

Policy Forum 07-090: The US-China Port Visit Spat: Opening a Pandora's Box?

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By Mark J. Valencia

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I. Introduction

Mark J. Valencia, a maritime security analyst in Kaneohe, Hawaii and Nautilus Institute Senior Associate, writes: "This spat may be the tip of an iceberg that expands into freedom of navigation

issues and deepens the growing rift in already brittle relations. Both nations should tread lightly and sort out their differences through negotiations less they open a Pandora's Box of maritime controversies."

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II. Article by Mark J. Valencia

- "The US-China Port Visit Spat: Opening a Pandora's Box"

By Mark J. Valencia

US Navy vessels make about 50 port calls a year in Hong Kong. Thus it came as a shock to the United States when in late November China refused entry to Hong Kong for some US Navy ships. The United States reacted by both stating and demonstrating its displeasure. Although this latest spat between burgeoning rivals focuses on maritime custom and comity, its roots and their implications go much deeper. Indeed, this is not the first US/China spat over maritime issues - and it won't be the last. The two powers need to develop a modus operandi to deal with these issues before they get out of control.

In this latest incident, China refused - without explanation - port calls in Hong Kong for nine US Navy vessels including a long-scheduled Thanksgiving port call by the aircraft carrier Kitty Hawk and its escort vessels - a guided missile cruiser and three guided missile destroyers - and an accompanying nuclear-powered submarine. The refusals were played up by the Western media as mean-spirited, particularly given that some 290 family members of US Navy personnel in the Kitty Hawk group had already arrived in Hong Kong to celebrate Thanksgiving with their loved ones. China also refused landing rights for a routine scheduled visit by a US Air Force C-17 carrying supplies for the US consulate in Hong Kong.

But what bothered the US Navy brass more was China's 20 November refusal of Hong Kong port calls by two US mine sweepers trying to avoid bad weather. Pacific Fleet commander Admiral Tim Keating was clearly irritated. "It is not, in our view, conduct that is indicative of a country who understands its obligations as a responsible nation", he fumed. The United States made a formal protest. And President George W. Bush even raised the issue with Chinese Foreign Minister Yang Jiechi. The protest, delivered by David Sedney, Deputy Assistant Secretary of Defense for East Asia, to Major General Zhao Ning, the Chinese defense attaché in Washington, stated "The denial of the USS Patriot and USS Guardian requests to refuel and avoid severe weather is contrary to commonly accepted international maritime safety protocols." It went on to proclaim that "Such cancellations run counter to our joint interest in positively developing our military to military relations."

Pentagon and Navy brass professed to be baffled by the abrupt refusals. And Minister Yang reportedly claimed that it was all a 'misunderstanding'. However China's state media reported that China blocked the visits in retaliation for the Bush administration's proposed upgrading of Taiwan's Patriot antimissile batteries. Apparently China's military was particularly upset because the announcement of the \$940 million upgrade was made shortly after visits by US Defense Secretary Robert Gates and senior US military officers, supposedly to build trust and understanding. China believes that this sale will alter the military balance in the Strait. Thus China considered the announcement an insult and a loss of face to those who met with the US delegations. China's Foreign Ministry spokesman Liu Jian Chao subsequently denied that Yang had said it was a "misunderstanding" and added that Bush's October meeting with the Dalai Lama had also damaged relations.

Perhaps signaling its displeasure with the refusals, the United States then ordered the rejected vessels to transit the Taiwan Strait on their way to Japan. Entire aircraft carrier battle groups rarely transit this Strait, as the waters are particularly sensitive for China. And as might be expected, Chinese Foreign Ministry spokesperson Qin Guan, said China "expressed grave concern to the US" about its naval vessels transiting the Strait.

The last such transit was in 2002 when the USS Constellation and its battle group moved through the Strait. Before that, in December 1995, the USS Nimitz passed through the Taiwan Strait. The Nimitz passage was widely viewed as a response to China's July and August 1995 missile tests targeting waters near Taiwan. In March 1996, when China apparently tried to intimidate the Taiwan electorate by another set of missile tests, the United States responded by deploying two aircraft carrier groups - the Independence and the Nimitz - to waters near Taiwan. But the carrier groups stayed out of the Strait to avoid an unintended clash.

Taiwan Strait narrows to 100 miles and is a potential flashpoint. China claims Taiwan as a renegade province and has nearly a thousand short and mid-range ballistic missiles aimed at it from across the Strait. If Taiwan is politically integrated with China, the Taiwan Strait will be geographically enclosed by it and its waters will be entirely within China's 12 nautical mile (nm) territorial sea and 200 nm Exclusive Economic Zone (EEZ). In that event the United States will likely insist on the right of transit passage in the Strait as provided for straits "used for international navigation" by the 1982 United Nations Convention on the Law of the Sea. However it is not clear that it will be granted to it, particularly given that the United States has not ratified the Convention which has been approved by more than 150 countries. Following other Convention language, China may argue that there is a route of "similar convenience" to the east of the Strait. Or equally controversial, it may assert that military vessels and aircraft must follow certain rules in the Strait.

For example, contrary to the Convention, China insists on prior notification for foreign warships to enter its territorial seas. However, the United States and other maritime nations reject such notification and claim the right of innocent passage in foreign territorial seas. In April 2001, three Australian warships passing through the Taiwan Strait apparently weaved in and out of China's territorial waters. China, believing that such passage was not 'innocent,' demanded that the warships leave China's territorial waters. Analysts speculated that the incident was in part a reaction by China to Australian Prime Minister John Howard's support for President Bush's position on Taiwan. The incident also occurred only a few weeks after the EP-3 incident.

That April 1, 2001 collision between a United States surveillance plane and a Chinese fighter jet raised several questions regarding the legality of military activities in EEZs. The collision took place about 62 nm southeast of Hainan in the South China Sea. China said that the US 'spy' plane was flying over its EEZ, and that it was endangering its security. Further, China demanded that the United States halt its spy flights off its coast. But the United States said that its plane was flying over 'international' waters that for navigation purposes are under the regime of 'freedom of the high seas,' and was thus enjoying the freedom of over-flight. China and the United States have held several meetings under the auspices of their Military Maritime Consultative Agreement to try to avoid a recurrence of this dangerous incident.

It is clear from the Convention and customary international law that US aircraft enjoy the freedom to fly over China's EEZ and that US vessels have the freedom to navigate its EEZ and territorial seas. But it is not clear that such freedom is absolute. The question is whether the flights are a peaceful act and give due regard to the 'interests' of China in its exercise of freedom of navigation and overflight, and in its management of its EEZ, including surveillance and enforcement of its regulations. The Convention prohibits intelligence operations in or over the territorial sea because they are not considered 'innocent.' Activities that are not 'innocent' in the territorial sea may not be

considered 'peaceful' in the EEZ. But the Convention mandates that uses of the ocean be peaceful. China certainly considers the spy missions unfriendly and perhaps even threatening.

There is also a question regarding the specific activities undertaken by the US EP-3E plane involved in the incident. EP-3Es are outfitted with high-tech eavesdropping equipment to intercept radio transmissions and other communications signals. The plane in question may have been monitoring Chinese submarine activities by accessing military communications traffic in the area. The plane may even have been interfering with communications between elements of China's armed forces. If so, this would probably not be a 'peaceful' use of China's EEZ.

Obviously one of the purposes of the flights is to gather military intelligence that could be used to delineate specific targets in a future armed conflict - in China's terms "preparing the battle field". Are such activities a 'peaceful' use of the ocean and of China's EEZ? Or do they violate the UN Charter and the Convention by threatening force against the territorial integrity or political independence of China?

On March 24, 2001, a week before the EP-3 incident, a Chinese frigate closed to within 100 meters of the Bowditch, a US Navy survey vessel collecting data in the Yellow Sea, and warned it not to operate in China's EEZ. Apparently, China believes such activities are a threat to its security and will not permit them to continue. A related issue is whether any of the activities carried out by such US naval vessels or airplanes can be considered 'scientific research'? If so, according to the Convention, such activities can be carried out in another country's EEZ only for peaceful purposes and then only with the consent of the coastal state.

This spat may be the tip of an iceberg that expands into freedom of navigation issues and deepens the growing rift in already brittle relations. Both nations should tread lightly and sort out their differences through negotiations less they open a Pandora's Box of maritime controversies.

III. 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.

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Nautilus Institute

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

nautilus@nautilus.org