

# Policy Forum 09-020: Tempting the Dragon



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# Tempting the Dragon

Policy Forum Online 09-020A: March 12th, 2009

By Mark J. Valencia

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## I. Introduction

Mark J. Valencia, Visiting Senior Fellow at the Maritime Institute of Malaysia (MIMA), writes, "the real issue of course is China's expanding blue water navy and its major submarine base on Hainan. 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 US wants to know as much as it can about China's submarine capabilities and the area it may one day need to do battle in. Thus such incidents are likely to be repeated and become more dangerous and they do not pertain to China and the US alone."

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## **II. Article by Mark J. Valencia**

- "Tempting the Dragon"

By Mark J. Valencia

The 'harassment' of the US Navy military survey vessel Impeccable operating in China's Exclusive Economic Zone (EEZ) in the South China Sea is but the tip of an iceberg of maritime legal differences between China and the US. Indeed this is not the first such incident and unless a compromise can be negotiated it certainly won't be the last.

According to the 1982 UN Convention Law of the Sea, 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 has ratified the Convention. The US has not although it maintains that most of it is binding customary law.

China maintains that what the US is doing comes under the marine scientific provisions of the Convention and that it did not give the required consent to the US. However, the US distinguishes between marine scientific research which requires consent and hydrographic and military surveys which are mentioned separately in the Convention. The US 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 even expressly for military purposes 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 both passive and active low frequency sonar arrays to enable detection and tracking of undersea threats. 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. The US 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 law and its law and leave the area. The US 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.

The distinction between different categories of surveying and marine scientific research hinges on more than the intent and the purpose of collecting the data. The potential economic value and utility of the data to the coastal state should also be considered, and it is difficult to argue that hydrographic or military data collected today will not have some value in the future. A possible criterion for consent might recognize both the intent of the activity and the relevance to resources of

the data collected.

Regardless, the real issue of course is China's expanding blue water navy and its major submarine base on Hainan. 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 US wants to know as much as it can about China's submarine capabilities and the area it may one day need to do battle in. Thus such incidents are likely to be repeated and become more dangerous and they do not pertain to China and the US alone.

Indeed military and intelligence gathering activities in EEZs are likely to become more controversial and more dangerous. In Asia, this disturbing prospect reflects the increasing and changing demands for technical intelligence; robust weapons acquisition programs of the littoral states, especially increasing electronic warfare capabilities; and the widespread development of information warfare capabilities.

Further, the scale and scope of US maritime and airborne intelligence collection activities are likely to expand rapidly over the next decade, involving levels and sorts of activities quite unprecedented in peacetime. They will not only become more intensive; they will generally be more intrusive. They 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.

Since the US is not a party to the Convention the issue can not be resolved by the International Tribunal on the Law of the Sea. Thus these disputes will likely be addressed through a chaotic and disorderly process whereby countries assert and defend their positions through state practices, followed by protests from offended countries, and eventually by the give and take of diplomatic negotiations. Sooner or later a consensus will emerge through this process. But meanwhile many sailors, pilots, and fishers may die and relations between some nations may become strained as assertions of unilateral positions result in violent interstate incidents.

A less confrontational option would be to increase dialogue, CBMs, and cooperative efforts among the states involved and strive for collective compromise and consensus. This dialogue might have as its objective the development of agreed voluntary guidelines regarding military and intelligence gathering activities in foreign EEZs.

### **III. Nautilus invites your responses**

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Nautilus Institute

608 San Miguel Ave., Berkeley, CA 94707-1535 | Phone: (510) 423-0372 | Email:

[nautilus@nautilus.org](mailto:nautilus@nautilus.org)