

US has more ways now to challenge China's maritime claims

Pompeo statement opens up Chinese state-owned companies to sanctions

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For The Straits Times

On July 13, US Secretary of State Mike Pompeo made an important statement on the United States' position on maritime claims in the South China Sea.

His statement was a follow-up to the US note verbale to China on Dec 28, 2016, and to the position outlined by the US in its letter to the United Nations Secretary-General last month, in response to China's objections to a Malaysian move to extend its continental shelf in December last year.

The June 11 letter reiterated previous statements that the US rejects any Chinese claim to "historic rights" in the South China Sea because such a claim is incompatible with the 1982 UN Convention on the Law of the Sea (Unclos).

The letter also stated that the US rejects any claim to maritime zones or entitlements from features in the South China Sea that are completely submerged (like James Shoal and Macclesfield Bank) or from features that are low-tide elevations rather than islands (like Mischief Reef and Second Thomas Shoal).

The letter also stated that the US rejects any claim by China to maritime zones derived from treating island groups in the South China Sea as a collective (Four Shas/Nanhai Zhudao) because there is no provision in Unclos permitting the drawing of straight baselines around dispersed offshore islands.

WHAT'S NEW IN POMPEO'S STATEMENT

The Pompeo statement went further in clarifying the US position on China's claims in the South China Sea.

First, it states that the US supports the 2016 decision of the arbitral tribunal that none of the individual islands in the Spratly Islands are capable of generating an exclusive economic zone (EEZ) and continental shelf of their own.

Unclos defines an island as a naturally formed area of land surrounded by and above water at high tide. All islands are entitled to a 12 nautical mile territorial sea, but they are entitled to an EEZ and continental shelf only if in their natural state they could sustain human habitation or economic life of their own.

The arbitral tribunal in the South China Sea case held that Scarborough Shoal and none of the islands in the Spratly Islands are entitled to an EEZ and continental shelf of their own.

This includes Taiping, the largest natural island in the Spratlys that is occupied by Taiwan, as well as the largest islands occupied by Malaysia, the Philippines, Vietnam and China.

Second, the Pompeo statement clarified the US position by stating that it rejects any maritime claims of China in the EEZ of other Asean member states bordering the South China Sea.

It states that the US rejects any Chinese claim in the waters surrounding Vanguard Bank off

the coast of Vietnam and Luconia Shoals off the coast of Malaysia, in the waters in the EEZ of Brunei or off the Natuna Islands of Indonesia.

The US also states that any action by China to harass fishing or hydrocarbon development by the Asean states in these waters – or any action by China to carry out such activities unilaterally – is unlawful.

In other words, the US position is that the provisions in Unclos as interpreted by the arbitral tribunal in the South China Sea case establishes the legal regime that applies in the maritime zones of all of the states bordering the South China Sea.

ASEAN ON UNCLOS AND THE SOUTH CHINA SEA

The US position on the importance of Unclos in the South China Sea is consistent with statements issued by Asean leaders this year.

The press statement by the chairman of the Asean Foreign Ministers' Retreat in January says that Unclos is the basis for determining sovereignty, sovereign rights and legitimate interests over maritime areas and the overarching framework of legal order for the seas that must be respected by all countries.

In addition, the 2020 Asean Summit leaders' statement reaffirmed that Unclos is the basis for determining maritime entitlements, sovereign rights, jurisdiction and legitimate interests over maritime zones, and that Unclos sets out the legal framework within which all activities in the oceans and seas must be carried out.

The US statement and those of Asean leaders on the importance of Unclos are also consistent with the responses this year of Indonesia, the Philippines and Vietnam to China's objection to Malaysia's submission to the Commission on the Limits of the Continental Shelf.

Beijing protested that Malaysia's attempt seriously infringed China's sovereign rights and jurisdiction in the South China Sea.

In their notes verbale to the UN Secretary-General, all three Asean member states emphasised the importance of Unclos as interpreted by the decision of the arbitral tribunal in the South China Sea case.

POSSIBLE U.S. ACTIONS

One question that arises from Mr Pompeo's statement is whether the US will take specific action in the South China Sea to challenge China's claims to resources in the maritime zones of other states which the US believes are unlawful.

US freedom of navigation operations (Fonops) are effective in challenging restrictions on navigation rights or restrictions on naval operations resulting from maritime claims that are contrary to Unclos.

Under the Trump administration, Fonops have been increasingly utilised to challenge China's straight baselines around the Paracel Islands, claims of a territorial sea from low-tide elevations, or requirements that foreign ships seek authorisation before exercising the right of innocent passage.

However, it is difficult to

conduct a Fonop to challenge the legality of what you believe is an unlawful claim to natural resources in the EEZ or on the continental shelf of another state. It is the coastal state that has the right to challenge Chinese ships that it believes are illegally fishing in its EEZ or conducting a seismic survey on its continental shelf.

However, the US could track and monitor the activities of Chinese ships in the EEZ of the Asean states. It could share this information with the coastal state and make public statements objecting to the actions of China that are contrary to international law.

One situation in which the US could have a legal right to intervene would be if a US company had a concession from a coastal state to exploit hydrocarbon resources in its EEZ in the South China Sea. If Chinese ships were to interfere with the activities of a US company, the US could arguably intervene to protect the company. However, such intervention would be unlikely without the permission or acquiescence of the coastal state.

Another possible action by the US was alluded to by US Assistant Secretary of State David Stilwell at a conference the day after the Pompeo statement. Mr Stilwell stated that Chinese state-owned enterprises have been used to attempt to enforce China's illegal claims in the South China Sea.

Observers have suggested that Mr Stilwell's statement indicates that the US is considering the prospect of imposing unilateral sanctions against these Chinese state enterprises. Such unilateral actions by the US would not require the support of any Asean member states.

BEYOND ASEAN

Will Asean encourage other states to support its position?

Asean member states are likely to encourage more states to support the Asean position on the importance of Unclos and the 2016 arbitral award in addressing the issue of rights and jurisdiction over the natural resources in the South China Sea.

They can argue that it is the common interest of all states that are party to Unclos to support the position that the disputes over access to resources in the South China Sea should be resolved in accordance with the rules-based order set out in Unclos.

IMPACT ON THE CODE OF CONDUCT TALKS

The Code of Conduct (COC) negotiations are unlikely to resolve the fundamental differences between China and the Asean states on rights and jurisdiction over the natural resources in the South China Sea.

However, the negotiations can produce agreement on mechanisms to reduce tensions and to minimise the risk of armed conflict in the South China Sea.

The COC negotiations could also produce mechanisms to cooperate on other issues of common interest, such as on marine scientific research and protection and preservation of the marine environment.

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