Association of Southeast Asian Nations

Freedom of Navigation in the South China Sea

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Introduction

The South China Sea, located between China, Taiwan, Vietnam, the Philippines, Malaysia, Indonesia and Brunei, is critical to the world's trade; an estimate of $5.3 billion in trade passes through this region every year. Passing through the South China Sea is the quickest and most inexpensive way for imports and exports between Asia on the one side and Europe, the U.S. or Africa on the other side to be made. Ensuring freedom of navigation in the region is, thus, critical.

However, peace and freedom of navigation in the region are in danger due to the overlapping claims of different countries and the growing aggression between them, a problem that was made worse with the 1951 San Francisco treaty, with which Japan gave up its rights to its islands in the South China Sea. Since then, who owns the South China Sea remains unclear, especially when it comes to the Paracel and Spratly island chains, which are claimed by China, Taiwan, the Philippines, Malaysia and Vietnam.

The United Nations Convention on the Law of the Sea (UNCLOS)[1] set clear rules regarding freedom of navigation and the distribution of the world's oceans and seas. Nevertheless, states have been making excessive maritime claims, trying to illegally limit freedom of navigation in the South China Sea. What needs to be done now is challenging excessive maritime claims, chastening the countries that make them and ensuring that the rights that UNCLOS has established stop being infringed.

[1] UNCLOS is defined in "Definition of Key Terms", as well as the territorial sea and excessive maritime claims

Definition of Key Terms

Excessive maritime claims:
Claims that don't comply with the terms of UNCLOS are illegal and referred to as excessive maritime claims. Through these claims, states usually either infringe the lawful division of the oceans/seas and the corresponding airspace (e.g. they claim territorial sea generated by low-tide elevations that are farther away than 12 miles from land) or impose illicit restrictions on navigation or overflight rights (e.g. they require permission for innocent passage through their territorial sea).

Maritime zones:

Territorial Sea of a State:
According to UNCLOS, the territorial sea is the sovereign territory of a state and extends twelve nautical miles[2] from its land; it can be generated by land and islands, while low-tide elevations can be used as starting points to measure it if they are within 12 nautical miles of land or an island. Although every state can create and execute its laws in its territorial sea without foreign interference, all ships of all states have the right of innocent passage (continuous and expeditious transit) through other states' territorial sea[2]. That applies to all states that have signed and ratified UNCLOS.

Contiguous zone:
The contiguous zone of a state begins twelve nautical miles from land—where the territorial sea ends—and extends 12 more miles; it is not the sovereign territory of a state, but part of international waters. It is generated by land, islands and rocks, while low-tide elevations can be used as starting points to measure it if they are within 12 nautical miles of land or an island. States do not have the right to limit navigation in the contiguous zone, except when a state is trying to prevent or punish the infringement of laws relevant to immigration, sanitation, taxes and customs—if that has occurred within the sovereign territory of the state. Military and surveillance activities that would be prohibited in the territorial sea are not illegal.

Exclusive Economic Zone (EEZ):
The EEZ of a state extends 200 nautical miles from land, including both the territorial sea and the contiguous zone; each state has special rights to the exploration and exploitation of natural resources in its EEZ. It is generated by land and islands, while low-tide elevations can be used as starting points to measure the EEZ if they are within 12 nautical miles of land or an island. Since the EEZ is part of international waters, no state has the right to limit navigation in it. International waters (the contiguous zone, the exclusive economic zone and more) are often referred to as "the high seas".

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[2] A nautical mile is equal to 1852 metres and is used for marine as well as air and space navigation. (It's historically been defined as the meridian arc length equivalent to one minute of latitude.)

United Nations Convention on the Law of the Sea (UNCLOS):
The UNCLOS is an international agreement that was signed in 1982 and came into force in 1994, establishing a legal framework for the use of the world's oceans and seas (regulating marine and maritime activity) while addressing new issues and introducing new legal concepts.

General Overview

Disputes around the land features of the South China Sea
Uncertainty isn't something new when it comes to the South China Sea; when China drew a map of its influence in 1279 it included all of the South China Sea, which has since then been claimed and occupied by many different powers. Most of today's problems, though, were caused when Japan gave up its rights to islands in the South China Sea with the 1951 San Francisco treaty and no state was granted sovereignty over them. That's when China submitted the "nine-dotted line", a claim which includes almost the entire South China Sea and is maintained today and known as the "Nine-Dash Line".

The People's Republic of China, however, is not the only state claiming these waters; Vietnam claims the land features in the South China Sea on account of discovery, use and occupation, having, as France's successor state, adduced the acts of sovereignty that France had carried out in the 1920s. The Vietnamese Prime Minister and Foreign Minister asserted claims of the Spratly and Paracel island groups without him being challenged. In 1974 there was an enormous clash between China (China's Communist Forces) and South Vietnam, with the former violently seizing the part of the Paracels that the latter were occupying. The ASEAN Member States (AMS), which were then five—Thailand, Indonesia, the Philippines, Singapore and Malaysia—, didn't react to this momentous conflict; some of them didn't want to offend Beijing since they wanted to establish diplomatic relations with it while there was a general sense that Chinese-allied North Vietnam would defeat South Vietnam in the Vietnam war anyway.

That event was followed by a series of violent battles and incursions such as the 1988 naval battle in the Spratlys, while more overlapping claims were laid by ASEAN Member States. Tomás Cloma, a marine educator, entrepreneur and adventurer from the Philippines laid claim to an area he named "Freedomland" in 1956—on his behalf, not on behalf of the Philippines. Freedomland eventually became a claim of the Philippines' government. Malaysia claims several land features due to their position on the EEZ and the continental shelves, invoking national security interests that stem from the features' proximity to Malaysia's main land territories. Some of those features are also claimed by Vietnam, China/Taiwan and the Philippines. Brunei Darussalam projects an "exclusive fishing zone" and a continental shelf that totally overlays part of Malaysia's EEZ and continental shelf, though, according to some statements, the issue of the overlap between the claimed waters of the two countries might be resolved soon. Brunei's claims also overlay some of China's "nine-dash line" claim and Vietnam's claimed waters.

Collaboration efforts between ASEAN and China

In July 1992 the AMS adopted the ASEAN Declaration on the South China Sea due to the growing risk of serious conflict and possibly the growing assertiveness of China's claims. The declaration called for the peaceful resolution of matters in the South China Sea related to sovereignty and jurisdiction and for the practice of "restraint"; it invoked the Treaty of Amity and Cooperation in Southeast Asia and its principles as the basis for the creation of a code of international conduct in the South China Sea, and lastly suggested cooperation in the South China Sea, recognising how dangerous adverse developments in the South China Sea can be for the region. China refused to adopt the declaration and—as it usually does—insisted on bilateral agreements.

In an attempt to protect peace and stability in the region per the 1992 Declaration, ASEAN sought to internationalise matters related to the South China Sea, by means such as the ASEAN Regional Forum (ARF), which included ASEAN's Dialogue Partners (DPs), China and Russia (then not yet ASEAN DPs), Vietnam and Laos (which weren't AMS at the time) and Papua New Guinea—an observer state of ASEAN. China eventually agreed to discuss a code of conduct with ASEAN, only to prevent further internationalisation of the issue. Although a code of conduct hasn't been achieved yet, in 1996 the Declaration on the Conduct of Parties in the South China Sea (DOC) was signed both by the AMS and by China, making it a significant stepping stone to a legally binding code of conduct.

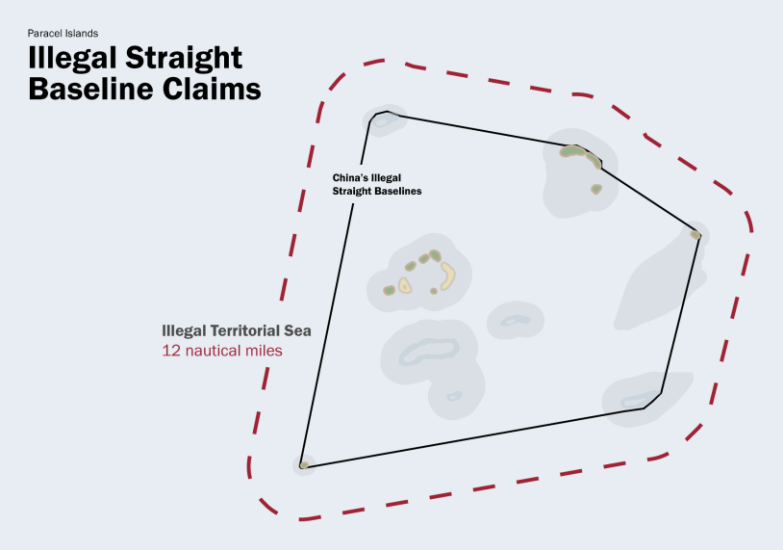
Despite all these efforts, the question of sovereignty is yet to be resolved; countries continue making overlapping claims and excessive maritime claims, putting freedom of navigation in the South China Sea in danger. Several states have been building infrastructure and stationing military hardware and troops in the land features they claim, with China's behaviour being the most concerning, due to the degree of its reclamation, construction and militarization.

Freedom of Navigation Operations

The most prominent measure that has been taken to challenge excessive maritime claims in the South China Sea is the USA's Freedom of Navigation Operations or FONOPs, operations by the US naval and air forces which differ depending on the claim that is being challenged each time. In its first three FONOPS, the US challenged the illegal requirement that ships provide notification or obtain permission before they transit through the territorial sea of another state under innocent passage (Under UNCLOS, innocent passage requires no prior notification or obtainment of permission). In the first one, conducted in October of 2015, a US Navy destroyer transited under innocent passage within 12 nautical miles of five features in the Spratly islands that are claimed by China, Taiwan, Vietnam and the Philippines. Even though none of these states has made a legal claim to a territorial sea around those features, they still illegally require notification or obtainment of permission. Since these features would be legally entitled to a territorial sea, the US destroyer transited under *innocent* passage without breaking any laws.

In the second one, on January 29, 2016, another US destroyer did the same thing within 12 nautical miles of Triton Island in the Paracel islands—an island claimed by China, Taiwan and the Philippines. A third destroyer transited under innocent passage within 12 nautical miles of Fiery Cross Reef—which was claimed by China, Taiwan and Vietnam—on May 16, 2016, to challenge the same excessive maritime claim for the third FONOP of the US in the South China Sea.

The fourth FONOP challenged a different excessive maritime claim—excessive straight baseline claims made by China around the Paracel islands. Baselines constitute the point from which a state's territorial sea, contiguous zone and EEZ can be measured, and usually exist at the low-water line along the coast. In 1996, China drew straight baselines that included the entire Paracel islands, claiming the waters within these baselines and 12 nautical miles around them as its territorial sea. UNCLOS, however, only allows straight baselines to be drawn by archipelagic states (states that are made up exclusively of islands), which means China's claim is illegal. This time, a US Navy destroyer loitered and conducted manoeuvring drills in the area—i.e. it travelled under non-innocent passage, something illegal in another state's territorial sea. This way the US showed that it doesn't consider those waters a part of China's territorial sea and challenged China's excessive maritime claim. Freedom of Navigation Operations continue being conducted and challenging excessive maritime claims in the South China Sea, which makes the US a significant actor in preserving justice and peace in the region.



At the same time, the United Kingdom, France, Australia and Japan have been conducting milder missions, patrolling the high seas in the South China Sea to support freedom of navigation.

Major Parties Involved

The People's Republic of China (PRC or just China)

China is the country with the largest amount of excessive maritime claims in the South China Sea. With its "nine-dash line" claim it claims almost all of the sea and the land features in it, while it's been worryingly aggressive with its assertions. Striving to dominate the sea, it has been building artificial islands and turning them into military

bases; military ships that can carry troops and weapons have also been stationed there, and communication towers, observation towers, helipads and other installations have been built in smaller reefs. Many of the reefs that China has been exploiting are also claimed by the Philippines, while the UN-backed Permanent Court of Arbitration in the Hague ruled that Panganiban Reef belongs to the Philippines.

Mischief Reef (Panganiban Reef) before and after China's militarisation [3]

It also requires that ships always provide notification or obtain permission before transiting through the sea it claims as its territorial sea, a claim that poses a major illegal restriction to freedom of navigation in the South China Sea. That behaviour, apart from being illegal, threatens peace, security and freedom of navigation in a sea of utmost importance to international trade and needs to be tackled accordingly. The South China Sea is, of course, heavily involved in all agreements about the South China Sea along with ASEAN, and any negotiation regarding freedom of navigation usual;y includes the PRC.

[3] *Sources: left: https://qz.com/863811/mischief-reef-how-a-fishermens-shelter-on-stilts-became-a-chinese-military-base-in-the-south-china-sea/*
right: https://www.inquirer.net/specials/exclusive-china-militarization-south-china-sea/

The United States of America (USA or US)

One of the US Navy destroyers

When it comes to challenging excessive maritime claims in the South China Sea, the US has acted more than any other country. With its FONOPs, it has actively challenged excessive maritime claims by China, the Philippines, Taiwan, Malaysia and Vietnam, as it has shown that it does not recognise their illegal assertions and that it is in fact safe to navigate the South China Sea freely. It has therefore supported the rights that UNCLOS has provided without even having to take a position regarding sovereignty over land features and waters in the South China Sea and protected freedom of Navigation.

ASEAN

Half of ASEAN's Member States—Vietnam, Malaysia, Indonesia, the Philippines and Brunei Darussalam—have made territorial sea claims in the South China Sea, many of which overlap each other. Those nations are the only ones that have such claims apart from China, while ASEAN is one of the most important parties in negotiations related to the division of the South China Sea and the land features in it. It has been responsible for the adoption of critical documents for the region, such as the 1992 ASEAN Declaration on the South China Sea and the Declaration on the Conduct of Parties in the South China Sea, and is possibly the organisation that will finally provide a code of conduct for the region; its role in resolving issues in the South China Sea has been unparalleled. Because of its potential to preserve justice and freedom of navigation in the South China Sea, it's important that ASEAN keep up its progress and its goals of cooperation and communication.

Timeline of Events

1279	China draws a map of its influence including all of the South China Sea
1951	With the San Francisco treaty, Japan gives up its rights to islands of the South China Sea, which become territorial claims of many other nations like China, the Philippines, Vietnam, Malaysia and Taiwan

August 8, 1967	ASEAN is established
1974	China seizes the part of the Paracel islands which it doesn't already occupy from South Vietnam in one of the most violent conflicts in the modern history of the South China Sea
1982	The United Nations Convention on the Law of the Sea (UNCLOS) is signed
July 22, 1992	The AMS adopt the ASEAN Declaration on the South China Sea
1994	UNCLOS is adopted
1994	The first ministerial meeting of the ARF takes place
2002	ASEAN and China sign the Declaration on the Conduct of Parties in the South China Sea
2011	Implementation guidelines for a code of conduct are finally formed
October 27, 2015	The USA conducts its first Freedom of Navigation Operation (FONOP) in the South China Sea
January 29, 2016	The USA conducts its second FONOP in the South China Sea
May 10, 2016	The USA conducts its third FONOP in the South China Sea

July 12, 2016	The Permanent Court of Arbitration in the Hague rules in favour of the Philippines in a case brought against the PRC, determining that China's claim is unlawful
October 21, 2016	The USA conducts its fourth FONOP in the South China Sea
May 24, 2017	The USA conducts its fifth FONOP in the South China Sea

Previous Attempts to Solve the Issue

FONOPs

The largest threat to freedom of navigation in the South China Sea are excessive maritime claims, and the most prominent way they've been challenged so far are Freedom of Navigation Operations. The FONOPS conducted by the US have shown the country's disagreement with those illegal claims and proved that freedom of navigation should continue in spite of them. Excessive maritime claims are illegal, and that's what FONOPs remind the world; challenging them is a stepping stone of utmost importance to banning and punishing them, and a way to preserve freedom of navigation in the South China Sea, as it serves as an example that it is not dangerous or illegal to navigate the sea freely in accordance with UNCLOS. Other countries have also conducted FONOPs, confirming the general disapproval of excessive maritime claims, a reproach helpful for the above-mentioned reasons.

Cooperation and multilateral agreements

Collaboration between different nations is critical in the resolution of problems like that of freedom of navigation in the South China Sea and should be encouraged at all costs. In the past, ASEAN has strived to adopt multilateral agreements and collaboration and made important steps in that direction. The 1992 Declaration on the South China Sea and the 2002 DOC constitute characteristic examples of that multilateral cooperation, which has provided elementary rules limiting arbitrary activity and behaviour in the South China Sea. We must also keep in mind that UNCLOS itself is the product of a long series of conferences and a prime example of collaboration. It is therefore safe to assume that multilateral collaboration has contributed immensely to the establishment of rules protecting freedom of navigation in the South China Sea and in general.

ASEAN Regional Forum

The ASEAN Regional Forum (ARF) is comprised of representatives of all ten ASEAN Member States (AMS'), as well as representatives of Australia, Bangladesh, Canada, the Democratic People's Republic of Korea (DPRK or North Korea), the European Union, India, Japan, Mongolia, Myanmar, Pakistan, New Zealand, Papua New

Guinea, the Republic of Korea (South Korea), Russia, Sri Lanka, Timor-Leste (East Timor) and the USA. The reason for its initiation was the need for consultation on political and security issues in ASEAN; the first ministerial meeting of the ARF was held in 1994. The ARF's objectives are holding constructive dialogue and consultation on issues of security and policy and contributing to confidence-building and preventive diplomacy in the Asia-Pacific region. The ARF successfully managed to serve as a platform for dialogue, negotiation and consultation, to build confidence between the different participants, promote collaboration on a wide range of subjects and establish important principles for cooperation. One of ARF's Areas of Cooperation is maritime security, while in the 28th ARF the Chairman's statement included the Forum's reaffirmation of the importance of freedom of navigation in the South China Sea and overflight above it and of the peaceful resolution of related issues in accordance with UNCLOS and international law in general. The meeting emphasised the importance of fully implementing the 2002 DOC.

Possible Solutions

A code of conduct

Despite all the efforts for the establishment of rules in the South China Sea, what hasn't yet been achieved is a code of conduct—a set of binding rules for ASEAN and China. The DOC—a document that did set some principles, but was not at all binding and not specific enough— was expected to initiate negotiations about an actual code of conduct (COC), but implementation guidelines weren't formed until 2011, with China asking to be included in the negotiations more, as ASEAN wanted it to have more f a consulting role. In 2017, the two parties finally agreed on a set of problems that should be addressed in the COC, which has supposed to be ready by 2021, though problems in the communication between ASEAN and China stalled the process of its development. With the COVID-19 pandemic and China's contradictory actions getting in the way, the future of the COC's development is frail. Both China's militarisation and foreign military presence in the South China Sea have been making the potential of armed conflict greater; China's behaviour might also not abide by the rules that ASEAN is planning to include in the COC, so the collaboration is at a fragile stage. In any case, ASEAN and the PRC should continue striving for a rapid implementation of the COC, which may constitute a catalyst for limits and rights of navigation, security and sovereignty in the land features and waters that have been facing instability for such a long period of time.

Penalties for excessive maritime claims

Excessive maritime claims are a grave danger to freedom of navigation and should be treated as such since they are misleading and deter vessels from transiting in legal ways. All states who have ratified UNCLOS are obliged to abide by it, which means that they should be penalised for excessive maritime claims and other actions that infringe the Convention. Since China and all of ASEAN's member states have ratified UNCLOS, all claims of theirs that don't comply with UNCLOS should be deemed as excessive maritime claims and penalised accordingly. That should start with calling for stricter regulations for the implementation of UNCLOS and urging states to bring cases to the Permanent Court of Arbitration or other courts that can prove that these claims are illicit.

Demilitarising the South China Sea

Military forces, mostly of the PRC, have occupied land features of the South China Sea to a worrying extent; if one of ASEAN's goals is to ensure navigation in South China is conducted without hesitation, the military forces will need to—at least partly—withdraw. As per the DOC, self-restraint is a necessary measure, and countries in the region should be urged to practice it to conserve peace and freedom of navigation in this important sea for international trade.

Bibliography

1. Erbas Y. The Conflict in the South China Sea: A Focus on a Possible Solution | Beyond the Horizon ISSG. Beyond the Horizon. Published April 11, 2022. https://behorizon.org/the-conflict-in-the-south-china-sea-a-focus-on-a-possible-solution/

2. Center for Preventive Action. Territorial Disputes in the South China Sea. Global Conflict Tracker. Published May 4, 2022. https://www.cfr.org/global-conflict-tracker/conflict/territorial-disputes-south-china-sea

3. Severino R. ASEAN and the South China Sea. *Institute for Regional Security*. 2010;6(2):37-47. Accessed September 10, 2022. https://www.jstor.org/stable/pdf/26459936.pdf?refreqid=excelsior%3Aef29d3386ba546b58cb06ce9d761fb12&ab_segments=&origin=&acceptTC=1

4. Wirth S. A code of conduct for the South China Sea. Pax et Bellum. Published March 12, 2021. Accessed September 10, 2022. https://www.paxetbellum.org/2021/03/12/a-code-of-conduct-for-the-south-china-sea/

5. VOA News. US Conducts Freedom of Navigation Operation in South China Sea. VOA. Published July 16, 2022. Accessed September 10, 2022. https://www.voanews.com/a/us-conducts-freedom-of-navigation-operation-in-south-china-sea/6661421.html#

6. UNITED NATIONS CONVENTION ON THE LAW OF THE SEA. UN. Published 2020. https://www.un.org/Depts/los/convention_agreements/texts/unclos/part2.htm

7. ASEAN Regional Forum. ASEAN Regional Forum Dev. https://aseanregionalforum.asean.org/about-arf/

8. Freund, Eleanor. “Freedom of Navigation in the South China Sea: A Practical Guide.” Belfer Center for Science and International Affairs, Harvard Kennedy School, June 2017. https://www.belfercenter.org/publication/freedom-navigation-south-china-sea-practical-guide

9. Mangosing F. EXCLUSIVE: New photos show China is nearly done with its militarization of South China Sea. Inquirer.net. Published February 5, 2018. https://www.inquirer.net/specials/exclusive-china-militarization-south-china-sea/

10. International Maritime Organization. United Nations Convention on the Law of the Sea. www.imo.org. https://www.imo.org/en/OurWork/Legal/Pages/UnitedNationsConventionOnTheLawOfTheSea.aspx

11. United Nations Convention on the Law of the Sea. Wikipedia. Published September 9, 2022. Accessed September 13, 2022. https://en.wikipedia.org/wiki/United_Nations_Convention_on_the_Law_of_the_Sea#

11. Areas of Cooperation Archives. Asean Regional Forum Dev. Accessed September 13, 2022. https://aseanregionalforum.asean.org/librarycat/areas-of-cooperation/

12. ASEAN. The Founding of ASEAN. asean.org. Accessed September 13, 2022. https://asean.org/about-asean__trashed/the-founding-of-asean/

13. The Voice of Vietnam. ARF calls for maintenance of security, freedom of navigation in East Sea. THE VOICE OF VIETNAM. Published August 9, 2021. Accessed September 13, 2022. https://vovworld.vn/en-US/news/arf-calls-for-maintenance-of-security-freedom-of-navigation-in-east-sea-1013563.vov

14. Wikipedia Contributors. List of parties to the United Nations Convention on the Law of the Sea. Wikipedia. Published April 13, 2019. https://en.wikipedia.org/wiki/List_of_parties_to_the_United_Nations_Convention_on_the_Law_of_the_Sea

15. KaranC. Nautical Law: What is UNCLOS? Marine Insight. Published June 18, 2022. Accessed September 14, 2022. https://www.marineinsight.com/maritime-law/nautical-law-what-is-unclos/#2_Are_the_UNCLOS_verdicts_legally_binding_on_states

16. U.S.-China Economic and Security Review Commission. *South China Sea Arbitration Ruling: What Happened and What’s Next?*; 2016. https://www.uscc.gov/sites/default/files/Research/Issue%20Brief_South%20China%20Sea%20Arbitration%20Ruling%20What%20Happened%20and%20What%27s%20Next071216.pdf