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China's Revised Maritime Traffic Safety Law

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CONTENTS

I.	Introduction.....	957
II.	Scope of Application.....	957
III.	MTSL Impediments to Freedom of Navigation.....	958
	A. Article 19	958
	B. Article 30	959
	C. Construction, Design, Equipment, or Manning.....	961
	D. Article 44	962
	E. Article 49	963
	F. Article 54	964
	G. Article 52	966
	H. Article 120	967
IV.	Conclusion.....	967

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I. INTRODUCTION

On April 29, 2021, at the 28th meeting of China's Standing Committee of the 13th National People's Congress, the Committee promulgated revisions to the 1983 Maritime Traffic Safety Law (MTSL), as amended in 2016.¹ The amendment of the 1983 law, just months after enacting the new Maritime Police Law granting questionable powers to the China Coast Guard to enforce Chinese laws at sea,² is yet another demonstration of Beijing's total disregard of its international legal obligations. It also demonstrates China's efforts to disrupt the rules-based international legal order that ensures safe and efficient use of the world's oceans for all nations without undue interference.

II. SCOPE OF APPLICATION

Like the Maritime Police Law, the MTSL's scope of application is problematic. Article 2 of the MTSL expands application of the law from "coastal waters" to "sea areas under the jurisdiction of the People's Republic of China." The term "sea areas under the jurisdiction of the People's Republic of China" is not defined in the law and is purposely vague. Enacting ambiguous and imprecise laws allows China to alter its position on the applicability of the law based on the circumstances at the time. Nonetheless, given China's excessive maritime claims and prior enforcement activities, the MTSL is likely intended to apply to all waters and seabed areas (1) encompassed by the nine-dash line in the South China Sea, (2) extending to the Okinawa Trough in the East China Sea, and (3) beyond Ieodo (Socotra Rock) in the Yellow Sea.

Such an expansive application of the MTSL would be inconsistent with the ruling of the South China Sea arbitration tribunal, which found that China's historic rights claims and other claimed sovereign rights and jurisdiction with respect to the maritime areas encompassed by the nine-dash line

1. Maritime Traffic Safety Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 2, 1983, rev'd Nov. 7, 2016, rev'd Apr. 29, 2021, effective Sept. 1, 2021) (Maritime Traffic Safety Law online link (use browser's English translation tab)).

2. For an analysis of the Maritime Police Law, see Raul (Pete) Pedrozo, *Maritime Police Law of the People's Republic of China*, 97 INTERNATIONAL LAW STUDIES 465 (2021).

were contrary to the United Nations Convention on the Law of the Sea (UNCLOS)³ and therefore lacked lawful effect.⁴ Application of the law in contested exclusive economic zones (EEZ) and continental shelf areas in the East China and Yellow Seas would likewise be inconsistent with China's legal obligations under Articles 74 and 83 of UNCLOS. Article 74 requires that, in delimiting overlapping EEZs, the parties not take action that would "jeopardize or hamper the reaching of the final agreement."⁵ Similarly, Article 83 requires that the delimitation of overlapping continental shelves be achieved by agreement of the parties or through third-party dispute settlement to achieve an equitable solution.⁶ Article 83 further requires that, pending such agreement, the parties shall not take action that could jeopardize or hamper reaching a final agreement.⁷

III. MTSL IMPEDIMENTS TO FREEDOM OF NAVIGATION

Chapter II of the MTSL applies only to Chinese-flagged vessels and Chinese nationals and should therefore not raise concerns of other States. Chapters III and IV, on the other hand, appear to apply to all vessels and contain several provisions that exceed international law limits on coastal State jurisdiction and could therefore adversely affect freedom of navigation.

A. Article 19

Article 19 purports to authorize the maritime administrative agency to establish ship routing and reporting areas, traffic control areas, and restricted navigation areas. Article 22 of UNCLOS allows a coastal State to require foreign ships engaged in innocent passage through its territorial sea to use designated sea lanes and traffic separation schemes if needed for the safety of navigation. Nonetheless, when designating sea lanes and traffic separation schemes, the coastal State must consider the recommendations of the International Maritime Organization (IMO).⁸ Moreover, the coastal State may not impose

3. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

4. South China Sea Arbitration (Phil. v. China), Case No. 2013–19, PCA Case Repository, Award, ¶¶ 277–78 (Perm. Ct. Arb. 2016).

5. UNCLOS, *supra* note 3, art. 74.

6. *Id.* art. 83.

7. *Id.*

8. *Id.* art. 22.

requirements on foreign ships that have the practical effect of denying or impairing the right of innocent passage except as provided for in UNCLOS.⁹

A coastal State's ship routing system or ship reporting system that applies only in its territorial sea needs to consider the recommendations of the IMO but does not have to be submitted to the IMO for adoption. Ship routing systems include traffic control areas (e.g., roundabout, deep water route, traffic lane, two-way route, or separation zone) and restricted navigation areas (e.g., inshore traffic zone, area-to-be avoided, or precautionary area).¹⁰ However, routing and reporting systems that apply beyond the territorial sea, in that part of the territorial sea constituting a strait used for international navigation, or are mandatory in nature must be submitted to the IMO for adoption and implementation in accordance with IMO guidelines and criteria pursuant to the General Provisions on Ships' Routeing.¹¹ Additionally, whether recommendatory or mandatory, warships, naval auxiliaries, and other government-owned or operated non-commercial ships are exempt from compliance with the requirements of such systems.¹²

Thus, routing, reporting, traffic control, and restricted navigation areas prescribed by Article 19 that apply within China's territorial sea may not have the practical effect of denying or impairing the right of innocent passage. Moreover, areas imposed by Article 19 that apply beyond China's territorial sea must first be submitted to the IMO for adoption. They may not be unilaterally imposed by the maritime administrative agency on foreign ships. Additionally, foreign warships and other government non-commercial vessels are exempt from compliance.

B. Article 30

Given the scope of application of the MTSL, Article 30 is highly problematic in that it imposes mandatory pilotage requirements on (1) foreign-flag vessels; (2) nuclear-powered ships, ships carrying radioactive materials, and ultra-large oil tankers; (3) bulk liquefied gas ships and bulk dangerous chemical ships that may endanger port safety; and (4) vessels whose length, width, and

9. *Id.* art. 24.

10. IMO Res. A/572, General Provisions on Ships' Routeing ¶ 2.1 (Nov. 20, 1985) [hereinafter GPSR].

11. International Convention for the Safety of Life at Sea, 1974, regulation V/10, V/11 Nov. 1, 1974, 32 U.S.T. 47, T.I.A.S. 9700, 1184 U.N.T.S. 277 (as amended) (*entered into force* May 25, 1980).

12. *Id.* regulation V/1.

height are close to the limits of the corresponding navigable channel conditions.

Compulsory pilotage is normally associated with ports and internal waters as a condition of port entry. It is inconsistent with international law, including Article 24 of UNCLOS, to require compulsory pilotage for foreign ships engaged in innocent passage that do not intend to enter the coastal State's ports or internal waters. Such a requirement would have the practical effect of denying or impairing the right of innocent passage. Article 30 also does not distinguish between commercial and government vessels. While it may be permissible for China to offer pilotage services in its territorial sea to foreign warships and other government ships operated for non-commercial purposes engaged in innocent passage, consistent with the immunities of such ships, pilotage services may be accepted or refused at the discretion of the flag State.¹³

Coastal State authority over nuclear-powered ships and ships carrying inherently dangerous or noxious substances engaged in innocent passage is also limited. Such vessels may only be required to confine their passage to designated sea lanes¹⁴ and to "carry documents and observe special precautionary measures established for such ships by international agreements."¹⁵

Beyond the territorial sea, all ships enjoy high seas freedoms of navigation and overflight and other internationally lawful uses of the seas.¹⁶ With limited exceptions reflected in UNCLOS, ships navigating in the EEZ and on the high seas are subject to the exclusive jurisdiction of the flag State.¹⁷ Similarly, warships and other government vessels operated for a non-commercial purpose beyond the territorial sea have complete immunity from the jurisdiction of any State except the flag State.¹⁸ Thus, application of the compulsory pilotage requirement in Article 30 to foreign ships navigating beyond China's territorial sea has no basis in international law.¹⁹

13. UNCLOS, *supra* note 3, art. 32.

14. *Id.* art. 22(2).

15. *Id.* art. 23.

16. UNCLOS, *supra* note 3, arts. 58, 86, 87, 90.

17. *Id.* arts. 58, 86, 92.

18. *Id.* arts. 95, 96.

19. *Id.* arts. 58, 86, 87, 89, 90, 92, 95, 96.

C. Construction, Design, Equipment, or Manning

Coastal State laws and regulations relating to innocent passage may not apply to the construction, design, equipment, or manning of foreign ships unless they give effect to generally accepted international rules or standards (e.g., those adopted by the IMO). Several provisions in MTSL Chapter IV impermissibly purport to impose construction, design, equipment, or manning requirements on foreign flag vessels engaged in innocent passage.

Article 33 requires that vessels meet minimum safe manning requirements and that crew members hold qualified and valid certificates. Article 37 requires ships to be equipped with navigation records (e.g., logbooks, engine logs, and radio record books) and requires the crew to record important events involving maritime traffic safety. Article 41 purports to establish an order of succession if the master dies or is unable to perform his duties (e.g., senior ranking pilot) and requires the owner, operator, or manager of the ship to appoint a new captain before the ship sails to its next port. Article 42 directs the crew to operate and manage the ship in accordance with the master's instructions and relevant rules, regulations, and operating procedures for navigation and watchkeeping, maintain a safe watch, and not leave their duties without authorization. Article 42 further prohibits the crew from ingesting food, medicine, or other items that may affect the safety of the watch. Finally, Article 43 requires ships passing through important fishery waters, areas with dense maritime traffic, ship routing areas, and traffic control areas to strengthen their lookout, maintain safe speeds, and comply with special navigation rules.

Given the vagueness of these articles, it is unclear whether these provisions of the MTSL give effect to generally accepted international rules and standards adopted by the member States of the IMO. China's application of these articles beyond the territorial sea is equally problematic. Beyond the territorial sea, ships are subject to the exclusive jurisdiction of the flag State.²⁰ Thus, the flag State (not China) has a duty to assume jurisdiction under its laws over each ship flying its flag and over its masters, officers, and crew in respect of administrative, technical, and social matters concerning the ship.²¹ It is the flag State (not China) that shall take measures to ensure safety at sea for ships flying its flag to include the construction, equipment, and seaworthiness of ships; the manning of ships, labor conditions, and training of

20. *Id.* art. 92.

21. *Id.* art. 94.

crews; and the use of signals, the maintenance of communications, and the prevention of collisions.²² Finally, to the extent these articles are intended to apply to warships and other government vessels used on non-commercial service, which are entitled to immunity from coastal State interference, the MTSL violates international law.²³

D. Article 44

Article 44 prohibits passage through restricted navigation zones established pursuant to Article 19. Article 25 of UNCLOS allows a coastal State to temporarily suspend innocent passage of foreign ships in specified areas of its territorial sea if “such suspension is essential for the protection of its security, including weapons exercises.”²⁴

Article 44 is overly broad in that it appears to allow restrictions on navigation for any reason and is not limited to the territorial sea. Moreover, it appears that restricted zones could be imposed for unlimited duration. Suspension of innocent passage in the territorial sea may only be temporarily imposed in a discrete area for security reasons, including weapons exercises. The restricted navigation zones authorized by Article 19 do not appear to be limited to the protection of China’s security.

Moreover, to the extent that the restricted navigation area extends beyond the territorial sea, China may only establish temporary warning areas to advise ships and aircraft that it is conducting activities that may pose a hazard to navigation and overflight.²⁵ These warning areas are not exclusion zones, and ships and aircraft retain the right to transit through the area, recognizing that there is an increased risk in doing so. Beyond the territorial sea, no State may subject any part of the high seas, including the EEZ, to its sovereignty.²⁶ Seaward of the territorial sea, all ships and aircraft enjoy high seas freedoms of navigation and overflight and other internationally lawful uses of the seas related to these freedoms.²⁷ To the extent Article 44 purports to temporarily

22. *Id.*

23. *Id.* arts. 32, 95, 96.

24. *Id.* art. 25.

25. IMO Res. A.706(17), World-wide Navigational Warning Service annex 1, ¶ 4.2.1.3. 13 (Nov. 6, 1991); Convention on International Civil Aviation annex 15, ¶ 5.1.1.1, Dec. 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 295 (as amended) [hereinafter Chicago Convention, Annex 15].

26. UNCLOS, *supra* note 3, art. 89.

27. *Id.* arts. 58, 86, 87, 90.

close areas of the ocean beyond China's territorial sea, it is inconsistent with international law.

E. Article 49

Article 49 requires anyone engaged in activities such as scientific observation to comply with the regulations on maritime traffic safety management and, where maritime traffic safety may be affected, notify Chinese authorities ten working days in advance of the activity.

Coastal States exercise exclusive jurisdiction over marine scientific research (MSR) in their territorial sea and EEZ.²⁸ On their face, China's 1996 domestic law governing foreign-related MSR,²⁹ the 1998 EEZ and continental shelf law, and the 2002 Surveying and Mapping Law appear to be consistent with Articles 56 and 246 of UNCLOS in that they assert exclusive jurisdiction over MSR.³⁰ However, in practice, China has an expansive view of what constitutes MSR and applies its domestic laws in a manner that is inconsistent with international law.

China argues incorrectly that coastal State jurisdiction over MSR also includes authority over hydrographic surveys and military marine data collection (military surveys). China's position is not supported by State practice or the plain language of UNCLOS.³¹ The term "marine scientific research" was used in UNCLOS to distinguish MSR from other types of marine data collection that are not resource-related, such as hydrographic surveys and mili-

28. *Id.* arts. 2, 56, 245, 246.

29. Provisions on the Administration of Foreign-Related Maritime Scientific Research (Decree No. 199 of the State Council of the People's Republic of China, June 18, 1996, effective Oct. 1, 1996).

30. Law of the People's Republic of China on the Exclusive Economic Zone and the Continental Shelf (adopted by the Standing Comm. Nat'l People's Cong. June 26, 1998, promulgated by Order No. 6 of the President of the People's Republic of China, June 26, 1998, effective June 26, 1998); Surveying and Mapping Law of the People's Republic of China (adopted by the Standing Comm. Nat'l People's Cong. Dec. 28, 1992, rev'd Aug. 29, 2002, promulgated by Order No. 75 of the President of the People's Republic of China, Aug. 29, 2002, effective Dec. 1, 2002).

31. Raul Pedrozo, *Coastal State Jurisdiction over Marine Data Collection in the Exclusive Economic Zone: U.S. Views*, in *MILITARY ACTIVITIES IN THE EEZ: A U.S.- CHINA DIALOGUE ON SECURITY AND INTERNATIONAL LAW IN THE MARITIME COMMONS* 23, 23–26 (Peter Dutton, ed., 2010), <https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1006&context=cmsi-red-books>; J. ASHLEY ROACH & ROBERT W. SMITH, *EXCESSIVE MARITIME CLAIMS* 413–50 (3d ed. 2012).

tary surveys conducted to gather intelligence and oceanographic data. Research and surveys are treated differently in UNCLOS. Article 19(2)(j) refers to “research or survey activities” for ships engaged in innocent passage.³² Article 40 applies a similar restriction to ships engaged in transit passage—“marine scientific research and hydrographic survey ships may not carry out any research or survey activities” without prior authorization of the States bordering the strait.³³ The same restrictions apply to ships engaged in archipelagic sea lanes passage (Article 54) and ships transiting archipelagic waters in innocent passage (Article 52).³⁴ Article 56, Article 87(1)(f), and Part XIII of UNCLOS, on the other hand, only refer to MSR and not to “survey” activities.³⁵ Thus, while the navigational regimes of innocent passage, transit passage, archipelagic sea lanes passage, and non-suspendable innocent passage in archipelagic waters outside of sea lanes all permit the coastal State to regulate surveys and MSR, the regime of high seas freedoms that applies in the EEZ only allows the coastal State to exercise jurisdiction over MSR. Thus, hydrographic surveys and military marine data collection activities beyond the territorial sea remain high seas freedoms of navigation and are internationally lawful uses of the sea. To the extent that Article 49 of the MTSL purports to regulate such activities, it is inconsistent with international law.

F. Article 54

Article 54 imposes a prior notification requirement of certain foreign ships entering or leaving China’s territorial sea. These ships include (1) submersibles; (2) nuclear-powered ships; (3) ships carrying radioactive materials or other toxic and hazardous materials; and (4) other vessels that may endanger China’s maritime traffic safety as prescribed by Chinese laws or regulations, or the State Council. These classes of ships are further required to hold relevant certificates when passing through China’s territorial sea, take special precautionary measures in compliance with the Chinese laws, regulations, and rules, and accept the instructions and supervision of the maritime administrative agency.

A fundamental principle of international law, reflected in UNCLOS, is that all ships, regardless of flag, cargo, or means of propulsion, enjoy the

32. UNCLOS, *supra* note 3, art. 19.

33. *Id.* art. 40.

34. *Id.* art. 52, 54.

35. *Id.* arts. 56, 87(1)(f), pt. XIII.

right of innocent passage through the territorial sea.³⁶ Submarines and other underwater vehicles may also exercise this right but must navigate on the surface and show their flag.³⁷ Passage is considered innocent so long as it is not prejudicial to the peace, good order, or security of the coastal State.³⁸ Article 19 of UNCLOS contains an inclusive list of activities considered to be non-innocent³⁹—lack of prior notice or consent is not one of those activities.

The coastal State may adopt laws and regulations relating to innocent passage regarding, *inter alia*, safety of navigation, regulation of maritime traffic, preservation of the marine environment, and reduction and control of pollution.⁴⁰ However, coastal State laws and regulations may not impose requirements on foreign ships that have the practical effect of denying, impairing, or hampering the right of innocent passage.⁴¹ Prohibiting transits based on the type of propulsion system or cargo on board is inconsistent with international law. China may require nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances or materials to use designated sea lanes and traffic separation schemes, as well as carry documents and observe special precautionary measures established for such ships by international agreements, but it may not prohibit transits by such ships or require that they provide prior notification before entering the territorial sea.⁴²

Prior notification was discussed during the UNCLOS negotiations. Efforts by a handful of States to include a prior notification or prior consent requirement in Article 21 failed to achieve a majority vote, so the proponents agreed not to pursue the matter as it was clear that there was insufficient support to adopt the proposal.⁴³ Shortly before the conclusion of the negotiations in 1982, the conference president, Ambassador Tommy Koh, confirmed that all ships have a “right of innocent passage through the territorial

36. *Id.* art. 17.

37. *Id.* art. 20.

38. *Id.* art. 19(1).

39. *Id.* art. 19(2).

40. *Id.* art. 22.

41. *Id.* art. 24.

42. *Id.* arts. 22, 23.

43. 2 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 195–99 (Satya N. Nandan & Shabati Rosenne eds., 1993).

sea, and there is no need . . . to acquire the prior consent or even notification of the coastal State.”⁴⁴

G. *Article 52*

Article 52 purports to authorize the maritime administration agency to impose traffic control measures such as suspending navigation, limiting speed, or delimiting traffic control zones in circumstances that impact maritime traffic safety, to include:

- (1) Bad weather and sea conditions;
- (2) A maritime danger or maritime traffic accident that affects navigation;
- (3) Conducting military training, exercises, or other related activities;
- (4) Carrying out large-scale water and underwater activities;
- (5) The navigable density of a specific sea area is close to saturation; or
- (6) Other situations that have a greater impact on maritime traffic safety.

As discussed above, China may temporarily suspend innocent passage in its territorial sea to conduct a military exercise or related activity.⁴⁵ It may not, however, suspend innocent passage for any of the other reasons listed in Article 52. Beyond the territorial sea, China may only declare a temporary warning area to advise ships and aircraft that it is conducting a military exercise that may pose a hazard to navigation and overflight.⁴⁶ It may not, however, exclude air and maritime traffic from the area. Ships and aircraft retain high seas freedoms of navigation and overflight and other internationally lawful uses of the seas in and through these areas subject to the due regard obligation (e.g., a ship or aircraft should not intentionally interfere with the military exercise).⁴⁷

It may be permissible for China to establish speed limitations and delimit traffic control zones in its territorial sea to ensure safety of navigation and regulate maritime traffic, as well as to protect the marine environment, to the extent such measures do not have the practical effect of denying or impairing

44. Quoted in Bernard H. Oxman, *The Regime of Warships Under the United Nations Convention on the Law of the Sea*, 24 VIRGINIA JOURNAL OF INTERNATIONAL LAW 809, 854 n.159 (1984).

45. UNCLOS, *supra* note 3, art. 25.

46. Res. A.706(17), *supra* note 25, ¶ 4.2.1.3.13; Chicago Convention, Annex 15, *supra* note 25, ¶ 5.1.1.1(1).

47. UNCLOS, *supra* note 3, arts. 58, 87.

the right of innocent passage.⁴⁸ However, before imposing such measures beyond its territorial sea, China must first submit the proposal to the IMO for adoption. It may not unilaterally impede high seas freedoms of navigation of foreign-flag vessels.⁴⁹

H. Article 120

Article 120 provides that foreign warships and other government vessels used for non-commercial purposes that violate Chinese laws and regulations while engaged in innocent passage shall be dealt with in accordance with “the relevant laws and administrative regulations.” It is unclear what these laws and administrative regulations entail. Warships and other government ships operated for non-commercial purposes enjoy complete immunity from coastal State jurisdiction.⁵⁰ If a warship engages in a prohibited activity while engaged in innocent passage, the coastal State may only require the warship to leave its territorial sea immediately. The flag State bears international responsibility for any loss or damage to the coastal State resulting from the non-compliance by a warship or other government ship operated for non-commercial purposes with the laws and regulations of the coastal State concerning innocent passage.⁵¹

IV. CONCLUSION

China is once again testing the international community to gauge how it will react to the enactment of yet another maritime law that exceeds the permissible jurisdictional limits of international law, as reflected in UNCLOS. China will undoubtedly use the new law to engage in grey zone operations below the threshold of armed conflict to intimidate its neighbors and further erode the rule of law at sea in the Indo-Pacific region. By using white hulls to engage in malign activities to advance its expansionist objectives within the First Island Chain, China can further solidify its incremental control in the South China Sea, East China Sea, and Yellow Sea while avoiding a kinetic response from its weaker adversaries. The scope of application of the MTSL dovetails neatly with the scope of application of the Maritime Police Law. This synergy will allow China to illegally and unilaterally assert maritime law

48. *Id.* art. 22.

49. *Id.* arts. 58, 86, 87, 90; GPSR, *supra* note 10.

50. UNCLOS, *supra* note 3, art. 32.

51. *Id.* art. 31.

enforcement jurisdiction throughout the waters of the First Island Chain to the detriment of its neighbors and other user States.