

US joins 'lawfare' by diplomatic notes over Chinese claims in S. China Sea

The recent US intervention in the battle of notes verbale is a clear signal that the dispute over the legality of China's claims is not going to go away any time soon

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For The Straits Times

On Dec 12 last year, Malaysia made a separate submission to the Commission on the Limits of the Continental Shelf (CLCS), claiming sovereign rights and jurisdiction to the natural resources of the seabed and subsoil in an area beyond the 200 nautical mile (370km) limit of its exclusive economic zone in the southern part of the South China Sea.

Its submission was in accordance with the rules established by the CLCS, a body set up under the 1982 United Nations Convention on the Law of the Sea (Unclos).

The 2019 Malaysian submission is a follow-up to the joint submission Malaysia made with Vietnam in 2009 and to the separate submission made by Vietnam in 2009.

Malaysia's move last year triggered an immediate response from China, which submitted a note verbale to the UN secretary-general, claiming that Malaysia's claim overlapped with its rights and jurisdiction in the South China Sea. China's note verbale triggered responses from the Philippines, Vietnam and

Indonesia, which, in turn, triggered further responses from the Chinese.

The notes verbale relating to submissions to the CLCS are not normal diplomatic notes exchanged between the parties concerned. Rather, they are diplomatic notes submitted to the UN secretary-general, with a request that they be circulated to all members of the United Nations.

The notes verbale are posted on the website of the UN Division for Ocean Affairs and Law of the Sea and are available to the general public. Therefore, they are a vehicle whereby a state can make its views on an issue of maritime claims known to all members of the United Nations, as well as the general public.

ASEAN MEMBERS' ASSERTIONS

All three Asean members state in their notes verbale that claims to rights and jurisdiction and to maritime zones in the South China Sea must be in accordance with Unclos, to which they and China are parties.

They further state that China has asserted rights and jurisdiction in the South China Sea that are not consistent with Unclos.

In support of their positions, they refer to the 2016 decision of the arbitral tribunal in the South China Sea case between the Philippines

and China (the Arbitral Award).

The Philippines and Indonesia refer specifically to the Arbitral Award. Vietnam does not specifically refer to the award, but the points in its note verbale are completely in accord with the decision of the Arbitral Award.

Therefore, the three states are in effect treating the Arbitral Award as an authoritative interpretation of the law, notwithstanding the fact that China decided not to participate in the arbitration and has stated that it considers the decision of the tribunal to be null and void.

To further complicate the battle of diplomatic notes, the United States entered the fray by submitting a note verbale on June 1 this year to the UN secretary-general, responding to the note verbale that China had submitted on Dec 12 last year in response to Malaysia's CLCS submission of the same date.

AMERICA'S REASONS FOR INTERVENTION

This may have been a surprise to most observers, given that the US is located far from the South China Sea and is one of the few states that is not a party to Unclos, which came into effect in November 1982.

The US explained its intervention by stating that it is submitting the note because China's note asserts claims which purport to unlawfully interfere with the rights and freedoms enjoyed by the US and all other states.

In most respects, the arguments of the US in its note verbale are consistent with the positions of Indonesia, Vietnam and the Philippines with regard to China's assertion of rights and jurisdiction and maritime claims in the South China Sea.

The US note verbale states that any claim by China to "historic rights" is unlawful if it exceeds the limits of the rights it would have in the maritime zones it could claim under Unclos.

The US note also states that China's claims are unlawful to the extent that it claims maritime zones from features that do not meet the definition of an "island" in Article 121 (1) of Unclos, that is, features which are naturally formed areas of land surrounded by water and above water at high tide. Features that are completely submerged or features that are low-tide elevations lying outside the territorial sea generated from an island do not qualify as an "island" under Unclos.

The US note goes on to assert that China has no right to claim maritime zones from the islands in the South China Sea by treating

island groups such as the Spratly Islands as a collective unit.

The US argues that Unclos requires that the normal baseline be used for mid-ocean archipelagos, and that only archipelagic states like Indonesia and the Philippines have the right under Unclos to draw straight baselines connecting the outermost points of their outermost islands and fringing reefs. The US note maintains that these positions are consistent with the decision of the tribunal in the Arbitral Award.

U.S. SILENCE ON EEZ CLAIM

However, it should also be pointed out that on one critically important issue, the US note does not refer to the decision of the tribunal in the Arbitral Award or to the positions that were taken by Indonesia, the Philippines and Vietnam in their notes.

The note verbale of the US is silent on the question of whether China has a right under Unclos to claim an exclusive economic zone (EEZ) and continental shelf from individual small islands in the South China Sea over which it claims sovereignty.

Its silence on these questions could suggest that in the view of the US, China could lawfully claim a 200 nautical mile EEZ and a continental shelf from the largest islands in the South China Sea over which it claims sovereignty, including from the largest islands in the Spratly Islands.

This issue was considered in the South China Sea arbitration and the tribunal ruled that none of the islands in the Spratly Islands are entitled to an EEZ and continental shelf; rather, they are all rocks which cannot sustain human habitation or economic life of their own, which are entitled only to a 12 nautical mile territorial sea.

One can only speculate as to why the US note verbale is silent on the issue of whether an EEZ and continental shelf can be claimed from individual islands in the Spratly Islands.

It could be that the US is primarily concerned with the potential interference with its rights and freedoms in the South China Sea, that is, overflight, navigation and military activities, and is less concerned with the issue of who has sovereign rights and jurisdiction to the natural resources in the South China Sea.

Also, the US may not be comfortable supporting the position of the tribunal on the right to claim an EEZ and continental shelf from very small features, given that it claims EEZs from very small uninhabited islands from US territories in the Pacific Ocean.

The decision of the tribunal that none of the islands in the Spratly Islands are entitled to an EEZ and continental shelf of their own is of critical importance to the Asean member states bordering the South China Sea.

These states claim an EEZ from the baselines along their mainland coast or main archipelago, and Unclos gives them sovereign rights and jurisdiction to explore and exploit the natural resources in and under the water in the EEZ and continental shelf adjacent to their coasts.

This is the basis on which Indonesia argues that it has no overlapping maritime zones with China. It is also the basis on which Vietnam argues that it has the exclusive right to explore and exploit the natural resources off its coast in the area known as Vanguard Bank, and the basis on which the Philippines argues that it has the sole right to explore and exploit the natural resources in Reed Bank.

LIKELY REACTIONS

China is likely to view the note verbale submitted by the US as an attempt to intrude on what in China's view is a regional dispute between the states bordering the South China Sea.

It is unclear how the Asean member states bordering the South China Sea will view the US action. On the one hand, they may be pleased that a superpower is challenging China's claims in the South China Sea through a note verbale circulated to all members of the United Nations, especially since it seems to regard the 2016 Arbitral Award as an authoritative interpretation of how Unclos applies to China's claims in the South China Sea.

On the other hand, they may be concerned that the US note will enhance the likelihood that the South China Sea will become a forum for the ongoing power struggle between China and the United States for dominance in Asia.

In any case, the exchanges of notes verbale are a clear signal that the dispute over the legality under international law of China's claims in the South China Sea is not going to go away any time soon, notwithstanding the ongoing negotiations between Asean and China to agree on a code of conduct for the South China Sea.

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American and Australian military ships during an exercise in the South China Sea in April. The US has said that it submitted its notes verbale because China's note asserts claims which purport to unlawfully interfere with the rights and freedoms enjoyed by the US and all other states. PHOTO: NYTIMES