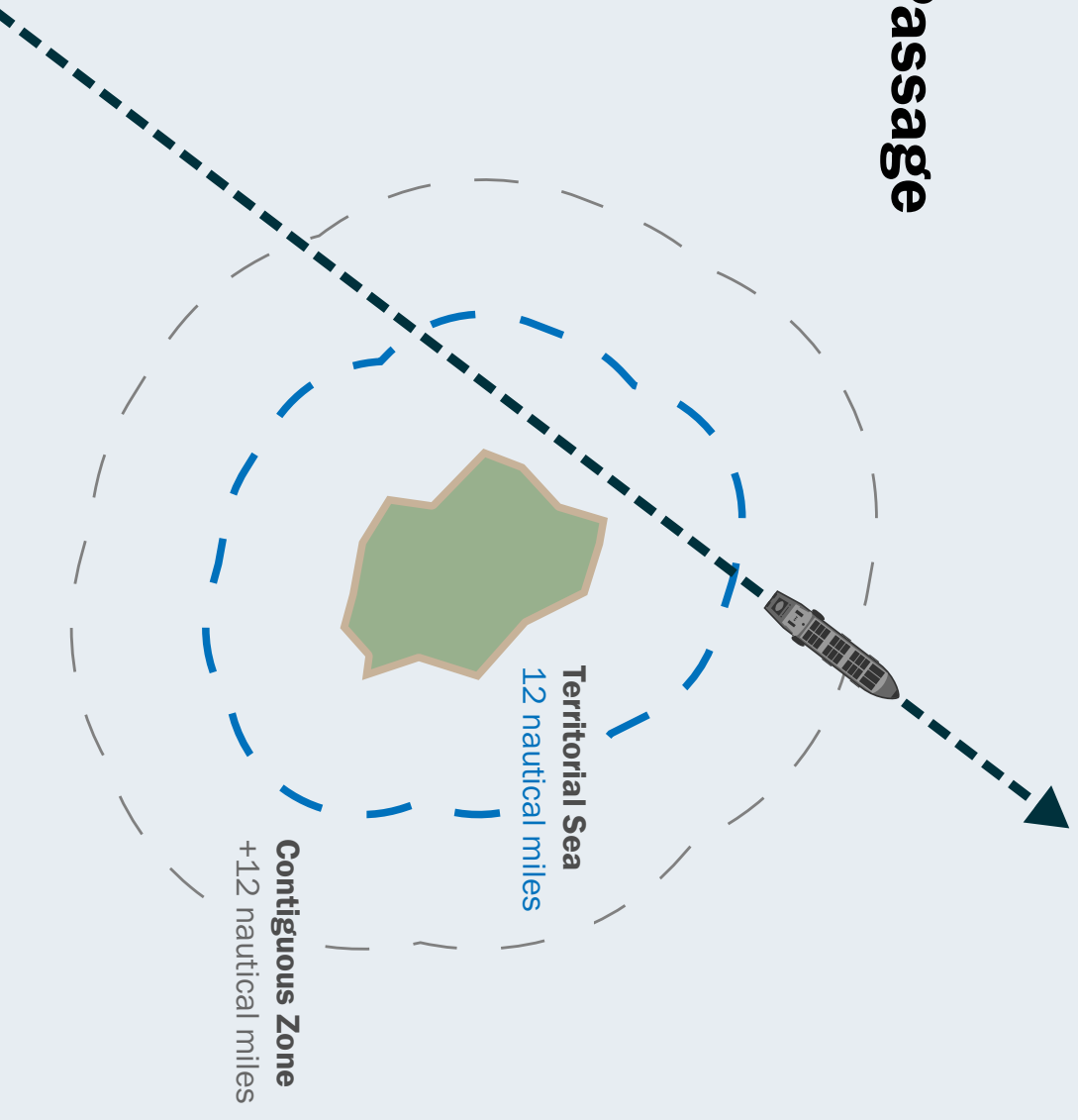
The territorial sea is the sovereign territory of a state. As such, the state has the exclusive right to make, apply, and execute its own laws in that space without foreign interference. However, one of the fundamental principles of UNCLOS is that all ships of all states, including both civilian and military vessels, enjoy the right of **innocent passage** through the territorial sea of other states. Any and all states that have signed and ratified UNCLOS are obligated to respect this provision.

Innocent passage requires that vessels move directly through the territorial sea and refrain from any activity not necessary for their continuous and expeditious passage. Providing notice or obtaining permission prior to transiting under innocent passage is not required.²

² The author is grateful to **Julian Ku** for pointing out that not all countries agree with this interpretation, particularly where the innocent passage of military vessels is concerned. Over 40 states impose restrictions on the innocent passage of military ships, including requiring permission or notice prior to transit under innocent passage.

Civilian + Military

Innocent Passage



UNCLOS lists those activities not permitted while transiting under innocent passage:

- threatening/using force against the state
- military exercises
- practicing with weapons
- surveillance operations
- propagandizing against the state
- launching/landing/taking on board aircraft or military devices
- loading/unloading illegal commodities, currencies, or persons
- polluting
- fishing
- research or survey activities
- interfering with the state's communications, or any other facilities/installations
- any other activity not having a direct impact on passage

It is important to note that while a state can limit military and surveillance *operations* in its territorial sea, it cannot limit military and surveillance ships *that transit in accordance with innocent passage*, provided they do not conduct military or surveillance activities while they do so. If a ship is found to conduct any of these activities while transiting under innocent passage, the state may require the ship to leave its territorial sea immediately.

Contiguous Zone

The contiguous zone is considered part of international waters. As such, states do not have the right to limit navigation in the contiguous zone. The only exception is if the state aims to prevent or punish the infringement of its customs, fiscal, immigration, or sanitary laws that occurred within its sovereign territory.

The state may not exercise control in the contiguous zone for security purposes. Accordingly, military and surveillance activities that would be illegal in the territorial sea (like military exercises or surveillance operations) are permitted.

Exclusive Economic Zone

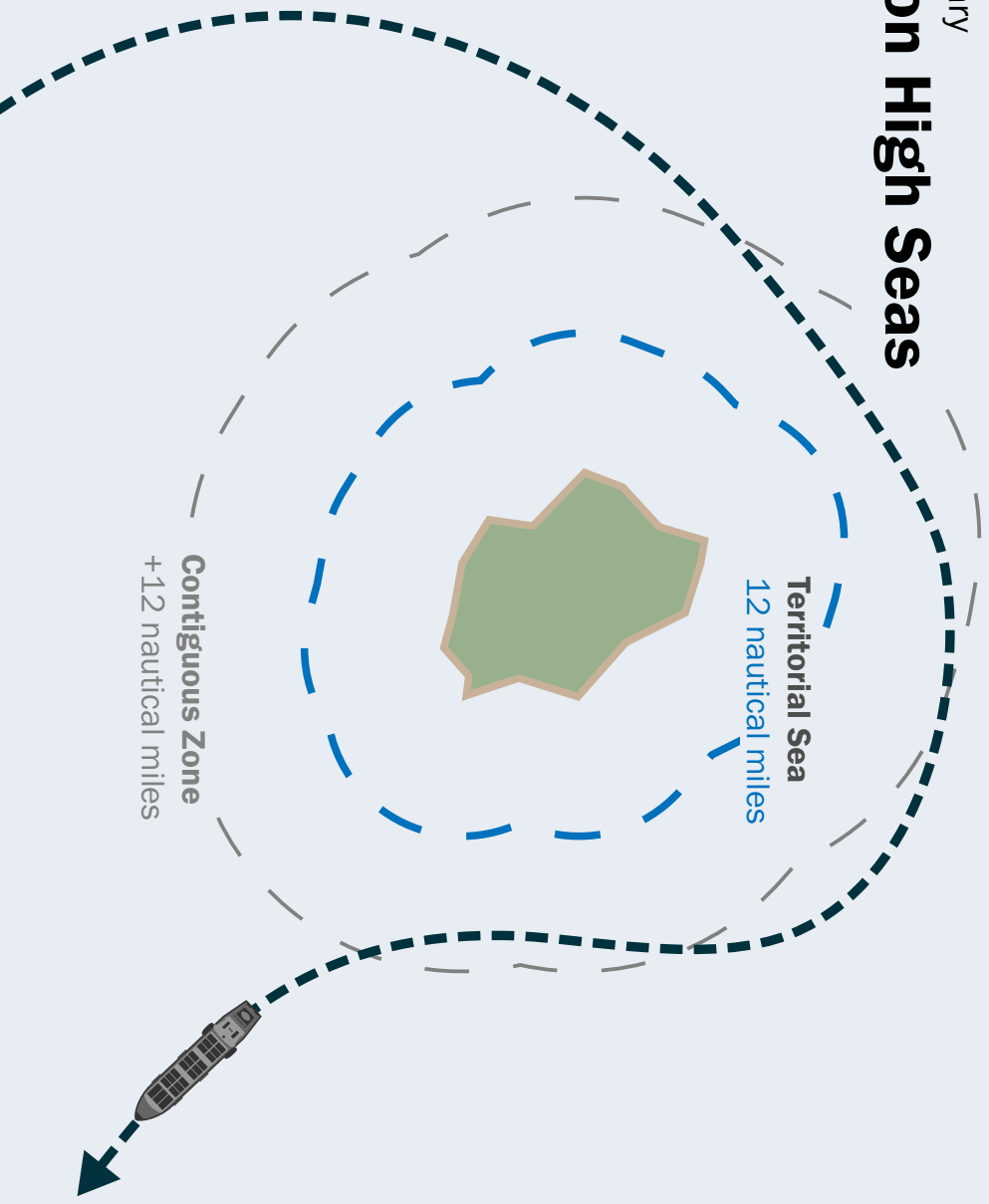
The exclusive economic zone is considered part of international waters. States do not have the right to limit navigation in the exclusive economic zone.³

Sailing in international waters (i.e. the contiguous zone, the exclusive economic zone, and beyond) is frequently referred to as sailing on “the high seas.”

³ Eight states disagree with this interpretation. They assert either that military surveillance in the exclusive economic zone is not permitted or that it requires prior consent.

Civilian + Military

Sailing on High Seas



What are excessive maritime claims?

Excessive maritime claims are assertions by states that are inconsistent with the terms of UNCLOS. In other words, they are unlawful or illegal. There are generally two types of these claims:

1. **claims inconsistent with the legal divisions of the ocean and related airspace** (e.g. territorial sea claims greater than 12 nautical miles)
2. **restrictions on navigation and overflight rights** (e.g. requiring advance notification or authorization for innocent passage of warships through the territorial sea)

Does the United States challenge excessive maritime claims? If so, why?

It is recognized international law and practice that, to prevent deviations from the law, states must persistently object to actions by other states that seek to change those rules.⁴ The United States challenges excessive maritime claims under its **Freedom of Navigation Program**, the purpose of which is to do exactly this: object to excessive maritime claims that could limit freedom of the seas. The program impartially rejects the excessive maritime claims of all states, friend and foe alike.⁵

4 *Fisheries Case (U.K. v. Nor.)*, Judgment, 1951 I.C.J. Rep. 116, 138 (Dec. 18).

5 Zbigniew Brzezinski, The White House, Memorandum for the Secretary of State and the Secretary of Defense, et al., "Navigational Freedom and U.S. Security Interests," March 20, 1979 (Confidential; declassified August 22, 2000).

How does the United States challenge excessive maritime claims?

There are generally three ways the United States contests excessive maritime claims as part of its Freedom of Navigation Program:

1. **diplomatic communications**
2. **operational assertions**
3. **bilateral and multilateral consultations**

Diplomatic communications include correspondence and formal protest notes.

Operational assertions are operations conducted by U.S. naval and air forces that assert internationally-recognized navigational rights and freedoms. These operations are called freedom of navigation operations, or **FONOPs**.

Finally, bilateral or multilateral consultations encourage maritime stability and adherence to the provisions of UNCLOS.

What are Freedom of Navigation Operations (FONOPs)?

Freedom of Navigation Operations are operations by U.S. naval and air forces that reinforce internationally-recognized rights and freedoms by challenging excessive maritime claims. The particulars of each operation are determined by the excessive maritime claim that is being protested.

For illustration of this point, consider two hypothetical scenarios on the following pages.

Scenario One:

A state claims a 12 nautical mile territorial sea around a low-tide elevation that is not within 12 nautical miles of land or an island. This would be inconsistent with the provisions of UNCLOS. (Recall that low-tide elevations alone do not generate territorial seas; see pages 7 and 10 for further elaboration on this point).

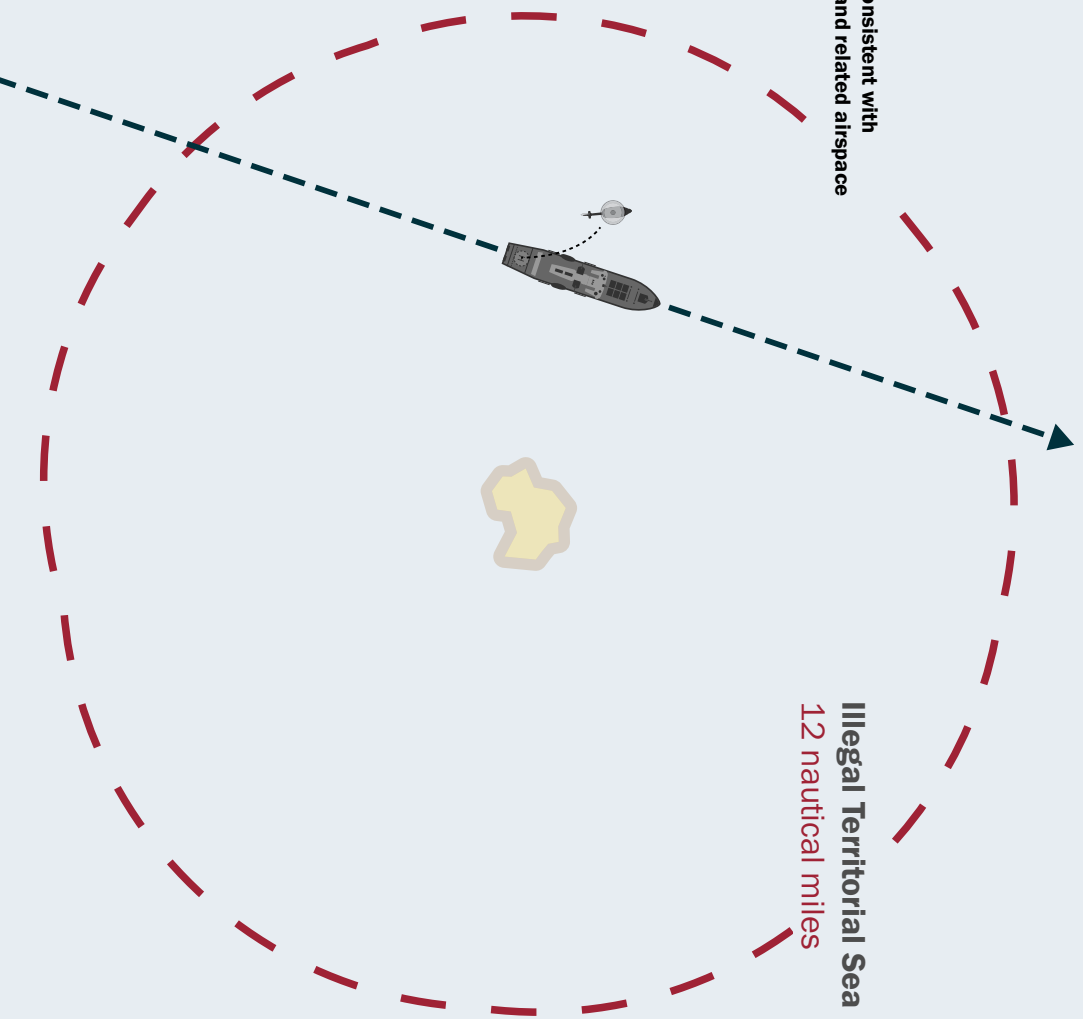
The United States protests this excessive claim by sailing within 12 nautical miles of the low-tide elevation and conducting activities not in accordance with innocent passage.

By **deliberately transiting in a manner inconsistent with innocent passage**—launching a helicopter, for example—the United States would send the message that it does not consider the low-tide elevation to be entitled to a territorial sea. The unstated assumption, of course, is that the United States would not deliberately disregard international law.

Military

FONOP

Challenging territorial claim inconsistent with
the legal divisions of the ocean and related airspace



Scenario Two:

A state requires that ships provide notice and obtain advance authorization for innocent passage through its territorial sea. This would be inconsistent with the provisions of UNCLOS. (Recall that all ships of all states enjoy the right of innocent passage through the territorial sea of other states, and providing or obtaining advance permission is not required. See pages 12–14 for further elaboration on this point.)

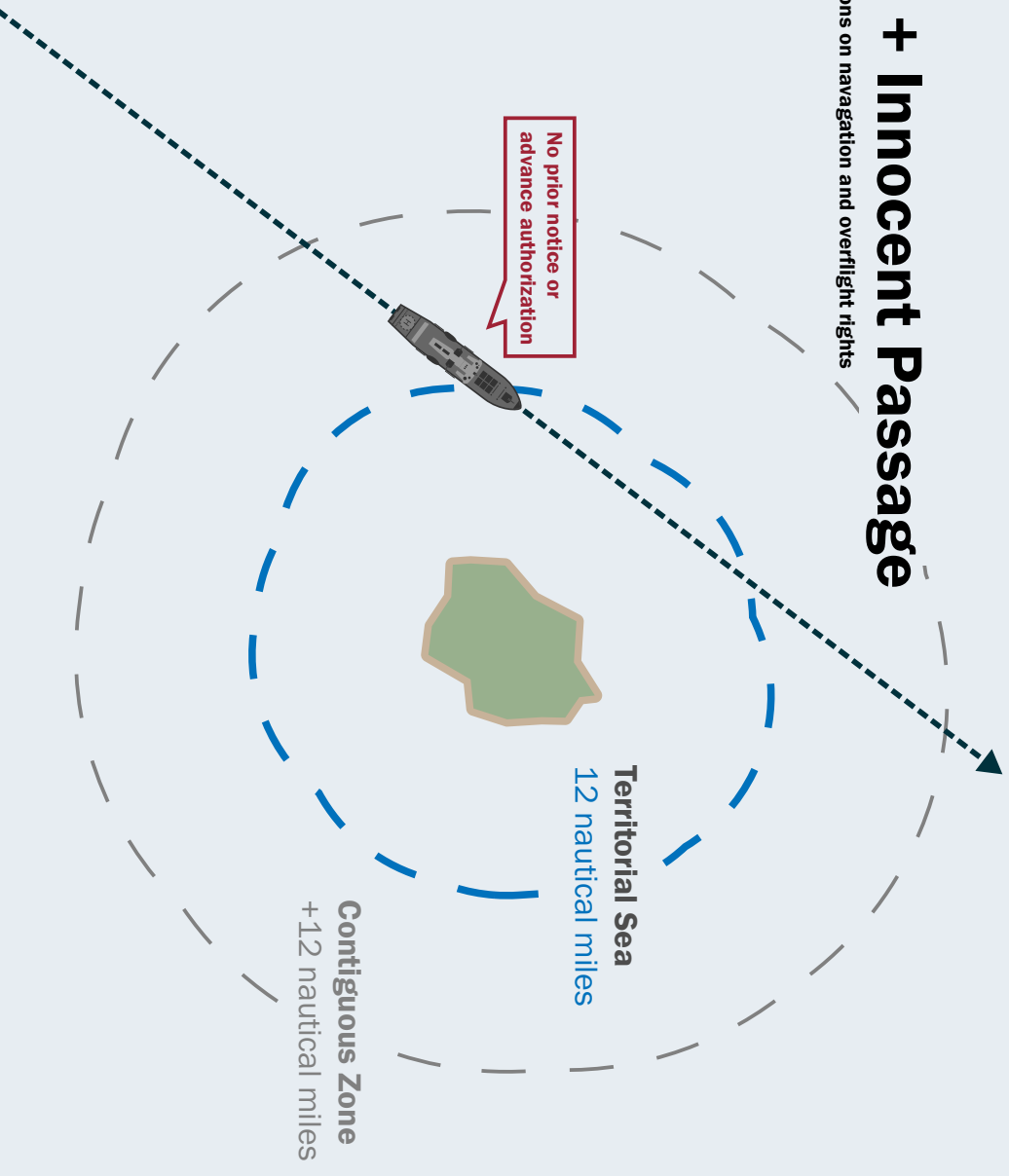
The United States wants to protest the requirement that ships provide notice and obtain advance authorization for innocent passage, but in this scenario it does not dispute the existence of a **territorial sea**. The United States thus sails under innocent passage through the territorial sea, but it does so **without providing notice or obtaining advance authorization**.

As a result, the United States is both transiting under innocent passage and conducting a freedom of navigation operation. In other words, innocent passage and freedom of navigation operations are not necessarily mutually exclusive.

Military

FONOP + Innocent Passage

Challenging restrictions on navigation and overflight rights



Why has the South China Sea become a focus of freedom of navigation concerns?

By virtue of geography, the South China Sea is home to some of the world's most important ship-ping lanes. Ships carrying exports and imports between markets in Asia and in Europe, Africa, and the Americas must transit through the South China Sea; it is estimated that \$5.3 trillion in trade passes through the region annually.⁶ Circumnavigating the region would involve both considerable expense and time delay in the delivery of goods. As a result, most nations have a direct stake in ensuring that freedom of navigation is respected in the South China Sea.

Unfortunately, however, the South China Sea is home to a number of longstanding territorial disputes. Brunei, China, Indonesia, Malaysia, the Philippines, Taiwan, and Vietnam have overlapping sovereignty claims to various maritime features and areas of water in the South China Sea. Most of these territorial disputes center on features located in the Paracel and Spratly island groups.

⁶ The origin of this \$5.3 trillion trade statistic is unclear. Although frequently cited by U.S. officials since 2010, the U.S. government has not provided an accounting of the statistic, and researchers are (at the time of writing) unable to independently verify the number. Ankit Panda of *The Diplomat*, for example, has reached out to U.S. Pacific Command (PACOM) but has not yet received a breakdown of the statistic from them. Nevertheless, the overall point remains accurate: the South China Sea is home to important shipping lanes that are vital to the conduct of international commerce and trade.

In order to reinforce territorial claims, several states occupy features in the South China Sea, and some have reclaimed land, built infrastructure (e.g. airfields, hangars, docks), and stationed troops and military hardware on these features. Their actions have raised concerns over the possibility of conflict and the increased capabilities of states to limit navigation in the region. Although several states have engaged in such activities, the amount of reclamation and construction undertaken by China, as well as the degree of militarization of features it occupies, has raised particular concern.

The United States does not take a position on territorial disputes over features in the South China Sea and the merits of various sovereignty claims will not be discussed in detail here. However, it does actively protest illegal claims to the waters surrounding these features, as well as illegal restrictions on navigation. Several states in the region have made such excessive maritime claims that illegally limit freedom of navigation. The United States conducts freedom of navigation operations in the South China Sea to protest these claims.

What excessive maritime claims has the United States challenged in the South China Sea?

Over the past year and a half, the United States has publicly conducted five freedom of navigation operations in the South China Sea. These operations took place on: October 27, 2015; January 29, 2016; May 10, 2016; October 21, 2016; and May 24, 2017.

In the first three freedom of navigation operations, the United States conducted operations challenging the illegal requirement that ships provide notification or obtain permission before transiting through another state's **territorial sea** under innocent passage.

In the fourth freedom of navigation operation, the United States challenged excessive straight baseline claims. *This document has not yet described straight baselines as outlined by UNCLOS, or excessive straight baseline claims. This will be included in discussion of this freedom of navigation operation.*

In its fifth and most recent freedom of navigation operation, the United States challenged the existence of an illegal territorial sea. There is some debate, however, as to whether this actually constituted a freedom of navigation operation.

The operational nature and legal rationale of each FONOP is outlined on the following pages.

U.S. Freedom of Navigation Operation #1

Date: October 27, 2015

Location: Spratly Islands (Subi Reef, Northeast Cay, Southwest Cay, South Reef, Sandy Cay)

Vessel: USS *Lassen* (DDG-82)

Excessive Maritime Claim: Requirement that states provide notice/obtain permission prior to innocent passage through territorial sea

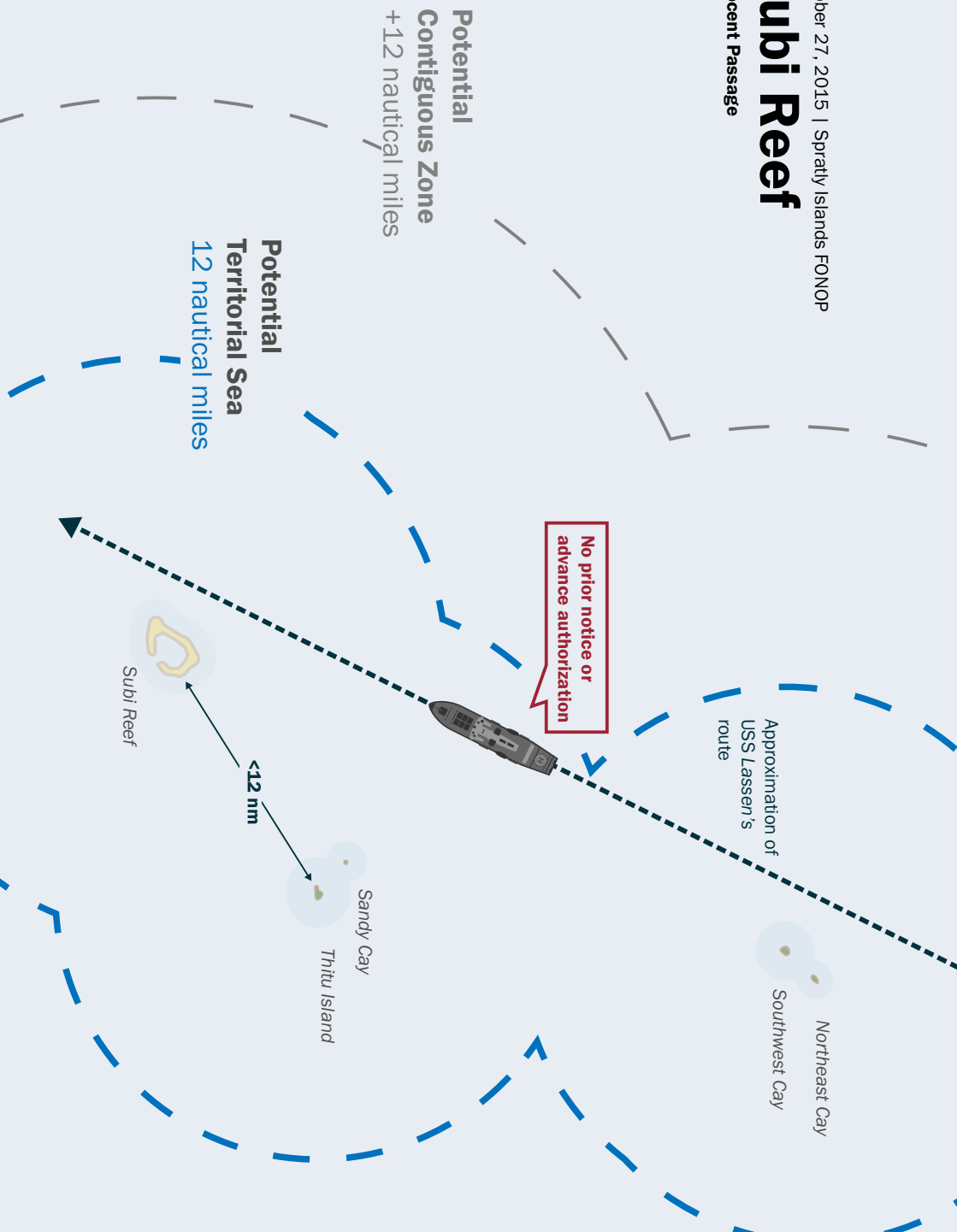
Nature of Transit: Innocent passage

On October 27, 2015, the U.S. Navy destroyer USS *Lassen* conducted a freedom of navigation operation by transiting under innocent passage within 12 nautical miles of five features in the Spratly Islands—Subi Reef, Northeast Cay, Southwest Cay, South Reef, and Sandy Cay—each of which is claimed by China, Taiwan, Vietnam, and the Philippines. The freedom of navigation operation was designed to challenge policies by China, Taiwan, and Vietnam requiring prior permission or notification of transit under innocent passage in their territorial sea. Accordingly, the United States did not provide notification, or request permission, in advance of transiting under innocent passage.

October 27, 2015 | Spratly Islands FONOP

Subi Reef

Innocent Passage



It should be noted, however, that none of these states has formally made a legal claim to a **territorial sea** around these features. Indeed, no state has made any specific claims to the waters surrounding the features it occupies in the Spratly Islands.

In practice, however, they still require that states obtain permission or provide notice prior to transiting within 12 nautical miles, and these specific features would be legally entitled to a territorial sea. As a result, the United States observed requirements of innocent passage during its transit. The United States does not take a position on which nation has sovereignty over each feature in the Spratly Islands, and the operation was not intended to challenge any country's claims of sovereignty over land features.

U.S. Freedom of Navigation Operation #2

Date: January 29, 2016

Location: Paracel Islands (Triton Island)

Vessel: *USS Curtis Wilbur* (DDG-54)

Excessive Maritime Claim: Requirement that states provide notice/obtain permission prior to innocent passage through territorial sea

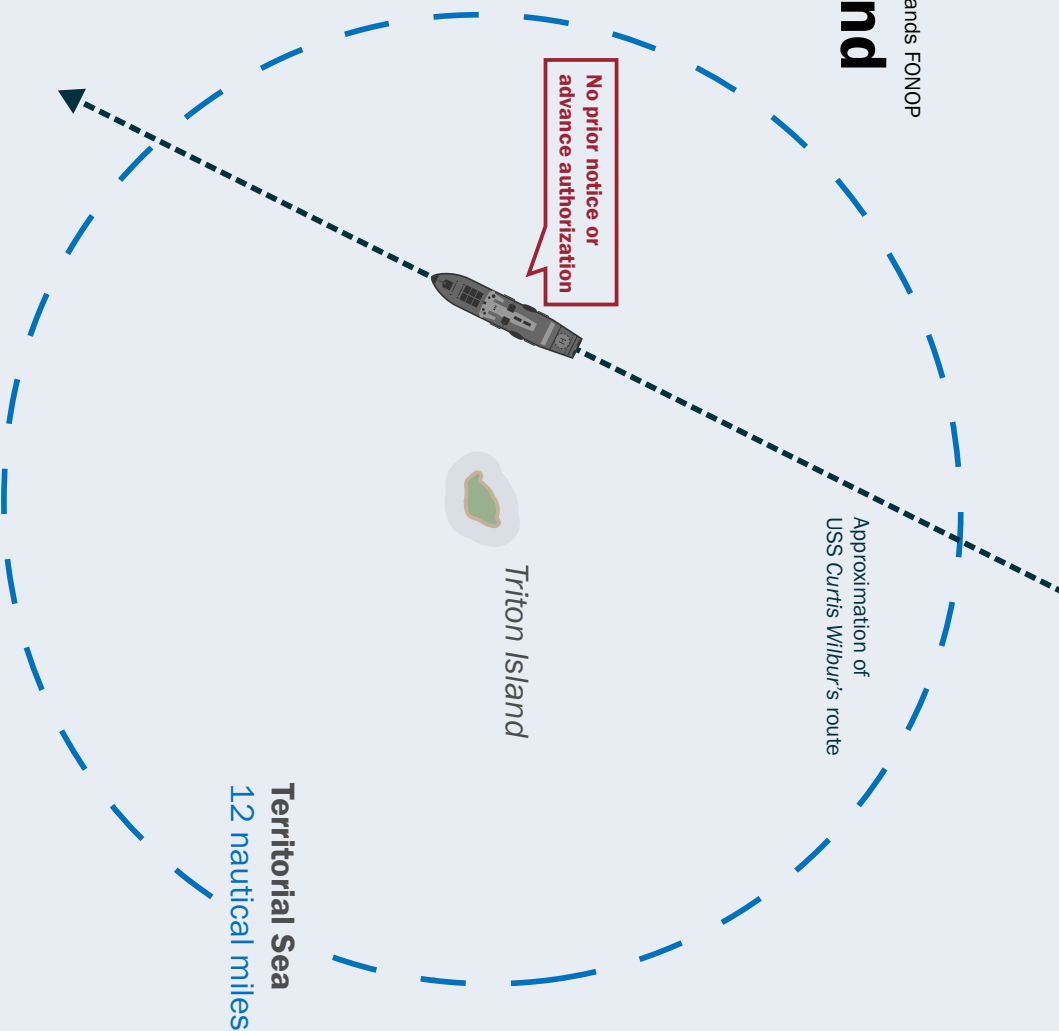
Nature of Transit: Innocent passage

On January 29, 2016, the U.S. Navy destroyer *USS Curtis Wilbur* conducted a freedom of navigation operation by transiting under innocent passage within 12 nautical miles of Triton Island in the Paracel Islands. Triton Island is occupied by the Chinese, but also claimed by Taiwan and Vietnam. The island is legally entitled to a **territorial sea**. The freedom of navigation operation was designed to challenge policies by China, Taiwan, and Vietnam requiring prior permission or notification of transit under innocent passage in the territorial sea. Accordingly, the United States **did not provide notification, or request permission, in advance of transiting under innocent passage**. The United States does not take a position on which nation has sovereignty over each feature in the Spratly Islands, and the operation was not intended to challenge any country's claims of sovereignty over land features.

January 29, 2016 | Paracel Islands FONOP

Triton Island

Innocent Passage



U.S. Freedom of Navigation Operation #3

Date: May 10, 2016

Location: Spratly Islands (Fiery Cross Reef)

Vessel: USS *William P. Lawrence* (DDG-110)

Excessive Maritime Claim: Requirement that states provide notice/obtain permission prior to innocent passage through territorial sea

Nature of Transit: Innocent passage

On May 10, 2016, the U.S. Navy destroyer USS *William P. Lawrence* conducted a freedom of navigation operation by transiting under innocent passage within 12 nautical miles of Fiery Cross Reef in the Spratly Islands. Fiery Cross Reef is occupied by the Chinese, but also claimed by the Philippines, Taiwan, and Vietnam.

At the time that the freedom of navigation operation was conducted, it was unclear if Fiery Cross Reef was legally considered a rock or an island. Moreover, none of the claimant states has formally made a legal claim to a **territorial sea** surrounding Fiery Cross Reef. Nevertheless, because Fiery Cross Reef is legally entitled to a territorial sea, irrespective of whether it is a rock or island, the United States transited within 12 nautical

May 10, 2016 | Spratly Islands FONOP

Fiery Cross Reef

Innocent Passage

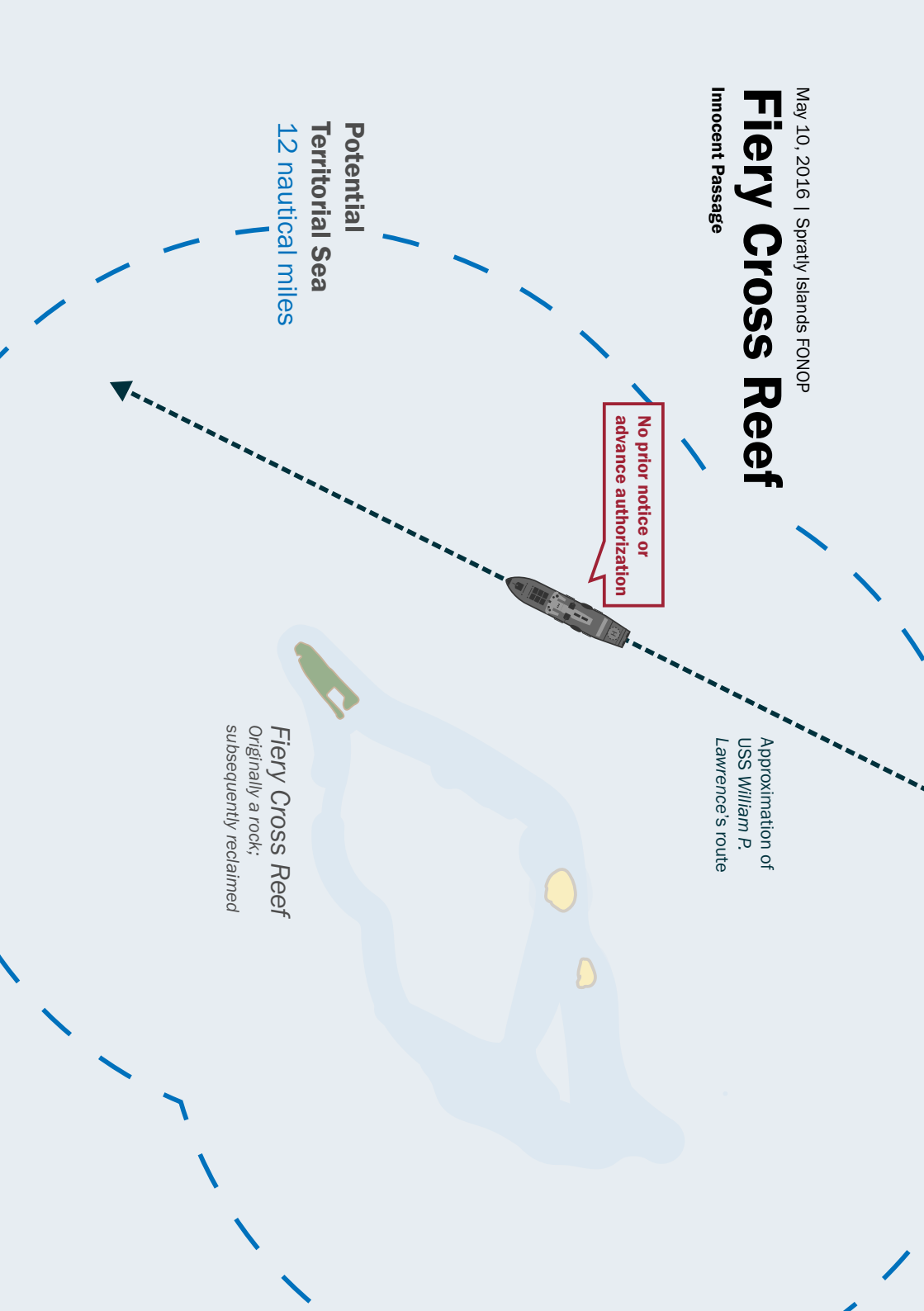
Approximation of
USS William P.
Lawrence's route

No prior notice or
advance authorization



Potential
Territorial Sea
12 nautical miles

Fiery Cross Reef
Originally a rock;
subsequently reclaimed



miles of Fiery Cross Reef under the provisions of innocent passage. When the decision in the *Philippines v. China* case was issued in July 2016, Fiery Cross Reef was found to be a rock.⁷

As in the previous two examples, this freedom of navigation operation was designed to challenge policies by China, Taiwan, and Vietnam requiring prior permission or notification of transit under innocent passage in the territorial sea. Accordingly, the United States **did not provide notification, or request permission, in advance of transiting under innocent passage**. The United States does not take a position on which nation has sovereignty over each feature in the Spratly Islands, and the operation was not intended to challenge any country's claims of sovereignty over land features.

⁷ *Philippines v. China* was a legal case brought by the Philippines against China under the dispute settlement provisions of UNCLOS. The case concerned disagreements between the two countries in the South China Sea; as part of the case, the Philippines asked for a ruling on the status of various features in the South China Sea. When the Permanent Court of Arbitration released the award in July 2016, it was widely considered to be a victory for the Philippines.

U.S. Freedom of Navigation Operation #4

Date: October 21, 2016

Location: Paracel Islands

Vessel: USS *Decatur* (DDG-73)

Excessive Maritime Claim: Excessive straight baseline claims

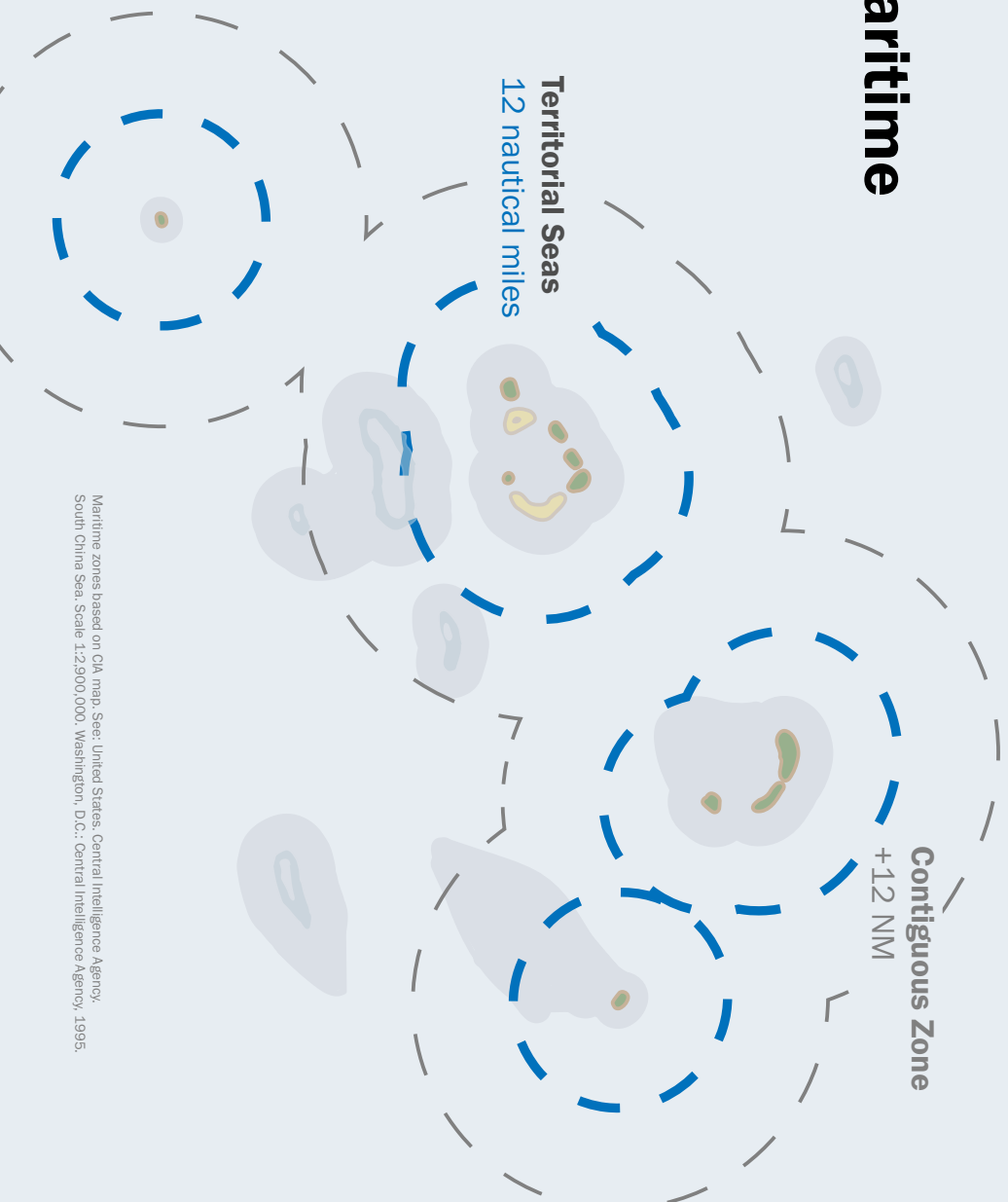
Nature of Transit: Sailing on the high seas

The fourth freedom of navigation operation, conducted on October 21, 2016, differed from the three previous freedom of navigation operations in that it did not challenge the illegal requirement that states provide notification or obtain permission prior to transiting through another state's territorial sea under innocent passage. Rather, it challenged excessive straight baseline claims made by China around the Paracel Islands. The Paracel Islands are occupied by the Chinese, but also claimed by Taiwan and Vietnam.

Baselines are the point from which the **territorial sea**, **contiguous zone**, and **exclusive economic zone** are measured. Generally speaking, they exist at the low-water line along the coast.

Paracel Islands

Legal Maritime Zones



Maritime zones based on CIA map. See: United States, Central Intelligence Agency, South China Sea, Scale 1:2,900,000, Washington, D.C.: Central Intelligence Agency, 1995.

On May 15, 1996, China issued a statement establishing straight baselines around the Paracel Islands in the South China Sea. The purported straight baselines, drawn between 28 basepoints, enclose the Paracel Islands in their entirety.

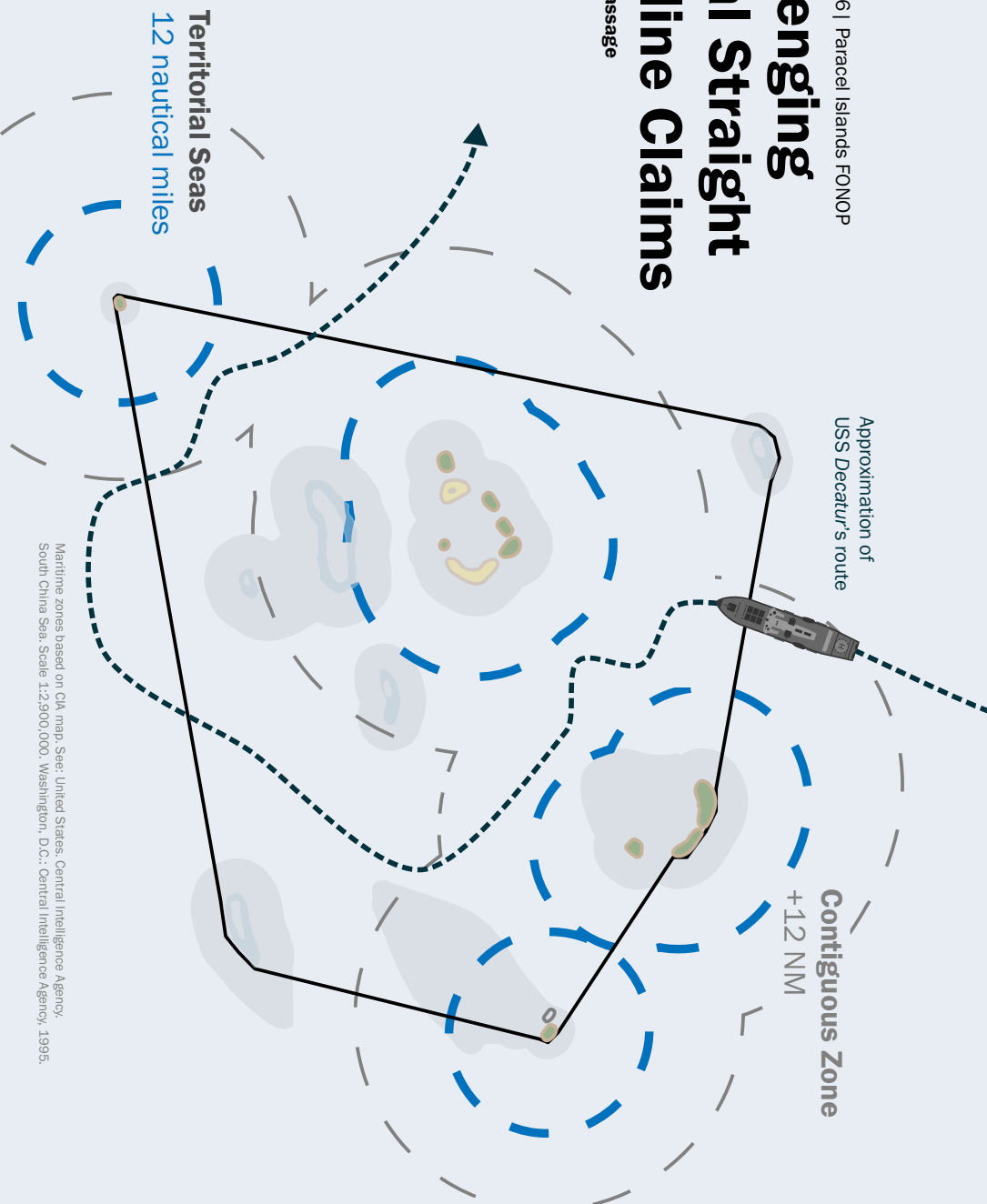
Straight baselines are important because—where they are established legally—they become the point from which a state can measure the breadth of its territorial sea, the contiguous zone, and other claimed maritime zones. By drawing straight baselines around the Paracel Islands, China claimed the entire enclosed area as part of its sovereign waters as well as a 12 nautical mile territorial sea surrounding the enclosed area.

The United States does not recognize China's straight baselines claim around the Paracel Islands for the reason that UNCLOS allows only archipelagic states (i.e. countries comprised entirely of islands) to draw straight baselines around island groups. China, as a continental state, cannot claim such a right.

October 21, 2016 | Paracel Islands FONOP

Challenging Illegal Straight Baseline Claims

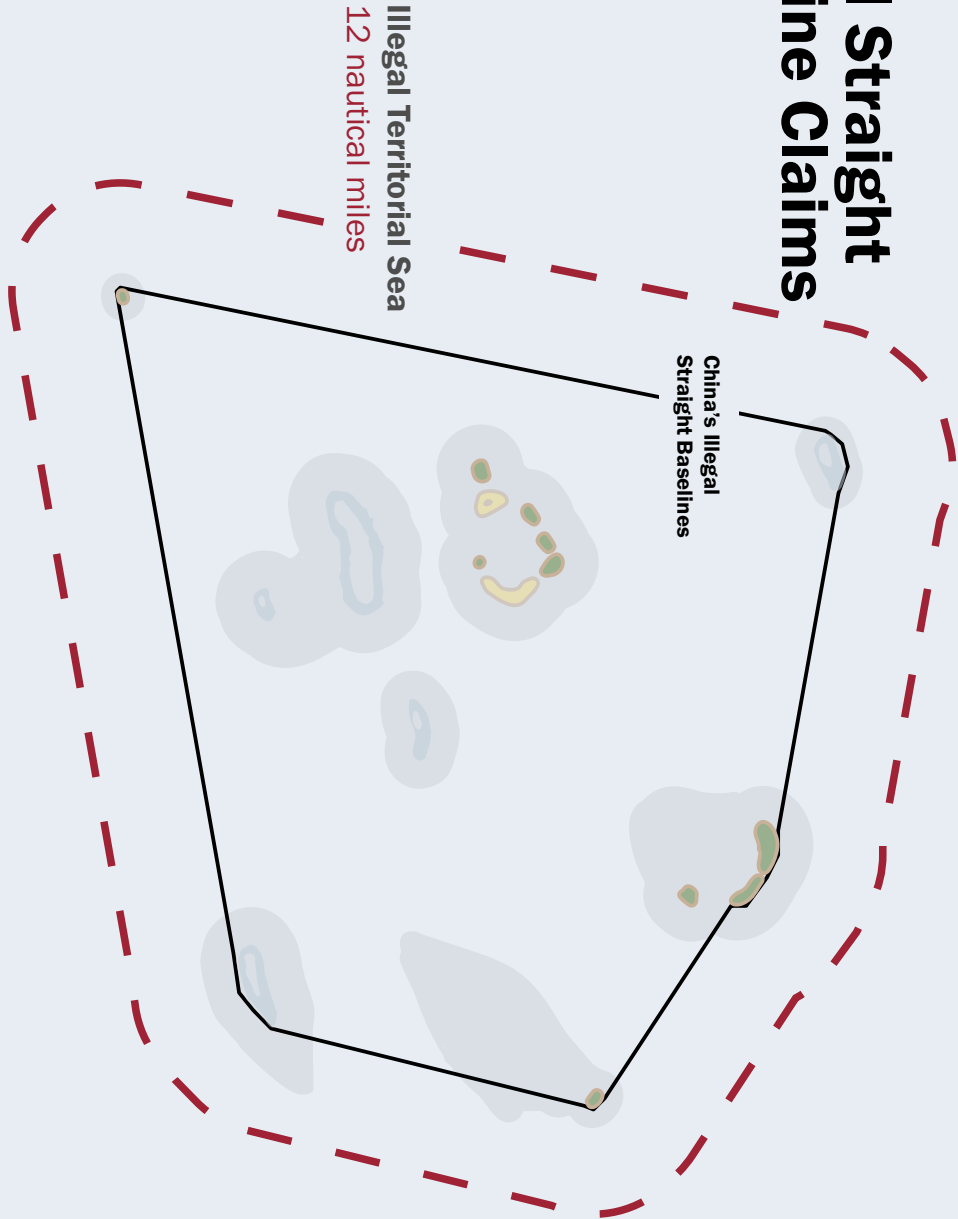
Non-Innocent Passage



Maritime zones based on CIA map. See: United States, Central Intelligence Agency, South China Sea, Scale 1:2,900,000. Washington, D.C.: Central Intelligence Agency, 1995.

Paracel Islands

Illegal Straight Baseline Claims



On October 21, 2016, the U.S. Navy destroyer USS *Decatur* conducted a freedom of navigation operation by crossing China's claimed straight baselines in the Paracel Islands, loitering in the area, and conducting maneuvering drills. The USS *Decatur* did not approach within 12 nautical miles of any individual land feature entitled to a territorial sea; rather, it sailed in the area between the outer limits of the 12 nautical mile territorial seas and China's claimed straight baselines. In doing so, the USS *Decatur* crossed into waters that would be considered China's internal waters if its straight baseline claims were legal, which they are not. (Internal waters are accorded the rights of the territorial sea.)

Because the USS *Decatur* loitered and conducted maneuvering drills, which cannot be considered continuous and expeditious passage, it signaled that it was not transiting under innocent passage and did not consider the waters to be part of the territorial sea. (Remember, innocent passage requires continuous and expeditious transit through another state's territorial waters. See pages 12–14 and 19–20 for further elaboration on this point.) In doing so, it deliberately challenged China's claim of straight baselines around the Paracel Islands.

U.S. Freedom of Navigation Operation #5

Date: May 24, 2017

Location: Spratly Islands (Mischief Reef)

Vessel: USS *Dewey* (DDG-105)

Excessive Maritime Claim: Unclear, presumed illegal territorial sea

Nature of Transit: Sailing on the high seas

On May 24, 2017, the U.S. Navy destroyer USS *Dewey* conducted a freedom of navigation operation by transiting within 12 nautical miles of Mischief Reef in the Spratly Islands. Mischief Reef is occupied by the Chinese, but also claimed by the Philippines, Taiwan, and Vietnam. When the Permanent Court of Arbitration issued the decision in *Philippines v. China*, it found Mischief Reef to be a low-tide elevation. For that reason, Mischief Reef is not legally entitled to a territorial sea.

The USS *Dewey* navigated within 12 nautical miles of Mischief Reef and proceeded to **sail in a zigzag pattern**. It also **conducted a “man overboard” drill**. Both actions were clear indications that the USS *Dewey* did not intend to transit under innocent passage. (Remember, innocent passage requires continuous and expeditious transit through another

state's territorial waters. Sailing in a zigzag pattern and conducting a man overboard drill are both violations of this condition. See pages 12–14 and 19–20 for further elaboration on this point.) Presumably then, the freedom of navigation operation was intended to challenge the existence of an illegal territorial sea around Mischief Reef by sailing within 12 nautical miles of the feature in a manner not in accordance with innocent passage.

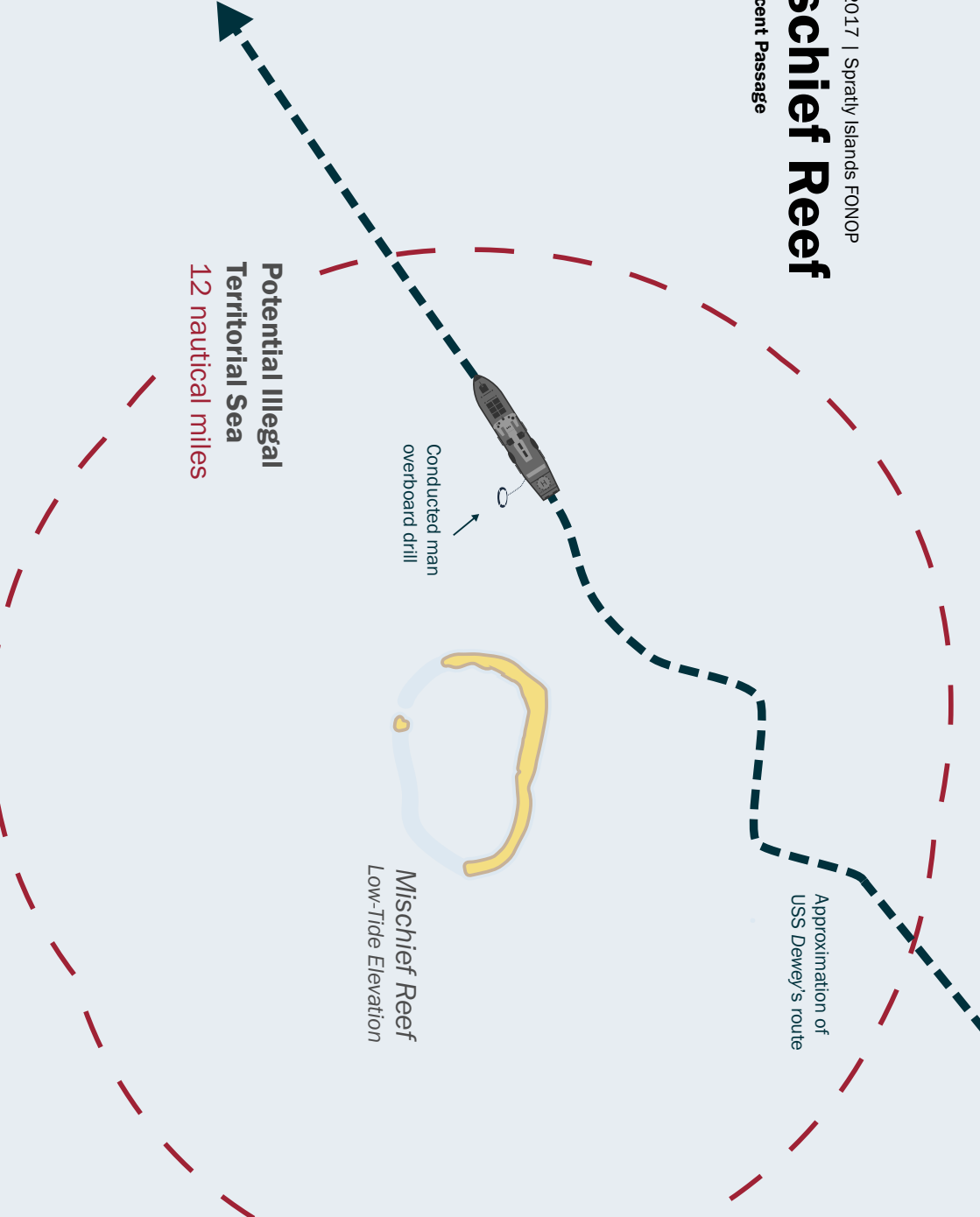
Complicating the operation, however, is the fact that neither China, the Philippines, Taiwan, nor Vietnam has actually claimed a territorial sea around Mischief Reef. This raises the question: what excessive maritime claim was the United States actually challenging? If the United States was not disputing an existing excessive maritime claim, then its actions would be more accurately described as sailing on the high seas than as a freedom of navigation operation. Unfortunately, the Pentagon has not explained the legal rationale behind the operation so the intent of the USS *Dewey*'s operation remains unclear.

As was true in prior examples, the United States does not take a position on which nation has sovereignty over each feature in the Spratly Islands, and the operation was not intended to challenge any country's claims of sovereignty over land features.

May 24, 2017 | Spratly Islands FONOP

Mischief Reef

Non-Innocent Passage





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