2017

The Arbitral Award in the Matter of the South China Sea between the Philippines and China: What are the Implications for Freedom of Navigation and the Use of Force?

Cameron Moore
University of New England, cameronm@uow.edu.au

Publication Details
The Arbitral Award in the Matter of the South China Sea between the Philippines and China What are the Implications for Freedom of Navigation and the Use of Force?

Abstract
This article considers the implications of the Award for freedom of navigation and the use of force in the South China Sea, identifying the conclusions that can be drawn from the Award and the questions that remain. The Award also indirectly raised the question of the use of force to defend navigational rights. This article therefore revisits the Corfu Channel Case for the light it may shed on the use of force and freedom of navigation in the South China Sea. This leads to questions of the danger of miscalculation and the potential importance of the Code for Unplanned Encounters at Sea (cues) in reducing the potential for miscalculation to occur. This article argues that the de-escalatory approach of cues may be the way in which States can assert competing rights without such action leading to loss of life.

Keywords
force?, navigation, south, freedom, china, sea, implications, between, award, philippines, matter, arbitral

Disciplines
Arts and Humanities | Law

Publication Details
The Arbitral Award in the Matter of the South China Sea between the Philippines and China

What are the Implications for Freedom of Navigation and the Use of Force?

Cameron Moore
University of New England, Australia

Abstract

This article considers the implications of the Award for freedom of navigation and the use of force in the South China Sea, identifying the conclusions that can be drawn from the Award and the questions that remain. The Award also indirectly raised the question of the use of force to defend navigational rights. This article therefore revisits the *Corfu Channel Case* for the light it may shed on the use of force and freedom of navigation in the South China Sea. This leads to questions of the danger of miscalculation and the potential importance of the *Code for Unplanned Encounters at Sea* (CUES) in reducing the potential for miscalculation to occur. This article argues that the de-escalatory approach of CUES may be the way in which States can assert competing rights without such action leading to loss of life.

I Introduction

Warnings about unintended incidents in the South China Sea abound. There have been near misses, and indeed loss of life, in incidents between government vessels and aircraft from China, the United States, the Philippines and Vietnam. There was a collision between a US maritime patrol aircraft and a Chinese fighter jet off Hainan Island in 2001, from which the Chinese pilot was not recovered.¹ There was also Chinese harassment of US Naval Service vessels

---

**Impeccable** and *Bowditch* in 2009. Kraska and Perdrozo discuss a series of confrontations between Chinese and Philippines vessels in 2011 and 2012 (including those discussed in this article), as well as Chinese harassment of Vietnamese vessels surveying for oil and gas in 2011. Zhiguo Gao and Bing Bing Jia argue that China is protecting rights in its EEZ in relation to incidents involving the United States. Bateman also discusses a clash at sea between Vietnam and China in 2014 over the placing of an oil rig by China in an area claimed by Vietnam. Further, there have been military clashes for occupation of islands between China and Vietnam in 1974 and 1988 with substantial loss of life. The United States has given prominence to freedom of navigation operations in the South China Sea, and there have been calls for Australia to do likewise. This leads to questions of the danger of miscalculation. This was a matter clearly in the minds of the leaders of the Association of South East Asian Nations (ASEAN) after the publication of the Award, as they made a joint statement.

---

7 see Kraska and Pedrozo, supra, n 1, at 313–314.
8 As to the US Freedom of Navigation programme generally, see Kraska and Pedrozo, supra, n 1, at 201–214.
soon after to affirm the importance of the *Code for Unplanned Encounters at Sea (CUES)* in reducing the potential for miscalculation to occur.  

This state of tension in the South China Sea begs the question of what the implications of the *Award of the Arbitral Tribunal in the Matter of the South China Sea between the Philippines and China* ¹¹ (‘the Award’) are for freedom of navigation and the use of force in the disputed area. Even though it did not directly concern navigational rights, the Award addresses claims to maritime jurisdiction around many of the features in the South China Sea. Its clarity on the status of the various features in the South China Sea as rocks which may have a territorial sea, or low tide elevations which may not ¹² has direct consequences for the regimes of navigation in the vicinity of these features. The Award was also critical of China’s actions in impeding vessels from the Philippines in the vicinity of Scarborough Shoal and Second Thomas Shoal, which it addressed in some detail as discussed below. Further, the Award raised the difficult question of navigation and overflight over disputed drying reefs in the Philippines’ Exclusive Economic Zone (EEZ), particularly in the vicinity of the artificial island built by China at Mischief Reef. ¹³ Questions therefore immediately arise as to what China could lawfully have done to deny passage to vessels navigating where they may have had no right to navigate, or for any State to protect its vessels asserting navigation rights where vessels may have a right to navigate; and also what can be done to limit the potential for this clash of rights to escalate into something more serious.

This article will therefore look at the three particular navigational incidents detailed in the Award and what it did and did not say about navigation, and the use of force to assert or deny navigational rights. It revisits the *Corfu Channel Case* ¹⁴ for the light it may shed on the use of force and freedom of navigation in the South China Sea. This article will argue that the conclusions that can be drawn from the Award for freedom of navigation and the use of force are:

---


12 Award 119–261.

13 Award 399–417.

14 *The Corfu Channel Case (Merits)*, International Court of Justice, 9 April 1949.
High speed close quarters manoeuvring to deny navigation is excessive because it is too dangerous; Claimant states should not be aggravating the dispute by threatening the use of force in disputed waters; Artificial islands on low tide elevations generate no maritime zones and therefore there can be no restriction on navigation in their vicinity; Escort of vessels for their protection is not objectionable in itself, and There are no Exclusive Economic Zones (EEZ) around the disputed features so there is no basis to interfere with navigation relying upon EEZ rights as generated from those disputed features.

This leaves a number of questions with respect to the navigational incidents in the Award:

What force can then be used to deny navigation? What force can then be used to assert navigation? Should states assert or deny navigational rights when there is a dispute over the sovereignty of the feature in question? What restrictions on navigation and overflight should there be in the vicinity of artificial islands? Does the law provide a way to de-escalate dangerous assertions of contested rights?

This article will address the navigational incidents in turn in order to analyse the conclusions that may be drawn from the Award on freedom of navigation and the use of force. It will in doing so address the questions which remain open as a result. It will then deal with separately with the issue of protecting vessels. This article will argue that international law goes some way to addressing the questions raised by the Award but it does not ensure that miscalculation will not occur. This is a matter for restraint at the political and operational level.

There is no scope within the limits of this article to explore fully important related questions of the right of warships to conduct innocent passage. It will assume for the purposes of argument that warships enjoy a right of innocent

---

passage in the territorial sea, even though China requires prior authorisation for this to occur.

II The Use of Force to Prevent Passage – The Navigational Incidents in the Award

The Award gave detailed consideration to incidents between China and the Philippines in two different locations, Scarborough Shoal and Second Thomas Shoal.

In relation to both Scarborough Shoal incidents, the Tribunal concluded,

Based on the considerations outlined above, the Tribunal finds that China has, by virtue of the conduct of Chinese law enforcement vessels in the vicinity of Scarborough Shoal, created serious risk of collision and danger to Philippine vessels and personnel. The Tribunal finds China to have violated Rules 2, 6, 7, 8, 15, and 16 of the COLREGS and, as a consequence, to be in breach of Article 94 of the [Law of the Sea] Convention.

This article will now consider these incidents in more detail to see how the Tribunal reached that conclusion before moving to consider the implications for freedom of navigation and the use of force.

1 The First Scarborough Shoal Incident

In the first incident at Scarborough Shoal, on April 28th 2012 two Philippines Coast Guard (PCG) vessels, BRP Pampanga and BRP Edsa II, were stationary in the vicinity of the Shoal for the purpose of handing over patrol duties.

---

16 See Ivan Shearer, ‘Navigation Issues in the Asia Pacific Region’ in James Crawford and Donald Rothwell (eds), The Law of the Sea in the Asian Pacific Region (Martinus Nijhoff Publishers, 1995) 199–222, at 205–207. Note that aircraft do not enjoy a right of overflight in the airspace over the territorial sea, see articles 2, 17, 19 & 87 of the Convention, and so this article will not address overflight in any detail. The issue of military aircraft in national airspace without permission is not settled but customary requirements of proportionality must apply (Caroline principles: 2 John Bassett Moore, A Digest of International Law (1906) 409–13). See Tom Ruys, ‘The Meaning of “Force” and the Boundaries of the Jus Ad Bellum: Are “Minimal” Uses of Force Excluded from UN Charter Article 2(4)?’ 108(2) American Journal of International Law 159–210, at 185.


18 Award 435.
The Award does not state whether they were in the territorial sea but the words ‘in the vicinity of’ suggests that they were. BRP Pampanga reported that, at 0900, Chinese Fisheries Law Enforcement Command (FLEC) vessel FLEC 110 approached it at a speed of 20.3 knots to a distance of 600 yards before turning away. BRP Pampanga also reported that, at 0915, FLEC 110 then approached BRP Edsa II at a speed of 20.6 knots to a distance of 200 yards before turning away. The 2 metre high wake ‘battered’ two rubber boats which were transferring Philippines personnel.

This incident raises three distinct issues:

- Preventing passage that is not innocent;
- Action against sovereign immune vessels, and
- Balancing the protection of sovereignty against the risk of escalation.

2 The Second Scarborough Shoal Incident

The second Scarborough Shoal incident involved Chinese attempts to impede the passage of a Philippines Bureau of Fisheries and Aquatic Resources vessel, MCS 3008, in the territorial sea of Scarborough Shoal, as well as to prevent it from entering the lagoon there. According to the Award, this incident occurred on May 26th 2012 when MCS 3008 approached the feature in order to resupply BRP Corregidor, which was at anchor outside the lagoon. Chinese Marine Service (CMS) vessel CMS 71 approached MCS 3008 approximately 7 nautical miles from Scarborough Shoal. It then engaged in two high speed manoeuvres attempting to cross the bow of MCS 3008 at close range. Reportedly, only dramatic evasive moves by MCS 3008 avoided collision. Chinese vessel FLEC 303 then attempted to do as CMS 71 had done, again with MCS 3008 avoiding collision only by hard manoeuvring. MCS 3008 managed to come alongside BRP Corregidor, after being pursued by FLEC 303 and CMS 71, joined by CMS 84. At this time, CMS 84 passed within 100 yards of MCS 3008 and took a stationary position 500 yards away. A fourth Chinese vessel, FLEC 301, took a stationary position 1000 yards away.

19 Award 418.
20 Ibid.
21 Ibid.
22 Award 418.
23 Award 419.
24 Ibid.
25 Ibid.
26 Award 420.
27 Ibid.
After leaving BRP Corregidor, MCS 3008 attempted to enter the lagoon. CMS 84 then pursued and tried to cross the bow of MCS 3008. The other Chinese vessels also pursued and manoeuvred to block the passage of MCS 3008. FLEC 306 and three Chinese fishing vessels then attempted to block the entrance to the lagoon. Mooring lines from the fishing vessels caused MCS 3008 to stop and go astern. As the vessel attempted then to pass astern of FLEC 306, FLEC 306 went full astern apparently in order to ram MCS 3008. According to the report of the Philippines vessel, the two vessels came within 10 metres of each other but the speed and manoeuvrability of the Philippines vessel averted collision. MCS 3008 entered the lagoon and came to anchor and the harassment ceased.28

This incident raises the same issues as the first.

3 The Second Thomas Shoal Incidents

What if the feature is not a rock or an island? The Second Thomas Shoal incidents concerned Chinese attempts to deny resupply by the Philippines to its marines aboard a naval landing craft, BRP Sierra Madre, permanently grounded on the Shoal.29 The Tribunal determined that this feature is a low tide elevation therefore no questions arose as to navigational rights within territorial or internal waters.30 The Tribunal determined that it had no jurisdiction in respect of these incidents as they concerned a ‘quintessentially military situation’.31 Even so, they further illustrate the level of tension in the South China Sea and, more importantly, raise the issue of low tide elevations.

The Award described the incident in similar terms to the Scarborough Shoal incidents, with Chinese vessels trying to impede the passage of the Philippines vessels. In the first incident, on March 9th 2014, the Chinese vessels succeeded in blocking a Philippine attempt from proceeding to the Shoal before later at least giving warnings by means of sirens, megaphones and digital signboards to prevent subsequent attempts. A machinery breakdown led to the two Philippines vessels departing the area.32 After a resupply of the marines by air, a later incident on March 29th 2014 led to blocking and evasion manoeuvres at

28 Award 420–421.
29 Award 442. For a Chinese perspective on this incident, and others not directly discussed in this article, see Hong, ‘Law Enforcement in a Disputed Maritime Zone: A Political and Legal Analysis’ in Wu and Zou (eds), supra, n 6, 223–225.
30 Award 453.
31 Award 456, and was therefore excluded under art 298(1)(b) of the Convention as China chose not to accept jurisdiction over disputes concerning military activities when it ratified the Convention.
32 Award 442–443.
speed again. The Philippines Bureau of Fisheries and Aquatic Resources vessel used its shallower draft to evade the Chinese vessels and effect the resupply and rotation of the marine garrison. On this occasion the Chinese vessels did reportedly give warnings by means of whistle and some form of unspecified communication in words, requiring the Philippines vessel to turn around.

Two distinct and important issues arise from this incident – the lack of maritime zones generated from low tide elevations, and then the issue of navigating in the vicinity of low tide elevations which are occupied and disputed.

III Conclusions that Can be Drawn from the Award for Denying Navigational Freedom and the Questions Which it Raises

1 Preventing Passage that is Not Innocent

Approaching the Philippines vessels at speed without prior warning appears needlessly dangerous on the part of China. The clear conclusion that can be drawn from the Award is that this is not an acceptable use of force to deny navigation.

A number of questions arise from this. The first is, what if this had occurred as part of an escalation of measures which began with a requirement for the Philippines vessels to leave? Just as the Tribunal has not, this article takes no position on the sovereignty of the disputed island or rock features in the South China Sea. Assuming for the sake of argument however that China did have sovereignty over Scarborough Shoal, what could it have done to prevent what would appear to have been non-innocent passage by the Philippines vessels? The passage would not have been innocent on the basis that it was neither continuous nor expeditious and the stopping was not incidental to navigation, nor related to distress, in accordance with article 18 of the Law of the Sea Convention (‘the Convention’). To the contrary, it was for the purpose of patrolling for law enforcement purposes, which is an act of sovereignty.

China could have required the Philippines vessels to leave the territorial sea on the basis that their passage was not innocent. In a context other than the

33 Award 444–445.
34 Ibid.
35 Ibid.
36 Award 58–59.
38 Convention art 30.
South China Sea, this would be a reasonable action consistent with coastal State sovereignty. Whilst provocative in the context of a disputed maritime claim, it is still not unreasonable as it involved no threat or use of force. It would merely be an assertion of sovereignty.

A second remaining question is, after giving a warning to the vessels to leave for conducting passage which was not innocent, could FLEC 110 have taken stronger action in response to a refusal to leave the territorial sea? If the warnings had been repeated and an opportunity had been given for compliance, it would be reasonable for China to resort to a limited threat of force. The International Tribunal for the Law of the Sea in 1999 stated relevant principles in the *Saiga Case*:

> Although the Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of article 293 of the Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law.

> These principles have been followed over the years in law enforcement operations at sea. The normal practice used to stop a ship at sea is first to give an auditory or visual signal to stop, using internationally recognized signals. Where this does not succeed, a variety of actions may be taken, including the firing of shots across the bows of the ship. It is only after the appropriate actions fail that the pursuing vessel may, as a last resort, use force. Even then, appropriate warning must be issued to the ship and all efforts should be made to ensure that life is not endangered.\(^\text{39}\)

Although made in respect of law enforcement against non-sovereign immune vessels, the principles derive from broader considerations of humanity and international law generally.\(^\text{40}\) Even when defending sovereignty against sovereign immune vessels, actions should be reasonable and necessary. Actions

\(^{39}\) *The ‘M/V Saiga’ (No.2) Case (Saint Vincent and the Grenadines v Guinea)*, ITLOS No 2, Judgment 1 July 1999, at paras 155–156.

which created a real risk of collision and potential loss of life, as with the actions of Flec 110, therefore would not likely be justifiable. Shadowing a delinquent vessel out of the territorial sea might have been however. Therefore Flec 110 could have sailed close to the vessels in a safe manner and possible even have fired warning shots. Risking life through collision however is not justified in the case of a mere violation of sovereignty with no accompanying threat to life.

A third remaining question is, given the claim of the Philippines to Scarborough Shoal it would also be reasonable for the PCG to have refused to leave, what then? Article 279 of the Convention refers to the United Nations Charter, specifically the requirement to resolve disputes by peaceful means under article 2(3) and the specific peaceful means identified under article 33, such as negotiation, judicial settlement and so on. Further, and as noted by the Tribunal, the 2002 Declaration of Conduct of Parties in the South China Sea, made by the foreign ministers of the ASEAN States and China, declared a commitment to freedom of navigation and overflight in accordance with the Convention. It also stated an undertaking, in accordance with international law and the Convention specifically:

> 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,

and,

> to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability.

---

41 Froman, supra, n 15, discusses this at 664–666.
42 Award 21.
44 Note also endorsement of the Declaration by the United States, reported in ‘U.S. Statement Calls for Peaceful Resolution of Competing South China Sea Claims; China Protests’ in John Crock (ed) ‘Contemporary Practice of the United States’ in (2012) 106 (4) American Journal of International Law, 855–856; see discussion of the Declaration in Clive Schofield, ‘What’s at Stake in the South China Sea? Geographical and Geopolitical Considerations’ in Robert Beckman, Ian Townsend-Gault, Clive Schofield, Tara Davenport, Leonard Bern (eds), Beyond Territorial Disputes in the South China Sea: Legal Frameworks for the Joint Development of Hydrocarbon Resources (Edward Elgar, 2013) 11–46, at 42; and in
This would strongly suggest that neither State should resort to any threat or use of force. The Chinese and Philippines vessels should therefore leave each other alone. This also includes the other claimant States.

While both China and the Philippines accused each other of violating these principles in respect of various aspects of their overall dispute, the Tribunal did not make such a finding and stated specifically in respect of the issue of denying traditional fishing rights that ‘the Tribunal does not find the record before it sufficient to support such a claim in respect of either Party’. The Tribunal did however state that, once dispute resolution proceedings have commenced, the obligations under article 279 of the Convention to resolve disputes by peaceful means obliged parties not to aggravate or extend a dispute. This is a further clear conclusion that can be drawn from the Award. Even when proceedings have not commenced, the Tribunal referred to the Friendly Relations Declaration of the General Assembly of the United Nations of 1970. It stated that refraining from the threat or use of force is ‘inherent in the central role of good faith in the international legal relations between States’. Even if the Tribunal did not apply this point directly to the incidents in question, it speaks strongly of the requirement to refrain from the threat or use of force in such situations. It also echoes the dissenting opinion of Judge Alvarez in the Corfu Channel Case in 1949, discussed below, that, ‘To answer: vim vi repellere, would amount to referring the solution of a purely juridical problem to the arbitrament of force.’

2 **Sovereign Immune Vessels**

A further question which arises from the navigational incidents in the Award is, what use of force is permissible against a sovereign immune vessel?

---


45 Nong Hong states that both sides should avoid using force, *supra*, n 29, 215–226, at 223, 225–226.

46 The claimant States include China, Taiwan, Philippines, Malaysia, Vietnam and Brunei, Schofield, *ibid*, 28–33.

47 Award 448, 450.

48 Award 317.

49 Ibid.


51 Award 459.

52 *Corfu Channel Case* 108.
Importantly, it would not be permissible to board a sovereign immune vessel in circumstances other than in armed conflict or self defence against an armed attack. By definition, such vessels are immune from the law enforcement processes of foreign States. The International Tribunal for the Law of the Sea stated in the ARA Libertad case that, ‘in accordance with general international law, a warship enjoys immunity, including in internal waters’.\(^53\) O’Connell had earlier stated that:

\[
\text{...it cannot be doubted that the principles of international law relating to sovereign immunity prohibit the arrest of both of these categories of ships [warships and other governmental ships operated for non-commercial purposes], in any circumstances short of declared war.}\(^54\)
\]

Preventing non-innocent passage is not the same as apprehension for the purpose of law enforcement.\(^55\) The options open to the coastal State are different and have a different character. This perhaps reinforces the point that the threshold for boarding, seizing or arresting sovereign immune vessels is very high. In the absence of armed conflict or armed attacks in the South China Sea, there should be no justification for such action against sovereign immune vessels.

The principles in the Saiga Case would still permit firing at or into a vessel where there is minimal risk to life however. FLEC 110, for example, could therefore possibly have gone so far as to fire at or into a sovereign immune vessel from a non-claimant State to compel it to leave territorial waters. This could only occur after an appropriate escalation, from conveying the requirement to leave through to measures such as warning off, shadowing, warning shots and, only if there was continued non-compliance, firing at or into the vessel whilst ensuring that life was not endangered.\(^56\) A controlled action such as this would actually appear to pose less risk to life than a collision of vessels at speed.


\(^{54}\) O’Connell, \textit{supra}, n 15, 965; Ruys expresses a similar view, suggesting that it is a matter of international peace and security rather than law enforcement, \textit{supra}, n 16, at 186.

\(^{55}\) ‘Self-defence and jurisdiction are not intrinsically related concepts’, O’Connell, ibid, at 964–965.

\(^{56}\) Froman, \textit{supra}, n 15, considers a similar escalation of force to be appropriate in such situations, at 674.
3 **Low Tide Elevations**

Apart from the Tribunal determining that the incidents had a military character, a key issue is the status of Second Thomas Shoal as a low tide elevation. A low tide elevation does not project any maritime zones and there are no restrictive navigation regimes associated with it as far as the Convention is concerned.\(^\text{57}\) Rather, high seas freedoms apply to the extent to which they may be subject to rules applying within an EEZ. The Tribunal saw Second Thomas Shoal as falling within the area within which the Philippines is entitled to claim an EEZ.\(^\text{58}\) There could be no disputed sovereignty, as with Scarborough Shoal, as there was no rock or island feature over which sovereignty could be disputed. A conclusion that can be drawn from the Award is there was no question therefore of preventing non-innocent passage or unauthorised entry into internal waters. Claimant States still have an obligation to resolve their disputes peacefully. There could be no basis then for China to interfere with the navigation of the Philippines vessel or any other State’s vessel, or aircraft, for that matter.

4 **A 500 Metre Safety Zone?**

A question which arises from the Award however is what are the implications for freedom of navigation and the use of force in the vicinity of low tide elevations? While Second Thomas Shoal has not been subject to artificial island building at this stage, a number of other low tide elevations have. The Tribunal identified Mischief Reef in particular as a low tide elevation which China has built up,\(^\text{59}\) which does not fall with the territorial sea of another feature\(^\text{60}\) and, more importantly, falls within the EEZ of the Philippines.\(^\text{61}\)

Under article 60 of the Convention, it is the coastal State which may establish artificial islands in its EEZ, including a 500 metre safety zone around them. Accepting the Tribunal’s view for the sake of argument, Mischief Reef is now an artificial island but not one established by the coastal State within its recognised EEZ. It would seem unlikely that the Philippines would legitimise China’s claim to Mischief Reef by establishing a 500 metre safety zone around

---

\(^{57}\) Art 60 (8). See discussion in see Schofield, supra, n 44, at 22.

\(^{58}\) Award 256, 453.

\(^{59}\) Award 335, 355, 356, 365, 399–415.

\(^{60}\) Award 256, 456. The Award determined that Subi Reef falls within the territorial sea of Thitu Island, 166, occupied by the Philippines. Hughes Reef falls within the territorial sea of McKennan Reef (unoccupied) and Sin Cowe Island, 174, occupied by Vietnam. Gaven Reef (South) lies within the territorial sea of Gaven Reef (North), occupied by China, and Namyit Island, 174, occupied by Vietnam.

\(^{61}\) Award 256, 260.
the artificial island, and China is not entitled to establish such a zone. Given the 500 metre zone is for the purpose of safety around artificial islands however, it would seem prudent for vessels to avoid sailing within 500 metres of Mischief Reef. Overflight of Mischief Reef should also be permissible but low flying would appear to be unnecessarily provocative. This would not be a case of accepting China’s claim so much as avoiding both unnecessary provocation and unnecessary navigational risk. This would be consistent with the spirit of the requirement in article 87 of the Convention for all States to exercise the freedoms of the high seas with ‘due regard for the interests of other States in their exercise of the freedom of the high seas’, even if China’s construction of an artificial island on Mischief Reef would not itself be an exercise of a freedom of the high seas. This leads to the issue of navigation in the EEZ.

IV Freedom of Navigation in the EEZ

The clear position in the Award is that none of the features in question generate an EEZ.62 There is also no particular meaning to the ‘Nine Dashed Line’63 in respect of navigation beyond the territorial sea of the disputed features. This means that the conclusion can be drawn from the Award that there is no basis to interfere with navigation beyond the territorial sea of the disputed features, through relying on rights to an EEZ generated from those features. The Award does address China’s violation of the Philippines EEZ rights, as generated from uncontested Philippines’ islands, through preventing fishing and the conduct of oil and gas exploration and exploitation.64 This concerned natural resource rights rather than navigation however so it does not change this conclusion. Even so, it was interference with EEZ rights in the award that raised the issue of escorting vessels.

V The Use of Force to Protect Vessels

The use of force to protect vessels is a distinct question which has attracted attention due to discussion particularly of United States and Australian interests in freedom of navigation operations by warships and aircraft in the South

62 Award 259–260.
63 Award 116–117.
64 Award 286.
China Sea. To what extent can they use force to assert these freedoms? If so, what then is the danger of escalation? The Tribunal did not address these questions but did touch on actions to protect fishing vessels. Its handling of these issues provides some perspective for the issue of use of force and freedom of navigation operations. This section will address the indirect reference to this issue in the Award and then analyse it by reference to the *Corfu Channel Case*.

## Protection of Vessels in the Award

The Award addresses Chinese escort and protection of its fishing vessels as follows:

Chinese fishing vessels have in all reported instances been closely escorted by government CMS vessels. The actions of these ships constitute official acts of China and are all attributable to China as such. Indeed, the accounts of officially organised fishing fleets from Hainan at Subi Reef and the close coordination exhibited between fishing vessels and government ships at Scarborough Shoal support an inference that China's fishing vessels are not simply escorted and protected, but organised and coordinated by the Government.

The Tribunal's concern was with China encouraging illegal fishing in the EEZ of the Philippines contrary to article 58(3) of the *Convention*, which requires States party to have due regard to the rights of coastal States in their EEZ. The more important question this raises for the purpose of this article however is the role of the escorting and protecting vessels. Putting the lawfulness of the fishing to one side, to what extent can States escort their fishing vessels and even use force to protect them? The point does not relate just to fishing vessels as it could apply equally to oil exploration vessels, vessels resupplying the outposts on the various features or even merchant vessels passing through. The question here concerns freedom of navigation therefore and not rights to fish.

Interestingly, the Tribunal did not question China's right to escort and protect its vessels, only its action in doing so to enable fishing contrary to the rights of the Philippines in its EEZ. A conclusion that can be drawn from the Award then is that escort and protection of vessels is not objectionable in itself.

A critical question that this leaves open then is that, noting the discussion above of refraining from the threat or use of force in international disputes,

---

65 Supra, nn 8 and 9.
66 Award 296.
67 Award 297.
what should occur when there is a dispute over whether passage in a particular case is permissible or not? As will be discussed in more detail below, where the passage is merely an assertion of a navigational right or freedom consistent with the regime of the maritime zone in which it is occurring, even if it is disputed, this is not in itself a threat or use of force. China could quite properly escort and protect its fishing or other vessels to prevent interference with their passage. The escort itself need not be seen as a threat or use of force but merely a measure to deter the threat or use of force by others. Should there be such a threat or use of force then China would be able to use the minimum force necessary to protect its vessels. The measures would be of the same nature as those discussed above, including signalling, interposing escort vessels between the threatening vessel and its target (which is not the same as threatening collision) and possibly even firing at or into vessels where life will not be endangered.\textsuperscript{68} Where the threat derives from sovereign immune vessels, such action would not normally include boarding them for the reasons discussed above. The \textit{Corfu Channel Case} is close to being on point here and must form a part of any analysis of the relationship between the exercise of navigational rights and the use of force.

2 \textit{The Corfu Channel Case}

Vessels from other States, whether claimants to South China Sea features or not, should equally be able to exercise their navigational rights and freedoms, including taking action to protect their vessels if subject to the threat or use of force. This could extend to escorting and protecting vessels to deter such threat or use of force. It is important however that the exercise of navigational rights and freedoms clearly be just that, and not appear to be a threat or use of force in themselves. Warships can still be ready and able to defend themselves. This is not a new issue. It arose in the \textit{Corfu Channel Case}. Of the incidents between the United Kingdom and Albania in 1946 which led to the case, O’Connell stated:

The important feature of the court’s judgment was that the right of passage of the two cruisers and the two destroyers was not affected by the fact that they were at actions stations in view of an earlier attack from

shore batteries ... the fact that the ships were closed up did not present an ostensible threat to the coastal state.69

The statement of the facts of the case in the judgment is succinct:

On October 22nd, 1946, a squadron of British warships, the cruisers Mauritius and Leander and the destroyers Saumarez and Volage, left the port of Corfu and proceeded northward through a channel previously swept for mines in the North Corfu Strait. The cruiser Mauritius was leading, followed by the destroyer Saumarez; at a certain distance thereafter came the cruiser Leander followed by the destroyer Volage. Outside the Bay of Saranda, Saumarez struck a mine and was heavily damaged. Volage was ordered to give her assistance and to take her in tow. Whilst towing the damaged ship, Volage struck a mine and was much damaged. Nevertheless, she succeeded in towing the other ship back to Corfu. Three weeks later, on November 13th, the North Corfu Channel was swept by British minesweepers and twenty-two moored mines were cut.70

With respect to the approach of engaging in innocent passage despite the threat of the use of force from the coastal State to prevent it, the International Court of Justice stated:

...the object of sending the warships through the Strait was not only to carry out a passage for the purposes of navigation, but also to test Albania's attitude... The legality of this measure cannot be disputed, provided that it was carried out in a manner consistent with the requirements of international law. The “mission” was designed to affirm a right which had been unjustly denied. The Government of the United Kingdom was not bound to abstain from exercising its right of passage, which the Albanian Government had illegally denied.71


70 Corfu Channel Case at 12.

71 Ibid, at 30, although the subsequent mine clearance operation was found to be a violation of Albania's sovereignty, at 36.
The difficulty still remains in ascertaining whether passage is innocent. Even if states have a right of innocent passage in the territorial sea of the features of the South China Sea, these seas are not necessarily routes normally used for international navigation such as the Strait of Saranda in the Corfu Channel. This was an international strait and the Court expressly avoided commenting on the territorial sea not within international straits. Schofield notes that the disputed islands of the South China Sea are marked as ‘Dangerous Ground’ on navigational charts and that much maritime traffic skirts to the west or east of the area.72 The state in occupation of the feature may well perceive the presence of warships in the territorial sea as threatening if they have no obvious navigational reason to be there. The lack of a navigational reason for the passage, together with a sensitive international political context, may well lead to just the sort of miscalculation that saw loss of life in the Corfu Channel in 1946. This could be the case whether the coastal state requires prior notification or authorisation for the passage of warships or not. This is not to deny the right of innocent passage of the warships, but it does point to how an unnecessary passage might be perceived as non-innocent passage.

The difference between a task group of warships exercising innocent passage and an attacking fleet might appear to be very little. O’Connell stated that:

The task [group] was obliged to follow this channel at one point so that the ships faced directly towards the Albanian port of Saranda, which made their conduct appear unnecessarily threatening... The right would not have lapsed for want of exercise, whereas there were risks in its assertion at a time of high political tension ... The loss of ships and men was a product of the Royal Navy’s incomprehension as much as of Balkan brigandage.73

Ruys and Froman emphasise the importance of context in determining the legality of a forceful response to an incursion74 and, in 1995, Shearer stated of the South China Sea, ‘For the time being, navigators are wise to give these disputed territories a wide berth’.75 The law can only go so far in preventing escalation where both sides believe they have a right to use force to defend their vessels, aircraft or coastal State sovereignty.76

---

72 Schofield, supra, n 44, at 40.
73 O’Connell, supra, n 15, 107–108.
74 Ruys, supra, n 16, at 175–176. Froman, supra, n 15, at 657.
75 Shearer, supra, n 16, at 212.
76 See Froman, supra, n 15, at 675. Kraska and Pedrozo, supra, n 1, at 247–252, discuss confrontations between Libya and the US over US freedom of navigation assertions during
3  

The Code for Unplanned Encounters at Sea

To exercise the right to use force, even if minimal and non-lethal and against a State vessel conducting non-innocent passage, creates the potential for dangerous miscalculation, escalation of force, loss of life and threats to international peace and security. The need to balance these considerations lends itself to a case by case analysis rather than a clear simple position, but the risks associated with miscalculation suggest erring on the side of caution. It would have been helpful if the Arbitral Tribunal had elaborated on the use of force to prevent non-innocent passage by sovereign immune vessels. It did not have to do so to decide the questions before it so it is easy to see why the Tribunal did not. Even so, the issue of the use of force against sovereign immune vessels in disputed waters in the South China Sea remains very much alive and of concern. The second Scarborough Shoal incident amply illustrates this.

In the course of an incident arising at sea, there will be no court on hand to determine which side has the better claim. It will be very much a matter for the practical good sense of the mariners or aviators concerned as to the steps to avoid dangerous escalation. This is the role of the Code for Unplanned Encounters at Sea, which is not an international legal instrument but rather a professional understanding developed by the Western Pacific Naval Symposium (WPNS). The WPNS is a meeting of the professional chiefs of the navies of the region.

The Code for Unplanned Encounters at Sea states its own purpose and character in its opening paragraphs:

1.1.1 The Western Pacific Naval Symposium (WPNS) “Code for Unplanned Encounters at Sea” (CUES) offers a means by which navies may develop mutually rewarding international cooperation and transparency and provide leadership and broad-based involvement in establishing international standards in relation to the use of the sea. The document is not legally binding; rather, it’s a coordinated means of communication to maximise safety at sea.

1.1.2 CUES offers safety measures and a means to limit mutual interference, to limit uncertainty, and to facilitate communication when naval ships or naval aircraft encounter each other in an unplanned manner.

---


77 Froman, ibid, shares this view, at 675.
Units making programmed contact should use procedures agreed between their national command authorities.

Interestingly, the final version of cues was approved at Qingdao in China on April 22nd 2014, around the time of the Second Thomas Shoal incidents described above. Notably, the heads of the member States of ASEAN endorsed cues on September 7th 2016, soon after the decision of the Arbitral Tribunal on July 12th 2016. The Joint Statement on the Application of the Code for Unplanned Encounters at Sea in the South China Sea affirmed that this was done as part of a:

commitment to maintaining regional peace and stability, maximum safety at sea, promoting good neighbourliness and reducing risks during mutual unplanned encounters in air and at sea, and strengthening cooperation among navies.78

Importantly, cues only applies to navies. Given that coastguards are usually not as well armed as navies, at least it applies where there is the greatest capacity for the use of lethal force. Cues itself is relatively brief and provides for manoeuvring and communication procedures. For the most part, the manoeuvring procedures reflect the Collision Regulations79 and the communication procedures are relatively simple. However, the more substantive provision of cues is clause 2.8.1, which states that the prudent commander should avoid:80

(a) Simulation of attacks by aiming guns, missiles, fire control radars, torpedo tubes or other weapons in the direction of vessels or aircraft encountered.
(b) Except in cases of distress, the discharge of signal rockets, weapons or other objects in the direction of vessels or aircraft encountered.
(c) Illumination of the navigation bridges or aircraft cockpits.

78 Supra, n 10.
(d) The use of laser in such a manner as to cause harm to personnel or damage to equipment onboard vessels or aircraft encountered.

(e) Aerobatics and simulated attacks in the vicinity of ships encountered.

Such actions should go some way to avoiding the initiation of a response in self defence. Problematically, there is an argument that it does not apply in the territorial sea.81 Although CUES does not state its geographical area of application, clause 1.5.2 states that it ‘does not supersede international civil aviation rules or rules applicable under international agreements or treaties or international law’. Practically, it should make little difference whether it strictly applies to the territorial sea or not. The actions to be avoided would be provocative whether in the territorial sea or the EEZ. Given that CUES has existed in some form since at least 2000,82 but received ASEAN endorsement just after the Arbitral Tribunal decision, it may be that implementation of CUES is the best hope at this stage of avoiding a dangerous escalation in the South China Sea. It remains to be seen if it will be effective if a freedom of navigation incident does arise.

VI Conclusion

The Award of the Arbitral Tribunal in the Matter of the South China Sea between the Philippines and China assists in clarifying the geographical status, although not the sovereignty, of many of the features in dispute. The Award is also clear on excessive uses of force to deny navigation in the vicinity of the features. This clarification allows the following conclusions, as stated in the introduction, to be drawn from the Award in respect of freedom of navigation and the use of force:


High speed close quarters manoeuvring to deny navigation is excessive because it is too dangerous;
Claimant states should not be aggravating the dispute by threatening the use of force in disputed waters;
Artificial islands on low tide elevations generate no maritime zones and therefore there can be no restriction on navigation in their vicinity;
Escort of vessels for their protection is not objectionable in itself, and
There are no Exclusive Economic Zones (EEZ) around the disputed features so there is no basis to interfere with navigation relying upon EEZ rights as generated from disputed features.

Its treatment of the navigational incidents at Scarborough Shoal and Second Thomas Shoal raises further questions of the freedom of navigation and the use of force. While it was not really for the Tribunal to address these questions, the history of incidents in the South China Sea and the potential risk to life demand a careful consideration of the Award for its implications for these issues.

With respect to preventing non-innocent passage in the territorial sea and the Scarborough Shoal incidents, the Award is clear that risking high speed collision is not lawful. It does not specifically mention the risk to life but the implication is obvious. This suggests that lower level uses of force may be acceptable. Even firing at or into a vessel in a controlled way may be less dangerous than risking a high speed collision.

The Second Thomas Shoal incident raises similar questions about the risks of high speed collision but the distinctive issue here is the status of the feature. It generates no maritime zones and no question can arise of preventing non-innocent passage or unauthorised entry into internal waters. This has implications for the artificial island which China has built on Mischief Reef within the Philippines EEZ. It also cannot generate any maritime zones, not even a 500 metre safety zone, but prudence would suggest avoiding sailing or flying within 500 metres of the feature consistent with other artificial islands.

The reference in the Award to China using enforcement vessels to protect its fishing fleet raised the question of enforcing freedom of navigation and the use of force to protect such action generally. The Corfu Channel Case made clear that enforcing navigational rights is not in itself a use of force, but it would be permissible to use force to protect such action. Given the loss of life in the incident that led to that case, balancing the enforcement of navigational rights with the risk to life must be front of mind. The ASEAN statement on CUES not long after the publication of the Award clearly suggests that it is front of mind for many in the region.
This article does not concern itself with whether a particular claim in the South China Sea is valid or not, only the level of force which a State may use to enforce its claim, whether as a coastal State or as a flag State. The mere presence of a foreign warship in the territorial sea does not of itself amount to an armed attack and does not justify the use of lethal force. However, the potential for misjudging whether enforcement of a right is actually an attack requiring a forceful response in self defence is clearly high. Measures such as observance of cues will hopefully go some way to reducing the risk of misjudgement, miscalculation or escalation.

The Award of the Arbitral Tribunal in the Matter of the South China Sea between the Philippines and China, in so far as it is accepted, has clarified some points but it also has raised further questions in respect of freedom of navigation and the use of force in the South China Sea. There is international law which addresses some of the questions but it only goes so far. If further loss of life is to be avoided, it will require restraint at an operational and political level which the law can encourage but not ensure.