

Navigating through the South China Sea: International Legal Issues

The South China Sea has been the scene of geopolitical rivalry and tension over recent years, and this has attracted much media attention. Less mainstream focus has been on international legal issues arising in the area, including in relation to territorial and maritime claims, as well as the rights to freedom of navigation through these waters.

Territorial and Maritime Claims

The legal issues associated with the South China Sea can be broadly characterised as those dealing with territorial disputes, and a range of interconnected maritime disputes. The territorial disputes are exclusively associated with competing claims to the islands scattered throughout the region made by Brunei, China, Indonesia, Malaysia, the Philippines, Taiwan and Vietnam. Some claims relate to islands that are actually occupied, such as those in the Spratly Island group, while others have no permanent human population, but are seen as valuable because of the maritime entitlement the feature may generate. There is no ongoing legal process for the settlement of these territorial disputes at the current time.

The maritime disputes are more complex. There are two principal issues. The first is the entitlement of the islands and associated maritime features to generate maritime zones consistent with the 1982 United Nations Convention on the Law of the Sea (LOSC) to which all of the coastal States are a party. The LOSC is clear as to the extent of the various maritime zones, including the 12 nautical mile territorial sea, 200 nautical mile exclusive economic zone (EEZ), and minimum 200 nautical mile continental shelf. Where the claims overlap, as they do in multiple instances in the South China Sea, there are established rules under the LOSC allowing for maritime boundaries to be settled.

A more contentious issue has been the precise entitlements of certain maritime features, including the distinction between islands, rocks, reefs, and low-tide elevations. In 2016 an Arbitral Tribunal gave some clarity to these issues in a case brought by the Philippines against China. While the Philippines was ultimately successful with its claim, China rejected the award and claimed that the Tribunal lacked jurisdiction. Despite this outcome, the award is important for the South China Sea, and the interpretation of Article 121 of the LOSC which distinguishes between the maritime entitlements of islands and rocks, of which only the former are entitled to an EEZ and continental shelf.

A second issue relates to the entitlements that arise as a result of the various maritime claims recognised under the LOSC and the capacity of the relevant coastal State to regulate a range of matters including navigation, fishing, marine pollution, and scientific research. Of all of these activities, navigation has proven to be the most contentious.

Freedom of Navigation

A key objective during the negotiation of the LOSC in the 1970s was to bring about clarity to navigational rights and freedoms as they would exist within the expanded LOSC maritime zones. To that end, the right of innocent passage is recognised within the territorial sea, transit passage within international straits (such as the Straits of Malacca and Singapore), archipelagic sea lanes passage within the major navigation routes of archipelagic states such as Indonesia and the Philippines, and high seas equivalent freedom of navigation in all other waters including within the EEZ. The effect of this LOSC navigation regime was that, provided shipping moved through waters such as the territorial sea of the coastal State in a peaceful manner, navigation was not to be interfered with.

In the South China Sea this respect for the freedom of navigation of merchant vessels has generally be honoured. States throughout South East Asia, including Australia, place a heavy reliance upon the freedom of navigation as a foundation stone for both global and regional international trade. China also relies upon the freedom of navigation as part of its 'Belt and Road Initiative' in which the 'Maritime Silk Road' is a central plank. In this respect, China is strongly promoting maritime trade and commerce not only with pivotal Chinese ports and within East and South East Asia, but further afield through key shipping routes in the Indian and Pacific Ocean. These maritime trade routes are reliant upon the freedom of navigation, especially through strategic waterways such as the Straits of Malacca and Singapore.

A distinction can be made in the case of navigation by government vessels, especially foreign military ships, where some coastal States insist upon prior notification of navigation by such ships and authorisation for the entry of foreign warships into the territorial sea. Some limitations are also insisted upon with respect to the movement of such vessels within the EEZ, especially with respect to scientific research. In some instances, foreign warships will have been invited, as local and foreign navies engage in joint exercises. In other instances, when foreign military vessels enter the South China Sea to exercise the freedom of navigation, there may be a diplomatic response or occasionally an actual challenge to the conduct of the navigation.

Key Lessons

All South China Sea coastal states and other major stakeholders have an interest in promoting a rules-based approach to use of the area. There is a well-developed law of the sea regime that can be applied to de-escalate and resolve issues arising in the South China Sea. This goes for issues relating to maritime claims and freedom of navigation. It is important for governments and other affected actors to fully understand and apply the law of the sea rules, especially as set out in the LOSC, to the issues at hand and in response to tensions that may arise.

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