

Chapter 7

SLOCs Security in the South China Sea: Enhancing or Hindering the Maritime Silk Road?

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Introduction

The 21st Century Maritime Silk Road (MSR) Initiative, which was put forward together with the Silk Road Economic Belt by the Chinese government in 2013, has provided new impetus and practical paths for intra- and inter-regional cooperation. By proposing full connectivity in policy coordination, facilities, unimpeded trade, financial integration and a people-to-people bond as its five cooperation priorities, the Initiative aims to strengthen global cooperation through more substantial, convenient and profitable connectivity.¹ Five years on, over 100 countries and international organizations have supported and got involved in this initiative. Important resolutions passed by the UN General Assembly and Security Council contain reference to it.² The

¹ Cui Hongjian, “The Belt and Road Initiative and Its Impact on Asia-Europe Connectivity,” *ASEF Outlook Report 2016/2017: Connectivity: Facts and Perspectives, Volume II: Connecting Asia and Europe*, Asia-Europe Foundation, June 2016, p.161.

² Para. 53 in *Resolution adopted by the General Assembly on 17 November 2016* reads: “Welcomes and urges further efforts to strengthen the process of regional economic cooperation, including measures to facilitate regional connectivity, trade and transit, including through regional development initiatives such as the Silk Road Economic Belt and the 21st-Century Maritime Silk Road (the Belt and Road) Initiative....” See: Resolution No. A/RES/71/9, Resolutions of 71st Session, available at: <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/71/9>. Para. 22 in *Resolution 2274 (2016)* reads: “Calls for strengthening the process of regional cooperation, including measures to facilitate regional trade and transit, including through regional development initiatives such as the ‘Silk Road Economic Belt and 21st Century Maritime Silk Road’ initiative....” See: “Security Council Adopts Resolution 2274 (2016), Authorizing One-Year Mandate Extension for United Nations Assistance Mission in Afghanistan,” available at: <<https://www.un.org/press/en/2016/sc12283.doc.htm>>. Para. 34

vision of the Belt and Road Initiative (BRI) has become a reality.

In line with the priorities of the MSR, three “Blue Economic Passages” are closely related to maritime cooperation. First, efforts will be made to build the China-Indian Ocean-Africa-Mediterranean Sea Blue Economic Passage, by linking the China-Indochina Peninsula Economic Corridor, running westward from the South China Sea to the Indian Ocean, and connecting the China-Pakistan Economic Corridor (CPEC) and the Bangladesh-China-India-Myanmar Economic Corridor (BCIM-EC). Second, efforts will also be made to jointly build the blue economic passage of China-Oceania-South Pacific, travelling southward from the South China Sea into the Pacific Ocean. Third, another blue economic passage is also envisioned leading up to Europe via the Arctic Ocean.³ According to this plan issued by the Chinese government, the South China Sea region, as a pivot for at least two Blue Economic Passages, will play an important role for the success of MSR.

The South China Sea is a marginal sea to the Pacific Ocean that forms a semi-enclosed sea under the 1982 United Nations Convention on the Law of the Sea (“Convention”, “UNCLOS” or “LOSC”),⁴ between the South East Asian countries and China through its unique properties and geography. The South China Sea’s unique geographic properties make it important in the sense of global trade and

in *Resolution 2344 (2017)* reads: “Welcomes and urges further efforts to strengthen the process of regional economic cooperation, including measures to facilitate regional connectivity, trade and transit, including through regional development initiatives such as the Silk Road Economic Belt and the 21st-Century Maritime Silk Road (the Belt and Road) Initiative....” See: “Security Council Authorizes Year-Long Mandate Extension for United Nations Assistance Mission in Afghanistan, Adopting Resolution 2344 (2017),” available at: <https://www.un.org/press/en/2017/sc12756.doc.htm>.

³ “Vision for Maritime Cooperation under the Belt and Road Initiative,” Xinhua Net, available at: http://news.xinhuanet.com/english/2017-06/20/c_136380414.htm. For details, see Chapter 3 of this book.

⁴ See Article 122 of the LOSC, *UN Convention on the Law of the Sea*, available at: http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

communications. There are important sea lanes of communications (SLOCs) which 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.⁵ 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.⁶ In addition, the South China Sea also connects the rich oil fields of the Middle East with the East Asian "tiger economies" and is a vital part of the global economy. For example, in 2016, it is estimated that 80% of China's crude oil imports is transported through the South China Sea.⁷ This means that this small sea is an important transportation route for energy, unfinished and finished goods. With an extensive coastline, China is a major trading and ship-owning country with a growing trading interest under the MSR Initiative. This gives China a strong vested interest in securing the SLOCs in the South China Sea. Thus China reiterated in the *Vision for Maritime Cooperation under the Belt and Road Initiative* the importance of "[c]ooperation on maritime navigation security" and that "China will shoulder its due international obligations, participate in bilateral and multilateral maritime navigation security and crisis-control mechanisms, and work with all parties to combat non-traditional security issues such as crimes on the sea."⁸

The security of SLOCs in the South China Sea, however, still remains an issue in the sense that territorial and maritime disputes between/among multiple claimants in

⁵ Stanley B. Weeks, "Sea Lines of Communications (SLOC) Security and Access", in Michael Stankiewicz (ed.), *Maritime Shipping in Northeast Asia: Law of the Sea, Sea Lanes, and Security*, IGCC Policy Paper No.33 (Institute on Global Conflict and Co-operation, University of California, February 1998), 55.

⁶ Hal Olson, "Marine Traffic in the South China Sea", *Ocean Yearbook*, Vol.12, 1996, 137.

⁷ China Power Team, "How Much Trade Transits the South China Sea?" CSIS Report (August 2, 2017. Updated October 27, 2017), available at: <https://chinapower.csis.org/much-trade-transits-south-china-sea/>.

⁸ "Vision for Maritime Cooperation under the Belt and Road Initiative," supra note 3.

the region, and the geopolitical competition between China and countries outside the region, may constitute threats to the safety of navigation in the South China Sea.

The South China Sea Dispute and Its Impact on the SLOCs Security in the Region

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 in terms of sovereign rights and jurisdiction as stipulated under the LOSC; and the third one 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 disputes are entangled one into the other, thus making the South China Sea disputes most complicated of all territorial and maritime disputes in the world.⁹

A pending dispute related to territorial sovereignty or maritime rights may pose severe dangers to the safety of navigation in the disputed area. Blockades have historically been used in wartime,¹⁰ e.g., the United States imposed a “quarantine” around Cuba during the October 1962 Cuban Missile Crisis.¹¹ During the 1982 Falklands/Malvinas War, the United Kingdom declared a 200-nautical-mile military exclusion zone around the islands.¹²

⁹ Zou Keyuan, “Navigation in the South China Sea: Why Still an Issue?” *The International Journal of Marine and Coastal Law*, Volume 32, Issue 2, 2017, p. 243.

¹⁰ Jon M. Van Dyke, “Balancing Navigation Freedom with Environmental and Security Concerns”, *15 Colo. J. Int'l Envtl. L. & Pol'y* 19, 28 (2004), p. 25.

¹¹ Proclamation No. 3504, 27 Fed. Reg. 10401 (Oct. 23, 1962), available at: <http://www.presidency.ucsb.edu/ws/index.php?pid=8987>.

¹² R.R. Churchill & A.V. Lowe, *The Law of the Sea* (3d ed. 1999).

The South China Sea dispute, observed from the situation in recent years, has not reached a degree that “the continuance of [the dispute] is likely to endanger the maintenance of international peace and security.”¹³ Nevertheless, the South China Sea has long been regarded as one of the most dynamic and controversial regions in the world and has been causing potential challenges to the security of SLOCs in the region. Moreover, the South China Sea issue involves a number of countries, and it is not an easy task to ultimately resolve it. In order to mitigate the disputes and safeguard the security of navigation and stability of the region, the countries concerned have been working together to enter into provisional arrangements of a practical and cooperative nature by negotiations.¹⁴

On the other hand, the exchanges of views between China and other claimants in relation to their disputes have so far pertained to responding to incidents at sea in the disputed areas and promoting measures to prevent conflicts, reduce frictions, maintain stability in the region, and promote measures of cooperation. The “dual-track” approach -- disputes should be resolved peacefully through negotiation between the parties directly concerned, and China and ASEAN countries should work together to maintain peace and stability in the South China Sea -- was first initiated by Brunei and supported by China.¹⁵ This approach complies with the Declaration on the Conduct of Parties in the South China Sea (DOC) and principles of the UN Charter and serves the common interests and desire of countries in the region.

¹³ Article 33(1), Charter of the United Nations, available at: <http://www.un.org/en/charter-united-nations/>.

¹⁴ *Report on the Obligations of States under Article 74(3) and 83(3) of UNCLOS in respect of Undelimited Maritime Areas*, published by the British Institute of International and Comparative Law (30 June 2016), pp. 105, 106. See also: para. 47, *Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines* (7 December 2014), available at: http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml.

¹⁵ “China Sticks to ‘Dual-Track’ Approach to Solve South China Sea Issue: FM,” Xinhuanet (24 July 2016), available at: http://www.xinhuanet.com/english/2016-07/24/c_135536484.htm.

Safeguarding the Security of SLOCs in the South China Sea after the South China Sea Arbitration

The *South China Sea Arbitration* case initiated by the Philippines in 2013 and filed by a final award in 2016 has touched upon the navigational issues by the Philippine Submissions No.9-15, in which the Philippines requests the arbitral tribunal to rule that China violated the Convention by interfering with the exercise of the Philippines' sovereign rights and jurisdiction, by interfering with the Philippines' *freedom of navigation* and by conducting construction and fishing activities that harm the marine environment.¹⁶

¹⁶ “(9) China has unlawfully failed to prevent its nationals and vessels from exploiting the living resources in the exclusive economic zone of the Philippines;

(10) China has unlawfully prevented Philippine fishermen from pursuing their livelihoods by interfering with traditional fishing activities at Scarborough Shoal;

(11) China has violated its obligations under the Convention to protect and preserve the marine environment at Scarborough Shoal, Second Thomas Shoal, Cuarteron Reef, Fiery Cross Reef, Gaven Reef, Johnson Reef, Hughes Reef and Subi Reef;

(12) China's occupation of and construction activities on Mischief Reef

(a) violate the provisions of the Convention concerning artificial islands, installations and structures;

(b) violate China's duties to protect and preserve the marine environment under the Convention; and

(c) constitute unlawful acts of attempted appropriation in violation of the Convention;

(13) China has breached its obligations under the Convention by operating its law enforcement vessels in a dangerous manner causing serious risk of collision to Philippine vessels navigating in the vicinity of Scarborough Shoal;

(14) Since the commencement of this arbitration in January 2013, China has unlawfully aggravated and extended the dispute by, among other things:

(a) interfering with the Philippines' rights of navigation in the waters at, and adjacent to, Second Thomas Shoal;

(b) preventing the rotation and resupply of Philippine personnel stationed at Second Thomas Shoal;

(c) endangering the health and well-being of Philippine personnel stationed at Second Thomas Shoal; and

(d) conducting dredging, artificial island-building and construction activities at Mischief Reef, Cuarteron Reef, Fiery Cross Reef, Gaven Reef, Johnson Reef, Hughes Reef and Subi Reef; and

(15) China shall respect the rights and freedoms of the Philippines under the Convention, shall comply

This arbitration, however, neither facilitates the ultimate settlement of dispute between China and the Philippines, nor touches upon the core issue which endangers the freedom of navigation in the South China Sea.

(1) The Ineffectiveness of the Arbitration to Resolve Dispute Concerning Navigational Rights

For the submissions put forward by the Philippines in relation to navigational rights and safety, essentially, China argues that the essence of the submissions for arbitration is land territorial matters regarding some islands and reefs in the Nansha Islands (*Spratlys*), which are beyond the scope of UNCLOS, and maritime delimitation issues, which have been excluded by China in its 2006 optional exceptions declaration¹⁷ made under Article 298 of UNCLOS from compulsory procedures entailing binding decisions under Section 2 of Part XV.¹⁸ As a result, China made it clear from the outset that it would neither accept nor participate in the arbitral proceedings as the disputes presented by the Philippines were outside the jurisdiction of the Tribunal. On 12 July 2016, the final award was issued by the Tribunal. The Chinese government immediately stated that the award was null and void and had no binding force.¹⁹

with its duties under the Convention, including those relevant to the protection and preservation of the marine environment in the South China Sea, and shall exercise its rights and freedoms in the South China Sea with due regard to those of the Philippines under the Convention.”

See: Letter from the Philippines to the Tribunal (30 November 2015) and also: Merits Hearing Tr. (Day 4), pp. 201-205.

¹⁷ In 2006, China declared that “the Government of the People’s Republic of China does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1 (a) (b) and (c) of Article 298 of the Convention”. See: *Declarations and statements*, Division for Ocean Affairs and the Law of the Sea, UN Website, available at: http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#China Upon ratification.

¹⁸ Sienho Yee, “Editorial Comment: The South China Sea Arbitration Decisions on Jurisdiction and Rule of Law Concerns,” *Chinese Journal of International Law*, Volume 15 Number 2 (2016), p. 220.

¹⁹ See: *Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines* (2016/7/12), available at: http://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1379492.htm.

As a general rule, China considers that States should be able to choose the means of settling a dispute, rather than being forced to face compulsory adjudication by an international court or tribunal. China considers negotiation and conciliation to be the most appropriate means for settling disputes involving its “core interests” which include issues of sovereignty and territorial integrity. In most cases, therefore, when China enters into a treaty, it will opt out of any provision referring to dispute settlement under international courts or tribunals.²⁰

In the meantime, “[t]he Chinese government will continue to abide by international law and basic norms governing international relations as enshrined in the Charter of the United Nations, including the principles of respecting state sovereignty and territorial integrity and peaceful settlement of disputes, and continue to work with states directly concerned to resolve the relevant disputes in the South China Sea through negotiations and consultations on the basis of respecting historical facts and in accordance with international law, so as to maintain peace and stability in the South China Sea.”²¹ The mutual understanding between China and other disputed parties to settle relevant disputes through negotiation has also been reaffirmed in a regional multilateral instrument. In 2002, China and ASEAN countries signed the DOC, which in Article 4 explicitly states that “the Parties concerned undertake to resolve their territorial and jurisdictional disputes by peaceful means ... through friendly consultations and negotiations by sovereign states directly concerned, in accordance with universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea.”²²

²⁰ For example, in ratifying the *International Convention on the Elimination of All Forms of Racial Discrimination* 1965 and the *Convention on the Elimination of Discrimination against Women* 1979, China submitted reservations that precluded the application both of the interstate dispute resolution provisions involving arbitration and of referrals to the ICJ.

²¹ *Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines* (2016/7/12), supra note 19.

²² *DECLARATION ON THE CONDUCT OF PARTIES IN THE SOUTH CHINA SEA*, available at:

(2) The Positive Trend towards a Final Dispute Resolution

The election of Rodrigo Duterte has qualitatively altered the political dynamics of the South China Sea disputes, while China and other disputant countries of the South China Sea are making active efforts to resume bilateral consultation as well as to promote cooperation at sea. The main feature of the dispute settlement in the South China Sea after the Arbitration can be described as “back on the right track”.²³ Since the second half of 2016, the relationship between China and the Philippines has experienced a positive shift from open hostility to exchanges of goodwill, informal contacts and meetings between the leaders of both countries.²⁴ Sensitive issues concerning the South China Sea have been agreed to be brought to the negotiation table.²⁵ China and the Philippines also signed the *Memorandum of Understanding between the China Coast Guard and the Philippine Coast Guard on the Establishment of a Joint Coast Guard Committee on Maritime Cooperation* during President Duterte’s visit in October 2016,²⁶ which laid a foundation for bilateral cooperation of two countries’ Coast

http://asean.org/?static_post=declaration-on-the-conduct-of-parties-in-the-south-china-sea-2.

²³ Su Xiaohui, “It’s Time to Stop Political Farce in the South China Sea,” China-US-Focus (25 July 2016), available at: <https://www.chinausfocus.com/foreign-policy/its-time-to-stop-political-farce-in-the-south-china-sea>.

²⁴ “China congratulates Duterte on taking office,” *ABS-CBN News* (1 July 2016), available at: <http://news.abs-cbn.com/nation/06/30/16/china-congratulates-duterte-on-taking-office>; “Xi Jinping Meets with President Rodrigo Duterte of the Philippines”(20 November 2016), available at: http://www.fmprc.gov.cn/mfa_eng/topics_665678/XJPDEGDEBLZLJXGSFWBCXZBLLMJXDYTHZZDESSCLDRFZSHY/t1417419.shtml; “ Li Keqiang Holds Talks with President Rodrigo Duterte of the Philippines” (16 November 2017), available at: http://www.fmprc.gov.cn/mfa_eng/wjdt_665385/wshd_665389/t1511465.shtml.

²⁵ Jane Perlez, “Rodrigo Duterte and Xi Jinping Agree to Reopen South China Sea Talks,” *The New York Times* (20 October 2016), available at: https://www.nytimes.com/2016/10/21/world/asia/rodrigo-duterte-philippines-china-xi-jinping.html?_r=1.

²⁶ “Full Text: Joint Statement of China and the Philippines,” *Xinhuanet* (21 October 2016), available at: http://news.xinhuanet.com/english/china/2016-10/21/c_135771815.htm.

Guards.

In November 2017, China and the Philippines reaffirmed that the two sides will address “territorial and jurisdictional disputes by peaceful means, without resorting to the threat or use of force, through friendly consultations and negotiations by sovereign states directly concerned, in accordance with universally recognized principles of international law, including the Charter of the United Nations and the 1982 UNCLOS.” In addition, the two sides also “agree to strengthen maritime cooperation in areas such as marine environmental protection, disaster risk reduction, including possible cooperation in marine scientific research.”²⁷

Following the example of China and the Philippines, China and Vietnam agreed to make good use of the border negotiation mechanism between the two governments and seek a fundamental and long-term solution to the maritime disputes in the South China Sea. To achieve this, both sides agreed to conduct follow-up works of the joint inspection in waters outside the Beibu Gulf.²⁸ Concerning the cooperation at sea, the two sides agreed to promote the efforts of the working group on cooperation for development at sea and step up joint projects in less-sensitive fields.²⁹ Before that, the two countries’ Coast Guards also signed a memorandum of understanding and held their first working meeting in August 2016.

On 20-21 November 2018, Chinese President Xi Jinping paid a State Visit to the Philippines, during which China and the Philippines “reaffirmed the importance of

²⁷ *Joint Statement between the Government of the People's Republic of China and the Government of the Republic of the Philippines* (16 November 2017, Manila), website of the Ministry of Foreign Affairs of the People's Republic of China, available at: http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1511299.shtml.

²⁸ “China, Vietnam reach consensus on trade, maritime cooperation: joint statement,” *Xinhua* (13 November 2017), available at: http://news.xinhuanet.com/english/2017-11/13/c_136749356.htm.

²⁹ “Vietnam, China issue joint statement,” *Nhan Dan* (13 November 2017), available at: <http://en.nhandan.com.vn/politics/external-relations/item/5641902-vietnam-china-issue-joint-statement.html>.

maintaining and promoting regional peace and stability, freedom of navigation in and over-flight above the South China Sea,” and “stay committed to addressing disputes by peaceful means, without resorting to the threat or use of force, through friendly consultations and negotiations by sovereign states directly concerned, and in accordance with universally recognized principles of international law, including the Charter of the [UN] and the [LOS Convention].”³⁰ More importantly, both sides agreed to “exercise self-restraint in the conduct of activities in the South China Sea that would complicate or escalate disputes and affect peace and stability,” and noted that “the importance of confidence-building measures to increase mutual trust and confidence.” In this regard, China and the Philippines agreed to “maximize and strengthen the on-going coast guard, defense and military dialogue and liaison mechanisms, with a view to facilitating quick responses to situations on the ground and contributing to the enhancement of mutual trust and confidence between their coast guards and defense agencies.”³¹ The two governments signed the *Memorandum of Understanding on Cooperation on Oil and Gas Development*, and agree to discuss maritime cooperation including maritime oil and gas exploration, sustainable use of mineral, energy and other marine resources.³² Between December 13 and 14 in the same year, China and Vietnam each assigned two naval vessels to participate in the 25th joint patrol in the Beibu Gulf, during which the fleet sailed for nearly 30 hours and they made information exchange on hydrological meteorology, sea and air conditions, formation course and speed, enhancing mutual maritime communications and resource sharing.³³

³⁰ *Joint Statement between the People's Republic of China and the Republic of the Philippines* (21 November 2018, Manila). See: “Full text of China-Philippines joint statement,” Xinhua Net (21 November 2018), available at: http://www.xinhuanet.com/english/2018-11/21/c_137622271.htm.

³¹ *Ibid.*

³² *Ibid.*

³³ “China, Vietnam wrap up 25th joint patrol in Beibu Gulf,” China Military Online (20 December 2018), available at: http://eng.chinamil.com.cn/view/2018-12/20/content_9384324.htm.

Keeping Peace and Stability in the South China Sea

The relationship between China and ASEAN countries on the issue of the South China Sea has seen several positive trends since the last quarter of 2016. A series of new consensuses have been made by the parties concerned, such as promoting cooperation, and speeding up consultations on the Code of Conduct in the South China Sea (“COC”). These positive trends have created a good climate for regional peace as well as for the SLOCs security.

China and ASEAN countries have reached consensus on further implementing the DOC and accelerating the COC consultation, which has borne fruitful results. With regard to the implementation of DOC, progress has been made via “early harvest” measures. In July 2016, China and ten ASEAN countries issued *the Joint Statement by the Foreign Ministers of ASEAN Member States and China on the Full and Effective Implementation of the Declaration on the Conduct of Parties in the South China Sea (DOC)*, which stressed that all parties shall resolve their disputes “by peaceful means...through friendly consultations and negotiations by sovereign states directly concerned.”³⁴ In September 2016, at the 19th China-ASEAN Summit, leaders from China and ASEAN countries reviewed and approved the *Guidelines for Hotline Communications among Senior Officials of the Ministries of Foreign Affairs of China and ASEAN Member States in Response to Maritime Emergencies*, and issued the *Joint Statement on the Application of the Code for Unplanned Encounters at Sea in the South*

³⁴ “Joint Statement of the Foreign Ministers of ASEAN Member States and China on the Full and Effective Implementation of the Declaration on the Conduct of Parties in the South China Sea” (24 July 2016), available at: <http://asean.org/storage/2016/07/Joint-Statement-on-the-full-and-effective-implementation-of-the-DOC-FINAL.pdf>.

China Sea.³⁵ These two important documents provide an institutional mechanism for China and ASEAN countries to manage and control contingencies in the South China Sea so as to avoid the emergence or escalation of maritime conflicts.

In 2017, the implementation of the DOC has seen a new breakthrough. On 31 October 2017, China and six ASEAN countries, including Thailand, the Philippines, Cambodia, Myanmar, Laos and Brunei, held the first multilateral joint maritime search and rescue drill at waters off Zhanjiang, China.³⁶ On the 20th ASEAN-China Summit held in November, The *Leaders' Declaration for a Decade of Coastal and Marine Environmental Protection in the South China Sea (2017-2027)* was also formally adopted.³⁷ Despite various obstacles and difficulties, the consultation and negotiation of COC has made remarkable achievements. In August 2017, Foreign Ministers of China and ASEAN countries formally adopted the framework of the COC.³⁸ On the 20th ASEAN-China Summit held in Manila in November 2017, leaders collectively announced that the substantive negotiations on the text of the COC would commence

³⁵ “Joint Statement on The Application of the Code for Unplanned Encounters at Sea in the South China Sea” (7 September 2016), available at: <http://asean.org/storage/2016/09/Joint-Statement-on-the-Application-of-CUES-in-the-SCS-Final.pdf>.

³⁶ “China, ASEAN hold joint maritime rescue drill” (13 October 2017), *China Military Online* (Website of the Ministry of National Defense of the People's Republic of China), available at: http://eng.mod.gov.cn/news/2017-10/31/content_4796204.htm.

³⁷ *Chairman's Statement of the 20th ASEAN-China Summit*, 13 November 2017, available at: <<http://asean.org/storage/2017/11/FINAL-Chairmans-Statement-of-the-20th-ASEAN-China-Summit-13-Nov-2017-Manila1.pdf>>; *Declaration for a Decade of Coastal and Marine Environmental Protection in the South China Sea (2017-2027)*, 13 November 2017, available at: <http://asean.org/storage/2017/11/Declaration-for-a-Decade-of-Coastal-and-Marine-Environmental-Protection-in-the-South-China-Sea-2017-2027.pdf>.

³⁸ Christian Shepherd & Manuel Mogato, “ASEAN, China adopt framework for crafting code on South China Sea,” *Reuters*, 6 August 2017, available at: <https://www.reuters.com/article/us-asean-philippines-southchinasea/asean-china-adopt-framework-for-crafting-code-on-south-china-sea-idUSKBN1AM0AY>.

in early 2018.³⁹

The year 2018 marks the 15th anniversary of the establishment of the China-ASEAN strategic partnership, and joint efforts have made to push for greater development in East Asian regional cooperation by the two sides. On August 2, Minister for Foreign Affairs of Singapore Vivian Balakrishnan said ASEAN member states and China have arrived at a single draft negotiating text of COC which will be a living document and the basis of future COC negotiations.⁴⁰ Between October 22 and 28, the navies of China and 10 ASEAN countries held the first joint maritime exercise in Zhanjiang, which aimed mainly at advancing defense cooperation and maritime security between China and ASEAN, as well as the application of *The Code for Unplanned Encounters at Sea*.⁴¹

However, given that the South China Sea has become primarily a crux of China-US competition in the Asia-Pacific, the uncertainties in this region still exist and will be closely related to what the US would behave in the future.

Differences and Frictions between China and the US Related to Navigational Rights in the South China Sea

Without any maritime territorial claims to the South China Sea, the US has maintained that freedom of navigation is at the heart of the country's maritime policy. It considers the freedom of navigation in the so-called "international waters", including exclusive economic zones (EEZ), to be an unalienable right of all countries and will continue to

³⁹ *Chairman's Statement of the 20th ASEAN-China Summit*, supra note 34.

⁴⁰ "China, ASEAN arrive at single draft negotiating text of COC in South China Sea," Website of China Daily (2 August 2018), available at: <http://global.chinadaily.com.cn/a/201808/02/WS5b62c87da3100d951b8c8460.html>.

⁴¹ "China, ASEAN begin joint naval drill," Website of China Daily (23 October 2018), available at: <http://www.chinadaily.com.cn/a/201810/23/WS5bce80d7a310eff303283f68.html>.

pursue national interests in the South China Sea based on this stance.⁴² On the other hand, to offset China's westward focus – the Belt and Road Initiative and Cooperation, the US seeks to create a global alliance strategy with the aim to maintain a balance of power in Eurasia,⁴³ and declares to “maintain a forward military presence capable of deterring and, if necessary, defeating any adversary.”⁴⁴ Thus the Freedom of Navigation Operation Programs (“FONOPs”) has become a useful tool for these strategic aims. During the period of Donald Trump Administration, the differences between two sides not only led to diplomatic arguments and battles of public opinion, but also led to the escalation of regional tensions and risk to navigational safety. It is necessary to evaluate the merits of differences between the two sides.

Regime of Navigation under the LOSC

The law of the sea is based on the fundamental principle of *mare liberum* for the last five centuries. Although some States had sought to establish sovereignty over the high seas in order to monopolize trade and fishing, these attempts failed in favor of the establishment of *mare liberum*, the freedom of the seas, for the benefit of every State.⁴⁵ At present, the navigational rights of vessels are mainly governed by the LOSC, though there are relevant treaties in this respect adopted under the auspices of the International Maritime Organization (IMO).⁴⁶ The LOSC today provides the legal framework with respect to navigational rights binding on all State parties and non-parties including the

⁴² *Challenges to Freedom of the Seas and Maritime Rivalry in Asia*, Directorate-General for External Policies, Policy Department European Parliament, 2017, p. 10.

⁴³ *Ibid.*, p. 1.

⁴⁴ *National Security Strategy of the United States of America* (December 2017), p. 46, available at: <https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf>.

⁴⁵ Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea*, Cambridge University Press 2005, p. 5.

⁴⁶ Zou Keyuan, “Navigation in the South China Sea: Why Still an Issue?” *The International Journal of Marine and Coastal Law*, Volume 32, Issue 2, p. 243.

US, be it through ratification, unilateral declaration or simply as reflecting customary international law.⁴⁷ The LOSC has made the legal arrangements for navigational rights of vessels in accordance with different sea zones - internal waters, territorial sea, straits used for international navigation, archipelagic waters, the EEZ, the continental shelf, and the high seas and the international seabed (the “Area”) - established under the Convention. Since 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 regulation of the coastal State.

Territorial sea is also part of the territory of the coastal State which owns the 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. In addition, the coastal State should give appropriate publicity to any danger to navigation, of which it has knowledge, within its territorial sea.⁴⁸ 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. Furthermore, the coastal State may take necessary steps in its territorial sea to prevent passage which is not innocent.⁴⁹

For navigational safety reasons, 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. In particular, tankers, nuclear-powered ships and ships carrying nuclear or other inherently dangerous

⁴⁷ Erik Franckx, “American and Chinese Views on Navigational Rights of Warships”, *10 Chinese J. Int'l L.* 187, 206 (2011), p. 192-193.

⁴⁸ See Article 21 of the LOSC, *supra* note 4.

⁴⁹ See Article 25 of the LOSC, *supra* note 4.

or noxious substances or materials may be required to confine their passage to such sea lanes. In the designation of sea lanes and the prescription of traffic separation schemes, the coastal State should 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.⁵⁰

The coastal State should clearly indicate such sea lanes and traffic separation schemes on charts to which due publicity should be given.⁵¹ Foreign nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances should, 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.

As to the navigation in the EEZ, the LOSC provides a legal regime similar to that in the high seas.⁵² However, since it is an area within national jurisdiction, the coastal State may have the right to lay down necessary laws and regulations relating to navigation safety and marine environmental protection. In this respect, the coastal State may well be aware that its laws and regulations should 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

⁵⁰ See Article 22 of the LOSC, *supra* note 4.

⁵¹ *Ibid.*

⁵² See: J. Ashley Roach, "Today's Customary International Law of the Sea," *Ocean Development and International Law*, Vol. 45 (2014) Issue 3, pp. 239-252.

the LOSC and other applicable rules of international law.⁵³

Navigation in the straits used for international navigation was hotly debated during the UNCLOS III. Finally, the LOSC adopted the “transit passage” for foreign vessels passing through the straits used for international navigation. The other sea area within national jurisdiction which foreign vessels enjoy navigational rights is the archipelagic waters. As for the high seas, all States enjoy the freedom of navigation.

China’s Policy on the Navigational Issues in the South China Sea

In spite of the existence of unresolved disputes in related areas in the South China Sea, China has repeatedly upheld the freedom of navigation and overflight enjoyed by all states under international law, and stayed ready to work with other coastal states and the international community to ensure the safety of and the unimpeded access to the international shipping lanes in the South China Sea.⁵⁴

The South China Sea is home to a number of important sea lanes, which are among the main navigation routes for China’s foreign trade and energy import. Ensuring freedom of navigation and overflight and safety of sea lanes in the South China Sea is crucial to China. Over the years, China has worked with ASEAN Member States to ensure unimpeded access to and safety of the sea lanes in the South China Sea and made important contribution to this collective endeavor. The freedom of navigation and overflight enjoyed by all states in the South China Sea under international law has never been a problem.

China has actively provided international public goods and made every effort to provide services, such as navigation and navigational aids, search and rescue, as well

⁵³ See Article 58 (3) of the LOSC, supra note 4.

⁵⁴ *Statement of the Government of the People’s Republic of China on China’s Territorial Sovereignty and Maritime Rights and Interests in the South China Sea* (12 July 2016), available at: http://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1379493.htm.

as sea conditions and meteorological forecast, through capacity building in various areas so as to uphold and promote the safety of sea lanes in the South China Sea. China maintains that, when exercising freedom of navigation and overflight in the South China Sea, relevant parties shall fully respect the sovereignty and security interests of coastal states and abide by the laws and regulations enacted by coastal states in accordance with the LOS Convention and other rules of international law.⁵⁵

“FONOPs” as a Major Threat to the Security of SLOCs in the South China Sea

The US FONOPs have been conducted globally since 1979, and US-China tensions in the South China Sea are nothing new, particularly regarding issues of surveillance in EEZs. However, the recent FONOPs conducted during the Trump Administration are clearly a response to China’s land reclamation activities in the Nansha Islands (*Spratlys*).⁵⁶

By January 2019, according to media reports, at least nine FONOPs had been conducted against China’s presence in the South China Sea during the two years’ presidency of Donald Trump.⁵⁷ This figure has more than doubled to that during eight

⁵⁵ “China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea”, paras. 136-139, available at: http://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1380615.htm.

⁵⁶ “South China Sea FONOPs,” (edited by Annie Kowalewski) website of Institute for China-America Studies, available at: <https://chinaus-icas.org/research-and-publications/icas-issue-primers/south-china-sea-fonops/>.

⁵⁷ According to media reports, on 25 May 2017, the USS Dewey missile destroyer entered the adjacent waters of the relevant islands and reefs in China's Nansha Islands without the permission of the Chinese government, the Chinese navy legally identified and verified the US vessel and warned it to leave; on 2 July, the missile destroyer USS Stethem trespassed China's territorial waters off the Xisha Islands, China dispatched military vessels and fighter planes in response to warn off the US vessel; on 10 August, USS John S. McCain entered the neighboring waters of relevant islands and reefs of China's Nansha Islands without the permission of the Chinese government, the Chinese armed forces immediately sent naval ships to identify and verify the US warship according to law and warn it to leave; on 10 October, the missile destroyer USS Chafee entered China's territorial sea off the Xisha Islands without China's approval, the Chinese side immediately sent naval ships and fighter planes to identify and verify the US

years of Obama Administration. According to the *Annual Freedom of Navigation Report* (Fiscal Year 2017) published by the US Department of Defense, six “excessive maritime claims” by China were challenged by US forces during the period from 1 October 2016 to 30 September 2017. It is worth noting that “multiple challenges” were conducted against each “excessive maritime claim.”⁵⁸ These challenges focus on the legality of enclosing dependent archipelagos with straight baselines in the Xisha Islands (*Paracel* Islands), the entitlement of territorial sea enjoyed by the Meiji Jiao (Mischief Reef), and the right of innocent passage of warships.

(1) Straight Baselines in the Xisha Islands (*Paracel* Islands)

In May 1996, China designated straight baselines for the Xisha Islands, in their entirety, by joining several islands and reefs including Zhongjian (Triton) Island, which was involved in the USS Stethem and the USS Chafee Incidents. China pointed out that the US warships “entered China's territorial sea off the Xisha Islands without China's

warship according to law and warn and expel it. On 17 January 2018, the USS Hopper missile destroyer sailed within 12 nautical miles off China's Huangyan Island without gaining permission from the Chinese government, the Chinese Navy carried out identification and verification procedures in accordance with law and warned the US vessel to leave; on 23 March, USS Mustin entered the neighboring waters of relevant islands and reefs of China's Nansha Qundao without the permission of the Chinese government, the Chinese Navy has identified and verified the US warship and warned it to leave in accordance with the law; on 27 May, US Navy's warships USS Higgins and USS Antietam entered China's territorial waters off the Xisha Islands without the Chinese government's approval, the Chinese Navy conducted identification and verification of the US warships in accordance with the law, and warned them off; on 30 September, the destroyer USS Decatur sailed into waters close to China's Nansha Islands without permission from the Chinese government, in response, the Chinese Navy identified and warned the ship to leave in accordance with laws. On January 7, 2019, the USS McCampbell entered China's territorial seas around Xisha Islands without permission from the Chinese side, China sent military vessel and aircraft to conduct verification and identification on the US ship and warned it to leave.

⁵⁸ *Annual Freedom of Navigation Report* (Fiscal Year 2017), available at: <http://policy.defense.gov/Portals/11/FY17%20DOD%20FON%20Report.pdf?ver=2018-01-19-163418-053>.

approval.”⁵⁹

These incidents refer to the issue that whether or not the use of straight baselines to enclose dependent archipelagos is authorized by international law. This issue is also mentioned in the Award of the South China Sea Arbitration case. The Tribunal concluded that it did not think it consistent with the LOSC or customary international law, but did not explain its rationale in detail.⁶⁰

The Convention confers State Parties with the right to establish their baselines either through the “normal baseline” prescribed by Article 5, or through the “straight baseline” provided by Article 7 of the Convention.⁶¹ According to these provisions, Article 3 of the *Law of the People’s Republic of China on the Territorial Sea and the Contiguous Zone* prescribes that “[t]he method of straight baselines composed of all the straight lines joining the adjacent base points shall be employed in drawing the baselines of the territorial sea of the People’s Republic of China.”⁶²

The Tribunal, however, believes that: “Article 7 provides for the application of straight baselines only ‘[i]n localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity.’ These conditions do not include the situation of an offshore archipelago.”⁶³

The problem is that Article 46 defines an “archipelagic State” as “a State

⁵⁹ “Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference,” Website of Ministry of Foreign Affairs of China (11 October 2017), available at: https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1500871.shtml.

⁶⁰ Paras. 575-576, Award, PCA Case No. 2013-19, available at: <https://www.pcacases.com/web/sendAttach/2086>.

⁶¹ LOSC, supra note 4.

⁶² See: *Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone*, available at: <http://www.lawinfochina.com/display.aspx?lib=law&id=670>.

⁶³ Para. 575, supra note 55.

constituted wholly by one or more archipelagos and may include other islands” and thus, an article 46 archipelagic State is distinguished from archipelagos that are part of a continental State. According to the *travaux préparatoires* and commentaries on article 46, it turned out that a number of States with dependent archipelagos, such as Ecuador for the Galapagos, sought to have them included. Competing versions appeared in the texts that were considered during the 1974 and 1975 sessions of the Third Conference. But the relevant proposal did not achieve consensus, and was dropped in the version considered at the fourth session in 1976, the RSNT, and did not reappear subsequently.

Therefore, the fact that neither article 5 on the normal baseline nor article 7 on straight baselines explicitly precludes their use to offshore archipelagos, makes it possible to apply the last preambular paragraph of the LOSC which states that “matters not regulated by the Convention continue to be regulated by the rules and principles of general international law.”⁶⁴

It is necessary to examine the *Anglo-Norwegian Fisheries* case carefully and identify the factors regarded by the ICJ as fundamental for justifying the establishment of straight baselines. In this case, the ICJ identified “certain basic considerations inherent in the nature of the territorial sea”:

“Another fundamental consideration, of particular importance in this case, is the more or less close relationship existing between certain sea areas and the land formations which divide or surround them...

Finally, there is one consideration not to be overlooked, the scope of which extends beyond purely geographical factors: that of certain economic interest peculiar to a region, the reality and importance of which are clearly evidenced by a long usage.”⁶⁵

⁶⁴ LOSC, supra note 4.

⁶⁵ *Fisheries case, Judgment of December 18th, 1951*: ICJ Reports 1951, p. 133, available at: <http://www.icj-cij.org/files/case-related/5/005-19511218-JUD-01-00-EN.pdf>.

Obviously, the considerations on the adoption of straight baselines include not only pure geographical factors, but also social, economic and historical factors. This is the case to justify the reason why China established straight baselines to enclose the Xisha Islands.⁶⁶

Furthermore, there are more than 10 dependent archipelagos worldwide that have been enclosed with straight baselines: the *Faroes* (Denmark), *Svalbard* (Norway), the *Canary Islands* (Spain), the *Azores* (Portugal), *Kerguelen Islands* (France), *Galapagos* (Ecuador), the *Bijagos Archipelago* (Guinea-Bissau), the *Arctic archipelago* (Canada), *Co Co* and *Preparis Islands* (Myanmar), etc.

Even though this state practice over the decades cannot be deemed as a rule of customary international law since there are a few oppositions which prevented the development of a uniform and widely accepted practice, it is unreasonable to conclude that the use of straight baselines to enclose dependent archipelagos is contrary to the Convention or customary international law.

(2) Entitlement of Territorial Sea in the Nansha Islands (*Spratly Islands*)

The Meiji Jiao (Mischief Reef), which was involved in the USS Dewey, USS John S. McCain and USS Mustin Incidents, is taken by the US as a low-tide elevation (LTE). An LTE, according to Article 13 of the Convention, does not have territorial sea of its own unless it is wholly situated at a distance within the breadth of the territorial sea from the mainland or an island.⁶⁷ In other words, an LTE may be used as a basepoint in drawing a baseline to 'bump out' the territorial sea, which makes it different from mid-ocean LTE or non-offshore LTE such as the Meiji Jiao. This position is also supported by the Award in the South China Sea Arbitration case.⁶⁸ Thus the USS

⁶⁶ Duan Jielong ed., *International Law in China: Cases and Practice* (in Chinese), China Law Press, 2011, pp. 84-85.

⁶⁷ See Article 13 of the LOSC, *supra* note 4.

⁶⁸ Paras. 378, 646-647, *supra* note 55.

Dewey, according to a report, was “engaged in normal operations by conducting a maneuvering drill inside 12 nautical miles of Mischief Reef.”⁶⁹ Article 19 of the Convention provides that “innocent passage” shall be continuous and expeditious; and shall not engage in certain activities including “any exercise or practice with weapons of any kind,” or “the launching, landing or taking on board of any aircraft.” Obviously, the US destroyer conducted a “man overboard” exercise, specifically to show that its passage within 12 nautical miles was not innocent passage; and this action “demonstrated that Mischief Reef is not entitled to its own territorial sea regardless of whether an artificial island has been built on top of it.”⁷⁰

However, China has long been reiterated the position that it enjoys sovereignty, sovereign rights and maritime jurisdiction over the Nansha Islands *in its entirety*, rather than a single island or reef or LTE. On 4 September 1958, the Chinese government declared that “[t]he breadth of the territorial sea of the People’s Republic of China shall be twelve nautical miles. This provision applies to all territories of the People’s Republic of China including the Chinese mainland and its coastal islands, as well as Taiwan and its surrounding islands, the Penghu Islands, the Dongsha Islands, the Xisha Islands, the Zhongsha Islands, the Nansha Islands and all other islands belonging to China which are separated from the mainland and its coastal islands by the high seas.”⁷¹

In Note Verbale No. CML/8/2011 of 14 April 2011 addressed to Secretary-General of the UN, the Permanent Mission of China to the UN stated that “under the relevant provisions of the 1982 [LOS Convention], as well as the Law of the People’s Republic of China on the Territorial Sea and the Contiguous Zone (1992) and the Law on the

⁶⁹ “U.S. warship drill meant to defy China's claim over artificial island: officials,” *Reuters* (25 May 2017), available at: <https://www.reuters.com/article/us-usa-southchinasea-navy/u-s-warship-drill-meant-to-defy-chinas-claim-over-artificial-island-officials-idUSKBN18K353>.

⁷⁰ *Ibid.*

⁷¹ *Declaration of the Government of the People’s Republic of China on China’s Territorial Sea*, 4 September 1958, available at: <https://www.chinausfocus.com/upload/file/2014/Annex1-4.pdf>.

Exclusive Economic Zone and the Continental Shelf of the People's Republic of China (1998), China's Nansha Islands is fully entitled to Territorial Sea, [EEZ] and Continental Shelf."⁷² On 12 July 2016, the Chinese government reiterated that "China has territorial sovereignty and maritime rights and interests in the South China Sea, including, inter alia: ...ii. China has internal waters, territorial sea and contiguous zone, based on *Nanhai Zhudao*; iii. China has exclusive economic zone and continental shelf, based on *Nanhai Zhudao*...."⁷³

Today however, it is not easy for China to draw such straight baselines for the Nansha Islands, as China and the ASEAN States have committed to each other under the DOC "to exercise self-restraint in the conduct of activities that would complicate or escalate disputes." Technically, it is also not very easy for China to find appropriate islands and reefs on the outskirts of the Nansha Islands as basepoints to draw straight lines enclosing all features of the Nansha Islands. It seems that China will not establish the baselines for Nansha Islands in the foreseeable future.

(3) Innocent Passage of Warships

The Huangyan Island (Scarborough Shoal), which was involved in the USS Hopper Incident, has a territorial sea of its own with a breadth of 12 nautical miles as determined by the 1992 Chinese Law -- territorial sea must exist *ipso facto and ab initio*; the lack of publicity and non-deposition of charts or lists of geographical coordinates do not make any difference in this matter.

Upon ratification of the Convention, China reaffirmed that "the provisions of the [Convention] concerning innocent passage through the territorial sea shall not prejudice

⁷² Para. 21, *Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines* (7 December 2014), supra note 14.

⁷³ *Statement of the Government of the People's Republic of China on China's Territorial Sovereignty and Maritime Rights and Interests in the South China Sea* (12 July 2016), supra note 49.

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.”⁷⁴ According to the 1992 Chinese Law, “[f]oreign ships for military purposes shall be subject to approval by the Government of [China] for entering the territorial sea of the People’s Republic of China.”⁷⁵

So far, there is no unified rule of customary international law regarding foreign warships’ innocent passage. That is why since the adoption of the LOSC in 1982, State parties have maintained a sharp difference on the issue of innocent passage of warships.⁷⁶ The Convention does not contain an explicit provision to confirm that foreign warships can enter territorial waters of coastal States without prior notification or authorization. Rather, Article 21 of the Convention confers coastal States with the right to “adopt laws and regulations...relating to innocent passage through the territorial sea, in respect of all or any of the following:

- (a) the safety of navigation and the regulation of maritime traffic;
- (b) the protection of navigational aids and facilities and other facilities or installations;
- (c) the protection of cables and pipelines;
- (d) the conservation of the living resources of the sea;
- (e) the prevention of infringement of the fisheries laws and

⁷⁴ See: *Declarations and statements*, Division for Ocean Affairs and the Law of the Sea, UN Website, available at: http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#China [Upon ratification](#).

⁷⁵ Article 6, *Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone*, available at: <http://en.pkulaw.cn/display.aspx?cgid=5597&lib=law>.

⁷⁶ Xinjun Zhang, “The Latest Developments of the US Freedom of Navigation Programs in the South China Sea: Deregulation or Re-balance,” 9 *J. E. Asia & Int’l L.* (2016) p.170.

regulations of the coastal State;

(f) the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof;

(g) marine scientific research and hydrographic surveys;

(h) the prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the coastal State.”⁷⁷ This is an extensive authorization to coastal States on the regulation of innocent passage.

At the same time, although the Convention prohibits reservation, Article 310 allows State Parties to make declarations or statements with a view to harmonize their laws and regulations with the provisions of this Convention, thus enabling auto-interpretations.⁷⁸ Article 310 was drafted and inserted, arguably, to leave space for interpretation considering that many provisions reached on the basis of consensus during the ten-year long negotiation are ambiguous. One of them is innocent passage. Pursuant to Article 310, over 25 States insisted that in order for warships to exercise passage through territorial sea, either advance approval (*e.g.*, Iran, Oman, Yemen, China and Algeria), or prior notification (*e.g.*, Egypt, Malta, Croatia, Finland, Sweden, Serbia and Montenegro, and Bangladesh) is necessary.⁷⁹ Accordingly, their domestic laws and regulations regarding innocent passage will not change even after the ratification of the Convention.

In conclusion, while the US has believed that its FONOPs are to enforce rule of law at sea, legal analysis better supports China's position that the US FONOPs in the South China Sea are offensive to its sovereignty. Moreover, the adverse effect of the FONOPs to the process of peaceful settlement of territorial issues and maritime disputes

⁷⁷ See: Article 21 of the LOSC, *supra* note 4.

⁷⁸ *Ibid.*, Article 310.

⁷⁹ Xinjun Zhang, *supra* note 81, p.170.

as well as to the security of SLOCs in the South China Sea region cannot be ignored.

Conclusion

We have reason to believe that the prospects of the Belt and Road Initiative should be optimistic, and all parties who participate in the cooperation should hope that the MSR will be an opportunity to gather momentum for common development and to deliver tangible outcomes. Nevertheless, we cannot ignore the important role of the South China Sea region and the safety of navigation in this region for the future success of the MSR Cooperation.

It is worth noting that we are in a period of reassessment and transition regarding how to strike the balance between navigational freedoms and the right of coastal States to limit navigation for self-protection. The law of the sea has always been created through the give-and-take process of states making conflicting claims, which are ultimately resolved through negotiation, a decision rendered by a tribunal or international organization, military force, or a pattern of practice that emerges and is accepted as obligatory by those concerned about the issue.⁸⁰ We are in a particularly active law-making period at present regarding navigational rights and responsibilities, and it appears that the law that will emerge will be different from the law that had existed previously.⁸¹ The freedom of navigation that has dominated the law of the sea during the past several centuries are diminishing in the face of competing considerations for environmental protection and security needs. All States should carefully exercise such freedom in accordance with international law without jeopardizing the legitimate rights and interests of coastal States including peace and security.

⁸⁰ Myres S. McDougal & Norbert A. Schlei, “The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security”, *64 Yale L.J.* 648, 659-60 (1955).

⁸¹ Jon M. Van Dyke, *supra* note 10, p. 28.