

**FREEDOM OF NAVIGATION IN THE SOUTH CHINA SEA:  
CHINA'S LEGAL POSITIONS AND UNITED STATES' FREEDOM OF  
NAVIGATION OPERATIONS**

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***Abstract***

*This research questions how China's legal positions regarding freedom of navigation (FON) differ from the United Nations (UN) Law of the Sea Convention (LOSC), and how these differences inform tensions in the South China Sea (SCS) vis-a-vis United States' (US) Freedom of Navigation Operations (FONOPs). Such inquiry is important for tensions between the US and China as superpower states over international sea law risks undermining stability in the SCS. It finds the LOSC generally affirms FON across maritime zones with varying degrees of contestation from coastal state's sovereignty or sovereign rights. Including in the SCS, FON is least restricted in high seas, faces contestation from coastal states' sovereign rights in Exclusive Economic Zones (EEZs), and is most restricted by their sovereignty within territorial seas. Still, the LOSC limits coastal state authority through provisions guaranteeing foreign vessels' innocent passage. Contrasting the LOSC, China adopts two key positions on FON: requiring prior authorization for warships' passage through "territorial seas", including in disputed islands, and opposing foreign surveillance within its EEZ. The legal bases and defences of these positions are critiqued and frequently challenged, including by US FONOPs entailing large naval vessels sailing near China's maritime claims. These operations raise concerns about regional stability as they may be perceived as unilateral military assertions and risk straining US relations with allies, including Australia, with SCS-adjacent countries, and China.*

**Keywords:** Exclusive Economic Zones, South China Sea, Freedom of Navigation, Maritime Zones, Nine-Dash Line.

## KEBEBA SAN NAVIGASI DI LAUT CINA SELATAN: POSISI HUKUM CINA DAN OPERASI KEBEBASAN NAVIGASI AMERIKA SERIKAT

### *Intisari*

Penelitian ini mengkaji bagaimana posisi hukum Cina terkait kebebasan navigasi (FON) berbeda dari Konvensi Hukum Laut (LOSC) Perserikatan Bangsa-Bangsa (UN) dan bagaimana perbedaan ini berkontribusi pada ketegangan di Laut Cina Selatan (SCS) dan Operasi Kebebasan Navigasi (FONOP) Amerika Serikat (AS). Penyelidikan ini penting karena ketegangan antara AS dan Cina sebagai negara adidaya atas hukum laut internasional berisiko merusak stabilitas di SCS. LOSC umumnya menegaskan FON di seluruh zona maritim dengan berbagai tingkat kontestasi dari kedaulatan atau hak berdaulat milik negara pantai. Termasuk di SCS, FON paling tidak dibatasi di laut lepas, menghadapi kontestasi dari hak berdaulat negara pantai di Zona Ekonomi Eksklusif (EEZ), dan paling dibatasi oleh kedaulatan mereka di laut teritorial. Namun, LOSC membatasi otoritas negara pantai melalui ketentuan yang menjamin lintas damai kapal asing. Berbeda dengan LOSC, Cina mengadopsi dua posisi kunci terkait FON, yaitu: mewajibkan izin dahulu bagi kapal perang untuk melintasi "laut teritorial", termasuk di pulau-pulau yang disengketakan, dan menentang pengawasan asing di EEZ-nya. Landasan hukum dan pembelaan atas posisi-posisi Cina sering ditantang, termasuk oleh FONOP AS yang melibatkan kapal-kapal angkatan laut besar yang berlayar di dekat klaim maritim Cina. Operasi-operasi ini menimbulkan kekhawatiran tentang stabilitas regional karena dapat dianggap sebagai pernyataan militer sepihak dan berisiko membebani hubungan AS dengan sekutu, termasuk Australia, negara-negara tetangga SCS, dan Cina.

**Kata Kunci:** Zona Ekonomi Ekslusif, Laut China Selatan, Kebebasan Navigasi, Zona Maritim, Sembilan Garis Putus-Putus.

## A. Introduction

The current geopolitical rivalry between great powers, the United States (US) and China, extend into the South China Sea (SCS), a water body critical for international trade adjacent to several states, including China, Taiwan, the Philippines, Malaysia, Indonesia, and Vietnam. Today, the SCS sees rising tensions due to multiple maritime territorial disputes among these states, including over the Pratas, Paracel, and Spratly island groups (called “Dongsha,” “Nansha,” and “Xisha” islands by China).<sup>1</sup> China’s ‘Nine-Dash Line’ map claim,<sup>2</sup> encompassing the majority of the SCS as under its indisputable sovereignty, has also raised concerns in the region regarding freedom of navigation (FON). China frequently interrupts navigation and innocent passage by foreign vessels, guaranteed by international sea law, within its claimed waters. To this, the US responds to China’s claims and conduct with assertive ‘freedom of navigation operations’ (FONOPs) in the SCS with warships, which in turn are met with Chinese criticism.<sup>3</sup> Research about China-US tensions regarding FON in the SCS is important for disagreements or misunderstandings between them as great powers threaten to exacerbate

1 The South China Sea Arbitration (The Republic of Philippines v The People’s Republic of China), Permanent Court of Arbitration (Annex VII Arbitral Tribunal 2016); “DFA Statement on Remarks of Chinese Foreign Ministry Spokesperson,” Department of Foreign Affairs, Republic of the Phillipines, March 17, 2024, <https://dfa.gov.ph/dfa-news/statements-and-advisoriesupdate/34289-dfa-statement-on-remarks-of-chinese-foreign-ministry-spokesperson.>; Khang Vu, “Situating the Battle of the Paracel Islands in Modern Vietnam-China Relations,” *The Diplomat*, January 24, 2025, <https://thediplomat.com/2024/01/situating-the-battle-of-the-paracel-islands-in-modern-vietnam-china-relations/>; “Malaysia Rejects New China Map Claiming Entire South China Sea,” *Al Jazeera*, July 31, 2023, <https://www.aljazeera.com/news/2023/8/31/malaysia-rejects-new-china-map-claiming-entire-south-china-sea>; “What Is the South China Sea Dispute?,” *BBC News*, July 7, 2023, <https://www.bbc.com/news/world-asia-pacific-13748349>.

2 Permanent Mission of the PRC to the UN, “Note Verbale from the Permanent Mission of the PRC to the UN to the Secretary-General UN Doc CML/17/2009UN,” May 7, 2009; Permanent Mission of the PRC to the UN, “Permanent Mission of the PRC to the UN, “Note Verbale from the Permanent Mission of the PRC to the UN to the Secretary-General UN Doc CML/18/2009,” May 7, 2009.

3 Michael R. Pompeo, *U.S. Position on Maritime Claims in the South China Sea*, Press Statement (U.S. Department of State, 2020), <https://2017-2021.state.gov/u-s-position-on-maritime-claims-in-the-south-china-sea/>; “U.S. Navy Destroyer Conducts Freedom of Navigation Operation in the South China Sea,” America’s Navy, November 3, 2025, <https://www.navy.mil/Press-Office/News-Stories/Article/3578783/us-navy-destroyer-conducts-freedom-of-navigation-operation-in-the-south-china-s/>; Heather Mongilio, “China Protests U.S. South China Sea Freedom of Navigation Operation,” *USNI News*, March 24, 2023, <https://news.usni.org/2023/03/24/china-protests-u-s-south-china-sea-freedom-of-navigation-operation>; “Foreign Ministry Spokesperson Wang Wenbin’s Regular Press Conference on July 12, 2023,” Ministry of Foreign Affairs People’s Republic of China, July 12, 2023, [https://www.mfa.gov.cn/eng/xw/fyrbt/lxjzh/202405/t20240530\\_11347562.html](https://www.mfa.gov.cn/eng/xw/fyrbt/lxjzh/202405/t20240530_11347562.html).

regional security if unmitigated.

Thus, this article proposes the following research questions: how does China's legal positions on freedom of navigation differ from the United Nations (UN) Law of the Sea Convention (LOSC), and how do these differences inform tensions in the SCS regarding the US' FONOPs.

The article's methodology and structure constitute three parts. First, it undergoes an analysis of the freedom of navigation as codified in the UN LOSC.<sup>4</sup> Second, the article conducts doctrinal research and literature reviews on Chinese official positions on FON, referring to official Chinese submissions to the UN upon accession into the UN LOSC, Chinese domestic laws regulating its maritime zones, and cases of Chinese authorities intercepting foreign vessels in its maritime zones. Lastly, doctrinal research and literature reviews are also implemented regarding US FONOPs as reactions to China's 'Nine-Dash Line' and legal positions as well as their impact on SCS tensions.

The article finds that the LOSC generally affirms FON across maritime zones but allows varying degrees of coastal state sovereignty or sovereign rights in territorial seas and exclusive economic zones (EEZs). In the SCS, FON is least restricted in high seas, faces contestation in EEZs, and is most restricted within territorial seas. Still, the LOSC maintains limits on coastal state authority through legal regimes such as innocent passage. In contrast to the LOSC, China's submissions to the UN, its domestic law, and conduct in its maritime zones reflect two key legal positions on FON: that China controversially believes it is entitled to require prior authorization for passage through territorial seas of its disputed islands in the SCS and to oppose foreign surveillance within its EEZ. In response, the US conducts Freedom of Navigation Operations (FONOPs) with warships to challenge China's SCS claims and legal positions. These operations raise concerns about regional stability as they may be perceived as unilateral military assertions and risk straining US relations with allies, including Australia, SCS-adjacent countries, and China. These legal and political differences regarding FON in the SCS by superpower states risk eroding stability in the SCS and international sea law itself.

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<sup>4</sup> United Nations Convention on the Law of the Sea (LOSC) (1982).

## B. The LOSC Regarding FON within the SCS

### 1. Maritime Zones within the SCS

Discussing the legal positions and practice of China and the US regarding FON in the SCS requires re-establishing the concept of freedom of navigation and how it influences modern law about navigating LOSC-authorized maritime zones.

The maritime zones and legal regimes most relevant to FON are those of coastal states' territorial seas, contiguous zones and exclusive economic zones (EEZs),<sup>5</sup> comprising the majority of the SCS.<sup>6</sup> Additionally, there are high seas near the centre of the SCS.<sup>7</sup> Several of those coastal states also have claims to 'continental shelves,'<sup>8</sup> though these are not as material to FON as coastal states are simply obliged not to unjustifiably infringe them.<sup>9</sup>

Furthermore, the SCS contains maritime features with specific LOSC regulations. These include straits (the Malacca, Singapore, and Taiwan straits),<sup>10</sup> and several islands (the Spratly, Paracel and Pratas island groups).<sup>11</sup> The following section analyses the notion of FON, as well as the LOSC's constitutional positions regarding FON in high seas, EEZs, territorial seas, and straits.

### 2. The LOSC and FON within LOSC Maritime Zones

Origins of the freedom of navigation and how the 1982 LOSC reconciles this freedom with coastal states' sovereignty, sovereign rights, and jurisdiction will be analyzed. Essentially, the LOSC's position varies between maritime zones as its regulations "balance between coastal states' rights and navigational freedoms."<sup>12</sup> The freedom of navigation in seas, including its modern codification within the 1982 LOSC, can be traced to 17<sup>th</sup>-century debates regarding whether seas could be dominated by European maritime powers. The notion that seas were instead the dominion of no country, ergo

5 LOSC, 1982, Arts. 2-33, 55-75.

6 *Maritime Claims of the Indo-Pacific* (Asia Maritime Transparency Initiative, n.d.), accessed May 29, 2025, <https://amti.csis.org/maritime-claims-map/>; Zander Bamford-Brown, "Understanding the South China Sea," *Sovereign Limits*, January 26, 2021, <https://sovereignlimits.com/blog/understanding-the-south-china-sea>.

7 LOSC, 1982, Arts. 86-120.

8 LOSC, 1982, Arts. 76-83.

9 LOSC, 1982, Art. 78(2).

10 LOSC, 1982, Arts. 34-45.

11 LOSC, 1982, Arts. 121-132.

12 Donald Rothwell, "Topic F: Navigational Rights and Freedoms," Lecture, Law for the Law of the Sea Course, Australian National University, May 2, 2024.

free to be navigated by any and all countries, was most famously posited by Dutch scholar Grotius in 1608.<sup>13</sup> This ‘Grotian’ doctrine that seas are natural entities that accommodate free global maritime trade<sup>14</sup> would prevail and become the legal basis for the modern freedom of navigation. Still, after Grotius and the 17<sup>th</sup> century, states continued to assert sovereignty and naval power over waters most adjacent to their coasts and nearby underwater resources. Thus, when states could freely traverse seas and when they could assert naval power over seas would be a long-standing ambiguity which could cause interstate disagreement and conflict. The growing importance of balancing these opposing state interests to maintain peace, trade, and political stability resulted in multiple international conferences regarding the law of the sea in the 20<sup>th</sup> century. This ultimately led to the signing of the 1982 LOSC by the United Nations. Grotius’ doctrine partly survives in the LOSC today, codified as the ‘freedom of navigation’ in Part VII. LOSC Part VII Article 87 is titled ‘Freedom of the high seas’ and declares “the high seas are open to all States, whether coastal or land-locked.”<sup>15</sup> It includes a list of countries’ freedoms in high seas beginning with the freedom of navigation.<sup>16</sup> Navigation is also reiterated as a right of all states within Part VII.<sup>17</sup> However, FON is not unlimited on the high seas. States must exercise FON with due regard for other states’ high seas freedoms, rights related to the ‘Area’, and occasionally other states’ rights of visit and hot pursuit.<sup>18</sup> For instance, rights of visit and hot pursuit entail ceasing the navigation of a foreign vessel over suspicions of conduct violating the LOSC Part VII or laws of the coastal state within their maritime zones.<sup>19</sup> Still, the LOSC upholds FON in the high seas with the least concessions since states cannot lawfully claim sovereignty in this zone.<sup>20</sup> One may assume, then, that FON is limited to only the high seas. Though LOSC

13 Hugo Grotius, *The Freedom of the Seas, Or, The Right Which Belongs to the Dutch to Take Part in the East Indian Trade* (The Lawbook Exchange, Ltd., 2001).

14 David Armitage et al., eds., *Oceanic Histories*, Cambridge Oceanic Histories (Cambridge University Press, 2018), 8.

15 LOSC, 1982, Art. 87(1).

16 LOSC, 1982, Art. 87(1)(a); Donald R Rothwell and Tim Stephens, *The International Law of the Sea*, Third Edition (Hart Publishing, 2023), 454.

17 LOSC, 1982, Art. 90.

18 Yoshifumi Tanaka, “Navigational Rights and Freedoms,” in *The Oxford Handbook of the Law of the Sea*, ed. Donald Rothwell et al. (Oxford University Press, 2015), 556; LOSC, 1982, Art. 87(2).

19 LOSC, 1982, Arts. 110-111.

20 LOSC, 1982, Art. 89.

Part VII only applies to seas outside of EEZs, states' territorial seas or internal waters, or archipelagic states' archipelagic waters, LOSC Article 86 affirms that this does not curtail the freedoms states also enjoy within EEZs.<sup>21</sup> This prompts the article to analyze the LOSC EEZ regime.

Article 86 above refers to provisions within the LOSC Part V regarding EEZs. Namely, Article 58(1) provides that states' freedoms of navigation and overflight (among others) from the previous Article 87 also apply within EEZs, not only high seas.<sup>22</sup> This position is upheld by the International Court of Justice (ICJ) to also constitute customary international law (CIL).<sup>23</sup> Unlike in high seas, however, the LOSC acknowledges unique EEZ dynamics wherein FON is checked.<sup>24</sup>

In EEZs, FON is checked by coastal states' sovereign rights and jurisdiction. Coastal states enjoy sovereign rights within their EEZ for the purpose of “*...exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds,*”<sup>25</sup>

Coastal states also enjoy jurisdiction over matters related to artificial islands and structures, marine scientific research, and protection of the marine environment.<sup>26</sup> Furthermore, though limited to 500 metres and prohibited from interfering with sea lanes, coastal states can establish ‘safety zones’ around artificial islands or structures within their EEZ which other states must comply with.<sup>27</sup> Against these coastal state rights and jurisdictions, Article 58(2) describes that Part VII provisions – including Article 90 on the right of navigation – “apply to the exclusive economic zone in so far as they are not incompatible with this Part (V).”<sup>28</sup>

Limitations upon flag states' FON within EEZs are further detailed by

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21 LOSC, 1982, Art. 86; Rothwell and Stephens, *The International Law of the Sea*, 454.

22 LOSC, 1982, Art. 58(1).

23 Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua vs Colombia) - Judgment, ICJ Reports \_\_\_\_ (International Court of Justice 2022).

24 Rothwell and Stephens, *The International Law of the Sea*, 457.

25 LOSC, 1982, Art. 56(1)(a).

26 LOSC, 1982, Art. 56(1)(b).

27 LOSC, 1982, Art. 60(4-7).

28 LOSC, 1982, Art. 58(2).

LOSC provisions obliging them to “*have due regard to the rights and duties of the coastal state and shall comply with the laws and regulations adopted by the coastal state in accordance with the provisions of this Convention and other rules of international law.*”<sup>29</sup>

Thus, the LOSC upholds FON within EEZs insofar as “they do not impact upon the particular EEZ interests of the coastal State.”<sup>30</sup> Consequently, coastal states’ sovereign rights and jurisdiction within EEZs also limit legal bases to impede other states’ FON. For instance, the International Tribunal for the Law of the Sea (ITLOS) decided that suspicion of foreign vessels ‘bunkering’ without permits within coastal states’ EEZ was an insufficient basis to detain foreign vessels.<sup>31</sup> Arbitral Tribunals have similarly decided that detaining vessels for protesting activities of coastal states violates other states’ FON.<sup>32</sup>

Next, dynamics between FON and coastal state rights within territorial seas are also unique and critical to disagreements between China, the LOSC, and US’ legal positions. In territorial seas, instead of sovereign rights and jurisdiction, FON is contested by coastal states’ sovereignty. LOSC Part II Article 2 outlines that coastal states enjoy sovereignty across their territorial sea (including internal and archipelagic waters), the airspace above, its bed and subsoil, and that sovereignty is only subject to the LOSC and wider international law.<sup>33</sup> This sovereignty includes entitlements to regulate foreign vessel navigation.

Yet, LOSC Part II also contains Section 3 provisions regarding ‘innocent passage’ for various foreign vessel types.<sup>34</sup> These ‘passage regimes’ represent reciprocal sovereignty concessions by all coastal states party to the LOSC, allowing each other some navigational rights in territorial seas.<sup>35</sup> In this sense, the LOSC still upholds FON within territorial seas though it is most constricted there than in other maritime zones. LOSC Article

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29 LOSC, 1982, Art. 58(3).

30 Tanaka, “Navigational Rights and Freedoms.”

31 The M/T “San Padre Pio” Case (Switzerland v. Nigeria), Provisional Measures, ITLOS Reports \_\_\_\_ (International Tribunal for the Law of the Sea 2019), 375.

32 The Arctic Sunrise Arbitration (Netherlands v Russia) (award on the merits), Permanent Court of Arbitration \_\_\_\_ (2015).

33 LOSC, 1982, Art. 2.

34 LOSC, 1982, Arts. 17-32.

35 Rothwell and Stephens, *The International Law of the Sea*, 439.

17 codifies ‘innocent passage’ as a right of all states’ vessels.<sup>36</sup> ‘Passage’ alone refers to vessels’ traversal of territorial seas without entering internal waters, traversal between internal waters, or calls at port facilities.<sup>37</sup> Passage must be “continuous and expeditious,” not permitting vessels to stop unless incidental to ordinary navigation, necessary by distress, or to assist other endangered persons, ships or aircraft.<sup>38</sup> Evidently, the LOSC most heavily restricts navigation within territorial seas, even regulating vessels’ manner of navigation.<sup>39</sup> States’ right of innocent passage is conditional on not prejudicing “the peace, good order or security of the coastal State,” conforming with the LOSC and broader international law.<sup>40</sup> Foreign vessels committing “any other activity not having a direct bearing on passage” within territorial seas can be considered prejudicial; therefore, they are un-innocent.<sup>41</sup> The LOSC provides a non-exhaustive list of un-innocent conduct, including the use of force and weapons, collecting defence-security information, fishing, and pollution.<sup>42</sup> The list also includes more ambiguous items like propaganda aimed at affecting coastal states’ defence.<sup>43</sup> Thus, countries’ FON as expressed with the right of passage is nullifiable based on the conduct of ships. Still, the LOSC provides all coastal states rights to regulate foreign vessels’ innocent passage within territorial seas. Namely, the capacity to adopt laws regarding innocent passage in respect of various interests<sup>44</sup> and prescribing sea lanes and traffic separation schemes (TSS),<sup>45</sup> insofar as such laws and prescriptions are given due publicity. While the safety of navigation is mentioned in this provision, regulating navigation itself is not expressly codified. Tangentially, ‘archipelagic states’ with ‘archipelagic waters’ are entitled to unique provisions limiting innocent passage. Archipelagic states’ may designate sea lanes that can influence foreign ships’ innocent passage not to deviate from defined axis lines and can similarly impose TSSs that affect the navigation of multiple

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36 LOSC, 1982, Arts. 17-8.

37 LOSC, 1982, Art. 18.

38 LOSC, 1982, Art. 18(2).

39 Tanaka, “Navigational Rights and Freedoms,” 541.

40 LOSC, 1982, Art. 19.

41 LOSC, 1982, Art. 19(2)(l).

42 LOSC, 1982, Art. 19(2).

43 LOSC, 1982, Art. 19(2)(d).

44 LOSC, 1982, Art. 21.; Tanaka, “Navigational Rights and Freedoms,” 543.

45 LOSC, 1982, Art. 22.

ships simultaneously.<sup>46</sup> Uniquely, archipelagic states can temporarily suspend innocent passage, even beyond sea lanes, but still within specific areas of their archipelagic waters.<sup>47</sup>

Still, the LOSC does check coastal states' sovereignty and capacities within territorial seas regarding navigation. The LOSC prohibits coastal states from unilaterally declaring sea lanes and TSS,<sup>48</sup> requiring recognition from a "competent international organization."<sup>49</sup> The LOSC obliges coastal states to "not hamper the innocent passage of foreign ships through the territorial sea except in accordance with this Convention," even prohibiting imposing requirements effectively impairing innocent passage rights or discriminating against certain ships.<sup>50</sup> Any capacity of coastal states to impede passage in territorial seas is limited to un-innocent passage, or temporary suspensions of only specific areas for security protection.<sup>51</sup> In summary, the LOSC seeks to uphold FON within all maritime zones, with varying concessions in zones where coastal states have sovereignty, sovereign rights, or jurisdiction. FON is least inhibited in high seas, but faces contestation by coastal states' sovereign rights on various matters within EEZs, and is most contested by coastal states' sovereignty within territorial seas. Nonetheless, the LOSC checks coastal states' entitlements to allow some traversal freedoms in all zones, including via innocent passage regimes.

### 3. The LOSC and FON in Straits

The LOSC's Part III provisions on FON within straits will also be briefly explored, for multiple straits are adjacent to the SCS. LOSC Part III Article 36 excludes straits containing "a route through the high seas or through an exclusive economic zone," where FON as per Article 87 would be applicable instead.<sup>52</sup> Otherwise, 'transit' and 'non-suspendable innocent' passage are the general navigational rights in straits upheld by the LOSC.<sup>53</sup>

Similar to maritime zones, the LOSC imposes rights and duties on both states that border straits and foreign states' vessels. Foreign flagged vessels

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46 LOSC, 1982, Arts. 52(1), 53.

47 LOSC, 1982, Art. 52.

48 Rothwell and Stephens, *The International Law of the Sea*, 450.

49 LOSC, 1982, Art. 22(3)(a).

50 LOSC, 1982, Art. 24(1).

51 LOSC, 1982, Arts. 25(1), (3).

52 LOSC, 1982, Art. 36.

53 Tanaka, "Navigational Rights and Freedoms," 550; LOSC, 1982, Arts. 38-45.

(and aircraft) enjoy transit passage without impairment, but are obliged to be expeditious, refrain from force, and comply with various international regulations.<sup>54</sup> Meanwhile, states bordering straits are permitted to publicly impose regulations related to matters including safety, pollution, and fishing.<sup>55</sup> Yet, these states must refrain from imposing laws discriminatory of certain vessels and generally impeding transit passage rights.<sup>56</sup> In the case of exceptional straits “formed by an island of a State bordering the strait and its mainland,” innocent passage rights from the LOSC Part II apply in lieu of transit passage.<sup>57</sup> However, innocent passage in straits cannot be suspended,<sup>58</sup> unlike in territorial seas.

### C. China’s Legal Positions on FON versus US FONOPs

The next section explores China’s legal position on FON expressed in its official communications to the UN, its domestic law, and conduct within its maritime zones as well as how the US’ FONOPs within the SCS in response to China present challenges. Such investigation prompts the article to first briefly outline where China and the US fundamentally disagree regarding the SCS.

China and the US (as well as other SCS-adjacent states and Australia) disagree on delimitations within the SCS, the status of its waters, and maritime features. China asserts that it has “sovereignty over the islands of the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant adjacent waters as well as the seabed and subsoil thereof.”<sup>59</sup> Meanwhile, though not a party to the LOSC, the US rejects China’s claim and asserts all states enjoy FON and innocent passage in the SCS under customary law reflected in the LOSC.<sup>60</sup> China, despite being a party to the

54 LOSC, 1982, Art. 39.

55 LOSC, 1982, Arts. 42(1), (3).

56 LOSC, 1982, Arts. 42(2), 44; Tanaka, “Navigational Rights and Freedoms,” 551.

57 LOSC, 1982, Arts. 38(1), 45.

58 LOSC, 1982, Art. 45(2); Tanaka, “Navigational Rights and Freedoms,” 552.

59 Permanent Mission of the People’s Republic of China to the United Nations, “Note Verbale from the Permanent Mission of the People’s Republic of China to the United Nations to the Secretary-General of the United Nations UN Doc CML/17/2009,” United Nations, May 7, 2009; Permanent Mission of the People’s Republic of China to the United Nations, “Note Verbale from the Permanent Mission of the People’s Republic of China to the United Nations to the Secretary-General of the United Nations (UN Doc CML/18/2009),” United Nations, May 7, 2009.

60 “U.S. Navy Destroyer Conducts Freedom of Navigation Operation in the South China Sea,” United States Navy, November 3, 2023, <https://www.navy.mil/Press-Office/News-Stories/Article/3578783/us-navy-destroyer-conducts-freedom-of-navigation-operation-in-the-south-china-s/https%3A%2F%2Fwww.navy.mil%2FPress-Office%2FNews->

LOSC, claims the SCS also falls within its ‘Nine-Dash Line’, entitling it to “historical rights”,<sup>61</sup> the legal basis of which remains ambiguous and unlikely to be aligned with international law.<sup>62</sup>

Authoritative legal bodies also reject China’s claims. Despite China’s efforts to project authority via artificial constructions on SCS “islands” disputed with the Philippines, a 2016 LOSC Annex VII Arbitral Tribunal ruled those maritime features as rocks or low-tide elevations,<sup>63</sup> incapable of generating any sovereign rights or jurisdiction, much less sovereignty. On the same day, the US State Department announced its support of the tribunal’s decision,<sup>64</sup> while China stated its rejection of the award as null and void.<sup>65</sup>

### 1. China’s Legal Positions on FON

The article highlights two distinct Chinese legal positions regarding FON, including in the SCS. Most controversially, China believes it has legal rights to require foreign naval vessels to obtain prior authorization to navigate its territorial seas, including those generated from disputed SCS islands. Additionally, China fundamentally disagrees with the US on the legality of foreign naval vessels conducting surveillance activities within EEZs. China has publicly expressed these positions since ratifying the LOSC in 1996, though with declarations. Indeed, states are permitted to make declarations to harmonize national laws with the LOSC without excluding or modifying the LOSC’s legal effects.<sup>66</sup>

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Stories%2FArticle%2F3578783%2Fus-navy-destroyer-conducts-freedom-of-navigation-operation-in-the-south-china-s%2F; “U.S. Navy Destroyer Conducts Freedom of Navigation Operation in the South China Sea,” United States Navy, May 10, 2024, <https://www.navy.mil/Press-Office/News-Stories/Article/3771407/us-navy-destroyer-conducts-freedom-of-navigation-operation-in-the-south-china-s/>.

61 Exclusive Economic Zone and Continental Shelf Act (People’s Republic of China) (1998), Art. 14.

62 Florian Dupuy and Pierre-Marie Dupuy, “A Legal Analysis of China’s Historic Rights Claim in the South China Sea,” *American Journal of International Law* 107, no. 1 (2013): 124–41, Cambridge Core, <https://doi.org/10.5305/amerjintlaw.107.1.0124>.

63 The South China Sea Arbitration (The Republic of Philippines v. The People’s Republic of China) (Award), Case No 2013-19 (Permanent Court of Arbitration July 12, 2016), Paras. 174, 259–60.

64 John Kirby, “Decision in the Philippines–China Arbitration,” U.S. Department of State, July 12, 2016.

65 “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,” Ministry of Foreign Affairs People’s Republic of China, July 12, 2016, [https://www.mfa.gov.cn/mfa\\_eng/wjdt\\_665385/2649\\_665393/201607/t20160712\\_679470.html](https://www.mfa.gov.cn/mfa_eng/wjdt_665385/2649_665393/201607/t20160712_679470.html).

66 LOSC, 1982, Art. 310.

First, China claims it can legally oblige other states' military vessels to announce themselves or obtain permission before navigating its territorial seas.<sup>67</sup> China declared in 1996 that the LOSC: "... shall not prejudice the right of a coastal state to request, in accordance with its laws and regulations, a foreign state to obtain advance approval from or give prior notification to the coastal state for the passage of its warships through the territorial sea of the coastal state."<sup>68</sup>

According to the LOSC, China, as a coastal state, may lawfully adopt laws and regulations surrounding innocent passage in its territorial seas.<sup>69</sup> Yet, provisions allowing the imposition of requirements for passage are not stated and would violate China's duties under the LOSC not to impair states' innocent passage rights or discriminate against vessels.<sup>70</sup> This contradiction is controversial as China has (rejected) claims over territorial seas generated from the Pratas, Paracel, and Spratly (so-called "Dongsha," "Nansha," and "Xisha") islands.<sup>71</sup> Consequently, the US continues to conduct FONOPs with warships near these islands to protest China's position,<sup>72</sup> heightening tensions and undermining regional stability. Prior philosophical debate between Chinese and foreign legal scholars on China's prior authorization requirements for passage in territorial seas has been ongoing since 1996. In recent appraisals of these debates by Bao, multiple Chinese scholars have

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67 "China's Territorial and Maritime Disputes in the South and East China Seas: What Role for International Law?," in *China's Global Engagement: Cooperation, Competition, and Influence in the 21st Century*, ed. Jacques deLisle and Avery Goldstein (Brookings Institution Press, 2017), 268; Munraj Singh Gill, "The Issue of Freedom of Navigation in the Asia-Pacific Region: The Rights and Interests of Coastal States and Practices," *The Journal of Defence and Security* 7, no. 1 (2016): 69.

68 United Nations, "Ratification by Algeria and China," August 6, 1996, 2.

69 LOSC, 1982, Art. 21.

70 LOSC, 1982, Arts. 17, 24.

71 Zhiguo Gao and Bing Bing Jia, "The Nine-Dash Line in the South China Sea: History, Status, and Implications," *American Journal of International Law* 107, no. 1 (2013): 104, Cambridge Core, <https://doi.org/10.5305/amerjintlaw.107.1.0098>.

72 Sam Lagrone, "China Says PLA Scrambled Aircraft, Ships to 'Expel' U.S. Warship from South China Sea Island Chain," *USNI News*, April 28, 2020, <https://news.usni.org/2020/04/28/china-says-pla-scrambled-aircraft-ships-to-expel-u-s-warship-from-south-china-sea-island-chain>; Sam Lagrone, "USS Bunker Hill Conducts 2nd South China Sea Freedom of Navigation Operation This Week," *USNI News*, April 29, 2020, <https://news.usni.org/2020/04/29/uss-bunker-hill-conducts-2nd-south-china-sea-freedom-of-navigation-operation-this-week>; Brad Lendon, "US Navy Stages Back-to-Back Challenges to Beijing's South China Sea Claims," *CNN World*, April 30, 2020, <https://edition.cnn.com/2020/04/30/asia/south-china-sea-us-navy-freedom-of-navigation-intl-hnk>.

posited different arguments to defend China's legal stance.<sup>73</sup> Among the eldest prominent arguments is that innocent passage was never extended to warships than merchant ships in the negotiation and conclusion of the LOSC.<sup>74</sup> Another is that the LOSC does permit domestic law restricting warship navigation in territorial seas,<sup>75</sup> likely invoking Article 21 as well as Article 25 on coastal states' rights of protection. More contemporary defenses include the argument that warships' unauthorised navigation in territorial seas can be inherently threatening to coastal states' sovereignty and constitute "political and legal provocation" that renders it un-innocent according to LOSC Article 19(1).<sup>76</sup>

Meanwhile, Bao summarizes that foreign critique of China's position hinges on how LOSC Section 3 on innocent passage, Subsection A on rules applicable to all ships, and Article 17 makes no distinction between merchant ships and warships.<sup>77</sup> Bao concurs that while LOSC Article 21 permits coastal states to impose some laws on innocent passage in territorial seas, it does not permit China to demand prior authorization in order to navigate these seas. While the article can understand the sentiment behind the defences of China's position, their inability to address the apparent lack of distinction between merchant ships and warships regarding innocent passage is not insignificant.

Another critical legal position of China regarding sea navigation is that it can lawfully interfere with navigation and activities of foreign naval vessels or aircraft (some unarmed), even surveillance, within its EEZs.<sup>78</sup> Examples include the *2009 Impeccable Incident* (five Chinese frigates intercepted an

73 Yinan Bao, "A Chinese Perspective on the Innocent Passage of Warships, Contemporary Issues and Analysis," in *Implementation of the United Nations Convention on the Law of the Sea*, 1st ed., ed. Dai Tamada and Keyuan Zou (Springer Singapore, 2021), 83–85.

74 Shao Jin, "The Question of Innocent Passage of Warships: After UNCLOS III," *Marine Policy* 13, no. 1 (1989): 59–60, [https://doi.org/10.1016/0308-597X\(89\)90041-9](https://doi.org/10.1016/0308-597X(89)90041-9).

75 Jianwen Zhao, "On the Interpretation Declarations by the State Parties to United Nations Convention on the Law of the Sea Concerning the Issue of Innocent Passage of Warships through the Territorial Sea," *China Oceans Law Review* 2 (2005): 305–6; Shigeki Sakamoto, "Anatomy of China's Maritime Strategy: Threatening the Maritime Order Through Its National Legislation and Self-Centered Interpretation of UNCLOS," *International Law Studies* 100 (2023): 379–80.

76 Jin Yongmin, "On the Regime of Innocent Passage in the Territorial Sea," *Chinese Review of International Law*, 2 (2016): 68; Shigeki Sakamoto, "Anatomy of China's Maritime Strategy: Threatening the Maritime Order Through Its National Legislation and Self-Centered Interpretation of UNCLOS," *International Law Studies* 100 (2023): 380.

77 Bao, "A Chinese Perspective," 89–90.

78 Cameron Moore, *Freedom of Navigation and the Law of the Sea: Warships, States and the Use of Force* (Taylor & Francis Group, 2021), 96; Raul (Pete) Pedrozo, "Preserving Navigational Rights and Freedoms: The Right to Conduct Military Activities in China's Exclusive Economic Zone," *Chinese Journal of International Law* 9, no. 1 (2010): 26–27.

unarmed US ocean surveillance vessel) and a 2016 incident where a Chinese submarine detained a US unmanned underwater vehicle.<sup>79</sup> Recall that according to the LOSC, within EEZs, flag states enjoy FON while coastal states only possess sovereign rights or jurisdiction over exploration and exploitation of natural resources and maritime scientific research, among others.<sup>80</sup> These rights or jurisdiction do not extend to regulating naval activities. It remains ambiguous whether China upholds this position as somehow consistent with the LOSC, perhaps conflating surveillance by foreign military vessels as maritime scientific research,<sup>81</sup> or based on their national law.

China's sensitivity to the navigation and activities of foreign navy vessels in its maritime zones is illustrated by its declaration of non-acceptance of LOSC Part XV Section 2 provisions with respect to certain types of disputes within LOSC Article 298.<sup>82</sup> Essentially, China rejects resolving interstate disputes regarding sea boundary delimitations and military or law enforcement activities<sup>83</sup> via certain procedures, including recourse to ITLOS, the ICJ, or arbitral tribunals in accordance with LOSC Annexes VII or VIII.<sup>84</sup> Thus, not only is China more restrictive on naval vessel's navigation within its EEZs, but even litigating disputes with China about the issue is also more difficult than with some other states.

## 2. Challenges to the SCS from US FONOPs

In response to China's legal positions on FON, the US conducts FONOPs, including in the SCS, sailing navy vessels in waters it claims to enjoy navigational freedoms in despite China's claims. In doing so, the US claims to uphold the navigational rights and freedoms of all states against excessive maritime claims and unlawful restrictions on innocent passage.<sup>85</sup>

79 Jing Geng, "The Legality of Foreign Military Activities in the Exclusive Economic Zone under UNCLOS," *Utrecht Journal of International and European Law* 28, no. 74 (2012): 23; Terri Moon Cronk, "Chinese Seize U.S. Navy Underwater Drone in South China Sea," U.S. Department of War, December 16, 2016, <https://www.war.gov/News/News-Stories/Article/Article/1032823/chinese-seize-us-navy-underwater-drone-in-south-china-sea/>.

80 LOSC, 1982, Arts. 56-8.

81 "China's Territorial and Maritime Disputes in the South and East China Seas: What Role for International Law?," 268-69.

82 "Declarations Made by States Parties under Article 298," International Tribunal for the Law of the Sea, accessed June 2, 2024, <https://www.itlos.org/en/main/jurisdiction/declarations-of-states-parties/declarations-made-by-states-parties-under-article-298/>.

83 LOSC, 1982, Arts. 298(1)(a-c).

84 LOSC, 1982, Art. 287.

85 America's Navy, "U.S. Navy Destroyer"; "U.S. Navy Destroyer Conducts Freedom of Navigation Operation in the South China Sea," America's Navy, May 10, 2024, <https://www>.

However, such unilateral operations inevitably present challenges to the SCS, which already experiences interstate tensions. The article affirms that challenges from US FONOPs are more problematic political-diplomatically than in a legal sense. While compliant with the LOSC and customary international law, US FONOPs are easily misinterpreted as power projection, and can strain relationships with US allies, the Association of Southeast Asian Nations (ASEAN) states – many of which are adjacent to the SCS – and China. US FONOPs are “operational challenges to excessive maritime claims” led by its Defense Department. FONOPs are executed alongside diplomatic protests from the US State Department as part of the Freedom of Navigation Program, operating for nearly fifty years.<sup>86</sup> Though initially established during the Cold War in response to US-Soviet Union rivalries, modern US FONOPs are increasingly focused on the SCS and China, especially after the 2016 South China Sea Arbitration.

Against the background of current US-China geopolitical rivalries, increasing US FONOPs in the SCS gives the impression of being targeted towards China,<sup>87</sup> harming their messaging as a public good for all countries. Though claiming to uphold international law and all states’ navigational freedoms, the fact that the US has well-known national interests in the SCS to contest Chinese military expansion<sup>88</sup> and that US FONOPs inevitably target several states whose own navies have negligible FONOPs capabilities<sup>89</sup> leads to perceptions that these operations are about projecting unilateral state power.<sup>90</sup> While some academics argue US FONOPs are unbiased to China,

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[navy.mil/Press-Office/News-Stories/Article/3771407/us-navy-destroyer-conducts-freedom-of-navigation-operation-in-the-south-china-s/](https://www.navy.mil/Press-Office/News-Stories/Article/3771407/us-navy-destroyer-conducts-freedom-of-navigation-operation-in-the-south-china-s/).

86 *Freedom of Navigation (FON) Report for Fiscal Year 2023* (U.S. Department of Defense, 2024), 2, [https://www.globalsecurity.org/military/library/report/2024/fy2023\\_dod\\_annual\\_fon\\_report.pdf](https://www.globalsecurity.org/military/library/report/2024/fy2023_dod_annual_fon_report.pdf).

87 Christian Wirth, “Whose ‘Freedom of Navigation’? Australia, China, the United States and the Making of Order in the ‘Indo-Pacific,’” *The Pacific Review* 32, no. 4 (2019): 487, <https://doi.org/10.1080/09512748.2018.1515788>.

88 Kyung Suk Lee and Kyuyoung Lee, “U.S. Freedom of Navigation Operations in South China Sea: An Ongoing Riddle between the United States and China,” *The Korean Journal of Defense Analysis* 29, no. 3 (2017): 455–73, <https://doi.org/10.22883/kjda.2017.29.3.007>.

89 Lalit Kapur, *Reading the USS John Paul Jones FONOP Right* (Delhi Policy Group, 2021), <https://www.delhipolicygroup.org/publication/policy-briefs/reading-the-uss-john-paul-jones-fonop-right.html>.

90 Kim Heriot-Darragh, “FONOPs Send a Message – but They Don’t Speak for Themselves,” *The Interpreter*, April 24, 2024, <https://www.lowyinstitute.org/the-interpreter/fonops-send-message-they-don-t-speak-themselves>.

since they are conducted in the territorial seas of other countries,<sup>91</sup> they are nonetheless provocative and highly threatening due to US Navy ships commonly equipping high-tech weaponry. This, in turn, has exacerbated SCS tensions as US FONOPs in the SCS are used by China as a pretext to continue its militarisation of artificial islands.<sup>92</sup>

Second, supporting US FONOPs may strain the relations of its allies with ASEAN countries and China. This is especially the case with Australia, a US ally situated closer to the SCS. Australia conducts naval operations categorically separate from US FONOPs, such as friendly port calls in several ASEAN states' waters. Yet since the 2016 Arbitration Award, the US has signalled to Australia to conduct its own SCS FONOPs, including sailing Australian naval vessels into (internationally rejected) territorial seas of China's artificial islands.<sup>93</sup> Australia has voiced how such operations do not align with its own foreign interests.

In 2018, then Australian Minister of Foreign Affairs Julie Bishop stated: *“We will continue to exercise our rights to freedom of navigation, pursuant to international law... What we won’t do is unilaterally provoke an increase in tensions in the South China Sea. There are a number of claimants, there are disputed territories, and there are negotiations underway, between, particularly ASEAN, the South East Asian nations, and China. Australia will continue to do what we have always done, uphold our right to traverse the South China Sea in accordance with international law...”*<sup>94</sup>.

Evidently, Australia aspires to balance its relations with the US as well as ASEAN and China, the latter of which may deliberate Codes of Conduct in the SCS inconsistent with the 2016 Arbitration Award. Open support of US FONOPs by Australia risks more aggravated Chinese responses in the SCS.<sup>95</sup> Indeed, blatant Australian support of US FONOPs risks exacerbating

91 Bao, “A Chinese Perspective,” 87–89.

92 Malcolm Cook, *Australia’s South China Sea Challenges* (Lowy Institute, 2021), <https://www.lowyinstitute.org/publications/australia-s-south-china-sea-challenges>.

93 Angus Grigg and Lisa Murray, “Former Spy Chief Dennis Richardson Says China Overstepped in Australia,” *Australia Financial Review*, March 7, 2018, <https://www.afr.com/business-summit/former-spy-chief-dennis-richardson-says-china-overstepped-in-australia-20180307-h0x5va>.

94 “Interview with Kieran Gilbert, Sky News,” Minister for Foreign Affairs, March 8, 2018, <https://www.foreignminister.gov.au/minister/julie-bishop/transcript-eoe/interview-kieran-gilbert-sky-news-1>.

95 Malcolm Cook, “Australia’s South China Sea Challenges,” May 26, 2021, <https://www.lowyinstitute.org/publications/australia-s-south-china-sea-challenges>.

perceptions of Australia being the US' "deputy sheriff" in the Indo-Pacific,<sup>96</sup> which may undermine its relations with ASEAN countries and China.

#### D. Conclusion

The article has sought to explore where China's legal positions on freedom of navigation differ from the UN LOSC, and how these differences inform tensions in the SCS regarding US' FONOPs conducted in response to China's position. To this end, the article reappraised FON in both how it is codified in the LOSC and Chinese official perspectives of it as well as challenges US FONOPs to contest China's presence in the SCS. It affirms that the LOSC upholds FON in all maritime zones present in the SCS to varying degrees. While states' FON must be exercised with due regard to the freedoms of other states in high seas, FON is contested by coastal states' sovereignty, sovereign rights, and jurisdiction within EEZs and territorial seas.

China's position on FON, including in the SCS, differs from the LOSC in its requirements for foreign naval vessels to obtain permission to navigate its territorial waters, and China believes that it can interfere with the navigation and activities of foreign naval vessels conducting surveillance in its EEZs. These positions either contradict coastal state duties in the respective maritime zones or exceed coastal state rights codified within the LOSC. While there exist arguments to defend China's position from legal scholars, they fail to substantiate where the LOSC distinguishes rules applicable to warships from merchant ships and permits states to impose laws regarding navigation in territorial seas that entail restricting it.

Meanwhile, though US FONOPs do not violate LOSC provisions or customary international law, they present significant political-diplomatic challenges. Among others, such operations complicate the foreign relations of US allies like Australia, which support similar principles asserted by US FONOPs but still aspire to balance its relations with the US, ASEAN, and China.

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<sup>96</sup> Donald Rothwell, "Is Australia in Danger of Becoming the US's 'Deputy Sheriff' in the South China Sea?," *The Conversation*, August 26, 2022, <https://theconversation.com/is-australia-in-danger-of-becoming-the-us-deputy-sheriff-in-the-south-china-sea-189314>.

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