Governing Ocean Resources
Governing Ocean Resources

New Challenges and Emerging Regimes
A Tribute to Judge Choon-Ho Park

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CONTENTS

Preface and Acknowledgments ........................................................................................................................................ ix
  Harry N. Scheiber and David D. Caron

Introduction ...................................................................................................................................................................... 1
  Sherry P. Broder

PART ONE

INTRODUCTORY OVERVIEW

Chapter 1. Judge Choon-Ho Park, The Law of the Sea Institute, and Modern Scholarship in Ocean Law ......................................................................................................................... 17
  Harry N. Scheiber

Chapter 2. International Tribunal for the Law of the Sea ................................................................................................... 25
  José Luís Jesus

PART TWO

MARITIME BOUNDARY DELIMITATIONS

Chapter 3. The Romania-Ukraine Decision and Its Effect on East Asian Maritime Delimitations ............................................................................................................................................... 43
  Jon M. Van Dyke†

Chapter 4. Article 121(3) of the Law of the Sea Convention and the Disputed Offshore Islands in East Asia: A Tribute to Judge Choon-Ho Park ........................................................................................................... 61
  Yann-huei Song
Chapter 5. The Baltic Sea Region
An Area of Interdependence of Baltic States .................................................. 99
Stanislaw Pawlak

Chapter 6. The Arctic and the Modern Law of the Sea ................................. 115
Helmut Tuerk

Chapter 7. Le Juge et La Delimitation Maritime : Mode D’emploi .............. 139
Tafsir Malick Ndiaye

PART THREE
CLAIMS TO THE EXTENDED CONTINENTAL SHELF

Chapter 8. The International Legal Framework and the State Activities
Regarding the Continental Shelf Beyond 200-n. Miles in and Adjacent
to the East and South China Seas ............................................................... 165
Ted L. McDorman

Chapter 9. Recent Continental Shelf Submission by Countries in East Asia
and Third Party Notifications ........................................................................ 195
Michael Sheng-ti Gau

Chapter 10. Japan’s Claim to Extended Limits of the Continental Shelf ... 229
Miyoshi Masahiro

Chapter 11. The Contribution of Trinidad and Tobago in the Development
of the Regime of the Continental Shelf ........................................................ 245
Anthony A. Lucky

PART FOUR
THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

Chapter 12. The Jurisdiction and Procedure of the International Tribunal
for the Law of the Sea: An Overview ............................................................. 259
Hugo Caminos

Chapter 13. Ad Hoc Chambers ...................................................................... 275
Rüdiger Wolfrum
PART FIVE
MILITARY ACTIVITIES IN THE EXCLUSIVE ECONOMIC ZONE

Chapter 14. The International Dynamics of the Controversy over Military Activities in the EEZ
Peter A. Dutton

Chapter 15. The “Case” of USNS Impeccable versus 5 Chinese Ships: A Close Examination of the Facts, the Evidence, and the Law
Jonathan G. Odom

PART SIX
PIRACY

Ved P. Nanda

Chapter 17. New Approaches to Protecting Shipping from Piracy and Terrorism
Masahiro Akiyama

PART SEVEN
FISHERY MANAGEMENT, MARINE PROTECTED AREAS AND THE RIGHTS OF INDIGENOUS PEOPLES

Chapter 18. An Analysis of the Goals and Achievements of the Western and Central Pacific Fisheries Commission from China’s Perspective
Xu Liuxiong and Liu Xiaobing

Chapter 19. Protecting and Perpetuating Papahānaumokuākea: Involvement of Native Hawaiians in Governance of Papahānaumokuākea Marine National Monument
Heidi Kai Guth

Chapter 20. Indigenous Values and the Law of the Sea
Williamson B. C. Chang

Craig Bowhay
PART EIGHT

CLIMATE CHANGE AND OTHER EMERGING ISSUES

Chapter 22. International Treaties and U.S. Laws as Tools to Regulate the Greenhouse Gas Emissions from Ships and Ports  ...................................................... 461
Richard Hildreth and Alison Torbitt

Chapter 23. UNCLOS and the Growing Use of Electronic Tagged Marine Animals as Autonomous Ocean Profilers  .......................................................... 489
Richard McLaughlin

Chapter 24. Existing Legal Frameworks Relevant to Marine Genetic Resources  .................................................................................................................... 503
Byung-Il Kim and Seokwoo Lee

Index ................................................................................................................................. 521
The successful conclusion of the lengthy international negotiations that produced the United Nations Convention on the Law of the Sea (UNCLOS) in 1982 was a genuinely transformative event in the history of modern international law and diplomacy. That it was an agreement global in both reach and scope, rather than one of limited dimensions, was itself a feature of great historic importance. Even before its signing, and prior to its formal entry into force in 1994, the Convention impelled an extraordinary acceleration in the pace of ocean-law development, bringing about a massive expansion in the type and scope of the ocean resources and marine activities affected by new rules, principles, and inspirational understandings. This complex process of development continues in a robust way today, as shown by the papers in the present volume.

The Law of the Sea Institute (LOSI) at the University of California, Berkeley is grateful to the authors and editors of this book, which contributes new perspectives on many vital aspects of ocean law and policy. Since the founding of LOSI in the mid-1960s, its conferences and publications have served as major forums for scholarly analysis and international discourse on how best to achieve an effective and equitable legal order for the oceans. Jurists, government officials, industry representatives, environmental organizations, and international agency staff all have participated prominently in LOSI activities—speaking at its workshops, writing its Occasional Papers, and above all presenting their research and policy views in a magisterial series of Proceedings volumes. The latter series are recognized as among the most important works in the literature of ocean law and policy; and many of them stand today as classics.

The Institute has been headquartered and administered since 2002 at the Law School of the University of California, Berkeley, and co-directed by the authors of this Preface. It was founded at the University of Rhode Island in 1965, where John Knauss, Lewis Alexander, William Herrington and other major figures in ocean policy studies led the organization quickly to a position of great prominence internationally. Some years later, it was moved to the University of Hawaii,
and then later, briefly to the University of Miami. The shift in 2002 to its present base at UC Berkeley Law School was approved, with the invaluable support of Professors William T. Burke, former LOSI director Bernard Oxman, and other members of the international advisory board that had overseen its prior administration. The Office of the Dean of UC Berkeley Law assumed responsibility for the organization’s support, and it became officially a unit of our University.

We have remained firmly committed to nurturing the international outreach and participation that have been the hallmark of LOSI from the time of its founding. In this effort, some of the most eminent figures in ocean law studies internationally—including the late Judge Choon-Ho Park of Korea, to whom this volume is dedicated—continuously lent their devoted support and participated actively in the Institute’s programs and publications. With their valued counsel, the Institute has organized and sponsored, both alone and in cooperation with other institutions, a series of international conferences and workshops. Papers from the major conferences, after being revised and comprehensively edited, have appeared in a series of books published by Martinus Nijhoff Publishers (an imprint of Brill Academic Publishers), the present volume being the most recent in this series. Two other volumes are currently in preparation. Meanwhile, other LOSI conference papers have appeared in web-based symposia and as traditional journal articles.¹ The acclaimed Proceedings series in many respects thus continues through these new efforts.

The issues and questions receiving fresh attention in recent LOSI studies include many that relate to the implementation of the UNCLOS agreement and other regimes for the oceans. Indeed, our conferences and publications have been concerned with resources management, technology and ocean science, the marine economy, and practical diplomacy reaching to every aspect of ocean uses. In the present volume, authors from eleven countries, and including several judges of the International Tribunal for the Law of the Sea, provide analyses of insights into a range of contemporary issues that are of enduring importance to the community of ocean scholars, policy makers, and practitioners. Among these issues are

¹ The books from LOSI at Berkeley that have appeared to date include a predecessor volume, The Law of the Sea: The Common Heritage and Emerging Challenges, ed. Harry N. Scheiber (2000); and, in the LOSI series, Bringing New Law to Ocean Waters, ed. David D. Caron and Harry N. Scheiber (2004); Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea, ed. Seoung-Yong Hong and Jon M. Van Dyke (2009); The Oceans in the Nuclear Age: Legacies and Risks, ed. David D. Caron and Harry N. Scheiber (2010); and Regions, Institutions, and the Law of the Sea: Studies in Ocean Governance, ed. Harry N. Scheiber and Jin-Hyun Paik (2013). The LOSI website at www.lawofthesea.org includes the titles of all papers in the older Proceedings series, as a guide to researchers, as well as web site and journal citations for papers that have been published or posted under LOSI auspices since the move of headquarters and reorganization at Berkeley.
the perplexities and possibilities in the jurisprudence of boundary delimitation; responses to the rising threats of piracy; the status of rival claims to the resources of the continental shelf; and the long-troubling problem of defining ‘rocks’ versus ‘islands’ in several major ocean areas. Also considered by some of the authors are issues of environmental policy, domestic law affecting offshore areas of jurisdiction, and the special characteristics of regional and sub-regional ocean regimes in areas such as the Baltic and the Arctic. The claims of indigenous peoples are also given attention, especially in relation to the Pacific region.

Withal, the range of topics here, both in the diversity of subject matter and the range of perspectives represented, reflects well the special genius of the late Jon Van Dyke, who was the principal designer and organizer of the Honolulu conference at which the original version of the papers were presented. It is with special pleasure, but also sadness, that we acknowledge Professor Van Dyke's special role in this project.

Special thanks are owed to Professor Sherry Broder, who has taken full charge of the extensive editorial work for this book since the untimely death of her husband, Professor Van Dyke, in November 2011 during an LOSI conference, in Wollongong, Australia. Her dedication to the project and the energy and scholarly care she has devoted to it, at a time when she has also been teaching in the William S. Richardson School of Law and maintained a private law practice in Honolulu, have been very special indeed.

Also requiring thanks are the contributions of many others, among them the creative role of Professor Seokwoo Lee of Inha University-Incheon, Korea, who arranged for generous funding from his university and collaborated with LOSI and Professor Van Dyke in conference organization and administration. Dr. Seoung-Yong Hong, former president of Inha University-Incheon, and Judge Jin-Hyun Paik of Seoul National University and the International Tribunal for the Law of the Sea, were stalwart supporters of all these efforts and are valued friends of the Institute.

The LOSI is indebted to Dean Christopher Edley, Jr., of the UC Berkeley School of Law, for his unstinting support of the Institute’s activities and the provision of administrative staff and facilities at our School. Dean Aviam Soifer of the Richardson School of Law, University of Hawaii, host institution for the conference, did much to make the conference an academic event of importance, at the same time providing splendid hospitality to the presenters and panelists. Special thanks are owed Marie Sheldon and to Lisa Hanson and her other colleagues in the editorial and production departments of Brill for their talented contributions to this volume.

A last word must be said of the late Judge Choon-Ho Park, to whose memory this volume is dedicated. Like his close friend and long-time associate Jon Van Dyke, he was a key adviser to LOSI and a central figure in all the organization’s scholarly efforts starting in the 1970s. He was an inspiring colleague, generous
with his time and wisdom, and with his friendship. Apart from his distinguished contributions to ocean law studies and jurisprudence, Judge Park was prominent globally in the efforts to advance the rule of law in the areas of human rights and general international law. We are honored that LOSI is associated with the authors in this book in paying tribute to him.

Harry N. Scheiber and David D. Caron
Co-Directors, Law of the Sea Institute
Many in the international law and foreign affairs communities are aware that an incident occurred on March 8, 2009, in the South China Sea, involving the United States Naval Ship (USNS) *Impeccable* (T-AGOS-23) and five vessels from the People's Republic of China (PRC). Only a small percentage, however, are familiar with the March 8 incident—what has come to be called the "*Impeccable* Incident"—in substantial detail, both factually and legally. Although the incident was reported by the news media in the weeks following the incident, such reporting was merely the "first rough draft of history." Therefore, much like

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how a courtroom trial provides a community with an opportunity to step back and dispassionately examine an alleged crime or civil wrong with deliberate consideration, so too is there value in the international community stepping back and reflecting upon this maritime incident in greater depth. Effective reflection on the incident can occur only when detached observers have an opportunity to weigh the actual facts of that day, apply international law to those facts, and reach a well-considered legal judgment—in essence, a "verdict"—on the incident. To reach such an informal verdict, these observers must be presented with detailed perspectives from the two nations involved. The purpose of this article is to provide such a detailed perspective from one of those nations—in this case, the United States.

There is an old adage shared among American trial lawyers—but perhaps also known among trial lawyers in the other nations—which distills a successful litigation tactic of emphasizing the strength of a client’s position in any given case. It has been phrased in various ways, but a common refrain is as follows:

If the facts of the case are on the client’s side, then the lawyer should pound the facts.
If the law is on the client’s side, then the lawyer should pound the law.
If neither the facts nor the law are on the client’s side, then the lawyer should pound the table.

For the case at hand, this essay will summarize the evidence presented and arguments made by the governments of the two nations involved, and evaluate which nation has the more persuasive case.

Part 1 of this essay will focus on the facts of the March 8 incident. This will include a factual account of the incident, as provided by the U.S. government one day after the incident actually occurred. Next, it will present the official public statements made by the PRC government about the incident. Then, perhaps most importantly, the discussion of facts will identify objective evidence which might corroborate or refute the respective factual accounts. Juxtaposing the two governments’ statements on the facts of the March 8 incident with this objective evidence will prove quite telling for which side’s account is closer to the truth.

Part 2 of this essay will focus on the applicable law of the March 8 incident. This legal discussion will examine two bodies of international law. The first body of law under which the incident will be analyzed is the international rules of navigational safety. The second body of law is the international law of the sea. Viewing the facts of the incident through the prism of these two distinct, but related, bodies of international law will show which nation operated in accordance with its legal rights and responsibilities, and which nation disregarded international law in its actions.

Part 3 of this essay will focus upon how a nation which is weak on the facts of the incident and the applicable law is left only to engage in politically posturing. This posturing mirrors the negotiating behavior of that nation’s government in unrelated bilateral discussions conducted in recent history. Unfortunately,
this negotiating is actually renegotiating—an attempt to unsettle settled law. In the end, this section will consider the potential risks and concerns for the international community of nations to validate such unilateral behavior by a single nation.

1. THE FACTS OF THE MARCH 8 INCIDENT

We now turn to the actual facts of the incident of March 8 which occurred in the South China Sea. Although legal experts instinctively want to jump to a debate of the law, practicing attorneys also know that they must take their clients “as is” and grapple with the facts of their case as they actually unfolded. As a British colonies defense lawyer turned U.S. President once told a jury in the famous “Boston Massacre” prosecution of occupying British soldiers, “Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passion, they cannot alter the state of facts and evidence.” Thus, before discussing the law, the facts of the March 8 incident should be examined.

1.1 Stating the Facts of the Incident

The incident occurred on Sunday, March 8, 2009, in an area of the ocean approximately 75 miles from the Chinese coastline. The U.S. government was the first nation involved to officially comment on the incident. Due to time zone differences between Beijing and Washington coupled with the lack of a timestamp for press releases and news articles, it is not absolutely clear which nation first made official statements about the incident.

On March 8, 2009, five Chinese vessels shadowed and aggressively maneuvered in dangerously close proximity to USNS Impeccable, in an apparent coordinated effort to harass the U.S. ocean surveillance ship while it was conducting routine operations in international waters.

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3 Local date and time.
5 Raw Data, supra note 5.
Thereafter, the official U.S. statement included more factual details of the incident:

The Chinese vessels surrounded USNS *Impeccable*, two of them closing to within 50 feet, waving Chinese flags and telling *Impeccable* to leave the area. Because the vessels’ intentions were not known, *Impeccable* sprayed its fire hoses at one of the vessels in order to protect itself. The Chinese crewmembers disrobed to their underwear and continued closing to within 25 feet.

USNS *Impeccable*’s master used bridge-to-bridge radio circuits to inform the Chinese ships in a friendly manner that it was leaving the area and requested a safe path to navigate. A short time later, two of the PRC vessels stopped directly ahead of USNS *Impeccable*, forcing *Impeccable* to conduct an emergency “all stop” in order to avoid collision. They dropped pieces of wood in the water directly in front of *Impeccable*’s path.

The incident took place in international waters in the South China Sea, about 75 miles south of Hainan Island.7

In addition, the official U.S. statement discussed other incidents which had occurred in the days preceding the incident.8 Then, the official U.S. statement of March 9 identified the Chinese vessels involved in the incident:

The Chinese ships involved in the March 8 incident included a Chinese Navy intelligence collection ship (AGI), a Bureau of Maritime Fisheries Patrol Vessel, a State Oceanographic Administration patrol vessel, and two small Chinese-flagged trawlers.9

Lastly, the official U.S. statement of March 9 discussed the law which applied to the vessels involved in this incident, both in terms of the international rules of navigation and safety as well as the international law of the sea.10

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7 *Id.*
8 It was preceded by days of increasingly aggressive conduct by Chinese vessels:
   
   On March 4, a Chinese Bureau of Fisheries Patrol vessel used a high-intensity spotlight to illuminate the entire length of the ocean surveillance ship USNS *Victorious* several times, including its bridge crew. USNS *Victorious* was conducting lawful military operations in the Yellow Sea, about 125 nautical miles from China’s coast. The Chinese ship then crossed *Victorious*’ bow at a range of about 1400 yards in darkness without notice or warning. The following day, a Chinese Y-12 maritime surveillance aircraft conducted 12 fly-bys of *Victorious* at an altitude of about 400 feet and a range of 500 yards.

   On March 5, without notice or warning, a Chinese frigate approached USNS *Impeccable* and proceeded to cross its bow at a range of approximately 100 yards. This was followed less than two hours later by a Chinese Y-12 aircraft conducting 11 fly-bys of *Impeccable* at an altitude of 600 feet and a range from 100–300 feet. The frigate then crossed *Impeccable*’s bow yet again, this time at a range of approximately 400–500 yards without rendering courtesy or notice of her intentions.

   On March 7, a PRC intelligence collection ship (AGI) challenged USNS *Impeccable* over bridge-to-bridge radio, calling her operations illegal and directing *Impeccable* to leave the area or “suffer the consequences. *Id.*

9 *Id.*
10 See discussion *infra* Part II.
In short, the official U.S. statement released on March 9 provides a good summary of the U.S. perspective of the incident. As will become evident, the U.S. government did not stop there in providing its side of the story, but released more detailed information and corroborating evidence in the days that followed. Before looking further at the official U.S. account of the incident, however, let us consider the PRC’s official statements about the facts of March 8 incident.

1.2 China Denies the Facts of the Incident

The PRC did not proactively issue an official statement about the incident, but rather addressed the matter reactively during a press conference two days later following the official U.S. statements. On March 10, Mr. Ma Zhaoxu, the Chinese Foreign Ministry spokesperson, held a regularly-scheduled press conference in Beijing, during which he answered media questions regarding issues of foreign affairs, including questions about the March 8 incident. Regarding the U.S. account of the facts, the following exchange occurred:

[Reporter]: Can you comment on accusations from the U.S. that Chinese ships surrounded and harassed a U.S. navy vessel in international waters? The U.S. says the Chinese ships sailed dangerously close and threw debris in the path of the navy ship.

[Mr. Ma]: The claims by the U.S. are flatly inaccurate and unacceptable to China.11

This exchange was followed by another, which reaffirmed the PRC’s blanket denial of the US account of the facts:

[Reporter]: Can I go back to the naval question again? If this was an illegal act, why was it that vessels which weren’t part of the Chinese navy were used in the response to the U.S. ship? Is it Chinese Government policy to send patrollers [sic] to deal with this kind of incursions?

[Mr. Ma]: The U.S. assertion is flatly inaccurate and unacceptable to China.12

Regarding how the PRC vessels behaved in the incident, Mr. Ma stated, “I can also tell you that China handles such issues in accordance with relevant laws and regulations.”13 This last statement was translated in English by Xinhua, the PRC’s official news agency, more emphatically: “The Chinese government always handles such activities strictly in accordance with these laws and regulations (emphasis added).”14 Lest there be any confusion about the Chinese account of the March 8 incident, Mr. Ma closed his remarks with the reporters at the March

12 Id.
13 Id.
press conference by discussing the clarity of the facts-versus-fiction of the two nations’ official accounts of the EP-3 incident in 2001 and the March 8 incident:

[Reporter]: Can you characterize the nature of this dispute? It took years to overcome the fictions [sic] between the two countries after the EP-3 incident last time. Is it something that will remain in the military sphere or will endanger the overall relationship?

[Mr. Ma]: The facts of the EP-3 incident were clear. I do not want to make more comments here again. On the incident of Impeccable, the U.S. Navy surveillance ship, this time, I have already made China’s view and position clearly. I have nothing more to add.\

Lending to the view that Mr. Ma was not merely arguing the law, but also denying the U.S. account of the facts of the March 8 incident, Xinhua translated Mr. Ma’s March 10 comments into English as “the U.S. claims are gravely in contravention of the facts and unacceptable to China.”

Not to be outdone by the PRC Foreign Ministry, the PRC Defense Ministry also disputed the U.S. account of the facts. On March 11—three days after the incident and one day after the PRC Foreign Ministry’s press conference—Senior Colonel Huang Xueping, a PRC Defense Ministry spokesman, was asked by reporters to respond to official U.S. statements made by the White House, the State Department, and the Pentagon, about the March 8 incident. His response to the factual account: “China cannot accept the U.S. groundless accusations.” Senior Colonel Huang also went on to describe the behavior of the PRC vessels involved in the March 8 incident as “normal activities of law enforcement.” This latter statement by Senior Colonel Huang—as well as the statement by Mr. Ma that “China always handles such issues strictly in accordance with relevant laws and regulations”—appear unconvincing since two of the PRC vessels involved in the incident were neither PRC military nor law enforcement vessels, but rather PRC-flagged fishing trawlers.

Nevertheless, the PRC government did not stop with its March 10 press conference in its blanket denial of U.S. account of the facts. On March 12—four days after the incident and two days after the first PRC denial of the facts—Mr. Ma held another regularly-scheduled press conference at the PRC Foreign Ministry, during which an additional question of fact about the incident was asked. As indicated by the content of the question itself, the reporters at these PRC press conferences were growing quite unsatisfied with the minimal level of detail in the PRC’s factual account of the incident. The following exchange occurred:

15 Ma Zhaoxu, supra note 11.
16 China Lodges Representation, supra note 14.
[Reporter]: I want to get more description of what has happened in the South China Sea from the Chinese side. The Pentagon has been very descriptive of what has been happening. Can we get the same kind of description from the Chinese side as well, especially about the Chinese ships involved? The Pentagon says there were three Chinese government ships and two Chinese flagged trawlers involved. Were they police ships, naval ships or civilian ships?

[Mr. Ma]: I already elaborated on China’s position about this incident yesterday.18

But we have seen that Mr. Ma’s “elaboration” on China’s position was merely the statement that “The claims by the U.S. are flatly inaccurate and unacceptable to China.” Thus, in light of repeated efforts by reporters to discuss the specific facts of the March 8 incident and to examine the U.S. account of those facts, the PRC government simply declined to elaborate, avoiding the issue altogether.

Then, on March 24—sixteen days after the incident—the PRC Foreign Ministry held another regularly-scheduled press conference, during which discussion of the March 8 incident arose once again. The following exchange occurred between a reporter and Mr. Qin Gang, another PRC Foreign Ministry spokesperson:

[Reporter]: How is the situation in the South China Sea? It seems that the Philippines have stopped clamoring for sovereignty over the Huangyan Island. Besides, the Pentagon claims that China attacked the sonar system of the Impeccable first. Now rumor has it that the US has sent another military vessel to the South China Sea. Could you confirm? Will China follow suit to send vessels to the waters?

[Mr. Qin]: We have reiterated our principled stance on the South China Sea issue, and we hope relevant countries abide by the Declaration on the Conduct of Parties in the South China Sea and do more things conducive to peace and stability of the region. Regarding your second question, the U.S. remarks are sheer lies. We have stated our position at the beginning of the Impeccable incident, and the U.S. is well aware of that, so is the international community. Now, the pressing task is the U.S. should take concrete measures to prevent a repeat of similar incident. The resolve of the Chinese government to safeguard territorial integrity and maritime rights and interests is resolute.19

Once again, the PRC government was unwilling to discuss the applicable law surrounding the incident or even to stand by its previous blanket denial; moreover, this time, the PRC government took a dramatic step further out on the rhetoric limb on March 24, describing the U.S. factual account as “sheer lies.” Of course, there is nothing diplomatic or vague about such an emphatic comment by the Chinese diplomatic spokesperson.

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18 Ma Zhaoxu, supra note 11.
I.3 United States Corroborates the Facts of the Incident

For the accounts that have been identified thus far in this essay based upon official statements by the two governments, the reader sees two mutually exclusive accounts that could not be dismissed as merely two different perspective of the same facts. Thus, before further discussing the facts of the March 8 incident, it might be helpful to first consider the dilemma of two conflicting accounts of an event—and the most effective way to determine which account is, in fact, the truth. To do so, let us return to the courtroom analogy presented at the outset of this essay. A binary dilemma often arises in an adversarial system of justice, which involves effectively evaluating two sides of a story to find the truth in a given case. For example, in the litigation of sex-related crimes (e.g. rape, sexual assault, child sexual abuse) and sex-related torts (e.g., sexual harassment in the workplace), a victim tells one account of events, the defendant tells another, and a jury of the defendant's peers is charged with deciding which account is truthful.

In a classic “he said-she said” case, where both sides tell their respective version of events, the burden ordinarily falls upon the trial attorneys on both sides of the case to convince the members of the jury to believe their side's account of the facts. Proving one's case often involves not merely putting your client on the stand to testify about their side of the story, but also corroborating that side of the story with objective evidence to the extent possible—either through the testimony of other eyewitnesses of the incident or through physical and documentary evidence. Because the defendant is usually aware of the evidence against him before the trial begins, it is rare to catch a defendant in a “gotcha” moment where his account of the facts is subsequently proven false with objective evidence. On those rare occasions when a defendant's statement is proven to be false by objective evidence, however, the trial judge may instruct the jury members that they are allowed to consider such false exculpatory statements20 as evidence of the defendant's consciousness of guilt—under the theory that innocent people do not lie.

In a similar fashion, the international law and foreign affairs communities are called upon to consider two accounts of the March 8 incident. On one side, there is one nation's government providing specific factual details of what happened. On the other side, there is another nation's government rejecting that account as “sheer lies”—but refusing to provide a contending version of the facts. Thus, the next logical question to consider becomes: how should a neutral observer decide which side in the March 8 incident is accurately presenting the facts?

Just like in a binary-type “he said-she said” case, the reader should consider any objective evidence offered by either side of the dispute that might corroborate

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one side’s account over the other. Moreover, a neutral observer also should consider any such corroborating evidence that comes to light after both sides have provided their initial “testimony” about the incident. For the March 8 incident, such corroborating evidence exists—and it corroborates the U.S. account of the facts. The evidence further shows that the PRC was inaccurate in its description of the event.

On Friday, March 20, 2009, the United States released such “gotcha” evidence which corroborated its side of the events.\textsuperscript{21} That date marked twelve days after the March 8 incident and eleven days after the U.S. government provided a detailed factual account of the incident. Perhaps more importantly, March 20 marked ten days after the PRC government described the U.S. account as “flatly inaccurate,” “gravely in contravention of the facts,” and “groundless accusations.” It also marked ten days after the PRC government specifically declined a request by a Beijing reporter to provide a detailed account of the events.

What exactly was the nature of the “gotcha” evidence provided by the United States which corroborated its account of the facts? Specifically, the evidence included photos and videos made by USNS \textit{Impeccable} crewmembers during the actual incident. Rather than merely asking the international community to take the United States at its word, such documentary evidence about the incident allowed third parties to consider the evidence and evaluate the matter for themselves. Of note, this documentary evidence was not kept close-hold by the U.S. government, but rather posted by the U.S. Navy’s Chief of Information on the publicly-accessible U.S. Navy’s official website\textsuperscript{22} as well as on the heavily-trafficked youtube.com.\textsuperscript{23}


\textsuperscript{22} See “Image 15.5, Description: A crewmember on a Chinese trawler uses a grapple hook in an apparent attempt to snag the towed acoustic array of the military Sealift Command ocean surveillance ship USNS \textit{Impeccable} (T-AGOS-23),” navy.mil, \textit{available at} http://www.navy.mil/view_single.asp?id=69479; see also “Image 15.2, Description: Two Chinese trawlers stop directly in front of the military Sealift Command ocean surveillance ship USNS \textit{Impeccable} (T-AGOS-23), forcing the ship to conduct an emergency all-stop,” navy.mil, \textit{available at} http://www.navy.mil/view_single.asp?id=69478.

As a matter of substance, what does this “gotcha” evidence corroborate? The easiest way to demonstrate this corroboration is to set out some of the substantive facts asserted by the United States in official statements made in the days immediately after the March 8 incident, and provide photos or video frame-captures which confirm these asserted facts—all of which the reader can access on the internet. Specifically, the following U.S. assertions of fact were corroborated as follows:

U.S. Assertion of Fact #1: “The Chinese ships involved in the March 8 incident included a Chinese Navy intelligence collection ship (AGI), a Bureau of Maritime Fisheries Patrol Vessel, a State Oceanographic Administration patrol vessel, and two small Chinese-flagged trawlers.”

Corroboration of U.S. Assertion of Fact #1: Images 15.1A and 15.1B are frame captures of the U.S.-released video which corroborate that five Chinese ships were, in fact, involved in the March 8 incident.

U.S. Assertion of Fact #2: “USNS Impeccable’s master used bridge-to-bridge radio circuits to inform the Chinese ships in a friendly manner that it was leaving the area and requested a safe path to navigate. A short time later, two of the PRC vessels stopped directly ahead of USNS Impeccable, forcing Impeccable to conduct an emergency ‘all stop’ in order to avoid collision. They dropped pieces of wood in the water directly in front of Impeccable’s path.”


24 Raw Data, supra note 5.
25 Id.
the “case” of USNS IMPECCABLE VERSUS 5 CHINESE SHIPS

Image 15.1B  Frame-capture of video, showing two of the five PRC vessels involved in the March 8, 2009 incident in the South China Sea. (Source: U.S. Navy).

Image 15.2  Photo showing two PRC vessels in front of USNS Impeccable, which caused USNS Impeccable to conduct an emergency “all-stop” to avoid collision. (Source: U.S. Navy).

Corroboration of U.S. Assertion of Fact #2: Image 15.2 is a U.S.-released photo which corroborates that two of the PRC vessels, in fact, stopped directly ahead of USNS Impeccable and forced Impeccable to conduct an emergency ‘all stop’ in order to avoid collision.

U.S. Assertion of Fact #3: “The Chinese vessels surrounded USNS Impeccable, two of them closing to within 50 feet, waving Chinese flags and telling Impeccable to leave the area.” 26

Corroboration of US Assertion of Fact #3: Images 15.3A and 15.3B corroborate that Chinese vessels, in fact, closed within 50 feet and that a crewmember, in fact, waved a Chinese flag.

26 Id.
Image 15.3A  Wide-angle photo, showing one of the PRC vessels closing USNS \textit{Impeccable} to within 50 feet and a crewmember waving a Chinese flag. (Source: U.S. Navy).

Image 15.3B  Zoom of Image 15.3A, showing crewmember of PRC vessel waving Chinese flag. (Source: U.S. Navy).

\textit{US Assertion of Fact #4}: “Because the vessels’ intentions were not known, \textit{Impeccable} sprayed its fire hoses at one of the vessels in order to protect itself. The Chinese crewmembers disrobed to their underwear and continued closing to within 25 feet.”\textsuperscript{27}

\textit{Corroboration of US Assertion of Fact #4}: Image 15.4 corroborates that a USNS \textit{Impeccable} crewmember, in fact, sprayed the ship’s firehose at one of the vessels in order to protect itself.

\textsuperscript{27} Id.
US Assertion of Fact #5: The Chinese crew members “used poles to try to snag the Impeccable’s acoustic equipment in the water.”

Corroboration of US Assertion of Fact #5: Image 15.5 corroborates that a crewmember of a Chinese vessel, in fact, used a pole to try to snag the Impeccable’s towed array.

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Jim Garamone, supra note 5.
Images 15.6A–E  Series of time-sequenced, frame-captures of video, showing PRC vessel attempting to run over USNS *Impeccable’s* towed array. (Source: U.S. Navy).

In addition to corroborating these five material facts in the official U.S. statement released on March 9, the video released by the U.S. government on March 20 also demonstrated another fact of significant concern. Specifically, as shown in the series of video frame captures, Images 15.6A through 15.6E, one of the PRC vessels followed USNS *Impeccable* and attempted to run over its towed array.

This corroborating “evidence” of the U.S. account of the facts raises several questions for someone to answer from the PRC perspective: Why did the PRC government refuse to ever provide a detailed account of the facts of the March 8 incident? When the PRC government spokesperson characterized the U.S. factual account as “sheer lies” on 24 March, was the PRC government aware of the photos and videos of the incident that the U.S. government had released to the international community four days earlier on March 20? Has the PRC government ever retracted its official statement that U.S. account of the facts of the March 8 incident were “sheer lies”? If not, why not? In light of the corroborating evidence, does the PRC government hold firm to its other characterizations of the U.S. factual account as “flatly inaccurate,” “gravely in contravention of the facts,” and “groundless accusations”?

Returning to the courtroom analogy, there is a process in many adversarial systems of justice in the world called discovery. During the discovery process, the parties to a legal action gather and exchange potentially relevant evidence—be it documentary evidence, physical evidence, photographs, video, or other forms.\(^{29}\) As the purpose of the pleadings phase of litigation has shifted in recent years from narrowing the issues of fact to merely putting the opposing party on notice,\(^{29}\)

one of the modern purposes of the robust discovery phase in civil litigation is to streamline the actual issues of fact in a legal dispute. In reality, a secondary effect in this discovery process is that a litigant that compiles evidence in its possession often self-discovers what factual issues exist and, more importantly, which facts are irreputable.

For the March 8 incident, the PRC experienced a similar narrowing of the factual issues—through “discovery” provided by the United States as well as through self-discovery. On the one hand, the PRC was confronted with the above photographs and videos produced by the crew of the USNS Impeccable during the actual incident. In addition, the PRC government likely examined the incident internally and gathered any relevant information produced by its personnel involved. Other photos were found by the author on the internet at websites not affiliated with the PRC government, but which are nonetheless images apparently produced by individuals aboard the PRC vessels involved in the March 8 incident.

What do these PRC-generated images show? In short, they corroborate material facts of the official U.S. account. Specifically, they show that five PRC vessels were, in fact, involved in the incident. They also show that these PRC vessels, in fact, surrounded the Impeccable. Additionally, they show that one of the PRC vessels, in fact, crossed the bow of the Impeccable, closing within 25 feet. Lastly, in case anyone were to argue that the United States released “doctored” images of the incident, these PRC-generated images validate the integrity of the U.S.-released photos and video. Despite the highly corroborative effect of these PRC-produced images, however, the author is not aware of the PRC government apparently ever posting these images on any official PRC government website or releasing them at a PRC government press conference. One is only left to wonder why.

Americans like to say, “A picture is worth a thousand words.” The Chinese also have an ancient adage, “Zhi Lu Wei Ma,” which translates in English to “Point at a deer and call it a horse” and is understood to mean: saying one thing and doing another. These idioms are on poignant display in the aftermath of the Impeccable incident. It is especially appropriate to consider the particular facts of the U.S. account of March 8 incident that were corroborated by Images 15.5 and 15.6A–E. Recall that on March 24—three days after the US government released these photos and video to the world—the PRC Foreign Ministry spokesperson was asked about a detail of the U.S. account of the incident, specifically “the

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31 JAMES McGRGORE, ONE BILLION CUSTOMERS: LESSONS FROM THE FRONT LINES OF DOING BUSINESS IN CHINA 8 (2005); SITU TAN, BEST CHINESE IDIOMS 151 (1986).
Pentagon claims that China attacked the sonar system of the *Impeccable.*” Mr. Qin’s response: “[T]he U.S. remarks are sheer lies.” Taken together, all of the above images of the March 8 incident—both those generated and released by the U.S. government and those apparently generated by the PRC personnel involved in the incident—are worth a thousand words: to show who was calling a deer a deer, and who was calling it a horse. Indeed, facts are stubborn things.

2. The Law of the March 8 Incident

Let us now turn to the applicable law. The general subject of foreign military activities in a coastal state’s exclusive economic zone immediately engenders thoughts of the international law of the sea. Before considering the March 8 incident in terms of the international law of the sea, however, we should not overlook another important area of international law that also applies in a maritime context—specifically, the international rules of the road. This body of international law ensures that nations operate their government-operated vessels safely and take measures to ensure that non-government vessels flying their respective flags also operate safely. In the context of the March 8 incident and similar scenarios, both nations have a fundamental obligation to ensure that their mariners interact safely with those of other nations—regardless of how the United States and the PRC view the strategic- or national-level legal issues governing foreign military activities beyond the territorial seas of coastal states. Nations may disagree on matters of boundaries and high politics, but their mariners are nonetheless bound by the ancient code of “rules of the road” at sea, which have been codified in modern history.

2.1 Navigational Safety under the International Collision Regulations

The USNS *Impeccable* acted consistent with international navigational safety rules and otherwise operated safely in relation to the five PRC vessels involved. On the other hand, the United States expressed substantial concern with the unsafe conduct of the five PRC vessels involved in the March 8 incident. In the official statement issued on March 9, the U.S. government alleged the following:

> The unprofessional maneuvers by Chinese vessels violated the requirement under international law to operate with due regard for the rights and safety of other lawful users of the ocean. We expect Chinese ships to act responsibly and refrain from provocative activities that could lead to miscalculation or a collision at sea, endangering vessels and the lives of U.S. and Chinese mariners.32

Similarly, on March 19, the Commander of U.S. Pacific Command highlighted the PRC’s violations of the International Regulations for Preventing Collisions at Sea

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32 *Raw Data, supra* note 5.
In public remarks. Commonly referred to by mariners of the world as the “rules of the road,” the COLREGs have the stated purpose of “desiring to maintain a high level of safety at sea.” In testimony before the U.S. Senate Armed Services Committee, Admiral Timothy Keating stated, “The Impeccable incident is certainly a troubling indicator that China, particularly in the South China Sea, is behaving in an aggressive, troublesome manner and [is] not willing to abide by acceptable standards of behavior or ‘rules of the road.’”

Critics of U.S. military activities in the PRC’s exclusive economic zone occasionally point out that the United States is not a party to the U.N. Convention on the Law of the Sea. Concurrently, these critics argue—either literally or rhetorically—that the United States therefore lacks standing to rely upon the convention’s legal regime. Regardless of the merit of such arguments, the issue of standing to debate the COLREGs is different. Namely, it is undisputed that both the United States and the PRC are parties to the COLREGs.

By the very terms of the convention, the COLREGs clearly applied to the operations of the USNS Impeccable and the five PRC vessels operating in the PRC’s exclusive economic zone on March 8. By the express language of the COLREGs, these international rules of navigational safety apply to all vessels operating on the high seas, as well as all vessels operating in all waters connected to the high seas.

The specific rules of international law contained therein establish clear responsibilities for how vessels safely operate in the vicinity of other vessels. For the March 8 incident, however, the facts—as asserted by the United States and as

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33 International Regulations for Preventing Collisions at Sea, Oct. 20, 1972, 1050 UNTS 16, 1143 UNTS 346 [hereinafter COLREGs].
36 The United States is a party to the COLREGs, supra note 33. See also, International Maritime Organization [IMO], Status of Conventions, available at http://www.imo.org/About/Conventions/StatusOfConventions/Pages/Default.aspx (follow “Status of conventions” hyperlink).
37 PRC is a party to the COLREGs. Id.
38 COLREGs, supra note 33. Rule 1 (“Application”) states: “Rules shall apply to all vessels upon the high seas and in all waters connected therewith navigable by seagoing vessels.” While the 1972 COLREGs predate the more detailed UNCLOS regime of maritime zones (i.e., territorial seas, contiguous zone, exclusive economic zone, and high seas), the express reference to all navigable waters connected to the high seas clearly means that the COLREGs applied to the operations of the USNS Impeccable and the five PRC vessels operating in the PRC’s exclusive economic zone on March 8.
corroborated by the photos and video previously discussed—show that the PRC vessels involved violated the following COLREGs:

First, the PRC vessels violated Rule 8 of the COLREGs. Specifically, the PRC vessels failed to take “action to avoid collision” or exercise “good seamanship.” Moreover, several of the PRC vessels actually took actions which would easily have led to a collision, but for the impressive navigational skills of the *Impeccable*’s master and crew.

Second, the PRC vessels violated Rule 13 of the COLREGs. Specifically, the PRC vessel which pursued the *Impeccable* at close range and attempted to overrun the towed array failed to remain clear and keep out of the way of *Impeccable*, a vessel which the PRC vessel was, by definition, “coming upon” and in a position of “overtaking.” Of note, regardless of whether the PRC vessel’s master intended to actually overtake the *Impeccable*, Rule 13 of the COLREGs makes it clear that he was required to assume he was overtaking the *Impeccable* and act in accordance with the rule’s requirements. The towed array is a part of the vessel, no different than a towed fishing net is part of a fishing trawler. Since the COLREGs are focused on maintaining a high level of safety at sea, any vessel which overrun either type of towed equipment creates serious risk of affecting the safety and potential seaworthiness of the vessel to which it is attached.

Third, the PRC vessels violated Rule 15 of the COLREGs. Specifically, two of the PRC vessels unilaterally created a risk of collision with the *Impeccable* by failing to “keep out of the way” and crossing its bow, even though the circumstances gave them ample opportunity to avoid doing so. Once again, only but for the impressive navigational skills of the *Impeccable*’s master and crew, a collision did not occur with the two PRC vessels. If a collision had occurred, there is no doubt that it would have been solely the responsibility of the PRC vessels for creating this risk of collision.

Fourth, the PRC vessels violated Rule 16 of the COLREGs. Specifically, despite the *Impeccable* initiating bridge-to-bridge communications to maintain a safe distance and avoid collision, the PRC vessels failed to “take early and substantial action” to keep well clear of the *Impeccable*.

Fifth, the PRC vessels violated Rule 18 of the COLREGs. Specifically, the PRC vessels also failed in its duty to “keep out of the way” of the *Impeccable*. By definition, the *Impeccable* was a vessel restricted-maneuver status under the

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39 *Id.* at Rule 8 (“Action to Avoid Collision”).
40 *Id.* at Rule 13 (“Overtaking”).
41 *Id.* at Rule 15 (“Crossing Situation”).
42 *Id.* at Rule 16 (“Action by Give-way Vessel”).
43 *Id.* at Rule 18 (“Responsibilities Between Vessels”).
44 *Id.* at Rule 3 (“General Definitions”), paragraph g, states: The term “vessel restricted in her ability to manoeuvre” means a vessel which from the nature of her work is restricted in her ability to manoeuvre as required by these Rules and is therefore unable
COLREGs as it conducted its underwater surveillance operations and towed its array. Meanwhile, the PRC vessels were “power-driven vessels.” Consequently, in that type of situation, the vessels which are not operating in a restricted-maneuver status have a duty to keep out of the way. In fact, the PRC vessels went a significant step beyond merely failing to keep out of the way—they actually put obstacles in its way by throwing pieces of wood into the water in front of the *Impeccable*.

In addition to identifying these specific COLREGs violated by the PRC vessels in the March 8 incident, it is also important to emphasize that the PRC government had legal responsibility as a matter of international law for the actions of *all* five vessels involved in the March 8 incident. Clearly, the PRC government is responsible for the unsafe conduct of the three government-operated vessels involved in the incident, but the PRC government’s responsibility did not end with the government-operated vessels. Additionally, the PRC government was also legally responsible for the conduct of the two non-government fishing trawlers involved in the incident. As indicated by the photo and video images, these fishing trawlers were PRC-flagged ships. As a flag state, the PRC government has an express duty under Article 94 of the Law of the Sea Convention to take all necessary measures to ensure its flagged vessels maintain safety at sea with regard to the prevention of collisions. This duty as a flag state includes the responsibility to take any steps which may be necessary to secure the observance of international regulations, like the COLREGs, by its PRC-flagged vessels. Additionally, a flag state has an obligation to investigate alleged violations of the COLREGs by any of its flagged vessels and, if appropriate, to take any action necessary to remedy violations of the COLREGs by those flagged vessels.

In the March 8 incident, the PRC government was put on notice of potential violations of the COLREGs by five of its flagged vessels, three of which were government-operated and two of which were not. Not only did the official U.S. government’s statements and corroborating visual evidence put the PRC government on notice of these potential violations, the three on-scene PRC government vessels also directly observed these potential violations of the COLREGs by its non-government vessels. Unfortunately, there is no indication that the PRC

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to keep out of the way of another vessel. The term ‘vessels restricted in their ability to manoeuvre’ shall include but not be limited to:

(i) a vessel engaged in laying, servicing or picking up a navigation mark, submarine cable or pipeline;

(ii) *a vessel engaged in dredging, surveying or underwater operations*;

(iii) a vessel engaged in replenishment or transferring persons, provisions or cargo while underway;

(iv) a vessel engaged in the launching or recovery of aircraft;

(v) a vessel engaged in minesweeping operations;

(vi) *a vessel engaged in a towing operation such as severely restricts the towing vessel and her tow in their ability to deviate from their course*. (Emphasis added.).
government either investigated or took any necessary measures to remedy the COLREG violations by the fishing trawlers.

It appears that the PRC government-operated vessels were, at a minimum, abrogating their responsibilities as law enforcement vessels of ensuring PRC-flagged fishing trawlers operate safely in the waters of the world. Worse yet, in light of their inaction and the unbelievable "coincidence" that all five PRC vessels happened to be in the vicinity of the Impeccable 75 miles off the PRC coast at the same time, it appears that the PRC government vessels were acting in coordination with the two non-government fishing trawlers, apparently employing them as their proxy. Regardless, this inaction or coordinated action raises additional concerns about the assurances from PRC spokespersons about how the PRC vessels were following normal procedures. Recall the PRC Defense Ministry spokesperson’s statements three days after the incident that the actions of the PRC vessels constituted, in his words, “normal activities of law enforcement.” Additionally, remember that the PRC Foreign Ministry spokesperson stated, “I can also tell you that China always handles such issues strictly in accordance with relevant laws and regulations.” Employing non-government fishing trawlers as law enforcement proxies, however, surely does not qualify as “normal activities” in China or “strict” compliance with the law.

2.2 Navigational Freedoms under the International Law of the Sea

Now, consider the international law governing the Impeccable’s right to conduct routine surveillance operations beyond the territorial seas of the PRC, and whether the PRC as a coastal state had the right to restrict the Impeccable’s operations in those waters. As indicated earlier, the U.S. government stated its legal position early after the March 8 incident regarding its right to conduct these operations beyond the territorial seas of the PRC. In the official U.S. statement released on March 9, the Pentagon stated: “U.S. Navy ships and aircraft routinely operate in international waters around the world, and this area is one such location where we operate regularly. . . . Coastal states do not have a right under international law to regulate foreign military activities in the EEZ.” All subsequent official statements issued by U.S. government representatives concerning the law of the sea and the March 8 incident were consistent with the original U.S. statement.

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45 Raw Data, supra note 5.
46 A complete listing of statements on the U.S. legal position by U.S. government representatives in response to media questions are as follows:
On the other hand, also consider the legal arguments made by the PRC government in its official statements. During the previously-mentioned March 10 press conference, Mr. Ma made the following declarative statement: “Engaging in activities in China’s exclusive economic zone in the South China Sea without China’s permission, US navy surveillance ship Impeccable broke relevant international law as well as Chinese laws and regulations.” The Beijing reporters present at the March 10 press conference, however, immediately realized that this statement was purely conclusory in nature. Thus, a follow-up question was asked that requested specificity:

[Reporter]: Can you clearly explain which article of the international law that the US ship broke and which specific act of the US ship broke the international law?

[Mr. Ma]: It seems that you are very interested in this issue. I think China’s position is already very clear, and I responded to the US stories. I can also tell you that China handles such issues in accordance with relevant laws and regulations. I have nothing more to add.

Much like its non-discussion of the facts of the March 8 incident, however, the PRC spokesman’s non-discussion of the law was also evident. That is, his statements avoided specificity at the outset, and when questioned thereafter, he referred back to the previous statements of non-specificity. The reporters present still were not buying this superficial response on the law, as indicated by a second follow-up question requesting specificity:

[Reporter]: I want to go back to the question of the US surveillance ship. You did mention a number of laws. Could you clarify what specific parts of the UN Convention on the Law of the Sea and Chinese laws of the sea are concerned so that we can refer to it and see on paper to know what you are talking about?


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47 Ma Zhaoxu, supra note 11.
48 Id.
49 See discussion supra Part I.B.
back to do some homework, reading these laws carefully, and you will thereby find
the answer you want.50

Here again, Mr. Ma implies that the rules of law in the Law of the Sea Convention
are so clear on their face, that the reporters will see that the PRC is right on the
law merely by reading the convention’s text.

Finally, two days later, the PRC provided a modicum of specificity on its legal
position. During the March 12 press conference, Mr. Ma emphasized that the
Impeccable’s operations on March 8 were illegal because they were conducted
without the PRC’s permission. He stated, “The activities of the said US ship in Chi-
na’s exclusive economic zone without our permission have broken international
laws as well as China’s laws and regulations.”51 Moreover, he defended the actions
of the PRC vessels involved, by stating, “It is totally justified and reasonable for
China to take actions to safeguard its rights in the sea waters under its jurisdi-
cion in accordance with law.”52 Through all of these statements, however, the
PRC never specified which provision of international law restricted the Impecc-
able’s right to operate in these waters beyond the PRC’s territorial seas. Moreover,
the PRC failed to specify which rule of international law gave it the authority to
require the Impeccable to seek and receive the PRC’s permission prior to conduct-
ing operations beyond its territorial seas.

Meanwhile, the PRC Navy also weighed in with its view of how the international
law of the sea applied to this incident. On March 10, Xinhua News Agency inter-
viewed Major General Wang Dengping, “a lawmaker from the navy,” about the
matter while he attended the PRC parliament’s annual full session.53 Major Gen-
eral Wang is the political commissar of the Armament Department of the People’s
Liberation Army Navy.54 Regarding the actions of the PRC vessels involved in
the March 8 incident, Major General Wang told Xinhua, “It is our sovereignty
for Chinese vessels to conduct activities in the country’s special economic zone,
and such activities are justified.”55 Regarding the issue of foreign military activi-
ties, Major General Wang stated, “Innocent passage by naval vessels from other
countries in the territorial waters in the special economic zone is acceptable, but
not allowed otherwise.”56 In essence, the Chinese Navy’s leadership apparently

50 Ma Zhaoxu, supra note 11.
51 Id.
52 Id.
53 Violation of China’s Sovereignty Never Allowed, XINHUA NEWS AGENCY, Mar. 10, 2009,
54 Id.; see also Cui Xiaohuo, Navy Poses No Threats to Others’, CHINA DAILY, Mar. 9, 2009
(stating that “...Major General Wang Dengping, the political commissar of the navy’s
armament department who is also a deputy to the legislative session...”).
55 Violation of China’s Sovereignty Never Allowed, supra note 53.
56 Id.
believes that the PRC vessels involved in the March 8 incident was lawfully exercising “sovereignty” over the PRC’s exclusive economic zone, while the Impeccable only had the right of innocent passage through those waters.

With both nations staking their respective legal claim about this matter on the record, let us now examine the legal basis for the Impeccable to conduct the operations in these waters—whether the waters are characterized as those beyond the PRC’s territorial seas, those within the PRC’s exclusive economic zone, or “international waters”57—which led to the March 8 incident. To address this question, it is critical to consider the development of this area of international law in several stages. First, this requires considering the history predating the Law of the Sea Convention. Then, it involves considering the negotiations between nations of the world which resulted in the final text of the Convention. Next, it warrants looking at the actually terminology of the Convention itself. Lastly, it means examining the state practice of the overwhelming majority of nations after the Convention was concluded. Ultimately, considering these critical facets of the applicable law will highlight the law in its actual state—vice as what one nation might wish it to be.

The first point to consider is the legal divisions recognized under the law of the sea prior to the Law of the Sea Convention. Specifically, as of the early twentieth century, there were only two types of waters of the oceans of the world—the territorial seas and the high seas.58 Coastal states had sovereignty over their territorial seas, while all nations had high seas freedoms beyond those coastal states’ territorial seas.59 At the outset, it is critical to note this bifurcated division of the oceans because that was the common perspective shared among all nations until some coastal states began taking unilateral actions that led to a collective response of modifying the regime of legal divisions that was ultimately negotiated in The Law of the Sea Convention.

57 Through the years, the phrase “international waters” has been used and defined in some international conventions, agreements, and negotiated documents (e.g., U.S.-PRC military working group charter, see footnote 91 infra), as well as in U.S. Navy doctrine. For those documents that have included a definition of the phrase, it is intended to include all waters beyond the territorial seas of any coastal state, to including contiguous zones, exclusive economic zones, and the high seas.

After the Impeccable incident, several of the official U.S. statements about the incident used the phrase “international waters.” This use of the phrase was consistent with the long-standing definition in those agreements and doctrine.

Admittedly, however, the phrase “international waters” is not used in the text of UNCLOS. For that reason, it is the personal opinion of this author that the U.S. government should consider discontinuing use of the phrase “international waters” and use the phrase “waters beyond the territorial sea of any coastal state” or words to that effect.

59 Id.
The next point to consider is the precise action taken by some of these coastal states that spurred the nations of the world to come together and negotiate the modified regime of the Convention. Specifically, a trend emerged among some developing coastal states, whereby they unilaterally expanded the breadth of their respective territorial seas.\(^{60}\) It is important, however, to also identify the specific vested interest or concern at stake among those states, because it highlights the limited scope of the accommodation that was ultimately bargained in the subsequent negotiations of the Convention. Were these developing states claiming additional territorial seas because they were concerned with foreign military activities off their coastline? The answer to that question is no. Typically, the motivation was to preserve coastal state rights over economic resources (i.e., fishing and mineral resources) found in the waters off their respective coasts.\(^{61}\)

There was not a trend among coastal states to expand their territorial sea claims in order to restrict the military activities of other nations.

It is useful to further consider a third point, which is what actually unfolded at the Law of the Sea Convention negotiations. The nations at the bargaining table developed and refined a modification to the legal division of the oceans of the world which would become known as the exclusive economic zone. The purpose of this modification was clear: to accommodate those coastal states desiring to preserve their economic rights in the waters off their respective coasts.\(^{62}\) For activities that had no bearing on these economic rights, the nations at the bargaining table agreed to preserve the otherwise preexisting regime of high seas freedoms beyond the territorial seas of coastal states. The concept of an exclusive economic zone was not intended to reserve any rights for coastal states other than the economic rights of the coastal state in those waters, as well as a narrow slice of associated jurisdiction for specific purposes, such as protection of the environment from major damage. In fact, the handful of nations that attempted to insert a reference to the coastal state's security interests in the “due regard” clause of the exclusive economic zone articles were roundly defeated during the negotiations.\(^{63}\) Thus, the regime of high seas freedoms beyond territorial seas which had existed prior to the Law of the Sea Convention remained otherwise fully intact in the Convention's final text.

With that background in mind, let us now turn our focus to the language of the Convention. First, consider the name of the zone itself. It is not called the “exclusive security zone” or the “exclusive military zone.” A famous political man-


\(^{61}\) Churchill and Lowe, supra note 58, at 15.

\(^{62}\) Id. at 160–61.

tra was coined by James Carville, the skilled strategists for former U.S. President Bill Clinton’s in his successful 1992 election campaign. In reminding his campaign staff what issue matters most in American presidential campaigns, he put up a large sign in their campaign headquarters which said: “It’s the economy, stupid.” Similarly, about the limited purpose and scope of the exclusive economic zone, one could borrow Mr. Carville’s mantra: It’s the economic zone, stupid.

Now, let us consider the provisions of the Convention that expressly delineate the balance of rights between coastal states and other states in the exclusive economic zone. The key provisions governing the exclusive economic zone are found in Article 56 and 58. As the authoritative five-volume Commentaries published by the University of Virginia’s Law School noted: “There is a mutuality of relationship of the coastal State and other States, and articles 56 and 58 taken together constitute the essence of the regime of the exclusive economic zone.”

Under Article 58(1), all states—including the United States—enjoy the high seas freedoms listed elsewhere in the Convention in the exclusive economic zones of the world. These high seas freedoms include the freedoms of navigation and overflight and of the laying of submarine cables and pipelines, and “other internationally lawful uses of the seas related to those freedoms.” How do nations determine what constitutes “other internationally lawful uses of the seas”? The text of the Convention does not provide more specific guidance. Therefore, we must turn to the custom and practice of nations through history—not merely what the PRC has unilaterally decided in the past few years. For centuries, nations have enjoyed high seas freedoms—to include collecting intelligence and conducting surveillance—beyond the territorial seas of coastal states. In the decades since the Law of the Sea Convention negotiations, naval forces of the world have continued to conduct military operations, exercises, and activities—including collecting intelligence and conducting surveillance—as internationally lawful uses of the sea in the exclusive economic zones throughout the world. Moreover, the state practice of the overwhelming majority of nations during the

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64 JAMES CARVILLE AND PAUL BEGALA, BUCK UP, SUCK UP . . . AND COME BACK WHEN YOU FOUL UP 115 (2002).

65 In some respects, any serious discussion of the exclusive economic zone concept is subconsciously diluted when we shorten it to the acronym “EEZ,” thereby hiding the “economic” focus of the term.

66 UNCLOS COMMENTARY, supra note 63, at 556.

67 UNCLOS, supra note 35, Art. 87.


69 UNCLOS, supra note 35, Art. 58(1).

70 Message, supra note 68.
past three decades reflects that coastal states lack the authority to restrict foreign military activities within their respective exclusive economic zones.\footnote{In fact, of the 192 member-states of the United Nations, only approximately 15 nations purport to regulate or prohibit foreign military activities in an exclusive economic zone. Those countries are: Bangladesh, Brazil, Burma, Cape Verde, China, India, Kenya, Malaysia, Maldives, Mauritius, North Korea, Pakistan, Philippines, Portugal, and Uruguay. \textit{See Maritime Claims Reference Manual}, U.S. Department of Defense, DOD 2005.1-M (June 23, 2005), http://www.dtic.mil/whs/directives/corres/html/20051m.htm. Of course, it should be pointed out that the United States has protested and/or conducted an operational challenge against all of those claims. \textit{Id.} In addition, two other state (Peru and Ecuador) unlawfully claim a 200 NM territorial sea, in which they purport to regulate and restrict foreign military activities. Few of these nations other than the PRC have operationally interfered with U.S. military activities within the exclusive economic zone or claimed 200 NM territorial seas. In short, the PRC’s legal position is an extreme minority view.}

Although the navigational rights identified in Article 58(1) are not absolute or unlimited, the text of the Convention clearly sets out only one set of limitations on those rights. Specifically, in that same Article 58, paragraph 3 states that the user states exercising these navigational rights shall have "due regard to the rights and duties of the coastal state." What coastal state rights and duties does Article 58(3) have in mind? Are the coastal state’s rights absolute and unlimited in the exclusive economic zone? No, they are not. Rather, they are the “sovereign rights” and “jurisdiction” which the coastal state enjoys over the exclusive economic zone, expressly delineated in Article 56.\footnote{UNCLOS, \textit{supra} note 35, Art. 56.} Specifically, a coastal state like the PRC possesses sovereign rights in its exclusive economic zone only with respect to living and non-living natural resources (conservation, management, exploration, and exploitation) as well as economic exploitation and exploration (such as using water, winds and currents for energy production). A coastal state also has “jurisdiction” in the exclusive economic zone (as opposed to sovereign rights) with respect to scientific research, man-made structures, and protecting the marine environment.

Put another way: Article 56 does not give the coastal state the right to limit non-economic high seas freedoms of other States beyond the coastal state’s territorial seas.\footnote{After the March 8 incident, some of the official remarks by the PRC spokespersons alleged that the \textit{Impeccable} violated not just international law, but also PRC domestic law. To be sure, a coastal state may enact laws governing its exclusive economic zone. States, however, are not required to blindly follow any law enacted by the coastal state, regardless of its content. Instead, Article 58(3) makes it clear that other states must comply with the domestic laws of the coastal state governing the exclusive economic zone, but only those domestic laws adopted by a coastal state which are “in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part."} None of those sovereign rights or jurisdiction includes the authority to restrict military activities. Thus, the PRC’s attempts to restrict mili-
tary surveillance activities of the *Impeccable* on March 8 exceeded the scope of the PRC’s sovereign rights and jurisdiction afforded to it as a coastal state under Article 56.

In summary, for the March 8 incident, the U.S. “pounds” the law because the law is also on the United States’ side—both in terms of how the five PRC vessels violated the international rules of the road, and in terms of how the *Impeccable* was exercising its right under the law of the sea to conduct these operations beyond the territorial seas of the PRC.

3. **China “Pounds” the Table**

So where does this leave the PRC in the wake of the *Impeccable* incident? With neither the facts nor the law to support its side, the PRC has no alternative other than to “pound” the table. But, in this situation, what exactly does it mean for it to pound the table? Some might think pounding the table in this case includes the emphatic declarations made by PRC spokespersons which choose not to focus on the facts or the law of the incident. In the alternative, pounding the table for the PRC might involve something a bit different, but which could be even more troubling than a press spokesman letting off verbal steam. In short, the PRC might be trying unilaterally to renegotiate a widely-accepted body of law.

Since the text and negotiating history of the Law of the Sea Convention, as well as centuries of state practice, undermine the PRC’s position on the issue of the freedom to conduct military activities beyond the territorial seas of any coastal state, the PRC is trying to persuade the international community that

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*Often times, in the international community’s debate with the PRC over its exclusive economic zone, it appears that the PRC simply ignores that express condition found in the Law of the Sea Convention—and merely maintain an oversimplified position that the PRC enacted a law and other nations must follow that law merely because the PRC enacted it.*

As indicated by the discussion *supra* about the text and negotiating history of the Law of the Sea Convention, the PRC laws governing its exclusive economic zone fail to meet the Article 58(3) standard of being “in accordance with” the provisions of the Convention. Therefore, from neither the United States nor any other nation is obligated to comply with such those laws as presently codified. As U.S. President Ronald Reagan stated in his Oceans Policy Statement in 1983, “The United States will not, however, acquiesce in unilateral acts of other States designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses.” U.S. Oceans Policy Statement, President Reagan, March 10, 1983, *reprinted in Commander’s Handbook on the Law of Naval Operations*, U.S. NAVAL WARFARE PUBLICATION 1-14M 1-1 (2007).

74 See, e.g., “We urge the U.S. to take effective measures to prevent similar incidents occurring in the future.” Ma Zhaoxu, *supra* note 11; “We urge the United States to respect our legal interests and security concern.” Defense Ministry, *supra* note 17; Qin Gang, *supra* note 19.
the Convention has “shortcomings” and that these defects must be “clarified” and “improved.” Therefore, despite a clear history of the parties rejecting an attempt by a few nations to insert security interests into the scope of exclusive economic zone restrictions, the international community is witnessing an ongoing effort by the PRC, in essence, to engage in classic PRC-style negotiating behavior and tactics, as they attempt to renegotiate the grand bargain reached by the nations of the world in the conclusion of the Convention. This is not a hollow allegation, but rather an assessment based upon four observations about PRC words and deeds that look and sound a lot like traditional PRC-style negotiating behavior.

First, the PRC is making general arguments that focus on principle-like phrases found in the text of the Law of the Sea Convention, but which are highly tenuous when considered in their full context. This approach is a tactic which the PRC has traditionally employed in negotiating new international agreements. In a seminal study of Chinese negotiating behavior, retired U.S. diplomat Richard H. Solomon identified some of the most common strategies and tactics that PRC officials have employed in negotiations with the U.S. government dating back to the late 1960’s. One bargaining tactic repeatedly employed by PRC negotiators has been to press the United States for acceptance of noble-sounding general principles and, once the United States accepts those general principles, to then pressure the United States to accept only terms of an agreement that purportedly follow those general principles.

Similarly, in the military activities debate, the PRC has focused its diplomatic efforts and informational campaign against U.S. military operations in its exclusive economic zone by relying upon principle-like phrases found in the Law of the Sea Convention. These phrases included, for example, “peaceful purposes” and “peaceful uses.” On their face, these phrases are unobjectionable and aspirational. They must be considered, however, in light of the negotiating history of those terms and their actual location within the text of the Convention itself. Upon closer examination, these provisions of the Convention apply not only to the exclusive economic zones of the world, but also to the high seas as well. Thus, taking PRC’s argument to its logical conclusion would mean that all militaries are prohibited from conducting operations and exercises on any of the high seas throughout the world. This was clearly not the intent of the nations that negotiated the Convention. Consequently, when the PRC employs phrases like “peaceful purposes” and “peaceful uses” as a principled position vice applying the

77 *Id.* at 71–73.
78 Xiaofeng and Xizhong, *supra* note 75.
79 UNCLOS, *supra* note 35, Arts. 58 and 301.
actual rules of law established in Articles 56 and 58, they are likely engaging in a classic PRC negotiating tactic.

Second, the PRC is using legal clauses out of context to make political arguments. This, too, is a classic negotiating tactic of the PRC. In a 2005 book about how to effectively conduct business negotiations in the PRC, financial media expert James McGregor recounts his negotiations on behalf of Dow Jones and Reuters with the official PRC news service Xinhua and the PRC government for access to reporting financial news in the PRC. He identified another classic PRC bargaining technique of “assembling legal clauses to frame their political arguments and their propaganda campaign.”80

Similarly, in the dispute over Impeccable incident as well as the military activities debate generally, the PRC is not building a legal case, but rather framing a political argument. Specifically, the PRC looks elsewhere in the Law of the Sea Convention for legal clauses which are wholly irrelevant or inapplicable to the present debate. It then populates the discussion with novel arguments about its authority to restrict military activities in its exclusive economic zone. For example, the PRC has argued that its authority to restrict foreign military activities in its exclusive economic zone is derived in part from a coastal state’s right to regulate the marine environment.81 Politically, the PRC knows that any environmental argument can politically resonate with some audiences within the international community. Legally, however, this argument ignores Article 236 which expressly exempts sovereign immune vessels like USNS Impeccable from the environmental regulations of coastal states. Moreover, factually, the PRC has failed to identify any evidence that U.S. military activities are actually damaging the environment within the PRC’s exclusive economic zone. With arguments like the environmental one, the PRC is raising as many conceivable arguments wrapped in legal terminology as possible—like throwing noodles up on a wall—in hopes that one will eventually “stick” and politically resonate with a target audience. In short, the PRC is using the law as a political weapon, by taking legal clauses out of context to frame a political argument.

Third, the PRC is making arguments about the law that are mutually contradictory or ambiguous. Professor James Sebinius, an expert on negotiation theory at the Harvard Business School, recently examined the Chinese negotiating culture. In discussing the relation between the PRC’s governance philosophy and negotiating culture, he wrote, “Contradictions and ambiguities are interpreted in a way that achieves the immediate policy objectives of the party and the government. The experimental nature of reform in China, moreover, renders laws subject to constant change, characterized by Deng Xiaoping as ‘crossing the river by feeling

80 James McGregor, supra note 31, at 150–51.
81 Xiaofeng and Xizhong, supra note 75.
the stones underfoot." In a legal sense, the PRC does not feel bound by precedent, or by previous or concurrent legal arguments it has espoused. Moreover, the PRC does not mind if two of its arguments in one dispute are inconsistent or contradictory.

Similarly, in the debate over the *Impeccable* incident and foreign military activities more generally, the PRC has made legal arguments which appear contradictory. For example, the PRC has criticized the United States for using the term “international waters” to discuss the location of these military operations. However, the PRC has previously joined with the United States to use the term “international waters” and included the exclusive economic zone within the scope of that term. More specifically, in 2002, the United States and PRC militaries agreed to a working group charter to develop “Guidelines to ensure the safety of navigation for surface vessels and aircraft involved in military activities in international waters and airspace, including the exclusive economic zone (EEZ) and the airspace above the EEZ.” Here again, the PRC government does not appear concerned that its previous and current legal arguments are contradictory.

Moreover, the PRC appears to be such textual purists only when it conveniently supports its overarching policy position. For example, the PRC feels less wedded to the text of the Law of the Sea Convention when using the phrase “territorial waters” in its national legislation. This cryptic term remains undefined by the PRC. Is it referring to the waters known as territorial seas, as defined under the Convention? Or does that phrase purportedly encompass the PRC’s contiguous zone and exclusive economic zone? Another phrase which has been

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83 Ren Xiaofeng and Cheng Xizhong, *supra* note 75.
85 Surveying and Mapping Law (P.R.C.) (promulgated on August 29, 2002), art. 2 (“All surveying and mapping activities in the territorial air, land and waters of the People’s Republic of China, as well as other sea areas under its jurisdiction shall be conducted in compliance with this Law.”), available at http://en.sbsm.gov.cn/article//LawsandRules/Laws/200710/20071000003241.shtml.
used by some within the PRC government is “China’s special economic zone.”

Is this the same as the exclusive economic zone, but the terminology was merely lost in translation? Once again, the PRC government is demonstrating yet another trait of its traditional negotiating behavior—that is, using contradictory or ambiguous legal arguments to achieve “the immediate policy objectives of the party and the government.”

Additionally, the PRC is making arguments that contradict its own actions. In particular, the PRC has been caught acting inconsistently on multiple occasions with its purported legal position that foreign military operations in another nation’s exclusive economic zone are restricted. For example, in June of 2009—only three months after the March 8 incident—a PRC submarine hit an underwater towed array of the destroyer USS John McCain “near Subic Bay off the coast of the Philippines.”

Thus, the PRC was apparently conducting military surveillance operations in the exclusive economic zone of another nation—in this case, the Philippines. Additionally, a comprehensive study has been published documenting how PRC submarines have conducted surveillance operations in the waters off the coast of Japan including operations within Japan’s exclusive economic zone, all of them without the permission of the Government of Japan. Together, these incidents of PRC surveillance operations in foreign exclusive economic zones send a duplicitous message from the PRC to the nations of the world to “do as we say, but not as we do.” The PRC duplicity creates substantial doubt in the minds of some observers over whether the PRC government actually believes its legal arguments for restricting the Impeccable’s operations on March 8, but rather is trying to bargain the United States and other nations out of their freedom to

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87 Sebenius and Qian, supra note 82.

88 Sub Collides with Sonar Array Towed By US Navy Ship, C.N.N., June 12, 2009, available at http://edition.cnn.com/2009/US/06/12/china.submarine/index.html. The PRC Government subsequently confirmed that the incident occurred, but provided no further details. See also, China: US Destroyer’s Sonar Hit Submarine, MSNBC, June 16, 2009, available at http://www.msnbc.msn.com/id/31382800. The U.S. Navy sources told the media that it did not believe the collision was deliberately caused by the PRC submarine, as it would have been extremely dangerous had the array gotten caught in the submarine’s propellers. Id. Beyond that, neither side made any additional comments on the matter.

89 Peter Dutton, Scouting, Signaling, and Gatekeeping: Chinese Naval Operations in Japanese Waters and the International Law Implications, 2 CHINA MARITIME STUDIES 17 (Naval War College 2009).
conduct lawful military activities beyond its territorial seas. Regardless, the PRC is exhibiting another trait of its traditional negotiating behavior.

Fourth, the PRC government is using a verbal convention that has been employed in its international negotiations. In Chinese Negotiating Behavior, Richard Solomon points out, “Chinese officials, like all negotiators, observe certain stylized conventions in official exchanges.”90 He concedes that “[s]ome verbal conventions are virtually universal in communicating intentions or in imparting second- and third-order meanings to words spoken.”91 Yet he also recognizes that “there are some certain forms of argumentation characteristic of Chinese negotiating practice that are, if not unique, at least highly distinctive.”92

In Solomon’s study, he presents an organized table of distinctive Chinese argumentation, entitled “Pressuring Phrases in Chinese Negotiating Parlance.”93 In this table, he lists categories of phrases used by Chinese negotiators along with the Chinese meaning of those phrases. Of the eight categories of phrases identified, one of the phrases includes “If you do X, your side will bear all the consequences.”94 Solomon determines the Chinese meaning of the phrase to be “[a] direct, but unspecified threat to take retaliatory action in response to a specific action on the part of the counterpart government.”95 These pressuring phrases employed by the PRC are not limited to verbal exchanges across a bargaining table.96 Some of them are employed through the public media. Once again, Solomon observed that Chinese Communists “discovered early in their history that the press could be a potent weapon” in its struggle against the Nationalist enemies.97 Thereafter, in 1950’s and 1960’s, the PRC used international media outlets in its dealing with the United States “to justify positions that could not be resolved behind closed doors.”98 The purpose of this PRC tactic is clear. As Solomon states, it is a “component of [the PRC’s] approach to negotiations—and especially as a way of bringing pressure to bear on their U.S. counterparts.”99 This public pressure is not an end in itself, but rather as provocation: that is, to “provoke a change in a position [the PRC] considers objectionable or move the U.S. government to take some desired action.”100

In recent years, we have seen the PRC employ this tactic of bargaining behavior with public statements that the United States Government or U.S. corporation

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90 Solomon, supra note 76, at 128.
91 Id.
92 Id.
93 Id. at 129.
94 Id.
95 Id.
96 Id. at 113.
97 Id.
98 Id.
99 Id. at 115.
100 Id. at 120.
will “bear the consequences” or “suffer the consequences” if it continues certain actions. For example, in February 2010, the Obama Administration indicated its intent to continue a long-standing tradition of U.S. Presidents meeting with the Dalai Lama. In response, an official PRC spokesperson forcefully stated that “any country would suffer consequences” if its leaders met with him.\textsuperscript{101} U.S. media outlets, however, pointed out that this PRC spokesperson “did not elaborate on what actions China would take.” Similarly, in March 2010, the U.S. corporation Google indicated that it did not intend to self-censor its internet search engine function in the PRC. In response, a PRC official told the state-run PRC media outlet Xinhua that Google “will have to bear the consequences for doing so.”\textsuperscript{102}

Similarly, in the debate over military activities, the PRC has also employed this bargaining tactic. While the phraseology has been similar, the channel of communication has been different. Instead of employing the pressuring phrase across a negotiation table or through public media outlets, the PRC has employed the pressuring phrase through direct radio communications with the U.S. military. As previously discussed, following the \textit{Impeccable} incident in March 2009, the U.S. Government issued a statement about the facts of incident. As part of that statement, the United States recounted a history of previous encounters between U.S. and PRC vessels. One of those encounters on March 7, 2009, involved a PRC intelligence collection ship challenging USNS \textit{Impeccable} over bridge-to-bridge radio. During the radio challenge, the PRC ship called the \textit{Impeccable}'s operations “illegal” and directed the \textit{Impeccable} to leave the area or “suffer the consequences.”\textsuperscript{103} Once more, we see the PRC engaging in its traditional negotiating behavior in its opposition to foreign military activities in its exclusive economic zone.

\section*{4. Conclusion}

This essay has examined the facts and applicable law of the \textit{Impeccable} incident, as presented by the U.S. and PRC governments, and reached several conclusions. First, it concluded that one of the nations involved (i.e., the United States) was candid, clear, and consistent in its factual account of the incident and provided corroborating evidence to the international community; in stark contrast, the other nation (i.e., the PRC) was cryptic at best, and misleading at worst. Second, it concluded that the actions of one nation during the incident (i.e., the United States) were wholly consistent with its rights and responsibilities afforded by

\begin{itemize}
\item \textsuperscript{103} Raw Data, supra note 5.
\end{itemize}
applicable international law; meanwhile, the other nation (i.e., the PRC) demonstrated utter disregard for those same bodies of law. Third, it concluded that, since neither the facts of the incident nor the applicable law supported the actions and position of one of those nations (i.e., the PRC), that nation might be attempting unilaterally to renegotiate an established body of international law.

To put it in the terminology of our original courtroom analogy, the United States pounded the facts of the *Impeccable* case because the facts were on its side; the United States pounded the law because the law was also on its side. In contrast, the PRC denied the facts of the incident because the actual facts were not on its side; the PRC also disregarded or misconstrued the applicable law because the law is also not on its side. In the end, all the PRC is left to do is pound the table.

In light of the above assessment that the PRC is “pounding the table” by engaging in negotiating-type behavior, the reader might wonder: So what? Should other nations be concerned with such political bargaining by the PRC? Yes, all nations—not just the United States—should be concerned because it puts the entire Law of the Sea Convention regime in jeopardy. Already, there is evidence that Chinese bellicosity is unnerving its neighbors. The incident against the *Impeccable* places on display the worst example of how China overreacts when faced with disagreements at sea, worrying the nations of East Asia that dispute China’s territorial claims in the South China Sea, East China Sea, and Yellow Sea.

The Law of the Sea Convention, which took nearly a decade to negotiate, has been signed and ratified by 162 of the 192 nations of the world. Many of the very points about the exclusive economic zone which the PRC raises now were addressed at the negotiating conferences of the Convention. The juridical features of the new exclusive economic zone concept were debated by the nations convened, and the conference of state-parties ultimately rejected those proposals at the bargaining table that proposed granting some type of security interest to the coastal state in the exclusive economic zone. Thus, the PRC had their chance at the bargaining table, but the majority view prevailed and the Chinese position was rejected.

More importantly, the Law of the Sea Convention reflects a grand bargain between all of the states who had a seat at the bargaining table during those ten plus years of negotiations—including the United States and the PRC, but also so many more states. Some of these states were coastal states, some were maritime states, and some had interests from both perspectives. Ironically, unlike the “unequal treaty” era which continues to sting in the psyche of Chinese history, the agreement reached at the Convention was not a forced deal between unequal nations, but rather a bargain among nations based on equality. If the PRC did not like the final terms as agreed by the parties, then it could have chosen not

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to sign it; however, it voluntarily chose to do so. If the PRC was concerned about the nature of the exclusive economic zone, it would have been barred under the treaty from reserving that position. In fact, however, Beijing did not even submit an understanding at the time of ratification on the issue, as a handful of other states have done. The year 2009 is too late in the game for the PRC to develop buyer’s remorse on the Convention. China should then either comply with the treaty, or withdraw from the framework altogether.

Like any bargain, no nation at the Law of the Sea Convention negotiations received everything it wanted in the deal. At its final session in Montego Bay in December 1982, Tommy T. B. Koh, the President of the Third United Nations Conference on the Law of the Sea, identified several common observations shared among the negotiators which highlight the nature of the bargained deal. One observation was that no individual nation was “fully satisfied” with the UNCLOS bargain as it was structured to accommodate competing interests. Another observation was that the Convention was a “package” deal where nations were not allowed to selectively follow certain provisions, while disregarding others. In short, no compromise is perfect.

Thus, when the PRC makes arguments that the Convention contains shortcomings that need to be improved or perfected, such noble-sounding comments ignore that no agreement can ever be perfected without the mutual consent of the parties. The only way an agreement can be perfected is when one nation receives everything it wants and then it is only perfect for that nation—which sounds a lot like the “unequal treaties” of the nineteenth century which the PRC has forever scorned. To argue that the Law of the Sea Convention can be “perfected” for all of the parties reflects an unrealistic utopian approach that is a feature of old-school socialist thinking. Today, this view is either naïve or deceptive if a single nation attempts to extract the benefits of the bargain without delivering a quid pro quo between all of the parties. A one-sided bargaining table is something the community of nations cannot afford to let the PRC pound.