

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

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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

Article 87 *Freedom of the high seas*

1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and land-locked States:

- (a) freedom of navigation;
- (b) freedom of overflight;
- (c) freedom to lay submarine cables and pipelines, subject to Part VI;
- (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;
- (e) freedom of fishing, subject to the conditions laid down in section 2;
- (f) freedom of scientific research, subject to Parts VI and XIII.

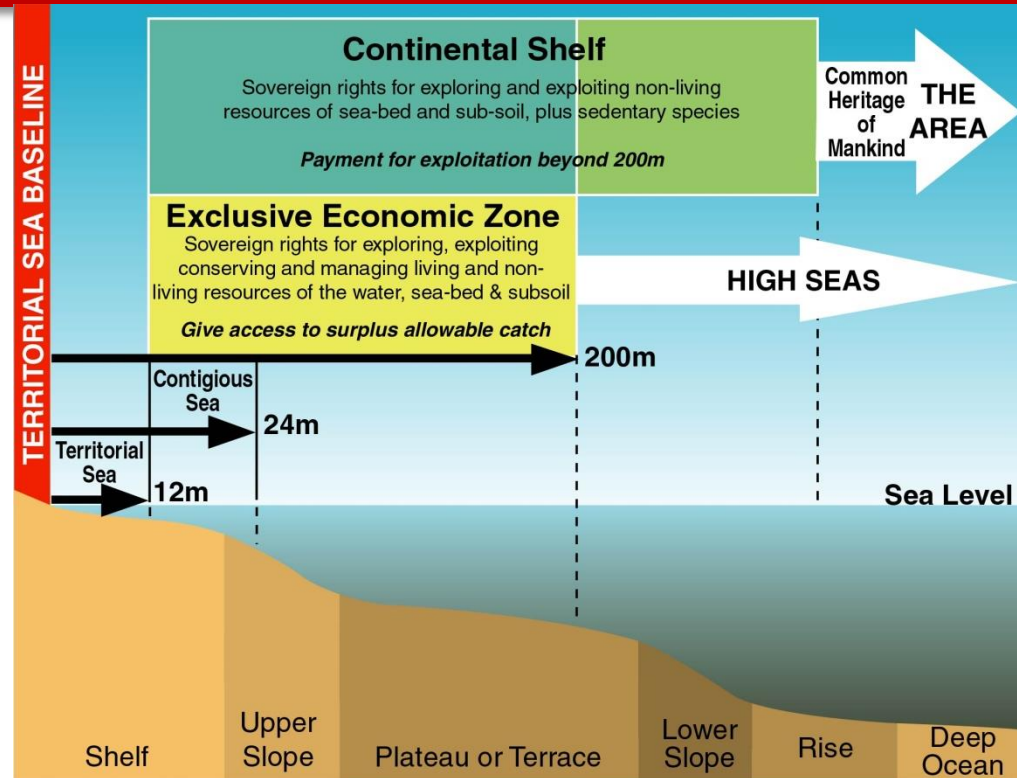
2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.

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

(1) Freedom of scientific research, subject to Part 11 and 111.

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

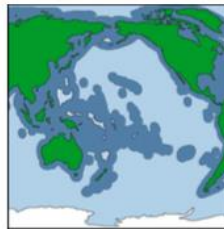
- Restrictions on “non-peaceful uses” of the EEZ without consent, such as weapons exercises;
- Limitations on military marine data collection (military surveys) and hydrographic surveys without prior notice and/or consent;
- Requirements for prior notice and/or consent for transits by nuclear-powered 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



Guidelines for Navigation
and Overflight in the
Exclusive Economic Zone
EEZ Group 21



26 September, 2005
Tokyo, Japan

Ocean Policy Research Foundation

PRINCIPLES FOR BUILDING CONFIDENCE AND SECURITY
IN THE EXCLUSIVE ECONOMIC ZONES OF STATES
IN THE ASIA-PACIFIC

*Meeting of the Steering Committee for Revising
the "Guidelines for Navigation and Overflight in the Exclusive Economic Zone"
worked out by the EEZ Group 21*

17th and 18th October 2012

U.S. FONOP

**Freedom of Navigation Challenges
Fiscal Year 2017**

Claimant	Excessive Maritime Claims	Geographic Location
Albania	Prior authorization required for foreign warships to enter the territorial sea (TTS)	Adriatic Sea
	Excessive straight baselines	Adriatic Sea
Algeria	Prior authorization required for passage of warships in the TTS	Mediterranean Sea
Cambodia	Excessive straight baselines	Gulf of Thailand
China	* Excessive straight baselines	Paracel Islands
	* Jurisdiction over airspace above the exclusive economic zone (EEZ)	South China Sea and East China Sea
	* Restriction on foreign aircraft flying through an Air Defense Identification Zone (ADIZ) without the intent to enter national airspace	East China Sea
	* Domestic law criminalizing survey activity by foreign entities in the EEZ	South China Sea
	Prior permission required for innocent passage of foreign military ships through the TTS	Paracel Islands
	* Actions/statements that indicate a claim to a TTS around features not so entitled	Spratly Islands
	Croatia	Prior notification required for foreign warships to exercise innocent passage in the TTS
Ecuador	* Actions/statements that indicate prior notification or permission is required for State aircraft to conduct overflight of EEZ	Pacific Ocean
India	* Prior consent required for military exercises or maneuvers in the EEZ	Indian Ocean

Indonesia	* Limits on archipelagic sea lane passage through normal routes used for international navigation	Java Sea
Iran	* Asserts that only Parties to the United Nations Convention on the Law of the Sea are entitled to the right of transit passage through the Strait of Hormuz	Strait of Hormuz
	* Prohibition on foreign military activities and practices in the EEZ	Persian Gulf
Malaysia	* Prior authorization required for nuclear-powered ships to enter the territorial sea	Strait of Malacca
	* Military exercises or maneuvers in EEZ requires prior consent	South China Sea
Maldives	* Prior authorization required for foreign ships to enter the EEZ	Indian Ocean
Malta	* Passage by foreign warships through the TTS subject to prior consent or prior notification	Mediterranean Sea
	Excessive straight baselines	Mediterranean Sea
Montenegro	Prior notification required for passage of foreign warships through the TTS	Adriatic Sea
Oman	* Prior permission required for innocent passage of foreign military ships through the TTS	Arabian Sea
	* Requirement for innocent passage through the Strait of Hormuz, an international strait	Strait of Hormuz
	Excessive straight baselines	Gulf of Oman
Philippines	* Claims archipelagic waters as internal waters	Sulu Sea
Slovenia	Prior notification required for passage through the TTS by foreign military vessels	Adriatic Sea
	Foreign military vessels required to confine innocent passage to designate sea lanes in the TTS	Adriatic Sea
Sri Lanka	Prior consent required for foreign warship to enter or pass through the TTS	Indian Ocean
	Claims a security jurisdiction in the contiguous zone (CZ)	Indian Ocean

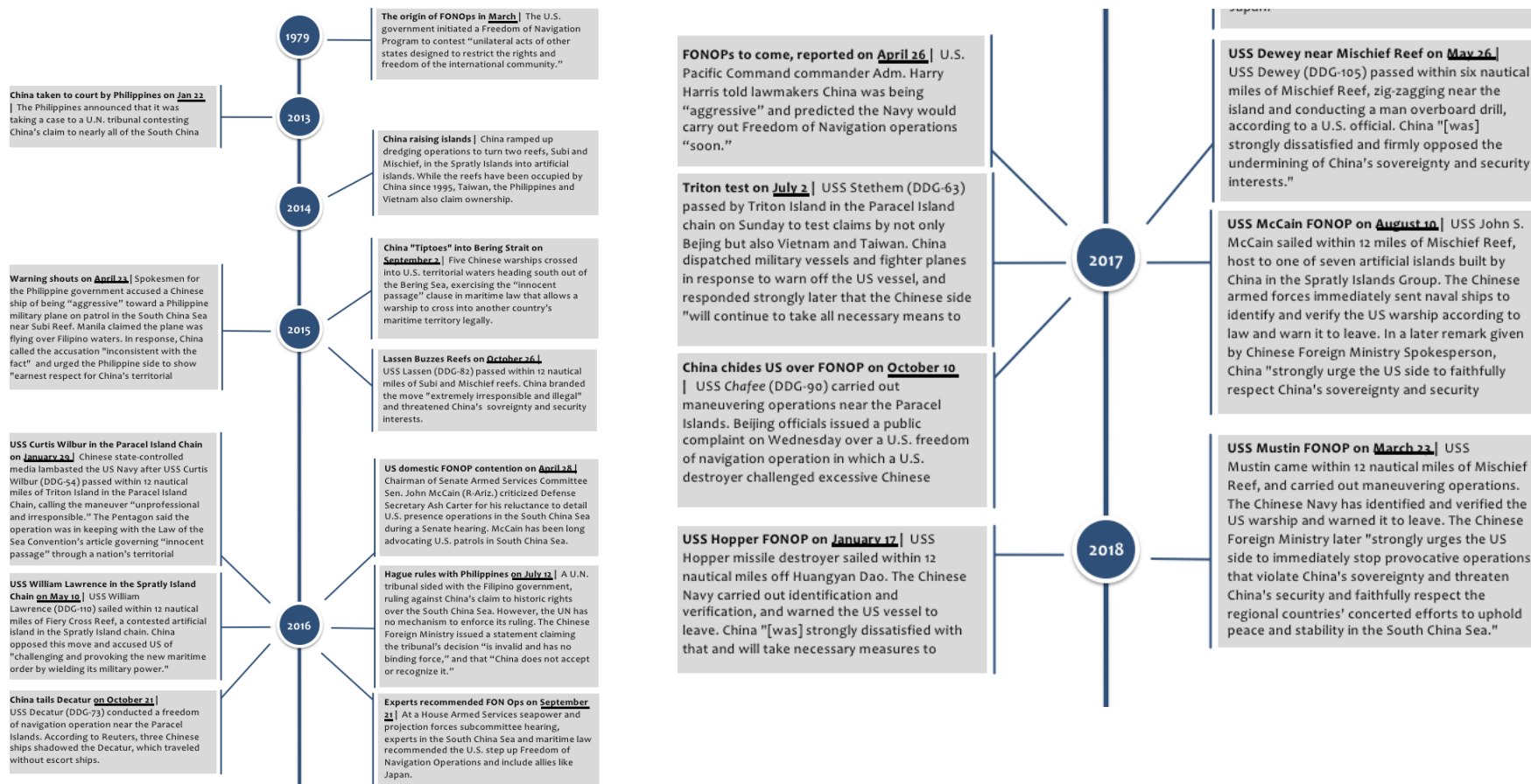
Taiwan	* Prior notification required for foreign military or government vessels to enter the TTS	Paracel Islands
Tunisia	Excessive straight baselines	Gulf of Tunis
Venezuela	* Prior permission for overflight of EEZ or in the Flight Identification Region (FIR)	Caribbean Sea
Vietnam	* Prior notification required for foreign warships to enter the TTS	Paracel Islands
	Excessive straight baselines	South China Sea
Yemen	* Prior authorization required for passage through the TTS by foreign warships	Red Sea and Gulf of Aden

Source: Pentagon 2017 Freedom of Navigation Report



- 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



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.

U.S./Canada on FoN in the Arctic

The Obama Administration released the 2013 National Strategy for the Arctic Region which focusses 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 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

