The South China Sea: Evolution of or Disregard for International Law?

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By Huy Duong and Tuan Pham

June 25, 2013

This article is a response to The South China Sea: What China Could Say by Mark Valencia, published on May 7, 2013.

Mark Valencia's rejoinder to this response is posted below.

I. Introduction

Huy Duong and Tuan Pham analyze statements that Mark Valencia, in his article The South China Sea: What China Could Say, asserts that China could potentially issue in order to 'clarify its position regarding its maritime claims and actions in the South China Sea.' Huy Duong and Tuan Pham conclude that these statements show that China's stance is at odds with the current regime of international law in a way that cannot be addressed by rhetoric or justified as evolution of international law.

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II. Article by Huy Duong and Tuan Pham

The South China Sea: Evolution of or Disregard for International Law?

In the article "The South China Sea: What China Could Say", Mark Valencia has proposed a number of statements that China could make in justification of its stance in the South China Sea disputes. This article analyses some of those statements and concludes that they show that China's stance is at odds with the current regime of international law in a way that cannot be addressed by rhetoric or justified as evolution of international law.

The Statements

> **As stated in its Law on the Exclusive Economic Zone and the Continental Shelf, China claims historic rights in much of the South China Sea. This claim is symbolized by its nine-dashed line map. This claim includes sovereignty over all the islands, rocks, reefs and banks within this nine-dashed line. It also includes sovereign rights over the living and non-living resources as well as the quality of the marine environment. The extent of its claim, the sharing of resources within it, and the details of the regime itself are subject to negotiation.*

This is actually what China has been saying. However, it is unusual for a country to make a claim without specifying the extent of the claim, the details of the regime claimed and the basis of the claim, and then demand that the other claimants negotiate with it. When countries make claims, they normally have a basis for that claim, and the extent and nature of the claim follow on from that basis. The statement above seems to be a claim in search of basis and definition.

> **The 1982 UNCLOS does not define historic title, historic rights or historic waters. China's claim of historic rights is distinct from the concept of historic waters in that the latter is commonly considered to imply a regime of internal waters that does not permit freedom of navigation and over flight. China has not and will not impede the freedom of navigation for commercial and normal peaceful purposes.*

Both before and after the advent of UNCLOS, international law guarantees the freedom of navigation on the high seas. It is undisputed that this freedom of navigation includes the freedom to conduct military activities that are for normal peaceful purposes. When UNCLOS introduced the regime of the Exclusive Economic Zone, it stipulated that the freedom of navigation in the EEZ is the same as that on the high seas as long as the exercise of that freedom not incompatible with its stipulations on the EEZ, which are about the exploration, exploitation, conservation and management of marine resources, and other economic activities. UNCLOS does not modify the criteria for "peaceful purposes" from those that apply to the high seas. It logically follows that the freedom of navigation in the EEZ includes the freedom to conduct military activities that are allowed on the high seas, except for those that impinge upon the coastal State's sovereign rights and jurisdiction over resources, marine scientific research and environmental protection in its EEZ. This is the view of the US and that of most countries in the world.

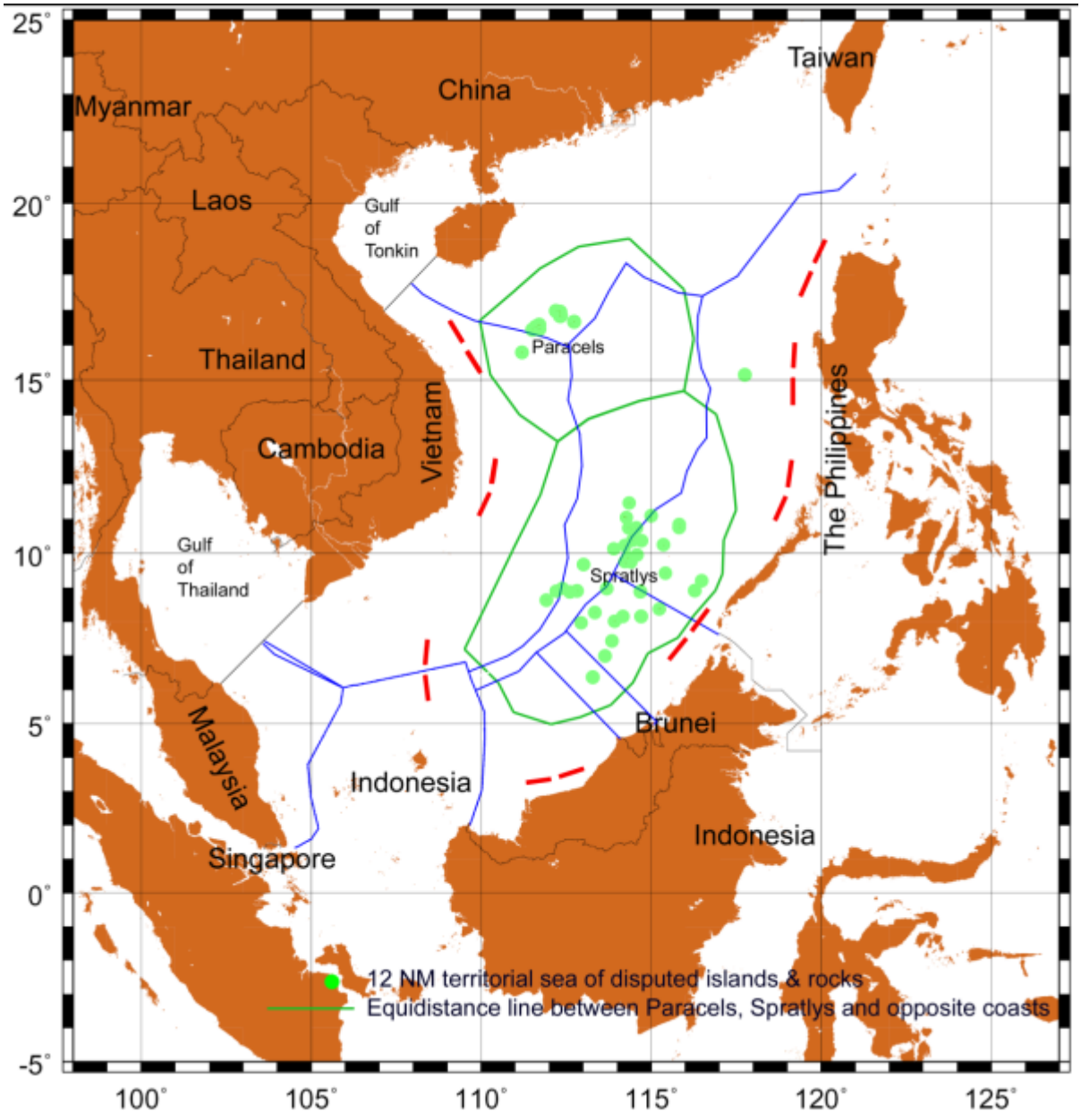
China and a minority of countries, on the other hand, want the freedom of navigation in the EEZ regarding military activities to be closer to the regime prescribed for the territorial sea than to that for the high seas. Effectively, China wants to turn UNCLOS's Exclusive Economic Zone into an exclusive military zone, and this can reasonably be viewed be an infringement of the freedom of navigation.

> **China also reserves its rights under the 1982 UNCLOS to claim territorial waters, continental shelf, extended continental shelf, and EEZs from its sovereign territory within the nine-dashed line.*

It is true that in principle a State has the rights to claim territorial sea, EEZ and extended continental shelf from sovereign or claimed territories.

However, if two countries have mainland coasts that face each other across a sea 200 nm wide, it would be most unreasonable for one of them to claim most of that sea, thus creating a conflict that affects most of that sea, and then to demand that the other give it a share of the resources just off the latter's coastline. In such situations, most countries would only claim rights up to the equidistance lines. There might be disagreements on how the equidistance line is drawn, which would create a narrow strip of conflict area in the middle of the sea. Jurisprudence on maritime delimitation is consistent with this. If one of the two countries' coast is defined by small islands rather than by the mainland, it would be contrary to jurisprudence for that country to even claim rights and jurisdiction up to the equidistance line.

[caption id="attachment_31245" align="aligncenter" width="600"]



The nine-dashed line lies beyond the equisitance lines and thus cannot be justified by maritime zones derived from the disputed Paracels and Spratlys.[/caption]

Given that the South China Sea is a small, semi-enclosed sea, it is absurd for any country to use its rights under UNCLOS to claim rights and jurisdiction up to 200 nautical miles from the Paracels and Spratlys or to claim anything as remotely expansive as the nine-dashed line. Such claims are unreasonable, contrary to international practice, and inconsistent with jurisprudence on maritime delimitation. Such claims put most of the South China Sea in dispute, with disastrous consequences for security, stability and development in the region.

If the Mediterranean countries were to claim up to 200 nm of EEZ, even from the tiniest of islets, that would certainly be an obstacle for regional security and co-operation. For example, if Vietnam were to cite its rights under UNCLOS to claim the Qiongdongnan Basin, that would certainly increase the tensions in the South China Sea.

> **Since maritime boundaries within the nine-dashed line area have not been agreed and the area is in dispute, there should be no unilateral drilling for hydrocarbons. The claimants should enter into interim arrangements of a practical nature such as joint development of resources in disputed areas.*

If that is the case then China should stop unilateral drilling for hydrocarbons in the Qiongdongnan Basin, which is within 200 nautical miles of Vietnam's mainland coast and of the disputed Paracels. Furthermore, it should stop other unilateral activities in the Paracels and its surrounding waters.

Countries cannot make arbitrary and excessive claims and expect others to give them a share of whatever they claim. If the nine-dashed line is used as the boundary of a maritime claim, that claim is patently an arbitrary one. It is excessive because it extends well beyond the equidistance lines between the disputed islands and the surrounding territories, whereas international law of maritime delimitation from jurisprudence would give these islands EEZs that fall far short of those lines.

Further, this argument is mischievous and potentially dangerous, as it may encourage States to make unreasonable territorial claims that create arbitrary "disputed areas" in an attempt to deny other States the right to carry out legitimate activities in a territory. For instance, the United States could lay claim to Hainan and insist that China halt "unilateral activities" in and around this island.

> **China has been consistent in its policy of being willing to negotiate these issues. China has proven its sincerity in negotiating and abiding by conflict management agreements in similar situations such as with Vietnam in the Beibuwan, with Japan in the East China Sea regarding oil and gas, fisheries and scientific research, and with the Republic of Korea in the Yellow Sea regarding fisheries. China has also offered to fund cooperative activities in the South China Sea without prejudice to any state's claims to the area.*

While the Paracels are clearly disputed territories, China has never been prepared to negotiate any issue regarding them with Vietnam. China has never been prepared to discuss any co-operative activity with Vietnam in the waters around the Paracels. In fact, China has attempted to drive Vietnamese fishermen out of the area, where they have traditionally fished for many generations.

One must ask whether China is sincere when it says it is willing to negotiate.

> **China believes that the United States, despite its claims to the contrary, is not neutral in this matter. The U.S. insists that China must base its claims solely on the 1982 UNCLOS although the U.S. itself has not ratified it. The U.S. insists that any claims to maritime jurisdiction in the South China Sea must be from land implying that China's claim to historic rights within the nine-dashed line is invalid. The U.S. also insists that China negotiate these issues multilaterally with a bloc of claimants and non-claimants. China believes that settlement of the disputes should be negotiated by 'sovereign states directly concerned' as stipulated in the 2002 ASEAN-China agreed Declaration of Conduct in the South China Sea (DoC) and that non-regional parties should not be involved. China also urges the ASEAN claimants to resolve relevant outstanding issues between themselves first.*

The US's insistence that any claims to maritime jurisdiction must be from land territories (which include islands) is based on the principle of "the land dominates the sea" from customary international law. As such, the US can rightfully assert that principle, regardless of whether it has ratified UNCLOS or not. As a country that has ratified UNCLOS, which codifies that principle, China must certainly abide by it.

It is true that the first avenue for settling disputes is negotiation between the claimants. However, while China rejects legal arbitration, it refuses to settle the question of sovereignty by negotiation as well, so China's stance means that the disputes cannot be settled in a peaceful manner. It does not take much imagination to guess which country stands to gain most from that situation.

> **Regarding creation, evolution and interpretations of international law, it should be borne in*

mind that the U.S. itself unilaterally initiated the concept of "extended maritime jurisdiction" via the 1945 Truman Proclamation on the Continental Shelf. It justified doing so by "the long range world-wide need for new sources of petroleum and other minerals"; that "efforts to discover and make available new supplies of these resources should be encouraged"; and that " recognized jurisdiction over these resources is required in the interest of their conservation and prudent utilization when and as development is undertaken."

It is true that international law is continually created, it continually evolves. However, after making the Truman Declaration the US did not, and does not, claim most of the Gulf of Mexico and the Caribbean Sea. It did not, and does not, make claims against Canada that extend way beyond the equidistance line. In making the Truman Declaration, the US pushed its claims into the high seas, not waters which were regarded by international law at the time as belonging to its neighbours. Furthermore, the United States did not pursue its claims under the Truman Declaration using force or threats of using force but through international negotiations and other peaceful means which led to the adoption of the 1958 Convention on the Continental Shelf.

When China makes maritime claims up to the nine-dashed line, it claims most of the South China Sea, pushing its claim into maritime space that in all likelihood belong to other countries according to contemporary international law. Furthermore, it pursues its claim using force and coercion. Inter alia, it has threatened to ram the Philippines's survey ship in the Reed Bank area in 2011, attempted to cut the seismic cables of Vietnam's survey ships in 2011 and 2013, sought to coerce international petroleum companies into pulling out of contracts with Vietnam and the Philippines, and has fired on Vietnamese fishing boats.

It is true that international law is subject to interpretation, and interpretation can be subjective. The international courts exist to provide an avenue for objective interpretation of international law. The US has on previous occasions subjected its territorial claims to the international courts, in the disputes with the Netherlands over Palmas Island, and in the dispute with Canada in the Gulf of Maine. Among South East Asian countries, Cambodia, Thailand, Indonesia, Malaysia and Singapore have also let the international courts interpret international law regarding territorial disputes.

China, on the other hand, makes arbitrary claims, interpret international law in its own subjective ways, and reject the option of allowing the international court to apply international law to asses it claims.

* *China maintains that other claimants are violating the 2002 DoC by conducting 'activities that would complicate or escalate disputes and affect peace and stability' such as occupying or building structures on disputed features, unilaterally exploring for petroleum, internationalizing the issues, conducting military exercises with outside powers, and violating China's fisheries laws. China urges other claimants to abide by the DoC and refrain from such activities.*

This statement is untenable in three aspects. First, China itself occupies and builds on disputed structures, unilaterally explores for petroleum in the northern part of the South China Sea, even within the 12-nautical-mile territorial sea of the disputed Paracels, unilaterally imposes its national laws on citizens of other States in areas of overlapping claims, and uses violence against Vietnamese fishermen in disputed areas. Second, no littoral state, except China, has conducted military exercise in areas of overlapping claims. Third, the DOC does not forbid military exercises in undisputed areas with outside powers.

The two biggest complications for the disputes are China's refusal to discuss the Paracels dispute with Vietnam and the nine-dashed line, which expands China's claim to most of the South China Sea, well beyond the maritime space that can reasonably be said to appertain to the disputed Paracels

and Spratlys.

The Philosophical Justification

At the end of the proposal, Mark Valencia raised the question of China challenging the existing world system and contemporary international law,

> *Of course the legal purists who think international law is absolute and unchanging and are wedded to the status quo –which favors Western powers—will criticize this position. But the reality is that 'international law is the arms of geopolitics' and its evolution and interpretation will be influenced by rising nations –just as they have been influenced by today's 'global leaders'. For China such a statement would indicate it has "risen" and is ready to challenge the existing world system and contemporary interpretations of international law—if necessary to protect its interests.*

One does not have to be a legal purist to see that the rule of law is preferable to the rule of arms. For all their limitations international legal mechanisms including UNCLOS have helped resolve peacefully many maritime disputes which in the old days would have resulted in armed conflicts. It must also be remembered that the present UNCLOS prevails in the world not because it was imposed by the Western powers, but because it has received overwhelming support from countries large and small.

It is a mistake to attribute legal objection to China's nine dotted line to a belief that international law is absolute and unchanging. The law of the sea has evolved from the concept of a 3-nautical mile territorial sea to 12 nautical mile, to the rights of the coastal state over its continental shelf, and to the 1982 UNCLOS. As world population and economic demands increase, and as technology advances, the law of the sea will continue to evolve through new treaties and jurisprudence. However, what China pursuing in the South China Sea is very different from this evolution of international law. It is seeking to expand its rights, based on the flimsiest of evidence, into what current international law would most likely regard as the EEZ of Brunei, Indonesia, Malaysia, the Philippines and Vietnam. That is not an evolution of current international law but complete disregard for it.

If it is true that present international law favours Western powers, then it's hard to see how changing it to suit China's ambition will improve this situation, as it will greatly disadvantage China's smaller neighbours whose rights are at present guaranteed by international law. On the contrary, if China gets more than its fair share of the sea, Western and other powers will be tempted to follow suit, carving up the world's oceans and seas at the expense of smaller countries.

International law must treat all countries equally, so that a superpower does not get better treatment than any other country. Thus, if the law is changed to allow for the concept of historic rights as it is understood by China, then many -- perhaps all -- coastal countries will be tempted to make historical claims that similarly overlap with others, resulting in a chaotic and dangerous situation. That would surely be a retrograde step that would be unacceptable to any peace-loving person.

The way for a rising China to challenge the existing world system and contemporary interpretation of international law is to shape the evolution of the law of the sea through the mechanisms available to the signatories of UNCLOS, on multilateral platforms, and though the international courts, not by making unilateral claims against what contemporary international law would regard as the EEZ of its neighbours, and not by using its new-found powers to coerce them into acquiescence.

In his article “The South China Sea: the evolving dispute between China and her maritime neighbours”, Robert Beckman summarised the situation regarding China’s maritime claims succinctly when he wrote “Therefore, unless China is willing to bring its maritime claims into conformity with UNCLOS and limit its claims to maritime zones measured from islands, it will continue on a legal collision course with its ASEAN neighbours.”

III. Rejoinder by Mark Valencia

General Comments

1. In the title of my piece I purposely used the word “COULD” (to indicate a possibility) not “SHOULD.” Mr. Huy Duong and Mr.Tuan Pham seem to be interpreting the word as “should” and attacking the piece because they have antipathy towards China.
2. These issues and their resolution require open minds – not an anti-China polemic. Their article states in the first paragraph that “China’s stance is at odds with the current regime of international law in a way that cannot be addressed by rhetoric or justified as evolution of international law.” The authors seem to have approached their analysis from this premise and perspective and then set out to support it.

Specific Comments

1. Contrary to the authors assertion, China has not clarified its claim as stated in the first paragraph quoted from my article—certainly not in the detail of the last two very important sentences. The authors need to study these issues and China’s statements more closely and carefully before making such public assertions.
2. The authors state “…the freedom of navigation in the EEZ includes the freedom to conduct military activities that are allowed on the high seas,” “…except for those that impinge upon the coastal state’s sovereign rights and jurisdiction over resources, marine scientific research and environmental protection in the EEZ.” Yes indeed, but there is strong, legal, political and operational disagreement over the meaning of these terms, including normal peaceful purposes (please see Guidelines for Navigation and Overflight in the Exclusive Economic Zone: A Commentary, EEZ Group 21, Ocean Policy Research Foundation, Tokyo, 2006.)
3. China has never stated that it “wants to turn UNCLOS’s Exclusive Economic Zone into an exclusive military zone…” To state such indicates a serious misunderstanding of China’s position (Please see above reference).
4. The authors state that “…most countries would only claim rights up to the equidistance lines.” This is simply contrary to world practice as well as the history of claims in the South China Sea – by all claimants, including Vietnam. Of course they “should” claim only to the ‘equidistance line’, but they often do not do so.
5. The Paracels are perhaps one of the best examples of the “real world” versus that of international law ‘purists.’ China's control of the Paracels is a fait accompli. This is not going to change – at least in our lifetimes.
6. Sovereignty issues including that of the Paracels are very different legally and politically from conflicting claims to maritime space and resources. But the authors conflate the issue of sovereignty over territory (islands) with issues of conflicting claims to maritime jurisdiction.

7. The so-called ‘mischievous and potentially dangerous’ “argument” is based on the judgement in the ARBITRATION UNDER ANNEX VII OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, REPUBLIC OF GUYANA v. REPUBLIC OF SURINAME VOLUME I 1 SEPTEMBER 2006 .
8. The authors state that “The United States did not pursue its claims under the Truman Proclamation using force or threats of using force…” That is not the point—rather it is that the U.S. unilaterally created new law.
9. The authors’ use of the U.S. as an example of a country which uses international courts for interpretation of international law, as well as international negotiations and other peaceful means to resolve conflicts is naïve. The US mining of Nicaragua’s harbor, its withdrawal from the ICJ when challenged, its refusal to join the ICC, its use of chemical warfare in Vietnam (Agent Orange) and its numerous invasions of and drone/missile attacks on other countries some violating international law are but a few examples of why this is nonsense. Criticizing China for its actions in the South China Sea while holding up the US as a shining example is—in this context-- like ‘the pot calling the kettle black’.
10. China has violated the DOC—as have other claimants.
11. The authors state that “No littoral state except China, has conducted military exercises in areas of overlapping claims.” This is not true. All littoral countries including Vietnam have conducted military exercises in areas claimed by others, particularly China.
12. The authors state “as world population and economic demands increase, and as technology advances, the law of the sea will continue to evolve through new treaties and jurisprudence.” I agree but I would add “state practice” as a contributor to the evolution of law of the sea. In fact unilateral acts like the Truman Proclamation, the Latin American claims out to 200nm for fisheries and many other unilateral actions contributed to customary international law. China may try to do the same—realistically this is to be expected.
13. I would add to the authors’ closing the quote from Robert Beckman that in addition to a “legal collision” there is likely to be a political and military collision if all parties insist on inflexible nationalistic positions , rhetoric and mindsets such as that apparent in the authors’ article.

IV. NAUTILUS INVITES YOUR RESPONSES

The Nautilus Peace and Security Network invites your responses to this report. Please leave a comment below or send your response to: nautilus@nautilus.org. Comments will only be posted if they include the author’s name and affiliation.

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