Freedom of navigation: where to go when political agenda shadows legal substance

Dr. Nong Hong
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Outline

• Conceptual “freedom of navigation” in UNCLOS
• Application of high sea regime in the EEZ: the case of FON
• Is U.S. FONOP in the SCS lost in translation?
• Comparing two cases: Arctic / SCS
• Policy reference
UNCLOS and Freedom of Navigation

Articles 17 - 26, 36, 38, 52, 58, 78, 87

Article 58
Rights and duties of other States in the exclusive economic zone

1. In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful

Freedom of navigation is a principle of customary international law that ships flying the flag of any sovereign state shall not suffer interference from other states, apart from the exceptions provided for in international law.

What distinguishes the FoN in the different zones of the sea is the different influence coastal States may exercise on the freedom of movement.
Contesting issues relevant to navigation regime

- Navigation regimes in different maritime zones (Internal water, TS and CZ, Strait, Archipelagic waters, EEZ, High Sea)
- TS: innocent passage/ prior notification, permission
- EEZ: activities of intelligence, surveillance, and reconnaissance / “freedom of navigation”
Application of high sea regime in the EEZ: the case of FON

- The limitations to the high sea freedom of navigation apply also in the EEZ regime. (Art. 87 (2); 58 (3))
- Additional limitations in the EEZ
  - Incompatible uses
  - Priority between competing uses
  - Residual rights
  - Naval maneuvers
  - Coastal State’s laws and regulations
  - The fisheries articles of UNCLOS Part V
  - Protection and preservation of the marine environment
  - Iced-covered areas
  - Pollutions from vessels and sovereign immunity
  - Marine scientific research

**Article 87**

*Freedom of the high seas*

2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.

**Article 58**

*Rights and duties of other States in the exclusive economic zone*

3. In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.
Coastal States’ restrictions on military activities within an EEZ

- Restrictions on “non-peaceful uses” of the EEZ without consent, such as weapons exercises;
- Limitations on military marine data collection (military surveys) and hydrographic surveys without prior notice and/or consent;
- Requirements for prior notice and/or consent for transits by nuclear-powered vessels or ships carrying hazardous and dangerous goods, such as oil, chemicals, noxious liquids, and radioactive material;
- Limiting warship transits of the EEZ to innocent passage;
- Prohibitions on surveillance operations (intelligence collection) and photography;
- Requiring warships to place weapons in an inoperative position prior to entering the contiguous zone;
- Restrictions on navigation and overflight through the EEZ;
- Prohibitions on conducting flight operations (launching and recovery of aircraft) in the contiguous zone;
- Requiring submarines to navigate on the surface and show their flag in the contiguous zone;
- Requirements for prior permission for warships to enter the contiguous zone or EEZ;
- Asserting security jurisdiction in the contiguous zone or EEZ;
- Application of domestic environmental laws and regulations; and
- Requirements that military and other State aircraft file flight plans prior to transiting the EEZ.
Some key concepts

• Due regard in the EEZ
• Maritime Surveillance
• Hydrographic Survey
• Military Activities
• Non-disruption Of Electronic Systems
• Marine Scientific Research
• Marine environment
## Freedom of Navigation Challenges
### Fiscal Year 2017

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<td>Yemen</td>
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Why U.S. FONOP in the South China Sea such a big issue?

Is its legal substance and function lost in translation?
**U.S. FONOP Timelines in the South China Sea**

**1979**
- The origin of FONOPs: The U.S. government initiated a Freedom of Navigation Program to contest “unilateral acts of other states designed to restrict the rights and freedoms of the international community.”

**2013**
- China took court to Philippines on Jan 22: The Philippines announced that it was taking a case to a U.N. tribunal contesting China’s claim to nearly all of the South China Sea.

**2014**
- China raising islands: China ramped up dredging operations to turn two reefs, Subi and Mischief, on the Spratly Islands into artificial islands. While the reefs have been occupied by China since 1995, Taiwan, the Philippines, and Vietnam also claim ownership.

**2015**
- Triton test on July 2: USS Stethem (DDG-63) passed by Triton Island in the Paracel Island chain on Sunday to test claims by not only Beijing but also Vietnam and Taiwan. China dispatched military vessels and fighter planes in response to warn off the US vessel, and responded strongly later that the Chinese side “will continue to take all necessary means to.”

**2016**
- China chides US over FONOP on October 10: China’s Foreign Ministry issued a public complaint on Wednesday over a U.S. freedom of navigation operation in which a U.S. destroyer challenged excessive Chinese claims.

**2017**
- USS Dewey near Mischief Reef on May 31: USS Dewey (DDG-105) passed within six nautical miles of Mischief Reef, zig-zagging near the island and conducting a man overboard drill, according to a U.S. official. China “was strongly dissatisfied and firmly opposed the undermining of China’s sovereignty and security interests.”

- USS McCain FONOP on August 21: USS John S. McCain sailed within 12 nautical miles of Mischief Reef, host to one of seven artificial islands built by China in the Spratly Islands Group. The Chinese armed forces immediately sent naval ships to identify and verify the US warship according to law and urge it to leave. In a later remark, given by Chinese Foreign Ministry Spokesperson, China “strongly urge the US side to faithfully respect China’s sovereignty and security interests.”

**2018**
- USS Mustin FONOP on March 3: USS Mustin came within 12 nautical miles of Mischief Reef, and carried out maneuvering operations. The Chinese Navy has identified and verified the US warship and warned it to leave. The Chinese Foreign Ministry later “strongly urges the US side to immediately stop provocative operations that violate China’s sovereignty and threaten China’s security and fairly respect the regional countries’ concerted efforts to uphold peace and stability in the South China Sea.”

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**FOFOPs to come, reported on April 26:** The U.S. Pacific Command commander Adm. Harry Harris told lawmakers China was being “aggressive” and predicted the Navy would carry out Freedom of Navigation operations “soon.”

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**USS Hopper FONOP on January 17:** US Navy’s freedom of navigation operation in which a US navy vessel sailed within 12 nautical miles of Huquinan Dao. The Chinese Navy carried out identification and verification, and warned the US vessel to leave. China “was strongly dissatisfied with that and will take necessary measures to uphold peace and stability in the South China Sea.”

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U.S./Canada on FoN in the Arctic: Northwest Passage

- Manhattan and Polar Sea Voyages
  - Canada perceived U.S. as ignoring Canadian sovereignty by these voyages through ‘Canadian waters’.  
  - The United States considers that this transit by the icebreaker Polar Sea will be an exercise of navigational rights and freedoms not requiring prior notification.

- The 1988 Agreement on Arctic Cooperation
  - Article 3: The Government of the United States pledges that all navigation by US icebreakers within waters claimed by Canada to be internal will be undertaken with the consent of the Government of Canada.
  - Arctic 4: Nothing in this agreement of cooperative endeavour between Arctic neighbours and friends nor any practice thereunder affects the respective positions of the Governments of the United States and of Canada on the Law of the Sea in this or other maritime areas or their respective positions regarding third parties.

- NORDREG
  - The legitimacy of the NORDREG regulations were the subject of diplomatic exchange between Canada and the United States in 2010, and between Canada, the United States and other States at the IMO at the same time. The US critique of NORDREG is framed around the view that they are not supportable under Article 234 of UNCLOS and represent an infringement of the freedom of navigation.
The Obama Administration released the 2013 National Strategy for the Arctic Region which focuses attention upon advancing US security interests in the Arctic, developing “Responsible Arctic Region Stewardship”, and strengthening international cooperation. The Strategy acknowledges the changing conditions in the Arctic, including that the Arctic Ocean is becoming more navigable which is increasing interest in the Northwest Passage.

March 2016: Implementation Framework for the National Strategy for the Arctic Region.

The 2013 Strategy and 2016 Implementation Framework were both inherited by the Trump Administration and remain current US policy.

1.6 Promote International Law and Freedom of the Seas

Objective: The United States will continue to promote freedom of the seas and global mobility of maritime and aviation interests for all nations in accordance with international law. The United States will promote and conduct such activities in the Arctic region as appropriate.

Next Steps: The United States will exercise internationally recognized navigation and overflight rights, including transit passage through international straits, innocent passage through territorial seas, and the conduct of routine operations on, over, and under foreign exclusive economic zones, as reflected in the Law of the Sea Convention. Toward this end, the US Government will, as appropriate:

1.6.1 Conduct routine Arctic maritime exercises, operations, and transits consistent with international law. Lead: Department of Defense

1.6.2 Document US diplomatic communications in the Digest of US Practice in International Law published by the Department of State. Lead: Department of State

1.6.3 Document the Department of Defense report on fiscal year freedom of navigation operations and other related activities conducted by the US Armed Forces. Lead: Department of Defense

1.6.4 Deliver strategic communications at appropriate opportunities to reflect US objections to unlawful restrictions in the Arctic on the rights, freedoms, and uses of the sea and airspace recognized under international law; and to promote the global mobility of vessels and aircraft.
U.S. / Russia Northern Sea Route

- NSR as the “historically developed national transport communication of the Russian Federation” that is open for the navigation of foreign vessels, but they must follow the Rules of navigation in its water areas. -- Russia Federal Law No. 132-FZ of July 28 2012

- There is currently no pressure to conduct exercises for the freedom of navigation in the Arctic, but… the US approach is that the Northern Sea Route should be open as an international water corridor for, let’s say, a transit passage – as we see this area is being cleared of ice,” -- Admiral Paul Zukunft, Commandant of the US Coast Guard, April 12, 2018
Comparing....

• Similarities: competing interests of littoral states and user states
• Differences: high politics vs. low politics
• Perception matters.
Policy reference

- Identity reconciliation
- From legal to geo-strategic
- Acting under
  - 1998 Military Maritime Consultative Agreement (MMCA)
  - 2014 Conduct for Unplanned Encounters at Sea (CUES)
  - 2014 Notification of major military activities
  - 2014 Code of conduct for safe conduct of naval and air military encounters.
- CBMs
“If you want to build trust and confidence in another nation, do not start with freedom of navigation exercise. Start with something with humanitarian in nature such as search and rescue, such as environmental…”
Thank you