



UNDERSTANDING FREEDOMS OF NAVIGATION – ASEAN PERSPECTIVES

Event Report

7 March 2017

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Holiday Inn Atrium, Singapore**

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Organised by:

Maritime Security Programme,
Institute of Defence and Strategic Studies (IDSS),
S. Rajaratnam School of International Studies (RSIS),
Nanyang Technological University (NTU),
Singapore

Rapporteur:

Philipp Martin Dingeldey

EXECUTIVE SUMMARY

This workshop discussed issues related to Freedoms of Navigation and Overflight, paying particular attention to the various Southeast Asian perspectives. It reviewed the strategic and economic importance of freedoms of navigation, examined some of the legal and language issues related to freedoms of navigation, highlighted the perspectives of several Southeast Asian states on freedoms of navigation, and tried to find prospects for a common understanding of the central issues related to freedoms of navigation.

The three main findings are:

First, the economic importance of the South China Sea for non-littoral countries was often overstated. Its greatest importance was to accommodate seaborne trade between Southeast Asia and Northeast Asia, and trade within Southeast Asia. Even though the economic dependence on the South China Sea for extra-regional countries is relatively small, states like the U.S. and Australia often exaggerate this dependence in order to assert their strategic interest in the sea or to extend freedoms of navigation to military vessels. The fact, however, is that China and Southeast Asian countries would be most affected if freedoms of navigation across the South China Sea were disrupted.

Second, the main difference between some Association of Southeast Asian Nations (ASEAN) states and extra-regional powers was that some ASEAN states do not necessarily think of freedoms of navigation, but rather of Rights of Navigation. This shows that major powers seek extensive freedoms and rights, whereas smaller coastal states generally emphasize their territorial control and integrity. In this regard, the workshop noted that the phrase “Freedom of Navigation” has become a sensitive topic for some ASEAN states because they perceived user states as using the phrase frequently to push for extensive navigational rights.

The third major finding was confirmation of the view that perceptions of law of the sea issues, freedoms of navigation in particular, vary widely both within Southeast Asia, and between most ASEAN countries and major extra-regional powers. Similarly, the two major powers, the U.S. and China — clearly have different views on key issues. With the law of the sea being so important, the differences in perspective make it difficult to establish a stable maritime security regime in the region. Developing a common view on some of the key

issues would, therefore, constitute an important step towards that regime.

In addition to the various issues addressed above, the workshop highlighted several issues to be considered for further research. These issues include the economic dependencies on the South China Sea, the role of language, the development of bilateral understandings between the U.S. and China, the possibility of a joint-resource exploration in the South China Sea, and the issue of archipelagic passage and straits transit passage, including the right of overflight.

ECONOMIC IMPORTANCE OF THE SOUTH CHINA SEA

One of the workshop's main topics was the economic importance of the South China Sea (SCS) to Australia, China, Japan, the U.S. and Southeast Asian states. It was highlighted that the risks of Freedoms of Navigation (FON) for commercial ships being impeded are overstated since trade across the SCS is mainly driven by intra-ASEAN trade and the trade between ASEAN and Northeast Asia. Hence, Southeast Asian states and China would be affected the most, if FON in the region is disrupted. This makes the obstruction of commercial ships by regional states or China unlikely, despite the belief of extra-regional states like the U.S. and Australia. These countries tend to overstate economic risks as a pretext to advocate FON for military vessels in the SCS. A more accurate assessment of the economic risks involved would, therefore, help reduce the risks of escalation in the SCS.

The U.S., Japan and Australia have highlighted the economic importance of the SCS to justify their political and strategic efforts in keeping the SCS open for military and commercial vessels. However, the U.S.' claim that US\$1.2 trillion of its annual trade passes through the SCS, and Australia's claim that roughly 60 percent of its annual trade traverses the SCS are clearly overstated. In fact, for both states, the significance of the SCS to their trade is rather marginal. Australia's busy trade route between eastern Australia, Japan and South Korea runs through east of the Philippines instead of the SCS. Other than its trade with China, only about 6.6 percent of Australia's overall trade is likely to pass through the SCS. This includes trade with Thailand, Vietnam and Taiwan.

Similarly, Japan highlighted that its economy would be greatly impacted, if China restricts FON and trade in the SCS. Japan claims that it would be forced to re-route its trade away from the SCS, and may even have to go around the southern coast of Australia. This point was especially brought forward with regards to energy shipments that must pass through the Malacca Strait, and on which Japan's economy relies. Nevertheless, it was pointed out that the overall cost for Japan to divert its trade route would be small, since shipping vessels are flexible and half of Japan's oil shipments already avoid the SCS by passing through the Lombok Strait.

A huge portion of China's trade must pass through the Strait of Malacca and the SCS. This discourages China from blocking the narrow water way, or

impeding FON in the SCS for commercial vessels. After all, China's trade-dependent economy would be greatly impacted, if FON in the SCS were obstructed. It was emphasised that should China be restricted from the Sea Lanes of Communication (SLOCs) through the SCS, it would likely suffer significant economic damage.

With regards to the Malacca Strait, it was pointed out that in addition to the commonly known influence of the Malacca Dilemma in Beijing's political and strategic decision-making, the dilemma narrative can be overstated. It is also partially fueled by economic interests from Chinese companies and local governments, benefiting from projects such as the Myanmar-China oil and gas pipeline, and advocates for greater investments in China's navy.

DIFFERENCES IN INTERPRETING UNCLOS: COASTAL VS USER STATES

Another important topic that emerged was the difference in the interpretation of FON between coastal and user states. The main difference in interpretation discussed during the workshop was about the rights and freedoms of warships to enter coastal waters. Since most coastal states depend on open trade routes, commercial traffic was not of concern for coastal states.

During the workshop, it was clarified that the term “Freedoms of Navigation” was used explicitly in UNCLOS — United Nations Convention on the Law of the Sea — in relation to the provision on straits used for international navigation, the exclusive economic zone (EEZ) and the high seas. The term “right” was used when referring to innocent passage in territorial seas, archipelagic waters, and archipelagic sea lanes (ASLs).

One issue that came forward was that the big powers tend to dominate the interpretation of what freedoms of navigation means. The U.S. and Union of Soviet Socialist Republics (USSR) had an agreement under which all ships, including warships, enjoyed the right of innocent passage through territorial seas without the need for prior notification or authorization. Some coastal states, however, see such extensive rights as a threat to their national sovereignty and security. China, Indonesia, Malaysia, the Philippines, Vietnam and Thailand, for example, interpret UNCLOS as providing grounds for some restrictions on FON for warships.

Another issue discussed during the workshop was the reciprocal nature of the “due regard” criteria in the EEZ regime. UNCLOS provisions require coastal states to have “due regard” to the rights and duties of other states in their EEZ (UNCLOS Article 56), while the other states are required to have “due regard” to the rights and duties of the coastal state in its EEZ (Article 58). Some clarification was still required to understand what constitutes as giving due regard” to the rights and duties of the other party. However, it was acknowledged that navigational rights and freedoms in another’s EEZ are not absolute.

Overall, it was highlighted that there is regional concern that the Law of the Sea favours the major powers and their preferences for navigational rights. The arrival of new technologies, such as unmanned vehicles, could also expand their concept of freedoms of navigation.

The U.S. and Japan interpret UNCLOS similarly, advocating that FON should be applied to both commercial and military vessels, prohibiting coastal states from requiring prior notification or authorization for foreign warships to exercise innocent passage. In their view, military vessels have a right to innocent passage, and that coastal states' security is covered under articles 19 and 25 of UNCLOS.

China, on the other hand, has a different perspective on FON, arguing that full FON should only apply to commercial ships. As such, Beijing requires foreign military vessels to obtain permission before entering Chinese waters, whereas commercial vessels enjoy the right of innocent passage. Nevertheless, it was pointed out that this may change in the long-run, as China's maritime interests could change with time.

China is not the only country in the Asia-Pacific to claim that UNCLOS does not give foreign military vessels the right to innocent passage. As an archipelagic state, Indonesia has been preoccupied with the provision of ASLs in conjunction with FON, and how this would affect its territorial integrity and security. Jakarta maintains that it has fulfilled its obligations under UNCLOS by designating three North-South ASLs. Nevertheless, there has been an ongoing debate over the designation of an additional East-West ASL. Jakarta, however, pointed out that an additional ASL is not required since the right of ASL passage may still be exercised by user states via the routes normally used for international navigation.

In 1996, several states and institutions voiced concern over a missing East-West ASL. Today, some user states, such as Australia and the U.S., are still pushing for the designation of an East-West ASL. It was pointed out that from Indonesia's perspective user states tend to want more and more rights from the coastal states.

Malaysia's perspective on FON is similar to that of China, arguing that there are no specific provisions in UNCLOS on the right to conduct military activities in another country's EEZ. Therefore, activities that are military in nature or result in the production of data to serve military needs and can be used against the interests of the coastal state are not allowed in Malaysian waters without prior approval. Malaysia considers unauthorized military activities in the EEZ as unlawful and a threat to its territorial integrity and political independence.

The Philippines pushed for recognition of the concept of an archipelagic state with archipelagic waters, to strengthen its sovereignty, security and economic progress. In 2011, the Supreme Court of the Philippines ruled that archipelagic waters are subject to archipelagic sea lanes passage and that the government could designate routes within the archipelagic waters to regulate innocent and sea lanes passage. This decision by the Supreme Court was highlighted as a step towards normalisation with UNCLOS during the workshop. Nevertheless, no ASLs have been declared so far.

During the discussion, it was brought forward that the “new freedoms” in the concept of maritime freedom seem to correlate with the arrival of new technologies and coincide with the geopolitical interests of the major powers. U.S.’ freedom of navigation operations (FONOPs), for example, were seen to challenge territorial claims rather than to advocate or defend FON.

THE ISSUE OF LANGUAGE WITH FREEDOM OF NAVIGATION

In addition to the previous two topics, a third issue, which focused on language with regards to FON, was carved out. It was pointed out that the term “Freedom of Navigation” was rather sensitive among some ASEAN countries, since user states were perceived to use it frequently to push for extensive navigational rights.

It was highlighted that terms like “freedom” and “maritime freedom” were not fully clarified in the international discourse. In order to find a solution to this issue, one would have to find communicable and comprehensible terms for political leaders. A number of phrases have been used to discuss the concept, but a great deal of balance is still needed.

It was suggested that the phrase “freedom of the seas” better captures the meaning of maritime freedom. It was argued that “freedom of the seas” goes beyond the focus of navigation, and such changes in terminology could reduce the risk of the phrase being misunderstood as an umbrella term or a specific navigational right. When used in the argumentation between coastal and user states, the term would allow for greater ambiguity as to which parts of the ocean involve true “freedom”. However, it was also noted that the trend was for the seas to become less free with greater controls, particularly for environmental and resource reasons.

Indonesia, for example, perceives the topic of FON at international forums as a rather sensitive topic due to its long-standing argument with user states regarding its East-West ASL. Although it is required to concede certain rights to user states, Indonesia understands that it has authority and control over the ASL passage. Jakarta has defined its ASLs with restrictions on how close vessels may pass to land with only innocent passage outside of the ASLs. This is because in Bahasa Indonesia there is a strong distinction between “freedom” and “rights”. For example, UNCLOS Article 38 on transit passage uses the term “freedom of navigation and overflight”, whereas Article 53 on archipelagic sea lanes passage uses the term “rights of navigation and overflight”.

It was also highlighted that in Chinese “sovereignty” and “sovereign rights” translate into the same word. This can lead to misunderstandings between states that communicate in different languages. For example, a person familiar

with the context would be able to distinguish the meaning despite the usage of that same word, whereas a less familiar person would not be able to see the difference. This misunderstanding could lead to unwanted or unintended tension between states.

EXPERT PANEL DISCUSSION – PROSPECTS FOR A COMMON UNDERSTANDING OF CENTRAL ISSUES

The final session of the workshop consisted of a panel discussion and an open forum. Overall, the participants were rather optimistic about finding a common understanding in the long-run, highlighting the importance of continued regional engagement in multilateral forums.

It was recognised that language is an important component in finding a common understanding with regards to FON. Panellists pointed out that there was a need to learn more about the Chinese perspective to better understand its specifics, and that it was pivotal to use clear and accurate language. This would help ASEAN states and the other parties involved in the South China Sea to find a common understanding with regards to FON issues.

Participants perceived multilateral non-governmental forums, such as academic conferences and workshops, to be appropriate for discussing issues related to FON and UNCLOS. These forums could create a platform for ASEAN members to better understand each other's position, and bring perspectives of the commercial sectors to the table too.

It was also brought up that a common understanding on FON between the two major powers — the U.S. and China — is important to encourage and shape a common understanding between the regional states in Southeast Asia.

Regarding the South China Sea, it was highlighted that in order to find a common solution it was important to think about the economic benefits and the need for cooperation. This would foster a common understanding among regional states, and establish the idea that shared security might be possible.

FURTHER RESEARCH

Despite the variety of well-known issues discussed throughout the workshop, several new issues were raised. Further research on these issues would be helpful.

The importance of language in implementing international laws and norms was highlighted throughout the workshop. Further research on the implementation of laws and norms in multilateral environments could help highlight the importance of nuances in terms such as “Freedom of Navigation.”

During the workshop, it was pointed out that the development of bilateral rules between the U.S. and China for military-to-military, military-to-civilian, and coast guard-to-coast guard engagements could contribute to less tension between the two powers in the South China Sea and elsewhere.

As the South China Sea is rich in natural resources, the need for joint development of fisheries and mineral resources was ever present. This requires further research in order to explore its feasibility and its contribution towards lowering tensions in the South China Sea.

During the workshop, it was recommended that China avoid over-militarizing the constructions of reefs and islands to prevent further destabilisation in the South China Sea.

With regards to FON, it was recommended to explore the possibility of a common recognition for navigation, research, surveillance and military operations in another country’s EEZ. Further research on this issue is necessary to check the feasibility of this recommendation.

The issue of ASL passage and transit passage, including the right of overflight, would also require more research to gain greater clarity. This is especially applicable in Southeast Asia.

Programme

Tuesday, 7 March 2017

0800 - 0830 hrs

Registration

0830 - 0900 hrs

Welcome Address

Dr Ralf Emmers
Associate Dean, RSIS

Scoping Address

Dr Sam Bateman
Advisor, Maritime Security Programme, IDSS, RSIS

0930 - 1100 hrs

Session 1

***Strategic and Economic Importance of
Freedoms of Navigation***

Chair:

Ms Jane Chan

Speakers:

Dr James Laurenceson
Dr Li Mingjiang
RADM Kazumine Akimoto (Rtd)

1100 - 1115 hrs

Tea Break

1115 - 1300hrs

Introduction and Training Roadmap

Session 2

Legal Issues

Chair:

Dr Sam Bateman

Speakers:

Dr Robert Beckman
CDR Jonathan Odom
Dr Wu Shicun

1300 - 1400 hrs

Lunch

1400 - 1530 hrs

Session 3

ASEAN Perspectives

Chair:

Ms Jane Chan

Speakers:

Dr Shafiah Fifi Muhibat

Dr B.A. Hamzah

Dr Raphael Lotilla

1530 - 1545 hrs

Tea Break

1545 - 1715 hrs

Session 4

Expert Panel Discussion

Chair:

Dr Sam Bateman

Speakers:

Dr James Laurenceson

Dr Ralph Lotilla

Dr Robert Beckman

Dr B.A. Hamzah

Dr Wu Shicun

1715 - 1730 hrs

Closing Remarks

ABOUT THE INSTITUTE OF DEFENCE AND STRATEGIC STUDIES

The **Institute of Defence and Strategic Studies (IDSS)** is a key research component of the S. Rajaratnam School of International Studies (RSIS). It focuses on defence and security research to serve national needs. IDSS faculty and research staff conducts both academic and policy-oriented research on security-related issues and developments affecting Southeast Asia and the Asia Pacific. IDSS is divided into three research clusters: (i) The Asia Pacific cluster – comprising the China, South Asia, U.S., and Regional Security Architecture programmes; (ii) The Malay Archipelago cluster – comprising the Indonesia and Malaysia programmes; and (iii) The Military and Security cluster – comprising the Military Transformations, Maritime Security, and Humanitarian Assistance and Disaster Relief (HADR) programmes. Finally, the Military Studies Programme, the wing that provides military education, is also a part of IDSS.

For more information about IDSS, please visit www.rsis.edu.sg/research/idss.

ABOUT THE S. RAJARATNAM SCHOOL OF INTERNATIONAL STUDIES

The **S. Rajaratnam School of International Studies (RSIS)** is a professional graduate school of international affairs at the Nanyang Technological University, Singapore. RSIS' mission is to develop a community of scholars and policy analysts at the forefront of security studies and international affairs. Its core functions are research, graduate education and networking. It produces cutting-edge research on Asia Pacific Security, Multilateralism and Regionalism, Conflict Studies, Non-Traditional Security, International Political Economy, and Country and Region Studies. RSIS' activities are aimed at assisting policymakers to develop comprehensive approaches to strategic thinking on issues related to security and stability in the Asia Pacific.

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