

The Impeccable Incident: Truth and Consequences

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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/>.

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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/.

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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.

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