



Policy Forum 09-026: Not an Impeccable Argument



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Recommended Citation

"Policy Forum 09-026: Not an Impeccable Argument", NAPSNet Policy Forum, April 01, 2009, <https://nautilus.org/napsnet/napsnet-policy-forum/not-an-impeccable-argument/>

Not an Impeccable Argument

Policy Forum Online 09-026A: April 1st, 2009

By Mark J. Valencia

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I. Introduction

Mark J. Valencia, a maritime policy analyst based in Kaneohe, Hawaii, writes, "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."

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views and opinions on contentious topics in order to identify common ground.

II. Article by Mark J. Valencia

- "Not an Impeccable Argument"

By Mark J. Valencia

On 8 March 2009, 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" [China's Exclusive Economic Zone (EEZ)]. In the view of some senior US Naval and State Department lawyers, the U.S. was in the 'right' and China was in the 'wrong'. However it is not that simple. Indeed, there is much more to this incident legally and politically than first meets the eye.

The views of these pro-US advocates are fundamentally flawed by justification of their positions through extensive reference to and interpretation of the 1982 UN Convention on the Law of the Sea. Why? The Convention was a package deal with many "bargains" between the maritime powers and the developing countries including extensive navigational rights for maritime powers in exchange for the deep seabed mining provisions. The U.S. did not hold up its end of the bargains i.e. it chose not to ratify the Convention and therefore is not a party. The advocates' arguments are based on the false assumption that the U.S., as a non-party to the agreement, can pick and choose those parts and interpretations of the Convention favorable to it. It would be more transparent to make the *real politik* argument that the U.S. remains outside the Convention - a 'rogue' nation - and can and will declare and follow whatever it deems is 'customary' law.

Moreover, to support their position these advocates refer to an 8 March 1983 US statement that purports to interpret the navigational regime in the EEZ. But for parties to the Convention, the statement by the U.S. as a non-party is legally irrelevant. Indeed such statements, if intended as 'reservations' regarding some of the Treaty's provisions, would not be valid even if it were a party. And any notion that it is "well-settled" -- as claimed by such advocates -- that the Convention preserves the freedom of military operations in the EEZ is certainly debatable. Many nations do not agree with this interpretation --- including in Asia, China, India and Malaysia.

These advocates also contend that "coastal states must not purport to extend authority or control over foreign warships, naval auxiliaries, or other public vessels" in their EEZ due to their sovereign immunity. However if those vessels are violating international or national law they should and can be asked to cease and desist. To suggest otherwise is to claim that in the EEZ such vessels can violate the law without 'due regard' to the rights of the coastal state. This is neither a fair nor reasonable interpretation of 'due regard' - even if the U.S. were a party to the Convention.

These advocates also attempt to define scientific research, a crucial matter in this dispute. However, again it is not for advocates for a non-party to define such critical terms. An important determinant of whether or not coastal state permission is required for such activities is whether or not the data collected can be used to delineate or harvest resources. Certainly data collected 'for military purposes only' can one day be used to delineate resources. One example is the military - collected side scan sonar data from the US Pacific EEZ which when eventually released assisted in the location of transform fault zones which could harbor heavy metal deposits.

These advocates also tend to confuse the issue with semantic arguments and the self-serving lumping of the Bowditch - another US Navy vessel involved in incidents with China - and the Impeccable as 'military survey vessels' when in fact according to the Military Sealift Command Ship Inventory the former is an 'oceanographic survey ship' and the latter is an 'ocean surveillance ship.'

The most absurd contention by such advocates is that "there is no surer sign of greatness in a nation or its Navy than to acknowledge and accept the exercise of navigational rights and freedoms by others." If they mean that developing countries should bow to the superior capabilities and rationale of the maritime powers and their perceived abuses of international law, this smacks of imperialism.

The mission of the Impeccable is to use both passive and active low frequency sonar arrays to enable detection and tracking of undersea threats-enemy submarines, mines and torpedoes. China argues that the collection of such data is a "preparation of the battlefield" and thus a threat of use of force-a violation of the U.N. Charter and not a peaceful use of the ocean as required by the Convention. Regarding the confrontation, China would presumably say that its vessels were not harassing the Impeccable but simply trying to make it cease violating what China says is both international law and its law.

These are 'novel' arguments and it would be interesting to see them as well as the marine scientific research/hydrographic survey/military survey questions resolved by the International Tribunal for the Law of the Sea. But since the U.S. is not a party to the Convention this peaceful approach to resolution is unlikely in the foreseeable future. Even if it were to become a party, I suspect that the U.S. would not want to chance a loss on this matter.

Finally, these advocates argue that the U.S. should not curtail its perceived provocative, threatening and abusive military activities in the interest of comity because it is difficult to discern (or explain) the difference between comity and acquiescence to an excessive claim, and the military activities in question are "fundamental to the maintenance of public order and the development of international trade". This argument seems disingenuous. Good diplomats should be able to explain the difference privately or otherwise-and China has shown no interest whatsoever in impeding international trade.

The real issue is of course China's expanding blue water navy capabilities and its new submarine base at Yulin. Obviously it wants to protect its "secrets" in the area including the activities and capabilities of its submarines and the morphology of the sea bottom. And just as intently, the U.S. wants to know as much as it can about China's submarine capabilities and the area it may one day have to do battle in. Thus such incidents are likely to be repeated and become more dangerous.

The positions and arguments put forth by such advocates beg the bigger question: is enforcing U.S. interpretations of the finer points of international law worth undermining US-China relations, particularly at this point in time? To some legal 'warriors' of a bygone era, perhaps it is. But there is a new commander-in-chief in town. And his mantra is change -not only in foreign policy but more importantly how it is conducted. The attitude and approach indicated by these advocates is a far cry from the open-minded, reasonable, conciliatory approach promoted by the Obama administration. Indeed, 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.

III. Notes

On 24 March a Rajaratnam School of International Studies (RSIS) Commentary by Patrick J. Neher, Raul A. Pedrozo and J. Ashley Roach "In Defense of High Seas Freedoms"(<http://www.rsis.edu.sg/publications/Perspective/RSIS0312009.pdf>) offering an "alternative view" of Sam Bateman's 13 March RSIS Commentary *Clashes at Sea: When Chinese Vessels Harass US Ships* . RSIS declined to publish an earlier version of this following perspective on Neher et al's Commentary and other articles with similar arguments.

IV. Nautilus invites your responses

The Northeast Asia Peace and Security Network invites your responses to this essay. Please send responses to: napsnet-reply@nautilus.org . Responses will be considered for redistribution to the network only if they include the author's name, affiliation, and explicit consent.

Produced by The Nautilus Institute for Security and Sustainable Development
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