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US-Japan Alliance:
Addressing the Threat of Legal Warfare**

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Freedom of Navigation and the US-Japan Alliance: Addressing the Threat of Legal Warfare

Tetsuo Kotani

“FREEDOM OF NAVIGATION” has become a key phrase in Asian security. The notion of free navigation has its roots in ancient Rome, when the seas were regarded as being common to all men. During the Age of Discovery, the notion of free navigation was widely accepted as part of the freedom of the high seas. In the 19th century, the rights and obligations of neutral states at sea were clarified in international treaties, following which freedom of navigation was recognized as the customary international law.

Freedom of navigation was one of the founding principles of the United States. The causes of American independence and freedom of navigation were intertwined. The United States continued to fight to ensure freedom of navigation after its independence as well, most notably in the Quasi-War with France, the Barbary Wars in the Mediterranean, and the War of 1812 with Britain. President Woodrow Wilson included freedom of navigation in his Fourteen Points, and President Franklin Roosevelt, together with British Premier Winston Churchill, emphasized the importance of free navigation in the Atlantic Charter. For the United States, freedom of navigation means the right of all nations to freely transit the seas in peacetime, as well as the rights of neutral states to trade with other neutral states during wartime.¹



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For Japan, freedom of navigation is also fundamental to the country's national security. Japan is a trading nation and seaborne shipping carries 99.7 percent of its overall trade by volume.² According to Japanese figures on its maritime seaborne trade in 2008, Asia accounted for 29.8 percent of that trade, Oceania 25.4 percent, the Middle East 23.3 percent, North America 7.9 percent, Central and South America 6.8 percent, Europe 3.9 percent, and Africa 2.9 percent.³ Thus, the maritime highway along the Eurasian rim literally constitutes the lifeline of the Japanese economy and the security of this maritime lifeline is a primary mission for the Japan Maritime Self-Defense Force (MSDF). Freedom of navigation is essential for military operations as well. US strategic mobility is the key to the US-Japan alliance and US reinforcements would need to travel across the seas to reach Japan in a wartime scenario. Securing the sea lines of communication is thus another primary mission for the MSDF.

Under the US-Japan alliance, the United States provides extended deterrence and long-range sealane protection for Japan, while Japan provides bases so that the United States can maintain its regional presence and strategic mobility. Thus freedom of navigation, especially in the international straits and exclusive economic zones (EEZs), is one foundation of the US-Japan alliance. However, this foundation is now endangered by the excessive claims being made by littoral states.

UNCLOS and Legal Warfare

The UN Convention on the Law of the Sea (UNCLOS) is often referred to as the “constitution for the world's oceans.” By defining states' rights and obligations in the maritime domain, it maintains a balance between the rights of maritime powers that seek unimpeded navigation in world waters and the

interests of coastal states that demand broader jurisdiction over their waters.⁴

However, coastal states often strive to expand their jurisdiction beyond their territorial waters. Some states persist in making a series of excessive maritime claims as part of a sea denial strategy. An example is China's claim that foreign warships must obtain Chinese permission to undertake innocent passage through its territorial seas. Iran, meanwhile, claims excessive straight baselines that convert international waters into Iran's territorial seas and it prohibits foreign military “activities and practices” in its EEZ. Some states attempt to impose excessive unilateral environmental standards on transiting vessels on the pretext of “environmental nationalism” or even “high seas environmental protection.” These states wage a form of persistent and patient “legal warfare” to renegotiate the very essence of freedom of navigation.

This legal warfare is an attempt by coastal states to increase the waters that are under their jurisdiction, while restricting other maritime powers' freedom of navigation, especially in EEZs. Whether UNCLOS can continue to serve as the basis for order at sea will depend on the outcome of this ongoing “struggle for law” in the oceans.⁵

China's Legal Warfare

Today's geopolitics in Asia can be described as a power struggle over EEZs. Ever since the Western powers reached the Far East in the 15th century, the possession of the island chains along the Asian continent and regional waters such as the Yellow Sea and East and South China Seas was considered the key to regional dominance. However, the age of imperialism is long gone and states now refrain from expanding their territories by force. China therefore seeks to establish sea control of those regional waters as a means to obtain regional dominance. Since those

regional waters consist of littoral states' EEZs, China conducts legal warfare to claim uninhabited islands as EEZ base points. The Senkaku collision incident in September 2010 should be understood in this context.

China's legal warfare is part of its broader anti-access strategy. China's domestic law guarantees freedom of navigation in its EEZ but denies the freedom in China's "historic waters." China's EEZ claims are based on the historical "occupation" of the waters in the Yellow Sea, East China Sea, and South China Sea. China thus does not accept surveillance or survey activities by foreign military vessels in its EEZ and fails to recognize the airspace above its EEZ as international airspace.⁶ This type of behavior precipitated the Hainan EP-3 incident in 2001 (when Chinese fighter jets collided with a US intelligence aircraft and forced it to land) and the USNS Impeccable incident in 2009 (when a US military vessel was harassed by Chinese naval and enforcement ships and aircraft). In this way, legal warfare to restrict freedom of navigation in international waters can easily escalate into a regional armed conflict.

On the other hand, China is conducting intense maritime activities in Japanese EEZs in the East China Sea and the Philippine Sea. China claims the entire East China Sea as its EEZ on the grounds that the continental shelf extends from the Chinese coast through to the Okinawa Trough, while Japan insists on a demarcation based on the median line between the Chinese and Japanese coasts. Japan and China agreed on prior notification regarding scientific surveys in the East China Sea in 2001, but China has continued to conduct unreported maritime surveys in Japanese EEZs. China has tried to justify its scientific surveys in the Japanese EEZ around Okinotorishima Island on the grounds that it is just a rock rather than an island, thereby negating Japan's claim to an EEZ there. It appears that China may be conducting those

surveys to identify seabed resources or to map the sea bottom for submarine operations.

Japanese defense planners have been very concerned about Chinese naval activities in and around Japanese waters. For instance, a Chinese nuclear submarine was found in Japanese territorial waters near Ishigaki Island in November 2004, and Chinese squadrons passed through the Tsugaru Strait in November 2008. China conducted a demonstration cruise with 10 warships, including two submarines, through the international waters of Miyako Channel, between Mainland Okinawa and Miyako Island, in April 2010. During the cruise, Chinese helicopters buzzed MSDF destroyers that were monitoring the fleet. The Chinese fleet conducted similar cruises through the Miyako Channel in June and November 2011.

Similarly, China's legal warfare has led to high tensions in the South China Sea. China claims sovereignty within a "nine-dotted line"—a U-shaped demarcation in the South China Sea that has no basis in international law. Chinese "marine surveillance" and "fishery control" boats protect Chinese fishermen in this region while intimidating other countries' fishing boats with the threat or even the use of force. Other claimants, especially Vietnam and the Philippines, have responded harshly with live-fire exercises.

The United States is also concerned about China's assertiveness and has called for the peaceful resolution of territorial disputes in the South China Sea, emphasizing its interest in the freedom of navigation. At the East Asia Summit in Bali in November 2011, the United States reiterated the importance of freedom of navigation and commerce and appealed for a peaceful resolution based on international law.

China has not rejected dialogue with other South China Sea claimants out of hand. It signed the 2002 Declaration on the Conduct of Parties in the South China Sea (DOC), which calls for peaceful solutions

through dialogue. Given the US determination to stand firm on this issue, China agreed with ASEAN on adopting guidelines to implement the DOC before the ASEAN Regional Forum in July 2011, and it hinted that it would be willing to start negotiations on a legally binding code of conduct at the November 2011 East Asia Summit.

Japan has its own strategic interests in the South China Sea, which is a critical sea lane through which 90 percent of its imported oil passes. The military balance in the South China Sea also has an impact on security in Japan's surrounding waters. Tokyo thus revised its common strategic objectives with Washington in June 2011 to include the maintenance of maritime security and freedom of navigation by promoting relevant customary international law.⁷ Japan also proposed an East Asia Maritime Forum to discuss issues regarding freedom of the seas at the 2011 East Asia Summit, although it was premature to do so.

Proposals for the US-Japan Alliance

Today, the growing global economy depends on free and fair access to the maritime domain, through which 90 percent of all trade is transported.⁸ US military operations also require stability in the maritime domain, and the United States has guaranteed the free and fair use of the maritime commons. Given the ongoing Chinese legal warfare in the western Pacific, Japan and the United States need to work together to ensure free and fair access to the global maritime commons by promoting the universal concept of freedom of navigation in Asia Pacific.

Many Asian littoral states share in the Chinese interpretation of the current laws and do not welcome foreign military surveillance activities in their EEZs.⁹ There have been constant attempts to restrict military activities in foreign EEZs. For example, the Tokyo-based Ocean Policy Research Foundation (OPRF)

published guidelines for navigation and overflight in EEZs in 2005, which calls for the restriction of surveillance and other military activities in foreign EEZs.¹⁰ The OPRF regarded those military activities as a source of conflict and proposed those guidelines as confidence-building measures. But EEZs now account for 40 percent of world's waters, and if military activities in those EEZs were restricted, that would lead to an increased level of unpredictability and uncertainty and, as a result, would destabilize regional security. In the context of the US-Japan alliance, if the US military cannot conduct surveillance in other countries' EEZs, that would restrict US strategic mobility and undermine the credibility of the US security umbrella.

Greater Joint Leadership on Freedom of Navigation Issues

In order to promote a universal interpretation of freedom of navigation, Japan and the United States should push to prioritize maritime issues in multilateral forums such as the East Asia Summit. This would entail working to convince countries in the region of the benefits of freedom of navigation as a community right while emphasizing respect for sovereign rights of littoral states over maritime resources.

To play such a leadership role, however, the United States should ratify UNCLOS as soon as possible. Despite the fact the United States follows the UNCLOS regime, Washington cannot persuade other nations to accept UNCLOS when it remains outside the treaty. One step that may help is for Japan's political leaders to discuss the benefits of UNCLOS ratification with US Senators when they meet in US-Japan parliamentary exchanges.

Enhanced Coordination of Policy

Japan also needs to clarify its interpretation of freedom of navigation in order to take greater leadership

in promoting it. Japanese policy planners recognize the importance of US surveillance activities in foreign EEZs but worry about Chinese surveillance in Japan's EEZs. Undoubtedly, no matter what Japan does, China will continue to conduct surveillance activities in Japan's EEZs. One underappreciated benefit, however, is that this gives Japan a good opportunity to monitor China's naval capabilities. In light of this, the Japanese Cabinet Secretariat's Headquarters for Ocean Policy should take the lead and make a statement that Japan accepts surveillance by foreign militaries in Japan's EEZs. This will do nothing to hurt Japan materially, while helping it make a more principled case for US surveillance activities in China's EEZs and elsewhere, which ultimately serves Japan's interests.

Launch Joint Freedom of Navigation Program

The United States is the only nation that has a freedom of navigation program, but its operational tempo is decreasing. To counter legal warfare, Japan and the United States should conduct a joint freedom of navigation program to challenge excessive claims by littoral states. Japan and the United States should jointly list up states that have excessive claims in

the East and South China Seas, and Japan's Foreign Ministry and the US State Department should apply diplomatic pressure on the claimants in a coordinated manner, both bilaterally and multilaterally. The two governments' militaries also should conduct maneuvers that physically challenge these excessive claims.

Conclusion

Japan and the United States have a special responsibility to promote freedom of navigation in Asia. Imperial Japan sought regional dominance, endangering the freedom of navigation in the western Pacific and opening up hostilities with the United States. The United States conducted commercial raids by sinking Japanese merchant ships to defeat Japan. The Pacific War thus clearly showed that impediments to free navigation can result in human tragedy.

Freedom of navigation is not only a foundation of the US-Japan alliance, but also a core value of the alliance. In order to avoid another human catastrophe, Japan and the United States should address the threat of legal warfare by pursuing greater coordination in their policies on free navigation and by jointly promoting the concept of free navigation in the region.

NOTES

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7. The joint statements of the US-Japan Security Consultative Committee are available at <http://www.mofa.go.jp/region/n-america/us/security/scc/index.html>.
8. See, for example, Barry Posen, “Command of the Commons: The Military Foundation of U.S. Hegemony,” *International Security* 28, no. 1 (Summer 2003); Michele Flournoy and Shawn Brimley, “The Contested Commons,” *U.S. Naval Institute Proceedings* 135, no. 7 (July 2009); Abraham M. Denmark et al., eds., *Contested Commons: The Future of American Power in a Multipolar World* (Washington DC: Center for a New American Security, 2010).
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10. EEZ Group 21, Ocean Policy Research Foundation, “Guidelines for Navigation and Overflight in the Exclusive Economic Zone” (September 16, 2005), http://www.sof.or.jp/en/report/pdf/200509_20051205_e.pdf.

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