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China's New Maritime Regulations: Do they accord with International Law?

By Sam Bateman

Synopsis

China's new regulations allowing the seizure of foreign vessels acting illegally in its claimed territorial sea in the South China Sea may accord with international law, but they might also open the South China Sea disputes to compulsory arbitration.

Commentary

ONCE AGAIN China has stirred up a "hornets' nest" in the South China Sea. New regulations recently approved by the Hainan's People's Congress to board and search vessels in China's claimed territorial sea in the South China Sea have met with an angry response from other countries bordering the sea.

Despite protests by other countries, the new regulations are most likely in accordance with international law. Technical detail is lacking so far about the regulations although it seems probable they only refer to the twelve nautical mile territorial sea and not to the wider exclusive economic zone. If this is the case, then they might be seen as a legitimate expression of a country's sovereignty over its territorial sea. The vexed issue causing the angry response from China's neighbours is that the new regulations extend to features in the South China Sea that are claimed by other countries.

Enforcement in territorial sea

A country is perfectly entitled to board and arrest a vessel acting illegally in its territorial sea or its internal waters. The only exceptions to this principle are, first, if the vessel is exercising the right of innocent passage and proceeding directly through the territorial sea. But if such a vessel engages in "non-innocent" activities, then it is open to boarding and arrest by the coastal state. Non-innocent activities include fishing, conducting research or causing serious pollution, as well as acts that are prejudicial to the peace, good order or security of the coastal state, including for example, interfering with the communications of the coastal state, or any acts of propaganda aimed at affecting the security of the coastal state.

China's new regulations are believed to define six actions that could lead to the seizure of a foreign vessel, including entering ports without approval and conducting acts of propaganda that threaten national security. All these actions could be accepted as either "non-innocent" or prejudicial to the interests of the coastal state provided of course that the sovereignty of the coastal state over the waters in question is not in dispute.

The second exception to the principle of boarding and arresting a vessel in the territorial sea is if it concerned a government vessel engaged on non-commercial service. In this case it has sovereign immunity to actions by the coastal state which is only entitled to direct it to leave the territorial sea.

In summary therefore, and despite some media reporting, China is not necessarily setting itself its own set of rules for protecting its sovereignty in the territorial sea. Its new regulations for boarding and arresting vessels in its territorial sea appear to be in accordance with international law.

Dispute settlement

Perhaps unintentionally with the new regulations, China may have opened itself up to compulsory dispute settlement procedures set out in the 1982 UN Convention on the Law of the Sea (UNCLOS) and entailing binding decisions on the parties to a dispute. China has always said that it would not accept compulsory arbitration of its maritime sovereignty disputes. This is acceptable as UNCLOS allows countries to opt out of the compulsory procedures in respect of disputes involving maritime boundaries and military activities. China in fact made such a declaration when it ratified UNCLOS.

The International Tribunal for the Law of the Sea (ITLOS) in Hamburg is the independent judicial body established under UNCLOS to adjudicate disputes arising out of the interpretation and application of the Convention. Since the tribunal's establishment, many of the cases brought before it have involved disputes over the arrest or detention of foreign vessel by a coastal state.

A current case before ITLOS involves the detention by Ghana of Argentina's naval sail training vessel ARA Libertad. The tribunal will be testing the strength of sovereign immunity as a defence against arrest and detention by a coastal state.

Although the legal situation is far from clear, it may be the case that should China seize a foreign vessel under its new regulations for acting illegally in the territorial sea of a disputed feature in the South China Sea, the flag state of the vessel could bring an action before ITLOS disputing China's action. This might have the inadvertent consequence of opening up arbitral consideration of China's sovereignty over the feature in question.

Avoiding over-reactions

The situation in the South China Sea continues to become both more contentious and more complex. It also continues to be made even more confusing by some media reporting that paints a more serious picture of a situation than it actually is. This would appear to be the case with China's new maritime regulations. Rather than being a gross new provocation by China, they may well be a legitimate expression of sovereignty that does not change the fundamental nature of the disputes in the South China. They are hardly worth the storm of protest and critical commentaries that have resulted.

It is unfortunate that countries on all sides of the South China Sea disputes tend to over-react to apparent provocation by other parties. This over-reaction is also fuelled by nationalistic public interest built up by the more extreme, and often misinformed, media reporting of a situation. Over-reaction to apparent provocations should be avoided at all cost. They just lead to a spiral of reaction and over-reaction with a 'lose-lose' outcome for all parties.

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