

Issue 14 Preview



Understanding the *Impeccable* Incident

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Inside the PRC's views on UNCLOS, the Exclusive Economic Zone and US Intelligence in the South China Sea

The Reckless and the Resolute: Confrontation in the South China Sea

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The capabilities of the USNS *Impeccable* leave little doubt as to its purpose sailing in the South China Sea, 75 miles off the coast of China's Hainan Island.¹ As the prefix USNS implies, the *Impeccable* is a predominantly civilian-manned ocean surveillance vessel. However, it, along with several other ships, tows the sonar array system (SURTASS²) that performs acoustic collection surveillance to help locate and identify submarines. While these operations are routine peacetime activities, they would be applied to any future antisubmarine warfare.³

While the *Impeccable's* confrontation was the first widely reported naval incident between the two countries in recent years, it was not unprecedented. The USNS *Victorious*, the ship replaced by the *Impeccable*, experienced harassment by a Chinese Bureau of Fisheries vessel and repeated low-altitude passes by a Chinese navy

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maritime patrol aircraft. In that incident, the Chinese ship illuminated the US ship with a high-intensity light and during the night crossed her bow at close distance without warning. The harassment intensified with the *Impeccable* and reached a peak on March 8. A radio call demanded that the *Impeccable* leave the area or “suffer the consequences”. The *Impeccable’s* passage was also blocked by a Chinese vessel, which turned across her bow, stopped and placed obstacles in the water. One Chinese ship with guns (reported as a frigate but probably a patrol boat), closed to about 100 yards. Another came within 25 feet, despite attempts to ward it off with fire hoses.⁴ The Chinese crew also attempted to snag the cable for the towed array.⁵ The reports suggest danger of collision and injury. Thus Chinese government ships blatantly violated the norms of good seamanship and safe maneuvering and the rules of the road—formally known as the International Regulations for Avoiding Collisions at Sea.⁶

The core issue of these incidents are the two countries’ differing interpretations and applications of international law to US naval activity in China’s Exclusive Economic Zone (EEZ). While neither is likely to significantly change their positions, such incidents, with their inherent risks of escalation and disruption of Sino-American relations, could be avoided through a clearer understanding of acceptable behavior in their interaction on the high seas, as well as a better system of communication and consultation. It is imperative the two countries find a way to agree to disagree, and find a way to avoid or defuse future confrontations that could lead to larger conflict.

DIFFERING INTERPRETATIONS

The Chinese justification for harassment of these US Navy ocean surveillance ships derives from an interpretation of a provision in the 1982 United Nations Convention on the Law of the Sea (UNCLOS). The Treaty provides coastal nations with Exclusive Economic Zones (EEZs), generally extending 200 miles seaward from the coastal baseline. States have special rights in their EEZs over exploration for and use of marine resources, but the normal rights of all other states to sail and fly in the EEZ are protected.

The United States, while not yet a party to UNCLOS, does adhere to its provisions under customary international law.⁷ China is a party to the treaty. Both accept the concept of an EEZ as stated in UNCLOS as providing the coastal State sovereign rights concerning the natural resources of the zone.⁸ Differences arise regarding what activities in the EEZ are permissible under the Treaty, including naval operations. The United States emphasizes the UNCLOS rule that preserves the rights of all states in the coastal State’s EEZ to freedom of navigation, overflight and even laying pipelines and cables.⁹ It interprets this as including naval activities that are of a non-aggressive nature and done in preparation for self-defense.

When China ratified UNCLOS in 1996, it filed a declaration emphasizing *sover-*

eign rights and jurisdiction over the EEZ.¹⁰ Moreover, Chinese international lawyers justify a more restrictive interpretation, citing further treaty language, which reads: “States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State”¹¹

China, in adopting this position, is accused by some of attempting to treat its EEZ like territorial waters. Germany, for example, pointedly declared when it ratified the treaty that the EEZ is a new concept designed to grant coastal states certain resource rights while preserving the rights of others to conduct normal, peaceful activities in the zone, striking a delicate balance between the rights of the coastal state and other states. The German declaration concludes with this directly pertinent sentence: “In particular, the rights and jurisdiction of the coastal State in such zone do not include the rights to obtain notification of military exercises or manoeuvres or to authorize them.”¹² This rebuff of the interpretation championed by China is perhaps a model for the United States to follow if it soon ratifies UNCLOS, as many expect it will.

On the other hand, there are other states that dispute the US interpretation and agree with China that US reconnaissance and surveillance activities conducted within its EEZ without its permission are violations of UNCLOS.¹³ In short, there is sufficient ambiguity to lead to differing interpretations, whether justified or not. The Chinese delegate to UNCLOS negotiations is quoted as saying that “freedom of scientific research in the past has meant espionage”.¹⁴ The United States remains resolute in the view that military activities on the high seas and in the EEZ are consistent with the “peaceful purpose” requirement, if they are conducted in a non-threatening fashion in order to prepare for legitimate self-defense.¹⁵ Neither side is inclined to change its position.

CONTRADICTIONS IN EEZ POLICY?

While China has been firm in defending what it sees as its sovereign rights at sea, its own track record with regard to military activities in the EEZs of other states raises questions. Some point out that China, over the years, has violated its own position on EEZ sovereignty by operating survey ships in Japanese waters. Indeed, Tokyo often protests the presence of Chinese survey ships near Japan (within the EEZ). Yet, the vast majority of these complaints are about operations in the disputed waters of the East China Sea (near Chunxiao and Diaoyutai), which China regards as its EEZ — thus justifying its presence. Nevertheless, there have also been intrusions in undisputed Japanese EEZ waters. The *Defense of Japan 2000 White Paper* describes a Chinese “information-gathering” ship circling Japan.¹⁶ In addition, the *2001 White Paper* reports the sighting of a Chinese navy missile observation support and survey and research ship navigating off the coast of Hamamatsu on the east coast of Japan to Tsushima, while appearing to conduct information-gathering activities.¹⁷

After a record of previous intrusions that would undermine its EEZ position, Beijing appears to have insulated itself from such arguments. In early 2001, Japan and China agreed on a two-month mutual prior notification system for maritime sci-

entific research in waters between the two countries. China is to give Japan at least two months' notice when its research ships plan to enter waters "near Japan and in which Japan takes an interest" while Japan is to inform China similarly before entering waters "near" China.¹⁸ Having concluded notification arrangements with Tokyo, Beijing probably feels it has now gained immunity from accusations that its actions contradict its own interpretation of the EEZ rights.

Beijing's recent move to dispatch People's Liberation Army Navy ships to the Gulf of Aden in support of anti-piracy operations seemingly represents a further divergence from its stated interpretation of EEZ rules. In a surprising decision that was announced last December, China declared that it would send three PLA Navy ships to the Gulf of Aden to protect Chinese shipping from Somali pirates. These ships did not become full-fledged members of Task Force 151--an international flotilla

Who Decided to Become Aggressive?

Did the top Chinese leaders specifically direct or approve the confrontations in the South China Sea, the 2007 anti-satellite (ASAT) missile test two years ago, and the aggressive action against a US EP-3 aircraft eight years ago? As to the *Impeccable* affair, it appears that as soon as the top leadership in Beijing was engaged, the aggressive behavior was halted. Is it possible that the harassment of the *Victorious* and the *Impeccable* was merely a reaction by low-level officials who were frustrated with US prying?

Indeed, the early March harassments of the *Victorious* and the *Impeccable* had strange timing if the decisions were indeed being made in Beijing. To amplify the doubts that Chinese president Hu Jintao was aware initially of the aggressive actions in the South China Sea, there are the following: US Secretary of State Hillary Clinton, on her first visit abroad in the new job, had a very warm and successful visit in Beijing in late February, and her counterpart, Chinese Foreign Minister Yang Jiechi, had a similarly successful visit to Washington in early March where he set up the London G20 meeting between Presidents Hu and Obama.

It would seem bizarre for Beijing to be doing so much to foster bilateral relations and for President Hu, back in Beijing, to be directing Chinese sailors to stage near-collisions with *Impeccable* and make threats over bridge-to-bridge radio. Perhaps the most compelling argument that the orders had not come from on high is the rapid and definitive manner with which the confrontation was resolved

once it reached the highest levels of both governments. It also seems unlikely that the White House was specifically aware that, during this period of critical engagement between Washington and Beijing, the USNS *Impeccable* was engaged in activities near China that were likely to draw a reaction from the Chinese. The *Impeccable* and the *Victorious* were probably carrying out a long-established deployment and collection plan. Similar suspicions surround the notorious January 2007 anti-satellite (ASAT) missile test that successfully intercepted a decaying Chinese weather satellite and created a debris field in space. With respect to this missile shot, then-US National Security Adviser Steve Hadley, in an interview with the *New York Times*, suggested that the most senior leaders in China might not have been aware of the testing. "The question on something like this is, at what level in the Chinese government are people witting, and have they approved?" he asked. The *Times* went on to state that American officials "were uncertain whether China's top leaders, including President Hu Jintao, were fully aware of the test or the reaction it would engender." These officials, the article states, presume that President Hu was generally aware of the missile testing program but speculate that he may not have known the timing of the test. China's continuing silence suggested, at a minimum, that Hu did not anticipate a strong international reaction.³⁵

Speculation also persists that senior Chinese leaders did not make the specific

decisions that resulted in the April 2001 collision of the US Navy EP-3 (on a routine reconnaissance mission) and the PLA Navy F-8 (conducting a routine intercept mission) near Hainan Island. Through personal conversations, two knowledgeable PLA Navy officers relayed that PLA Navy personnel at the Lingshui naval air base and the Yulin naval base believed that the frequency of reconnaissance flights had increased and that the standoff distance from PLA Navy ships had decreased. The middle-grade officers there on Hainan were said to be frustrated, even angry, and felt like their protests had been ignored by the Americans. F-8 pilot Lieutenant Commander Wang Wei's conduct, with his gestures and reckless passes or join-ups with the EP-3, was consistent with the attitude attributed to the PLA Navy officers at these two bases on Hainan. A PLA Navy senior officer related that, after the F-8 had fallen into the sea, the flight leader requested by radio permission to shoot down the American aircraft. Officials at Lingshui relayed the request to PLA Navy headquarters at Beijing. The request, assuming the validity of this assertion, was denied. The level of ire among the Lingshui officers was apparently not matched in Beijing.

The general consensus among China watchers — that the collision owed more to Wang Wei's reckless and poor airmanship in his highly maneuverable fighter and likely not an aggressive move by the relatively cumbersome four-engine EP-3 — has never reached Beijing's top leaders. Many had hoped that recognition of this shortcoming might bring about reforms in the Chinese government and lead to the development of a crisis management system that might include something resembling the US National Security Council. Rudimentary efforts in that direction apparently failed, and crises in China seem still to be handled without benefit of a system for supplying accurate information to top Chinese leaders, especially if it is bad or unwelcome news.

Notes

- ¹ David E. Sanger and Joseph Kahn, "US Tries to Interpret China's Silence Over Test," *New York Times*, January 22, 2007; http://www.nytimes.com/2007/01/22/world/asia/22missile.html?_r=1

that includes the United States, several European countries, and, recently, the ROK and Japan.¹⁹ This deployment marks the first time since the establishment of the PLA Navy that a force has been sent to conduct combat-like operations beyond the Chinese littoral waters. It raises questions not only how will China manage its naval expansion into distant places, but also how it would defend its interpretation of permissible operations in the EEZs of other countries.

Before the Senate Armed Services Committee, Admiral Timothy J. Keating, commander, US Pacific Command, contrasted the two simultaneously occurring events, the South China Sea confrontation and the Gulf of Aden anti-piracy operation. "The *Impeccable* incident is certainly a troubling indicator that China, particularly in the South China Sea, is behaving in an aggressive, troublesome manner, and they're not willing to abide by acceptable standards of behavior or rules of the road," he said. But, at the same time, Keating noted that China is cooperating with the international naval task force led by the United States to fight piracy in the Gulf of Aden. The two types of Chinese behavior, the admiral added, are confusing.²⁰

From Beijing's perspective, its position on these two events is clear. With respect to its operations in the Gulf of Aden, Chinese leaders are careful to justify it based on the United Nations Security Council actions authorizing the operations.²¹ China

even awaited a definitive UNSC decision before publicly declaring intent to send a naval force. Equally important, China has noted the expressed desire of the Somalia government for help in combating piracy.²² These were important factors in the unprecedented Chinese decision to dispatch a force on what is essentially a combat mission within the EEZ of another country. In citing these factors, China seems to have carefully constructed a legal framework to defend against assertions of a double standard: that is, objecting to US military activities in its EEZ while conducting such activities in another state's EEZ.

This point was reinforced with the statement by the Chinese rear admiral heading the anti-piracy operation who made clear that his force would not accept direction from others but would limit the interaction to the "exchange of information" with other ships of the multinational force,²³ thereby avoiding the possibility of being assigned tasks incompatible with Beijing's guidelines for the employment of force. In this way, the PLA Navy operations in the Gulf of Aden conform to Beijing's interpretation of the UNCLOS: that non-coastal states must obtain the coastal state's approval for military operations in an EEZ.

While the diverging interpretations of permissible activities within an EEZ under international law provide a rationale for the two countries' conduct, the problem would exist even if EEZs did not. There is something more fundamental behind the actions of Beijing and Washington in these confrontations. Beijing understandably opposes Washington's right to fly reconnaissance aircraft and position surveillance ships off the coast of China. Washington's position, if largely tacit, is that intelligence collection against the Chinese military is warranted if China attacks Taiwan or undertakes other actions that require a US military response. In other words, China is indignant at what it sees as American intrusive conduct,²⁴ and China's refusal to renounce the use of force against Taiwan compels the United States to maintain efforts to ensure success if US military intervention is required.

SEEKING A SOLUTION

The repetition of risky encounters between the two countries again points to the need for a formal mechanism for dealing with maritime incidents between the two countries. As retired Australian Rear Admiral Sam Bateman put it, "It is important that incidents such as the recent ones are not allowed to escalate. In a scenario not unlike that of the USS *Pueblo* off North Korea in 1968, China could be tempted to seize an unarmed MSC survey vessel in its EEZ. Or in a similar provocative action, the US might begin to escort its survey vessels with naval warships."²⁵ Thus there is a clear need for confidence-building measures and a code of conduct to mitigate escalation.

While some suggest that China should go to the United Nations to establish and clarify its position, the Chinese already think the EEZ rules work their way. The point to be made to the senior Chinese leadership is that we agree to disagree on EEZ rules, but how we then react or avoid overreaction is the matter to be resolved. For

example, China might legitimately employ noisemakers to foil acoustic collection or otherwise mask submarine emissions, but it cannot physically snag the towed array or stage near-collisions.

At least on paper, the United States and China have developed a framework to resolve such incidents. In 1998, the two countries established a mechanism called the Military Maritime Consultative Agreement, which included maritime and aviation safety working groups; however, the agreement fell apart after the 2001 EP-3 incident. Following the collision between the planes, then-Secretary of State Colin Powell attempted to utilize the MMCA framework to call an emergency meeting to investigate the accident. But, when he called the Chinese foreign minister, Chinese officials made it clear they had no interest in the agreement that they had signed. Instead, they insisted Washington halt the reconnaissance flights and subsequently suspended the MMCA talks — an action former Deputy Assistant Secretary of State Randy Shriver labeled a counterintuitive response if there ever was one.²⁶ In the context of the recent incident, Shriver stated that we have the vehicle for managing incidents at sea, but the Chinese are not particularly interested in a rules-based, operator-to-operator approach to safety on the high seas. They have other (probably strategic) objectives in play.

Despite unfavorable past experiences, a new bilateral environment accompanied by pressing economic and other issues that demand cooperation presents a fresh opportunity. This time an effort to revisit the MMCA should aim at a higher level in the Chinese government thereby depriving lower level officials the chance to reject the idea. The goal would be either to seek a direct remedy from the top, or to propose that the highest levels of each government direct the prompt convening of a meeting of the MMCA principals and its safety working groups. The goal of the meeting would not be to resolve the fundamental divergence, but to establish procedures to govern conduct during confrontations such as with the EP-3 and *Impeccable*. There is precedent with the 1972 US-Soviet Incidents at Sea Agreement (INCSEA), where violations would be handled jointly by senior officials.

INCSEA AS PRECEDENT

Before INCSEA, encounters with the Soviets were often dangerous and outcomes unpredictable. After INCSEA, that was rarely the case. As this author experienced first-hand in the 1960s and 1970s, “games of chicken” on the seas led to loss on both sides, in terms of military equipment and lives. The many close calls (see insert) illustrate an atmosphere where actions by officers of both navies at sea and in the air were exacerbating tensions with consequent political fallout and the risk of escalation.²⁷

Soviet naval ships routinely shadowed and often harassed or interfered with operations of the US Navy and other NATO countries. Some incidents were deliberate expressions of policy, while others were attributable to aggressiveness or even inexperience. Soviet fighters often intercepted US Navy P-2 and P-3s. Aircraft carriers

were shadowed endlessly by Soviet “trawlers” and occasionally by Bear aircraft.

The US employed such tactics as surprising Soviet Navy ships by flying aircraft low and at high speed, remaining below the radar horizon and escaping detection until the last minute. In this way, Soviet activities could be observed.²⁸ American carrier-based pilots reportedly flew sufficiently low over Soviet warships to snag radio antenna wires between masts with lowered tailhooks—likely apocryphal but representative of the aggressive attitudes at the time. In less aggressive activities, from the Iceland Defense Force, US fighters intercepted Soviet Bear aircraft, and P-3s were sent to locate Soviet submarines and even simulate attacks on Soviet surface ship formations.²⁹

High-risk activities reached a peak in 1967. On 10 and 11 May of that year, Soviet navy ships collided with the destroyer USS *Walker* in the Sea of Japan as it was attempting to fend off Soviet efforts to disrupt the flight operations of the carrier USS *Hornet* that USS *Walker* was escorting. Then-Congressman Gerald R. Ford suggested that the US Navy be authorized to use its guns to respond. Soon after, a Soviet navy Tu-16 Badger aircraft cart wheeled into the Norwegian Sea while “buzzing” the carrier USS *Essex* during flight operations, killing the Soviet crew of seven.

After several major incidents, the Soviets finally agreed to start talks on safety at sea.³⁰ The talks produced INCSEA, a tangible result. Conduct by both sides became generally more responsible. The risk of investigation under INCSEA and charges for violations of the agreement acted as a deterrent to officers on both sides. Under the agreement, each side had a mechanism to report dangerous conduct, thus deterring many risky and provocative actions. The average number of incidents per year dropped from over 100 in the 1960s to 40 by 1974. The 1973 Arab-Israeli War saw close to 100 Soviet ships intermingling with US forces in tense circumstances, yet no serious incidents occurred.³¹

When violations did occur, they were resolved smoothly because a mechanism was in place to adjudicate, review procedures, and correct transgressions. INCSEA not only provided rules but was also something of a safety valve. Indignation, frustration, ideological differences, and the like could be vented. The wronged would be heard and the reckless chastised. INCSEA worked because neither government wanted collisions or escalation.

INCSEA WITH CHINA?

The top leadership in China seems to share the desire to avoid escalation. If nothing else, proposing use of the MMCA to develop an agreement could be a way to start a conversation between top leaders where both sides could be candid about their reasons, rationale and readiness to avoid a recurrence. However, both the United States and China have expressed opposition to replicating the 1972 US-Soviet INCSEA agreement because that agreement was clearly made between adversaries.

Any new agreement will inevitably repeat many of the common sense rules of the

road laid out in the INCSEA document. However, a new direction might be undertaken in certain important ways. First, it may be critical to incorporate additional and modified provisions that change the language and tone, so as to avoid misunderstandings and unwanted associations. In essence, an agreement with China might be conceived as prescribing procedures for *coordination* (in place of the emphasis on incidents). These might be called a Military Maritime Coordination Procedures Agreement (MMCPA). CPA is already a widely familiar term both at sea and in the air; it stands for closest point of approach, or the minimum distance calculated when a ship or aircraft is approaching another ship or aircraft. A minimum CPA for ships while conducting surveillance could be agreed upon. A similar minimum distance could be prescribed for aircraft. Additionally, the agreement could become a coordination method that, to a far greater extent than INCSEA, employs communications as an additional buffer (beyond the written rules) to avoid collisions or other incidents. For instance, a vessel or aircraft about to commence surveillance would reveal its presence, and then both sides would keep each other apprised of movements of interest.

With respect to language or tone, the agreement with China, in line with the coordination theme, could replace the confrontational thrust generally associated with INCSEA with a collegial and professional quality. Moreover, the wording, as compared to that of INCSEA, should be amplified and updated to reflect technological advances, and the scope might be broadened to include vessels and aircraft of government agencies other than the armed forces, since such vessels have been involved in recent events.

In general (see appendix for details), MMCPA would cover the activities of military, government and auxiliary ships and aircraft on the high seas and in the airspace above. Approaching vessels and aircraft would announce by radio maneuvers of interest to the other country. The agreement would, like INCSEA, prohibit interference with naval formations and require special consideration for maneuvers in areas of heavy sea traffic. Also like INCSEA, MMCPA would envision the negotiation of minimum distances for closure and prohibit simulated attacks and the use of strong lights or lasers to illuminate ship bridges and aircraft cockpits.

SURPRISE RESOLUTION

As it happened, the March 2009 incident ended unexpectedly. A March 20 Chinese news report started with the declaration that the Chinese military was ready to call an end to the standoff with the United States after diplomatic efforts had reduced tensions. It was stated that top commanders did not have plans to increase the military presence in the South China Sea and that military analysts agreed it was time to end the dispute and move on with more important issues concerning Sino-US relations.³² This occurred despite the fact that Beijing had followed Washington's declaration that it was sending a destroyer to escort the *Impeccable* with an announcement that it would augment patrols in the South China Sea, converting

decommissioned naval ships and possibly acquiring fishing boats to join the effort.³³ In addition, the USNS *Impeccable* was said to be remaining in the area.³⁴

The surprise ending was consistent with many China watchers' expectations that the top leadership would conclude that this confrontation was not the issue upon which Beijing and Washington should be expending time, effort and hard-earned goodwill. An overriding need required China and the United States to stop squabbling over EEZ rules and intelligence collection rights and move on to the issues facing the G20, the Six-Party process, global climate change, among other things.

Although this confrontation finished peacefully, it is by no means a permanent resolution. The USNS *Impeccable* continues to sail off Hainan and US reconnaissance aircraft still fly through China's EEZ. The potential for trouble will persist. The short-term solution was the apparent mutual recognition of the importance of other issues. The mid-term solution might resemble the described coordination agreement with the Chinese that would make surveillance and confrontation less risky to the bilateral relationship and to those involved at sea and in the air. The toughest issues can be resolved through the adoption of cooperative undertakings, such things as broad maritime cooperation that will serve to build trust and confidence between Beijing and Washington—which now feel the need to continue to hedge in the form of military readiness to confront the other. Engagement can serve to reduce the need to hedge. ☹️

APPENDIX

CONCEPTUAL OUTLINE FOR US-CHINA MILITARY

MARITIME COORDINATION PROCEDURES AGREEMENT (MMCPA)

Based on the concept, as described in the article, of an agreement to facilitate coordination, what follows is a very much abbreviated version (in the form of working guidelines, not formal language) of an agreement with China, by a new name. Procedures from the 1972 INCSEA agreement appear in regular font, while new suggestions are bolded and include the author's explanatory comments in italics:

Geographic scope: The navigation of the high seas including EEZs and flight over the high seas [thus effectively excluding territorial waters—just as in 1972]

Types of vessels and aircraft covered: Ships, **other vessels**, and aircraft of the naval forces, naval auxiliaries, and **other government agencies** of the United States and China—whether alone or in formation.

Bases and premise:

- International Regulations for Preventing Collisions at Sea (Rules of the Road)
- International law codified in the 1958 Geneva Convention on the High Seas
- Instruction of the commanding officers of their respective ships to observe strictly the letter and spirit of these fundamental guidelines.

Article 10 of the Geneva Convention provides an underlying basis: 1. Every State shall take such measures for ships under its flag as are necessary to ensure safety

at sea with regard, inter alia, to: (a) *The use of signals, the maintenance of communications and the prevention of collisions...* [This new proposal gives emphasis to radio and other electronic means of exchanging information that now seem available and appropriate for use between the United States and China. INCSEA contemplated visual signals and communications. The suggested requirement, described below in some detail, to make a voluntary announcement of impending arrival in the vicinity also sets a better tone—collegial and professional rather than adversarial or confrontational]

Conduct by ships, **other vessels** [patrol craft and other types not called ships could be involved], and aircraft:

- Avoid ship collisions by adhering to Rules of the Road; **announce when a deviation from the Rules is intended and receive acknowledgement**; e.g., electing to stop or turn away when in the position of a privileged crossing ship and obligated normally to maintain course and speed.
- Avoid aircraft collisions by adhering to ICAO (International Civil Aviation Organization) visual or instrument flight rules and take extraordinary precautions when operations require deviation from such practices; e.g., operating in “due regard” status where an aircraft is responsible over the high seas for separation from other aircraft.
- Do not interfere in the “formations” of the other party.
- Avoid maneuvers in areas of heavy sea traffic where international traffic schemes exist.
- Surveillance ships are to maintain a safe distance from the object of investigation so as to avoid “embarrassing or endangering the ships under surveillance” [consider a minimum distance rule, possibly 500 yards or meters, without mutual consent for a closer approach].
- Use accepted international signals including bridge-to-bridge radio circuits when ships maneuver near one another; after initial contact, automated position-reporting means may be utilized as available, but intentions must be announced for maneuvering in the immediate vicinity, perhaps within 2,000 yards.
- Do not simulate attacks with actions such as pointing guns, missile launchers, torpedo tubes; locking on with fire-control radars, launching objects toward, or illuminating with powerful lights or lasers the bridges of the other party’s ships or cockpits of aircraft.
- Inform vessels when submarines are exercising near them.
- Require aircraft commanders, **in addition to complying with ICAO rules for collision avoidance**, to use the greatest caution and prudence in approaching aircraft and ships of the other party and not permitting simulated attacks against aircraft or ships, performing aerobatics over ships, or dropping hazardous objects near them.
- Require the ship or aircraft arriving in the vicinity of the other party’s ships, vessels, or aircraft to announce on bridge-to-bridge radio, a specified radio frequency (to be monitored when surveillance is likely or observed), or other advanced reporting means the following “approach report”:

- » Identity (as best known) of unit(s) being approached, call sign of transmitting vessel or aircraft, identity or composition of approaching unit or group, position (relative or geographic), altitude, course and speed, intentions. These could be formatted to facilitate use by those with lack of language skill.
- » The approach report from a US Navy aircraft might sound as follows: “The following is a US-China MMCPA approach report. Unidentified PLA Navy ships 45 miles northwest of Hainan Island, this is US Navy 7937, one EP-3 aircraft 14 miles south of your formation at flight level 215 on a course of 025 at 335 knots expecting to transit your position and proceed northward. Do you have known aircraft in your vicinity? Over.”
- » The approach report from a PLA Navy surface group might be composed at follows: “The following is a US-China MMCPA approach report. Unidentified US Navy aircraft carrier formation 225 miles east of Djibouti, this is PLA Navy destroyer 136 in company with another destroyer and a frigate at 12 degrees 10 minutes north latitude and 46 degrees 38 minutes east longitude on a course of 295 at 12 knots. We are considering coming left to 185 to avoid interference with your ongoing flight operations and to avoid heavy merchant traffic. When will you complete flight operations? Over.”

NOTES

¹ The prefix USNS, not USS, indicates that these are not warships but rather vessels operated primarily by civilians (with some uniformed Navy personnel) to do special missions and technical tasks for the US Navy.

² Tactical-Auxiliary General Ocean Surveillance

³ Surveillance Towed Array Sensor System

⁴ It was reported that the crew of the *Impeccable* used fire hoses to try to stop the approach, but the Chinese crew stripped to their underwear and came within about 25 feet. “US protests ‘harassment’ of USNS *Impeccable* by Chinese vessels,” *Los Angeles Times*, March 9, 2009, <http://www.latimes.com/news/nationworld/world/la-fg-impeccable-china10-2009mar10,0,5014118.story?track=rss>

⁵ “Pentagon says Chinese vessels harassed US ship,” CNN, March 9, 2009, <http://www.cnn.com/2009/POLITICS/03/09/us.navy.china/>

⁶ The COLREGS, as they are sometimes called, are premised on the need to avoid collisions at sea—as reflected in the title. Obviously, actions to heighten the danger of collision are not anticipated. Extracts from Rules 2 and 8 are illustrative of obligations:

Rule 2

(a) Nothing in these Rules shall exonerate any vessel, or the owner, master, or crew thereof, from the consequences of any neglect to comply with these Rules or of the *neglect of any precaution which may be required by the ordinary practice of seamen*, or by the special circumstances of the case.

Rule 8

(d) *Action taken to avoid collision with another vessel shall be such as to result in passing at a safe*

distance. The effectiveness of the action shall be carefully checked until the other vessel is finally past and clear.

(e) If necessary to avoid collision or allow more time to assess the situation, a vessel may slacken her speed or take all way off by stopping or reversing her means of propulsion.

(f)

(i) A vessel which, by any of these rules, is *required not to impede the passage or safe passage of another vessel* shall when required by the circumstances of the case, take early action to allow sufficient sea room for the safe passage of the other vessel.

(ii) A vessel required not to impede the passage or safe passage of another vessel is not relieved of this obligation *if approaching the other vessel so as to involve risk of collision and shall, when taking action, have full regard to the action which may be required by the rules of this part.*

(iii) A vessel the passage of which is not to be impeded remains *fully obliged to comply with the rules of this part when the two vessels are approaching one another so as to involve risk of collision.* [Emphasis supplied.]

⁷ President Clinton signed the Convention in 1994 and passed it to the Senate for the required ratification. After a decade and a half of delay, the Senate may ratify it in 2009. China ratified it in 1996.

⁸ UNCLOS Article 56 (1) states: In the exclusive economic zone, *the coastal State has:*

(a) *sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources*, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds. [Emphasis supplied.]

⁹ Article 58 (1) states with respect to permissible activities in another country's EEZ: In the exclusive economic zone, *all States...enjoy...the freedoms...of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines....* [Emphasis supplied.]

¹⁰ Article 310 of the Convention allows States and entities to make declarations or statements regarding its application at the time of signing, ratifying or acceding to the Convention, *which do not purport to exclude or modify the legal effect of the provisions of the Convention*. Upon ratifying the treaty in 1996, China, nevertheless, made the following declaration with respect to jurisdiction over its EEZ: In accordance with the provisions of the United Nations Convention on the Law of the Sea, the People's Republic of China shall enjoy sovereign rights and jurisdiction over an exclusive economic zone of 200 nautical miles and the continental shelf. This declaration is at the website of United Nations Oceans and Law of the Sea, Division for Ocean Affairs and the Law of the Sea, Declarations and statements; http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#China%20Upon%20ratification. Listed alphabetically under China.

¹¹ UNCLOS Article 58 (3); http://www.un.org/Depts/los/convention_agreements/texts/unclos/part5.htm

¹² *Ibid.* Listed alphabetically under Germany.

¹³ The diverse views on military activities in an EEZ expressed authoritatively by UNCLOS delegates and specialists of several countries including China, the United States, Singapore, Mexico and others are described in Van Dyke, Jon M., "Military Ships and Planes Operating in the EEZ of Another Country," undated paper, <http://www.hawaii.edu/elp/publications/faculty/TokyoPaperFinal.doc>, pp. 3-6. On p. 5, Van Dyke stated: "[C]ountries have remained conflicted about this issue, expressing the view that they made strategic sacrifices during the Convention's

negotiations in order to achieve a universally acceptable Convention, and are still uneasy about other countries' military activities close to their coasts....”

¹⁴ Wallace, Michele, “The Right of Warships to Operate in the Exclusive Economic Zone as Perceived by Delegates to the Third United Nations Law of the Sea Convention” in Jon M. Van Dyke, Lewis M. Alexander, and Joseph R. Morgan (eds.), *International Navigation: Rocks and Shoals Ahead?* Honolulu: Law of the Sea Institute, 1988, pp. 345, 346-47; as cited in <http://www.hawaii.edu/elp/publications/faculty/TokyoPaperFinal.doc>.

¹⁵ Article 58 of UNCLOS concerning EEZs, refers to the applicability of Article 88, which states: “The high seas shall be reserved for peaceful purposes.”

¹⁶ Assumed to be conducting information gathering operations since the ship was casting its equipment into the sea and rotating its antennas. *Defense of Japan 2000 White Paper* English translation by Urban Connections, p. 49; <http://www.infoasia.co.jp>

¹⁷ *Defense of Japan 2001 White Paper* available at <http://www.jda.go.jp/e/pab/wp2001/youyaku/by1301030000.htm>

¹⁸ “Japan, China agree on 2-month maritime notice system,” Japan Policy & Politics, Kyodo News Agency, Feb 19, 2001; available at http://findarticles.com/p/articles/mi_m0XPQ/is_2001_Feb_19/ai_70709776.

¹⁹ Interestingly, Seoul and Tokyo decided to send ships only after Beijing had done so. The Chinese ships, although remaining independent, are communicating with Task Force 151 ships by e-mail and bridge-to-bridge radio, and exchanging information on operations and positions, thus participating substantially, if not officially, in the multinational undertaking to protect maritime activity in the Gulf of Aden. It is not clear if the JMSDF ship is part of TF 151 or simply cooperating.

²⁰ Al Pessin , “US Admiral Calls for Renewed US-China Military Talks,” VOANews.com, 19 March 2009; <http://www.voanews.com/english/2009-03-19-voa63.cfm>

²¹ “Remarks by Vice Minister He Yafei at the UNSC Ministerial Meeting On Counter Piracy off the Coast of Somalia,” Ministry of Foreign Affairs of the PRC, 17 December 2008, <http://www.fmprc.gov.cn/eng/wjb/zzjg/gjs/gjxw/t526519.htm>

²² “Vice Foreign Minister He Yafei Meets with Foreign Minister of the Transitional Federal Government (TFG) of Somalia Ali Ahmed Jama,” Ministry of Foreign Affairs of the PRC, 17 December 2008, <http://www.fmprc.gov.cn/eng/wjb/zzjg/gjs/gjxw/t526947.htm>

²³ “Chinese Navy sends most sophisticated ships on escort mission off Somalia,” *China View: Window of China*, 26 December 2008; http://news.xinhuanet.com/english/2008-12/26/content_10565179.htm

²⁴ The author met with a think-tanker from a prominent Shanghai university on April 2, 2009. He described the widely held view among the Chinese public that, issues of international law aside, the United States should not conduct operations in areas of sensitivity to China—such as near this new nuclear submarine base. He went on to say that there are only small areas that fall into this category.

²⁵ Bateman made this statement in a give-and-take in the Nelson Report on March 16, 2009.

²⁶ Nelson Report, March 11, 2009

²⁷ The descriptions of the circumstances that led to and then resulted from the INCSEA agreement are a combination of the author’s recollections of personal experiences in his career in the US Navy and reports from that period, which were refreshed, reaffirmed, and augmented by reading numerous documents and articles, prominently including the following three: (1) Winkler, David F., “IncSea, games of “chicken,” and fortunate timing,” *Sea Power*, April 2001, available at http://findarticles.com/p/articles/mi_qa3738/is_200104/ai_n8932960/; (2) David N. Griffiths,

“Catalyst for Confidence: 25 Years of INCSEA,” available at http://www.noac-national.ca/article/griffiths/incsea_bydavidngriffiths.html; (3) Rose Gottemoeller, “US-Russia Cooperation on Iran: Aftermath of the Summer War in Georgia,” *Pro et Contra*, July-August 2008; <http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=22449&prog=zru>

²⁸ The author recalls conducting a similar maneuver in a P-2 aircraft, over Soviet ships in the Sea of Japan in 1962.

²⁹ As Commander of the Iceland Defense Force 1986-89, the author routinely directed F-15s from Iceland to intercept Soviet Bear aircraft and sent P-3s to find Soviet submarines and to simulate attacks on Soviet surface ship formations. These activities benefited from the, by then, well-established IncSea rules.

³⁰ A US Navy officer involved in the last incident involving the USS *Essex* explained how this dangerous pass over his ship had led to that Soviet plane crashing into the sea; his Soviet counterpart solemnly note that his son had been on that flight.

³¹ *Ibid.*

³² *Ibid.*

³³ Jane Macartney, “China ends naval stand-off and credits Barack Obama,” *Times Online*, March 21, 2009; <http://www.timesonline.co.uk/tol/news/world/asia/article5942562.ece>

³⁴ “Sino-US sea standoff appears to have ended,” *China Daily*.

³⁵ David E. Sanger and Joseph Kahn, “US Tries to Interpret China’s Silence Over Test,” *New York Times*, January 22, 2007; http://www.nytimes.com/2007/01/22/world/asia/22missile.html?_r=1

The Legality of the “*Impeccable* Incident”

Ji Guoxing

The “*Impeccable* Incident” constitutes the most serious friction between China and the United States since the collision of their military aircraft near Hainan Island in April 2001. Like the previous one, this incident shows the two countries’ differing understandings and implementation of the United Nations Convention on the Law of the Sea (UNCLOS) – particularly the Convention’s provisions on coastal states’ rights in their exclusive economic zones (EEZs). In attempting to justify the US conduct in the South China Sea, Chairman of the Joint Chiefs of Staff Admiral Michael Mullen said that though the *USNS Impeccable* was in China’s EEZ, the United States has the right to enter this area. “These aren’t territorial waters. Territorial waters go out to 12 nm [nautical miles], and exclusive economic zones go out to 200 nm. Any country has the right to enter,” he said. But in fact, the *Impeccable*’s activities did contravene the UNCLOS, as the Convention affords China

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jurisdiction over relevant activities in the EEZ and prohibits actions that are not for peaceful purposes.

The UNCLOS, the document underlying this controversy, was adopted in April 1982 after more than 14 years' of negotiation and consultation, and finally took effect in November 1994. To date, 156 countries have signed it. Although the United States has not yet ratified the Convention, it is still bound to follow it, as the Convention has become customary international law. Since the Convention itself is the outcome of compromise between coastal states and maritime powers, it attempts to strike a balance between the needs of coastal countries striving to expand their marine interests and rights over resources and of maritime powers insistent on preserving their freedom of navigation. Therefore the Convention is ambiguous on many issues. Each country usually takes the interpretation most favorable to its own interests and there are always many differences over the Convention's enforcement.

HIGH SEAS VS. INTERNATIONAL WATERS

Though the United States supports the EEZ regime, it insists on using language that reinforces its own interpretation of the Convention's provisions. In particular, the United States continues to use the phrase "international waters" when referring to the EEZ, in an attempt to support its desire for unimpeded freedom of navigation. But since UNCLOS took effect, the words "international waters" have no legal meaning. Historically, the terms "high seas" and "international waters" were interchangeable, as both words referred to the waters beyond the territorial seas. But now, according to the UNCLOS, "high seas" refer to the sea areas beyond the extent of national jurisdiction. According to Article 86 of the Convention, "high seas" refer to "all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State." UNCLOS does not address the notion of international waters, and the term does not appear in the Convention.

The United States believes that "All waters seaward of the territorial seas are international waters where the ships and aircraft of all States enjoy the high seas freedom of navigation and overflight;" "International waters include the contiguous zone, exclusive economic zone and high seas;" and "The international respect for freedom of the seas guarantees legal access up to the territorial waters of all coastal countries of the world."¹ However, while the United States regards the EEZs of other countries as international waters, it requires other countries to abide by its procedures and designated routes when flying in its "Air Defense Identification Zone" (ADIZ), which extends 434 nautical miles off its coast. The ADIZ is unilaterally set by the United States and its extent greatly exceeds that of the exclusive economic zone, though there is no provision for this in international law.²

At present the United States regards the freedom of navigation in exclusive eco-

conomic zones as equal to the freedom of navigation on high seas; but this is in conflict with the UNCLOS. Although the Convention grants freedom of navigation in the EEZ, such freedom is subject to the resource-related and environment-related laws and regulations of the coastal state. According to Article 58, in the exclusive economic zone, all States enjoy the freedoms of navigation, overflight, the laying of submarine cables and pipelines, but when exercising their rights, "States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State." Thus, the United States enjoys the freedom of overflight and navigation in China's EEZ, but such freedom is not unrestricted, and US aircraft and vessels must observe the relevant Chinese laws. By the end of the 1990s, China had promulgated more than thirty laws and regulations related to marine resources and environment, covering the basic marine legal system, mineral resources, fishing, environmental protection and marine scientific research among others.³

China is not alone in its protest against US activities in its EEZ. For example, although India explicitly opposes other countries conducting military activities in its EEZ, the US navy operates there all the same, and these operations increased after September 11. Each time the US navy enters the Indian EEZ, the Indian government lodges a protest.⁴ Likewise, the "Regional Maritime Security Initiative" (RMSI) championed by the United States has also met resistance from coastal states. The US planned to deploy its marines and special operations forces on high-speed vessels along the Strait of Malacca to flush out terrorists, but this caused an immediate negative reaction in Asia. The main reason is that RMSI does not conform to the right of innocent passage in the territorial sea, nor to the right of transit passage in the international straits, and that it also transcends the right of freedom of navigation in the EEZ. Similarly, the US "Proliferation Security Initiative" (PSI) plans to intercept ships and planes carrying suspected weapons of mass destruction (WMD). PSI is very controversial, because the legality of interdicting such shipments on the high seas as well as in EEZs and territorial waters is highly questionable and contravenes international law.

NOT FOR PEACEFUL PURPOSES

The US military survey activities in the Chinese EEZ violate the fundamental principle of the UNCLOS for "peaceful uses of the seas." According to Article 301, "In exercising their rights and performing their duties under this Convention, State Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State".⁵ As a marine surveillance ship, the *Impeccable's* expedition to the south of Hainan Island aimed to detect activities of the Chinese submarines deployed at the Sanya Submarine Base. In an interview with the Russian ITAR-TASS News Agency, an anonymous Pentagon official admitted that the ship was indeed engaged in collecting intelligence in the South China Sea.⁶ The activities of the *Impeccable* are obviously aimed at collecting military information and are not for peaceful purposes. They openly encroach on the national security and peaceful

order of China and constitute a threat of force against its territorial integrity and political independence.

As the Convention is the outcome of compromises between coastal states and maritime powers, the issue of military and information-gathering activities in the EEZ is an unspecified “grey area” in the Convention. Since the formulation of the Convention, there have existed two opposite standpoints on the matter. The coastal states including Brazil, Cape Verde, Uruguay, India, Pakistan, Bangladesh, Malaysia and China oppose the military and information activities of other countries in their EEZs, which, they argue, jeopardize their security and violate the fundamental principle for “peaceful uses of the seas.” On the other hand, the United States, Italy, Germany, the Netherlands and Britain actively advocate the freedom of military and information activities in the EEZ. For China and other coastal countries, what is not authorized in the Convention is not permitted; for the US and other maritime powers, what is not explicitly prohibited in the Convention is permitted.

The United States emphasizes that the *Impeccable* was in the Chinese EEZ but not in the Chinese territorial sea, and thus the Convention’s provisions on “innocent passage” are not applicable to the *Impeccable*. Article 19 of the Convention enumerates 12 activities that should be considered to be prejudicial to the peace, good order or security of the coastal State and not in conformity with innocent passage of the territorial sea. Item 3 refers to “any act aimed at collecting information to the prejudice of the defense or security of the coastal State.” The United States believes that the provisions on innocent passage are not applicable to the *Impeccable*. But the problem is that an activity considered to violate innocent passage in the territorial sea cannot be considered to be a “peaceful activity” in the EEZ.

The United States calls its reconnaissance in the South China Sea a “hydrographic survey”. China and other coastal states hold that hydrographic surveys relate to resources and environment in EEZs. They fall into the category of marine scientific research, and should be subject to the jurisdiction of the coastal states. The United States emphasizes that hydrographic surveys are part of the right of freedom of navigation, with the purpose to draw marine charts and to ensure the safety of submarine navigation. Yet, the freedom of navigation in the EEZ is subject to the restrictions of relevant laws and regulations of coastal states.

According to some US critics, China’s position on these issues is hypocritical, as they allege that China also engages in military and information-collecting activities in Japan’s EEZ. However, China’s activities in the East China Sea involve several contentious issues with Japan. First, the Diaoyudao Islands are historically part of Chinese territory, and Chinese ships have the right to enter sea areas adjacent to them; Second, China and Japan have not yet delimited the EEZ line in the East China Sea, and when their EEZ claims overlap, Japan cannot accuse China of its encroachment upon Japan’s EEZ. Third, Chinese warships passing through the Tsugaru and Tsushima Straits are exercising the right of transit passage in straits used for interna-

tional navigation, and Japan cannot use this to assert China's "expansion." Besides, the Chinese ships that traverse the Japanese territorial sea abide by the provisions of the innocent passage through the territorial sea.

American critics have accused China of duplicity, and criticized "China's provocation." But the fact is that it was the US survey ship that came to China's EEZ and tried to collect information. What would the United States do if the tables were turned? If China or other countries would imitate US actions and try to collect information in the United States' EEZ, how would Washington react? The United States and China are equal members of the international community, and the United States should give up its hegemonic mentality.

AN EQUITABLE RESOLUTION

According to Article 59 of the Convention, the conflict regarding the attribution of rights and jurisdiction in the exclusive economic zone "should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole." The China-US dispute on the *Impeccable* should be resolved in line with this spirit and on the basis of equity, with full respect for coastal states' regulations on the management of resources and military activities within the EEZs and for maritime powers' need for freedom of navigation.

In view of the difficulties in resolving the dispute within a short period of time, it is necessary for China and the United States to adopt confidence-building measures: first establish a maritime code of conduct, second, develop and sign an incidents at sea agreement (INCSEA). As to the code of conduct, they could try to reach some consensus on the military information activities in the EEZ. The aim is not to prohibit navigation or overflight in the EEZ, but only to create a framework for the exercise of freedom of navigation. For example, they could specify that activities such as collecting marine meteorological information to safeguard safe navigation are permissible, and that activities such as collecting military intelligence for military purposes are not permissible. They could also clarify each other's stand on the extent of China's jurisdiction in managing the resources and environment in its EEZ and on the extent of the US application of the freedom of navigation in the Chinese EEZ.

As to an INCSEA agreement, China and the United States, based on the Military Maritime Consultative Agreement (MMCA) reached between them in January 1998, could further sign a document similar to the 1972 US-Soviet INCSEA agreement. Although the US-Soviet agreement was signed during the Cold War, its positive role in preventing marine incidents has been acknowledged in the world community and many countries have followed suit. For example, Indonesia and Malaysia signed an INCSEA agreement in 2001. At that time, the two countries had not yet settled their dispute over the islands of Sipadan and Ligitan in the Sulawesi Sea, and their vessels often had encounters in the sea areas adjacent to the two islands. As in the original INCSEA agreement, there are concrete rules and regulations regarding the safe dis-

tance that must be kept between the ships and planes encountered. Also, both sides agreed to avoid dangerous actions and to exercise restraint in their naval operations, thus preventing the escalation of the tense situation. There is also an INCSEA agreement between Japan and the ROK. Although there is a long-standing dispute over the ownership of Dokdo Island, no unexpected accidents have ever taken place between the Japanese and Korean navies.

Finally, little can be accomplished until the United States revises its adversarial mentality towards China. The third US President, John Adams, once said that America “does not go abroad in search of monsters to destroy. She is the well-wisher to freedom and independence of all.” However, the United States now seems to look for adversaries and enemies abroad. China seems to be one of its targets, as US military authorities continuously speak of a “China threat.” China has no intention to confront the United States in the Pacific, no intention to drive the United States out of East Asia and no intention to replace the US role in East Asia. In fact, China’s main strategic interests in the Asian-Pacific converge with those of the United States, and they need cooperation in many aspects such as safeguarding the strategic lanes of communication (SLOCs), fighting against terrorism and dealing with the current international financial crisis. If the United States regards China as its potential enemy, it will be impossible for them to talk about the commonalities in strategic interests. Following the Impeccable incident, President Obama has emphasized the enhancement of the level and frequency of China-US military dialogs to avoid the recurrence of such incidents in the future. This is certainly a positive step. ☺

NOTES

¹ Dennis Mandsager. “U.S. Free Navigation Program: Policy, Procedure and Future”; in Michael N. Schmitt edited. “The Law of Military Operations”, International Law Studies, Vol. 72, p114 and p117. Newport, Rhode Island: Naval War College Press, 1998.

² Some Chinese scholars suggest that China should formulate the law concerning the establishment of ADIZ and organically connect it with the exclusive economic zone. See Xue Guifang, Xiong Xuyuan. A Legal Analysis of the Establishment of Air Defense Identification

³ See Collection of the Sea Laws and Regulations of PRC (3rd Edition). Beijing: Ocean Press, 2001.

⁴ Comments made by Ram Anand, honorable professor with Nehru University of India, at the International Meeting on EEZ Regime sponsored by the Institute for Ocean Policy, Ship and Ocean Foundation in Tokyo on February 19-20, 2003.

⁵ This Article was included in Part XVI: “General Provisions” of the Convention; although it does not specifically refer to the EEZ, it includes the EEZ.

⁶ Chinese editon from ITAR-TASS. See, <http://news.sohu.com/20090312/n262749905.shtml>

The Impeccable Incident: Truth and Consequences

Mark Valencia

The *Impeccable* incident 75 miles south of the island of Hainan in China's Exclusive Economic Zone (EEZ) was supposedly due to different interpretations of international law.¹ But more fundamentally it underscored the lack of transparency and trust in the US-China relationship. Given the mutual uncertainty regarding strategic intent, such incidents are likely to increase in frequency and intensity if the two rivals cannot develop a *modus operandi* to deal with their differences.

According to the Pentagon, "five Chinese vessels shadowed and aggressively maneuvered in dangerously close proximity to USNS *Impeccable*, in an apparent coordinated effort to harass the US ocean surveillance ship while it was conducting routine operations in international waters."² The Pentagon cited recent instances of previous "harassment of its naval vessel including shining of spotlights, low altitude flyovers,

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crossing of bows at night at close range, and finally a bridge-to-bridge warning calling [Impeccable's] operations illegal and directing Impeccable to leave the area or 'suffer the consequences.'" The US Navy's *Bowditch*, an oceanographic survey ship, has been occasionally hounded out of China's EEZ in the Yellow, East China and South China Seas beginning in 2002. Pentagon spokesman Stewart Upton explained that "Chinese ships and aircraft routinely steam or fly near US Navy ships in this area. However these actions [regarding the Impeccable] were considerably more aggressive and unprofessional than we have seen, and greatly increased the risk of collision or miscalculation."

SPLITTING HAIRS

There are several problems and lacunae in the Pentagon's explanation of the incident. First of all there is no such thing as "international waters." According to the 1982 UN Convention on the Law of the Sea, there are internal waters, territorial waters, the exclusive economic zone and the high seas, each with their own regime regarding freedom of navigation. "International waters" is a term used by the US Navy to indicate areas where it thinks it has unconstrained navigational freedom. The term is imprecise and confusing and its use should be discontinued.

The legal underpinnings of the US position are soft and ambiguous. According to the 1982 convention, marine scientific research in a foreign EEZ can only be undertaken with the consent of the coastal state. This is because such research and activities may have direct bearing on the exploration, exploitation, conservation or management of the coastal state's living and non-living resources. The research must also be for peaceful purposes only. China is among some 156 nations that have ratified the convention. The US is among a small minority that has not, although it maintains that most of it is binding customary law. However, customary law is constantly evolving based on state practice. China maintains that what the United States is doing comes under the marine scientific research provisions of the convention and that it did not give the required consent to the United States. However, the United States distinguishes between marine scientific research, which requires consent, and hydrographic and military surveys, which are mentioned separately in the convention. The United States maintains that the latter do not require consent and that they are an exercise of the freedom of navigation and "other internationally lawful uses of the sea" protected by the convention.

Critics of this position point out that collection of data that is specifically for a military purpose may also unintentionally or otherwise shed light on resources in the area. They also argue that a country that has not ratified the convention does not have much credibility interpreting it to its advantage.

The mission of the *Impeccable* is to use passive and active low-frequency sonar arrays to enable detection and tracking of undersea threats, including submarines. Tracking is a necessary prelude to targeting. China argues that the collection of such data is a "preparation of the battle field" and thus a threat of use of force - a violation

of the UN Charter and certainly not a peaceful use of the ocean as required by the convention. China is not alone in barring certain military activities from its EEZ. Brazil, India, Malaysia and Vietnam also have some restrictions. The United States argues that its data gathering is purely defensive and certainly not a threat of use of force.

Regarding the confrontation, China would say that its vessels were not harassing the *Impeccable* but simply trying to make it cease violating what China says is both international and Chinese law and leave the area. The United States argues that according to the convention, China must pay “due regard” to its navigational and operational rights and that “harassing” its vessel - particularly a naval vessel which has sovereign immunity - is a violation of the due regard principle.

CUTTING TO THE CHASE

Those are the respective legal arguments. However this confrontation was not really about the finer points of international law. Rather it was about mutual distrust stemming from China’s military expansion and aggressive US actions to monitor this growing Chinese “threat” in order to neutralize it if need be.

Beijing has long sought to prevent other countries from carrying out surveillance or surveying operations within its EEZ. In 2002, China enacted a law against the undertaking of such activities in its EEZ without its permission. China has recorded at least 200 incidents of US vessels collecting intelligence in its EEZ, but generally has avoided such confrontations.³ However, it has tried to enforce its interpretation of the law several times against the *Bowditch*, a US hydrographic survey vessel. But this time the Chinese approach was different in degree. For example, it was considerably more aggressive and sustained. Why?

China is currently no match militarily for the United States in a full military conflict. However, there may come a day when it is - and the United States is taking no chances. It is particularly concerned with China’s fleet of submarines. In the last decade China has acquired 12 Russian kilo-class subs and built by itself two types of new nuclear-powered ones – the Jin-class, which carries ballistic missiles, and the Shan-class attack subs.⁴ China plans to build at least five Jin-class SSBN so that like the United States, it can have a near-continuous presence at sea of this nuclear deterrent.⁵ China has recently built a submarine base at Yulin, Hainan with 11 submerged tunnel openings to accommodate its new subs. Thus, the US concern and focus on Yulin.

Instead of simply surveying the ocean bottom like the *Bowditch*, to aid in the future navigation of its own subs and detection of underwater threats, the *Impeccable* was probably tracking Chinese submarines.⁶ Indeed it may have been trying to determine at what distance it could detect the subs exiting China’s Yulin base. It was also likely mapping the navigational channels emanating from Yulin to facilitate targeting in case it one day becomes necessary to bottle them up.⁷ Because China does

not have a similar capability to monitor the US fleet and ocean bottom off its ports, this incident embarrassed the Chinese navy, potentially emasculated its submarine nuclear weapon capability and greatly frustrated its leadership. For China, this is a very “unfriendly” act and is well-known as such to the United States. This explains the strong Chinese reaction.

The aftermath of the incident was initially rather frightening for US-China relations. US officials lodged formal protests with the Chinese Foreign Ministry and the Chinese Embassy in Washington. The protests were promptly rejected in no uncertain terms by the Chinese Foreign Ministry. “The US claims are gravely in contravention of the facts and confuse black and white, and they are totally unacceptable to China,” said its spokesman Ma Zhaoxia.⁸ Adm. Timothy Keating, the commander in chief of the US Pacific Command, told the US Senate Armed Services Committee that the Chinese had “behaved in an aggressive and troublesome manner “and are not willing to abide by acceptable standards of behavior.”⁹ He added that China’s actions were unlawful and dangerous.” US National Intelligence Director Dennis Blair told Congress that the incident was the “most serious in eight years.”¹⁰ He went on to say “preparations for a Taiwan conflict” still drive the modernization goals of the Chinese military and that the recent naval incident was part of a plan by Beijing to expand its influence.¹¹ Conservatives used the occasion to re-emphasize the China threat. A study published by the American Enterprise Institute in January warned that “The minimal aim of American strategy must remain what it has been for the past century: to preclude the domination of Asia by any single power or coalition of hostile powers. This is necessary to prevent others from threatening our security and prosperity through any attempts to control the region’s resources, form exclusive economic blocs, or deny our physical access to and through Asia.” Adding fuel to the fire, the Pentagon released a report concluding that China is increasing its military power and developing new “disruptive” technologies that are shifting the military balance in the region.¹²

IMPECCABLE TIMING?

Some US officials apparently think the confrontation was authorized in Beijing and timed to test the new US president.¹³ President Barack Obama ordered a guided missile destroyer to escort the *Impeccable*. China appeared to respond in kind, but subsequently said its patrol boat was dispatched to protect Chinese fisheries vessels in the South China Sea in the wake of the Philippines passing its Baselines Law, which included part of the Spratlys as a “regime of islands.” Nevertheless this set the stage for a worst scenario of confrontation between warships and the potential incalculable consequences. US officials, including White House Press Secretary Robert Gibbs, said publicly that the US Navy will continue to operate in the South China Sea “and we expect the Chinese to observe international law around that.”¹⁴

However it appears that cooler heads have prevailed - at least for the moment -beginning with President Obama. He “stressed the importance of raising the level and

frequency of the US-China military – to – military dialogue in order to avoid future incidents.”¹⁵ US Secretary of Defense Robert Gates said he did not think China was trying to prevent the US Navy from operating in the South China Sea and that he hoped armed escorts would not be needed in future.¹⁶ US Secretary of State Hillary Clinton told reporters after her meeting with Chinese Foreign Minister Yang Jiechi that “we both agreed that we should work to ensure that such incidents do not happen again.”¹⁷ For its part, China said that its top commanders do not have plans to increase the military presence in the South China Sea and that it considers the incident “closed.”¹⁸

The plain fact is now is not the time for either party to expand this incident. The United States and China are deeply interdependent in trade and financial flows and need to work together to mitigate the burgeoning economic crisis. China has not linked economic and military issues in its relations with the US - but it could. At the end of January, China held 740 billion in US Treasury securities, more than any other country.

China and the United States have a 1998 agreement regarding military consultations for the very purpose of avoiding misunderstandings and confrontations. However, China froze such exchanges last October in retaliation for a 6.5 billion US weapons sale to Taiwan. Even though they resumed in February 2009, the Chinese side was quoted as saying “contacts will remain tenuous unless the United States removes remaining obstacles to improvement.”¹⁹ Obviously these consultations urgently need to be reinvigorated and expanded to include such incidents and ways to avoid them.

There may be room for a tacit compromise. Perhaps the Obama administration would be willing to modify some of its procedures - particularly regarding the more aggressive tracking and targeting of China’s submarines. China might in turn tacitly allow by inaction some collection of information by US naval vessels in its EEZ, e.g., general hydrography rather than tracking of submarines. The latter could actually be in China’s interest because as its capabilities expand it will increasingly need to collect similar information in other countries EEZs, particularly that of Japan. Indeed it already does so. Perhaps an incident at sea agreement similar to that worked out with the Soviet Union at the height of the Cold War could mitigate actual confrontations.

But this would be only a stop-gap measure and useful only for China and the United States (and maybe Japan). Unfortunately as technology advances, the scale and scope of maritime and airborne intelligence collection activities are likely to expand rapidly over the next decade in many countries, involving levels and types of activities quite unprecedented in peacetime. They will not only become more intensive; they will generally be more intrusive and include unmanned aerial and submerged vehicles. These intelligence gathering activities will generate tensions and more frequent crises; they will produce defensive reactions and escalatory dynamics; and

they will lead to less stability in the most affected regions, especially in Asia.

Agreement is needed on a set of voluntary guidelines for military and intelligence-gathering activities in foreign EEZs. Such guidelines would provide indicators of friendly (and unfriendly) behavior and help parties avoid unnecessary incidents without banning any activities outright. Specific guidelines have been proposed by a group of international experts meeting in their personal capacities over several years with the support of the Ocean Policy Research Foundation of Japan.²⁰ The most relevant of these voluntary guidelines would be the obligation to use the ocean for peaceful purposes only, and to refrain from the threat or use of force, as well as provocative acts such as collecting information to support the use of force against the coastal state or interfering with electronic systems. Unfortunately, the United States rejected any and all such guidelines as unacceptable. It may be time for it to re-evaluate its position.

The bigger question is whether enforcing US interpretations of the finer points of a treaty it did not ratify is worth undermining US-China relations, particularly at this point in time? To some “cold warriors” of a bygone era, perhaps it is. But there is a new commander-in-chief in Washington. And his mantra is change - not only in foreign policy, but more importantly how it is conducted. President Obama seems to prefer an open-minded, reasonable, and conciliatory approach. But US government arguments and immediate follow-up actions regarding the incident seem to constitute a “might makes right” approach that only increases the damage being done to the US image in Asia. Real change is needed in US maritime diplomacy in Asia and elsewhere. 🇺🇸

NOTES

¹ For an elaboration of the finer points of the respective legal positions, see Mark J. Valencia, “Tempting the dragon,” *Far Eastern Economic Review*, 11 March, 2009, <http://www.feer.com/international-relations/20098/march58/tempting-the-dragon>.

² Yuli Yang, “Pentagon says Chinese vessels harassed U.S. ship,” CNN, 10 March, 2009, <http://edition.cnn.com/2009/POLITICS/03/09/us.navy.china/>.

³ Christopher Bodeen, “China-US sea confrontations could continue,” YAHOO! NEWS, 11 March, 2009, http://img.news.yahoo.com/s/ap/20090310/ap_on_re_as/as_china_us.

⁴ Hari Sud, “China’s Vulnerability in Malacca Strait,” UPI Asia.com, 20 March, 2009, http://www.upiasia.com/Security/2009/03/20/chinas_vulnerability_in_malacca_strait/7196/.

⁵ Patrick Goodenough, “Naval confrontation: China pushing U.S. further away from its territory,” CNSNews.com, 11 March, 2009, <http://www.cnsnews.com/Public/Content/Article.aspx?rsrcid=44839>.

⁶ John Chan, “Naval incidents highlight tense US-China relations,” wsws.org, 12 March, 2009, <http://www.wsws.org/articles/2009/mar2009/usch-m12.shtml>.

⁷ Judah Grunstein, “An Impeccable U.S.-China incident at sea,” Worldpoliticsreview.com, 15 March, 2009, <http://www.worldpoliticsreview.com/article.aspx?id=3438>.

⁸ Don Lee, “China says U.S. provoked naval confrontation,” *Los Angeles Times*, 11 March ,

2009, <http://www.latimes.com/news/nationworld/world/la-fg-china-sea-confrontation11-2009mar11,0,1469403.story>.

⁹ Dune Lawrence, "China flash of maritime muscle may mean power push in Asia sea," Bloomberg.com, 23 March, 2009, <http://www.bloomberg.com/apps/news?pid=20601101&sid=an19wYmJX91w&refer=japan>.

¹⁰ Blair: China adopting a more aggressive military stance, FoxNews.com, 10 March, 2009, <http://www.foxnews.com/politics/2009/03/10/official-somali-extremist-group-poised-merge-al-qaeda/>.

¹¹ William Lowther, "Taiwan driving Chinese military goals," *Taipei Times*, 12 March, 2009, <http://www.taipeitimes.com/News/front/archives/2009/03/12/2003438279>.

¹² "Pentagon questions growing Chinese military power," USA TODAY, 25 March, 2009, http://www.usatoday.com/news/washington/2009-03-25-washington-china_N.htm.

¹³ Richard Halloran, "US-Chinese contacts are imperative for military," *Taipei Times*, 17 March, 2009, <http://www.taipeitimes.com/News/editorials/archives/2009/03/17/2003438702>.

¹⁴ Pauline Jelinek, "US protests 'harassment' by Chinese vessels," The Associated Press, 9 March, 2009, <http://apnews.myway.com/article/20090310/D96QR9H00.html>.

¹⁵ Ibid.

¹⁶ "Gates hopes to call off escorts in South China Sea," AFP, 18 March, 2009, <http://www.google.com/hostednews/afp/article/ALeqM5gDDjIDKuWxw9IpJVQIgctvYVSSkKw>.

¹⁷ Matthew Lee, "US, China agree on need to reduce sea tension," YAHOO! NEWS, 12 March, 2009, http://news.yahoo.com/s/ap/20090311/ap_on_go_ca_st_pe/us_china_16/print.

¹⁸ "Confrontation" heating up in South China Sea," Asianews.it, 23 March, 2009, www.asianews.it/index.php?l=en&art=14804&geo=5&theme=6&size=A.

¹⁹ Christopher Bodeen, US-China wrapup resumed military consultations, Associated Press, 3 February, 2009, http://news.technology.findlaw.com/scripts/printer_friendly.pl?page=/ap_stories/i/1104/02-27-2009/20090227230509_15.html.

²⁰ EEZ Group 21, "Guidelines for Navigation and Overflight in the Exclusive Economic Zone A Commentary," Ocean Policy Research Foundation, Tokyo, Japan, 2006.