



The USS Dewey in the South China Sea last month. A US official said the USS Dewey last week “engaged in normal operations by conducting a manoeuvring drill inside 12 nautical miles of Mischief Reef”. PHOTO: AGENCE FRANCE-PRESSE

Better late than never

Trump administration’s first freedom of navigation operation in the South China Sea is a key indicator of US commitment to the region

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For The Straits Times

Pundits have been keeping a close eye on if, when, and how the Donald Trump administration conducts a freedom of navigation operation near disputed features in the South China Sea. The willingness to conduct the operations signals United States commitment to upholding international law, particularly maritime rights vested under the United Nations Convention on the Law of the Sea (Unclos). More broadly, it is an important indicator of US commitment to the region.

In the last year of the Obama administration, one such operation per quarter was conducted and, even then, this was

criticised by some as too few.

Allies and partners in the region and beyond were growing increasingly anxious when, four months into the Trump administration, no freedom of navigation operation in the South China Sea had been conducted. This led to questions about whether this administration would overlook the South China Sea in exchange for China’s cooperation elsewhere, such as on North Korea.

Recent reports of the US conducting a freedom of navigation operation within 12 nautical miles of Mischief Reef in the Spratlys last Wednesday ended months of speculation. A US official, “speaking on condition of anonymity”, highlighted that the “USS Dewey engaged in normal operations by conducting a manoeuvring drill inside 12 nautical miles of Mischief Reef”. Some reports further specify

that the vessel zig-zagged within 12 nautical miles of Mischief Reef and at one point conducted a “man overboard” drill.

PASSAGE RIGHTS UNDER UNCLOS

Unclos specifies the passage regime that applies in different maritime zones.

Land territory, including “islands”, is entitled to a 12 nautical-mile territorial sea. Within the territorial sea, a user state is entitled to exercise “innocent passage”. There is no need to notify or seek authorisation from the coastal state to exercise this right. Passage, however, must be “continuous and expeditious” and must refrain from activities listed under Unclos considered to be prejudicial to the “peace, good order or security” of the coastal state, such as military exercises and reconnaissance activities. A “man

overboard” exercise is not consistent with the rules on innocent passage.

Outside the 12 nautical-mile territorial sea, a user state is entitled to exercise freedom of the seas, an extensive basket of rights which includes freedom of navigation and overflight. But a user state must have due regard for the economic rights of a coastal state within a 200 nautical-mile exclusive economic zone from land territory.

Freedom of the seas is also understood by most members of the international community as including the right to conduct military exercises and reconnaissance activities.

FREEDOM OF NAVIGATION OPS UNDER TRUMP ADMINISTRATION

When a US official describes the USS Dewey as conducting “normal operations” and a “manoeuvring drill”, the implication is that the United States is not asserting the more limited right of innocent passage through the territorial sea.

Rather, it is asserting freedom of the seas, which is a right enjoyed in the high seas and in the exclusive economic zone outside of a territorial sea generated from land territory.

This is significant. If the USS Dewey had exercised “innocent passage”, it would be implicitly recognising that Mischief Reef is an island entitled to a territorial sea.

The latest freedom of navigation operation is thus consistent with the arbitral tribunal’s finding last July in the Philippines case against China that Mischief Reef is, in its natural condition, a low-tide elevation that generates no territorial sea or exclusive economic zone. While China has undertaken extensive land reclamation and construction activities on the reef, the legal position that it is not entitled to any territorial sea or exclusive economic zone remains unchanged.

There are no mechanisms by which to enforce the tribunal’s award in the Philippines case against China. But freedom of navigation operations that assert maritime rights consistent with the award’s findings on the status and maritime entitlements of features in the Spratlys can indirectly support the award.

More generally, the regular conduct of such operations,

consistent with international law, will help to curtail any attempts by China to assert de facto control over the South China Sea.

CHINA’S RESPONSE

China raised several objections to the latest operation. First, Beijing decried the United States as undermining “China’s sovereignty and security interests”. Yet, as the tribunal confirmed, China can have no sovereignty over low-tide (or submerged) features located in another state’s exclusive economic zone and continental shelf. Mischief Reef is located in the Philippines’ exclusive economic zone and continental shelf.

Second, Beijing objected to the USS Dewey entering “the adjacent waters of the relevant islands and reefs in China’s Nansha Islands without the permission of the Chinese government”. However, even if Mischief Reef were entitled to a territorial sea, which the tribunal made clear is not the case, a warship has a right to innocent passage without prior authorisation.

Third, China’s Foreign and Defence ministries have hurled a litany of complaints against freedom of navigation operations: “wrongdoing”, “provocative actions”, “showing force”, “boosting regional militarisation” and “misconduct”.

However, the view of the US and the majority of countries is that such operations are no more than a legitimate, peaceful assertion of a legal position, so that rights are not lost in law or in practice over time. Moreover, the International Court of Justice in the Corfu Channel case supports the right to conduct exercises for no other reason than to affirm a right.

REGIONAL IMPLICATIONS

With the Trump administration demonstrating a willingness to conduct freedom of navigation operations, many countries in the region are heaving a collective sigh of relief, though they are doing so quietly and away from China’s glare. But they should be unabashed about their support for the rule of law, which benefits all countries, including China.

Beijing should understand that such an approach is not anti-China, but stems from a principled support for a rules-based order, which in turn promotes peace and stability.

China has on numerous

occasions expressed its own support for international law, including Unclos, which it ratified in 1996. It should expect no less from other countries.

While the latest operation is reassuring, the United States cannot stop there if it wishes to influence the broader strategic landscape of the region, as allies and partners take measure of the new US administration.

The US should regularly assert maritime rights in accordance with Unclos. A public, matter-of-fact approach is preferable in the South China Sea. Details such as where the operation took place, what the operation did, and what right(s) the US was asserting should be clearly and expeditiously made public after each operation, with no chest thumping.

This will help to ensure that messaging in the more complicated freedom of navigation operations is not muddled, as arguably occurred in the first and last such operations near disputed features in the South China Sea under the Obama administration – the USS Lassen in October 2015 and the USS Decatur a year later. More fundamentally, public but level-headed statements will help to achieve the wider goal of assuring allies and partners in the region and beyond about US commitment to the rule of law.

In addition, the Trump administration needs to undertake a serious effort to accede to Unclos. Washington’s argument has been that, with over 160 countries ratifying the convention, its provisions are now part of customary international law, which the US adheres to. However, the US’ failure to accede to the convention allows others to criticise it for double standards and hypocrisy.

Moral standing is as important for a superpower like the US as it is for a rising one like China. Acceding to the convention will bring robustness to US policy in the region and will help steer a positive course in the South China Sea.

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