

South China Sea conundrum: US and China's differing views

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Last Friday, The Straits Times ran a commentary by Mark Valencia titled "Separating fact from fiction in South China Sea conundrum". Mr 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 were accurate or exaggerated.

Today, we run a rejoinder from 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.

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 in the South China Sea.

First, Mr 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 only be made 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 asserts 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 statement is likely to have made this statement because none of the claimants have clarified the basis of their claims to maritime jurisdiction in the South China Sea. For example, none of the claimants have 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. 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 Mr 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 that: "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 (United Nations Convention on law of the seas).

"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.

"These are not passive intelligence collection activities commonly undertaken and usually tolerated by many states, but intrusive, provocative and controversial practices."

Mr Valencia is asserting that such actions are an abuse of the consent regime for marine scientific research, an abuse of right under the UN Convention on the Law of the Sea (UNCLOS), and a "threat of the use of force" in possible violation of the UN Charter.

Although Mr Valencia rightly points out that the US has not ratified UNCLOS, it should be noted that the US has recognized UNCLOS as a codification of customary international law.

The exclusive economic zone (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 who 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 cable 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 recognizes 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.

The position of the United States is that marine scientific research refers to activities undertaken in the oceans to expand general scientific knowledge of the marine environment for peaceful purposes which is made publicly available.

The US position is that the collection of data about the marine environment by naval vessels for military purposes in the EEZ of another State is not marine scientific research because it is not carried out to expand general scientific knowledge about the marine environment and it is not made publicly available.

Further, the US argues that its actions are for peaceful purposes so long as they do not amount to a threat or use of force against a State. In addition, the US argues that such marine data collection activities do not prejudice the rights and duties of the coastal State to explore and exploit the natural resources in its EEZ because the information collected is solely for military purposes and is not used for economic purposes.

China's 1996 Regulations on the Management of Foreign-Related Marine Scientific Research state that they apply to survey activities and research on marine environment and marine resources "solely for peaceful purposes". China's definition does not confine marine scientific research to that carried out to expand general scientific knowledge about the marine environment that is made publicly available.

China also seems to give the term "peaceful purposes" a much broader meaning. Therefore, there is a significant difference of opinion between the two States on the interpretation of the provisions in UNCLOS on marine scientific research. This could give rise to serious incidents at sea if Chinese vessels attempt to prevent such activities by US vessels in their EEZ.

Mr 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.

Also, 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, Mr Valencia suggests 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 minimize 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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