

UN Convention on the Law of the Sea

Why China stands to gain from freedom of navigation rights

Beijing frets about transits by Western naval vessels. But those rights are in its interest as a major naval power with global maritime interests.

Robert Beckman

For The Straits Times

Recent press reports indicate that the government of China has protested against the transit of United States, French and British naval vessels through the waters surrounding the islands it occupies in the South China Sea and through the Taiwan Strait.

As a result, commentators have called for the development of a rules-based order for naval operations in East Asia and South-east Asia in order to

minimise the risk of armed conflict.

Such calls ignore the fact that a universally accepted set of rules governing naval operations in the oceans already exists. It is set out in the 1982 United Nations Convention on the Law of the Sea (Unclos).

Unclos was negotiated in the 1970s, during the Cold War, when there were two superpowers, the US and the USSR. Despite their differences, both stood together during the negotiations of Unclos on the issue of naval operations in the oceans. That was because they had a common interest in ensuring that they could move their navies freely around the world and carry out naval operations in ocean areas.

THE 'GRAND BARGAINS'

Unclos contains several provisions that reflect "grand bargains" between coastal states and the naval powers.

One of the grand bargains is on passage regimes through straits used for international navigation and through archipelagic waters. Coastal states are entitled to claim a 12-nautical-mile territorial sea, and archipelagic states are given sovereignty over the "archipelagic waters", that is, waters inside straight baselines connecting the outermost part of their outermost islands and drying reefs. However, sovereignty in these waters is subject to the passage regimes set out in Unclos.

Two new passage regimes were established in Unclos to ensure that all states enjoy rights of overflight and navigation through straits used for international navigation within the 12-nautical-mile territorial sea and through routes used for international navigation through archipelagic states. These regimes guarantee the right of naval powers to send their ships and aircraft through choke points in straits used for international navigation and in archipelagic states, with submarine cover below and air cover above.

The second grand bargain between the maritime powers and coastal states was the establishment of a new zone – the exclusive economic zone (EEZ).

The EEZ begins at the 12-nautical-mile territorial sea limit and extends out to 200 nautical miles from the baseline from which the territorial sea is measured. It is not a part of the high seas and it is not subject to any sovereignty claim of the coastal state. Rather, it is a sui generis zone for which the rights and jurisdiction of the coastal state are set out, and the rights and freedoms of other states are set out.

The grand bargain was to give coastal states the exclusive right to explore and exploit all the

hydrocarbon and mineral resources as well the fisheries resources in the EEZ.

Consequently, long-distance fishing states suddenly found that they no longer had any right to fish in their historic fishing grounds.

In addition, the EEZ regime gives coastal states the right to regulate other economic activities as well as marine scientific research in their EEZ.

At the same time, all states enjoy the freedoms of navigation and overflight and "other internationally lawful uses of the sea" related to those freedoms in the EEZ of every state. The naval powers maintain that the phrase "other internationally lawful uses of the sea" preserves their right to conduct traditional naval operations in the EEZ of any state.

In summary, the view of the naval powers is that the EEZ regime gives all the natural resources to the coastal states, but preserves high seas freedoms of the seas for all other states.

In exercising their rights and jurisdiction over the natural resources in their EEZ, coastal states must give "due regard" to the rights and freedoms of the other states in the EEZ. At the same time, states exercising high seas freedoms in the EEZ of other states must give "due regard" to the rights and duties of the coastal states in the EEZ.

CHINA'S INTERESTS

China participated in the negotiations and ratified Unclos. During the negotiations, it expressed the view that greater concern should be given to the security interests of coastal states from the naval operations of the superpowers off their coasts. However, its concerns were not reflected in the final package deal.

China's historic position on naval operations in the oceans is not consistent with its evolving

interests in the oceans. China is fast becoming a naval power that will rival or even overtake the US.

China is the world's major trading nation and a worldwide investor with global maritime interests. As a major naval power, China has a legitimate interest in moving its navy around the world and sending its naval vessels off the coasts of its potential adversaries to monitor their military capabilities.

China also has a very strong interest in maintaining the passage regimes in Unclos. Merchant ships and naval vessels from ports in China cannot sail to the Indian Ocean or Europe without passing through choke points governed by the regimes of transit passage or archipelagic sea lane passage. This is also the case for ships sailing from Chinese ports through the Arctic.

In conclusion, it would be in China's national interest to look beyond the current threats it perceives from foreign naval vessels sailing through or conducting naval operations off its coasts or off disputed islands it occupies, and focus on how the provisions in Unclos further its long-term interests as a major naval power with global maritime interests.

Once it recognises that its long-term interests are consistent with the other naval powers' interpretation of the legal regimes established in Unclos, it can focus its efforts on the creation of mechanisms to minimise the risk of conflict arising from the unique circumstances that result from the sovereignty and maritime disputes in the South China Sea.

stopinion@sph.com.sg

• Robert Beckman is head of the Ocean Law & Policy Programme at the Centre for International Law, National University of Singapore.