

On the Legal System Construction of Marine Freedom and Ship Navigation Right under the jurisdiction of the South China Sea

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Abstract: The South China Sea is one of the most controversial maritime areas in the world. The disputes over islands, energy and shipping routes are complicated. The phenomenon of the overflow of freedom of navigation and the abnormal jurisdiction over the marine environment coexist. Establish a particularly sensitive sea area in the South China Sea, make full use of the navigation measures in its “relevant protection measures” to strengthen the management and control of the sea area. For China, we should clarify the content of freedom of navigation from two aspects: strengthening domestic legislation and cohesive consensus with foreign countries, so as to effectively guarantee the realization of the right to freedom of navigation. This paper discusses the construction of the legal system of freedom of the sea and the right of navigation of ships under the jurisdiction of the South China Sea. Based on the coordination mechanism of the legal fiction area, the marine area is the institutional basis, which specifies the right of navigation in each marine area and the right of navigation in the marine environment, and elaborates different coordination schemes for each marine area.

1. Introduction

The purpose of the study on the coordination mechanism of the conflict between navigation rights and jurisdiction over marine environment in disputed waters is to solve the dilemma in reality [1-2]. The plight of the South China Sea is a long-standing problem that has plagued China, as shown in Figure 1 In addition to demarcation disputes and energy disputes, the conflict between navigation rights and marine environmental jurisdiction in the South China Sea is also very serious, and there is no effective coordination mechanism [3]. The severity of ecosystem decline in the South China Sea and the strong human desire for sustainable ecosystem development mean that disputes over delimitation cannot be allowed to hinder the process of coordinating conflicts [4-5]. Therefore, it is also an urgent problem for China to find an appropriate coordination mechanism for the conflict between maritime navigation rights and Maritime Environmental jurisdiction in South China.



Figure 1 Freedom of navigation of ships in the South China Sea

2. Current Situation Analysis of Conflict between Navigation Right and Marine Environmental Jurisdiction in South China Sea

The South China Sea is one of the most controversial sea areas in the world, because it not only contains abundant biological and abiotic resources, but also is an important sea passage in the world and has a prominent strategic position. It is precisely because of the long-standing disputes over delimitation that the jurisdiction over the marine environment of the South China Sea is abnormal: on the one hand, the jurisdiction of coastal States is enforced in spite of the opposition of other countries to the waters they claim, and unreasonable interference is often carried out in the navigation activities of ships with the nationality of the disputing countries [6-7]. On the other hand, due jurisdiction has not been exercised over dangerous activities carried out by ships from non-disputing States. Thus, in the South China Sea, the conflict between the right of navigation and the jurisdiction of the marine environment appears special and complex.

2.1 Flooding of the right to freedom of navigation

Although Vietnam, the Philippines, Malaysia, Indonesia and Brunei all claim sovereignty over some islands and reefs in the South China Sea and declare a 200-nautical-mile exclusive economic zone, they are only concerned about marine activities that threaten the “sovereignty” of their islands and reefs and fish in their “exclusive economic zone”. However, insufficient attention has been paid to shipping activities, especially those of ships carrying large quantities of oil and dangerous goods. Moreover, law enforcement activities in disputed sea areas are prone to trigger conflicts, and countries have no time to take into account the protection of marine environment beyond sovereignty and resource interests [8-9]. In fact, most of the waters of the South China Sea are in a state of overflowing freedom of navigation. There is a lack of strict technical norms and legal management for the navigation of ships carrying dangerous substances, foreign warships and large oil tankers. The hydrological, geological and climatic conditions of the South China Sea determine that it belongs to the area where maritime accidents occur frequently. Therefore, the cherished and fragile ecosystem of the South China Sea is always threatened by navigation.

The disputes over the South China Sea are not only disputes over resources but also disputes over waterways. The unique marine geographic characteristics of the South China Sea make it an area under the control of big powers and power groups in order to ensure their respective strategic interests. For a long time, in order to pursue its global hegemony strategy, especially its military presence in the South China Sea, the US military has continuously strengthened its reconnaissance and surveillance of the armies of China, North Korea and Russia. In addition, the US trade in the Asia-Pacific region has accounted for more than 60% of its total foreign trade. Therefore, it has to strengthen its control over the South China Sea in order to safeguard its political, economic, military and strategic interests in the Asia-Pacific region [10].

In addition, the South China Sea is the maritime lifeline of energy security for East Asian countries such as China, Japan and South Korea, which undertakes 710% of Japan's crude oil transportation. More than half of the world's large oil tankers and cargo ships pass through the waters every year, and two-thirds of the world's total trade in liquefied natural gas is transported through the waters. Relevant countries in the South China Sea, including China, have not made any special regulations on such vessels. Even in the territorial waters around the islands and reefs which claim sovereignty, they have not designated or prescribed sea lanes and channel navigation systems for navigation safety, nor have they restricted the passage of oil tankers, nuclear-powered vessels and ships carrying dangerous substances.

2.2 Abnormal jurisdiction of marine environment

Facing the flooding of the right to freedom of navigation, the jurisdiction of marine environment in the South China Sea is in a state of abnormality: on the one hand, the jurisdiction of coastal States is enforced in spite of the opposition of other countries, and unreasonable interference in the right to navigation is often carried out. On the other hand, for dangerous navigation activities

occurring in non-disputed areas, due jurisdiction has not been exercised, specifically [11-12]:

First of all, the relevant countries in the South China Sea, including China, have not designated or prescribed sea lanes and separate navigation systems for the territorial waters around the claimed islands to prevent the marine environmental threats posed by foreign ships in exercising their right of innocent passage. Secondly, China's historical rights in historical waters do not include jurisdiction over the marine environment. Finally, in the half closed sea of the South China Sea, the relevant countries have not cooperated on marine environmental protection. In addition, the maritime law enforcement forces of the relevant countries in the South China Sea are very weak on the whole, the maritime law enforcement system is still not perfect, the level of marine management is low, and the maritime crisis management mechanism is not mature.

These problems all aggravate the threat to the ecosystem of the South China Sea caused by the flood of freedom of navigation. As a semi-closed sea with extremely fragile marine environment, very busy maritime traffic and high incidence of maritime accidents, the South China Sea has no way to cope with the threat of marine environment brought by navigation. The current ecological situation in the South China Sea is very serious. Not only are fishery resources exhausted, but more than 80% of coral reefs are threatened. Many species are endangered and wetlands and mangroves disappear in large areas.

3. The Boundary of Freedom of Navigation

As mentioned above, freedom of navigation, rooted in freedom of the sea, does not have a clear definition in UNCLOS. Because of the principle and lag of treaty provisions, problems arise in practice. Therefore, a clear scope of freedom of navigation will play a positive role in establishing a clear system of rights and obligations of the right to passage.

3.1 The necessity of clearing the free boundary of navigation

Although the maritime jurisdiction of States and the Convention on the Law of the Sea impose certain restrictions on freedom of the sea and navigation, in fact, disputes and discussions on freedom of navigation have never ceased. As far as China is concerned, there have been many disputes over freedom of navigation in the high seas and exclusive economic zones, such as the Galaxy Incident, the Baudich Survey Ship Incident and the No Time Incident. In the aforementioned incidents, American surveying vessels and warships carried out surveying and exploration with military surveying nature in our exclusive economic zone. The purpose of this survey is to obtain all kinds of marine and geographic environmental data in China. It is an act of war readiness obviously directed against China, rather than merely for scientific research purposes, which infringes on China's national security interests.

At the same time, the United States, which has not yet acceded to the Convention on the Law of the Sea, insists on "absolute freedom of navigation" and uses this view to create problems. On the South China Sea issue, the United States has repeatedly asked China to "respect the freedom of navigation in the South China Sea and take responsible actions". In fact, relevant practice can prove that the freedom of navigation and military exercises of the countries around the South China Sea has been guaranteed. China has never interfered with the freedom of navigation of the countries in the South China Sea contrary to international law. On the one hand, the fuzziness of the provisions of the Convention on the Law of the Sea leads to different interpretations of the specific connotation of freedom of navigation, which is easy to cause controversy. On the other hand, the United States is "moving eastward strategically", using the issue of freedom of navigation to intervene in East Asian affairs and squeeze China's maritime space. Under such circumstances, it is of great realistic and necessary to clarify the connotation of freedom of navigation in UNCLOS and to seek the consensus of all countries on this issue.

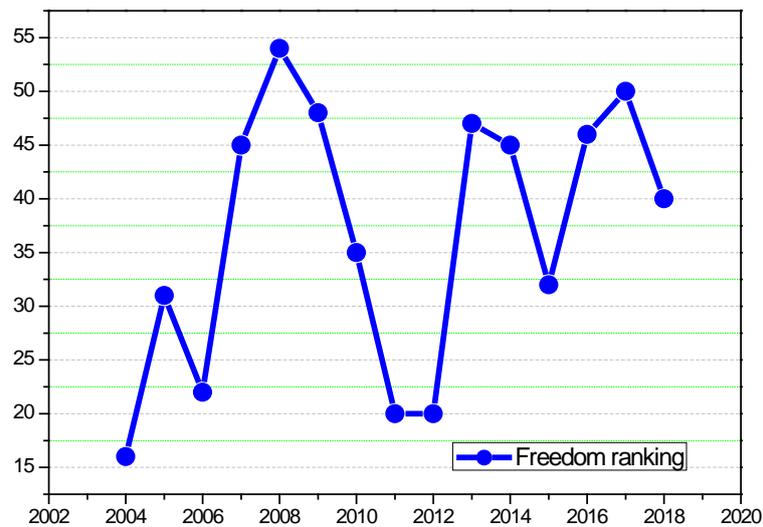


Figure 2 United States press freedom ranking

3.2 On the premise of the Principle of the Use of the Sea for Peaceful Purposes

In its preamble, the Convention on the Law of the Sea refers to the establishment of a legal order for the oceans through this Convention, taking due account of the sovereignty of all States, in order to facilitate international traffic and promote the peaceful uses of the oceans. The equitable and effective use of marine resources, the conservation of marine living resources and the study, protection and preservation of the marine environment reveal the theme of the “Principles of the Peaceful Uses of the Sea” of UNCLOS. The implementation of the preamble can be seen in Article 58 of UNCLOS, entitled “Rights and obligations of other States in the exclusive economic zone”, and article 88, entitled “The high seas are used only for peaceful purposes”. These provisions require that all activities of States parties in the exclusive economic zone and on the high seas, including navigation, be in conformity with the purpose of peaceful use, and therefore freedom of navigation should be subject to the principle of peaceful use. With the entry into force of the Convention on the Law of the Sea, great progress has been made in marine military equipment technology, especially underwater missiles and electronic reconnaissance technology. Military activities carried out by marine powers in the exclusive economic zones of high seas and coastal states, including military surveys and data collection for war readiness, are increasing day by day, as shown in Figure 2. The exclusive economic zones of coastal countries have become “positions” for military activities and intelligence gathering in these countries. Because the definition of “freedom of navigation” in UNCLOS is not clear, different countries interpret freedom of navigation from their own interests, which has triggered many disputes as listed above, harming the normal maritime rights and interests of coastal countries and endangering the national security of coastal countries.

3.3 Priority level of effectiveness under the “appropriate consideration” mechanism

The Convention on the Law of the Sea stipulates that “when exercising the rights and obligations stipulated in the Convention, both coastal States and other States shall give due consideration to the legitimate rights and obligations of the other party”, which we call the “due consideration” mechanism. This clause only gives a principled explanation of the acts of both parties to rights and obligations in terms of “appropriate”, which makes it difficult for the clause to be effectively applied. So when the right of “freedom of navigation” conflicts with the national security interests of coastal countries, how to determine which party's rights have priority is an important issue to clarify the meaning of freedom of navigation and to resolve the conflict of rights of disputed countries. The scope of the right to freedom of navigation varies with the nature of the sea area. According to customary law, the high seas are the common property of the international community. All countries have the freedom to navigate and fish on the high seas. Ships can only be subject to jurisdiction in violation of jus cogens and flag state laws. Therefore, the right to freedom of navigation on the high seas should be given priority. According to the Convention on the Law of the

Sea, other countries have the freedom of navigation and overflight in the exclusive economic zone, but coastal States should also take into account the laws of coastal States in their navigation and overflight. China's "Exclusive Economic Zone and Continental Shelf Law" also stipulates that "any country in China's exclusive economic zone has freedom of navigation and flight, but under the premise of the legitimate use of the sea. China has the right to take necessary measures for violations of Chinese laws and regulations in the exclusive economic zone and the continental shelf, and to pursue legal liabilities in accordance with the law." According to the Convention and the domestic law of our country, ships of other countries in our exclusive economic zone should sail and fly freely on the premise of "legitimate use" of our oceans. The content of "legitimate use" is interpreted by the coastal state. Of course, the interpretation by the coastal state must be carried out on the basis of not violating the rights and obligations of the Convention on the Law of the Sea. In view of the current disputes, the greatest concern of coastal countries about their freedom of navigation in the exclusive economic zone lies in the impact on their own national security. As far as a country is concerned, national security is the core interests of the country and the fundamental interests to be actively safeguarded by the principle of national sovereignty. The principle of international sovereignty is the most basic principle of international law and the source of a country's international legal status. Based on this, when the freedom of navigation of a country in the exclusive economic zone conflicts with the national security of a coastal country, the national security interests of a coastal country should be superior to the right of freedom of navigation. The restriction of maritime jurisdiction on freedom of navigation under the existing maritime law system is shown in figure 3.

But for the foreign ships mentioned above, which pose a potential threat to China's national security in our exclusive economic zone, such as approaching military investigation and military surveying, these activities belong to the residual rights of UNCLOS, and it is difficult to characterize them. Based on the consideration of the priority of the national security interests of the coastal state, the maritime user state can be required to pass the consent of the coastal state and accept the jurisdiction of the coastal state before carrying out military surveying activities, and the coastal state can send official ships to track the problem in the course of surveying.

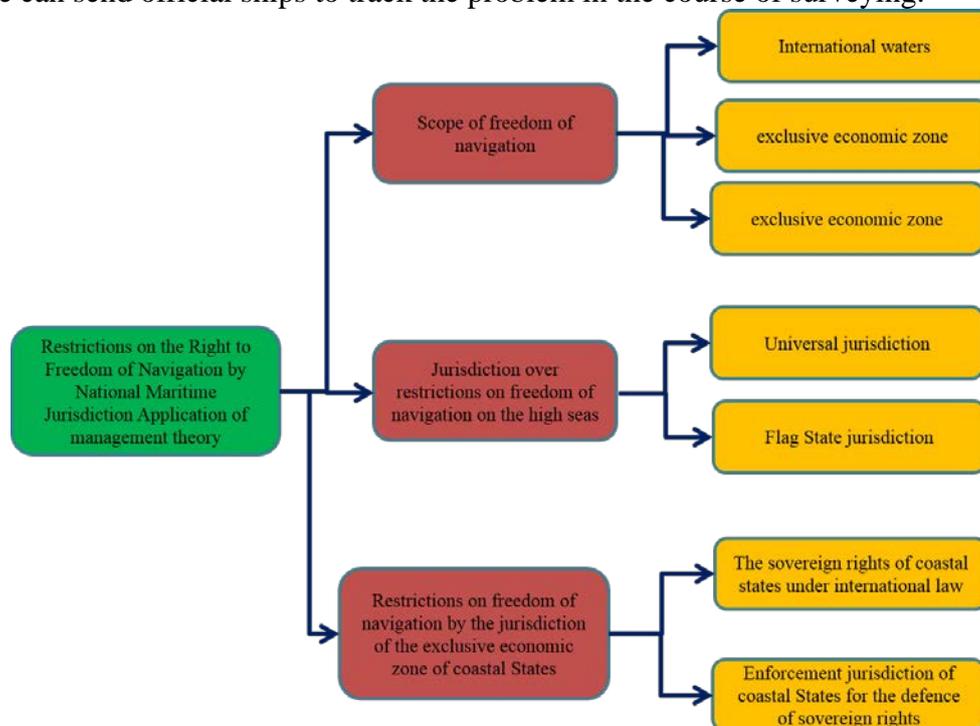


Figure 3 Restriction of maritime jurisdiction on the right of freedom of navigation

4. The Basic Thought of Balancing the Principle of Marine Freedom and State Sovereignty

The struggle and integration between the principle of freedom of the sea and the principle of national sovereignty run through the whole process of human exploration and utilization of the sea. It is in this contradiction that the international law of the sea has been developed and a new international maritime order has been established. This paper tries to elaborate the basic idea of balancing the principle of freedom of the sea and national sovereignty from the perspective of international unity and safeguarding the interests of our country.

From an international perspective, peace and development are the two major themes of today's world. Therefore, both politically and legally, the principle of national sovereignty should be the basic norm followed by the international community. When conflicts of interest arise between national territorial security, dignity and interests and the freedom of navigation and overflight of ships and aircraft of other countries, the exercise of the rights of the former should be guaranteed, while taking into account the interests and needs of the latter. Some maritime powers pursue the so-called liberalism, whose essential purpose is to realize substantive inequality with superior Naval Technology under the cover of formal equality. The principle of sovereign equality of States is embodied in various international conventions, and no state can exercise its rights above the sovereignty of other states.

It is undeniable that economic globalization is an irresistible historical trend, and the accompanying globalization of production, trade and capital necessarily requires convenient transportation. With its unique interactivity and media, the ocean has become an important bridge to communicate with the global economy. Implementing the principle of freedom of the sea helps to reduce transaction costs and take into account both immediate and long-term interests. On the premise of not harming the peace and security of coastal countries, the establishment of innocent passage is generally beneficial to all countries in the world. This is a transfer of rights based on reciprocity and equality. It also helps countries to develop their marine undertakings and reduce trade barriers. All countries should, on the basis of equal consultation, forge mutual understanding and compromise, form generally acceptable international practices, and facilitate international navigation on the basis of Non-prejudice to national sovereignty and security.

From the perspective of safeguarding China's interests, it is particularly urgent to improve China's domestic laws related to maritime rights and interests. To safeguard our national sovereignty, we need to strengthen our jurisdiction over the relevant sea areas. The scientific level is the technical support of effective jurisdiction, while the clear code of conduct and clear legal consequences are the legal and institutional guarantee for our country to effectively safeguard the rights and interests of the sea. Firstly, it clarifies the substantive requirements and approval procedures for ships of government nature such as warships passing through territorial waters, and stipulates both positive and negative legal consequences. On the one hand, it declares our sovereignty and safeguards our national dignity; on the other hand, it gives convenience to other countries and shows the attitude of reciprocity and mutual benefit. Secondly, we should strengthen the protection of marine environmental pollution, further clarify the conditions that ships in China's territorial waters should possess to reduce the coastal environmental risks, and refine the responsibilities of ship environmental pollution, so as to truly prevent pollution accidents from the source. Deepening the marine ecological supervision system is conducive to the collection of evidence and the implementation of responsibilities. We will enrich the public interest litigation system for marine environment and raise citizens' awareness of marine environmental protection. Finally, we should enhance our maritime law enforcement capability, learn from other countries' ways and means of exercising the right to freedom of the sea, and truly realize our country's long-term national interests.

5. Conclusion

China's economic and military strength has made a breakthrough in the past. On the one hand,

we should uphold China's basic rights and interests as a party to the Convention on the Law of the Sea and a coastal state. On the other hand, the enhancement of marine power has a positive impact on the expansion of China's maritime interests. We need to consider the issue of “going out” to further expand marine development space. In this context, we rely more on the right of freedom of navigation in international waters. According to the principle of reciprocity, only on the basis of consensus with interested countries on the meaning of freedom of navigation, can China's navigation rights be truly guaranteed and realized. This paper holds that China can jointly conclude bilateral or multilateral treaties with coastal countries with the same interests, clearly stipulate the restrictions on the right of free passage and freedom of navigation in the treaties, and guarantee the realization of China's marine rights and interests to the greatest extent on the basis of consensus.

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