



Australian
National
University

“Maritime Security: Preserving Access to Sea Lanes in Southeast Asia”

Workshop Report

Workshop held at:

The Keypoint, 20 June 2018
S. Rajaratnam School of International Studies (RSIS)
Nanyang Technological University, Singapore

Organised by:

Centre for Military and Security Law
ANU College of Law
and
Institute of Defence and Strategic Studies
RSIS

Introduction

On 20 June 2018, the Australian National University College of Law's Centre for Military and Security Law (CMSL), in co-operation with the Institute of Defence and Strategic Studies, S. Rajaratnam School of International Studies (RSIS), Nanyang Technological University conducted a workshop on maritime security.

The purpose of the workshop was to bring together a number of experts to discuss maritime security issues in the Southeast Asia region, which will inform the production and publication of an academic paper. An agenda, and list of workshop attendees, is attached to this report.

Background

The research project into maritime security issues was made possible through a grant provided to the CMSL from BlueScope Steel Limited (BSL). The focus of the project is to consider some of the key legal issues that are relevant to the preservation of access to sea-lanes in Southeast Asia. The final product of the research project will be an academic paper that identifies and discusses maritime security issues that have the potential to interfere with shipping throughout the region.

Due to Singapore's vital strategic location and its leading role in maritime commerce, it was determined that cooperation with the RSIS would provide significant insight and assistance in the development of the project, as well as access to an interdisciplinary academic network which included legal, international relations and strategic studies scholars.

The key legal framework for much of the discussion was the international law of the sea, as codified in the 1982 UN Convention on the Law of the Sea (UNCLOS). It is generally accepted that the operative elements of UNCLOS represent customary international law, and are therefore binding on all States as a matter of international law – regardless of whether the State is party to UNCLOS. Significantly, UNCLOS sets out the manner in which claims to maritime zones can be made by States, as well as specifying the applicable passage regimes for vessels in those zones.

The workshop was held at the Nanyang Technological University on Wednesday 20 June 2018, and conducted under the Chatham House Rule.

Introduction to the Workshop

Associate Professor David Letts, the Director of CMSL, welcomed participants to the Workshop and thanked them for attending. He explained the background to the research project and set the scene for the day's discussion which was divided into three sessions with each session containing two separate thematic issues.

Session 1: The Strategic Setting

The first presenter on the program led the workshop by discussing the emerging political environment in the region, noting that the distinction between communism and capitalism has virtually disappeared in the region, with most states embracing capitalism to various extents.

Whilst there are a variety of forms of government, the majority of states are governed by authoritarian regimes that recognize the benefits of regional stability and access to international markets.

Much of the initial discussion was focused on the Belt and Road Initiative (BRI), and the Maritime Silk Road (MSR), a development strategy launched by the Chinese government with the intention of reviving ancient land and sea trade routes linking China and South-East Asia to Europe, Africa and the Middle East. This mega project, which will require some USD\$2.8 trillion in infrastructure investment along the proposed routes, was presented as both an issue of political concern and opportunity to the region.

One of the notable concerns expressed in relation to BRI was the threat of growing Chinese influence in the region. Although it was noted that China does not officially require that conditions be attached to development and trade assistance, it was acknowledged that the provision of large sums of funding is generally accompanied by implicit requirements and expectations.

Another concern respecting the BRI was the rise of political instability in some areas along the proposed route of the BRI. Specific mention was made of the potential for instability in Thailand, Malaysia, Egypt and Turkey. Because of the strategic locations of those states, it is believed that instability in the countries could pose a threat to the flow of trade through their territory, either by land or sea routes.

One of the aspects of the BRI will also be the development of Asian rivers in order to make them navigable to large commercial vessels. One such project is the Mekong River Development Project, which will virtually transform the river, turning it essentially into a series of canals and lakes that will be optimized for electrical generation and shipping. The impacts of the project are already being felt, with a significant water shortage experienced in Vietnam in 2016 as a direct result of Chinese control of the Mekong's water flow from upstream dams. Such activity has the potential to be ruinous for fish, fishermen and farmers along the lower parts of the river.

The first presentation concluded with the observation that the BRI will provide substantial economic opportunities for the region, but noted that the project will also bring significant challenges, both in the matter of increasing Chinese hegemony, and potential environmental alteration that will be a part of the over-all program.

Session 2: Navigation Regimes: Threats and Challenges

The second speaker discussed maritime passage regimes, particularly in contested areas. Focusing primarily on the regime of innocent passage, consideration of the effect on innocent passage in areas where there are disputes over sovereignty, and similar issues that arise when considering the status of maritime features to determine if such a feature should be properly classified as a rock or an island and the implications that flow from such designation.

Discussion on this matter moved toward the issue of freedom of navigation (FON) activities that are regularly conducted in disputed areas. While it was noted that there is tension in the region, it was pointed out that such tension only applies to military activities in each states' claimed maritime zones, and in particular to navigation and overflight by military/government aircraft and vessels.

Setting the issue of resource exploitation aside, it was noted that China in particular, has never interfered with commercial shipping conducting innocent passage through any of its claimed territorial seas. In fact, it was assessed as being counter-productive to freedom of trade in the region for any State to contemplate such interference with maritime passage. Thus, while there may be disputes surrounding military activities in claimed territorial waters, there was a consensus that current activities in the South China Sea, including those of China, do not have any appreciable impact on commercial shipping through the region, and that it would not be in any State's interest for such impact to occur in the future.

Session 3: Maritime Security Issues

The third presenter's topic was maritime security, particularly piracy and other forms of maritime crime that occur in the region. While it was noted that there has been a world-wide decrease in piracy incidents over the past number of years, piracy and maritime crime (particularly against ships at anchor) both remain a threat to shipping along the length of the proposed MSR. It was noted that the decrease in piracy has been the result of increased military and coast guard cooperation and operations, the effects of which have been particularly notable in the Indian Ocean Region. The decrease in piracy incidents in the Indian Ocean also coincided with the increasing employment of Privately Contracted Armed Security Personnel (PCASP) on commercial vessels.

From there the discussion focused on the employment of PCASP to protect shipping in the SE Asia region. Lively discussion focused on the legality of using PCASP on board commercial vessels and whether coastal states have jurisdiction to prohibit the employment of PCASP on vessels that are conducting passage through the various maritime zones encountered along the proposed MSR.

Session 4: Implications Arising From Automation and New Technologies

The fourth presenter identified a number of legal issues that have arisen, or will arise, as a result of the use of autonomous vessels. Some of these issues challenge the very foundational aspects of the law of the sea, such as whether an autonomous vessel can be considered to be a ship under UNCLOS. Questions as to who is the master of an autonomous vessel, whether autonomous vessels require pilots, and how ports may have to amend procedures to deal with autonomous ships were discussed.

The development of autonomous vessels is clearly a matter of interest for companies like BSL that rely heavily on maritime trade, as there are obvious cost benefits that can be realised if the

legal and operational obstacles involved in the development of these vessels can be successfully overcome. Although few answers on the myriad of issues surrounding autonomous vessels were offered, the presentation highlighted the fact that the advent of autonomous vessels will necessitate a review of existing legal frameworks to ensure that the laws surrounding commercial shipping remain current and relevant.

Session 5: The Role of States and Regional Institutions Including ASEAN and the Proposed Code of Conduct

During the fifth session, the role of States and regional institutions, and the prospect for finalisation of the proposed ASEAN-China Code of Conduct (CoC) for the South China Sea, was examined. A negotiating framework for the CoC was agreed in Manila on 6 August 2017 by the foreign ministers of ASEAN and China, and it has three primary objectives:

1. establish a rules-based framework containing a set of norms to guide the conduct of parties and promote maritime cooperation in the South China Sea;
2. promote mutual trust, cooperation and confidence, prevent incidents, manage incidents should they occur, and create a favourable environment for the peaceful settlement of the disputes; and
3. ensure maritime security and safety and freedom of navigation and overflight

It was noted that while the framework is a step forward in the conflict management process for the South China Sea, it is short on details and contains many of the same principles and provisions contained in the 2002 ASEAN-China Declaration on the Conduct of Parties in the South China Sea (DOC) which has yet to be even partially implemented.

Additionally, although the text includes a new reference to the prevention and management of incidents, as well as a seemingly stronger commitment to maritime security and freedom of navigation it was noted that the document is not legally binding and there is no mention of enforcement and arbitration mechanisms.

It was suggested that while the framework will form the basis for further negotiations on the COC, it falls short of the expectations of ASEAN members states that had hoped to see a legally binding, comprehensive and effective COC.

Session 6: Regional Initiatives for Protection of Shipping and Reduction of Tension

The final presenter for the day focused on regional initiatives that have been established to enhance cooperation and security in the maritime domain. Measures such as the Code for Unplanned Encounters at Sea, The Joint Coordination Centre for the Malacca Strait, and joint patrols in the Sulu Sea were all discussed as confidence building measures that enhance the safety and protection of commercial shipping. Increased emphasis and presence from the United

Nations Office on Drugs and Crime Global Maritime Crime Program on measures that can deal with criminal activity in the SE Asia region in the near future was also highlighted.

Discussion focused on the challenges that regional operations are facing with respect to interoperability, information sharing, and jurisdiction. It was noted that a number of the issues being encountered are not uncommon when new international organizations and procedures are being established.

Workshop Conclusion and Next Steps

During the final session of the workshop, discussion centred on the information obtained during the six thematic sessions and how best to make use of the assembled expertise in providing assistance with the production of the academic paper. It was agreed that a draft academic paper would be produced by early August and circulated to workshop attendees for comment so that any revision and/or clarification could occur. Once the academic paper is finalised it will be submitted to a peer-reviewed journal for publication.

Associate Professor Letts concluded the workshop by thanking all participants for their attendance and specifically thanking RSIS for co-hosting the meeting. A final thank you was provided to BlueScope Steel Limited for providing the financial support that made the workshop possible.



Associate Professor David Letts
Director, Centre for Military and Security Law
ANU College of Law

24 July 2018

Attachments:

- A. Workshop agenda
- B. List of workshop attendees

Centre for Military and Security Law, ANU College of Law

Australian National University

Research Project

Maritime Security: preserving access to sea lanes in South East Asia

Workshop Agenda

1000 – 1030 Welcome and Introduction – David Letts

1030 – 1200 Session 1 – Rapporteur David Letts

- Strategic setting
 - Focus on South East Asia region
 - Geographical and political characteristics
 - Importance of maritime trade
 - Belt and Road Initiative
 - Maritime Silk Road
 - Role and influence of external States
 - Constant source of maritime tensions since at least 1970s
- Navigation regimes: threats and challenges
 - Law of the sea fundamentals
 - High seas freedoms
 - Innocent passage
 - Archipelagic sealand passage
 - Straits used for international navigation
 - Interference with military vessels/aircraft
 - Impact of differing LoS interpretations

1200 – 1245 Lunch

1245 – 1400 Session 2 – Rapporteur Donald Rothwell

- Maritime security issues
 - Threats from criminal elements
 - Piracy and maritime crime
 - Rise of maritime militias in SE Asia
 - Maritime terrorism
 - Unregulated movement of people
 - Resource depletion

- Implications arising from Automation and New Technologies
 - Automated cargo ships
 - Technical issues
 - Command/control
 - Safety
 - Compatibility with existing legal regimes (UNCLOS, COLREGs, SOLAS, SAR etc)
 - Potential benefits for industry
 - Application of unmanned maritime systems
 - Port control issues

1400 – 1420 Afternoon tea break

1420 – 1540 Session 3 – Rapporteur Phil Drew

- The role of States and regional institutions including ASEAN and the proposed Code of Conduct
 - ASEAN's membership and purpose
 - 'Other' regional institutions
 - Code of Conduct
 - Background
 - Purpose
 - Likelihood of finalisation
 - Role and influence of external States

- Regional initiatives for protection of shipping and reduction of tension
 - Joint co-operation and patrols
 - Code for Unplanned Encounters at Sea (CUES)
 - Malacca strait
 - Sulu sea
 - UN activity
 - NGO activity

1540 – 1600 Concluding remarks and Workshop completion

Centre for Military and Security Law, ANU College of Law

Australian National University

Research Project

Maritime Security: preserving access to sea lanes in South East Asia

Workshop in Singapore 20 June 2018

Attendees

Associate Professor David Letts (ANU)

Professor Donald Rothwell (ANU)

Associate Professor Phil Drew (ANU)

Professor See Seng Tan (RSIS)

Professor Ralf Emmers (RSIS)

Professor Hitoshi Nasu (Exeter)

Dr Beverley Loke (Exeter)

Associate Professor Robert Beckman (CIL NUS)

Ms Tara Davenport (CIL NUS)

Ms Luci Carey (CML NUS)

Dr Ian Storey (ISEAS)

Dr Christopher Len (ESI NUS)

CAPT (N) Jean-Rene Degans (French Assistant Defence Attaché in Singapore)