

The Legality of the “*Impeccable* Incident”

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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>