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# Navigation in the South China Sea: Why Still an Issue?

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## Abstract

The safety of navigation remains an issue in the sense that navigation through the South China Sea is essential for world seaborne trade and communications, and the lingering territorial and maritime disputes would constitute a threat to the safety of navigation there. In recent years, the term ‘freedom of navigation’ has become a pivotal expression in the rivalry between China and the United States in the South China Sea. This paper starts with addressing the international legal framework concerning navigation, followed by state practice in the South China Sea, including domestic legislation and safety measures. It then discusses the issue of military activities in the exclusive economic zone and their implications for the freedom of navigation. The paper identifies several issues connected to navigation, such as the U-shaped line, law enforcement patrols, and the recent South China Sea Arbitration. A brief conclusion is provided at the end.

## Keywords

China – United States – navigation – LOSC – South China Sea

## Introduction

The South China Sea, categorised as a semi-enclosed sea under the 1982 United Nations Convention on the Law of the Sea (LOSC or Convention),<sup>1</sup> is one of

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<sup>1</sup> United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982, in force 16 November 1994) 1833 *UNTS* 396 (hereinafter “LOSC”).

the most important seas in the world, not only in that it contains rich marine resources and distinctive biodiversity, but also because it forms a critical sea route for global trade and communications. There are important sea lanes of communications (SLOCs) that are vital for the adjacent countries in East Asia and also for the rest of the world. More than half of the world's merchant fleet capacity sails through the straits of Malacca, Sunda and Lombok and the South China Sea.<sup>2</sup> More than 10,000 vessels of greater than 10,000 dwt move southward through the South China Sea annually, with well over 8,000 proceeding in the opposite direction.<sup>3</sup> In addition, with the rise of China and the fast growth of economies in East Asia, the recent trend to greater intra-Asian trade (relative to trade with Europe and North America) results in more shipping in the littoral waters of Southeast Asia and the South China Sea.<sup>4</sup>

The South China Sea is also known as a flashpoint of territorial and maritime disputes between/among multiple claimants. The complicated political landscape of the South China Sea contains the potential for conflicts with various national interests. As for the four groups of islands, because of their different geographical locations, their political statuses differ from one another. The Pratas Islands are under the full control of the Taiwanese authorities. No competing claims exist there under the current "one China" policy across the Taiwan Strait.<sup>5</sup> For the Macclesfield Bank Group, the only claimant is China (including mainland China and Taiwan).<sup>6</sup> Nevertheless, as Scarborough Reef is considered part of the Macclesfield Group, recent developments indicate that the Philippines has also lodged its territorial claim over the Reef, and over the Macclesfield Group. The Paracel Islands are under the control of China, though contested by the Vietnamese. The dispute over the Spratly Islands is the most complicated, because it has been lingering for a long time and involves as many

2 See SB Weeks, 'Sea Lines of Communications (SLOC) security and access' in M Stankiewicz (ed), *Maritime Shipping in Northeast Asia: Law of the Sea, Sea Lanes, and Security* (Institute on Global Conflict and Co-operation, University of California, San Diego, 1998) 49–61, at p. 55.

3 H Olson, 'Marine traffic in the South China Sea' (1996) 12 *Ocean Yearbook* 137–153, at p. 137.

4 See SJ Meyrick, 'Development in Asian maritime trade', in Stankiewicz (n 2), at p. 21.

5 This policy has been held by Beijing and Taipei based on the so-called "92 Consensus" which supports one China but with different interpretations. For Beijing, "one China" is the People's Republic of China; for Taipei, it refers to the Republic of China on Taiwan. For details, see A Teon, 'The 1992 Consensus and China-Taiwan Relations', 31 August 2016, available at <https://china-journal.org/2016/08/31/the-1992-consensus-and-china-taiwan-relations/>.

6 A main reason that there is no other claimant for the Macclesfield Bank is that this Bank is permanently sub-merged under the water. Otherwise, Vietnam or the Philippines might have claimed it as well. However, the recent Vietnamese extended continental shelf claims intruded into the area of *Zhongsha Qundao* claimed by the Chinese.

as five states and six parties, i.e., China, Chinese Taipei, Malaysia, Vietnam, the Philippines, and Brunei. It is predicted that if the issue of the Spratly Islands is not handled well, it could pose a danger or threat to peace and security in the East Asian region and even beyond.

Having said that, we have come to know that there are three layers of disputes in the South China Sea. The first and most fundamental are the overlapping claims of sovereignty to the geographic features between/among littoral states; the second are the overlapping claims to the maritime zones generated either from the islands or from the surrounding coasts of the littoral states which are basically related to sovereign rights and jurisdiction as stipulated under the LOSC; and the third are the disputes in relation to the use of the oceans, including conflicting uses of marine resources and development between/among littoral states, the use of sea lanes and the conduct of military activities in the name of the freedom of navigation between littoral states and user states. These are entangled disputes, thus making the South China Sea the most complicated of all territorial and maritime disputes in the world.

The safety of navigation still remains an issue in the sense that navigation through the South China Sea is essential for world seaborne trade and communications, and also the lingering territorial and maritime disputes would constitute a threat to the safety of navigation there. In recent years, the term 'freedom of navigation' has become a pivotal expression in the rivalry between China and the United States in the South China Sea. This paper starts with addressing the international legal framework concerning navigation, followed by state practice in the South China Sea, including domestic legislation and safety measures. It then discusses the issue of military activities in the exclusive economic zone (EEZ) and their implications for the freedom of navigation. The paper also identifies several issues connected to navigation, such as the U-shaped line, law enforcement patrols, and the recent South China Sea Arbitration. A brief conclusion is provided at the end.

### Navigation in the International Context

Freedom of navigation has been accepted as a principle of international law for centuries. However, it was first incorporated into conventional international law as late as 1958 when the four Geneva Conventions on the Law of the Sea were adopted.<sup>7</sup> At present, the navigational rights of vessels are mainly

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7 Convention on the Territorial Sea and the Contiguous Zone (Geneva, 29 April 1958, in force 10 September 1964) 516 *UNTS* 205; Convention on the Continental Shelf (Geneva, 29 April

governed by the LOSC, though there are relevant treaties in this respect adopted under the auspices of the International Maritime Organization (IMO).

The LOSC has made the legal arrangements for navigational rights of foreign vessels in accordance with different sea zones established under the Convention. The sea zones include internal waters, the territorial sea (TS), straits used for international navigation, archipelagic waters, the EEZ, the continental shelf (CS), the high seas, and the international seabed (the Area). The sea zones of internal waters, the territorial sea, and the EEZ are particularly related to navigational rights of foreign vessels within the national jurisdiction of a coastal state.

The term ‘internal waters’ or ‘inland waters’ refers to “waters on the landward side of the baseline of the territorial sea”.<sup>8</sup> It can cover “a group of cognate but separable legal areas, namely: bays, gulfs, estuaries, and creeks; ports and roadsteads; and water inside straight baselines linking the coast with offshore features”.<sup>9</sup> Because internal waters are part of the territory of a coastal state, no freedom of navigation is granted there and any navigational rights are subject to the regulations of the coastal state.

The territorial sea is also part of the territory of the coastal state, which has full sovereignty over it. However, due to the expeditiousness of navigation, the right of innocent passage is reserved for foreign vessels under the guarantee of international law. The meaning of innocent passage is explained in the LOSC as follows:

1. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law.
2. Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities:
  - (a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any

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1958, in force 10 June 1964) 499 *UNTS* 311; Convention on the High Seas (Geneva, 29 April 1958, in force 30 September 1962) 450 *UNTS* 11; and Convention on Fishing and Conservation of the Living Resources of the High Seas (Geneva, 29 April 1958, in force 20 March 1966) 559 *UNTS* 285.

8 LOSC (n 1), at Art. 8.

9 DP O’Connell, *The International Law of the Sea, Volume I* (edited by IA Shearer) (Clarendon Press, Oxford, 1982) 338.

other manner in violation of the principles of 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 customs, fiscal, immigration or sanitary laws and regulations of the coastal State;
- (h) any act of willful and serious pollution contrary to this Convention;
- (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.<sup>10</sup>

Passage here means

navigation through the territorial sea for the purpose of: (a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or (b) proceeding to or from internal waters or a call at such roadstead or port facility.<sup>11</sup>

Furthermore, passage

shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.<sup>12</sup>

<sup>10</sup> LOSC (n 1), at Art. 19.

<sup>11</sup> LOSC (n 1), at Art. 18.

<sup>12</sup> *Ibid.*

Coastal states have the duty not to hamper the innocent passage of foreign ships through the territorial sea except in accordance with LOSC. In particular, the coastal states

shall not: '(a) impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage; or (b) discriminate in form or in fact against the ships of any State or against ships carrying cargoes to, from or on behalf of any State'.<sup>13</sup>

In addition, the "coastal state shall give appropriate publicity to any danger to navigation, of which it has knowledge, within its territorial sea".<sup>14</sup>

On the other hand, the coastal state may adopt laws and regulations on, *inter alia*, the safety of navigation and the regulation of maritime traffic and the protection of navigational aids and facilities and other facilities or installations, in conformity with the provisions of the Convention and other rules of international law, relating to innocent passage through the territorial sea. Such laws and regulations do not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards. "Foreign ships exercising the right of innocent passage through the territorial sea shall comply with all such laws and regulations and all generally accepted international regulations relating to the prevention of collisions at sea".<sup>15</sup> Furthermore, the coastal state may take "necessary steps in its territorial sea to prevent passage which is not innocent".<sup>16</sup> In the case of ships proceeding to internal waters or a call at a port facility outside internal waters, the coastal state also has "the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject".<sup>17</sup> The coastal state

may, without discrimination in form or in fact among foreign ships, 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, including weapons exercises. Such suspension takes effect only after having been duly published.<sup>18</sup>

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<sup>13</sup> *Ibid.*, at Art. 24.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*, at Art. 21.

<sup>16</sup> *Ibid.*, at Art. 25(1).

<sup>17</sup> *Ibid.*, at Art. 25(2).

<sup>18</sup> *Ibid.*, at Art. 25(3).

The coastal state may, where necessary, having regard to the safety of navigation, “require foreign ships exercising the right of innocent passage through its territorial sea to use such sea lanes and traffic separation schemes as it may designate or prescribe for the regulation of the passage of ships”.<sup>19</sup> In particular, “tankers, nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances or materials may be required to confine their passage to such sea lanes”.<sup>20</sup> In the designation of sea lanes and the prescription of traffic separation schemes, the coastal state

shall take into account: (a) the recommendations of the competent international organization; (b) any channels customarily used for international navigation; (c) the special characteristics of particular ships and channels; and (d) the density of traffic.<sup>21</sup>

The coastal state “shall clearly indicate such sea lanes and traffic separation schemes on charts to which due publicity should be given”.<sup>22</sup>

Foreign nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances shall, when exercising the right of innocent passage through the territorial sea, carry documents and observe special precautionary measures established for such ships by international agreements.<sup>23</sup>

Despite the above stipulations in the LOSC, state practice is still divergent in regard to the right of innocent passage for foreign warships, although there is a uniform practice regarding the same right for foreign merchant vessels. Some countries, including China, impose the requirement of prior authorization on the innocent passage of foreign warships.<sup>24</sup>

As to navigation in the EEZ, the LOSC provides a legal regime similar to that in the high seas, i.e., freedom of navigation for foreign vessels including foreign warships.<sup>25</sup> However, as it is an area within national jurisdiction, the coastal

19 *Ibid.*, at Art. 22(1).

20 *Ibid.*, at Art. 22(2).

21 *Ibid.*, at Art. 22(3).

22 *Ibid.*, at Art. 22(4).

23 *Ibid.*, at Art. 23.

24 For details, see K Zou, ‘Innocent passage for warships: The Chinese doctrine and practice’ (1998) 29(3) *Ocean Development and International Law* 195–223.

25 LOSC (n 1), at Art. 58.



state may have the right to lay down necessary laws and regulations relating to navigational safety and marine environmental protection. In this respect, the coastal state may well be aware that its laws and regulations may not hamper the smooth navigation of foreign vessels in and through its EEZ. On the other hand, foreign vessels are obliged to have due regard to the rights and duties of the coastal state and should comply with the laws and regulations adopted by the coastal state in accordance with the LOSC and other applicable rules of international law.<sup>26</sup>

Navigation in straits used for international navigation was hotly debated during the Third United Nations Conference on the Law of the Sea (UNCLOS III). Finally, the LOSC adopted 'transit passage' for foreign vessels passing through straits used for international navigation. According to the definition given in the LOSC, these straits are located within the territorial seas of the coastal states concerned but are critical navigable channels for international maritime transportation, such as the Straits of Malacca and Singapore. The other sea area within national jurisdiction where foreign vessels enjoy navigational rights are the archipelagic waters.

As for the high seas, all states enjoy freedom of navigation. Judging from the legal arrangements under the LOSC, the legal situation for navigational rights of foreign vessels within national jurisdiction is just as Sohn once depicted: "The rule of thumb is that the closer a ship comes to land, the stronger is the control of the coastal state".<sup>27</sup>

### Chinese Domestic Regulations

China has enacted a series of laws and regulations governing the navigation of foreign vessels in China's different waters in accordance with general international law, particularly the LOSC. The most important ones include, *inter alia*, the Law on the Territorial Sea and the Contiguous Zone, the Law on the Exclusive Economic Zone and the Continental Shelf, the Law on Maritime Traffic Safety,<sup>28</sup> the Regulations Governing Supervision and Control of Foreign

<sup>26</sup> *Ibid.*, at Art. 58(3).

<sup>27</sup> LB Sohn, 'International navigation: Interests related to national security' in JM Van Dyke, LM Alexander and JR Morgan (eds), *International Navigation: Rocks and Shoals Ahead?* (The Law of the Sea Institute, Honolulu, 1988) 307–323, at p. 307.

<sup>28</sup> The text is available in Office of Laws and Regulations, Department of Ocean Management and Monitoring, State Oceanic Administration (ed), *Collection of the Sea Laws and Regulations of the People's Republic of China* (Ocean Press, Beijing, 1991) 248.

Vessels, the Regulations Governing Non-Military Foreign Vessels Passing Through the Chiungchow Strait. In order to exercise navigational rights within China's jurisdictional waters, foreign vessels have to comply with a set of Chinese laws and regulations concerning navigation and management of foreign vessels. Several general laws and regulations including the above in China are applicable to foreign ships in all jurisdictional waters of the PRC.<sup>29</sup>

Under international law, the right of innocent passage is a well-established rule and constitutes a part of the territorial sea regime. On 4 September 1958, China promulgated the Declaration on China's Territorial Sea, which is generally regarded as the first law to regulate the territorial sea of China. On innocent passage, the Declaration stated that "[n]o foreign vessels for military use and no foreign aircraft may enter China's territorial sea and the air space above it without the permission of the Government of the People's Republic of China. While navigating in the Chinese territorial sea, every foreign vessel must observe the relevant laws and regulations laid down by the Government of the People's Republic of China".<sup>30</sup> The Law on Maritime Traffic Safety, which came into effect on 1 January 1984, provides in Article 11 that "[n]o military vessels of foreign nationality may enter the territorial sea of the People's Republic of China without being authorised by the Government thereof".<sup>31</sup> The 1992 Law on the Territorial Sea and the Contiguous Zone (the Territorial Sea Law) contains several important provisions relating to innocent passage.<sup>32</sup>

According to the Territorial Sea Law, foreign ships used for non-military purposes enjoy the right of innocent passage through China's territorial sea in accordance with the law. However, foreign ships used for military purposes are subject to permission of the Chinese Government before entering the territorial sea (Art. 6). Foreign submarines and other underwater vehicles, when passing through the territorial sea, should navigate on the surface and show their flag (Art. 7). Foreign ships passing through China's territorial sea must comply with the laws and regulations of China and shall not be prejudicial to the peace, security and good order of China. Foreign nuclear-powered ships and ships carrying nuclear, noxious or other dangerous substances, when passing through the territorial sea, must carry relevant documents and take special precautionary measures. The Chinese Government has the right to take all

29 For details, see K Zou, 'Navigation of foreign vessels within China's jurisdictional waters' (2002) 29(4) *Maritime Policy and Management* 351–374.

30 Section 3 of the Declaration, in Office of Laws and Regulations (n 28), at p. 4.

31 *Ibid.*, at pp. 237–238.

32 The English version is reprinted in K Zou, *China's Marine Legal System and the Law of the Sea* (Nijhoff, Leiden, 2005) 338–341.

necessary measures to prevent and stop non-innocent passage through its territorial sea. Cases of foreign ships violating the laws and regulations of China will be handled by the relevant Chinese organs in accordance with the law (Art. 8). The Chinese Government may, for maintaining the safety of navigation or for other special needs, request foreign ships passing through its territorial sea to use the designated sea lanes or to navigate according to the prescribed traffic separation schemes. The specific regulations to this effect will be promulgated by the Chinese Government or its competent authorities concerned (Art. 9). In the case of violation of the Chinese laws or regulations by a foreign ship used for military purposes or a foreign government ship used for non-commercial purposes when passing through the territorial sea of China, the Chinese competent authorities have the right to order it to leave the territorial sea immediately and the flag state should bear international responsibility for any loss or damage caused by the ship (Art. 10).

In 1996 when ratifying the LOSC, China re-emphasised its position on innocent passage for foreign warships by stating that “the provisions of the United Nations Convention on the Law of the Sea concerning innocent passage through the territorial sea shall not prejudice the right of a coastal State to request, in accordance with its laws and regulations, a foreign State to obtain advance approval from or give prior notification to the coastal State for the passage of its warships through the territorial sea of the coastal State”.<sup>33</sup> However, China’s regulations on innocent passage for foreign warships may not be consistent with the relevant provisions of the LOSC. As a party to the LOSC, China is obliged to abide by the Convention. It may be wise to improve the situation by amending China’s domestic law and bringing it fully in line with the Convention.

### *Navigation in the EEZ*

Because coastal states have the right to enact laws and regulations governing their EEZ and resources, those laws and regulations may have an impact on the navigation of foreign vessels. According to China’s Law on the Exclusive Economic Zone and the Continental Shelf, foreign vessels, including warships, can enjoy the freedom of navigation in China’s EEZ provided they comply with the relevant Chinese laws and regulations as well as international law.<sup>34</sup> Although there is no substantive difference, navigation under the EEZ regime

33 See ‘Decision to ratify the United Nations Convention on the Law of the Sea by the Standing Committee of the National People’s Congress [15 May 1996]’ (16 May 1996) *People’s Daily (Overseas Edition)* (in Chinese).

34 Chinese EEZ Law, at Art. 11. The English version is available in Zou (n 32), at pp. 342–345.

may not be as free as under the high seas regime simply because of the sovereign rights and jurisdiction of the coastal state over its EEZ. For example, the Chinese EEZ Law provides that China has the right to take necessary measures against violations of Chinese laws and regulations, to investigate according to the law those who are liable, and may exercise the right of hot pursuit.<sup>35</sup>

As depicted by some scholars, there are two trends in governing navigation in the EEZ: 'thickening jurisdiction' and 'creeping jurisdiction'.<sup>36</sup> The term 'thickening jurisdiction' refers to "the process of either tightening regulations over activities within the EEZ in areas where the coastal State legitimately exercises jurisdiction, or extending regulations to activities that are usually regarded as not within the jurisdiction of the coastal State".<sup>37</sup> Though China's Law on the EEZ and the Continental Shelf does not mention how to govern foreign military activities in its EEZ, the 2001 Sino-American air collision incident over China's EEZ in the South China Sea manifested China's intention to oversee and control military activities of foreign states within its EEZ.<sup>38</sup>

### Are Military Activities Navigational Rights?

According to one scholar, military use of the oceans consists of two categories: movement rights and operational rights. The former embraces the notion of mobility and includes such legal rights as transit passage through straits used for international navigation, innocent passage in territorial seas and archipelagic waters, and high seas freedoms of navigation and overflight, and the latter includes such activities as task force manoeuvring, anchoring, intelligence

35 *Ibid.*, at Art. 12. It is based on LOSC (n 1), at Art. 111(2).

36 See WS Ball, 'The old grey mare, national enclosure of the oceans' (1996) 27(1-2) *Ocean Development and International Law* 97-124, at p. 103. He states that "coastal states are more stringently regulating a wider range of activities with their prescribed zones ['thickening jurisdiction'], while at the same time they are expanding the reach of their regulations beyond 200 miles ['creeping jurisdiction']".

37 WSG Bateman, DR Rothwell and D VanderZwaag, 'Navigational rights and freedoms in the new millennium: Dealing with 20th century controversies and 21st century challenges' in DR Rothwell and WSG Bateman (eds), *Navigational Rights and Freedoms and the New Law of the Sea* (Nijhoff, The Hague, 2000) 314-335, at p. 324.

38 On 1 April 2001, a US spy plane collided with a Chinese jet fighter in an area 104 kilometres from the baseline of Chinese territorial waters. China condemned the United States for violating the rule reflected in the LOSC (n 1) which stipulates that any flight in airspace above another state's EEZ should respect the rights of the country concerned. See 'FM spokesman gives full account of air collision' (4 April 2001) *China Daily*.

collection and surveillance, military exercises, ordnance testing and firing, and hydrographic and military surveys.<sup>39</sup>

There is a controversy over whether the conduct of military activities in the EEZ of another country is legitimate. Some states may invoke Article 58(1) LOSC to justify their military activities in other countries' EEZs. The provision reads:

[i]n the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.

Freedoms on the high seas provided in Article 87 are thus applicable to the EEZ as long as they are not contrary to other provisions of the LOSC. According to maritime powers such as the United States, the term freedoms "associated with the operation of ships, aircraft" implies the legality of naval manoeuvres in a foreign EEZ.<sup>40</sup> One view even considers military exercises, aerial reconnaissance and all other activities of military aircraft as freedom of high seas if due regard is paid to the rights and interests of third states.<sup>41</sup> As advocated, because the LOSC mainly provides the rights of navigation and overflight, but keeps silent on the rights of military activities, maritime superpowers must defend and enforce such rights for their security interests.

The LOSC does not mention military use; hence it becomes a grey area leading to different interpretations. It is argued that without an express mention in the Convention, military use is hardly regarded as one of such lawful uses.

39 CE Pirtle, 'Military uses of ocean space and the law of the sea in the new millennium' (2000) 31(1-2) *Ocean Development and International Law* 7-45, at p. 8.

40 See BA Boczek, 'Peacetime military activities in the exclusive economic zone of third countries' (1988) 19(6) *Ocean Development and International Law* 445-468, at p. 450.

41 K Hailbrunner, 'Freedom of the air and the Convention on the Law of the Sea' (1983) 77(3) *American Journal of International Law* 490-520, at p. 503. A US operational commander opined that the EEZ regime "does not permit the coastal state to limit traditional non-resources related high seas activities in this EEZ, such as task force manoeuvring, flight operations, military exercises, telecommunications and space activities, intelligence and surveillance activities, marine data collection, and weapons' testing and firing". WF Doran, 'An operational commander's perspective on the 1982 LOS Convention' (1995) 10(3) *International Journal of Marine and Coastal Law* 335-348, at p. 341.

However, such an argument may not be convincing. According to a fundamental legal principle, nothing is illegal if there is no law to make it so. Following this principle, military use is not prohibited because there is no such prohibition in the LOSC. Second, the LOSC in its preamble affirms that matters which are not regulated under it continue to be governed by general international law. This is considered to include customary international law. Looking back at history, military activities were consistently allowed under customary international law, though in the implied form. In that sense, it is argued that military activities could be a historically lawful use of the high seas.<sup>42</sup> Third, it is admitted that there is a difficulty in inferring from the text and legislative history of Article 58 LOSC that the creation of the EEZ has limited foreign military operations other than pure navigation and communication.<sup>43</sup>

The legality of military activities under international law does not mean that they can be conducted in the EEZ without any regulation. It should be borne in mind that the circumstances now are fundamentally different from those in the past. There was and still is no controversy regarding military activities conducted in the high seas which was and is open to all. The EEZ is different from the high seas in that it is an area under national jurisdiction. Although military activities are permitted there, the factor of national jurisdiction must be taken into account. Even if military use is an internationally lawful use, it can be argued that according to the LOSC it is limited to navigation and overflight, and other rights as provided in Article 87 of the Convention. This can be gleaned from some domestic EEZ legislations, such as Suriname's, which provides that "all nations, with the observance of the international law, enjoy: [...] 4. Freedom to exercise internationally recognized rights in connection with navigation and communication".<sup>44</sup>

In practice, coastal states, including Bangladesh, Brazil, Cape Verde, India, Pakistan, and Uruguay, explicitly restrict unapproved military exercises or activities in or over their EEZs conducted by other countries. According to the

42 See D Guilfoyle, 'Maritime security' in J Barrett and RA Barnes (eds), *Law of the Sea: UNCLOS as a Living Treaty* (British Institute of International and Comparative Law, London, 2016) 329–362, at p. 356.

43 F Francioni, 'Peacetime use of force, military activities, and the new law of the sea' (1985) 18(2) *Cornell International Law Journal* 203–226, at p. 216.

44 Suriname, Law concerning the Extension of the Territorial Sea and the Establishment of a Contiguous Economic Zone (11 June 1978), at Art. 5, in Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations, *The Law of the Sea: National Legislation on the Exclusive Economic Zone* (United Nations, New York, 1993) 351. Honduras's law contains a similar provision (Decree No. 921 on the Utilization of Marine Natural Resources (13 June 1980), at Art. 2, in *ibid.*, at p. 129).

Brazilian law, military exercises or manoeuvres, in particular those that imply the use of weapons or explosives, can only be carried out with the consent of the Brazilian Government.<sup>45</sup> Brazil is perhaps the most adamant country which strictly regulates foreign military activities in its EEZ. As early as December 1982 when Brazil signed the LOSC, it made a statement of this kind which was reiterated several times afterwards. The United States reacted to it on each occasion by protesting against Brazil's restrictions and stating its reservation of military exercises in Brazil's EEZ as internationally lawful uses of the ocean.<sup>46</sup>

Relating to East Asia, it is worth mentioning Malaysia's position. As stated, "the Malaysian Government also understands that the provisions of the Convention do not authorize other States to carry out military exercises or manoeuvres, in particular those involving the use of weapons or explosives in the exclusive economic zone without the consent of the coastal State".<sup>47</sup> According to a prominent Malaysian scholar, three reasons explain Malaysia's position. First, in Malaysia's view, no law prohibits coastal state jurisdiction over foreign military activities in the EEZ. Moreover, unauthorised foreign military activities can undermine a coastal state's security, particularly if they are non-peaceful in nature. Second, the LOSC is a treaty where the provision on foreign military activities in the EEZ is a new and controversial concept, rather than customary international law. Third, the provision on military activities in the EEZ is not consistent with the principle of peaceful uses of the sea. Malaysia views foreign military activities in its EEZ as undermining and threatening its security as well.<sup>48</sup>

The regulations above are made under the rationale that military activities are inherently potential threats to peace and good order of the coastal states. Although such regulations are understandable, it should be borne in mind that not all military activities are threatening. Some military activities, such as the activities undertaken by the UN peacekeeping forces, are indispensable to maintaining peace and good order. In the same line of thought, some civilian activities may be threatening and this can be illustrated by a severe marine

45 Brazil, Act concerning the Territorial Sea, the Contiguous Zone, the Exclusive Economic Zone and the Continental Shelf (Act No. 8617 of 4 January 1993), at Art. 9, in *ibid.*, at p. 38.

46 For details, see JA Roach and RW Smith, *United States Responses to Excessive Maritime Claims* (2nd ed, Nijhoff, The Hague, 1996) 409–413. See also by the same authors, *Excessive Maritime Claims* (3rd ed, Nijhoff, Leiden, 2012) 379–392.

47 Malaysian Declaration Upon Ratification of the Convention (14 October 1996), available at [http://www.un.org/Depts/los/convention\\_agreements/convention\\_declarations.htm](http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm).

48 See BA Hamzah, 'Military activities in the EEZ: Preliminary views from Malaysia' in S Wu and K Zou (eds), *Securing the Safety of Navigation in East Asia: Legal and Political Dimensions* (Chandos, Oxford, 2013) 161–169.



pollution accident caused by a civilian activity or illegal fishing in the EEZ. In such a context, what we should look into is not the form of a certain activity, but its nature. If a military activity is threatening in nature and with clear bad intentions and/or in a hostile manner, it should be banned in the EEZ. Otherwise, it can be allowed under certain conditions in accordance with relevant international law together with the regulations laid down by the coastal state, similar to the marine scientific research regime under the LOSC.

There is a discrepancy regarding the concept of the EEZ between the legal term and the operational term. The United States Navy divides the ocean into two categories: national waters and international waters, for operational and mobility purposes.<sup>49</sup> The EEZ is accordingly categorized as 'international waters'.<sup>50</sup> However, it must be pointed out that it is only an expression for operational purposes, thus in no way affecting the legal nature of the EEZ as a maritime zone within national jurisdiction under the LOSC.

It is worth mentioning that the East-West Center once organized several workshops on 'military and intelligence gathering activities in the EEZ'. The launch of this series of workshops was triggered by the EP-3 incident between China and the United States. The first one was held in Bali, Indonesia in June 2002, which focused on identifying disagreements and contrasting positions, as well as on areas of possible mutual understanding and agreement.<sup>51</sup> The Honolulu Meeting in December 2003 went further and Guidelines for military and intelligence gathering activities in the EEZs were drafted, based on the

49 National waters include internal waters, territorial seas and archipelagic waters, and international waters include contiguous zones, EEZs, high seas and security zones. See United States, Department of the Navy, *The Commander's Handbook on the Law of Naval Operations* (July 2007) 1–7 to 1–9, available at [http://www.jag.navy.mil/documents/NWP\\_1-14M\\_Commanders\\_Handbook.pdf](http://www.jag.navy.mil/documents/NWP_1-14M_Commanders_Handbook.pdf).

50 The term "international waters" is even questioned by retired naval officials. See R Pedrozo, 'Preserving navigational rights and freedoms: The right to conduct military activities in China's exclusive economic zone' (2010) 9(1) *Chinese Journal of International Law* 9–29, at p. 19: "continued reliance on the term "international waters" by the United States muddies the waters and unnecessarily allows China to divert attention from the legitimacy of the US position by arguing that the United States does not know the difference between the EEZ and the high seas. The United States should therefore cease to use the term "international waters" when referring to its lawful military activities in the EEZ".

51 For details, see East-West Center, *Military and Intelligence Gathering Activities in Exclusive Economic Zones: Consensus and Disagreement: A Summary of the Bali Dialogue* (East-West Center, Honolulu, 2002).



disagreement between maritime powers and developing coastal countries.<sup>52</sup> According to the Guidelines drafted by the study group,

ships and aircraft of a State undertaking military activities in the EEZ of another State have the obligation to use the ocean for peaceful purposes only, and to refrain from the threat or use of force, or provocative acts, such as stimulating or exciting the defensive systems of the coastal State; collecting information to support the use of force against the coastal State; or establishing a 'sea base' within another State's EEZ without its consent. The user State should have due regard for the rights of others to use the sea including the coastal State and comply with its obligations under international law.<sup>53</sup>

Furthermore,

warships or aircraft of a State intending to carry out a major military exercise in the EEZ of another State should inform the coastal State and others through a timely navigational warning of the time, date and areas involved in the exercise, and if possible, invite observers from the coastal State to witness the exercise.<sup>54</sup>

As for military surveying, the Guidelines provide that "maritime surveillance may be conducted by States for peaceful purposes in areas claimed by other States as EEZ and should not prejudice the jurisdictional rights and responsibilities of the coastal State within its EEZ".<sup>55</sup> Unfortunately, these constructive Guidelines are rejected by the United States despite the involvement of American scholars in the drafting process.

It is worth mentioning that at the 14th Annual Conference of the Western Pacific Naval Symposium (WPNS) held in Qingdao, China on 22 and 23 April 2014, the participating navies agreed on the Code of Unplanned Encounters

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52 See H Djalal, A Yankov and A Bergin, 'Draft guidelines for military and intelligence gathering activities in the EEZ and their means and manner of implementation and enforcement' (2005) 29(2) *Marine Policy* 175–183.

53 See EEZ Group 21, 'Guidelines for navigation and overflight in the exclusive economic zone' (16 September 2005) *Ocean Policy Research Foundation*, available at [https://www.spf.org/opri/publication/pdf/200509\\_20051205\\_e.pdf](https://www.spf.org/opri/publication/pdf/200509_20051205_e.pdf).

54 *Ibid.*

55 *Ibid.*

at Sea (CUES).<sup>56</sup> Though legally non-binding, it is helpful to avoid misunderstanding and miscalculations at sea.<sup>57</sup> It is reported that recently the US littoral combat ship USS *Fort Worth* (LCS 3) and the People's Liberation Army Navy [PLA(N)] Jiangkai II frigate *Hengshui* (FFG 572) practiced the CUES on 23 February 2015. The two warships conducted routine training and operations in international waters of the South China Sea, thereby enhancing the professional maritime relationship between the US 7th Fleet and the PLA(N).<sup>58</sup> It seems that the two navies have attempted to narrow their differences on the issue of military activities in the EEZ.

In conclusion, military activities, except the exercise of the right of navigation in and/or overflight above the EEZ, under the LOSC are not navigational rights *per se*, but special rights associated with navigation. It should not be taken for granted that, in so far as such activities are navigation-associated, they will be treated equally as navigational rights.

### Related Issues

Several issues are relevant to navigation in the South China Sea. The first is China's unilaterally drawn U-shaped line in the South China Sea. The U-shaped line in the South China Sea is the line with nine segments off the Chinese coast on the South China Sea, as displayed on the Chinese map. In February 1948, the Atlas of Administrative Areas of the Republic of China was officially published, in which the above map was included.<sup>59</sup> As mentioned by Franckx, the U-shaped line can have serious implications for navigational freedoms in the maritime areas enclosed within.<sup>60</sup> It is evident that Chinese maritime law enforcement extends to the whole range of the U-shaped line. In February 2007, the State Council approved the scheme of regular rights-safeguarding law enforcement patrols carried out by China Ocean Surveillance in the Yellow Sea

56 See P Xiaoqian, 'Maritime security cooperation' (8 May 2014) *Beijing Review*, available at [http://www.bjreview.com.cn/quotes/txt/2014-07/05/content\\_627875.htm](http://www.bjreview.com.cn/quotes/txt/2014-07/05/content_627875.htm).

57 See Chief of Naval Operations Public Affairs, 'Navy leaders agree to CUES at 14th WPNS' (23 April 2014) *United States Navy*, available at [http://www.navy.mil/submit/display.asp?story\\_id=80532](http://www.navy.mil/submit/display.asp?story_id=80532).

58 See L Dempsey, 'USS Fort Worth conducts CUES with Chinese Navy' (26 February 2015) *United States Navy*, available at [http://www.navy.mil/submit/display.asp?story\\_id=85767](http://www.navy.mil/submit/display.asp?story_id=85767).

59 Z Han (ed), *A Compilation of Historical Materials on China's South China Sea Islands* (Oriental Press, Beijing, 1988) (in Chinese) 181–184.

60 E Franckx, 'American and Chinese views on navigational rights of warships' (2011) 10(1) *Chinese Journal of International Law* 187–206, at pp. 196–197.

and the South China Sea. In 2008, China Maritime Surveillance began its regular law enforcement patrols, covering all sea areas within China's jurisdiction from the Mouth of Yalu River to *James Shoal* (italics added).<sup>61</sup>

Whereas free navigation in the South China Sea is not hampered by the Chinese maritime law enforcement forces, some activities associated with marine resources exploration or with consolidation of territorial and/or maritime claims are disrupted. This is demonstrated by the Binh Minh 02 incident, when the Chinese cut the cables of a Vietnamese seismic surveying vessel,<sup>62</sup> and also by the Reed Bank incident, when the survey vessel *MV Veritas Voyager* chartered by Forum Energy, a UK-based oil and gas company, which had been awarded a contract by the Philippines, was disrupted by two Chinese patrol boats in March 2011.<sup>63</sup>

Related to the U-shaped line is the issue regarding China's jurisdictional waters in addition to its internal waters, territorial sea, EEZ and continental shelf. It is recalled that in China's Law on the EEZ and the Continental Shelf, China states that the Law should not affect the historic rights of the PRC. This implies that China considers that there are some waters or some rights in some waters historically belonging to China. This is also connected with the Chinese legislation on marine environmental protection and fishery management, which is not only applicable to the sea areas recognized under the LOSC, such as internal waters, the territorial sea, the contiguous zone (CZ), the EEZ, and the continental shelf, but also "other sea areas" under China's jurisdiction.<sup>64</sup> The term "other sea areas" is believed to refer to waters within the U-shaped line, but it is not clear how China treats such "other sea areas", as territorial sea, EEZ or otherwise? No clear explanation is ever given by the Chinese.

61 See *China Maritime Law Enforcement Bulletin* (2008), available at [http://www.soa.gov.cn/zwgk/hygb/zghyxxzfgb/2008nzghyxxzfgb/201212/t20121217\\_22961.html](http://www.soa.gov.cn/zwgk/hygb/zghyxxzfgb/2008nzghyxxzfgb/201212/t20121217_22961.html).

62 See 'Vietnam says Chinese boat harassed survey ship; China disputes' (9 June 2011) *Bloomberg Businessweek*, available at <https://www.bloomberg.com/businessweek>.

63 See I Storey, 'China and the Philippines: Implications of the Reed Bank incident' (6 May 2011) *China Brief* (The Jamestown Foundation), available at [http://www.jamestown.org/single/?no\\_cache=1&tx\\_ttnews%5Btt\\_news%5D=37902](http://www.jamestown.org/single/?no_cache=1&tx_ttnews%5Btt_news%5D=37902).

64 According to the amended Law on Marine Environmental Protection and Law on Fisheries, they should apply to China's internal waters, TS, contiguous zone, EEZ, CS, and other sea areas under China's jurisdiction. China, Law on Marine Environmental Protection (adopted on 23 August 1982, amended on 25 December 1999), at Art. 2, in *People's Daily* (in Chinese) (28 December 1999); China, Fisheries Law (adopted 20 January 1986, amended on 31 October 2000), at Art. 2, in *Gazette of the Standing Committee of the National People's Congress of the People's Republic of China* (in Chinese) (No 6, 2000) 608–615.

The second issue relates to China's military zones established in the early 1950s. China designated three military zones: The Military Alert Zone in the Bohai and Yellow Sea (37°20'N, 123°03'E to 39°45'N, 124°09'12"E); the Military Prohibited Navigation Zone around the mouth of the Qiantang River of Zhejiang Province and close to the Taiwan Strait (27°00'N, 121°10'E to 30°44'N, 123°25'E); and the Military Operational Zone south of 27°N latitude which encompassed Taiwan and its environs.<sup>65</sup> The lines to demarcate these zones were first publicly shown on the map attached to the Sino-Japanese (Non-Governmental) Fishery Agreement signed in April 1955. China advised Japanese fishing vessels not to enter these zones; otherwise they had to bear any consequence by themselves. The 1985 revised map attached to the formal Sino-Japanese Fishery Agreement still indicated the existence of such zones.<sup>66</sup> However, in the latest Sino-Japanese Fishery Agreement signed in November 1997, there was no such indication of the above designated zones. Thus, it is unclear whether these zones are still there and would hamper the navigation of foreign vessels. People may also be puzzled regarding the relationship between these zones and China's territorial sea and/or EEZ in these seas.

Third, China has no archipelagic waters as defined under the LOSC, so strictly speaking the navigational regime designed for archipelagic waters by the LOSC is not applicable in China. However, China encircled the Xisha (Paracel) Islands in 1996 with straight baselines. This has brought protests from other countries, particularly the United States. According to the United States, China would not be allowed to establish archipelagic straight baselines around the Paracel Islands because China is not an archipelagic state and the Paracel Islands are not an archipelago under the definition of the LOSC.<sup>67</sup> The question of whether a continental state has the right to draw straight baselines around its mid-ocean islands or archipelagos is still debatable. In practice, some countries are using archipelagic straight baselines for their mid-ocean archipelagos,

65 See J Greenfield, *China's Practice in the Law of the Sea* (Clarendon Press, Oxford, 1992) 97.

66 See the third attached map in China, Bureau of Fishery Management, Ministry of Agriculture, *The Sino-Japanese Governmental Fishery Agreements and Non-Governmental Protocols on Safety of Fishing Operations* (in Chinese) (1993).

67 See United States Department of State, Office of Ocean Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, 'Straight baselines claim: China' (1996) 117 *Limits in the Seas* 1–16, at p. 8. LOSC (n 1) defines "archipelagic State" as "a State constituted wholly by one or more archipelagos and may include other islands", and "an archipelago" as "a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographic, economic and political entity, or which historically have been regarded as such". LOSC (n 1), at Art. 46.

such as Ecuador (which encircled its Galapagos Islands in 1971), Denmark (around the Faroe Islands in 1976), and Portugal (around the Azores Islands in 1985).<sup>68</sup> Despite the controversy over China's straight baselines for the Paracel Islands, foreign vessels can enjoy innocent passage under the LOSC within the waters encircled by China and treated as China's internal waters.<sup>69</sup> It is noted that the United States challenged China's Paracel straight baselines as 'excessive maritime claims' and the most recent challenge took place in October 2016 when the US sent its destroyer USS *Decatur* there under the 'Freedom of Navigation' Program.

Finally, we need to look at the *South China Sea Arbitration* to see whether it has an impact on navigation in the South China Sea. On 22 January 2013, the Philippines, by a *note verbale* with the Notification and Statement of Claim on West Philippine Sea (i.e., South China Sea), instituted the compulsory arbitration procedures stipulated in the LOSC against China, asking the Arbitral Tribunal to:

Declar[e] that China's rights in regard to maritime areas in the South China Sea, like the rights of the Philippines, are those that are established by [the LOSC], and consist of its rights to a Territorial Sea and Contiguous Zone under Part II of the Convention, to an Exclusive Economic Zone under Part V, and to a Continental Shelf under Part VI; Declar[e] that China's maritime claims in the South China Sea based on its so-called "nine dash line" are contrary to [the LOSC] and invalid.<sup>70</sup>

A finding was sought that China is not entitled to exercise 'historic rights' over the waters, seabed and subsoil beyond the limits of its entitlements under the Convention in the areas encompassed within its so-called "nine-dash line".

The case mainly concerned maritime entitlements as claimed by the Philippines, but some parts of the arbitral proceedings have implications

68 See Roach and Smith (1994) (n 46), at pp. 112–122, and by the same authors (2012) (n 46), at pp. 108–115, where some other examples are added.

69 LOSC (n 1), at Art. 8(2) provides that: "Where the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage as provided in this Convention shall exist in those waters".

70 The diplomatic note and the Philippines' 'Notification and Statement of Claim' are available in *South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, Memorial of the Philippines, Volume III, at Annexes 1 and 2 (30 March 2014), PCA Case No. 2013–19, available at <http://www.pcacases.com/web/view/7>.

for navigation in the South China Sea. Particularly, in the Memorial of the Philippines submitted to the Arbitral Tribunal in March 2014, the Philippines accused, in its Submission 13, Chinese vessels of threatening Philippine vessels in the vicinity of Scarborough Shoal by engaging in highly dangerous manoeuvres that had caused serious risks of collision and that China thus violated Article 94 of LOSC and the COLREGS (1972 Convention on the International Regulation for Preventing Collisions at Sea).<sup>71</sup> In the Award of 12 July 2016, the Arbitral Tribunal fully supported the Philippines' allegation and found that "China has, by virtue of the conduct of Chinese law enforcement vessels in the vicinity of Scarborough Shoal, created serious risk of collision and danger to Philippine vessels and personnel. The Tribunal finds China to have violated Rules 2, 6, 7, 8, 15, and 16 of the COLREGS and, as a consequence, to be in breach of Article 94 of the Convention".<sup>72</sup>

There are a couple of problems regarding the findings of the Arbitral Tribunal. For example, the Tribunal treated the adjacent waters of the Scarborough Reef as high seas and consequently applied the COLREGS. As pointed out, it is absurd that the Tribunal allows foreign vessels to sail into the TS of a coastal state but that said state should not undertake any law enforcement activity but instead should keep its distance from these vessels by complying with the COLREGS.<sup>73</sup>

In addition, other parts of the Final Award in the *South China Sea Arbitration* also have legal implications for navigation in the South China Sea. For example, the arbitral findings that Mischief Reef, currently occupied by China, is a low-tide elevation in the EEZ of the Philippines and that Chinese land reclamation activities there are treated as artificial installations give a wider special area for free navigation in the surroundings of that Reef. The arbitral Award is, in particular, favourable for the United States to further assert its freedom of navigation in the South China Sea.

71 *Ibid.*, Memorial of the Philippines, Volume I (30 March 2014), at Chapter 6.IV.

72 *Ibid.*, Award (12 July 2016), at para. 1109.

73 See D Zhang and R Zhang, 'The legitimacy of Chinese vessels' law enforcement activities in the territorial sea of Huangyan Dao—Comments on the fallacy of submission 13 and the award thereon in the South China Sea Arbitration Case' (2016) 7 *Asia Pacific Security and Maritime Affairs* (in Chinese), at p. 66.

## Conclusions

One should be aware that the United States is most adamant in defending the freedom of navigation due to its importance for military mobility. In 1979, the United States set up the Freedom of Navigation Program which was designed to challenge what are in the US's view so-called 'excessive maritime claims'.<sup>74</sup> As intended, the United States likes to target those states with military capability.<sup>75</sup> China could be one of such states. As some of China's domestic rules relating to navigation and other ocean uses are regarded by the United States as excessive, those rules are vulnerable to challenges by the US through the Freedom of Navigation Program. In recent years, China and the United States reached agreements in terms of navigational rights in the South China Sea. These include the 2014 Memorandum of Understanding on the Rules of Behavior for the Safety of Air and Maritime Encounters<sup>76</sup> and the 2015 Supplement to the Memorandum of Understanding on the Rules of Behavior for the Safety of Air and Maritime Encounters.<sup>77</sup> They make many references to COLREGS and CUES. However, despite these agreements, incidents have occurred between the two sides in the South China Sea from time to time. The seizure of an American underwater drone deployed by a US military oceanographic vessel in the South China Sea on 16 December 2016 was the latest incident.

As is rightly pointed out, the freedoms of the high seas are not absolute rights, but conditional: "[T]hese are not absolute rights but are subject to a number of limitations and corresponding duties upon which their legal

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74 The objective of this Program "combines diplomatic action and operational assertions of navigation and overflight rights to encourage modification of and to demonstrate nonacquiescence in maritime claims that are inconsistent with the navigation and overflight freedoms reflected in the 1982 LOS Convention". United States Department of Defence, 'U.S. program for the exercise of navigation and overflight rights at sea' (1983) cited in RJ Grunawalt, 'Freedom of navigation in the post-Cold War era' in Rothwell and Bateman (n 37) 11–21, at p. 18.

75 *Ibid.*

76 US-China Memorandum of Understanding on the Rules of Behavior for Safety of Air and Maritime Encounters (Washington and Beijing, 9–10 November 2014), available at [http://archive.defense.gov/pubs/141112\\_MemorandumOfUnderstandingRegardingRules.pdf](http://archive.defense.gov/pubs/141112_MemorandumOfUnderstandingRegardingRules.pdf).

77 Supplement to the US-China Memorandum of Understanding on the Rules of Behavior for Safety of Air and Maritime Encounters (Beijing and Washington, 15–18 September 2015), available at [http://www.defense.gov/Portals/1/Documents/pubs/US-CHINA\\_AIR\\_ENCOUNTERS\\_ANNEX\\_SEP\\_2015.pdf](http://www.defense.gov/Portals/1/Documents/pubs/US-CHINA_AIR_ENCOUNTERS_ANNEX_SEP_2015.pdf).



exercise is pre-conditioned".<sup>78</sup> Freedom of navigation is also conditional. The United States, when exercising this freedom, has to pay due regard to the public order of the South China Sea and to the rights and interests of the littoral states. Navigation in the South China Sea never becomes an issue but the United States uses the freedom of navigation as a pretext to enhance its military presence in the South China Sea with the aim to deter and confront a rising China. It is perceived that with the Trump Administration in power, the rivalry between China and the United States in the South China Sea will be more intensive, which is detrimental to peace, stability and prosperity in the region.

There should be caution for foreign vessels navigating in and through disputed waters due to the unclear maritime boundary delimitation between China and its neighbouring countries. In terms of maritime boundary delimitation, China has only settled the delimitation in the Gulf of Tonkin with Vietnam. China has to negotiate and settle maritime boundary issues with Brunei, Indonesia, Malaysia, the Philippines, and Vietnam, respectively, in the South China Sea. Some boundary issues are even entangled with overlapping territorial claims made by China and other countries to tiny islands situated in the South China Sea. Yet, the undemarcated sea areas may not greatly affect the navigational rights of foreign vessels. For example, China pledged to ensure the unimpeded passage of foreign vessels in the South China Sea, despite China's territorial claims to the islands there as well as to the maritime rights and interests.<sup>79</sup> Even after the *South China Sea Arbitration*, China still maintains its original position that "China is committed to upholding the freedom of navigation and overflight enjoyed by all states under international law, and

78 See D Freestone, 'International governance, responsibility and management of areas beyond national jurisdiction' (2012) 27(2) *International Journal of Marine and Coastal Law* 191–204, at p. 200.

79 As the Chinese Ministry of Foreign Affairs states: "China attaches great importance to the safety and unimpededness of the international water lanes in the South China Sea. Its efforts to safeguard its sovereignty over the Nansha Islands and maritime rights and interests do not affect the freedom of the passage foreign vessels and aircraft enjoy in accordance with international law. In fact, China has never interfered with the freedom of passage of foreign vessels and aircraft in this area, nor will it ever do so in the future. China is ready to work together with the littoral states of the South China Sea to safeguard the safety the international water lanes in the area of the South China Sea". See Chinese Ministry of Foreign Affairs, 'Basic stance and policy of the Chinese Government in solving the South China Sea issue' (17 November 2000), available at [http://www.fmprc.gov.cn/mfa\\_eng/topics\\_665678/3754\\_666060/t19230.shtml](http://www.fmprc.gov.cn/mfa_eng/topics_665678/3754_666060/t19230.shtml).



ensuring the safety of sea lanes of communication”.<sup>80</sup> On the other hand, if there is tension, even armed conflict, between claimant states in the disputed areas or between China and the United States, then normal navigation would be unnecessarily but inevitably hampered.

Finally, it is to be noted that at present, China and ASEAN countries are discussing and negotiating a legally binding Code of Conduct for the South China Sea (COC). Safety of navigation and navigational security should be considered and incorporated into the future agreement. It is recalled that in the 2002 Declaration on the Conduct of Parties in the South China Sea (DOC), China and its ASEAN counterparts reaffirmed “their respect for and commitment to the freedom of navigation in and overflight above the South China Sea as provided for by the universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea”.<sup>81</sup> This respect and commitment should be necessarily reiterated in the upcoming COC. It is a positive sign that in September 2016, ASEAN members and China adopted the Joint Statement on the Application of the Code for Unplanned Encounters at Sea (CUES) in the South China Sea, and the Guidelines for Hotline Communications among Senior Officials of the Ministries of Foreign Affairs of ASEAN Member States and China in Response to Maritime Emergencies in the Implementation of the DOC. The two sides planned to finish the consultation on the COC outline in the first half of 2017 under circumstances without disturbances.<sup>82</sup> It is therefore strongly believed that navigation in the South China Sea will be adequately addressed in the negotiations on the COC and the COC itself.

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80 See China, State Council Information Office, ‘China adheres to the position of settling through negotiation the relevant disputes between China and the Philippines in the South China Sea’ (13 July 2016), available at [http://english.gov.cn/state\\_council/ministries/2016/07/13/content\\_281475392503075.htm](http://english.gov.cn/state_council/ministries/2016/07/13/content_281475392503075.htm).

81 Declaration on the Conduct of Parties in the South China Sea (Phnom Penh, 4 November 2002), available at [http://asean.org/?static\\_post=declaration-on-the-conduct-of-parties-in-the-south-china-sea](http://asean.org/?static_post=declaration-on-the-conduct-of-parties-in-the-south-china-sea).

82 Chairman’s Statement of the 19th ASEAN-China Summit to Commemorate the 25th Anniversary of ASEAN-China Dialogue Relations (Vientiane, 7 September 2016), available at <http://asean.org/storage/2016/09/Final-Chairmans-Statement-of-the-ASEAN-China-25th-Anniversary-Commemo....pdf>.

TABLE 1     *National Regulations concerning navigation by the states adjacent to the South China Sea*

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**Brunei:** 12 nm TS

**China:** Requires prior notice for transport of waste in TS and EEZ  
 Requires warships to get prior authorisation for passage through TS  
 CZ 24 nm security interests

**Indonesia:** peaceful crossing rights through the territorial sea and waters of the Indonesian  
 archipelago;  
 archipelagic sea channel crossing;  
 free transit crossing rights;  
 freedom of navigation in EEZ

**Malaysia:** prior consent to military activities in EEZ and CS

**Philippines:** freedoms with respect to navigation and overflight in EEZ  
 expressed concern at UNCLOS III in respect of military  
 activities in EEZ

**Vietnam:** Warships require authorisation to be applied for at least 30 days  
 prior to passage through TS; passage restricted to three warships at  
 a time  
 CZ 24 nm security interests

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**Source:** prepared by the author with references to UN Secretariat, Office of Legal Affairs, Division for Ocean Affairs and the Law of the Sea, 'Maritime space: Maritime zones and maritime delimitation', available at <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/asia.htm>; and S Kaye, 'State practice and maritime claims: Assessing the normative impact of the Law of the Sea Convention' in A Chircop, TL McDorman and SJ Rolston (eds), *The Future of Ocean Regime-Building: Essays in Tribute to Douglas M. Johnston* (Martinus Nijhoff, Leiden, 2009) 133–158, at pp. 151–154.