

Chapter 1

The Security of the Sea

Significance of the Freedom of Navigation and Related Challenges

Yu Harada (lead author, Section 3)

Seiya Eifuku (Sections 1 and 2)

In recent years, the issue of maintaining the stability of a rules-based maritime order has drawn attention as fundamental to the security of the sea. Underlying that background is the concern that the freedom of navigation—a fundamental principle of the maritime regime—is being challenged. A review of maritime history shows that two principles—the freedom of navigation and the freedom of fishing—both constituted the foundation of the *freedom of the seas*, which was the sole principle supporting the maritime regime from ancient times through the Middle Ages. However, since the Middle Ages, some countries have come to claim territorial ownership of certain maritime areas and place restrictions on fishing in their offshore areas, resulting in a gradual change to the principle of the freedom of the seas. Subsequently, the concept of the freedom of the seas was transformed into the *freedom of the high seas* due to the establishment of a dual-structure maritime regime which consisted of the territorial sea and the high seas against a backdrop of various states' practices in the eighteenth and nineteenth centuries. Furthermore, the institutionalization of the Exclusive Economic Zone (EEZ) by the end of the twentieth century dealt an extensive setback to the freedom of fishing. In contrast, the freedom of navigation continues to serve as a fundamental principle of today's maritime regime, guaranteed by the EEZ and other institutions.

However, different countries maintain different attitudes toward the freedom of navigation. Moreover, disputes among littoral countries over their maritime interests, triggered by the changes of the maritime regime, have also cast a shadow on the freedom of navigation as the risk to the operation of vessels diversifies. Such challenges are especially evident in the South China Sea, which is an important strategic area of the Sea Lines of Communication (SLOC, or sea lane). One of the prominent challenges is a normative one which relates to maritime zones, such as the territorial sea and the EEZ. Namely, there is a lack of mutual understanding about how the maritime zones in the South China Sea ought to be divided in the first place as well as about the extent to which the vessels (particularly warships) of non-coastal states can operate in the maritime zones where littoral states have jurisdiction. Moreover, China's large-scale and rapid reclamation and its militarization are leading to new physical challenges. Should the freedom of navigation as a fundamental principle become challenged, the rules-based maritime order will become unstable, perhaps ending up shaking the very foundations of the security of the sea. All the countries deriving benefits

from the sea are called upon to embody the freedom of navigation and share its significance and benefits through practical operation consistent with international law of the sea. The South China Sea thus serves as a litmus test for that project.

1. From the *Freedom of the Seas* to the *Freedom of the High Seas*

In 2017, freedom of navigation continued to be a keyword for the security of the sea. The inauguration of the US Donald Trump administration in January of that year heightened interest in how the US Navy would conduct Freedom of Navigation Operations (FONOPs), based on the Freedom of Navigation Program, under the new administration. In July, British Defence Secretary Michael Fallon drew attention when he announced his country's plan to dispatch a naval warship to the South China Sea to practice the freedom of navigation there.¹⁾ Also, the Japan-US summit in November 2017 championed a "Free and Open Indo-Pacific Strategy," reaffirming the importance of having all countries "respect the freedom of navigation and overflight and other internationally lawful uses of the seas."²⁾ If the freedom of navigation, as a fundamental principle of the maritime regime, comes under challenge, it would also destabilize the rules-based maritime order, which lies at the basis of the security of the sea. Nevertheless, the freedom of navigation is not a natural or obvious principle; rather, it is crystallized and upheld through changes in the maritime regime.

(1) Sign of change in the principle of the *Freedom of the Seas*

For a country to control a certain sea area, logically it must maintain the readiness to exert force either from land as the execution of state authority, or from the sea via shipping vessels. However, both of those were impossible, when neither firearms nor the technology to build ships with an ability to conduct long-term navigation and activities existed. For that reason, countries in ancient times never made a claim of controlling the sea: in Roman law, the sea was free, and considered open to all.³⁾

However, when the advancement of shipbuilding technology made it possible to build vessels capable of long-term navigation and activities, some countries started to claim control over certain maritime areas. For example, in the Middle Ages, Italian city-states such as Pisa claimed control over its neighboring sea.⁴⁾

Moreover, starting in the fifteenth century, besides the development of shipbuilding technology, the invention and application of such instruments as the compass enabled the further development of navigation technology, which, together with the evolution of firearms, spurred a further advance of navigation and warring capabilities. As a result, certain countries emerged that came to claim ownership of vast maritime areas, such as Spain and Portugal.⁵⁾

Meanwhile, Holland opposed Portugal's claim over the Indian Ocean. To counter that claim, Hugo Grotius published *Mare Liberum* in 1609, asserting the concept of the *freedom of the seas*. England also did not recognize the ownership of the sea, as demonstrated in Queen Elizabeth I's assertion to the Spanish ambassador to England that "no title to the ocean could belong to any nation."⁶⁾ Those statements by Holland and England were made to prevent Portugal, Spain, or any other country from restricting navigation of their vessels by the claim to ownership of maritime areas.⁷⁾ For that reason, certain steps were made to regulate the sea aside from the regulation of the navigation of ships, such as England's prohibition of fishing by foreigners in its offshore waters.⁸⁾ Also, in the seventeenth century, Denmark, Norway, and others also reserved fishing rights for their own citizens in offshore maritime areas.⁹⁾

Thus, while the freedom of the seas constituted the sole principle of the maritime regime from ancient times to the Middle Ages, ever since the Middle Ages, countries started to make territorial claims of certain maritime areas or to restrict fishing in offshore maritime areas, gradually effecting changes in the principle of the freedom of the seas. In addition, when seen against such historical developments, the focus of countries on the freedom of the seas since the Middle Ages is believed to have been on the operation of vessels and fishing. That is to say, the basis or foundation of the freedom of the seas can be said to have rested on two principles: the freedom of navigation and the freedom of fishing.

(2) Establishment of the Regime of the Territorial Sea and the High Seas: Transformation from the *Freedom of the Seas* to the *Freedom of the High Seas*

The freedom of the seas, maintained over many centuries as the sole principle governing the maritime regime, started to gradually change circa the Middle Ages owing to certain states' practices. Additionally, the establishment of a regime in which states could claim ownership of certain maritime areas as their territorial

sea led to the modification of the principle of the freedom of the seas, with the principle of the freedom of the seas being transformed into the principle of the *freedom of the high seas*.

The initial trigger for the development of the regime of the territorial sea was the recognition by neutral states of the necessity to demarcate the extent of neutral waters during European wars, so as to restrain the operation of belligerent states' navies.¹⁰⁾ Concretely speaking, that range came to be defined as three nautical miles from shore; the first national practice is said to have been a notification delivered by the United States to Britain and France on November 8, 1793, while those two countries were at war.¹¹⁾ Also, the theoretical grounds for the three-mile limit is believed to have been suggested by the Italian Ferdinando Galiani in 1782, who said that such a distance corresponded with the range of cannon shot in the so-called cannon-shot rule, a doctrine first proposed by the Dutch jurist Cornelius van Bynkershoek.¹²⁾

Thus, in the initial stages of the territorial sea regime, it is considered that states presumed a range within which they could extend their control from land into surrounding sea areas. That is illustrated by responses given to the British government in 1874 when it made inquiries to the governments of the United States, France, Germany, the Netherlands, Italy, Denmark, Sweden, Norway, and Russia about how far countries could claim offshore maritime areas for themselves as areas of their legitimate jurisdiction. Except for the United States and the Netherlands, all of them told the United Kingdom that the cannon-shot rule was the principle governing international law concerning the breadth of the territorial sea.¹³⁾ Also, given that the initial trigger for the territorial sea claims was intimately related to security purposes—namely, countries desiring to restrict the activities of belligerent states in their offshore maritime areas—one can conclude that the idea of maximizing national interests, such as in the acquisition of marine resources through the demarcation of the territorial sea or the operation of marine vessels, did not exist at the beginning.

Thus, judging from that, the purpose of establishing the territorial sea was initially related to the security of coastal states.¹⁴⁾ Accordingly, the minimum range to maintain the security and civil order of coastal states was sufficient for the breadth of the territorial sea. Naturally, given that the extent of that necessity to maintain security can differ depending on the feasibility of the activities taking place or such technological advances as the capability of the opponent's target,

among other factors, the extent of the need for the breadth of the territorial sea also changes. Therefore, the limit should not be something intrinsically absolute. Nevertheless, for the sake of the stability as a regime, it has been necessary to express and codify it numerically.¹⁵⁾ However, the breadth of the territorial sea had never been defined specifically in international law before the adoption of the UN Convention on the Law of the Sea (UNCLOS) in 1982, which stipulated a maximum of twelve nautical miles for the limit. On the other hand, the regime of the territorial sea itself is thought to have already been established through the practices of nations in the eighteenth and nineteenth centuries.

Furthermore, with the institutionalization of the territorial sea, the institutional structure of the sea has taken on a dual nature—the territorial sea vs. the waters lying beyond them—with the waters beyond the territorial sea taking on the appellation of the high seas, and continuing to enjoy the freedom derived from what had hitherto been the freedom of the seas. Therefore, the high seas emerged as a concept or regime that contrasted with the concept of the territorial sea. It was hinted at in the 1958 Convention on the High Seas, the first international regulation to prescribe the high seas explicitly. It stated, “The term ‘high seas’ means all parts of the sea that are not included in the territorial sea or in the internal waters of a State.”¹⁶⁾ In that fashion, because of the emergence and institutionalization of the concept of the territorial sea, as well as the emergence and institutionalization of the high seas as a kind of reflective response to the institutionalization of the territorial sea, the principle of the freedom of the seas, in the sense of the sea being common to all humankind, was transformed to the freedom of the high seas in the sense of the sea being common to all states.

Even UNCLOS recognizes the freedom of the high seas, stating that “The high seas are open to all States,”¹⁷⁾ and that “No State may validly purport to subject any part of the high seas to its sovereignty.”¹⁸⁾ In addition, as for the items comprised in freedom of the high seas, Article 87(1) of the Convention details six items, as follows: freedom of navigation, freedom of fishing, freedom to lay submarine cables and pipelines, freedom of overflight, freedom to construct artificial islands and other installations, and freedom of scientific research. However, that is taken to be a non-exhaustive list,¹⁹⁾ and such other activities as aircraft taking off from and landing on military vessels are also regarded as part of the exercise of the freedom of the high seas in accordance with customary international law.

Also, two of the items mentioned by Article 87(1) of UNCLOS as part of the freedom of the high seas—namely, the freedom to construct artificial islands and other installations and the freedom of scientific research—were not part of the freedom of the high seas as defined by the 1958 Convention on the High Seas but were newly added. That demonstrates that what the freedom of the high seas covers can be expanded with the broadening of the utilization of the sea on account of the progress of science and technology. Furthermore, though it had been scientifically or technologically impossible to include either the freedom to lay submarine cables and pipelines or the freedom of overflight in the ancient concept of freedom of the seas up through more modern times, because of different levels of advancement, that they became included in the concept of the freedom of the high seas—which emerged as the result of the transformation of the concept of the freedom of the seas owing to the institutionalization of the territorial sea—thanks to subsequent progress in science and technology.

Meanwhile, the freedoms of navigation and fishing have consistently been included in the concept of the freedom of the seas—not just in ancient times, but more recently in the modern era (i.e., post-Middle Ages), as well as in the period after the concept became transformed into the freedom of the high seas. Because of that, both can be said to constitute fundamental principles of the maritime regime.

2. From the Freedom of the High Seas to the Freedom of Navigation

(1) Impact of the Institutionalization of the EEZ on the Freedom of the High Seas

As pointed out in the previous section, the fundamental principles underlying the freedom of the seas, as the principle governing the maritime regime from ancient times to the Middle Ages, were the freedom of navigation and the freedom of fishing. However, after World War II, when Latin American countries started asserting jurisdictional areas extending 200 nautical miles from their coasts in order to protect their coastal fishing resources from the fishing activities of maritime developed countries, the principle of the freedom of fishing came to be challenged as well.²⁰ Furthermore, beginning in the 1970s, countries in Africa proposed maritime zones of two hundred nautical miles' breadth called the "Exclusive Economic Zone" (EEZ). After deliberations by the Third United

Nations Conference on the Law of the Sea (UNCLOS III), which lasted from 1973 to 1982, a regime comprising of the territorial sea having a breadth of twelve nautical miles and the EEZ stretching 200 nautical miles from coasts was reflected in UNCLOS. The EEZ is a maritime area within which coastal states can exercise their sovereign rights for the protection and management of their marine resources, including fishing resources. The establishment of the regime signified an extensive expansion of those waters where the freedom of fishing could not be enjoyed, so it represented a big setback to freedom in that regard.

Meanwhile, as far as the freedom of navigation is concerned, UNCLOS stipulates that all countries enjoy that freedom within the EEZ.²¹⁾ That is believed to have stemmed from the fact that the EEZ regime originated in the demands by Latin American and African countries to secure the fishery resources off their coasts. Moreover, when Chile and Peru established maritime zones of 200 nautical miles in 1947, they both declared that it would not impinge on the freedom of navigation; Argentina also reflected the principle of the freedom of navigation in the 200-mile maritime zone within which it claimed sovereignty. In that manner, it can be understood that those countries did not intend to restrict the freedom of navigation through the establishment of their EEZ.

In contrast to the significant setbacks encountered by the freedom of fishing through the establishment of the EEZ regime, the freedom of navigation remains positioned as a fundamental principle in the maritime regime of today, based on UNCLOS. In addition to the stipulation that the freedom of navigation is part of the freedom of the high seas, it has also been guaranteed by the stipulation that every state “has the right to sail ships flying its flag on the high seas.”²²⁾ Moreover, it is shown that the stipulation can also be applicable in the EEZ as well.²³⁾

(2) Issues Related to the Activities of Non-coastal States in the EEZ

However, it is unclear whether the kind of freedom of navigation enjoyed in the EEZ is the same as that on the high seas or whether it is more restricted, as far as the Convention is concerned. That is because unlike the Convention on the High Seas, UNCLOS lacks any stipulation pertaining to the geographical extent of the high seas, as well as any clear definition of the legal status of the EEZ. Accordingly, scholars are divided in their opinions, as it is unclear whether the EEZ constitute a unique body water distinct from the territorial sea and the high seas, on the one hand, or whether they are bodies of water within the high seas to which special

regulations have been applied.²⁴⁾ The related Japanese act, when mentioning the EEZ and the high seas at the same time, employs an expression friendlier to the latter interpretation, saying that “high seas (include the EEZ as stipulated by UNCLOS).”²⁵⁾ The lack of mutual understanding concerning the EEZ has resulted in problems caused by the activities of non-coastal states within the EEZ, such as military activities and military surveys.

2a. Military Activities in the EEZ

Maritime military operations can be divided into two types according to the situation at hand—armed conflict or peacetime—as well as broadly into four types depending on their nature and/or purpose: (1) combat operations as well as activities in preparation for combat, along with related activities (namely, combat operations and the like), (2) collecting information, (3) military exercises, and (4) any activities other than those included in the other categories (such as weapons testing). Carrying out military operations on the high seas, according to customary international law, has been traditionally recognized as part of the freedom of the high seas. However, according to the general principles of law, the carrying out of unilateral and unrestricted military operations as part of the concept of the freedom of the high seas is not admissible, and it is natural for such operations to be limited insofar as harmony is to be kept with other countries’ freedom of the high seas, as far as legal theory is concerned. While military activities have not been enumerated among the different forms of the freedom of the high seas in Article 87(1) of UNCLOS, it is a non-exhaustive list, so does not comprise the full extent of the freedom of the high seas.²⁶⁾ Even those other activities recognized under customary international law as being part of the freedom of the high seas—and that goes for military operations as well—can be permitted under the maritime regime based on UNCLOS, except for those activities that conflict with related provisions in the convention.

As far as that point is concerned, the provision of UNCLOS that “(t)he high seas shall be reserved for peaceful purposes”²⁷⁾ raises the question of whether military operations can be considered as representing peaceful purposes in the first place. However, those activities assumed to be not for “peaceful purposes” include such operations as the unlawful exercise of military force in violation of the Charter of the United Nations along with other actions that are not recognized by other regulations in international law. It does not mean that an activity should

not be regarded as an operation for peaceful purposes if it is a military operation.²⁸⁾

Meanwhile, as the complete range of the freedom of the seas cannot be enjoyed in the EEZ, the issue arises of to what extent the freedom of the high seas as understood by customary international law operates in the EEZ. Even for those military operations allowed within the freedom of the high seas under customary international law, if the actual operations are staged in the EEZ of a coastal state, then it is obvious that such actions cannot be carried without any conditions or restrictions. For that reason, if a non-coastal state intends to carry out military operations in the EEZ of a coastal state, *due regard* should, at least, be paid to the rights and interests of the coastal state within that EEZ. The question of how much consideration needs to be given depends on the underlying situation—whether an armed conflict is occurring—as well as the nature of the activities and their necessity, and such matters as the benefit of the non-coastal state gained from the conduct of such activities and the influence received by the coastal state. All those factors must be weighed, with an individual judgment probably needing to be made in each case. It must be added that according to the history of the establishment of the EEZ regime, as well as the purpose of the regime, among other things, it ought to be understood that coastal states cannot restrict the military activities of non-coastal states in their EEZ in order to secure national security interests on the ground that the maritime area where the activities are conducted is its own EEZ.

2b. Military Surveys in the EEZ

Collecting information is one kind of maritime military operation, and can be divided into two types of activities, broadly speaking: (1) investigations of the sea itself, such as acoustic transmission conditions underwater, as related to the operation of submarines, and (2) investigations of other matters besides the condition of the ocean itself, such as the actions and movements of other countries' naval vessels. Of those two, the problem in carrying out the second type of activity in coastal states' EEZ is that it can sufficiently be considered as a military operation taking place within the EEZ (the details of which were described in the previous section). On the other hand, opinions and views are divided and do not accord as to whether the first type of activity—namely military surveys of the ocean water itself—constitutes marine scientific research or not. In other words, while UNCLOS calls for gaining the “consent” of coastal states before carrying

out marine scientific research in those states' EEZ,²⁹⁾ there is no clear definition within the convention as to its contents or methods. Accordingly, it is obscure whether military surveys of the ocean waters themselves fall under the rubric of marine scientific research as far as convention-based definitions are concerned.

Regarding that point, the United States and the United Kingdom have adopted the position that military surveys do not constitute "marine scientific research,"³⁰⁾ although China and some states believe the opposite.³¹⁾ Academic theory is also divided on the matter.³²⁾ While the aim and purpose of the various provisions of the UNCLOS pertaining to marine scientific research are to protect the EEZ and the economic interests of the continental shelf of coastal states, the results of military surveys are used solely for military purposes and are not released publicly in most cases. Thus, as there is no room for the economic interests of coastal states to be harmed, nor for there to be any conflict with the legal interests of coastal states in the first place, so far as legal theory is concerned, it is valid to conclude that military surveys ought not to be considered marine scientific research.³³⁾ On the other hand, there are no procedures outlined in the UNCLOS to prevent the infringement of sovereign rights and jurisdiction under the pretense of military surveys in coastal states' EEZ, making it difficult to distinguish technically between marine scientific research and military surveys of ocean conditions, so it will be necessary to continue to debate the issue carefully and render a judgment on it.

(3) The Regime of Guaranteeing the Passage of Foreign Vessels in the Territorial Sea

As seen above, the concept of the freedom of navigation, which had served as a fundamental principle of the freedom of the seas, became institutionalized as part of the concept of the freedom of the high seas established along with the development of the dual-structure maritime regime composed of the territorial sea and the high seas. In addition, the freedom of navigation was also reflected in the regime of innocent passage, created as an attempt to harmonize with the sovereignty of coastal states in the territorial sea.³⁴⁾ Moreover, with the development of the twelve-nautical-mile limit of the territorial sea, the freedom of navigation became reflected as the *regime of transit passage* even in straits used for international navigation that were foreseen to become the territorial sea belonging to coastal states.

3a. The Regime of Innocent Passage

The regime of innocent passage is the regime by which coastal states, by principle, cannot hamper the passage of foreign vessels through their territorial sea if such passage is innocent (i.e., without causing harm).³⁵⁾ The concept of the right of innocent passage itself, while first having been discussed in the mid-eighteenth century by Emer de Vattel, is believed to have developed as a regime within customary international law in the mid-nineteenth century.³⁶⁾ However, its institutionalization did not progress owing to the lack of progress in the institutionalization of the territorial sea. It was not until the 1958 Convention on the Territorial Sea and Contiguous Zone that it was institutionalized for the first time. In the second part of UNCLOS, “Territorial Sea and Contiguous Zone,” Section 3 (Articles 17–32) prescribes “Innocent Passage in the Territorial Sea.”

Under the regime of innocent passage, the key criterion is whether passage is innocent or not; UNCLOS prescribes that “[p]assage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State,”³⁷⁾ adding a list of twelve categories that “shall be considered ... prejudicial to the peace (of coastal states).”

Those twelve categories, however, constitute a non-exhaustive list, so it is to be understood that coastal states can even consider other activities as “innocent passage” as long as they fulfill the criterion of not being “prejudicial to the peace, good order or security” of such states.³⁸⁾

The type of ships for which the right of innocent passage can be granted is not limited to merchant vessels, but can be enjoyed by all ships, including warships. On the other hand, there are certain countries requiring prior authorization for the passage through their territorial sea by foreign warships. As far as that is concerned, both the United States and the former Soviet Union confirmed in the 1989 “Uniform Interpretation of the Rules of International Law Governing Innocent Passage” that all ships, including warships, enjoy the right of innocent passage without being demanded prior notification or authorization.³⁹⁾

The submerged passage of submarine, however, is not considered to be innocent passage, so submarines and other underwater vehicles must navigate on the surface and show their flag to enjoy the right of innocent passage in the territorial sea.⁴⁰⁾ In 2004, the maritime security operation conducted by the Japan Maritime Self-Defense Force (JMSDF) against a Chinese nuclear-powered submarine was the result of the submarine having violated that rule by carrying out submerged

Table 1.1. Twelve activities classified as “not innocent” by UNCLOS

(a)	any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of the international law embodied in the Charter of the United Nations
(b)	any exercise or practice with weapons of any kind
(c)	any act aimed at collecting information to the prejudice of the defence or security of the coastal state
(d)	any act of propaganda aimed at affecting the defence or security of the coastal State
(e)	the launching, landing or taking on board of any aircraft
(f)	the launching, landing or taking on board of any military device
(g)	the loading or unloading of any commodity, currency or person contrary to the custom, fiscal, immigration or sanitary laws and regulations of the coastal State
(h)	any act of willful and serious pollution contrary to UNCLOS
(i)	any fishing activities
(j)	the carrying out of research or survey activities
(k)	any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State
(l)	any other activity not having a direct bearing on passage

Source: Compiled by the author.

navigation through Japanese territorial sea. Also, UNCLOS states, “The coastal State may ... suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security.”⁴¹⁾ Meanwhile, considering that a similar right of innocent passage is not permitted for the overflight of aircraft, the regime of innocent passage can be thought of as a regime that reflects the principle of the freedom of navigation.

3b. The Regime of Transit Passage

Although the breadth of the territorial sea was settled upon as three nautical miles when the territorial sea regime was established, many countries came to set their territorial sea at a breadth of twelve nautical miles by the mid-twentieth century. However, when the right of establishing a breadth of twelve nautical miles for the territorial sea was set up under international law, it was foreseen that many of the straits used for international navigation would turn into the territorial sea of coastal states. In such a case, the freedom of navigation through such straits would only be guaranteed insofar as it corresponded to innocent passage. As the innocent passage regime does not permit the submerged passage of submarines and the overflight of

aircraft, UNCLOS established the regime of transit passage to make that possible. In other words, the regime of transit passage is a regime set up to harmonize the transformation of the straits used for international navigation into the territorial sea, on the one hand, with the freedom of navigation (or overflight), on the other.

The regime of transit passage is a regime of passage and navigation by which states bordering straits shall not hamper navigation or overflight if it is conducted solely for continuous and expeditious transit. While innocent passage can be stopped, transit passage cannot be stopped.⁴²⁾ In addition, the regime of transit passage applies to straits used for international navigation between one part of the high seas or the EEZ and another part of the high seas or the EEZ, such as the Malacca Strait, the Hormuz Strait, and the Dover Strait.⁴³⁾ However, the regime of transit passage is not applicable to those cases where alternative routes to the strait in question can be found, such as the Messina Strait lying between the mainland of Italy and the island of Sicily,⁴⁴⁾ or in straits constituting part of the high seas or the EEZ and territorial sea of a foreign state,⁴⁵⁾ such as the Straits of Tiran (the straits separating the Gulf of Aqaba from the Red Sea and leading to Israel). Instead, a regime of innocent passage that cannot be stopped shall apply there.⁴⁶⁾

Japan enacted the Territorial Sea Act in 1977, widening the breadth of its territorial sea from three to twelve nautical miles. At that time, it retained the three-mile territorial sea breadth for five straits used for international navigation: the Soya Strait, the Tsugaru Strait, the Tsushima Strait East Channel, the Tsushima Strait West Channel, and the Osumi Strait. That was maintained during the 1996 the amendment of the Territorial Sea Act in conjunction with Japan's joining UNCLOS, meaning that certain sections of those straits do not correspond to Japanese territorial sea. Subsequently, the regime of transit passage does not apply to straits making up Japanese territorial sea.

The regime of transit passage can also be described as a regime reflecting the freedom of navigation. That freedom came to be crystallized after many centuries of changes to the maritime regime, and continues to constitute a fundamental principle of the maritime regime today. If that principle is challenged, the rules-based maritime order will also become unstable, shaking the very foundations of the security of the sea. Accordingly, maintaining and securing the principle of the freedom of navigation is a critical issue for the security of the sea.

3. Challenges Related to the Freedom of Navigation in the South China Sea

Although the freedom of navigation has served over time as a fundamental principle of the maritime regime, the attitude toward it depends on the country. Furthermore, disputes over maritime interests among littoral states, triggered by changes in the maritime regime, have cast shadows on the freedom of navigation as the risks associated with operation of ships have diversified. These have particularly emerged as normative and physical challenges in the South China Sea.

(1) The South China Sea as a Key Shipping Corridor

The South China Sea is a vital part of the Sea Lines of Communication (SLOC, or sea lane) connecting the Indian and Pacific Oceans via the Malacca Strait. That SLOC represents one of the major arteries supporting the stability and prosperity of the international community, the traffic there accounting for approximately one-third of annual global trade.⁴⁷⁾ For Japan in particular, which depends on the SLOC for much of its trade, the South China Sea is a vital area. A situation allowing any country to gain exclusive control over the sea would not only be detrimental economically, but would have a serious adverse effect on the security of the Asia-Pacific region. The freedom of navigation in the South China Sea is of extreme significance in maintaining a stable regional security environment.

The South China Sea as a key crossroads is also the area representing an increasingly challenging regional security environment. There are four groups of islands and underwater features—the Paracel (Xisha) Islands, the Spratly (Nansha) Islands, Macclesfield Bank (Zhongsha Islands), and the Pratas (Dongsha) Islands—each of which is a source of dispute for multiple claimants, not only for over the sovereignty of those geographical features but also the surrounding maritime borders. Particularly, the dispute over the Spratly (Nansha) Islands is quite complicated, with competing interests by China, Vietnam, the Philippines, Malaysia, and Brunei. While China's large-scale and rapid reclamation and its militarization is creating the so-called "A Great Wall of Sand,"⁴⁸⁾ the South China Sea disputes entered a new stage with the award rendered in July 2016 in the case filed by the Philippines against China over their dispute claims in the area. Upon the unfavorable ruling, China not only claimed that it was null and void but also rejected the legality of the proceedings itself in the first place, so

Figure 1.1. The South China Sea and Japan's major shipping routes

attention then focused on its future course of action. Tensions, however, have been eased for the time being, at least on the surface, with the Philippines having shelved the award and realigned with China. At the same time, the ASEAN PMC+1 Session with China of August 2017, held in Manila, Philippines, officially adopted the framework of the Code of Conduct (COC) in the South China Sea agreed upon three months earlier in May 2017, with an announcement subsequently being made at the ASEAN-China summit held in November 2017 that negotiations regarding the COC would begin. Still, some regard the framework to be lacking in terms of substantive content, such as whether it would be legally binding, as well as a dispute resolution mechanism, and thus have criticized the various developments as merely being a way for China to gain time.⁴⁹⁾ With doubts remaining about whether a truly effective COC can be drawn up, the outlook for the situation in the South China Sea continues to be as unpredictable as ever.

(2) The Complicated Normative Challenges

At the primary level, the disputes over the sovereignty of geographical features and the maritime boundary delimitation in the South China Sea is an issue for the

claimants directly involved. It is highly expected to advance discussions steadily among those claimants toward a peaceful resolution. At the same time, though, the South China Sea also poses a challenge to the international community as a sort of litmus test relating to the stability of a rules-based maritime order, and impinging on the foundation of the security of the sea. Underlying that is the concern that the freedom of navigation—a fundamental principle of the maritime regime—is being challenged due to claims and actions that are not rules-based, with an increasingly powerful China assertively advancing into the maritime area.

The freedom of navigation in the South China Sea has come up against significant challenges amidst the historical background of changes to the maritime regime. One of those is a complicated normative challenge stemming from a lack of mutual understanding concerning the maritime zones such as the territorial sea and the EEZ. In the first place, the problem has arisen of the littoral states of the South China Sea not seeing eye to eye about the extent to which shipping vessels—particularly military vessels—of non-coastal states can operate within the territorial sea and the EEZ that the littoral states are able to establish. For instance, the United States takes the view that the right of the innocent passage of foreign vessels in the territorial sea also applies to naval vessels, and that non-coastal states' naval vessels can carry out, for example, intelligence-gathering activities in the other countries' EEZ. China, on the other hand, begs to differ on both issues. Upon ratifying UNCLOS, China made a statement reaffirming its right to request foreign states to obtain advance approval from or give prior notification to it for the right of innocent passage of their warships through its territorial sea.⁵⁰⁾ Also, in March 2009, several Chinese ships, including a Chinese Navy intelligence ship and other government ships, harassed the US ocean surveillance ship USNS *Impeccable* within two hundred nautical miles off the southern coast of Hainan Island.⁵¹⁾

The ASEAN members also differ among themselves concerning the operation of vessels by non-coastal states. According to a survey by the US Navy Judge Advocate General's Corps, of the various ASEAN members, Malaysia, Myanmar, and Vietnam take a stance through the enactment of domestic laws, etc., that they will request prior authorization or notification from, for example, foreign warships of other countries before allowing navigation.⁵²⁾ Also, Cambodia, Malaysia, Myanmar, Thailand, and Vietnam take a stance through enacting domestic laws, etc., that they will place restrictions on, for example, the military activities of other countries within their EEZ.⁵³⁾

Judging from that, one realizes that several of the ASEAN members have adopted a stance close to China's when it comes to the interpretation and application of international law of the sea. Both China and ASEAN, just as the United States, have emphasized the importance of the freedom of navigation in the South China Sea.⁵⁴⁾ However, the situation seems to be one of *cohabiting but living in different worlds*, given the difference between the United States, which interprets the freedom broadly, on the one hand, and China and certain ASEAN countries, which do so more narrowly, on the other.

However, the way a certain country interprets international law of the sea can change. For example, instances have been reported of Chinese naval vessels exercising the right of innocent passage in other countries' territorial sea, as well as carrying out intelligence-gathering activities in other countries' EEZ. Specifically speaking, in September 2015, five Chinese naval vessels passed through US territorial sea when they transited the Aleutian Islands off Alaska, and it was reported that the US side accepted that action as not being problematic in terms of international law.⁵⁵⁾ Also, in July 2017, during the Australian-US joint exercise "Talisman Sabre" in Queensland in eastern Australia, attention was drawn to the presence of Chinese intelligence-gathering ships discovered offshore within Australia's EEZ.⁵⁶⁾ With China progressively developing capabilities to become a blue-water navy, it may come to emphasize the acquisition of naval mobility and ocean access, carrying out military activities there such as naval exercises and training and intelligence-gathering so it is possible that it will discover the same kind of significance in the freedom of navigation that the United States has. On the other hand, one cannot deny the possibility of a double standard taken by China, namely, its different stance toward such neighboring sea as the South China Sea in comparison with its actions in the outer sea, as has already been observed. China's future direction in that regard is thus a focus of attention.

Interestingly, Vietnam has also been changing its policy. Its "Law of the Sea of Viet Nam," enacted in June 2012, declares that Vietnam requires foreign military vessels exercising the right of innocent passage through its territorial sea to give *prior notice* to the country's competent authorities.⁵⁷⁾ This stipulation shows that its stance still separates it from the United States, but given that Vietnam used to even require foreign military vessels desiring to enter its contiguous zone (i.e., the zone contiguous to its territorial sea) to seek *permission* from the country,⁵⁸⁾ one can see that it has been gradually relaxing its restrictions. In addition, the 2012

law clearly states that Vietnam respects freedoms of navigation and overflight in its EEZ, listing as a condition that those operations which are not detrimental to the national maritime interest of Vietnam.⁵⁹⁾ While the concrete meaning of the stipulation is not clear, one can conclude that it might even allow the military activities of other countries to occur within its EEZ as long as they were not detrimental to Vietnamese interests. Vietnam, whose interests in the South China Sea are sharply opposed to China, is reinforcing its relations with the United States, and in that context, it may further bring its stance over the freedom of navigation closer to that of the United States as well.

Meanwhile, even if there were to be a nearing or concurrence of opinions about how much operation by non-coastal state vessels should be permitted in the territorial sea or the EEZ, the other normative challenge still remains. That is the lack of mutual understanding about how maritime zones in the South China Sea ought to be divided. As the nature of the rights recognized for non-coastal states depends on the type of maritime zones in question, this is a prominent challenge related to the stability of the freedom of navigation.

One reason for the division of maritime zones in the South China Sea being so complicated is the so-called *nine-dash line* claimed by China, the specific contents of which are uncertain. Judging from China's statements so far, it does not seem to be the case that it positions the whole marine area surrounded by that line as being its territorial sea. For example, the white paper on the South China Sea, released by the State Council Information Office of the People's Republic of China the day after the arbitration award was made in July 2016, said that China claims that it has, based on the Nanhai Zhudao (the South China Sea Islands), the territorial sea, the EEZ, and the continental shelf, etc.⁶⁰⁾ The same white paper also refers to China's historical rights in the South China Sea. With those in mind, one could argue that the grounds for the maritime interests claimed by China were dual-structured, being both UNCLOS rights and historical rights. In other words, China seems to be implying a structure in which the rights it cannot get from UNCLOS can be supplemented by history.

Incidentally, according to a report, there was a meeting between the US Department of State and the Chinese Ministry of Foreign Affairs behind closed doors in August 2017, in which the Chinese side put forward the concept of the *Four Sha* to replace the nine-dash line.⁶¹⁾ While the specific contents of that concept are unclear, it can be interpreted as the conceptualization of the rights

claims of the territorial sea and the EEZ based on China's sovereignty claim over the Nanhai Zhudao (the South China Sea Islands), as referred to by the white paper mentioned above. Regarding the Paracel (Xisha) Islands, China has treated them as a single geographical unit and drawn baselines around it straightly, from which the breadth of the territorial sea was measured. One can view the concept of the Four Sha as China's attempt to assert maritime claims in the South China Sea by extending the same formula to the other island groups.⁶²⁾

Indeed, UNCLOS does entitle archipelagic states to measure the breadth of the territorial sea and the EEZ, etc., from archipelagic base lines, a line surrounding an archipelago as a whole, if "a group of islands, including parts of islands ... are so closely interrelated."⁶³⁾ Also, in those cases "where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity," UNCLOS allows the application of straight baselines in exceptional instances.⁶⁴⁾ However, it goes without saying that China is not an archipelagic state but a continental nation; moreover, its enclosure of the various geographical features sprinkled throughout the islands using a system of straight baselines can be viewed as an abuse of the system. Even the arbitration award made clear that the Spratly (Nansha) Islands cannot "be enclosed within a system of archipelagic or straight baselines ... and accorded an entitlement to maritime zones as a single unit."⁶⁵⁾ Accordingly, based on that award, the claim of the Four Sha can be regarded as being devoid of a legal foundation. On the other hand, some have pointed out that China could give up its unique terminology of the nine-dash line and replace it with an assertion of rights couched in more amicable terms from UNCLOS with a view to tempering criticisms from other countries and creating a new interpretation of the treaty.⁶⁶⁾ Either way, no matter which concept is referred to—the nine-dash line or the Four Sha—the contents of China's claims are unclear, and it cannot be determined exactly how China is dividing up the area, that is, which maritime areas it considers to be its territorial sea, which are the EEZ, and so forth.

Another reason for the difficulty of attaining mutual understanding about the division of the South China Sea maritime zones is the vagueness of the legal status of the various geographical features dotting the waters there. Based on the stipulations of UNCLOS, formations recognized as *islands* can generate not only the territorial sea but also the EEZ and the continental shelf. On the other hand, those formations regarded as *rocks* can generate only the territorial sea, while

low-tide elevations that become submerged at high tide cannot generate even the territorial sea around them with an exception. Despite those definitions, the criteria defining what constitutes *islands* are not clear. If there are indeed several *islands* in the South China Sea, entitling their sovereign state to create the EEZ and the continental shelf around them, then that would be considered sufficient backing to cover the vast extent encompassed by China's nine-dash line.⁶⁷⁾ It can be pointed out that China's large-scale and rapid reclamation carried out since 2013—when the Philippines initiated procedures to bring its disputes with China to arbitration—resulted from its scheme to obfuscate the judgment of whether such geographical features were islands or not, leaving open the path for it to claim the EEZ and the continental shelf around them, thereby beefing up the legality of its nine-dash line claim.

It is noteworthy, insofar as the legal status of the geographical features in the region are concerned, that the arbitration award concluded that the Spratly (Nansha) Islands did not constitute *islands*. The award, at least as it pertained to the Spratly (Nansha) Islands area, opened the possibility of dividing up the maritime zones objectively, and is significant in having left more the high seas than had been supposed. Still, it is unclear how much the claimants will implement policies based on the award. Problems that make it difficult to establish clearly organized maritime zones, where the rights recognized for non-coastal states change, would be factors destabilizing the freedom of navigation in the South China Sea.

(3) The Diversification of Physical Challenges

Normative challenges are not the only matters casting a shadow on the freedom of navigation in the South China Sea; there are also physical challenges that could potentially harm the safe navigation of vessels there. While a typical example of such a challenge is piracy and armed robbery against ships, the risk in the South China Sea area is diversifying, owing to the disputes of the maritime rights and interest among the littoral countries there, triggered by changes in the maritime regime. As a matter of fact, some have pointed out a new challenge emerging in the South China Sea in the form of the “strategic triangle,”⁶⁸⁾ stemming from China's large-scale, rapid reclamation of islands in the area and their subsequent militarization.

The “strategic triangle” refers to the triangular formation composed of the

Spratly (Nansha) Islands, Paracel (Xisha) Islands, and Scarborough Shoal at the three points of the triangle.⁶⁹⁾ Not only do China’s reclamation efforts in the Spratly (Nansha) Islands would give them room to beef up the legality of its nine-dash line claim by leaving open the path for them to create the territorial sea and the EEZ around geographical features, as mentioned above, but also allow it to acquire a so-called *unsinkable aircraft carrier*. Part of the reclaimed area has been developed into a 3,000-meter-class runway along with port facilities, and structures such as radar facilities have been found in certain spots.⁷⁰⁾ At a hearing of the US House Committee on Armed Services in April 2017, US Pacific Command (PACOM) Commander Adm. Harry B. Harris Jr. said that China was expected to complete seventy-two fighter aircraft hangars and about ten larger

Figure 1.2. The “strategic triangle”



hangars that could support bombers by the end of the year, and warned about the further militarization of the Spratly (Nansha) Islands, pointing out the possibility of China's also deploying long-range surface-to-air missiles there.⁷¹⁾

The second point of the triangle is the Paracel (Xisha) Islands, the sovereignty over which Vietnam also asserts. Ever since the Sino-Vietnamese War of 1974, China has controlled the whole area. In 2012, China established the municipal government of Sansha City, Hainan Province on Woody Island, the largest geographical formation in the islands, for the administration of the Xisha, the Nansha, and the Zhongsha, also building a 2,400-meter-class runway and large-scale port facilities.⁷²⁾ It is also believed to have built sixteen fighter aircraft hangars and four larger hangars, along with deploying surface-to-air missiles; some have pointed out that Woody Island thus also serves as a model for the militarization of the Spratly (Nansha) Islands.⁷³⁾ China is also promoting the *civilianization* of the Paracel (Xisha) Islands, not only operating tours to the islands but also recently building a new movie theater there.⁷⁴⁾ One could argue that China will also aim to boost its civilian presence in the reclaimed Spratly (Nansha) Islands as well in the future.

The third point in the triangle is Scarborough Shoal, which is also claimed by the Philippines as sovereign territory. China showed its presence in the area in 2012, after which it permanently stationed vessels from the China Coast Guard, putting it under Chinese control. At the same time, however, China has not yet begun the reclamation or militarization of the shoals, although one cannot deny the possibility in the future. In March 2017, it was reported that the mayor of Sansha City had declared that plans were being made to prepare for the construction, by the end of the year, of environmental monitoring stations on several geographical features in the area, including Scarborough Shoal.⁷⁵⁾ If China begins reclaiming Scarborough Shoal toward the realization of the strategic triangle, it will have crossed a line, according to some experts,⁷⁶⁾ so future developments are deserving of attention.

Heightened concern about the emergence of the “strategic triangle” has led to the expectation of the onset of a new phase in the challenge of the freedom of navigation in the South China Sea. If the China People’s Liberation Army (PLA) and law enforcement agencies become mobilized and permanently stationed on the reclaimed islands as bases, the surrounding waters will see an increase in China’s ISR capabilities, as well as a reinforced ability to carry out various operations. Moreover, there are concerns that China will set up an Air Defense Identification Zone (ADIZ) in the skies over the South China Sea just as it has in the East China Sea. If it comes to that, it is feared that a situation will result in which operation by vessels in the South China Sea will have to submit to Chinese-led principle rather than following the principle of the freedom of navigation.

(4) Toward Upholding the Freedom of Navigation

Amidst the historical background of changes to the maritime regime, the freedom of navigation in the South China Sea has come up against a diverse, complicated set of challenges. If the fundamental principles of the maritime regime are challenged, the rules-based maritime order will also become destabilized, quite possibly ending up shaking the very foundations of the security of the sea. That situation highlights the importance of engaging in an effort to continue maintaining the sea as an open, free, and peaceful space.

In his keynote speech delivered at the Thirteenth International Institute for Strategic Studies (IISS) Asia Security Summit (Shangri-La Dialogue) in May 2014, Japanese Prime Minister Shinzo Abe argued for the thorough compliance to three principles of the rule of law at sea in order to achieve those goals, namely: (1) that states shall make and clarify their claims based on international law, (2) that states shall not use force or coercion in trying to drive their claims, and (3) that states shall seek to settle disputes by peaceful means.⁷⁷⁾ Also, strategic documents successively released by the United States, the United Kingdom, and France in 2014 and 2015 concerning maritime security emphasized that they would not recognize the assertion of non-rules-based rights in a way that could restrict the freedom of navigation, so as to protect the safety of the sea.⁷⁸⁾

In that context, the United States’ FONOPs have come to draw attention. Carried out as part of the Freedom of Navigation Program drawn up by the United States in 1979, FONOPs are staged around the world. Starting in October 2015, when the USS *Lassen*, an Aegis guided missile destroyer, started operating near

Subi Reef and Mischief Reef in the Spratly (Nansha) Islands, the FONOPs suddenly began to capture attention as a ploy by the United States to check China's assertiveness into the South China Sea. According to reports, the Trump administration carried out its first such operation in the vicinity of Mischief Reef in May 2017, and since then it appears to have carried out a total of five FONOPs, the last being in the vicinity of Scarborough Shoal in January 2018.⁷⁹⁾ Some have even called for an enhancement of future FONOPs through such means as increasing the number of vessels taking part in the operations.⁸⁰⁾

Freedom of Navigation Program

The US Freedom of Navigation Program consist of two lines of effort which are closely connected with each other: the FONOPs executed by the US Department of Defense (DOD) and the US Coast Guard, and the diplomatic means led by the US Department of State (DOS). Its aim is to demonstrate non-acquiescence of the excessive maritime claims by other countries that could restrict the freedom of navigation and overflight. It also targets allies and partners.⁸¹⁾ Between fiscal 1991 and 2016, FONOPs were carried out against fifty-nine countries and regions,⁸²⁾ and were especially numerous against the coastal states along the SLOC stretching from the South China Sea through the Malacca Strait and on toward the Indian Ocean and the Middle East.⁸³⁾ Also, other operations which do not directly aim to challenge excessive maritime claims by other countries, but could have a secondary effect of challenging such claims, are categorized as Freedom of Navigation-related (FON-related) activities.⁸⁴⁾ The diplomatic measures, moreover, involve requests for other countries to clarify their assertions through diplomatic communications, and in certain cases not just issuing official diplomatic protests but also providing advice so that the other countries' claims would be consistent with international law.⁸⁵⁾ Meanwhile, certain problems have been pointed out about the program, such as the significant reduction in the US Navy fleet size since the end of the Cold War and the lack of "shared vision and priority within the U.S. government interagency community," for example, coordination between DOD and DOS.⁸⁶⁾

The United States has championed the freedom of navigation as a part of its foreign policy ever since the country was founded in 1776.⁸⁷⁾ After World War I, President Woodrow Wilson included the freedom of navigation as one of the Fourteen Points declared in 1918 as his vision for a new international order. The program was initially formalized some six decades later in 1979, under the Jimmy Carter administration, resulting from dramatic changes to the maritime regime as represented by the emergence of the concept of the EEZ. Next, in 1983, after the announcement of the United States Oceans Policy made upon that country's refusal to sign UNCLOS, President Ronald Reagan called for "fair and balanced" rules that would support traditional uses of the oceans, mainly the freedoms of navigation and overflight, while recognizing the rights of other states in the waters off their coasts,

and emphasized that the United States would “not ... acquiesce in unilateral acts of other states designed to restrict ... freedoms.”⁸⁸⁾ Thus, one can regard the US Freedom of Navigation Program as a deeply-rooted, fundamental diplomatic principle inherited in an unbroken fashion from the time of the nation’s founding.

Meanwhile, there are those who regard the current situation, with its excessive interest in FONOPs, as an issue. In the first place, an important characteristic of the Freedom of Navigation Program is to serve as a means of supporting international law, through non-acquiescence in excessive maritime claims asserted by other states that could place restrictions on the freedoms of navigation and overflight, both fundamental principles of the maritime regime.⁸⁹⁾ FONOPs, as a means of sending a message of disagreement or protest so as not to convey the impression of acquiescing to excessive maritime claims, are carried out in combination with a diplomatic approach.⁹⁰⁾ To paraphrase that depiction, the primary purpose of the FONOPs is not to demonstrate the United States’ deterrence, resolve, and not to reassure support for its allies.⁹¹⁾ Given that effect, FONOPs have not been carried out in a grand fashion but are rather low-key, and that is precisely why they have not drawn so much attention despite having had been implemented around the world for so many years.

Professor Peter A. Dutton of the US Naval War College (NWC) and his colleague have demonstrated concern over the way that FONOPs are viewed as a “barometer” of how committed and resolved the United States is toward the South China Sea issues.⁹²⁾ That reflects their worry that the unnecessary politicization of FONOPs, while recognizing the missions’ significance as “a specialized tool to protect discrete legal norms that underpin the order of the oceans,” would overshadow their original significance, and moreover, would obfuscate the message that the United States wants to send.⁹³⁾ Furthermore, they argue that viewing the upholding the freedom of navigation merely through the lens of FONOPs leads to the negative effect of underestimating the presence of the US Pacific Fleet whose ships spent more than the seven hundred ship-days a year in the region.⁹⁴⁾ Another problem being pointed out is that while there may be excessive maritime claims targetable by FONOPs in the Paracel (Xisha) Islands, the situation is not so clear elsewhere, particularly in the Spratly (Nansha) Islands.⁹⁵⁾ That is why Professor Dutton and his colleague have pointed out the

importance for the US Navy to expand and enhance, as necessary, “routine naval operations” consisting with the international law of the sea, such as continually carrying out training and exercises and such activities as gathering intelligence, without being too caught up in FONOPs.⁹⁶⁾

For the United States, it is possible to say that FONOPs have become an appropriate measure to involve in the South China Sea issues while remaining neutral about sovereignty disputes. However, given the current situation in the area, with concerns stemming from the emergence of China’s so-called “strategic triangle,” the nature of the US involvement is increasingly becoming a source of debate. Nonetheless, the two sides in the debate—those advocating an expansion of FONOPs and those emphasizing routine operations—are coming from the same place insofar as they both stress the realization of the freedom of navigation through the continuation of practical efforts based on international law of the sea. For that reason, the question is one of how the presence of the United States should be played out to those ends.

Japan faces similar problems as to the nature of its involvement in the South China Sea. The country has declared that it supports FONOPs by the United States, but has no intention of having the SDF participate in the missions.⁹⁷⁾ That does not mean, naturally, that Japan’s involvement in the South China Sea is passive. As emphasized at the August 2017 meeting of the Japan-US Security Consultative Committee (“2+2”), it is important for Japan to continue to be involved in the South China Sea through “respective activities to support freedom of navigation.”⁹⁸⁾ Also, as was confirmed at the November 2017 Japan-US summit, it is essential to enlist the cooperation of like-minded countries concerning the promotion and establishment of such fundamental values as the rule of law and the freedom of navigation.⁹⁹⁾ Simply put, what is crucial for Japan is to firmly show its presence by continuing to carry out practical operations consisting with international law of the sea with regional countries to embody the freedom of navigation, sharing its significance and benefits among them.

Japan’s Ministry of Defense (JMOD) and the SDF have contributed actively to cooperation in the region so far. Japan has a proven record of continued efforts aimed at capacity building, having also served as co-chair of several expert working groups (EWGs) of the expanded ASEAN Defence Ministers Meeting (ADMM-Plus).¹⁰⁰⁾ In November 2016, moreover, Japan took the initiative in revealing its own vision regarding future cooperation between Japan and ASEAN

on defense matters, entitled the *Vientiane Vision*. It was the first-ever presentation by JMOD and SDF, in a transparent manner, of the full picture of the future direction of defense cooperation with the ASEAN as a whole in priority fields. Not only did the vision talk about capacity building, but it also touched upon the promotion of a shared understanding and experience of international law concerning aviation and maritime security, defense equipment and technology cooperation, joint training and exercises, and others. Through a combination of diversified means, then, the vision aimed to promote defense cooperation that would contribute to the improvement of ASEAN-wide capacity.¹⁰¹⁾

In March 2017, in line with that vision, JMOD and the SDF organized the first-ever personnel training seminar on international law of the sea, holding it in Indonesia.¹⁰²⁾ Similar efforts by Japan to promote the shared understanding and experience of international law began in 2014 in Vietnam and Indonesia, with seminars held on international aviation law. While such efforts have only just begun, they potentially may constitute the first step toward paving the path toward the resolution of normative challenges, through the shared understanding and experience of the significance of the freedoms of navigation and overflight, which not only help realize safe navigation and flights by vessels and aircraft, respectively, but also lead to the maintenance of a safe and secure environment. Through such continued efforts, it is hoped that especially those who enjoy those freedoms—namely, the practitioners in each country who engage in operations at sea and air—will come to develop a shared view.

Besides such an *intangible type* of cooperation, Japan is gradually pursuing more a *tangible type* of cooperation as well. It has donated patrol boats to the Philippines, Malaysia, and Vietnam, and donated two TC-90 JMSDF training planes to the Philippines, thereby contributing to maritime domain awareness (MDA) capacity building on the part of the coastal states in the South China Sea. The unified efforts by the countries in the region to grasp the situation in the strategic area of the South China Sea contribute to the safe navigation of vessels—something that is in the interest not only of the countries in the region but of the international community as a whole.

Also, as was also referred to in the joint declaration by the aforementioned “2+2” meeting, it is also important to carry out bilateral and multilateral joint exercises and training with regional countries for continued involvement in the South China Sea. Japan had carried out joint exercises in the South China Sea

with the United States and Australia before, but added Canada in the holding of the first joint exercises under a quadrilateral framework in June 2017.¹⁰³⁾

Notably, the two Japanese vessels taking part in the joint exercise—the JMSDF escort vessels *Izumo* and *Sazanami*—also engaged in several other missions both beforehand and afterward. Before the joint exercise, both convoy vessels called at Cam Ranh Bay in Vietnam in May 2017 to participate in Pacific Partnership, a program planned and carried out by the US Navy Pacific Fleet, after which they went to the Philippines in June for a vessel inspection by Philippine President Rodrigo Duterte, then carrying out friendship exercises. After the aforementioned quadrilateral exercise in the South China Sea, then, the two vessels passed through the Malacca Strait to take part in Malabar 2017, a trilateral exercise among Japan, India, and the United States, which was held in July. Additionally, as they were passing through the waters near Singapore on their way to the Indian Ocean in June, the Japan-ASEAN Ship Rider Cooperation Program took place aboard the *Izumo* with all ASEAN member countries and the ASEAN Secretariat. The JMSDF's Ship Rider program originally targeted officers and others from participating countries in the West Pacific Naval Symposium (WPNS) for the purpose of promoting mutual understanding and building contact networks,¹⁰⁴⁾ but was amplified as a policy based on the Vientiane Vision, and staged for ASEAN as a whole with a view to sharing the understanding and experience regarding international law of the sea.¹⁰⁵⁾ The three months or so of the various missions by *Izumo* and *Sazanami* were truly an embodiment of the freedom of navigation together with regional countries, and serve as an excellent example of Japan's practical efforts toward the sharing of its significance with them.



The escort vessel JMSDF *Izumo* (right) and the guided missile destroyer USS *Dewey* participating in a Japan-US joint patrol exercise in the South China Sea (U.S. Navy Photo by Mass Communication Specialist 3rd Class Kryzentia Weiermann)

Japan is being called upon to firmly demonstrate its presence in the sea toward upholding the freedom of navigation, while continuing to cooperate with the United States and other countries. Just as Britain and France show their proactive stance toward embodying the freedom of navigation in the South China Sea,¹⁰⁶⁾ all countries that reap

benefits from the sea must also shoulder the responsibilities of keeping them open, free, and peaceful; it is impossible to remain an outsider in the matter. The South China Sea—where various challenges have emerged that possibly cast a shadow on the freedom of navigation, a fundamental principle of the maritime regime—presents to the international community a quandary that impinges upon the very foundation of the security of the sea, and serves as a litmus test related to the stability of a rules-based maritime order.



Scene from the Japan-ASEAN Ship Rider Cooperation Program on board the *Izumo* (Japan Ministry of Defense)

NOTES

- 1) Reuters, July 27, 2017.
- 2) Ministry of Foreign Affairs (MOFA), Japan, Nichibei Shuno Wakinguranchi oyobi Nichibei Shuno Kaidan [Japan-US Working Lunch and Japan-US Summit Meeting], November 6, 2017.
- 3) D. R. Rothwell and Tim Stephens, *The International Law of the Sea*, Hart Publishing, 2016, p. 2.
- 4) Chiyuki Mizukami, *Kaiyoho* [The Law of the Sea], Yushindo, 2005, p. 8.
- 5) Tullilo Treves, “Historical Development of Law of the Sea,” in Donald R. Rothwell et al., eds., *The Oxford Handbook of the Law of the Sea*, Oxford University Press, 2014, p. 3.
- 6) R. Jennings and A. Watts, *Oppenheim’s International Law*, Longman, 1996, pp. 720-721.
- 7) Mizukami, *Kaiyoho* [The Law of the Sea], pp. 10-12.
- 8) Treves, “Historical Development of Law of the Sea,” p. 3.
- 9) Mizukami, *Kaiyoho* [The Law of the Sea], p. 12.
- 10) Hideo Takabayashi, *Ryokai Seido no Kenkyu* [Studies of the Territorial Sea System], Yushindo, 1979, p. 78.
- 11) Ian Brownlie, *Principles of Public International Law*, Oxford University Press, 2008, p. 175.
- 12) *Ibid.*, pp. 174-175; Shigeru Oda, *Kaiyoho no Genryu o Saguru* [Exploring the Origins of the Law of the Sea], Yushindo, 1989, p. 84.

East Asian Strategic Review 2018

- 13) Takabayashi, *Ryokai Seido no Kenkyu* [Studies of the Territorial Sea System], p. 302.
- 14) Rothwell and Stephens, *The International Law of the Sea*, p. 4.
- 15) Takabayashi, *Ryokai Seido no Kenkyu* [Studies of the Territorial Sea System], pp. 286, 288, 299-300.
- 16) Convention on the High Seas, Article 1.
- 17) UN Convention on the Law of the Sea (UNCLOS), Article 87(1).
- 18) *Ibid.*, Article 89.
- 19) Douglas Guilfoyle, "The High Seas," Rothwell et al., eds., *The Oxford Handbook of the Law of the Sea*, p. 206.
- 20) Chiyuki Mizukami, *Haitateki Keizaisuiiki* [Exclusive Economic Zone], Yushindo, 2006, p. 45.
- 21) UNCLOS, Article 58(1).
- 22) UNCLOS, Article 90.
- 23) UNCLOS, Article 58(2).
- 24) Mizukami, *Haitateki Keizaisuiiki* [Exclusive Economic Zones], pp. 58-60.
- 25) Act on the Restriction of Maritime Transportation of Foreign Military Supplies, etc. in Armed Attack Situations (Act No. 116, 2004), Article 2 (ii).
- 26) Akira Kotera, "Haitateki Keizaisuiiki ni okeru 'Gunji Chosa'" ["Military Surveys" in Exclusive Economic Zones], *Kaiyo Ken'eki no Kakuho ni Kakaru Kokusai Funso Jirei Kenkyu: Kaijo Hoan Taisei Chosa Kenkyu Inka Hokokusho* [International Case Study on Securing Marine Interests: Report by the Marine Safety System Research Committee], No. 2, March 2013, p. 53.
- 27) UNCLOS, Article 88.
- 28) R. R. Churchill and A. V. Lowe, *The Law of the Sea*, Manchester University Press, 1999, p. 206.
- 29) UNCLOS, Article 246(2).
- 30) Department of the Navy, *The Commander's Handbook on the Law of Naval Operations* (NWP1-14M/MCWP5-12.1/COMDTPUB P5800.7A), July 2007, para. 2.6.2.2; Sam Bateman, "Hydrographic Surveying in the EEZ: Differences and Overlaps with Marine Scientific Research", *Marine Policy*, Vol. 29, No. 2, March 2005, p. 173.
- 31) Zou Keyuan, "Law of the Sea Issues between the United States and East Asian States," *Ocean Development and International Law*, Vol. 39, 2008, p. 79.
- 32) Kentaro Wani, "Kokuren Kaiyohojoyaku ni okeru 'Gunji Chosa' no Ichi" [Position of 'Military Surveys' in the United Nations Convention on the Law of the Sea], *Handaihogaku* [Osaka University Law Review], Vol. 66, Nos. 3-4, November 2016, p. 619.
- 33) *Ibid.*, p. 629.
- 34) Mizukami, *Kaiyoho* [The Law of the Sea], p. 65.

- 35) UNCLOS, Article 24(1).
- 36) Yoshifumi Tanaka, "Navigational Rights and Freedoms," in Rothwell et al., eds., *The Oxford Handbook of the Law of the Sea*, p. 540.
- 37) UNCLOS, Article 19(1).
- 38) Tanaka, "Navigational Rights and Freedoms," p. 542.
- 39) *Ibid.*, pp. 546-547.
- 40) UNCLOS, Article 20.
- 41) *Ibid.*, Article 25(3).
- 42) *Ibid.*, Article 44.
- 43) Mizukami, *Kaiyoho* [The Law of the Sea], p. 94.
- 44) UNCLOS, Article 38(1).
- 45) *Ibid.*, Article 45(1).
- 46) *Ibid.*, Article 45.
- 47) Department of Defense (DOD), US, *Asia-Pacific Maritime Security Strategy*, August 2015, p. 1.
- 48) Commander U.S. Pacific Fleet, *Australian Strategic Policy Institute Canberra, Australia, Admiral Harry B. Harris Jr., 31 March 2015, as delivered*, March 31, 2015, p. 4.
- 49) Reuters, August 6, 2017.
- 50) Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations, *Declarations and Statements*.
- 51) Reuters, March 10, 2009.
- 52) U.S. Navy Judge Advocate General's Corps, *Maritime Claims Reference Manual*.
- 53) *Ibid.*
- 54) *Chairman's Statement of the 19th ASEAN-China Summit to Commemorate the 25th Anniversary of ASEAN-China Dialogue Relations*, September 7, 2016.
- 55) *The Wall Street Journal*, September 4, 2015.
- 56) Euan Graham, "China's Naval Surveillance off Australia: Good News and Bad," *The Interpreter*, Lowy Institute, July 24, 2017.
- 57) *Law of the Sea of Vietnam*, July 2, 2012, Art. 12(2).
- 58) *Decree of the Government Council of the Socialist Republic of Vietnam on Regulation for Foreign Ships Operating in Vietnamese Maritime Zones*, January 29, 1980, Art. 3(C).
- 59) *Law of the Sea of Vietnam*, Art. 16(2).
- 60) The State Council of the People's Republic of China, "Full Text: China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea," July 13, 2016, para. 70.
- 61) The Washington Free Beacon, September 21, 2017.
- 62) Julian Ku and Chris Mirasola, "The South China Sea and China's 'Four Sha' Claim: New Legal Theory, Same Bad Argument," *Lawfare*, September 25, 2017.
- 63) UNCLOS, Articles 47, 48.

East Asian Strategic Review 2018

- 64) UNCLOS, Article 7.
- 65) *PCA Case N° 2013-19: In the Matter of the South China Sea Arbitration*, July 12, 2016, para. 571-576, especially para. 573.
- 66) Ku and Mirasola, “The South China Sea and China’s ‘Four Sha’ Claim: New Legal Theory, Same Bad Argument.”
- 67) *PCA Case N° 2013-19: In the Matter of the South China Sea Arbitration*, para. 207; Robert C. Beckman, and Clive H. Schofield, “Defining EEZ Claims from Islands: A Potential South China Sea Change,” *The International Journal of Marine and Coastal Law*, Vol. 29, Issue 2, 2014, pp. 193-243.
- 68) Yoji Koda, “Japan’s Perceptions of and Interests in the South China Sea,” *Asia Policy*, January 2016, No. 21, pp. 29-35.
- 69) *Ibid*, p. 30.
- 70) Ministry of Defense, Japan (MOD), “Minamishinakai ni okeru Chugoku no Katsudo” [China’s Activities in the South China Sea], December 2016; Office of the Secretary of Defense, *Annual Report to Congress: Military and Security Developments Involving the People’s Republic of China 2017*, May 2017, pp. 12-16.
- 71) House Armed Services Committee on U.S. Pacific Command Posture, “Statement of Admiral Harry B. Harris Jr., U.S. Navy Commander, U.S. Pacific Command Before the House Armed Services Committee on U.S. Pacific Command Posture,” April 26, 2017, p. 8.
- 72) MOD, “Minamishinakai ni okeru Chugoku no Katsudo” [China’s Activities in the South China Sea].
- 73) “Update: China’s Continuing Reclamation in the Paracels,” CSIS AMTI, August 9, 2017.
- 74) Reuters, March 3, 2017; Reuters, August 1, 2017.
- 75) Reuters, March 2017.
- 76) Jay Batongbacal, “Scarborough Shoal: A Red Line?” CSIS AMTI, April 25, 2016.
- 77) MOFA, “Dai 13-kai Ajia Anzen Hosho Kaigi (Shangurira Daiarogu) Abe Naikaku Soridaijin no Kicho Koen” [The 13th Asian Security Council Shangri-La Dialogue Keynote Speech by Prime Minister Abe], May 30, 2014.
- 78) DOD, *Asia-Pacific Maritime Security Strategy*; HM Government, *The UK National Strategy for Maritime Security*, May 2014; République Française Premier Ministre, *National Strategy for the Security of Maritime Areas*, October 2015.
- 79) Reuters, May 25, 2017; Reuters, July 3, 2017; Reuters, August 10, 2017; Reuters, October 11, 2017; Reuters, January 20, 2018.
- 80) James Kraska, “The Struggle for Law in the South China Sea,” *Statement of Professor James Kraska Before the Seapower and Projection Forces Subcommittee Hearing on Seapower and Projection Forces in the South China Sea*, September 21, 2016, pp. 9-13.
- 81) DOD, *Freedom of Navigation (FON) Program*, February 28, 2017; DOS, *Maritime*

- Security and Navigation*; Jonathan G. Odom, “How the U.S. FON Program is Lawful and Legitimate,” CSIS AMTI, October 30, 2015.
- 82) DOD, *Annual Freedom of Navigation (FON) Reports*.
- 83) Lowy Institute, *History of US Freedom of Navigation Operations*.
- 84) DOD, *Freedom of Navigation Program Fact Sheet*.
- 85) Odom, “How the U.S. FON Program is Lawful and Legitimate.”
- 86) Kraska, “The Struggle for Law in the South China Sea,” pp. 10, 12-13.
- 87) Mira Rapp-Hooper, “Freedom of Navigation in the South China Sea Is Business as Usual,” *Center for a New American Security*, October 12, 2015.
- 88) *Statement on United States Oceans Policy*, March 10, 1983.
- 89) DOD, *Freedom of Navigation (FON) Program*; DOS, *Maritime Security and Navigation*; Odom, “How the U.S. FON Program is Lawful and Legitimate.”
- 90) *Ibid.*
- 91) Bonnie S. Glaser, Zack Cooper, and Peter A. Dutton, “Mischief Reef: President Trump’s First FONOP?” *CSIS Commentary*, November 30, 2016.
- 92) Peter A. Dutton and Isaac B. Kardon, “Forget the FONOPs: Just Fly, Sail and Operate Wherever International Law Allows,” *Lawfare*, June 10, 2017.
- 93) *Ibid.*
- 94) *Ibid.*
- 95) *Ibid.*
- 96) *Ibid.*
- 97) *Nihon Keizai Shimbun*, November 22, 2015; *Nihon Keizai Shimbun*, February 6, 2017.
- 98) MOFA, “Nichibei Anzen Hosho Kyogi Iinkai Kyodo Happyo (kariyaku)” [Joint statement of the Japan-US Security Consultative Committee], August 17, 2017.
- 99) MOFA, Japan, Nichibei Shuno Waakinguranchi oyobi Nichibei Shuno Kaidan [Japan-US Working Lunch and Japan-US Summit Meeting], November 6, 2017.
- 100) MOD, Takoku-kan no Anzen Hosho Kyoryoku Taiwa: Nichi-ASEAN Boei Kyoryoku [Multilateral Security Cooperation and Dialogue: Japan-ASEAN Defense Cooperation].
- 101) MOD, “Vientiane Vision: Japan’s Defense Cooperation Initiative with ASEAN.”
- 102) MOD, “Indonesia ni taisuru Kaiyo Anzen Hosho (Kokusai-ho) Bun’ya ni kansuru Noryoku Kochiku Shien Jigyo ni tsuite” [Concerning Capacity Building Cooperation with Indonesia Related to Maritime Security (International Maritime Law)], March 17, 2017.
- 103) Maritime Staff Office, “Nichibeigoka Kyodo Junko Kunren no Jisshi ni tsuite” [Concerning Japan, the United States, Australia, and Canada Multilateral Exercise], June 12, 2017.
- 104) MOD, “Heisei 28-nendo-ban Boei Hakusho,” [Defense White Paper 2016], p. 332.
- 105) MOD, “Nichi-ASEAN Jokan Kyoryoku Puroguramu no Jisshi ni tsuite” [Concerning

East Asian Strategic Review 2018

the Japan-ASEAN Ship Rider Cooperation Program], June 19, 2017.

- 106) Reuters, July 27, 2017; Jean-Yves Le Drian, “Fourth Plenary Session: The Challenges of Conflict Resolution,” 15th Asia Security Summit, The IISS Shangri-La Dialogue, June 5, 2016.

Chapter 1 authors: Yu Harada (lead author, Section 3)

Seiya Eifuku (Sections 1 and 2)