South China Sea: US and China's different views

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Last Friday, The Straits Times ran a commentary by Dr Mark Valencia titled "Separating fact from fiction in South China Sea conundrum". Dr Valencia, a maritime policy specialist, is an adjunct senior scholar at the National Institute for South China Sea Studies in Haikou, China. In the article, he highlighted several oft-repeated statements on the South China Sea dispute between China and rival claimants, and gave his take on whether they are accurate or exaggerated. Today, we run a rejoinder from Professor Robert Beckman, director of the Centre for International Law at the National University of Singapore and head of the centre's programme in ocean law and policy.

DR MARK Valencia's recent comment titled "Separating fact from fiction in South China Sea conundrum" has provided much food for thought. However, I believe that some of his points on international law warrant a reply in order to help clarify the facts, as well as fictions about the South China Sea.

First, Dr Valencia seems to agree that the United States is neutral on the issue of which state has the better claim to sovereignty over the disputed islands in the South China Sea. This is correct.The US position is that any claim to sovereignty by any state over features in the South China Sea must be in accordance with international law. Under international law, a claim to sovereignty can be made only to offshore features that meet the definition of an "island", that is, a naturally formed area of land, surrounded by water, which is above water at high tide. Low-tide elevations or submerged features cannot be subject to appropriation.

Second, the writer asserted that the US position on maritime claims by China in the South China Sea is not neutral because the US insists that any claims to maritime jurisdiction in the South China Sea must be from land, and that this implies that any Chinese claim to jurisdictional rights within the nine-dash line is invalid.

The US is likely to have made this statement because none of the claimants has clarified the basis of their claims to maritime jurisdiction in the South China Sea. For example, none of the claimants has stated which features they believe are islands entitled to maritime zones of their own. Also, it is generally agreed that the basis of China's maritime claims in the South China Sea is especially vague.

So when the US asserts that maritime claims must be from land territory, including islands, it is simply repeating the generally accepted principle of international law that "the land dominates the sea" and that claims to rights in maritime space must be made from land territory, including islands.

The inference should not be drawn from this that the US considers the Chinese claim invalid.

Third, the most controversial of Dr Valencia's comments concerns US military activities in the South China Sea, and in particular its maritime surveillance activities in China's claimed exclusive economic zone (EEZ). He rightly wrote that "China has never challenged commercial freedom of navigation".

He went on to say: "China is objecting by word and deed to what it perceives as US abuse of this right and a threat to use force - a possible violation of the United Nations Charter - let alone Unclos (UN Convention on the Law of the Sea).

"The activities of the maritime surveillance aircraft Poseidon P8A just this past August, as well as US Navy ships Bowditch, Impeccable and Cowpens, probably collectively included active 'tickling' of China's coastal defences to provoke and observe a response, interference with shore to ship and submarine communications, abusing the consent regime for marine scientific research, and tracking China's new nuclear submarines for potential targeting."

Dr Valencia was asserting that such actions are an abuse of the consent regime for marine scientific research, an abuse of right under Unclos, and a "threat of the use of force" in possible violation of the UN Charter.

Although Dr Valencia rightly pointed out that the US has not ratified Unclos, it should be noted that the US has recognised Unclos as a codification of customary international law.

The EEZ is a functional maritime zone prescribed by Unclos in which the coastal state enjoys "sovereign rights" for the purpose of exploring, exploiting, conserving and managing the natural resources in and under the water, as well as rights with regard to other activities for the economic exploitation and exploration of the zone.

In the EEZ, other states (including states that are not parties to Unclos) enjoy the freedoms of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea relating to these freedoms. These include uses associated with the operation of ships, aircraft and submarine cables and pipelines.

In doing so, other states must give due regard to the rights and duties of the coastal state when it comes to exploring and exploiting natural resources and other economic activities.

However, the coastal state also has the obligation to give due regard to the rights and duties of other states.

In this case, China's EEZ legislation contains no provisions prohibiting or restricting foreign military activities in its EEZ.

Indeed, Article 11 of China's 1998 EEZ and Continental Shelf Act expressly recognises that any state enjoys freedom of navigation and overflight in the EEZ, as provided in Article 58(1) of Unclos.

The writer alleged that some activities by US vessels (such as the Bowditch) were "an abuse of the consent regime for marine scientific research". This implies that the activities were marine scientific research, which, under Unclos, cannot be carried out in the EEZ of another state without its consent.

Unfortunately, the term "marine scientific research" is not defined in Unclos. There is also a significant difference of opinion between the two states on the interpretation of the Unclos provisions on marine scientific research.

The gap in understanding between the two countries on the issue of marine scientific research is a serious one. If unbridged, it could give rise to serious incidents at sea if Chinese vessels attempt to prevent such activities by US vessels in their EEZ.

Dr Valencia also described America's tracking of Chinese nuclear submarines for the purpose of "targeting". If a vessel is targeted, it is selected for attack. However, if submarines are tracked for the purpose of identifying them and monitoring their movements, it does not reach the level of selecting them for attack.

The tracking of a submarine or the interception of electronic communications does not amount to a threat of force as prohibited by Unclos and Article 2(4) of the UN Charter. Rather, they are normal and lawful military activities, so long as they are conducted outside the territorial sovereignty of the coastal state.

Finally, Dr Valencia suggested that the details of US reconnaissance activities should be revealed and carefully examined by a neutral body to determine if they are "legal" or "friendly", or not.

The legality of such actions could be examined by a court or tribunal if both China and the US agreed to refer the legal question to an international court or tribunal. It seems highly unlikely that either state would even consider this option. The prospect of both China and the US asking a neutral body to determine whether such actions are "friendly" seems even less likely.

What may be more useful would be for both states to enter into negotiations to develop procedures to govern management of incidents at sea, to minimise the risk of a collision or firing incident when the military aircraft or warships of the two states encounter each other in the EEZ.

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