If a country cites international law to justify its position while avoiding having that position tested in court, such use of international law is just rhetoric, and does not deserve support from scholars.

In the article “Separating fact from fiction in South China Sea conundrum”, Dr Mark Valencia decries “a veritable fountain of government pronouncements, propaganda, and biased analyses” and the conflation of information with misinformation, and he claims to “separate fact from fiction when it comes to several oft-made statements.” Unfortunately his article contains a number of flaws that could contribute to the very problems he is trying to address.

**US pivot**

One of the allegedly oft-made statements that Dr Valencia was refuting was that “the US pivot or rebalance to Asia is enhancing security and stability in the region.” In actual fact, no government or serious analyst has made such a claim, and neither is the statement oft-made in the media. In any case, the US pivot or rebalance is hardly past gestation, and not even its most ardent proponents and supporters can say that it is already enhancing security and stability in the region. Nevertheless, it seems that Valencia is using this statement as a lead-in for putting forward the view that the US pivot has contributed to instability in the region, and it is still worth analysing his view.

Valencia argues that

*China is convinced that the US is trying to draw ASEAN or some of its members together with Australia, Japan and South Korea into a soft alliance to constrain if not contain it. China alleges that tacit US support has emboldened the Philippines and Vietnam to challenge China’s claims and actions.*

*Whether correct or not, the contrasting perceptions have enhanced rivalry and tension in the region. There is an honest difference of opinion regarding who is reacting to whom and who has the “right” or “obligation” to be active there.*

*But there is little doubt that the US pivot has contributed to instability in the region.*

The fact is that stability and security in region started to deteriorate in 2007 when China put pressure on BP to withdraw from petroleum projects with Vietnam in the Nam Con Son Basin near the southern end of the South China Sea, a long way from the disputed Spratlys, and then in the same year mooted the establishment of Sansha Prefecture, which was to include Pratas Island and the disputed Paracel Islands and Spratly Islands. The situation got worse in 2008 when China put pressure on Exxon Mobil to withdraw from another petroleum project with Vietnam, and reached a peak in 2009 when it confronted the US Navy surveillance ship Impeccable, unilaterally enforced a fishing ban in the
South China Sea, and submitted a map with the nine-dash line to the international Commission on the Limit of the Continental Shelf. A series of incidents followed in the next few weeks, including

- In March 2011 a Chinese maritime surveillance ship threatened to ram a seismic survey ship operating on behalf of the Philippines in the Reed Bank area,

- In June 2011 Chinese maritime surveillance ships sabotaged the seismic survey equipment being towed by the Vietnamese ship Binh Minh 2, and Chinese fishing boats attempted to do the same against the Viking II geological survey ship at another location, both within the 200 nautical mile EEZ generated by Vietnam’s mainland coast.

Serious tensions and instability in the region had thus existed prior to the US pivot from Afghanistan and Iraq to Asia-Pacific, which was proclaimed by US State Secretary Hillary Clinton in October 2011.

Therefore China’s view that its “assertiveness” is a reaction to the US pivot cannot be an honest opinion as China has the greatest maritime capabilities of all the claimants, claims all of the land features in the South China Sea (along with Vietnam and Taiwan), and maintains ambiguity regarding the meaning and legal status of the of the “nine-dashed line,” U.S. policy has responded to Chinese actions more than those of any other claimant.

Valencia refutes the statement “China’s claims are not illegitimate and even absurd” by considering it to be the root of most of the maritime incidents. Under UNCLOS’s Articles 74 and 83’s requirement that the claimants refrain from such activities in disputed areas is clearly legitimate. Unfortunately for the South China Sea, the cynical strategy described in the previous paragraph is what China is employing. It is essentially putting itself in a position to be able to claim that it does not violate any other nation’s claims. Anti-China policies have been promulgated by nations throughout the region in order to prevent others from carrying out such actions.

Chinese assertions

Valencia attempts to refute the statement “China’s assertion regarding its maritime claims has created instability” by making the other claimants look as bad as China:

There are also International Court of Justice preents that should discourage disputants from undertaking unilateral activities that would alter the nature of disputed areas.

Another DOC provision qualifies the parties to resolve their differences "through friendly consultations and negotiations by sovereign states directly concerned”.

China has indeed been increasingly aggressive in implementing its claims, but other claimants have also undertaken unilateral activities on and off features and in maritime areas claimed by China. Instead, China maintains that the Philippines have violated both DOC provisions and that Vietnam is on the verge of doing so.

Concerning sovereignty disputes over islands, Valencia suggests. Matt Taylor Fravel, an expert on China, offers a more accurate view.

Chinese claims

Valencia refutes the statement “China’s claims in the South China Sea are illegitimate and even absurd” by considering it to be the root of most of the maritime incidents. Under UNCLOS’s Articles 74 and 83’s requirement that the claimants refrain from such activities in disputed areas is clearly legitimate. Unfortunately for the South China Sea, the cynical strategy described in the previous paragraph is what China is employing. It is essentially putting itself in a position to be able to claim that it does not violate any other nation’s claims. Anti-China policies have been promulgated by nations throughout the region in order to prevent others from carrying out such actions.

Concerning jurisdictional disputes over maritime space, Valencia argues that “China has never specified what it claims since China has not specified or clarified its claims, it cannot be said that those claims are illegitimate or absurd. Instead, while the requirement itself is fair, its application to a given area is only fair if that area has been objectively determined to be subject to a legal dispute. If the claimants disagree on whether an area is subject to a legal dispute, then only the international courts and tribunals should be relied on to objectively make this call.

The claimants refrain from unilateral petroleum activities in disputed areas still be applied to this area? If so then China’s argument is false. Consider a scenario in which a country claims an area regardless of the fact that area has been objectively determined to belong to another country. Therefore, on the surface it looks as if China’s position is reasonable. However, a deeper look shows that China’s strategy is to create a dispute in the area and use that to prevent others from carrying out such activities.

It is the root of most of the maritime incidents. Under UNCLOS’s Articles 74 and 83’s requirement that the claimants refrain from such activities in disputed areas is clearly legitimate. Unfortunately for the South China Sea, the cynical strategy described in the previous paragraph is what China is employing. It is essentially putting itself in a position to be able to claim that it does not violate any other nation’s claims. Anti-China policies have been promulgated by nations throughout the region in order to prevent others from carrying out such activities.

It is the root of most of the maritime incidents.
It has claimed that its fishermen have traditional fishing rights in Indonesia’s EEZ. In one incident, a Chinese Maritime Surveillance ship trained its gun on an Indonesian coast guard ship, forcing the latter to withdraw.

It claims James Shoal.

It has challenged the Philippines' petroleum activities in the Reed Bank area, including threatening to ram a geological ship operating on behalf of the Philippines.
South China Sea Disputes: Facts or Fiction?

Written by vuquangtiep
Thursday, 06 November 2014 04:06

In trying to refute the statement "The US is neutral regarding maritime claims in the South China Sea", Valencia argues that

Although it has not ratified the 1982 United Nations Convention on the Law of the Sea (UNCLOS), the US insists that China must base its claims only on land. This applies that any Chinese claim to jurisdictional rights within the nine-dash line is invalid. This position is neutral and in complete accord with international law.

The US also insists that China negotiate these issues multilaterally with a bloc of claimants - Asean - that includes non-substantive, and that it cease its aggressive actions there. The US may be neutral as to the sovereignty claims but it is decidedly not neutral regarding the jurisdictional claims.

Claims to maritime space must be derived from claims to land and insular features.
Disputes over territorial and maritime claims must be resolved without force or coercion.
Support for the agreement of a full code of conduct.
Disputes over territorial and maritime claims must be resolved without force or coercion.

Although the US has not ratified UNCLOS, it takes the correct view that certain provisions of UNCLOS are codification of customary international law. The fact that the US has not ratified UNCLOS does not mean it does not have the legal or moral right to make valid objections. In addition, the US insists is no way suggests that any Chinese claim to jurisdictional rights within the nine-dash line will be invalid, as insular claims. It simply means that any claim to jurisdictional rights in the South China Sea must be derived from land and insular territory. This principle "the land determines the sea" is codified in customary international law. The fact that the US has not ratified UNCLOS does not mean it does not have the legal or moral right to make valid objections. In addition, the US insists is no way suggests that any Chinese claim to jurisdictional rights within the nine-dash line will be invalid, as insular claims. It simply means that any claim to jurisdictional rights in the South China Sea must be derived from land and insular territory. This position is neutral and is complete accord with international law.
If China does not intend to make claims to maritime space and does not intend to resolve the disputes with force or coercion, there is no reason to regard the US's position as biased against it. Furthermore, US's position does not indicate any intention that China's claimable maritime rights and interests with non-claimants, or with ASEAN as a bloc.

It is thus that appearing a code of conduct for the South China Sea would in open negotiation between China and ASEAN, as the US only expresses support for it, it does not insist that the two sides negotiate to reach an agreement. In addition, a code of conduct for the South China Sea has wider scope than just the territorial and maritime disputes, so it is necessary for ASEAN countries that are not parties to these disputes to participate in the negotiation.

### Threat to navigation

Valencia's argument on this topic has been discussed by Robert Beckman, an expert on international law regarding the South China Sea disputes in the article "South China Sea: US and China's different views". In this conundrum, legal scholars such as Dr Valencia have a privileged position. Their knowledge of jurisprudence and international law makes them well placed to offer a voice of reason by encouraging the parties to accept the most authoritative interpretation possible: that by a relevant international court or tribunal. This is critical in the case of disputes over islands, which are often the subject of overlapping claims and political tensions. Legal scholars can provide a valuable perspective by offering objective interpretations of international law and helping to resolve disputes through peaceful means.

Regarding the disputes over islands, these legal scholars could call on the countries involved to have the sovereignty over these islands tested in court. The value of international law lies in its ability to resolve disputes in a neutral and objective manner. When legal scholars from different countries are called upon to provide opinions on the issue, they can offer a fresh perspective that can help to bridge differences and promote understanding. This is especially true in the context of the South China Sea, where disputes over islands have been a major source of tension.

China and its supporters can also say that China is defending what it sees to be its rights. So which side is correct? It is a fallacy and patronising to suggest that the US's presence has egged Vietnam and the Philippines on. Countries are capable of exercising their sovereignty independently of external influence. They will have known that Vietnam, the Philippines, Malaysia, and Singapore have gone to court over Pedra Branca Island, Middle Rock and South Ledge. Therefore, regarding the jurisdictional disputes over maritime space, legal scholars can thus offer a voice of reason by encouraging the parties to accept the most authoritative interpretation possible: that by a relevant international court or tribunal.

Brunei and Indonesia have all accepted this dispute settlement procedure, while China has rejected it to the maximum possible extent, so in principle an objective interpretation and application of the most relevant articles of UNCLOS to the maritime dispute impossible. In this conundrum, legal scholars such as Dr Valencia have a privileged position. Their knowledge of jurisprudence and international law makes them well placed to offer a voice of reason by encouraging the parties to accept the most authoritative interpretation possible: that by a relevant international court or tribunal. This is critical in the case of disputes over islands, which are often the subject of overlapping claims and political tensions. Legal scholars can provide a valuable perspective by offering objective interpretations of international law and helping to resolve disputes through peaceful means.

In this topic Valencia discusses the US-China relationship and its role in stability or instability in the South China Sea. He argues that the US's presence is stabilising in nature, providing a counterweight to China's assertiveness. Valencia's argument is that the US is acting as a mediator or a balancing power, helping to prevent the situation from escalating. Valencia's argument on this topic has been discussed by Robert Beckman, an expert on international law regarding the South China Sea disputes in the article "South China Sea: US and China's different views". In this conundrum, legal scholars such as Dr Valencia have a privileged position. Their knowledge of jurisprudence and international law makes them well placed to offer a voice of reason by encouraging the parties to accept the most authoritative interpretation possible: that by a relevant international court or tribunal. This is critical in the case of disputes over islands, which are often the subject of overlapping claims and political tensions. Legal scholars can provide a valuable perspective by offering objective interpretations of international law and helping to resolve disputes through peaceful means.

The solution in the Convention text is very complicated. Nowhere is it clearly stated whether a third state may or may not conduct military activities in the EEZ. The general understanding that the text we negotiated and agreed upon would permit such activities to be conducted.

### ASEAN unity

Regarding the territorial disputes, it is well known that Vietnam, the Philippines and Malaysia all accept UNCLOS's dispute settlement procedures, which is an encouraging sign. They have shown a willingness to resolve disputes through peaceful means. However, China has rejected these procedures to the maximum possible extent, so in principle an objective interpretation and application of the most relevant articles of UNCLOS to the maritime dispute impossible.

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