

China and 'might makes right' at sea

By **ROBERT C. BECKMAN**
FOR THE STRAITS TIMES

THE main theme of Mr Mark Valencia's commentary published in *The Straits Times* last Saturday is that if the United States Navy exercises rights of navigation and overflight in the waters surrounding the reefs on which China is constructing artificial islands through reclamation, the US will be engaging in "gunboat diplomacy".

He also argues that a more "peaceful and civil option" would be for the US to ratify the United Nations Convention on the Law of the Sea (Unclos) and use its dispute settlement mechanisms to resolve the legal issues relating to navigation and overflight, as this approach would be preferable to the "might makes right" principle and the precedent it sets.

Mr Valencia fails to mention that in January 2013, before China started its massive reclamation works on the reefs, the Philippines instituted a case against China under the Unclos dispute settlement mechanism. The Philippines requested that the Unclos Arbitral Tribunal rule on the legal status of the reefs occupied by China, as well as on the rights and jurisdiction of China in the waters surrounding them.

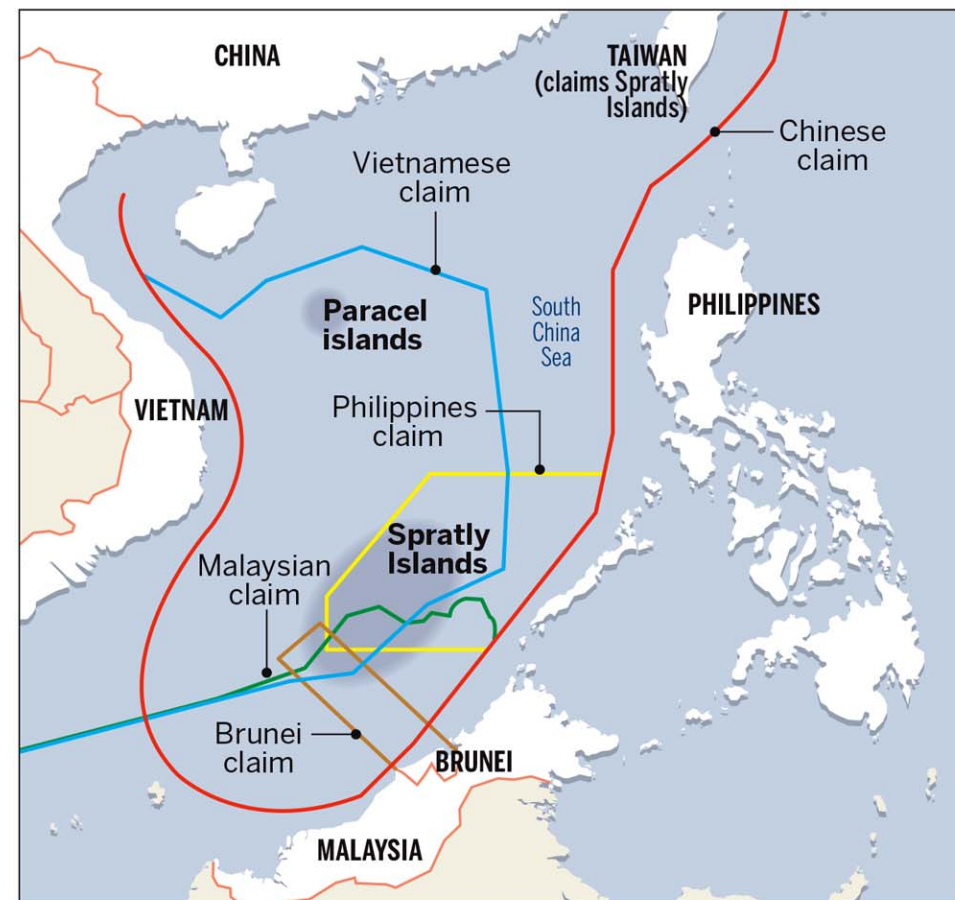
Unfortunately, rather than accepting this option to resolve the dispute in accordance with Unclos, China refused to participate in the case before the arbitral tribunal. Instead, it adopted a policy of non-appearance and non-participation, and began undertaking large-scale reclamation works on the very features whose status is in dispute in the case.

The reclamation works have increased tensions in the South China Sea and raised concerns on whether China's actions are in violation of its obligations under Unclos to protect and preserve the marine environment. Also, it can be argued that because China is undertaking large-scale reclamation works to turn small disputed reefs into large artificial islands, it is China that is pursuing a policy of "might makes right" in the South China Sea.

Several of Mr Valencia's comments on the nature of China's claim over the reefs also require a response. First, he states that China insists it has sovereignty over the features in question and that it has the right to do as it pleases on and with its own territory. However, he also states that three of the reefs (Hughes Reef, Mischief Reef and Subi Reef) are not above water at high tide. If these reefs are not "islands" as defined in Unclos, that is, naturally formed areas of land surrounded by and above water at high tide, they are not capable of being subject to a claim of sovereignty. They are either "low-tide elevations" or "artificial islands", which are not entitled to any maritime zones of their own, but only to a 100m safety zone. Therefore, any state could exercise freedom of overflight at the reefs and freedom of navigation in their surrounding waters.

Mr Valencia also correctly

Disputed claims in the South China Sea



Source: AFP
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states that it is not even clear what jurisdiction China claims from the features it is "reclaiming". He then asserts that three of the features on which China is undertaking reclamation works – Fiery Cross Reef, Gaven Reefs and Johnson South Reef – do generate a 12 nautical mile (nm) territorial sea. This is presumably because they meet the definition of an island in Unclos, that is, they are naturally formed areas of land surrounded by and above water at high tide.

Mr Valencia's statement on the status of the features is not entirely consistent with the statement of claim of the Philippines in its case before the arbitral tribunal. In its statement of claim, the Philippines lists Gaven Reefs, together with Hughes Reef, Mischief Reef and Subi Reef, as a feature that is below water at high tide and not capable of a separate claim of sovereignty. It also states that in addition to Johnson South Reef and Fiery Cross Reef, China occupies another reef that is an

island above water at high tide – Cuarteron Reef.

Although those three reefs occupied by China in the Spratly Islands are in principle entitled to a 12nm territorial sea because they meet the definition of an island, China in fact has not officially claimed a 12nm territorial sea from any features in the Spratlys. China's national legislation states that it claims a 12nm territorial sea from its officially declared baselines. It has declared baselines along its mainland coast and around the Paracel Islands and Diaoyu Islands. However, it has not declared any baseline around any island in the Spratlys.

Even if three of the reefs occupied by China are islands entitled to a 12nm territorial sea, it would be very difficult for China to claim a 12nm territorial sea from these reefs for several reasons.

First, Vietnam and the Philippines also claim sovereignty over the same reefs and are likely to challenge China's claim to sovereignty and a 12nm territorial sea. Second, some of the reefs occupied by China are located less than 12nm from islands or reefs occupied by other claimants.

For example, Johnson South Reef is less than 4nm from Collins Reef, which is occupied by Vietnam, and less than 12nm from Sin Cowe Island, also occupied by Vietnam. Also, Cuarteron Reef is less than 12nm from East Reef, again occupied by Vietnam.

Therefore, if China were to attempt to regulate passage near these islands and overflight above them, it would significantly in-

crease the risk of an incident not only with the US, but also with Vietnam and the Philippines.

The claimant states have occupied more than 40 tiny features in the Spratly Islands. Sovereignty over all of the occupied features is in dispute and the occupied features are located very close to one another. Any attempt to enforce sovereignty in the airspace above these features and in waters adjacent to them is certain to increase the risk of an incident that is in no state's interest. Therefore, Mr Valencia's focus on the actions of the US – rather than those of the claimant states – is misplaced.

To minimise the risk of incidents at sea, the claimant states should agree to respect a safety zone of 1nm to 3nm around all the occupied features. The claimant states should also agree that all states may exercise freedom of navigation and overflight at the Spratly Islands until such time as the underlying sovereignty issues are resolved and maritime boundaries are delimited. They should also agree that these "provisional arrangements" are "without prejudice" to the sovereignty claims over the islands and to the delimitation of maritime boundaries in the waters surrounding them.

Provisions to this effect should be included in the code of conduct being negotiated between Asean and China.

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