
LKI *Explainers* examine an aspect of Sri Lanka's international relations.

Freedom of Navigation in Law of the Sea

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Abbreviations

UNCLOS	United Nations Convention on the Law of the Sea
EEZ	Exclusive Economic Zone
FONOP	Freedom of Navigation Operations
DOC	Declaration on the Conduct
CoC	Code of Conduct

This LKI Explainer explores the legal concept of ‘Freedom of Navigation’ especially as articulated in the United Nations Convention on the Law of the Sea (1983), the South China Sea Code of Conduct (2017), and the Jakarta Concord (2016). It considers ways in which Sri Lanka can implement and enforce freedom of navigation in the Indian Ocean.

1. What is Freedom of Navigation?

- Freedom of navigation is a principle that allows all ships flying the flags of sovereign States to navigate and roam international waters freely, [subject to restrictions in customary international law](#) (including the sovereignty of States, territorial seas, and Exclusive Economic Zones),¹ as well as under treaties.
- Vessels exercising the freedom of navigation are subject to the [exclusive jurisdiction](#)² of the flag State. Flag States are the States under which a ship is registered or flagged. States have a responsibility over their ships, including when a [ship is outside their territorial waters](#).³
- The principle was first articulated in a legal context in 1604 by [Hugo Grotius of the Netherlands](#),⁴ who affirmed that since the sea is fluid, intangible, and cannot be possessed, the Portuguese could not claim exclusive possession of waters around the East Indies.
- The significance of the freedom of navigation, and its articulation by Hugo Grotius, is that it led to the [triumph of his notion of Mare Liberum](#) (free sea) over John Seldon’s conception of Mare Clausum (closed sea).⁵ Grotius rejected the idea that national sovereignty could extend to the high seas.
- Thus, all States met on an equal footing on the high seas, and [no State can independently impose its legislative will](#)⁶ upon use of the high seas.

2. United Nations Convention on the Law of the Sea (UNCLOS)

- The [1955 Report of the International Law Commission](#)⁷ stated that any freedom exercised in the interest of all must also be regulated. The law of the sea, therefore, contains certain rules and regulations, designed not to limit the freedom of the high seas, but to safeguard its exercise in the interest of the international community.
- The first UN Conference on the Law of the Sea (UNCLOS I) took place in Geneva in 1956. UNCLOS I resulted in four treaties, which were signed in 1958. The Convention on the High Seas was regarded as a codification of customary international law and therefore binding on all States.

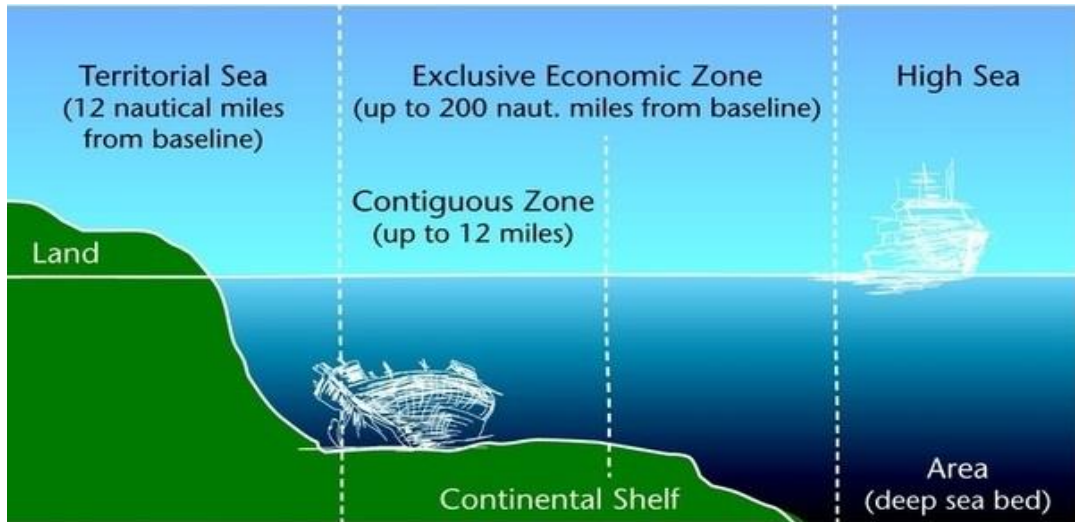
- The four treaties of the 1958 Conference – including the Convention on the High Sea – were signed by Sri Lanka in 1958, but never ratified. The Conference left [unresolved the maximum breadth of the territorial sea](#),⁸ the limits of the fishery jurisdiction of coastal States and the rights of foreign ships to pass through straits used for international navigation.
- The second UN Conference on the Law of the Sea (UNCLOS II) took place in 1960. This conference did not result in any new agreements; substantive decisions on the breadth of the territorial sea and fishery limits were deferred to a later time.
- The third UN Conference on the Law of the Sea (UNCLOS III) (1973-1982) [addressed all outstanding issues](#)⁹ concerning the law of the sea. Legal and scientific experts from more than 150 States participated in formulating over 300 articles and seven Annexes.
- UNCLOS III set out the [international norms governing the use of the world's oceans](#)¹⁰ and its resources by States (through international divisions of territorial sea, Exclusive Economic Zones, continental shelf and recognising the status of the deep seabed). It is one of the most widely accepted international conventions, with [167 current member States](#) including Russia, China, and the EU.¹¹
- UNCLOS III replaces the two prior attempts to articulate the rights of States with respect to their territorial seas, continental shelves, use of the high seas, and management of maritime resources. The convention was [signed by Sri Lanka in 1982 and ratified in 1994](#).¹²

3. Objectives and Principles of UNCLOS

- Freedom of navigation rights concern the types of operations permitted within specific maritime zones.
- The freedom of navigation is subject to the rights of coastal States in those maritime zones closest to the shore. UNCLOS distinguishes between [seven maritime zones](#):¹³ internal waters, the territorial sea, the [contiguous zone](#),¹⁴ the continental shelf, the Exclusive Economic Zone, the high seas and the deep seabed (see Figure 1).
- The territorial sea extends up to 12 nautical miles from land and is considered subject to the sovereignty of a coastal State.
 - A State has the exclusive right to make, apply and execute its own laws in the territorial sea without foreign interference, subject to limitations under UNCLOS and other rules of international law.
 - In particular, according to UNCLOS, [all ships of all States enjoy the right of innocent passage](#) through the territorial sea of other States.¹⁵ Innocent passage requires that [vessels move directly and continuously through the territorial sea](#);¹⁶ military operations, fishing, pollution and surveillance operations are prohibited.

- States that have ratified UNCLOS are obligated to respect this provision and the right of innocent passage is also recognised as customary international law therefore also binding on States that are not party to UNCLOS.

Figure 1:



Source: Garry Taylor (2015). *The Law of the Sea and “creeping jurisdiction” of coastal States*.
<https://www.linkedin.com/pulse/law-sea-creeping-jurisdiction-coastal-states-garry-taylor/>

- The contiguous zone extends another 12 nautical miles, ending up to 24 nautical miles from land. The contiguous zone is not subject to the sovereignty of the coastal State – it is considered part of international waters.
 - Within the contiguous zone, coastal States may only exercise limited jurisdiction over foreign-flagged vessels to prevent and punish offences related to its fiscal, immigration, sanitary and customs laws. Any coastal State exercise of jurisdiction for security purposes more broadly is not permissible.
 - Apart from these limited coastal State powers in the contiguous zone, vessels otherwise enjoy the freedom of navigation in this maritime area.
- The exclusive economic zone (EEZ) extends up to 200 nautical miles from land and includes both the territorial sea, and the contiguous zone. Within the 200 nautical miles, a coastal State has sovereign rights to the exploration and exploitation of natural resources. A coastal State also has exclusive jurisdiction over artificial islands and installations, for the protection and preservation of the marine environment and over marine scientific research.
 - The exclusive economic zone is considered [part of international waters](#); ¹⁷ States do not have the right to limit navigation therein. Obligations of due regard are nonetheless applicable in the respective exercise of rights within the EEZ.
- The objectives of UNCLOS are to:
 - Protect the economic, environmental, and national security concerns of coastal States;
 - Strengthen coastal State rights up to 200 miles offshore;

- Protect the marine environment;
- Protect freedom of navigation; and
- Maintain international peace.
- Articles relevant to freedom of navigation include:
 - **Article 36:** *Freedom of navigation in straits used for international navigation*
 - **Article 38:** *Freedom of transit passage in straits used for international navigation*
 - **Article 58:** *Freedom of navigation in the exclusive economic zone*
 - **Article 78:** *The exercise of the rights of the coastal State over the continental shelf must not infringe or result in any unjustifiable interference with navigation and other rights, and freedoms of other States*
 - **Article 87:** *Freedom of the high seas, for both coastal and landlocked States, includes freedom of navigation, freedom of overflight, freedom to lay submarine cables and pipelines, freedom to construct artificial islands, freedom of fishing, and freedom of scientific research*

4. Freedom of Navigation Programme

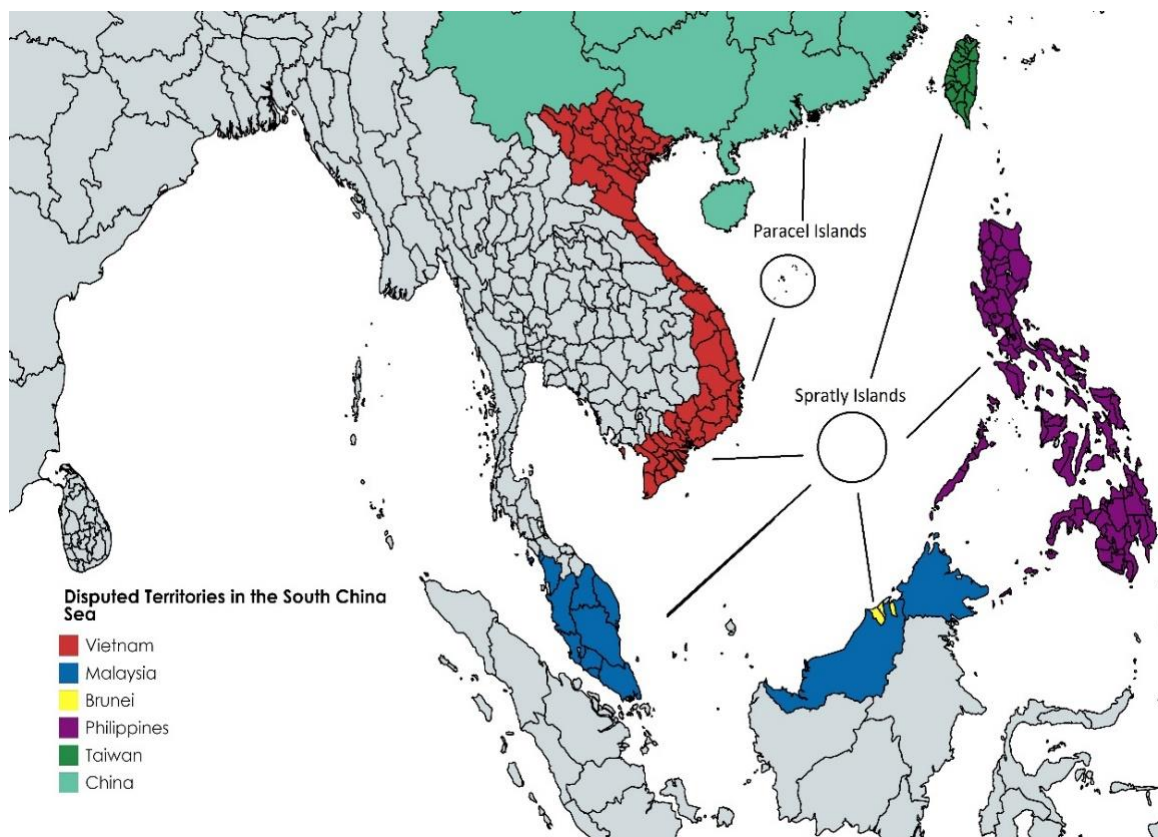
- The United States (US) played an [instrumental role in forming UNCLOS](#)¹⁸ in the 1970s, despite not signing or ratifying the treaty.
- Critics in the US have argued that:
 - UNCLOS is flawed and would detract from US interests by [ceding sovereignty](#)¹⁹ to international organisations and tribunals.
 - The US should not bind itself to international bureaucracies, such as the International Seabed Authority (ISA) created by UNCLOS. These bureaucracies are often hostile to US interests and the ISA, in particular, is threatening since [there is no veto for the US](#).²⁰
 - Joining the Convention would expose the US to frivolous lawsuits for maritime activity. Critics assert that the treaty would become a [weapon for environmental activists](#)²¹ to bring legal claims against American companies and the US Navy.
- Nevertheless, the US recognises the importance of maintaining the freedom of navigation, and has, therefore, initiated its own [Freedom of Navigation Operation](#) (FONOP).²² The programme was created to ensure stability and consistency with international law.
- The programme was prompted by US concerns over the impact of [excessive maritime claims on national security](#)²³ and international trade. The programme includes:
 - Diplomatic communications, in the form of correspondence and formal protest notes;
 - Freedom of Navigation Operations (FONOPs) by the US naval and air forces to assert internationally recognised navigational rights and freedoms; and
 - Bilateral and multilateral consultations to encourage maritime stability and adherence to the provisions of UNCLOS.

- Over the past year and a half, the US has conducted [eight FONOPs](#)²⁴ in the South China Sea.
 - In 2015-2016, the US FONOPs challenged the illegal requirement of China, Taiwan, and Vietnam that ships provide advance notice before transiting through a State's territorial sea under innocent passage.
 - In 2017, the US also challenged claims from China, Vietnam, and Taiwan to Triton Island within the Paracel Island chain.

5. Freedom of Navigation in the South China Sea

- The US has a specific freedom of navigation programme in the South China Sea. In light of China's extensive maritime claims and assertions, the US conducts freedom of navigation operations to [assert maritime rights in the South China Sea](#).²⁵
- The South China Sea contains some of the world's most important shipping lanes; it is estimated that [USD 5.3 trillion in trade](#) passes through the region annually.²⁶
- Freedom of navigation in the South China Sea is governed by UNCLOS, and the Code of Conduct on the South China Sea.
- The South China Sea is home to a number of longstanding territorial disputes and sovereignty claims between Brunei, China, Indonesia, Malaysia, the Philippines, Taiwan and Vietnam (see Figure 2). Most territorial disputes focus on features within the Paracel and Spratly Island groups.
- To reinforce territorial claims, the States listed above occupy features of the South China Sea and have reclaimed land, built infrastructure, and stationed troops or military hardware. Such actions have raised concerns over the possibility of conflict.
- [Excessive maritime claims](#) are assertions by States that are: (1) inconsistent with the legal divisions of ocean and airspace of UNCLOS (e.g. territorial sea claims greater than 12 miles) or (2) restrictions on navigation, and overflight rights (e.g. required advanced notification of warships and naval auxiliaries).²⁷

Figure 2:



Source: *South China Sea Verdict* (2016). *The Wall Street Journal*.

<https://www.wsj.com/articles/south-china-sea-verdict-1468343029>

- At the 8th ASEAN Summit in Phnom Penh (2002), China and ASEAN had agreed upon a [Declaration on the Conduct of Parties in the South China Sea](#) (DOC)²⁸ which promised to “enhance favourable conditions for a [peaceful and durable solution of differences](#) and disputes among countries concerned.”²⁹ The [Declaration](#) affirms:³⁰
 - Respect for and commitment to freedom of navigation in and above the South China Sea;
 - Pledge to resolve territorial and jurisdictional disputes by peaceful means; and
 - China and ASEAN’s commitment to exercising self-restraint in activities which would complicate or escalate disputes and affect peace and stability.
- Many consider the DOC ineffective and intrinsically flawed, since it does not have [the legal power to restrict claimants’ behaviour](#)³¹ in the South China Sea. Furthermore, the text of the DOC provides little information on the specific implementation of forms of cooperation in the South China Sea.
- In August 2017, ASEAN and China agreed to a [Code of Conduct on the South China Sea](#) (CoC).³² The CoC is intended to supersede the DOC, and contains a “set of norms to guide the conduct of parties and promote maritime cooperation in the South China Sea.”

- The CoC framework will “[promote mutual trust](#), cooperation and confidence, prevent incidents, manage incidents should they occur and create a favourable environment for the peaceful resolution of disputes.”³³
- The CoC will also maintain “[respect for each other’s independence](#), sovereignty and territorial integrity in accordance with international law, and the principle of non-interference in the internal affairs of other States.”³⁴
- The CoC is not, however, “an [instrument to settle territorial disputes](#) or maritime delimitation issues.”³⁵
- Critics maintain that a non-legally binding CoC would be “[meaningless](#)” and not differ substantially from the 2002 DOC.³⁶

6. Freedom of Navigation in the Indian Ocean

- The Indian Ocean rim region is host to [2.6 billion people](#),³⁷ and [more than half](#) of the world’s oil shipments.³⁸ Freedom of navigation in the Indian Ocean is governed by UNCLOS and the Jakarta Concord. Comoros, Somalia, UAE and Iran are among the Indian Ocean Rim States that have not ratified UNCLOS.
- The Jakarta Concord is an agreement to [maintain peace and stable relations](#) among member States of the Indian Ocean Rim Association (IORA).³⁹ In March 2017, 21 member countries of IORA signed the Jakarta Concord, titled “[Promoting Regional Cooperation for a Peaceful, Stable, and Prosperous Indian Ocean](#).”⁴⁰
- In the Jakarta Concord, IORA member States declare their commitment to promoting maritime safety, enhancing trade and investment cooperation, promoting sustainable fisheries management and development, enhancing disaster risk management, and fostering tourism and cultural exchanges.
- In particular, Article 16a of the document affirms the [freedoms of navigation and overflight](#)⁴¹ in accordance with UNCLOS and international law, to promote maritime safety and security.
- To implement provisions of the Jakarta Concord, IORA States have also agreed on an [Action Plan for 2017-2021](#).⁴² Long-term goals involve establishing a regional surveillance network with Member States, and deepening collaboration between regional governments and multilateral bodies.

7. Sri Lanka and Freedom of Navigation

- In 1971, at the 26th session of the UN General Assembly, Sri Lankan Prime Minister Sirimavo Bandaranaike submitted a proposal to declare the Indian Ocean a “Zone of Peace.” The resulting “[Declaration of the Indian Ocean as a Zone of Peace](#)”⁴³ was adopted by the General Assembly as Resolution 2832 ([XXVII](#)).⁴⁴

- Sri Lanka is party to UNCLOS III, and ratified UNCLOS in 1994. Sri Lanka is also among the IORA member States who signed the Jakarta Concord.
- In 1974, a [bilateral agreement](#)⁴⁵ between Sri Lanka and India established [maritime boundaries](#)⁴⁶ between the Gulf of Mannar and the Bay of Bengal. Kachchativu Island, a strategically important island for fishing, which Sri Lanka and India both claimed in 1921, fell under Sri Lanka's sovereignty.
 - The bilateral agreement, which was realised through cooperative negotiation and calculations, is an example of Sri Lanka's commitment to the drawing of clear maritime boundaries. This commitment in turn ensures adherence to international law, and the principle of freedom of navigation.
- In maritime security, Sri Lanka could become a [central body that other nations consult](#),⁴⁷ by hosting an institution that deals with a particular maritime security threat (such as bottom trawling and destructive fishing). For example, through ReCAAP – an organisation focused on piracy and armed robbery at sea – Singapore has become the centre for information sharing on this topic.
- Sri Lanka could also learn from law enforcement operations around transnational crime and apply such principles to the case of foreign vessels. The [UNODC piracy prosecution model](#)⁴⁸ could provide inspiration in this regard.
- Similarly, Sri Lanka could create guidelines for nuclear conduct in the maritime domain, to ensure the prohibition of testing and use of nuclear weapons in the Indian Ocean, as stated in [the 1971 Zone of Peace resolution](#).⁴⁹
- Through convening Indian Ocean States and major users, Sri Lanka could help articulate key guidelines and promote freedom of navigation practices to ensure that disputes are minimised and excessive maritime claims are efficiently resolved.

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