

China's approach to the Freedom of Navigation

Part 1 - No-Sail Zones

(This is the first of the three-part series on the subject)

Author: Jayesh Mathur

Date: 06 May 2018

Introduction

Torturous negotiations, involving much bargaining and several compromises, characterised the multiple sessions of the Third United Nations Conference on the Law of the Sea (UNCLOS III). Although the Conference eventually succeeded in formulating the United Nations Convention on the Law of the Seas, 1982 (UNCLOS), the consequences of these compromises continue to be felt.ⁱ In contemporary times, a great deal of controversy is concentrated upon the exact meaning of the term 'Freedom of Navigation'. The UNCLOS has, indeed, laid down the extent of the freedoms available to a given of State that is operating within the maritime zones of a different Coastal State. However, this notwithstanding, there remain significant differences in the manner in which States have interpreted permissible 'activities' under the ambit of 'Freedom of Navigation'. This is especially so in the context of 'Military Freedoms'. China has been at loggerheads with the United States of America (USA), and other countries, too, over this very issue, with Beijing alleging that some activities of the USA are inconsistent with the spirit of UNCLOS (which was ratified by China in 1996). Ostensibly to curb US activities that it considers as being greatly in excess of those permissible under the 'Freedom of Navigation' clause (as defined under UNCLOS), China has, in the recent past and particularly during its conduct of military exercises, promulgated and established 'No-Sail Zones' beyond its territorial waters, barring ships other than its

own from sailing in such zones. This action by China has attracted considerable opprobrium, especially from the USA (but from other countries as well), who hold that such curbs upon the right of Freedom of Navigation of other States is grossly violative of international law.ⁱⁱ

This Article will analyse the degree to which such 'No-Sail Zones' conform to international law, as also the degree to which China's position is legally justified, using one such zone, which was created by China in the South China Sea, in 2016, as a case-in-point.

In July of 2016, China cordoned off an area off Hainan, covering the Paracel Islands (which are also claimed by Vietnam), within which it conducted military (predominantly 'naval') drills over a period of a week. Beijing issued an official statement declaring that no other ships would be allowed in the area. This statement evoked a sharp response from a variety of quarters, including from Vietnam, which strenuously protested against the drills in waters which, in the opinion of Ha Noi, belonged to Vietnam.ⁱⁱⁱ Other critics of the Chinese action argued that barring ships from entering the area was against the principles of international law.^{iv}

Legality of 'No-Sail Zones'

The United Nations Convention on the Law of the Sea (UNCLOS) states that all ships are entitled to the 'Right of Innocent Passage' within the territorial sea of a coastal State.^v As long as the passage is innocent (i.e., it is not prejudicial to the peace, good order and security of the coastal State), the coastal state is not supposed to interfere with a ship undertaking such 'innocent-passage'. In addition, Article 25 (3) of the UNCLOS authorises a coastal State to temporarily suspend the right of innocent passage in specified areas of its 'territorial sea' for purposes relating to its own security and the safety of shipping, such as during the conduct of weapon-firing exercises. In such cases, movement of foreign ships is restricted, even if their passage is otherwise not prejudicial to the peace, good order or security of the coastal State. However, the convention does not confer upon the coastal State any right to suspend movement of ships of other states

within the Exclusive Economic Zone. Article 58 of the Convention states that all states enjoy the right of 'Freedom of Navigation' in the Exclusive Economic Zone (EEZ) of the coastal State.^{vi} The coastal State is under an obligation to demonstrate due regard for the rights of other States within its own EEZ.^{vii} Thus, the imposition of restrictions by a coastal State on the entry-into or passage-through its EEZ of foreign ships unlawfully impedes the movement of ships of other States.

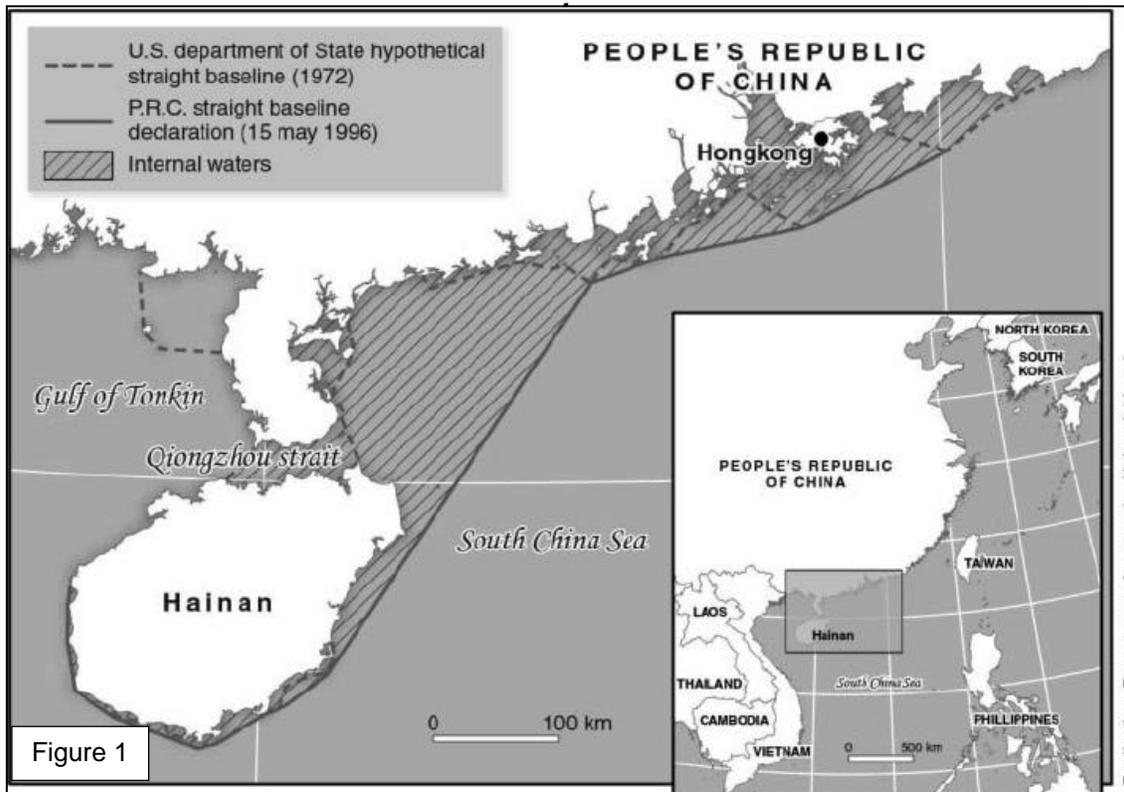
China's Actions

China's Maritime Safety Administration, on the 3rd of July, 2016, issued a Notice to Mariners, directing all vessels not to operate in an area roughly spanning 39,000 square miles, enclosed by geographical coordinates published on its website. The Notice stated that military exercises would be conducted in the area from the 5th to the 11th of July, 2016, during which period the 'entry' of vessels into the area was 'prohibited'. In other words, China created a temporary 'No-Sail Zone' in waters off the coast of its island province of Hainan, which also covered portions of the Paracel Islands.^{viii}

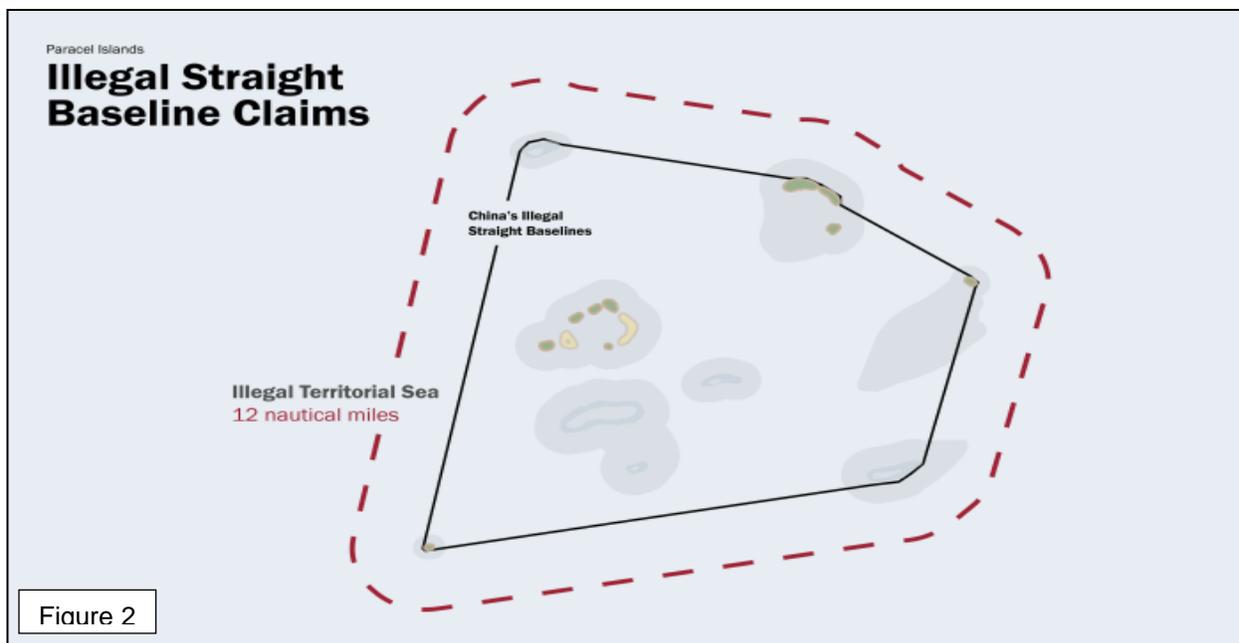
Declaration of Straight Baselines

Although China did not make reference to its regime of baselines while dismissing international criticism of its 'No-Sail Zone', it is pertinent to take note of the basis upon which China has drawn its baselines, since these baselines form the reference for the delineation of its maritime zones.

In 1996, China declared two sets of 'straight baselines'. The first baseline was drawn along the coast of its mainland, traversing southwards from the eastern tip of the Shandong peninsula to encompass the island of Hainan. This effectively converted waters lying to the west of Hainan into 'internal waters' (See Figure 1^{ix}).



The second baseline was created off the Paracel Islands, wherein the outermost points of the islands were connected (See Fig 2^x), and the waters that were now enclosed within such zone were, once again, claimed to be 'Internal Waters'.^{xi}



Article 7 of UNCLOS states that Straight Baselines may be drawn by States whose coastlines are deeply indented, which is not true of China. There is no “fringe of islands” in the immediate vicinity of the Chinese mainland either, which might have necessitated the use of straight baselines.

Legitimacy of the Zone based on ‘Chinese’ Baselines

Even if one were to accept China’s position on the issue (which is based on a highly flawed interpretation of the conditions laid down in UNCLOS, which must be met for straight baselines to be drawn), parts of the ‘No-Sail Zone’ declared in July 2016, lie beyond the 12 nautical mile breadth of the Territorial Sea that the straight baselines in the Paracel Islands would generate. Similarly, large swathes of the zone appear to lie well beyond territorial waters to the south-east of Hainan (generated by the first baseline). Large parts of the cordoned-off area are actually within China’s claimed Exclusive Economic Zone (EEZ). As stated earlier, all States, whether landlocked or coastal, enjoy the right of freedom of navigation in the Exclusive Economic Zone of every coastal State.

A number of States conduct military exercises on a routine basis, both in their territorial waters as well as international waters. The US “Commander’s Handbook on the Law of Naval Operations” states, “*Notices may be issued to airmen and other mariners, alerting ships and aircraft of the heightened hazards and recommending but not requiring that foreign ships and aircraft steer clear.*”^{xii} Ships and aircraft of ‘other nations’ are not required to remain outside, but are ‘obliged’ to refrain from interfering with activities therein.^{xiii} The instructions enumerated in the handbook intend to convey, to foreign ships which plan to enter the area, the dangers that are attendant upon the conduct of such exercises. Unlike the USA, which does not require ships and aircraft of other nations to remain outside the specified zone during military exercises, China’s Notice constituted an encroachment upon the ‘freedom of navigation’ all States enjoy in the Exclusive Economic Zone of the coastal state. The official position

of States such as the USA(which has not yet ratified the UNCLOS) vis-à-vis military exercises in international waters is indicative of its awareness of the rights of other States. Thus, the zone created in 2016 is devoid of legitimacy, even by China's own baseline-measuring standards.

China's unilateral imposition of restrictions on the freedom of navigation has no place under UNCLOS or other rules of international law. This conclusion is independent of the gross violation of the regime of Straight baselines, which China has illegally drawn around Hainan Island and the Paracel Islands (the latter are themselves subject to overlapping claims by Vietnam and Taiwan).

Conclusion

China's actions in the given case, i.e. prohibiting entry of vessels in international waters represent a breach of its commitments under the UNCLOS. The fact that such 'No Sail Zones' are temporary creations notwithstanding, if these are not challenged, it could encourage the other 'erring States' to trample upon the navigational freedoms of other States.

**Jayesh Mathur has been a Research Intern at the National Maritime Foundation (NMF), New Delhi. The views expressed here are his own and do not reflect the position of the NMF. Jayesh may be reached at jayesh.sudhir.mathur@gmail.com*

Notes and References

¹ Third United Nations Conference on the Law of the Sea – 187th Plenary meeting, December 7, 1982, A/CONF.62/SR.187.

² Sam LaGrone, *Chinese Military South China Sea 'No Sail' Zone Not a New Move*, USNI News, (July 7, 2016), <https://news.usni.org/2016/07/07/chinese-military-south-china-sea-no-sail-zone-nothing-new>.

³ Echo Huang Yinyin, *China Declares a No-Sail Zone in Disputed Waters during Wargame*, DEFENSE ONE, (July 5, 2016), <http://www.defenseone.com/threats/2016/07/china-declares-no-sail-zone-disputed-waters-during-wargame/129607/>.

⁴ Alex Rockie, *China doesn't want anyone to come near their latest 'no sail zone' in the South China Sea*, BUSINESS INSIDER INDIA, (July 8, 2016), <https://www.businessinsider.in/China-doesnt-want-anyone-to-come-near-their-latest-no-sail-zone-in-the-South-China-Sea/articleshow/53106426.cms>.

⁵ United Nations Convention on the Law of the Sea (UNCLOS), Article 25.

⁶ UNCLOS, Article 58.

⁷ UNCLOS, Article 56.

⁸ Ibid.

⁹ https://www.researchgate.net/figure/The-Qiongzhou-Strait_fig4_263716217

¹⁰ <https://seasresearch.wordpress.com/2018/04/08/offshore-archipelagos-enclosed-by-straight-baselines-an-excessive-claim/>

¹¹ the commander's handbook on the law of naval operations (july, 2007 ed.), department of the navy office of the chief of naval operations and headquarters, u.s. marine corps, department of homeland security and u.s. coast guard.