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WORLD MARITIME UNIVERSITY

Malmö, Sweden

**ENSURE FREEDOM OF NAVIGATION IN
DISPUTED SEA AREAS IN THE SOUTH CHINA
SEA UNDER UNITED NATIONS CONVENTION
ON THE LAW OF THE SEA, 1982**

By

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Vietnam

A dissertation submitted to the World Maritime University in partial
Fulfilment of the requirements for the award of the degree of

MASTER OF SCIENCE

In

MARITIME AFFAIRS

(MARITIME LAW AND POLICY)

2017

DECLARATION

I certify that all the material in this dissertation that is not my own work has been identified, and that no material is included for which a degree has previously been conferred on me.

The contents of this dissertation reflect my own personal views, and are not necessarily endorsed by the University.

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ABSTRACT

Title of Dissertation: **Ensure freedom of navigation in disputed sea areas in the South China Sea under United Nations Convention on the Law of the Sea, 1982**

Degree: **MSc**

The dissertation is a study of the freedom of navigation affected by territorial disputes in the South China Sea. It is undeniable that the South China Sea plays an important role for the region and the world. Therefore, there have been prolonged maritime disputes between littoral states with increasing tension and complexity.

Freedom of navigation is one of important legal principles under UNCLOS. It is the right, interests and obligation of every country, whether they are coastal or land-locked. This is particularly significant for the South China Sea, because freedom of navigation in this sea is being affected by maritime disputes between littoral states.

To assess the current situation, the dissertation studies the legal framework for the freedom of navigation and the influence caused by territorial disputes in the South China Sea to the freedom of navigation. Comparative case study method with the jurisprudence related to freedom of navigation, as well as the typical incidents caused by territorial disputes in the South China Sea is used to assess and analyse the problem of freedom of navigation in this sea. Furthermore, solutions and recommendations are proposed in concluding chapters to prevent and eliminate future challenges resulting from conflicts of territorial disputes caused for ensuring freedom of navigation in the South China Sea.

KEYWORDS: Ensure freedom of navigation, Disputed sea area, Assessment, Solution, South China Sea, UNCLOS

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LIST OF ABBREVIATIONS

APEC	Asia-Pacific Economic Cooperation
ASEAN	Association of Southeast Asian Nations
COLREGs	Convention on the International Regulations for Preventing Collisions at Sea, 1972
CSIS	Center for Strategic and International Studies
DOALOS	Division for Ocean Affairs and the Law of the Sea
DOC	Declaration on Conduct of Parties in the South China Sea
EEZ	Exclusive economic zone
EIA	U.S Energy Information Administration
EU	European Union
FONOP	Freedom of Navigation Operation Program
G20	Group of Twenty
G7	Group of Seven
IMO	International Maritime Organization
ITLOS	International Tribunal for the Law of the Sea
PCA	Permanent Court of Arbitration
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
US	United States

Chapter 1: Introduction

1.1. Background

The formation of legal concept of the right of navigation and the freedom of navigation is always linked to the development history of the world maritime activities, and is now becoming important international principle for maritime operations of every ship of all countries, whether they are coastal or land-locked countries. The navigation of ships is the process of directing the movements of ships from one point to another, and this process always present in some form when a ship is under way and not drifting. These legal concepts are interrelated and they are particularly significant for the South China Sea because in this sea, there have been territorial disputes causing increasingly complex and great influence for ensuring the freedom of navigation in disputed sea areas.

The South China Sea is located to the Eastern of Vietnam's territory. This marginal sea is a part of the western edge of the Pacific Ocean, stretching from Singapore and the Strait of Malacca to the Strait of Taiwan (International Hydrographic Organization, 1953) with the water surface area of about 3.5 million square kilometers. Furthermore, it is surrounded by 9 countries and 1 territorial region including: Vietnam, China, Philippines, Thailand, Cambodia, Indonesia, Brunei, Malaysia, Singapore and Taiwan. It is also the site of territorial disputes that have been the cause of potential conflict and tension within the region.

The South China Sea has a wealth of natural resources and these resources play an extremely important role in the socio-economic development of these littoral states. In addition, South China Sea is strategically important because of vital shipping routes that linking the Pacific Ocean to the Indian Ocean, connecting Asia to other continents and between the Asian countries. It can be considered that the South China Sea is a

critical commercial gateway and these shipping lanes play a very important role for a significant portion of maritime activities and seaborne trade in the region and the world. As a result, it is an important economic and strategic sub-region of the Indo – Pacific. Particularly, the volume of oil and natural gas transported from the Indian Ocean crossing the Singapore Strait via South China Sea is much more three times and fifteen times than those transported through Suez Canal and Panama Canal respectively (Rowan, 2005). It is estimated that approximately one third of all global maritime traffic and over 50 percent of worldwide annual merchant fleet tonnage (Kaplan, 2014). Maritime transport is the backbone of international trade as well as the global economy. According to Maritime Transport Review of UNCTAD (2015), there are 80 percent of annual global volume of goods were transported by sea and more than 70 percent in value shipped by sea. Each year, about 45 percent of them are transported through South China Sea shipping routes with an estimated amount of 5 trillion US dollars worth of goods. According to Glaser (2012), there are about 5.3 trillion US dollars in global trade each year through the South China Sea and in which United States trade accounts for 1.2 trillion dollars. In addition to commercial ships, non-commercial ships such as fishing, military, public service are operating daily in the South China Sea with large density. Obviously, the South China Sea has a geographic location and natural conditions that are favorable to the economic development of the region and the world in general, especially in the fields of maritime transport, seaborne trade and exploitation of resources. Therefore, the South China Sea has many benefits for all states whether coastal or land-locked, including the interest of freedom of navigation, which rights and obligations were recognized by international law, including the United Nations Convention on the Law of the Sea, 1982 (UNCLOS).

Freedom of navigation is the one of the principles in the legal regime governing ocean space. According to UNCLOS, the freedom for operation of both commercial and non-commercial ships in the following sea areas:

- The high seas (Articles 86, 87 and 90 of UNCLOS);

- The exclusively economic zones - EEZs (Articles 58, 86 of UNCLOS).

To carry out the freedom of navigation in the maritime zones under the above articles of UNCLOS, the states must also comply with other related articles of the Convention. Thus, UNCLOS asserts that the freedom of navigation is applicable in the EEZs and the high seas without any prohibition or threat. However, the states exercising this right shall ensure that their ships meet all conditions in accordance with the related provisions of international law, including UNCLOS and related IMO's Conventions. Therefore, freedom of navigation is an international legal regime for the right and interest of a state, and is bound by its obligations under the implementation of these right and interest in the EEZs and the high seas. This is particularly significant for freedom of navigation in the EEZs and high seas within the South China Sea, because the area of these sea areas is about two-thirds of this sea.

Furthermore, the South China Sea littoral states are members of the Charter of United Nations, UNCLOS and IMO's Conventions relating to ensure freedom of navigation. These states have enacted laws on the sea regimes, maritime operations and other legal systems relating to the implementation and enforcement of UNCLOS and other related international conventions, aiming to maintain the freedom of navigation in the South China Sea.

On the other hand, China and ten member states of the Association of Southeast Asian Nations (ASEAN) including Brunei, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam have adopted regional agreements to solve sovereignty dispute, ensure freedom of navigation in the South China Sea, including "Declaration on Conduct of Parties in the South China Sea", dated 4th December 2002 (DOC) and "Guidelines for the Implementation of DOC", dated 2011. The DOC is a joint statement by ASEAN and China on principles of conduct in territorial dispute solve, as well as the respect and maintenance of the freedom of navigation in the South China Sea. However, after fifteen years since the announcement of DOC, territorial disputes in the South China Sea have not declined,

but have continued to increase with increasingly complex developments that have had a severe impact on ensuring freedom of navigation in this sea.

Therefore, what happens when the freedom of navigation in disputed sea areas in the South China Sea is not secured due to being prevented or threatened by territorial disputes between littoral states? Because of the abundant marine resources and the geostrategic advantages, the disputes over maritime zones between coastal states in the South China Sea are more complex and tense than in other marine regions of the world.

The disputes in the South China Sea (or the South China Sea disputes) are mainly disputes over maritime zones and other maritime features between littoral states such as China, Philippines, Vietnam, Indonesia, Malaysia and Taiwan. These disputes have arisen since the World War II, but the situation of these disputes have become increasingly complicated, tense and been difficult to control, leading to conflicts between relevant states from the 21st century until now. In particular, the South China Sea disputes erupted after China claimed unreasonable sovereignty over the "nine-dash line" in accordance with the historic rights, which accounted for nearly 80 percent of the South China Sea, and also used forces to seize the Paracel Islands and the Spratly Islands, as well as constructed these features into artificial islands with large and modern military bases.

It has been shown that unresolved disputes have led to unlawful acts such as the prohibition, prevention, deterrence, threat or other harmful behaviors of vessels of a state on ships to those of another state while operating legally in the South China Sea. This situation not only violated international law, but also destabilized and affected peace and development of the region. In several cases which will be mentioned in chapter three of this dissertation, these actions have caused serious consequences to human life and property, such as some ships sank or damaged and injured crew members. It can be said that the South China Sea disputes between the related parties are the main cause which threatening the freedom of navigation in this sea.

From the overview of the context mentioned above, South China Sea is the waters in the world which the freedom of navigation is affected by the territorial disputes among coastal states. Obviously, whether freedom of navigation in disputed sea areas in the South China Sea is ensured depends on the stability of the region and the disputes among coastal states are controlled. In particular, the conflict involving force or threat of use of force not only hinder the freedom of navigation but also stagnate the maritime activities of countries in the region and in the world. This not only violates international laws, including the Charter of the United Nations, the United Nations Convention on the Law of the Sea, 1982 and the IMO's Conventions, but also regional agreements, including the DOC and the Guidelines for the Implementation of DOC".

This worrying situation is being concerned by the international community and called for action by stakeholders to maintain freedom of navigation in the South China Sea. It means that, in order to maintain the freedom of navigation in disputed sea areas in the South China Sea, measures should be taken in accordance with international law and regional agreements.

1.2. Objectives

The objectives of the research, therefore, is to study the freedom of navigation in disputed sea areas in the South China Sea and the solutions needed to ensure freedom of navigation under UNCLOS.

First, to review and analyze the legal regime of freedom of navigation in the South China Sea, including the regulations of UNCLOS, IMO's Conventions, regional agreements and national laws.

Second, to analyze the freedom of navigation in disputed sea areas affected by territorial disputes in the South China Sea.

Last but not least, to give recommendations regarding the solutions to be addressed, in order to ensure and maintain the freedom of navigation in the South China Sea.

1.3. Research question and methodology

Ensuring the freedom of navigation in the South China Sea is a large and complex issue. Thus, this research should answer the main questions as follows: How does the territorial disputes in the South China Sea affect to ensure freedom of navigation? What solutions should be proposed for this disputed sea area to maintain freedom of navigation?

The research will be carried out by the qualitative research method. It is based on reviewing and analyzing the implementation of UNCLOS regulations on the freedom of navigation, related IMO's Conventions, national law and regional agreements. Furthermore, comparative case study is used with the jurisprudence of case study related to freedom of navigation. In particular, the case of "Haiyang Shiyou 981" happened in Vietnam's EEZ, the "South China Sea Arbitration" between Philippines and China, as well as the "Arctic Sunrise case" between Netherlands and Russia will be compared and analyzed.

1.4. Limitation of the Research

The subject of research is limited to the regulations of UNCLOS, regional agreements and national laws relating to ensure freedom of navigation in the South China Sea. This means that the issue is studied in this research are also limited to the freedom of navigation in the South China Sea under UNCLOS. Although the maritime safety, maritime security, environment protection, innocent passage and transit passage are related to the freedom of navigation, but neither of these five issues are reviewed and analyzed in detail within the above limitation of the research.

1.5. Structure of the Research

This research is structured into five following chapters:

Chapter one explains the background of the research, objectives, research question and methodology, limitation of the study and structure of the subject of research.

Chapter two explains the legal regime for the freedom of navigation and the legal basis of national laws, regional agreements pertaining to the maintenance of the freedom of

navigation disputed sea areas in the South China Sea; as well as general information on the South China Sea and its importance and necessity to maintain the freedom of navigation.

Chapter three analyzes the freedom of navigation affected by territorial disputes in the South China Sea.

Chapter four proposes solutions that related parties need to address in order to ensure freedom of navigation in the South China Sea.

Chapter five contains the conclusion and recommendations of the subject of research.

Chapter 2: Legal regime of freedom of navigation in the South China Sea

2.1. General information of the South China Sea

The South China Sea or “Mer de Chine méridionale” (French) is the marginal sea in the western of the Pacific Ocean. Historically, Vietnamese has called the South China Sea as East Sea or “Biển Đông” to mention a landmark in the eastern sea of its state. The South China Sea is located in the southern of China and has the same name as the mainland of China, therefore, China has claimed that it is under its sovereignty by unreasonable declaration on “historic rights” and “nine-dash line”, accounting for nearly 80 percent of this sea area. This is the main cause of territorial disputes between the littoral states of the South China Sea that have taken place decades ago but have not ended yet.



Figure 1. South China Sea (Source: U.S. Energy Information Administration, 2013)

In the South China Sea, there are two large archipelagic states (Indonesia and Philippines), two large groups of island (Paracel and Spratly), two large gulfs (Gulf of Tonkin and Gulf of Thailand) and important straits (Singapore and Taiwan). Therefore, it can be considered that the South China Sea is a geographic region which is very favorable to trade and other maritime activities of the region and the world. This is especially true for the right of freedom of navigation in the South China Sea under UNCLOS, because the area of the high seas and EEZs of littoral states accounting for more than two thirds of the water surface of the sea.

On the other hand, in the South China Sea, there are abundant resources with huge reserves and this is a very important resource for the economic development of littoral states, especially biological (marine), non-living resources (petroleum, natural gas and minerals). Thus, the South China Sea is the sea of diverse natural resources with great reserves, but has not been exploited in conformity with the potential. However, these advantages are being considered as one of the causes for territorial disputes in the South China Sea. These disputes often lead to tensions, which destabilize the region and give rise to the threat to the right of freedom of navigation in the South China Sea under UNCLOS.

2.2. Importance of freedom of navigation in the South China Sea

Freedom of navigation in the South China Sea is important to the region and the world, especially for trading between states, whether coastal or land-locked. Because, in the South China Sea, there are many key seas routes connecting the Pacific Ocean with Indian Ocean and Asia with Europe, Africa, North and South America, Antarctica and Australia, as well as between parts of Asia continent. Moreover, there are more than 500 seas ports in this region, including many of the world's leading ports with huge annual volume of cargo, especially the ports of Singapore and Hong Kong. These seaports serve as "focal points" as well as "bridges" that form a network of sea routes between littoral states in the South China Sea and between them and other countries around the world.

In fact, the East Asia's countries have a sea route-dependent economy in the South China Sea. Trade and maritime industries of the countries outside of East Asia also depend heavily on these sea routes. For examples, about two thirds and 60 percent of energy supplying for South Korea, Japan and Taiwan respectively get through the route of South China Sea (Kaplan, 2014). In addition, the total volume and value of goods transported annually through the South China Sea is very large. Each year, about 45 percent are transported through these sea routes with an estimated amount of 5,000 billion US dollar worth of goods, including approximately 30 percent of all global shipping and more than 50 percent of worldwide annual merchant fleet tonnage (Kaplan, 2014). Particularly, the volume of oil and natural gas transported via South China Sea is much more 15 times than those transported through Panama Canal (Rowan, 2005). This suggests that South China Sea significantly contributes to the maritime activities and seaborne trade of not only the region but also the world. In other words, South China Sea has huge benefit from activities of maritime and trade of all countries whether they have sea or not, especially the freedom of navigation, rights and obligations of which have been recognized by international law, including UNCLOS.

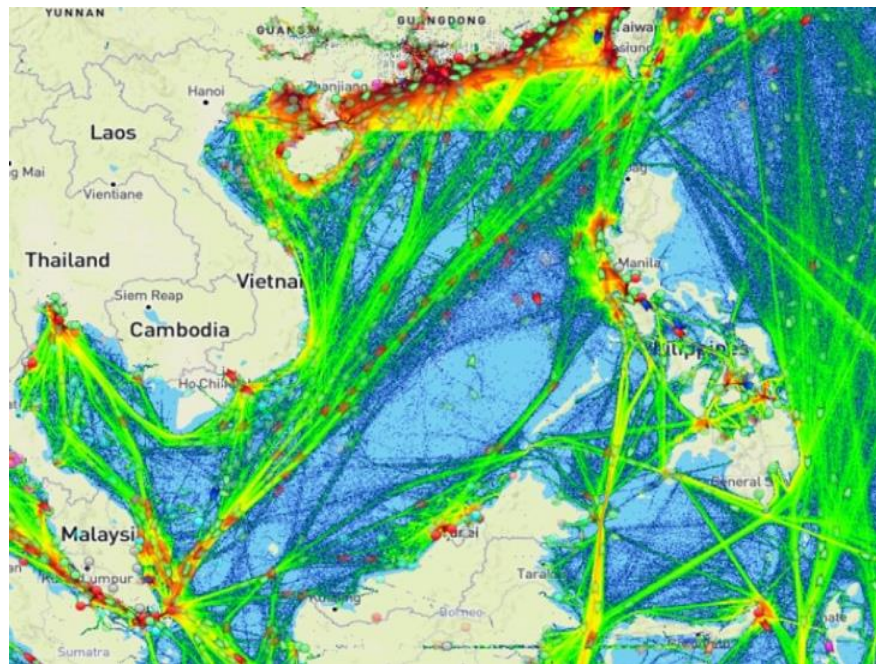


Figure 2. Shipping-density map in the South China Sea (Source: Laurenceson, 2017)

Thus, the high density of commercial and non-commercial vessels operating in the South China Sea further underscores the importance of freedom of navigation in the sea.

2.3. Necessity of maintaining freedom of navigation in the South China Sea

It can be considered that trade activities between the states and other maritime operations in the South China Sea depend on the maintenance of the right of freedom of navigation in this sea, it means that the right of freedom of navigation in the South China Sea must be respected. Because if the right of freedom of navigation in the South China Sea is impeded, it seriously damages the trading and other maritime activities of the region and the world.

Obviously, the right of freedom of navigation in the South China Sea is respected or not, or is impeded by territorial disputes and it is becoming a common concern of the region as well as the international community. According to Fensom (2016), it is estimated by experts that if tankers can not go cross the South China Sea but must pass through the Lombok Strait and east of the Philippines, the cost of transportation will increase by 270 million and 600 million US dollar for Korea and Japan respectively per year. Furthermore, China is the destination for the majority of Australian cargo transported through the South China Sea. In case that these shipping routes are obstructed in the South China Sea between Australia and its other trading partners, it could lead to the reroute of some 20 billion US dollar worth of cargo annually.

Trading and maritime industries between ASEAN states, between Northeast Asia and Southeast Asia and between these two regions and other parts of the world have grown, the density of commercial vessels crossing the South China Sea increased. In addition, other activities in the South China Sea, such as exploitation of natural resources (oil, natural gas, fishing), freedom of navigation operations, technical services, public services, security, military are enhanced, the density of non-commercial vessels crossing the sea increased. On the other hand, Southeast Asia and Northeast Asia are two of the fastest growing and dynamic regions, with very high growth rates and top ranking in comparison with other parts of the world. This is one of the factors

contributing to the increase in the density of commercial vessels across the South China Sea.

Therefore, what will happen to the region and the world when the conflicts of the South China Sea continue to increase and obstruct the freedom of navigation in the sea? Clearly, freedom of navigation in the South China Sea is considered as a very important benefit, and essential for the planning and implementation of each state's policies in this sea. In the face of the challenge posed, coastal states assert that freedom of navigation in the South China Sea is vital to the economic development and international integration of their countries and should therefore be sustained.

In addition, international organizations (United Nations, EU, ASEAN, G7, G20, APEC, etc.) and many countries around the world have expressed concern and urged to maintain and respect the right and interest of freedom of navigation in the South China Sea in accordance with international law, including UNCLOS. For the United States, the interest of freedom of navigation is a vital factor in its policy in the South China Sea. In the statement dated 10th May 1995 of the U.S. Department of State, stating that "Maintaining freedom of navigation is a fundamental interest of the United States. Unhindered navigation by all ships and aircraft in the South China Sea is essential for the peace and prosperity of the entire Asia-Pacific region, including United States". In addition, in a meeting at ASEAN Regional Forum held in Hanoi – Vietnam on 23rd June 2010, Secretary of State Hillary Clinton has attracted attention of the world by declaring that "The United States has a national interest in freedom of navigation, open access to Asia's maritime commons and respect for international law in the South China Sea".

The above situation shows that securing the freedom of navigation, maintaining peace and promoting cooperation for development in the South China Sea are becoming a common concern of the region and the international community. It is impossible to imagine how maritime and international commerce would work as shipping of goods and other ship operations through the South China Sea are stalled due to unresolved territorial disputes among the relevant states. If this case occurred, it would be

detrimental to the economic development of many states, especially those with strong maritime and trade industries. Obviously, freedom of navigation in the South China Sea is really the right and the common interest of all states, whether coastal or land-locked and this is extremely important for the growing trend of maritime and commercial activities in the region and the world.

Thus, as well as in the future, the normal maintenance of the right of freedom of navigation in the South China Sea under the UNCLOS is a very necessary issue, which each member state is obliged to implement, to ensure peace, stability and prosperity of the region and the world.

2.4. Legal regime of the freedom of navigation in the South China Sea

2.4.1 Freedom of navigation under international law of the sea

UNCLOS governs the rights, interests and obligations of all states for the maritime zones belonged to jurisdiction of each State, as well as for international sea areas which are beyond the national jurisdiction. This means that UNCLOS regulates the world's sea and ocean-based legal systems, particularly those on the equitable and effective use of the natural resources that oceans and seas bring to the humanity, to serve the legitimate interests of every state and for the peace, security and prosperity of all states in the world. This is particularly significant for the South China Sea as territorial disputes are increasing and the right of freedom of navigation continues to be threatened.

Freedom of navigation is considered as one of the oldest and most recognized principles in the governing ocean legal regime. It was established in the early 19th century (Tanaka, 2015) and then was codified in the 1958 Geneva Convention on the High Seas. As a result, every state has equal right to apply the freedom to use the sea for navigation in the high seas and EEZs. The right of freedom of navigation is the international legal regime of a state binding its obligation to exercise such rights and interests in the seas of the world in accordance with the relevant regulations of UNCLOS. Article 87 of UNCLOS on the freedom of the high seas provides for the legal regime of freedom of navigation as follows:

“1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by rules of international law. It comprises, *inter alia*, both for coastal and land-locked States:

- (a) Freedom of navigation;
- (b) Freedom of overflight;
- (c) Freedom to lay submarine cables and pipelines, subject to Part VI;
- (d) Freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;
- (e) Freedom of fishing, subject to the conditions laid down in Sections 2;
- (f) Freedom of scientific research, subject to Parts VI and XIII.

2. These freedom shall be exercised by States with due regard to the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.”

In addition to Article 87 as mentioned above, the right of freedom of navigation for ships of a state is also applicable in the EEZ of another State under Article 86:

“The provisions of this Part apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State. This article does not entail any abridgement of the freedoms enjoyed by all States in the exclusive economic zone in accordance with article 58.”

Furthermore, Article 58 (1) also provides:

“In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.”

In addition to the high seas and EEZs, freedom of navigation regime is also applicable in the straits used for international navigation under Article 36:

“This Part does not apply to a strait used for international navigation if there exists through the strait a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics; in such routes, the other relevant Parts of this Convention, including the provisions regarding the freedoms of navigation and overflight, apply.”

Thus, the above provisions of UNCLOS assert that the freedom of navigation is applicable on the high seas, in EEZs and straits used for international navigation. In other words, ships of all states are entitled to the right of freedom of navigation on the high seas, in EEZs and straits used for international navigation, without any interference, interruption or threat. This is particularly significant for the South China Sea when approximately two thirds of water surface area of this sea are the high seas and EEZs, including strait used for international navigation (Strait of Taiwan).

On the other hand, in order to exercise the right of freedom of navigation in the South China Sea, flag states must ensure that their ships meet all maritime safety and security and prevention of environmental pollution in accordance with the relevant provisions of UNCLOS, such as nationality of ships (Article 91), status of ships (Article 92), duties of flag State (Article 94), immunity of warships on the high seas (Article 95), immunity of ships used only on government non-commercial service (Article 96), penal jurisdiction in matters of collision or any other incident of navigation (Article 97), duty to render assistance (Article 98), prohibition of the transport of slaves (Article 99), duty to cooperate in the repression of piracy (Article 100), right of visit (Article 110), right of hot pursuit (Article 111) and other relevant articles of the Convention.

2.4.2. The right of freedom of navigation with other rights of navigation

The legal regime of freedom of navigation is related to the right of navigation on the high seas as defined in Article 90 “Every States, whether coastal or land-locked, has

the right to sail ships flying its flag on the high seas”, and other rights of navigation under UNCLOS, including:

- Right of innocent passage in the internal waters (Article 8 (2)), in the territorial seas (Article 17), in the archipelagic waters (Article 52) and in the straits used for international navigation (Article 45);
- Right of transit passage in the straits used for international navigation (Article 37 and Article 38) and this right are especially meaningful to the Strait of Singapore because all ships enjoy uninterrupted transit rights in the Strait. However, right of transit passage through straits must comply with Part III of UNCLOS on the freedom of navigation solely for the sustained and rapid crossing of the strait between a part of the sea or an EEZ and another part of the sea or an EEZ. This transit must be continuous and rapid and shall not prohibit cross-strait travel to the territory of a littoral state, to leave or re-enter that territory in accordance with the provisions of this State.
- Right of access to and from the sea and freedom of transit (Article 125) means that land-locked states have these rights in accordance with UNCLOS, including the right of access of the high seas.

Thus, although there are differences in nature, but between the right of freedom of navigation and the other rights of navigation mentioned above are related to each other. The States shall implement and consistently comply with the provisions of UNCLOS and other relevant international laws, including IMO’s Conventions and this is particularly significant for littoral states of the South China Sea.

2.4.3. Littoral states of the South China Sea with UNCLOS

The validity of UNCLOS is promoted, mainly depending on the effectiveness of the implementation and enforcement of the Parties. This means that the legal regime of the freedom of navigation is guaranteed and respected only when international law, in particular UNCLOS, is implemented, enforced and fully and strictly adhered to by the Parties. In other words, these are not only the rights and interests but also the obligations of the Parties to maintain the legal regime of the freedom of navigation under the Convention.

According to the United Nations (2017), the littoral states of the South China Sea are the Parties of UNCLOS and this is shown in Appendix A. Clearly, these states have affirmed their respect for international law on the sea, including UNCLOS. However, the validity of UNCLOS does not only depend on the respect of the Parties but also requires each member state to perform its obligations in implementation and enforcement of the Convention.

The fact is that, due to the lack of proper adherence or the application of the provisions of the Convention at their own will, it often leads to tension, especially tension in territorial disputes among states, including littoral states of the South China Sea. Obviously, if UNCLOS regulations are implemented and complied with by these states, these disputes will be controlled and the right of freedom of navigation in the South China Sea will not be impeded or threatened.

2.4.4. IMO's Conventions related to freedom of navigation's regime

Littoral states of the South China Sea are members of IMO's Conventions, especially conventions on the maritime safety, maritime security and prevention of environmental pollution.

The said IMO's Conventions relate to the conditions required for all ships when performing the right of freedom of navigation in accordance with the relevant provisions of UNCLOS. In other words, commercial and non-commercial ships of all states, including the littoral states of the South China Sea, have the right of freedom of navigation but satisfy the conditions of maritime safety and security, and prevention of environmental pollution under UNCLOS and other relevant international laws, particularly related IMO's Conventions.

In fact, prohibiting, hindering or threatening the safety of navigation of a State's ship to other's ships while exercising the right of freedom of navigation in the South China Sea violates UNCLOS and related IMO's Conventions, including the Convention on the International Regulations for Preventing Collisions at Sea, 1972 (COLREGs) and Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988 (SUA). This situation not only causes damage to ships and crews but

also interrupts the right of freedom of navigation in the South China Sea and threatens the safety of navigation. Therefore, the relevant parties in the South China Sea disputes need to restrain and implement effective solutions to effectively prevent such actions.

2.4.5. National laws related to freedom of navigation's regime

The national laws of the littoral states of the South China Sea concerning legal regime of freedom of navigation including laws, rules and regulations on maritime regime of each state and the conditions required for its ships when exercising the right of freedom of navigation in this sea. Within the limits of this research, it only mentions the main laws of coastal states in the South China Sea related with legal regime of freedom of navigation is shown in Appendix B.

For the legal regime of freedom of navigation, Article 16 (2) of the Law of Vietnamese Sea, 2012 provides:

“The state respects to the freedom on aviation and maritime; right to put underground cables, pipes and operations using sea legally of other countries in the exclusive economic zones of Vietnam under this law and International treaties of which the Socialist Republic of Vietnam is a member, being not prejudicial to right of sovereignty, national jurisdiction and national benefits at sea of Vietnam.”

Thus, by reviewing the national laws of the littoral states of the South China Sea related with legal regime of freedom of navigation, the following characteristics are observed as below:

First, the national laws concerning the sea regime of the littoral states of the South China Sea specify the sovereignty, sovereign rights and jurisdiction over internal waters, territorial seas, contiguous zones, EEZs and continental shelf in accordance with the relevant provisions of UNCLOS. This is an important legal basis for determining the scope of the maritime zones (high seas, EEZs) in the South China Sea to apply legal regime of freedom of navigation under UNCLOS.

Second, the national laws concerning maritime, shipping, fishing and other activities at sea of the littoral states of the South China Sea specify the maritime safety and

security and prevention of environmental pollution under UNCLOS and IMO's Conventions. Especially, there are the regulations concerning registration, survey and certification for ships and training, certification and watchkeeping for seafarers and other mandatory requirements for ships, seafarers, as well as shipping companies.

Finally, the maritime zones under the sovereignty, sovereign rights and jurisdiction of the littoral states of the South China Sea have been declared by these states (including China) in accordance with the provisions of UNCLOS. However, China resolved not to give up the "historic rights" with the "nine-dash line", which accounted for nearly 80 percent of this sea and invaded the EEZs of other states, although in 2016, the Award of the PCA Tribunal on the "South China Sea Arbitration" issued that there was no legal basis for this claim. This means that if China does not renounce the claim, the disputes between the littoral states in the South China Sea will continue to increase and the right of freedom of navigation in disputed sea areas within the South China Sea will continue to be affected.

2.4.6. Regional agreements in the South China Sea

The littoral states of the South China Sea have signed multilateral agreements relating to freedom of navigation's regime in the region, which is shown in Appendix C.

These multilateral agreements affirm the interest of the littoral states in maintaining the freedom of navigation and ensuring maritime safety and security and prevention of environmental pollution from shipping, as well as restraint to avoid increased conflicts in territorial disputes in the South China Sea. This is reflected in the Article 3 and Article 4 of the DOC as follows:

- "3. The Parties reaffirm their respect for and commitment to the freedom of navigation in and overflight above the South China Sea as provided for by the universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea.
4. The Parties concerned undertake to resolve their 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 1982 UN Convention on the Law of the Sea.”

However, the implementation of the principles on conduct among parties in the South China Sea under the DOC has not yet gained the desired results for the region. The reality is that the tension in the territorial dispute has not declined, but continued to increase and the freedom of navigation in disputed sea areas within the South China Sea continues to be severely affected.

In addition to the above-mentioned multilateral agreements, the littoral states have concluded bilateral agreements relating to freedom of navigation’s regime in the South China Sea region, as shown in appendix C. Agreements are the legal bases not only to assert sovereignty, sovereign rights and jurisdiction over adjacent seas, but also to determine the extent of the sea zones (the high seas, EEZs) in the South China Sea are subject to the right of freedom of navigation in accordance with the relevant provisions of UNCLOS.

Thus, the right of freedom of navigation affirms the benefits, but has a binding obligation on every state, and this is particularly significant for the South China Sea. Because, the right of freedom of navigation in this sea is being affected by territorial disputes and this is the problem to be detailed in the following chapter three of this research.

Chapter 3: Ensure freedom of navigation in the South China Sea

3.1. Disputed sea areas in the South China Sea

3.1.1. Overview

As mentioned in chapter two of this research, although ten littoral states of the South China Sea have declared their respective territorial waters, territorial seas, contiguous zones, EEZs and continental shelves in accordance with the relevant provisions of UNCLOS, but the disputes over the maritime boundaries and maritime features in this sea are still very complex and tense.



Figure 3. Territorial claims with “nine-dash line” in the South China Sea (Source: Edgerton, 2017)

In 1947, the Chinese government at that time issued the sovereign claim of “history rights” in the South China Sea with an “eleven-dash line” map after the 2nd world war finished (Gao & Jia, 2013). Since then, the Chinese government has continued to use the claim but dropped the first two dashes and ended up as the “nine-dash line” (also known as the “U-shaped line”), to assert its sovereignty over nearly 80 percent of the South China Sea along with all maritime features (islands, rocks, low-tide elevation, etc.) within the limit of this line. In 2009, the Chinese government submitted to the United Nations a record of its sovereignty over the South China Sea by claiming “historic rights” with the “nine-dash line” (UN, 2017). Thus, the above claim of China to the South China Sea has penetrated into the EEZs according to UNCLOS of other littoral states, including archipelagos and other maritime features in this sea, such as the Paracel Islands, the Spratly Islands, the Scarborough Shoal, which these states also have claimed to belong to its sovereignty. Clearly, in the maritime disputes in the South China Sea, China’s claim is not just an unjustified ambition, but it is also the main cause of longstanding disputes between the states and regional instability.

On the other hand, there are disputes between the littoral states for maritime features in the South China Sea such as islands, rocks, low-tide elevations, etc. For examples, Vietnam has always claimed that the Paracel Islands and Spratly Islands are under its sovereignty because this state has long exercised control over, maintained the presence of continuous civilian activity on the islands. Especially, this area is also the traditional fishing ground of Vietnamese fishermen. However, the archipelagos are subject to dispute between Vietnam and five states, including the Philippines, Taiwan, China, Malaysia and Indonesia. In addition, the Scarborough Shoal is claimed as part of its territory by China, Taiwan and the Philippines.

3.1.2. General status of disputed sea areas in the South China Sea

Taking these maritime disputes into consideration, this suggests that disputes in the South China Sea are increasingly complex, therefore, it is inevitable that there will be effect on the freedom of navigation in disputed sea areas within this sea.

Firstly, the South China Sea is a sea with disputed sea areas that are increasingly tense, complex and prolonged compared to disputed sea areas in other parts of the world. The reality is that the main cause of this situation is China's claim to "historic rights" with the "nine-dash line". Although the name of a sea has no legal meaning for asserting a state's sovereignty, with mentioned above claim, China declares that the South China Sea belongs to the historical sovereignty and this increases the reaction of other littoral states.

Secondly, the large extent of the sea area in China's claim to the "nine-dash line" covers high seas and EEZs in the South China Sea, which the ships of all states have the freedom to navigate and not be blocked or obstructed. This means that the ships of all states shall be entitled to the right of navigation within the boundaries of these waters under Articles 58, 86, 87 and 90 of UNCLOS, without being barred or hindered by other states. Because, according to UNCLOS, these areas are within the scope of the high seas and EEZs. Moreover, as explained in the judgment of the PCA Tribunal on the "South China Sea Arbitration" in 2016, maritime features in the Spratly Islands are not entitled to generate EEZs and continental shelf. Thus, the prohibition and impediment of a state to ships of another state have occurred in the sea zones of the disputed sea areas is a violation of the related regulations of UNCLOS (except for territorial seas within 12 nautical miles that these features are entitled under UNCLOS). Obviously, territorial disputes in the South China Sea are complex and will inevitably lead to tension between disputing parties, particularly those involving the use of force or the threat of use of force. This will not only continue to exert a great influence on the stability and development of the region and the world in general, but also on maritime and commercial activities, as well as the right of freedom of navigation in disputed sea areas in the South China Sea.

Thirdly, in the South China Sea, the disputed sea areas related to overlapping maritime disputes have formed "Joint Development Authorities" between parties to develop and distribute equity interests equally but have not resolved the sovereignty issues with the overlapping areas. This has brought practical results, such as the joint development in 1999 between Vietnam with Thailand and Malaysia in the Gulf of Thailand (Nguyen,

1999). In addition, although the dispute between Vietnam and China over the Gulf of Tonkin has been going on for a long time, but with good will and development cooperation, in 25th December 2000, both countries signed agreement on boundary delimitation and fishery cooperation in this gulf. Clearly, these practical experiences have implications for resolving disputes and it confirms their sincere cooperation for stability and co-development, as well as for ensuring freedom of navigation in these disputed sea areas. Therefore, the right of freedom of navigation in these areas is guaranteed and unobstructed.

Last but not least, the member states of ASEAN in general and China in particular have wanted for disputed sea areas in the South China Sea not to become conflicting areas, affecting the right of the freedom of navigation, but in 2016 China declared not to hesitate for use of force in disputed sea areas. This threat of using force increases the concern of the ASEAN and the international community. Obviously, as long as disputes in the South China Sea are not resolved or there is no restraint of related parties, then the right of freedom of navigation in these disputed sea areas continues to be affected.

3.2. The influence of the territorial disputes for ensure freedom of navigation

3.2.1. Overview

As mentioned in chapter two, freedom of navigation in the South China Sea is of importance to maritime, trade and exploration and exploitation activities of marine resources (oil, natural gas, fishing, etc.), as well as other activities related to the management and use of this sea. This means, the right and interest of freedom of navigation in the South China Sea are important to all countries. Therefore, their interest in the freedom of navigation in the South China Sea have been affirmed and called for maintaining the freedom of navigation in this sea. However, as the status of maritime disputes becomes increasingly complex, the issue of ensuring freedom of navigation in the waters is becoming a common concern of the region and the world.

Clearly, the influence of the territorial disputes for freedom of navigation in the disputed sea areas within the South China Sea is a matter that has been practically

recognized and will continue to occur if this situation is not addressed by the relevant parties and prevented. According to the research of Center for Strategic and International Studies, two-thirds of 45 incidents occurring in the South China Sea from 2010 were caused by China's ships (Torode, 2016). Obviously, territorial disputes in the South China Sea have been interfering with the right of freedom of navigation, particularly those that have caused major damages to ships and crew, for examples:

- In 2011, Chinese ships impeded the operation and severed cables of Vietnamese seismic survey ship "Binh Minh 02" while operating in Vietnam's EEZ (CSIS, 2017).
- In 2012, China law enforcement ships have unlawful actions at Scarborough Shoal including obstructing ships, prohibiting fishing, creating high threat to the Philippines personnel and ships in the disputed waters. The case has been ruled by the PCA Tribunal in July 2016, and this is the jurisprudence related to dispute settlement which will be analyzed in the section 3.3 of this chapter.
- In 2014, an oil platform "Haiyang Shiyu 981" owned and operated by the China National Offshore Oil Corporation illegally incorporated into the EEZ of Vietnam. This action by China not only violated the sovereignty and jurisdiction of Vietnam, but also hindered the right of freedom of navigation in this area. This is one of the typical incidents that occurred in the South China Sea and will be analyzed in detail in the section 3.4 of this chapter.
- In June 2017, a Vietnamese fishing boat "QNg 90909TS" was boarded and requested to reroute by Chinese coast guard vessels when fishing near the disputed Paracel Islands. Furthermore, equipment of the fishing boat was destroyed (CSIS, 2017).

On the other hand, the benefits of natural resources (oil, natural gas, fishing) in the South China Sea also causes obstruction to the right of freedom of navigation in this sea. Because the status of a state to issue a restraining order or to obstruct other ships in disputed sea areas continues to occur.

3.2.2. Overall evaluation and analysis

Firstly, the South China Sea is the sea have the disputes between the littoral states that are complex, stressful and often lead to conflicts. This is a matter of particular concern to the region and the world, because these conflicts not only affect the peace, stability and development of the region and the world in general, but also obstruct the right of freedom of navigation in disputed waters within this sea. It is impossible to imagine what would happen to the freedom of navigation when the disputes in this sea continue, especially when conflicts arise out of the use of force or the threat of using the force between disputing parties. Obviously, territorial dispute is one of the challenges that the freedom of navigation in disputed sea areas within the South China Sea are facing.

Secondly, when the territorial disputes between the littoral states in the South China Sea, especially the dispute over the claim of “historic rights” with the “nine-dash line” are not resolved, then the freedom of navigation in these disputed sea areas will continue to face the challenges posed by these conflicts. This means, if the activities such as the prohibition, harassment, ramming, threat, deterrence and other dangerous behaviors of a state’s vessels to commercial and non-commercial vessels, including those of other states when operating legally in the South China Sea, the freedom of navigation in disputed sea areas within the sea will continue not to be prevented. Obviously, the right of freedom of navigation in the South China Sea is not really guaranteed and the interest of freedom of navigation of States in these disputed sea areas is seriously affected. The international community is very concerned about this situation and calls on all parties concerned to respect the right and interest of freedom of navigation of the states in these disputed sea areas within the South China Sea in accordance with relevant international law, especially UNCLOS.

Thirdly, the right and interest of freedom of navigation in these disputed sea areas within the South China Sea are a special focus not only of the littoral states but also of the countries outside the region, including developed countries such as the United States, Russia, India, Japan, Korea, as well as other countries in Europe. Because, the right and interests of freedom of navigation in the South China Sea are important factors in the policies of development on trade, maritime industry and other economic sectors of these nations. In order to protect the right and interests of the freedom of

navigation of their states in disputed sea areas within the South China Sea, many states have acted in opposition to illegal activities, such as obstructing the right of freedom of navigation or causing harms to the safety of navigation, maritime security and the prevention of environmental pollution in this sea. Several countries are very interested, and have taken practical steps to maintain freedom of navigation in the South China Sea. This is reflected in the fact that these countries themselves or in collaboration with other countries carry out patrols to ensure freedom of navigation in this sea. In particular, Freedom of Navigation Operation Program (FONOP) has been conducted by the U.S Navy to challenge excessive maritime claims by littoral states in the South China Sea (Torbati et al., 2017).

3.3. The South China Sea Arbitration (The Republic of the Philippines v. the People's Republic of China)

3.3.1. Overview

In the face of the unjustified claim of China in the South China Sea as mentioned in chapter two of this research, especially after China took control of the Scarborough Shoal in 2012, in January 2013, the Philippines filed a lawsuit against China at the PCA Tribunal. The Philippines submitted the case and although China declared it did not accept and refuse to participate in the lawsuit, but the PCA Tribunal, established under Annex VII of UNCLOS, has adjudicated in accordance with Conventions. After more than three years of conducting the trial process, in 12th July 2016, the PCA Tribunal officially issued its decision on the case.

According to the award by the PCA Tribunal, in the 15 issues submitted by the Philippines, there is the ruling on the following key issues:

- Award for “historic rights” claim with the “nine-dash line” of China:

The PCA Tribunal denied the “nine-dash line” and claimed that China had no legal basis in the “historic rights”. The award is very significant because the claim on the “nine-dash line” accounted for almost 80 percent of the South China Sea along with all maritime features within the limit of this line, including the Paracel Islands, Spratly Islands, Scarborough Shoal, etc. On the other hand, the maritime zones within the limit

of the “nine-dash line” are largely within the scope of the EEZs of the littoral states and the high seas within the South China Sea under UNCLOS. This means, in addition to the territorial sea that the maritime features mentioned above may be entitled to generate under UNCLOS, all remaining sea area within the “nine-dash line” are the right of freedom of navigation for ships of all states, whether coastal or land-locked.

Historically, the claim on the “historic rights” with the “nine-dash line” has caused disagreement and opposition from the states in the region as well as from outside the region having the same rights and benefits in this sea under UNCLOS. Moreover, the claim mentioned above for resources within the “nine-dash line” in the South China sea is considered obsolete and the concept of “historic rights” has been removed when UNCLOS was adopted and in effect.

- Award on the status of maritime features within the South China Sea:

The purpose of the Philippines’s lawsuit was to request the PCA Tribunal to determine the legal framework for certain maritime features, whether they are islands or rocks in disputed waters within the South China Sea, in order to rule on the extent of the maritime zones which these features are entitled under UNCLOS. The PCA Tribunal has ruled that no maritime features in the Spratly Islands has the ability to create extensive sea areas, meaning that all maritime features in the archipelago are only entitled to territorial sea under UNCLOS. It is considered to prevent large maritime features within the South China Sea from generating vast maritime zones and this may violate the maritime boundaries of other littoral states. Thus, in practice, the award has helped prevent China from expanding its jurisdiction by establishing EEZ and continental shelf from its own maritime features within the South China Sea. And also, the award also rejected China’s intention to use control of these maritime features to try to claim an absurd “nine-dash line” to expand the waters it could claim.

- Illegal activities of China in the South China Sea:

The PCA Tribunal ruled that some of China’s actions in the South China Sea are contrary to international law, as these actions took place in the EEZ of the Philippines that violate the sovereign rights and jurisdiction of the Philippines. The award also

affirms that China's intentional and risky actions against the Philippines's ships are contrary to COLREGs 1972 and Article 94 of UNCLOS.

3.3.2. Legal meaning of the Award of the PCA Tribunal

Firstly, the PCA Tribunal's award is of great historic significance, because this is the first time an international court has denied the unreasonable evidence that China has relied on for the first time its arguments and wrong actions in the South China Sea. The award has affirmed the absurdity of the "nine-dash line" claim and completely rejected it and also, asserting that China's conduct in the South China Sea is against the international law.

Secondly, the award has important legal implications not only for the Philippines but also for other littoral states in this sea. Like the Philippines, these states are severely affected by China's unjustified claim, as the "nine-dash line" penetrated the EEZs and continental shelf of these states. In other words, the award has significant legal implications for all issues related to the South China Sea disputes and this is a lesson learned that other coastal states can apply to practice of their states when resolving disputes. This is particularly significant for Vietnam, as apart from some maritime features of the Paracel islands that China occupied, and EEZs and continental shelf under UNCLOS being invaded by "nine-dash line".

Thirdly, it is of the utmost importance for the first time in determining the legal status of maritime features, in other words for the first time that mankind has a complete set of definitions of islands and rocks, as well as legal regimes for these features.

Fourthly, the award is important for the enforcement and adherence of UNCLOS, the use of dispute resolution mechanisms, the enforcement of judicial decisions and the building of trust between the littoral states of the South China Sea.

Lastly, it is also important for ensuring the right of freedom of navigation in disputed sea areas within the South China Sea, because the territorial disputes are dealt with in accordance with international law, including UNCLOS and controlled by disputing parties, the right of freedom of navigation in this sea shall be upheld without the prohibition or restriction.

3.3.3. Enforcement for the award of PCA Tribunal

The PCA Tribunal's award is final, and it imposes legal responsibilities on the relevant parties, including the parties to UNCLOS. This award was supported by many countries and international organizations in the region as well as the world, we strongly sympathize with and urge the stakeholders, especially China and the Philippines, to respect and adhere to, in order to maintain the stability and development of the region, and to contribute to ensure the right of freedom of navigation in disputed sea areas within the South China Sea.

However, China has refused the award and will certainly not enforce its responsibility for the award. Regional and international researchers say that although there have been less stressful moves after the PCA Tribunal released the award, China still has a chance to continue to exert its influence on freedom of navigation by its illegal actions in the South China Sea. This is more worrisome for the region as well as the world as a whole, because the right of freedom of navigation is hard to avoid from the challenges posed by territorial disputes in this sea.

Therefore, respect and adherence to the PCA Tribunal's award are a legal responsibility for disputing parties in the South China Sea, particularly China. This is very important not only for the maintenance of peace, stability and development in the region, but also for ensuring the right of freedom of navigation in disputed sea areas within the South China Sea.

3.4. The case of China's oil platform "Haiyang Shiyou 981" in 2014

3.4.1. Overview

On 1st May 2014, the platform "Haiyang Shiyou 981" illegally incorporated into the EEZ of Vietnam, which is 119 nautical miles away from Vietnam's coast (Vietnam Coast Guard, 2014).



Figure 4. Position of Platform "Haiyang Shiyu 981" in Vietnam's EEZ

(Source: Vietnam Coast Guard, 2014)

This incident was very tense with a very dangerous level, shocking the opinion of the region and the world at that time. Immediately after the incident, Vietnam vehemently protested and resolutely asked China to remove from the area and not to interfere with ships of other countries operating in this sea area within Vietnam's EEZ. Vietnam's response not only aims to safeguard its sovereign rights and jurisdiction, but also respects the right of freedom of navigation in Vietnam's EEZ under UNCLOS.



Figure 5. China's ships protect oil platform in Vietnam's EEZ

(Source: Vietnam Coast Guard, 2014)

According to the Ministry of Foreign Affairs of Vietnam (2014), in order to protect this oil platform, China operated approximately 120 ships of all kinds, including navy

and coast guard ships and aircraft and on. These Chinese vessels are responsible for chasing and blocking ships of other states entering the forbidden zone imposed by China with radius ranging up to twelve nautical miles from the oil platform.



Figure 6. Chinese ship attacked Vietnamese ship

(Source: Vietnam Coast Guard, 2014)

In addition to obstruct, these ships acted dangerously to the safety of navigation of other ships such as direct collision, ramming, damaging and other hazardous behaviors. As a consequence, several Vietnamese ships were severely damaged including 1 fishing boat sank, 17 Vietnamese crew members were injured (Ministry of Foreign Affairs of Vietnam, 2014). Although the platform was expected to operate until the end of August 2014, but in response to the drastic reaction of Vietnam and the pressure from the response of regional and international public opinion, on 15th July 2014, it was removed.

3.4.2. Comment on the case study of oil platform “Haiyang Shiyu 981”

The cause of the oil platform activity in the position of Vietnam’s EEZ is because China claims this sea area is within the “nine-dash line”. As long as China has not relinquished its claim rejected by the PCA Tribunal’s award, territorial disputes between China and related states will continue to occur in any sea areas within the “nine-dash line”, and the right of freedom of navigation in disputed sea areas will continue to be affected.

The oil platform operated at the location within Vietnam's EEZ, which is an act of infringement of Vietnam's sovereign right and jurisdiction, as well as obstructing the right of freedom of navigation in this sea zone in the South China Sea. This action of China is in violation of relevant international law, especially UNCLOS and COLREGs 1972.

On the other hand, this case was very unexpected and ended quickly, but it has had serious consequences such as: the impact on the stability and development of the region; raising regional and international community's concern for ensuring the right of freedom of navigation in disputed sea areas within the South China Sea; decreasing in trust and cooperation between littoral states; damage to ships as well as crews, and related international law is violated and not respected.

Although the oil platform stopped its activities and left Vietnam's EEZ by the reaction of Vietnam as well as the response of the regional and international community in the face of China's misconduct, what will happen when China continues to take similar actions in other areas of Vietnam's EEZ or EEZ of other littoral states, but has been encroached by China's "nine-dash line" that it claims to be under its sovereignty.

In order to effectively and legally prevent similar cases, apart from resolving disputes through peaceful means, political and diplomatic measures, the relevant parties should take legal action. In this case, Vietnam has not yet applied legal measures such as initiating a lawsuit against China at international court for acts of infringing upon its sovereignty, as well as claiming damages for ships and crew as mentioned above.

The application of legal remedies can make use of the experience of the case submitted by the Philippines and has been judged by the PCA Tribunal mentioned in section 3.3 of this chapter, or other similar case studies such as the case of the Netherlands filed a lawsuit against Russia concerning the arrest of the ship "Arctic Sunrise" in September 2013. The ship "Arctic Sunrise" is registered with the Dutch flag and used by activists of the Greenpeace organization to carry out "peaceful demonstration" against oil exploration activities, damaging the environment of North Pole. Russia seized the ship where it is located in the EEZ of Russia, initially accused of piracy, later changed to

“hooliganism”. After two months of arrest, 30 people on board the ship were released and nine months later, the ship “Arctic Sunrise” was returned to the Netherlands. In November 2013, provisional measures order was issued by ITLOS; however, Russia failed to comply and pay the compensation. In addition, on 18th July 2017 the award by PCA Tribunal has ordered the compensation from Russia to the Netherlands due to damage caused by violations of UNCLOS related regulations. Although Russia’s action with the ship “Arctic Sunrise” did not take place in a disputed sea area, it deals with the right of freedom of navigation and is similar to prohibiting or hindering the operation of ships occurring in the sea zone of the Scarborough Shoal (the case between the Philippines and China) and the oil platform operated in Vietnam’s EEZ in 2014.

The above mentioned case studies are lessons learned that Vietnam and other disputing parties in the South China Sea can use when resolving disputes through legal means.

3.5. Problems for ensuring freedom of navigation in the South China Sea

The studies mentioned in the aforementioned sections of this chapter show that ensuring freedom of navigation in disputed sea areas in the South China Sea is facing the following problems:

Firstly, the territorial disputes in the South China Sea have caused serious damage to the freedom of navigation in this sea and this will continue to happen, if the disputes between the parties continue to increase; especially when China did not give up the claim on “historic rights” with the “nine-dash line”, which was denied by the award of PCA Tribunal as mentioned above. China’s renunciation of this claim is unlikely, however, because the award is not recognized or having enforcement mechanisms and insists the South China Sea is under its sovereignty. Thus, the right of freedom of navigation in disputed sea areas in the South China Sea continues to face challenges due to the unresolved disputes. Addressing this issue is entirely contingent upon respect and adherence to relevant international laws, particularly UNCLOS, and this is an obligation that the littoral states of the South China Sea must follow.

Secondly, the behavior of the littoral states in resolving territorial disputes over maritime zones and maritime features in the “nine-dash line” as well as to respect and ensure the right of freedom of navigation in disputed sea areas within the South China Sea, although it was confirmed by ASEAN and China in the DOC, but the agreement has not yielded the desired results. Since the declaration in 2002, tension and conflicts among the parties in the South China Sea continue to increase and the right of freedom of navigation in disputed sea areas continues to be obstructed. The cause for this situation is that the DOC lacks legal mechanisms that impose responsibilities on every littoral states before the region and the international community. In addition to the obligation of these states to respect and abide by relevant international laws, particularly UNCLOS, for nearly 15 years since the DOC was proclaimed to date, this issue has been advanced by ASEAN and China. On the other hand, negotiations for the Code of Conduct have not yet received results due to disagreement over the legal mechanisms and political will of the parties. Clearly, as long as the member states of ASEAN and China have not yet adopted the Code of Conduct in the South China Sea to impose responsibility on the littoral states, the disputes in South China Sea will continue to occur, and the right of the freedom of navigation in disputed sea areas will continue to be impeded.

Thirdly, the impact of disputes on the right of freedom of navigation in the South China Sea is a matter of regional and international concern and urges the states to cooperate to maintain freedom of navigation in this sea, especially in the context of increasing tension. Because, the right and interest of freedom of navigation in the South China Sea are not only of the littoral states but of all countries outside the region. International organizations and many other states outside the region are calling for stakeholders jointly to ensure freedom of navigation in this sea. For examples, United States has been patrolling to guarantee the freedom of navigation in the South China Sea. Therefore, the establishment of a cooperative mechanisms between ASEAN and China on freedom of navigation in the South China Sea is essential not only for the present but also for the future. This will contribute to the

peace, stability and development of the region and the world, and the maintenance of freedom of navigation in the South China Sea.

Fourthly, in addition to the Philippines case against China in 2013, other territorial disputes in the South China Sea between the littoral states have not been resolved by legal measures. This means that disputes should be brought before the international court in accordance with UNCLOS, if disputing parties can not resolve by themselves. This is a limitation to the situation of long-running, stressful disputes and often leads to conflict between disputing parties and the effect of ensuring freedom of navigation in disputed sea areas in the South China Sea. The South China Sea Arbitration and the Arctic Sunrise case (Kingdom of the Netherlands v. Russian Federation) are lessons that Vietnam or other states may apply to the practice of settling disputes relating to their own country. In both cases, the awards were issued by the tribunal although one party of each case did not attend the hearings. Obviously, if disputes in the South China Sea are dealt with in accordance with relevant international law, especially UNCLOS, this is an important factor contributing to ensure freedom of navigation in disputed sea areas in the South China Sea. As such, these issues are the basis for proposing solutions to ensure freedom of navigation in disputed sea areas within the South China Sea and these solutions will be addressed in chapter four hereafter.

Chapter 4: Solutions for ensuring freedom of navigation in the South China Sea

4.1. Necessity of the solutions for ensuring freedom of navigation in disputed sea areas in the South China Sea

From the contents mentioned in the chapter two and chapter three of this research, the right and interest of freedom of navigation in disputed sea areas within the South China Sea are being affected by territorial disputes in this sea. To prevent this influence requires the littoral states, including states that are disputing parties need to by themselves, or cooperate together to implement solutions in accordance with international law, including UNCLOS. Implementing these solutions is essential for the current and future context of the South China Sea to meet the following requirements.

Firstly, to respect and comply with the freedom of navigation in the South China Sea. The research content mentioned in chapter of this dissertation indicate that freedom of navigation in the EEZs and high seas are the right and interest of all states, whether coastal or land-locked. Therefore, the right and interest of freedom of navigation in the South China Sea, in particular in disputed sea areas within this sea, must be respected and complied with by States in accordance with international law, including UNCLOS. This means that the right and interest of freedom of navigation in the South China Sea in general and in disputed sea areas in particular will need to be guaranteed. Thus, the respect and compliance of the littoral states to international law relating to assurance of freedom of navigation in the disputed sea areas within the South China Sea, including UNCLOS and IMO's Conventions are the respect and compliance with the right and interest of freedom of navigation in this sea.

Secondly, to meet the needs of maritime activities in the South China Sea. It has been shown in the dissertation that the South China Sea plays a very important role in

maritime activities of the region and the world, especially seaborne trade and exploitation of marine resources, as well as other activities relating to the management and the use of maritime zones and features in this sea. However, the demand for these activities is only met when freedom of navigation in the South China Sea is secured. In other words, the needs of maritime activities in the South China Sea will be met when they are not stalled or threatened by territorial disputes. The said issue is a common concern of the region and the world, because the tension in territorial disputes in the South China Sea continues to grow at an increasingly complex level and influence the right of freedom of navigation in this sea. Therefore, the implementation of the solutions for ensuring freedom of navigation to meet the needs of maritime activities in the South China Sea is becoming an urgent requirement.

Thirdly, to ensure maritime safety, security and prevention of marine pollution. Ensuring freedom of navigation in disputed sea areas within the South China Sea is significant to ensure maritime safety and security, as well as the prevention of environmental pollution in this sea under international law. Because the right and interest of freedom of navigation in the South China Sea are maintained, maritime safety and security, as well as the prevention of environmental pollution in this sea, will be guaranteed. The implementation of freedom of navigation solutions in the South China Sea therefore contributes to the improvement of three important issues as mentioned above of maritime activities.

Fourthly, to meet the needs of economic development of the region and the world. The South China Sea is vital for the economic development of the region and the world. Because of the sea routes, the region has a fast-paced and dynamic economy, as well as a “hub” and a “bridge” between the region and the economy of other parts of the world. However, this role is only brought into play when disputes are controlled and there is no tension, thus affecting the right of freedom of navigation in this sea. Therefore, the implementation of measures to ensure freedom of navigation in the South China Sea is a factor contributing to the economic development of the region and the world.

Last but not least, to maintain peace and stability in the region. It can be said that peace and stability is the common desire of all states and when this desire is met, it benefits not only a separate region but also the common interests of the whole world. This is particularly significant for the South China Sea region as tension continues to worsen as disputes are not resolved, not in favor of freedom of navigation in this sea. Therefore, the implementation of measures aimed at limiting and proceeding to eliminate this situation is an urgent requirement for littoral states, especially disputing parties.

4.2. The solutions for ensuring freedom of navigation

4.2.1. Solution 1: Set up cooperative mechanisms on ensuring freedom of navigation

4.2.1.1. Purpose

Setting up cooperative mechanisms to ensure freedom of navigation in the South China Sea is an essential solution for the present and future context, which ASEAN and China should address for the following purposes:

- Develop and implement the Code of Conduct in the South China Sea:

The purpose of setting up cooperative mechanisms on ensuring freedom of navigation in the South China Sea is to establish code of conduct with high legal implications for littoral states' responsibilities in the prevention of conflicts, hindering the right of freedom of navigation in this sea, especially in disputed sea areas. This means that ASEAN and China need to promote the negotiation, signing and implementation "Code of Conduct in the South China Sea".

As discussed in chapter two of this dissertation, DOC is the agreement between ASEAN and China on the principles governing the settlement of disputes and the maintenance of the right of freedom of navigation in this sea. However, since DOC was adopted so far, the tension in the disputes has not only declined but has continued with increasingly complex development that have had a major impact on the right of freedom of navigation in this sea.

One of the reasons for the above situation is that DOC does not have legally binding mechanisms for the responsibilities of the parties involved in the conflict that hinders the right of the freedom of navigation. Therefore, the effectiveness of this declaration are limited and do not meet the general desire of the region. Thus, the promotion of establishment of code of conduct is an important issue and purpose of this solution.

- Set up co-ordinate mechanisms on ensuring freedom of navigation

The purpose of setting up a co-ordinate mechanism on the freedom of navigation in the South China Sea is to establish a coordinated mechanism between the littoral states, with the formation of a joint co-ordination center (“Coordination Center on Ensuring the Freedom of Navigation in the South China Sea”) to help ASEAN and China control and resolve incidents that obstruct the right of freedom of navigation in the South China Sea, especially in disputed sea areas within this sea.

This purpose requires ASEAN and China to negotiate, sign and soon implement the “Agreement on Co-ordinate Mechanisms between ASEAN and China on Ensuring freedom of navigation in the South China Sea”, including the establishment of the center as mentioned above. Because, until now littoral states do not have coordinate mechanisms to prevent or mitigate problems relating to freedom of navigation. Especially the coordination mechanisms for incident information processing, freedom of navigation patrol and other co-ordination mechanisms. Furthermore, this agreement is an important supporting tool for helping ASEAN and China control the implementation of code of conduct, after being approved by the littoral states.

- Prevent and proceed to eliminate freedom of navigation interference:

The right of freedom of navigation in the South China Sea has been affected by territorial disputes. The cause of this situation is due to disputing parties not complying with international law, including UNCLOS and COLREGs 1972; or lack of control in conduct that often leads to conflicts, hindering the right of freedom of navigation in the South China Sea. Clearly, binding responsibilities and enhancing cooperation mechanisms of the littoral states to prevent unpredictable and uncontrolled moves that hamper the right of freedom of navigation are imperative. Hence, restraining and

avoiding conflicts, especially conflicts relating to the use of force or the threat of using force, is important for the region as a whole and to ensure freedom of navigation in the South China Sea in particular.

- Enhance the applicability of international law on freedom of navigation

Because the disputes and the actions that obstruct the right of freedom of navigation in this sea generally do not comply with the principles of international law and international commitments of related states. Obviously, the South China Sea is an area that must be managed and used in accordance with the principles of international law, which means not to be claimed under sovereignty and national jurisdiction of a particular state. Therefore, strengthening the application of international law to ensure the right of freedom of navigation in the South China Sea, especially in disputed sea areas within this sea, is an indispensable obligation of the littoral states.

4.2.1.2. Advantages and difficulties

In fact, the influence of disputes over the freedom of navigation in the South China Sea is becoming a common concern of the region, and setting up cooperative mechanisms on the freedom of navigation in this sea are general aspirations of the littoral states. Therefore, the early adoption and implementation of the code of conduct, as well as the Agreement mentioned above are of particular interest to ASEAN and China. Thus, ten states of ASEAN and China have expressed their goodwill towards the establishment of cooperative mechanisms on the freedom of navigation in the South China Sea, in order to meet the regional aspirations and interests. This is a very favorable factor for ASEAN and China when negotiating, signing and implementing the above mentioned regional legal framework.

On the other hand, the establishment of cooperative mechanisms on the ensure freedom of navigation is entirely dependent on the consent of the littoral states for the legal regime of the code of conduct and the said agreement, in particular the legally binding rules in these instruments. This can be seen as the greatest obstacle to the process of developing and adopting the above legal instruments, because these binding legal rules are related to responsibilities and sovereign claims of every littoral state.

This is one of the reasons for the long preparing process of cooperative mechanisms on the freedom of navigation of ASEAN and China.

However, with the goodwill and common interest of the region, it is hoped that ASEAN and China will overcome obstacles to complete and soon implement the code of conduct and the agreement as mentioned above.

4.2.2. Solution 2: Dispute resolution by legal measures

4.2.2.1. Purposes

The solution to resolve disputes by legal measures in a competent court or arbitration is aimed at the following purposes:

- Limit prolonged dispute, which is detrimental to ensure freedom of navigation:

In fact, in addition to the award by the PCA Tribunal as mentioned in chapter 3 of this research, there are other disputes which have not been solved by the relevant parties. This protracted situation often leads to conflicts, which are prone to freedom of navigation in this sea. Thus, in addition to settling disputes by peaceful means on the basis of bilateral or multilateral negotiations, disputing parties may also submit lawsuits at the competent court or arbitration according to the principles of international law of the sea. In the present context of the South China Sea, the settlement of disputes by legal means is a very necessary solution, which disputing parties can apply.

- Set up fairness, equality and efficiency in dispute resolution:

The settlement of disputes by legal measures in accordance with the principles of international law, in particular Charter of the United Nations and UNCLOS, is fair, equitable and effective solution for disputing parties in the South China Sea. This means that, when fairness, equality and efficiency in the settlement of disputes are established, peace and stability in this region generally and the right of freedom of navigation in disputed sea areas within this sea in particular are guaranteed.

- Respect and compliance with international law:

Disputes in the South China Sea are resolved through legal measures expressing the will and responsibility of disputing parties in respect of international law, as well as their international commitments. Obviously, disputes in the South China Sea are resolved through legal means that are important elements, contributing to increased respect and compliance by disputing parties to international law. This is very beneficial for the stability and development of the area, as well as ensures freedom of navigation, especially in disputed sea area in the South China Sea.

4.2.2.2. Advantages and difficulties

The settlement of disputes by legal measures is a very favorable factor for disputing parties in the South China Sea when applying this solution, especially when there is lack of political will in the cooperation between disputing parties, international law should prevail and apply to solve the dispute. Moreover, the outcome of the dispute settlement by this measure, including the case of Philippines against China and the case of the Netherlands against Russia are lessons learned, disputing parties in the South China Sea can apply to the practice of each state and ask for compensation when there is damage caused by another state's vessels.

In contrast, resolving disputes by legal measures is a complex process and requires the related parties to be well prepared for the concerned issues according to the regulations of international law. This can be considered as a challenge for any dispute that disputing parties in the South China Sea should be concerned about, if there is decision to proceed to resolve the dispute in accordance with this solution.

Chapter 5: Conclusion and recommendation

5.1. Conclusion

In the content of this research, with its extremely favorable geographic location and abundant marine resources, as well as the great advantages of maritime and commercial activities, the South China Sea is considered to be important to the region in particular and the world in general. However, it is precisely because of these advantages and potentials, territorial disputes between the littoral states in this sea have become increasingly complex. This situation not only destabilizes the area but also has the effect of ensuring the right of freedom of navigation in the South China Sea, especially in disputes sea areas in this sea.

Freedom of navigation is an important principle under UNCLOS, and for every state whether coastal or land-locked, it is not only the right and interest but also the obligation of each country. This is particularly significant for the South China Sea when the right and interest of freedom of navigation is being affected by increased and unresolved disputes between parties. The right and interest of freedom of navigation in the South China Sea are guaranteed or continue to be obstructed by these conflicts, and this is a matter of great concern, which is of particular interest to the international community.

In order to limiting this concern, this research recommends two main solutions, including setting up cooperative mechanisms on freedom of navigation in the South China Sea and resolving disputes by legal measures through an international competent court or arbitration.

5.2. Recommendation

To ensure the right and interest of freedom of navigation in the South China Sea, this research proposes the following recommendations:

First, ASEAN and China promote the negotiation and early adoption of “Code on Conduct in the South China Sea” and “Agreement on Co-ordinate Mechanisms between ASEAN and China on Ensuring freedom of navigation in the South China Sea” to prevent and proceed to eliminate freedom of navigation interference in the South China Sea;

Second, the disputing parties in the South China Sea should respect and abide by international laws and related regional agreements, as well as simultaneously resolve the disputes by legal measures.

Finally, China should respect and comply with the award of the PCA Tribunal on the South China Sea Arbitration. Thus, the legal regime for the right and interest of freedom of navigation is the principle recognized by UNCLOS and all states are obliged to respect and comply with these principles. This is a particularly significant issue for the states and solution to ensure freedom of navigation in the South China Sea as discussed in this dissertation.

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Appendix A. The littoral states of the South China Sea with UNCLOS

State	UNCLOS	
	Signature	Ratification/Accession
Brunei	05/12/1984	05/11/1996
Cambodia	01/07/1983	-
China	10/12/1982	07/06/1996
Indonesia	10/12/1982	03/02/1986
Malaysia	10/12/1982	14/10/1996
Philippines	10/12/1982	08/05/1984
Singapore	10/12/1982	17/11/1984
Thailand	10/12/1982	15/05/2011
Vietnam	10/12/1982	25/07/1984

Source: DOALOS, 2017

Appendix B. The national legislation of littoral states in the South China Sea

Country	National legislation
Brunei	<ul style="list-style-type: none"> - Territorial Waters of Brunei Act, 1982 - Merchant Shipping Order, 2002
Cambodia	<ul style="list-style-type: none"> - Statement Issued by the Spokesman of the Ministry of Foreign Affairs, 1978 - Decree of the Council of the State, 1982 - An Act for the Registration of Merchant Vessels, 1994 - Regulation on the Management of Sea Navigation, 1999 - Resolution for the Registration of Merchant Vessels, 2003
China	<ul style="list-style-type: none"> - Law on the Territorial Sea and the Contiguous Zone, 1992 - Declaration on the baselines of the Territorial Sea, 1996 - Exclusive Economic Zone and Continental Shelf Act, 1998 - Maritime Code, 1992 - Law on the Maritime Traffic Safety, 1983 - Law on the Administration of the use of the Sea Areas, 2001
Indonesia	<ul style="list-style-type: none"> - Declaration concerning the Exclusive Economic Zone of Indonesia, 1980 - Act No. 5 on the Indonesian Exclusive Economic Zone, 1983 - Act No. 6 regarding Indonesian Waters, 1996 - Law No. 17 on Shipping, 2008 - Indonesian Law of the Sea, 2014
Malaysia	<ul style="list-style-type: none"> - Continental Shelf Act, 1996 as amended 1972 - Territorial Sea Act, 2012 - Exclusive Economic Zone Act, 1984 - Merchant Shipping Ordinance, 1952 and Merchant Shipping Acts
Philippines	<ul style="list-style-type: none"> - Republic Act to define the Baselines of the Territorial Sea, 1961 as amended 1968

	<ul style="list-style-type: none"> - Presidential Decree establishing an Exclusive Economic Zone, 1978 - Republic Act to define the Archipelagic Baselines - Merchant Marine Rules and Regulations, 1997
Singapore	<ul style="list-style-type: none"> - Proclamation on the Exclusive Economic Zone, 1980 - Singapore Maritime Zone, 2008 - Merchant Shipping Act (Chapter 179), 1996 - Prevention of Pollution of the Sea (Chapter 243), 1999
Thailand	<ul style="list-style-type: none"> - Proclamation Establishing the Breadth of Territorial Waters, 1996 - Royal Proclamation Establishing the Exclusive Economic Zone, 1981 - Announcement concerning straight baselines and internal waters, 1992 - Royal Proclamation Establishing the Contiguous Zone, 1995 - Thai Vessels Act, B.E. 2481 - Collision Prevention Act B.E. 2522, 1979
Vietnam	<ul style="list-style-type: none"> - Statement on the Territorial Sea, the Contiguous Zone, the Exclusive Economic Zone and the Continental Shelf, 1977 - Statement of the Territorial Sea Baseline, 1982 - Law of Vietnamese Sea, 2012 - Maritime Code, 2015

Source: DOALOS, 2017

Appendix C. Regional Instruments of the South China Sea

Parties	Name of instruments
ASEAN	Agreement for the Facilitation of Search of Ships in Distress and Rescue of Survivors of ship accidents, 1975
ASEAN and China	Agreement on the Maritime Transport, 2007
ASEAN and China	Declaration on the Conduct of Parties in the South China Sea, 2002
ASEAN and China	Guidelines for the Implementation of the DOC, 2011
ASEAN and China	Joint Statement on The Application of the Code for Unplanned Encounters at Sea in the South China Sea, 2016
China and Vietnam	Agreement on boundary delimitation in the Gulf of Tonkin between China and Vietnam, 2000
China and Vietnam	Agreement on fishery cooperation in the Gulf of Tonkin between Vietnam and China, 2000
Indonesia and Singapore	Treaty relating to the delimitation of the territorial seas of the two countries in the Strait of Singapore, 1973
Indonesia and Singapore	Treaty relating to the delimitation of the territorial seas of the two countries in the western part of the Strait of Singapore, 2009
Malaysia and Indonesia	Agreement on the delimitation of the continental shelves between the two countries, 1969
Malaysia and Thailand	Treaty relating to the delimitation of the territorial seas of the two countries, 1979
Thailand and Vietnam	Agreement between Vietnam and Thailand on the delimitation of maritime boundary in the Gulf of Thailand, 1997

Source: ASEAN & DOALOS, 2017