

THE TRUE “LIES” OF THE *IMPECCABLE* INCIDENT: WHAT REALLY HAPPENED, WHO DISREGARDED INTERNATIONAL LAW, AND WHY EVERY NATION (OUTSIDE OF CHINA) SHOULD BE CONCERNED

*Jonathan G. Odom**

INTRODUCTION	411
I. WHAT REALLY HAPPENED ON MARCH 8, 2009.....	414
A. Stating the Facts of the Incident.....	414
B. China Denies the Facts of the Incident	416
C. United States Corroborates the Facts of the Incident.....	420
II. WHICH NATION DISREGARDED INTERNATIONAL LAW ON MARCH 8, 2009	426
A. Navigational Obligations Under the International Rules of the Road	427
1. <i>Applicability of COLREGs</i>	427
2. <i>Violations of Specific COLREGs</i>	428
3. <i>Breach of Duty as a Flag State</i>	431
B. Navigational Freedoms under the Law of the Sea	432
CONCLUSION: CAUSE FOR CONCERN.....	442

INTRODUCTION

Many in the international law and foreign affairs communities are aware of an incident which 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 of those communities, however, are familiar with the March 8th incident in substantial detail, both factually and legally. Although the incident was reported by the news media in the days and weeks following, such reporting was merely the “first rough draft of history.”¹ Therefore, much like how a courtroom trial provides a

* B.A., Duke University, 1993; J.D., Wake Forest University School of Law, 1996. Commander Odom is an active-duty judge advocate in the U.S. Navy. He is currently serving as the Deputy Staff Judge Advocate for Commander, U.S. Pacific Command, focusing on legal aspects of maritime security, oceans law and policy, and the law of armed conflict. Previously, he has served as legal advisor for numerous flag and general officers in the Pentagon, for afloat commanders during operational deployments to the Arabian Gulf and the Pacific Rim, and for multi-national force commanders on the ground in Iraq and Kosovo. *The views presented are those of the author and do not represent the official policy or position of the Department of Defense.*

1. See Philip Graham, Address to Newsweek Magazine Correspondents in London, England (April 1963) (“So let us today drudge on about our inescapably impossible task of providing every week a first rough draft of history that will never really be completed about 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 stepping back and reflecting upon this maritime incident in greater depth as its one-year anniversary has approached. 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.

This discussion will focus upon the March 8th incident—which has come to be known in some circles as “the *Impeccable* incident.” Thus, it will not discuss matters like the competing maritime claims between the PRC and its nation-state neighbors in the South China Sea region because those maritime claims are not directly implicated in the March 8th incident. It will also not discuss concepts like marine scientific research, hydrographic surveys, or military surveys because the U.S. ship was not conducting military survey operations, but rather routine military surveillance operations.² It will also not discuss the legality of conducting military aerial surveillance outside a coastal state’s national airspace because this March 8th incident involved only surface vessels.³ Additionally, because the March 8th incident involved only U.S. and PRC vessels, it will not discuss how government ships operated by other nations have recently experienced similar treatment by the PRC while they too

world we can never really understand . . .”). Graham was the long-time publisher of the *Washington Post* newspaper. He made this often-quoted observation in a early 1960s speech to an audience of *Newsweek* magazine correspondents in London, soon after his company acquired *Newsweek*.

2. See RAW DATA: *Pentagon Statement on Chinese Incident with U.S. Navy*, FOX NEWS, Mar. 9, 2009, <http://www.foxnews.com/politics/2009/03/09/raw-data-pentagon-statement-chinese-incident-navy/> [hereinafter “Pentagon Statement”] (“[T]he U.S. ocean surveillance ship . . .”); see also U.S. Navy’s Military Sealift Command, USNS *Impeccable*, Ocean Surveillance Ship, <http://www.msc.navy.mil/inventory/ships.asp?ship=106> (last visited Mar. 26, 2010) (“USNS *Impeccable* is one of the five Ocean Surveillance Ships that are part of the 25 ships in Military Sealift Command’s Special Mission Ships Program.”). The function of these ocean surveillance ships is to use sonar arrays to detect and track undersea threats. See U.S. Navy’s Military Sealift Command, Special Mission Program, <http://www.msc.navy.mil/PM2/> (last visited Mar. 26, 2010) (“Five ocean surveillance ships directly support the Navy by using both passive and active low frequency sonar arrays to detect and track undersea threats.”).

3. For a summary of the facts of the incident between a U.S. Navy EP-3 and a People’s Liberation Army (“PLA”) F-8 which occurred on April 1, 2001, and the corresponding legal positions espoused by the two governments on the matter, see *China-US Aircraft Collision Incident of April 2001: Assessments and Policy Implications*, Congressional Research Service (CRS) Report for Congress, RL30946, Oct. 10, 2001, available at <http://www.fas.org/sgp/crs/row/RL30946.pdf> [hereinafter *CRS Report RL30946*].

conducted lawful military activities beyond the territorial seas of the PRC. Many of these related subjects have already been previously discussed by U.S. Navy legal experts.⁴ In short, rather than discuss all things regarding exclusive economic zones ("EEZ"), this article will focus upon the specific "cause of action" at issue—that is, the incident which occurred on March 8, 2009.

This discussion is "a" perspective from the United States—vice "the" perspective of the United States—because the incident is discussed in the personal capacity of the Author. With that being said, this discussion will attempt to focus upon and synthesize the official statements and comments issued by and physical documentation (i.e., video and photographs) released by the United States and PRC governments, to the extent possible. This focus on official statements and information serves multiple purposes. First, it keeps the discussion at the unclassified level and thereby, available to the broadest possible audience. Second, it also prevents the discussion from chasing down rhetorical rabbit holes and responding to every conceived legal argument posited by any outsider about the general subject of foreign military activities in an exclusive economic zone. Instead, since the March 8th incident involved official government actions by the two nations' governments, this discussion of the facts and the law will focus on the actions and intent of those two nation-state actors.

Part I of this Article will focus on the facts of the March 8th 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 8th incident with this objective evidence will prove quite telling for which side's account is closer to the truth.

Part II of this Article will focus on the applicable law of the March 8th incident. This legal discussion will examine two bodies of international law: first the international rules of navigational safety, and second, 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.

4. See generally Capt. Raul Pedrozo, *Close Encounters at Sea*, 62 NAVAL WAR C. REV. 101, 101–11 (2009); see also Cdr. James Kraska, *Sovereignty at Sea*, 51 SURVIVAL 13 (June–July 2009). For a legal discussion about marine scientific research and survey activities from the U.S. perspective, see Ashley Roach & Robert W. Smith, *Excessive Maritime Claims*, 66 INT'L L. STUD. U.S. NAVAL WAR COL. 247, 247–49 (1994).

Ultimately, this Article will reach several conclusions. First, it will conclude that one of the nations involved was candid, clear, and consistent in its factual account of the March 8th incident and provided detailed corroboration to the international community; in stark contrast, the other nation was cryptic at best, and misleading at worst. Second, it will conclude that the actions of one nation during the March 8th incident were wholly consistent with its rights and responsibilities afforded by applicable international law; meanwhile, the other nation demonstrated utter disregard for those same bodies of law. Third, it will conclude that since neither the facts of the incident nor the applicable law support the actions and position of one of these nations—both in the specific incident of March 8, 2009 or in this dispute generally—that nation is attempting to unilaterally renegotiate an established body of international law right before the world’s very eyes. All of these conclusions should be extremely troubling to the community of nations.

I. WHAT REALLY HAPPENED ON MARCH 8, 2009

We now turn to the actual facts of the March 8th incident in the South China Sea. While legal experts instinctively want to jump to debating the law, practicing attorneys also know that they must take their client “as is” and grapple with the facts of their case as they actually unfolded—vice as their counsel wished for them to have happened. As an American colonial 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.”⁵ Thus, before discussing the law, the facts and evidence of the March 8th incident should be examined.

A. Stating the Facts of the Incident

The incident occurred on Sunday, March 8, 2009,⁶ in an area of the ocean approximately seventy-five miles from the Chinese coastline. The U.S. government was the first nation involved to officially comment on the

5. FREDERICK KIDDER, HISTORY OF THE BOSTON MASSACRE, MARCH 5, 1770 258 (1870). John Adams was the first Vice-President and second President of the United States of America. However, prior to being elected to the Vice-Presidency in 1789 and the Presidency in 1796, he was a practicing attorney in colonial Boston and known as the American lawyer who agreed as a matter of principle to defend the British soldiers who were prosecuted for the Boston Massacre of March 5, 1770. Ironically, the *Impeccable* incident of “stubborn facts” was merely three days after the 239th anniversary of the Boston Massacre.

6. Local date and time of the *USNS Impeccable* incident.

incident.⁷ On Monday, March 9—the day after the incident—American media outlets reported an official statement issued by the U.S. Department of Defense at the Pentagon.⁸ This official statement opened with a general remark 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.”⁹

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 [fifty] 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 [twenty-five] 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 [seventy-five] miles south of Hainan Island.¹⁰

In addition, the official U.S. statement discussed other incidents which had occurred in the days preceding the incident:

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

7. 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.

8. Pentagon Statement, *supra* note 2; Press Release, Jim Garamone, Armed Forces Press Service, Chinese Vessels Shadow, Harass Unarmed U.S. Surveillance Ship (Mar. 9, 2009); *Pentagon: Chinese Vessels Harassed Unarmed Ship*, BREITBART, Mar. 9, 2009, available at http://www.breitbart.com/article.php?id=D96QJ2S00&show_article=1.

9. Pentagon Statement, *supra* note 2.

10. *Id.*

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."¹¹

Then, the official U.S. statement of March 9th identified the five 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."¹²

Lastly, the official U.S. statement of March 9, 2009 briefly 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.¹³

In short, the official U.S. statement released on March 9, 2009 provides a good summary of the U.S. perspective of the incident. As will become evident, however, the U.S. government effort to present its account of the incident did not end with the March 9, 2009 statement. Instead, it continued with the release of 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 8th incident.

B. 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 and following the official U.S. statements. On March 10, 2009, 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

11. *Id.*

12. *Id.*

13. See discussion *infra* Part II.

affairs, including questions about the March 8th 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. [N]avy vessel in international waters? The U.S. says the Chinese ships sailed dangerously close and threw debris in the path of the [N]avy ship.

[Mr. Ma]: The claims by the U.S. are flatly inaccurate and unacceptable to China.¹⁴

This exchange was followed by another, which reaffirmed the PRC's blanket denial of the U.S. 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 incursion[]?

[Mr. Ma]: The U.S. assertion is flatly inaccurate and unacceptable to China.¹⁵

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."¹⁶ This last statement was translated into 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."¹⁷ Lest there be any confusion about the Chinese account of the March 8th incident, Mr. Ma closed his remarks with the reporters at the March 10th 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 8th 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.

14. Ma Zhaoxu, *P.R.C. Foreign Ministry Regular Press Conference*, Mar. 10, 2009, <http://www.fmprc.gov.cn/eng/xwfw/s2510/2511/t541713.htm>.

15. *Id.*

16. *Id.*

17. *China Lodges Representation as U.S. Naval Ship Breaks Int'l, Chinese Laws*, XINHUA NEWS AGENCY, Mar. 11, 2009, available at http://news.xinhuanet.com/english/2009-03/11/content_10990180.htm (emphasis added).

Navy surveillance ship, this time, I have already made China's view and position clearly. I have nothing more to add.¹⁸

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 8th incident, *Xinhua* translated Mr. Ma's March 10th comments into English as "the U.S. claims are *gravely in contravention of the facts* and unacceptable to China."¹⁹

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 8th incident. His response to the factual account: "China cannot accept the U.S. [*sic*] groundless accusations."²⁰ Senior Colonel Huang also went on to describe the behavior of the PRC vessels involved in the March 8th 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 10th press conference in its blanket denial of the 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:

[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?

18. Ma, *supra* note 14.

19. XINHUA NEWS AGENCY, *supra* note 17.

20. *Defense Ministry Urges U.S. to Respect China's Security Concern*, XINHUA NEWS AGENCY, Mar. 11, 2009, available at http://news.xinhuanet.com/english/2009-03/11/content_10994295.htm.

[Mr. Ma]: I already elaborated on China’s position about this incident yesterday.²¹

But we have seen that Mr. Ma’s “elaboration” on China’s position was merely the statement that “[t]he 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 8th 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 8th 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 a similar incident. The resolve of

21. Ministry of Foreign Affairs of the PRC, Press Conference on March 12, 2009, <http://www.fmprc.gov.cn/eng/xwfw/s2510/2510/t542166.htm> (last visited April 9, 2010). The remainder of Mr. Ma’s response to the question focused not on the facts, but rather legal arguments. In the interests of completeness, however, below is his full response to the question:

I already elaborated on China’s position about this incident yesterday. The activities of the said [U.S.] ship in China’s exclusive economic zone without our permission have broken international laws as well as China’s laws and regulations. It is totally justified and reasonable for China to take actions to safeguard its rights in the sea waters under its jurisdiction in accordance with law. We request the [U.S.] side to adopt effective measures to prevent similar incidents from happening again. I would emphasize here that a stable and sound Sino-[U.S.] relationship is in the fundamental interests of the two countries and two peoples, hence conducive to peace, stability and development of the Asia-Pacific region. This demands the concerted efforts of both sides.

the Chinese government to safeguard territorial integrity and maritime rights and interests is resolute.²²

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, 2009, 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.

C. United States Corroborates the Facts of the Incident

Before discussing the facts of the March 8th incident further, 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 Article. A binary dilemma often arises in an adversarial system of justice, which requires the finder of fact (i.e., judge or jury) to effectively evaluate 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, and pedophilia) 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 their fellow citizens is charged with deciding which account is truthful.

In a classic “he said-she said” case, where both sides tell their version of events, the burden ordinarily falls upon the trial attorneys for 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. Such objective evidence can include the testimony of other eyewitnesses of the incident, as well as physical or 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 statements²³ as evidence of the defendant’s consciousness of guilt—under the theory that innocent people do not lie.

22. Qin Gang, *P.R.C. Foreign Ministry Regular Press Release*, Mar. 24, 2009, available at <http://www.fmprc.gov.cn/eng/xwfw/s2510/2511/t553628.htm>.

23. See *Military Judges’ Benchbook*, Pamphlet 27–9, Dep’t. of the Army (Apr. 1, 2001). *False Exculpatory Statements*

In a similar fashion, the international law and foreign affairs communities are called upon to consider two accounts of the March 8th 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 8th incident is accurately presenting the facts?

Just like in a binary-type sexual harassment case, the reader should consider any objective evidence offered by either side of the dispute that might corroborate 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 8th 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.

There has been evidence that after the offense(s) (was) (were) allegedly committed, the accused may have (made a false statement) (given a false explanation) (_____) about the alleged offense(s), specifically (that (he) (she) told an investigator that (he) (she) was at another place when the crime was committed) (that (his) (her) positive urinalysis test was caused by medication) (he) (she) was taking at the time) (_____). Conduct of an accused, including statements made and acts done upon being informed that a crime may have been committed or upon being confronted with a criminal charge, may be considered by you in light of other evidence in the case in determining the guilt or innocence of the accused.

If an accused voluntarily offers an explanation or makes some statement tending to establish (his) (her) innocence, and such explanation or statement is later shown to be false, you may consider whether this circumstantial evidence points to a consciousness of guilt.

You may infer that an innocent person does not ordinarily find it necessary to invent or fabricate a voluntary explanation or statement tending to establish (his) (her) innocence. The drawing of this inference is not required.

Whether the statement was made, was voluntary, or was false is for you to decide. (You may also properly consider the circumstances under which the statement(s) (was) (were) given, such as whether they were given under oath, and the environment (such as (fear of law enforcement officers) (a desire to protect another) (a mistake) (_____)) under which (it was) (they were) given.)

Whether evidence as to an accused’s voluntary explanation or statement points to a consciousness of guilt, and the significance, if any, to be attached to any such evidence, are matters for determination by you, the court members.

Id.

On Friday, March 20, 2009, the United States released such “gotcha” evidence which corroborated its side of the events.²⁴ That date marked twelve days after the March 8th incident and eleven days after the U.S. government provided a detailed factual account of the incident. Perhaps more importantly, March 20, 2009, 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 *Impeccable* crewmembers during the actual incident. Rather than merely asking the international community to take the United States at its word, the United States released documentary evidence about the incident, which allowed third parties to 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 website²⁵ as well as on the heavily-trafficked youtube.com.²⁶

24. *Pentagon Video: “Chinese Aggression . . . Details at 11”*, CNN, Mar. 21, 2009, available at <http://edition.cnn.com/2009/WORLD/asiapcf/03/20/us.china.navy/index.html>.

25. “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 *Impeccable* (T-AGOS-23),” (photograph), http://www.navy.mil/view_single.asp?id=69479 (last visited Mar. 26, 2010) [hereinafter Grapple Hook]; “Two Chinese trawlers stop directly in front of the military Sealift Command ocean surveillance ship USNS *Impeccable* (T-AGOS-23), forcing the ship to conduct an emergency “all stop” in order to avoid collision,” (photograph), http://www.navy.mil/view_single.asp?id=69478 (last visited Mar. 26, 2010) [hereinafter Chinese Trawlers].

26. Youtube, Chinese Ships Approach USNS *Impeccable* - RAW VIDEO, http://www.youtube.com/watch?v=CHvWkK1576s&feature=channel_page (last visited Mar. 26, 2010); Youtube, Chinese Ships Approach USNS *Impeccable* - RAW VIDEO #2, http://www.youtube.com/watch?v=0g56VL003FM&feature=channel_page (last visited Mar. 26, 2010); Youtube, Chinese Ships Approach USNS *Impeccable* - RAW VIDEO #3, http://www.youtube.com/watch?v=pm2nYGp3dd4&feature=channel_page (last visited Mar. 26, 2010); Youtube, Chinese Ships Approach USNS *Impeccable* - RAW VIDEO #4, http://www.youtube.com/watch?v=9IG9dEI44iE&feature=channel_page (last visited Mar. 26, 2010); Youtube, Chinese Ships Approach USNS *Impeccable* - RAW VIDEO #5, http://www.youtube.com/watch?v=BlhjhDrChno&feature=channel_page (last visited Mar. 26, 2010); Youtube, Chinese Ships Approach USNS *Impeccable* - RAW VIDEO #6, http://www.youtube.com/watch?v=vLEC_f2_Fbg&feature=channel_page (last visited Mar. 26, 2010); Youtube, Chinese Ships Approach USNS *Impeccable* - RAW VIDEO #7, http://www.youtube.com/watch?v=LILK3i0X0hM&feature=channel_page (last visited Mar. 26, 2010); Youtube, Chinese Ships Approach USNS *Impeccable* - RAW VIDEO #8, http://www.youtube.com/watch?v=9SB5I-24Vbw&feature=channel_page (last visited Mar. 26, 2010).

As a matter of substance, what does this smoking-gun, “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 8th incident, and cite photos or video frame-captures that 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[th] 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.”²⁷

Corroboration of U.S. Assertion of Fact #1: “Raw Video #3”²⁸ (at the 0:14 mark) is one of the U.S.-released video clips which shows three of the five PRC ships involved in the March 8th incident. “Raw Video #8”²⁹ (at the 1:57 mark) is another of the U.S.-released video clips which shows the other two of the five PRC ships involved. Together, these U.S.-released images 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.”³⁰

Corroboration of U.S. Assertion of Fact #2: “Image 090308-N-0000X-003.jpg”³¹ 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 [fifty] feet, waving Chinese flags and telling *Impeccable* to leave the area.”³²

27. Pentagon Statement, *supra* note 2.

28. Chinese Ships Approach USNS *Impeccable* - RAW VIDEO #3, *supra* note 26.

29. Chinese Ships Approach USNS *Impeccable* - RAW VIDEO #8, *supra* note 26.

30. Pentagon Statement, *supra* note 2.

31. See Chinese Trawlers, *supra* note 25.

32. Pentagon Statement, *supra* note 2.

Corroboration of U.S. Assertion of Fact #3: “Image 090308-N-0000X-004.jpg”³³ is a U.S.-released photo which corroborates that Chinese vessels, in fact, closed within fifty feet and that a crewmember, in fact, waved a Chinese flag.

U.S. Assertion of Fact #4: “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 [twenty-five] feet.”³⁴

Corroboration of U.S. Assertion of Fact #4: “Raw Video #3”³⁵ (at the 0:48 mark) corroborates that a USNS *Impeccable* crewmember, in fact, manned the ship’s fire hose at one of the PRC vessels in order to protect itself.

U.S. Assertion of Fact #5: The Chinese crew members “used poles to try to snag the *Impeccable*’s acoustic equipment in the water.”³⁶

Corroboration of U.S. Assertion of Fact #5: “Image 090308-N-0000X-004.jpg” and “Raw Video #3” (at the 2:10 mark) are U.S.-released images which corroborate that a crewmember of a Chinese vessel, in fact, used a pole to try to snag the *Impeccable*’s towed array.³⁷

In addition to corroborating these five material facts in the official U.S. statement released on March 9, 2009, the video released by the U.S. government on March 20, 2009 also demonstrated another fact of significant concern. Specifically, “Raw Video #2”³⁸ (in its entirety) and “Raw Video #3”³⁹ (at the 1:01 mark) are U.S.-released videos which corroborate that one of the five 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 8th incident? When the PRC government spokesperson characterized the U.S. factual account as “sheer lies” on March 24, 2009, 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

33. See Grapple Hook, *supra* note 25.

34. Pentagon Statement, *supra* note 2.

35. Chinese Ships Approach USNS *Impeccable* - RAW VIDEO #3, *supra* note 26.

36. Garamone, *supra* note 8.

37. Chinese Trawlers, *supra* note 25; Chinese Ships Approach USNS *Impeccable* - RAW VIDEO #3, *supra* note 26.

38. Chinese Ships Approach USNS *Impeccable* - RAW VIDEO #2, *supra* note 26.

39. Chinese Ships Approach USNS *Impeccable* - RAW VIDEO #3, *supra* note 26.

earlier on March 20, 2009? Has the PRC government ever retracted its official statement that the 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.⁴⁰ 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, 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 also that a litigant compiling evidence in its possession often self-discovers what factual issues exist and, more importantly, which facts are irrefutable.

For the March 8th incident, the PRC apparently 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,⁴¹ but which are nonetheless images apparently produced by individuals aboard the PRC vessels involved in the March 8th 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 twenty-five feet. Lastly, in case anyone planned 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-

40. See, e.g., FED. R. CIV. P. 26–37.

41. Richard Weitz, *Maritime Confrontation Highlights Troubled State of China-U.S. Defense Diplomacy*, 9 CHINA BRIEF 9, Apr. 30, 2009, http://www.jamestown.org/programs/chinabrief/single/?tx_ttnews%5Btt_news%5D=34923&cHash=0958acf22e; Latest Photos of Naval Dispute Between China and USA, <http://sinodefence.blogspot.com/2009/03/latest-photos-of-naval-dispute-between.html> (last visited Mar. 26, 2010); More Photos of Naval Dispute, http://sinodefence.blogspot.com/2009_03_01_archive.html (last visited Mar. 26, 2010).

produced images, however, the PRC government apparently never posted these images on an official PRC government website or released 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.⁴² 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 8th incident that were corroborated by the U.S.-released images showing a PRC crewmember attempting to hook the *Impeccable*’s towed array and of a PRC vessel attempting to run over the array. Recall that on March 24, 2009—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 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 8th 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.

II. WHICH NATION DISREGARDED INTERNATIONAL LAW ON MARCH 8, 2009

Let us now turn to the applicable bodies of international 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 8th incident in terms of that body of international law, however, we should not overlook another 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 8th incident and similar scenarios, both nations had a fundamental obligation to ensure that their mariners interacted 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 all manner of boundaries and high

42. JAMES MCGREGOR, ONE BILLION CUSTOMERS: LESSONS FROM THE FRONT LINES OF DOING BUSINESS IN CHINA 8 (2005); SITU TAN, BEST CHINESE IDIOMS 151 (1986).

politics; however, their mariners are nonetheless bound by the ancient code of "rules of the road" at sea, which have been codified in recent decades.

A. Navigational Obligations Under the International Rules of the Road

The USNS *Impeccable* acted consistent with international navigational safety rules and otherwise operated safely in relation to the five PRC vessels involved.⁴³ On the other hand, the United States expressed substantial concern with the unsafe conduct of the five PRC vessels involved in the March 8th incident. In the official statement issued on March 9, 2009, 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.⁴⁴

Similarly, on March 19, 2009, the Commander of U.S. Pacific Command highlighted the PRC's violations of the International Regulations for Preventing Collisions at Sea ("COLREGs")⁴⁵ 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."⁴⁶ 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.'"⁴⁷

1. *Applicability of COLREGs*

Critics of U.S. military activities in the PRC's EEZ occasionally point out that the United States is not a party to the U.N. Convention on the Law

43. The Author is unaware of any source—within the PRC government, PRC academic community, or elsewhere—claiming otherwise.

44. Pentagon Statement, *supra* note 2.

45. International Maritime Organization, Convention on the International Regulations for Preventing Collisions at Sea, Oct. 20, 1972, 28 U.S.T. 3459, 1050 U.N.T.S. 16, *amended by* Amendments to the International Regulations for Preventing Collisions at Sea, Nov. 19, 1981, 35 U.S.T. 575, 1323 U.N.T.S. 353 [hereinafter COLREGs].

46. *Id.*

47. Press Release, Donna Miles, Armed Forces Press Service, More Work Needed in Military Relationship With China, Admiral Says (Mar. 19, 2009).

of the Sea (“UNCLOS”).⁴⁸ 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 States⁴⁹ and the PRC⁵⁰ are parties to the COLREGs.

By the very terms of the treaty, the COLREGs clearly applied to the operations of the USNS *Impeccable* and the five PRC vessels operating in the PRC’s EEZ on March 8, 2009. 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. COLREGs, Rule 1 (“Application”) states: “Rules shall apply to all vessels upon the high seas and in all waters connected therewith navigable by seagoing vessels.”⁵¹ 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 EEZ on March 8, 2009.

2. *Violations of Specific COLREGs*

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 8th incident, however, the facts—as asserted by the United States and as 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, entitled “Action to Avoid Collision.”⁵² Specifically, the PRC vessels failed to take “action to

48. United Nations Convention on the Law of the Sea art. 94, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

49. COLREGs, *supra* note 45; *see also* International Maritime Organization, Status of Conventions, http://www.imo.org/includes/blastData.asp/doc_id=693/status-x.xls (last visited Mar. 28, 2010).

50. PRC is a party to the COLREGs. *See* International Maritime Organization, http://www.imo.org/includes/blastData.asp/doc_id=693/status-x.xls (last visited Mar. 26, 2010).

51. COLREGS, *supra* note 45.

52. *Id.* Rule 8 (“Action to Avoid Collision”) states:

(a) Any action taken to avoid collision shall, if the circumstances of the case admit, be positive, made in ample time and with due regard to the observance of good seamanship.

(b) Any alteration of course and/or speed to avoid collision shall, if the circumstances of the case admit, be large enough to be readily

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, entitled "Overtaking."⁵³ 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 overruns either type of towed equipment creates

apparent to another vessel observing visually or by radar; a succession of small alterations of course and/or speed should be avoided.

(c) If there is sufficient sea room, alteration of course alone may be the most effective action to avoid a close-quarters situation provided that it is made in good time, is substantial and does not result in another close-quarters situation.

(d) Action taken to avoid collision with another vessel shall be such as to result in passing at a safe distance. The effectiveness of the action shall be carefully checked until the other vessel is finally past and clear.

(e) If necessary to avoid collision or allow more time to assess the situation, a vessel shall slacken her speed or take all way off by stopping or reversing her means of propulsion.

Id.

53. *Id.* Rule 13 ("Overtaking") states:

(a) Notwithstanding anything contained in the Rules of Part B, Sections I and II any vessel overtaking any other shall keep out of the way of the vessel being overtaken.

(b) A vessel shall be deemed to be overtaking when coming up with another vessel from a direction more than 22.5 degrees abaft her beam, that is, in such a position with reference to the vessel she is overtaking, that at night she would be able to see only the sternlight of that vessel but neither of her sidelights.

(c) When a vessel is in any doubt as to whether she is overtaking another, she shall assume that this is the case and act accordingly.

(d) Any subsequent alteration of the bearing between the two vessels shall not make the overtaking vessel a crossing vessel within the meaning of these Rules or relieve her of the duty of keeping clear of the overtaken vessel until she is finally past and clear."

Id.

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, entitled “Crossing Situation.”⁵⁴ 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, entitled “Action by Give-way Vessel.”⁵⁵ 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, entitled “Responsibilities Between Vessels.”⁵⁶ Specifically, the PRC vessels also

54. *Id.* Rule 15 (“Crossing Situation”) states: “When two power-driven vessels are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way and shall, if the circumstances of the case admit, avoid crossing ahead of the other vessel.” *Id.*

55. COLREGs, *supra* note 45 Rule 16 (“Action by Give-way Vessel”) states: “Every vessel which is directed to keep out of the way of another vessel shall, so far as possible, take early and substantial action to keep well clear.” *Id.*

56. *Id.* Rule 18 (“Responsibilities Between Vessels”) states:

Except where Rules 9, 10 and 13 otherwise require:

(a) A power-driven vessel underway shall keep out of the way of:

- (i) a vessel not under command;
- (ii) a vessel restricted in her ability to manoeuvre;
- (iii) a vessel engaged in fishing;
- (iv) a sailing vessel.

(b) A sailing vessel underway shall keep out of the way of:

- (i) a vessel not under command;
- (ii) a vessel restricted in her ability to manoeuvre;
- (iii) a vessel engaged in fishing.

(c) A vessel engaged in fishing when underway shall, so far as possible, keep out of the way of:

- (i) a vessel not under command;
- (ii) a vessel restricted in her ability to manoeuvre.

(d) (i) Any vessel other than a vessel not under command or a vessel restricted in her ability to manoeuvre shall, if the circumstances of the case admit, avoid impeding the safe passage of a vessel constrained by her draught, exhibiting the signals in Rule 28.

(ii) A vessel constrained by her draught shall navigate with particular caution having full regard to her special condition.

(e) A seaplane on the water shall, in general, keep well clear of all vessels and avoid impeding their navigation. In circumstances,

failed in its duty to “keep out of the way” of the *Impeccable*. By definition,⁵⁷ the *Impeccable* was a vessel with restricted-maneuver status under the 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*.

3. Breach of Duty as a Flag State

In addition to identifying these specific COLREGs violated by the PRC vessels in the March 8th incident, it is also important to emphasize that the PRC government had legal responsibility for the actions of *all* five vessels involved in the March 8th 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 UNCLOS⁵⁸ to take all necessary measures to ensure its flagged vessels

however, where risk of collision exists, she shall comply with the Rules of this Part.

Id.

57. *Id.* 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 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.”

Id. (emphasis added).

58. UNCLOS, *supra* note 48. The United States is not a party to UNCLOS, but considers the navigation and overflight provisions therein reflective of customary international law. See Ronald Reagan, President, Statement on United States Oceans Policy

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 8th 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. First, the official U.S. government's statements and corroborating visual evidence put the PRC government on notice of these potential violations. Second, the three on-scene PRC government vessels also directly observed these potential violations of the COLREGs by its non-government vessels. Despite this notice, there is unfortunately no indication that the PRC 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* seventy-five 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 of law enforcement" in China or as "strict" compliance with the law.

B. Navigational Freedoms under the Law of the Sea

Next, consider the international law governing whether the *Impeccable* had the right to conduct routine surveillance operations beyond the territorial seas of the PRC, and whether the PRC as a coastal state had the

(Mar. 10, 1983), available at <http://www.oceanlaw.org/index.php?module=News&func=display&sid=101>.

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 8th 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, 2009, 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."⁵⁹ Additionally, the March 9th statement included, "[c]oastal states do not have a right under international law to regulate foreign military activities in the EEZ."⁶⁰ All subsequent official statements issued by U.S. government representatives concerning the law of the sea as it applied to the March 8th incident were consistent with this initial U.S. statement.⁶¹

59. Pentagon Statement, *supra* note 2.

60. *Id.*

61. A complete listing of statements on the U.S. legal position by U.S. government representatives in response to media questions are as follows: For White House comments, see Robert Gibbs, White House Press Secretary, White House Press Briefing (Mar. 9, 2009), available at <http://www.whitehouse.gov/the-press-office/briefing-white-house-press-secretary-robert-gibbs-3909>.

Q: Mr. Gibbs, two questions. First, Chinese vessels have been harassing U.S. ships with increasing aggressiveness. I know that the Chinese defense attaché went to the Pentagon, or is at the Pentagon right now, to review a complaint, but is the President taking any other action regarding the Chinese government, to tell them to stop doing this?

MR. GIBBS: I know that our embassy in both Beijing and here protested the actions of the Chinese ships that have been reported. *Our ships obviously operate fairly regularly in international waters where these incidents took place. We're going to continue to operate in those international waters, and we expect the Chinese to observe international law around them.*

Id. (emphasis added). For U.S. Department of Defense comments, see Press Release, Geoff Morrell, U.S. Defense Department, Department of Defense News Briefing with Geoff Morrell from the Pentagon (Mar. 11, 2009), available at <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=4369>.

Q: On China, Admiral Blair said yesterday this is the most serious—the ship incident was the most serious incident since the Hainan Island incident. Does the Pentagon see it as a serious incident or just more of a minor irritation? And has the Navy taken any steps either to change their procedures or practices in that area or to provide additional protection for the ships involved?

MR. MORRELL: I don't know that I'm in a position to characterize it—serious, unserious, degrees of seriousness. It's serious enough that we have reached out to our counterparts. And our Defense attaché in Beijing has been talking with the Ministry of Defense. These Chinese defense attaché here in Washington has been talking to the Pentagon. So it's serious enough that we believe it requires face-to-face talks to find out what was going on here and to ensure that there are no further incidents of this nature in the

future. *We believe firmly that what that naval ship was doing in those international waters is not only fully consistent with international law, it is common practice.* And we hope that the Chinese would behave in a similar way, that is, according to international law. I would say that, furthermore, that this incident is not at all consistent with the expressed desire of both governments to build a closer relationship, particularly a closer military-to-military relationship. So at this point I think we remain hopeful that our face-to-face dialogue in Beijing and in Washington will go a long way to clearing up any misunderstandings that there may be about this incident and ensuring that there is not a repeat and that the productive military-to-military talks that took place, I think, last week will -- can be built upon in a positive manner going forward.

Id. (emphasis added); see also Press Release, Jim Garamone, Armed Forces Press Service, Discussions Aim to Resolve U.S. Survey Ship Incident (Mar. 11, 2009), available at <http://www.defenselink.mil/news/newsarticle.aspx?id=53438> (“The U.S. position is that if a ship is lawfully operating in international waters ‘that is legal and permitted, and there should be no . . . reason to interfere with those operations,’ [DoD spokesperson Geoff] Morrell said.”). For U.S. Department of State comments, see Robert Wood, U.S. State Department Press Secretary, State Department Daily Press Briefing, Mar. 10, 2009, available at <http://www.state.gov/r/pa/prs/dpb/2009/03/120232.htm>.

MR. WOOD: I’m not aware of any further exchanges with the Chinese on this. They’re certainly well aware of our position. We were—it is our view that we were operating in international waters. I don’t have anything further for you on it, except just to refer to the Pentagon for more details.

Id. (emphasis added); see also Robert Wood, U.S. State Department Press Secretary, U.S. State Department Daily Press Briefing, Mar. 12, 2009, available at <http://www.state.gov/r/pa/prs/dpb/2009/03/120300.htm>.

QUESTION: On China, today the Chinese Defense Ministry demanded that the U.S. Navy end surveillance missions. Do you have a general reaction to that?

MR. WOOD: I haven’t seen the statement, but, you know, *the United States will continue to operate in international waters as it has been doing.* And I don’t have anything beyond that. . . .

QUESTION: But the obvious follow-up to that is if there is this disagreement that appears to be about that international waters and whether the U.S. should be allowed to operate there, then clearly, you haven’t reached an agreement.

MR. WOOD: Well, again, I haven’t seen these remarks, so I don’t know what the context is here. *But let me just say that the United States, with regard to this particular incident, was clearly operating in international waters. We were respecting international law.* We will continue to do that. And as I said, the Secretary and Foreign Minister Yang spoke about this issue, and both agreed that they wanted to – we wanted to create – we wanted to make sure that these types of incidents don’t recur. They’re not helpful to trying to carry on the positive agenda that we have in our bilateral relationship.

Id. (emphasis added); see also Hillary Clinton, U.S. Secretary of State, Remarks After Her Meeting with Chinese Foreign Minister Yang Jiechi, Mar. 11, 2009, available at <http://www.state.gov/secretary/rm/2009a/03/120284.htm>.

On the other hand, also consider the legal arguments made by the PRC government in its official statements. During the previously-mentioned March 10th 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, [U.S.] navy surveillance ship *Impeccable* broke relevant international law as well as Chinese laws and regulations."⁶² The Beijing reporters present at the March 10th 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 [U.S.] 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 [U.S.] stories. I can also tell you that China handles such issues in accordance with relevant laws and regulations. I have nothing more to add.⁶³

Much like its non-discussion of the facts of the March 8th incident,⁶⁴ 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 [U.S.] surveillance ship. You did mention a number of laws. Could you clarify what specific

QUESTION: Good, thanks. Secretary Clinton, on the *Impeccable*, do you continue to believe that the U.S. ship was in the right, was in international waters, and was harassed by the Chinese vessels? And do you think that with your agreement to try to avoid these things in the future that the case is now closed, or this is going to be a continued irritant in the relationship?

SECRETARY CLINTON: *With respect to the Impeccable*, we have each stated our positions. But the important point of agreement coming out of my discussions with Minister Yang is that we must work hard in the future to avoid such incidents, and to avoid this particular incident having consequences that are unforeseen. And I appreciate the agreement that Minister Yang and I hold on this matter.

Id. (emphasis added).

62. Ma, *supra* note 14.

63. *Id.*

64. See discussion *supra* Part I.B.

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?

[Mr. Ma] : While answering the questions, I mentioned three laws: UN Convention on the Law of the Sea, Law of the People's Republic of China on the Exclusive Economic Zone and the Continental Shelf, and Regulations of the People's Republic of China on the Management of Foreign-related Marine Scientific Research. I suggest you go back to do some homework, reading these laws carefully, and you will thereby find the answer you want.⁶⁵

Here again, Mr. Ma implies that the rules of law in UNCLOS 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 12th press conference, Mr. Ma emphasized that the *Impeccable's* operations on March 8, 2009 were illegal because they were conducted without the PRC's permission. He stated, "The activities of the said [U.S.] ship in China's exclusive economic zone without our permission have broken international laws as well as China's laws and regulations."⁶⁶ 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 jurisdiction in accordance with law."⁶⁷ Through all of these statements, however, the PRC never specified which provision of international law restricted the *Impeccable'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 conducting 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, 2009, *Xinhua News Agency* interviewed Major General Wang Dengping, "a lawmaker from the navy," about the matter while he attended the PRC parliament's annual full session.⁶⁸ Major General Wang is the political commissar of the Armament Department of the People's Liberation Army Navy.⁶⁹ Regarding the actions of the PRC vessels involved in the March

65. Ma, *supra* note 14.

66. Ministry of Foreign Affairs, *supra* note 21.

67. *Id.*

68. *Violation of China's Sovereignty Never Allowed*, XINHUA NEWS AGENCY, Mar. 10, 2009, http://www.chinadaily.com.cn/china/2009-03/10/content_7564839.htm.

69. *Id.*; see also Cui Xiaohu, *Navy "Poses No Threats to Others"*, CHINA DAILY, Mar. 9, 2009, at 1, http://en.ce.cn/National/Politics/200903/09/t20090309_18433802.shtml ("Major General Wang Dengping, the political commissar of the navy's armament department who is also a deputy to the legislative session . . .").

8th 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."⁷⁰ Regarding the issue of foreign military activities, 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."⁷¹ In essence, the Chinese Navy's leadership apparently believes that the PRC vessels involved in the March 8th incident was lawfully exercising "sovereignty" over the PRC's EEZ, 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"—which led to the March 8th 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 UNCLOS. Then, it involves considering the negotiations between nations of the world which resulted in the final text of UNCLOS. Next, it warrants looking at the actually terminology of UNCLOS itself. Finally, it means examining the state practice of the overwhelming majority of nations after UNCLOS 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 UNCLOS. Specifically, as of the early twentieth century, there were only two categories of oceans of the world—the territorial seas and the high seas.⁷² Coastal states had sovereignty over their territorial seas, while all nations had high seas freedoms beyond those coastal states' territorial seas.⁷³ It is critical to note this bifurcated division of the oceans at the outset, 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 UNCLOS.

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 UNCLOS. Specifically, a trend emerged among some developing coastal states, whereby they unilaterally expanded

70. *Violation of China's Sovereignty Never Allowed*, *supra* note 68.

71. *Id.*

72. R. R. CHURCHILL & A. V. LOWE, *THE LAW OF THE SEA* 2 (3d ed. 1999).

73. *Id.* at 2.

the breadth of their respective territorial seas.⁷⁴ 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 UNCLOS. Were these developing states claiming additional territorial seas because they were concerned with foreign military activities off their coastline? 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.⁷⁵ 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 also useful to further consider a third point, which is: what actually unfolded at the negotiations of UNCLOS? 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.⁷⁶ For activities which 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, a 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.⁷⁷ Thus, the regime of high seas freedoms

74. Roach & Smith, *supra* note 4, at 110–11 (quoting RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES, §511 cmt. n.7) ("In the decades following the Second World War, several Latin American states, and later a few African states, purported to extend their territorial sea to 200 nautical miles, principally to obtain the exclusive right to fish and to regulate fishing in that area. For some time, major maritime powers, including the United States resisted that expansion . . .").

75. CHURCHILL & LOWE, *supra* note 73, at 15.

76. *Id.* at 160–61; MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, S. TREATY DOC. NO. 103-39, at 5–6 (1994), available at <http://lugar.senate.gov/sfrc/sea.html> [hereinafter PRESIDENTIAL TRANSMITTAL] ("The purpose of the EEZ regime is to balance the rights of coastal states, such as the United States, to resources (e.g. fisheries and offshore oil and gas) and to protect the environment off their coasts with the interests of all States in preserving other high seas rights and freedoms.").

77. See generally CENTER FOR OCEANS LAW AND POLICY, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, 1982: A COMMENTARY VOL. II, at 558–60 (Satya N. Nandan et al. eds., 2002).

beyond territorial seas which had existed prior to UNCLOS remained otherwise fully intact in its final text.

With that background in mind, let us now turn our focus to the language of UNCLOS. First, consider the name of the zone itself. It is not called the “exclusive *security* zone” or the “exclusive *military* zone.” A famous political mantra was coined by James Carville, the skilled strategists for former U.S. President Bill Clinton 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.”⁷⁸ Similarly, about the limited purpose and scope of the exclusive economic zone, one could borrow Carville’s mantra: It’s the *economic* zone, stupid.⁷⁹

Now, let us also consider the provisions of UNCLOS that expressly delineate the balance of rights between coastal states and other states in the exclusive economic zone. The key provisions of international law governing the exclusive economic zone are found in Articles 56 and 58 of UNCLOS. As the authoritative five-volume UNCLOS 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 [A]rticles 56 and 58 taken together constitute the essence of the regime of the exclusive economic zone.”⁸⁰

Under Article 58(1) of UNCLOS, all states—including the United States—enjoy the high seas freedoms listed elsewhere in convention⁸¹ in the exclusive economic zones of the world.⁸² 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

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

79. 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.

80. CENTER FOR OCEANS LAW AND POLICY, *supra* note 78, at 556.

81. UNCLOS, *supra* note 48, art. 87.

82. PRESIDENTIAL TRANSMITTAL, *supra* note 77, at 24.

Pursuant to Article 58, in the EEZ all States enjoy the high seas freedoms of navigation and overflight, laying of submarine cables and pipelines, and other internationally lawful uses of the seas related to those freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and which are compatible with the other provisions of the Convention. Article 88 to 115, which (apart from the fuller enumeration of freedoms in Article 87) set forth the entire regime of the high seas on matters other than fisheries, apply to the EEZ in so far as they are not incompatible with Part V. These rights are the same as the rights recognized by international law for all States on the high seas.

related to those freedoms.”⁸³ How do nations determine what constitutes “other internationally lawful uses of the seas?” The text of UNCLOS does not provide more specific guidance. Therefore, we must turn to the custom and practice of nations through history—vice 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.⁸⁴ In the decades since UNCLOS was negotiated, 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 past three decades reflects that coastal states lack the authority to restrict foreign military activities within their respective EEZs. In fact, of the 192 member-states of the United Nations, only approximately fifteen nations purport to regulate or prohibit foreign military activities in an EEZ. Those countries are: Bangladesh, Brazil, Burma, Cape Verde, China, India, Kenya, Malaysia, Maldives, Mauritius, North Korea, Pakistan, Philippines, Portugal, and Uruguay.⁸⁵ Of course, it should be pointed out that the United States has protested and/or conducted operational challenges against all of those claims.⁸⁶ In addition, two other states (Peru and Ecuador) unlawfully claim a 200 nautical mile 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 EEZ or claimed 200 nautical mile territorial seas. In short, the

83. UNCLOS, *supra* note 48, art. 58(1).

84. PRESIDENTIAL TRANSMITTAL, *supra* note 77, at 24 (“Military activities, such as anchoring, launching and landing of aircraft, operating military devices, intelligence collection, exercises, operations and conducting military surveys are recognized historic high seas uses that are preserved by Article 58.”).

At the same time, all States continue to enjoy in the zone traditional high seas freedoms of navigation and overflight and the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, which remain qualitatively and quantitatively the same as those freedoms when exercises seaward of the zone. Military operations, exercises and activities have always been regarded as internationally lawful uses of the sea. The right to conduct such activities will continue to be enjoyed by all States in the exclusive economic zone. This is the import of article 58 of the Convention.

Roach & Smith, *supra* note 4, at 242 (quoting the World Conference on the Law of the Sea, U.N. Doc. A/CONF.52/WS/37 (Dec. 10, 1982)).

85. See Maritime Claims Reference Manual, Department of Defense 2005.1-M, Under Sec’y of Def. for Policy (June 23, 2005).

86. *Id.*

PRC's legal position about the *Impeccable's* operations in its EEZ is an extreme minority view among the community of nations.

While the navigational rights identified in Article 58(1) are not absolute or unlimited, the text of UNCLOS clearly sets out only one set of limitations on those rights. Specifically, in that same Article 58 of UNCLOS, paragraph 3 states that the user states exercising these navigational rights shall have "due regard to the rights and duties of the coastal state."⁸⁷ 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 EEZ, expressly delineated in Article 56 of UNCLOS.⁸⁸ Specifically, a coastal state like the PRC possesses sovereign rights in its EEZ 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 EEZ (as opposed to sovereign rights) with respect to scientific research, man-made structures, and protecting the marine environment.

What is most telling is Article 56's deliberate use of the term "sovereign rights," vice sovereignty.⁸⁹ Coastal states do not have sovereignty over their EEZs.⁹⁰ Put another way: Article 56 does not give the coastal state the right to limit high seas freedoms of other States beyond the coastal state's territorial seas.⁹¹ None of those sovereign rights or jurisdiction includes the

87. UNCLOS, *supra* note 48, art. 58(3).

88. PRESIDENTIAL TRANSMITTAL, *supra* note 77, at 24 ("Article 56 enumerates the rights of the coastal State in the EEZ.").

89. UNCLOS, *supra* note 48, art. 56.

90. PRESIDENTIAL TRANSMITTAL, *supra* note 77, 6 ("The coastal state does not have sovereignty over the EEZ . . .").

The terms 'sovereign rights' and 'jurisdiction' are used to denote functional rights over these matters and do not imply sovereignty. A claim of sovereignty in the EEZ would be contradicted by the language of Articles 55 and 56 and precluded by Article 58 and the provisions it incorporates by reference.

Id. at 24. Roach & Smith, *supra* note 4, at 113 (quoting the World Conference on the Law of the Sea, U.N. Doc. A/CONF.52/WS/37 (Dec. 10, 1982)) ("In this zone beyond its territory and territorial sea, a coastal State may assert sovereign rights over natural resources and related jurisdiction, but may not claim or exercise sovereignty. The extent of coastal State authority is carefully defined in the Convention adopted by the Conference."); Roach & Smith, *supra* note 4, at 114 (quoting RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES §514 cmt C) ("The coastal state does not have sovereignty over the exclusive economic zone but only 'sovereign rights' for a specific purpose—the management of natural resources and other economic activities.").

91. UNCLOS, *supra* note 48, art. 56.

authority to restrict military activities.⁹² Moreover, it is the duty of the flag state, not the right of the coastal state to enforce due regard obligations to coastal state resources and other rights.⁹³ Therefore, the PRC's attempts to restrict military surveillance activities of the *Impeccable* on March 8, 2009 exceeded the scope of the PRC's sovereign rights and jurisdiction afforded to it as a coastal state under Article 56 of UNCLOS.⁹⁴

CONCLUSION: CAUSE FOR CONCERN

When considering the *Impeccable* incident from a U.S. perspective, we must be reasonable and actually "keep perspective" on the incident. That is, the incident should first be assessed in light of other international incidents involving a single platform of U.S. Navy forces. For example, the *Impeccable* incident clearly did not rise to the level of the attack on the *USS Cole*,⁹⁵ a precursor to 9/11 and the resulting Global War on Terror; nor did the incident equate to the attack on the *USS Maine*,⁹⁶ a suspected hostile act

92. Of course, a law school hypothetical could be envisioned in which a military vessel must not engage in economic activities like fishing or extracting mineral resources. However, as for the actual operations conducted by the *Impeccable* on March 8, 2009, it will come as no surprise to the reader that the master of *Impeccable* was not named Captain Ahab and the *Impeccable's* towed array was not a rod and reel designed to catch Moby Dick in the South China Sea.

93. PRESIDENTIAL TRANSMITTAL, *supra* note 77, at 24.

94. *Id.* at 25.

While no State has claimed an EEZ extending beyond 200 miles from coastal baselines, several of the States which have declared EEZs claim rights to regulate activities within the EEZ well beyond those authorized in the Convention. For example, Iran claims the right to prohibit all foreign military activities within its EEZ. The United States does not recognize such claims, which are not within the competence of coastal States under the Convention.

Id.

95. See Commanding Officer *USS Cole*, History: *USS Cole* (DDG 67), <http://www.cole.navy.mil/site%20pages/history.aspx> (last visited Mar. 9, 2010). In 2000, the destroyer *USS Cole* (DDG 67) deployed to the Mediterranean and Red Seas as part of the *George Washington* Battle Group. *Id.* On October 12, 2000, the *Cole* was refueling in Aden Harbor, Yemen. *Id.* A small boat with explosives on board approached the *Cole* and attacked its port mid-ships. *Id.* The terrorist attack resulted in the death of seventeen crewmembers and injury to thirty-nine others, and blasted a 40-foot by 60-foot hole in the ship. *Id.*

96. See Naval History & Heritage Command, *The Destruction of the USS Maine*, Aug. 13, 2003, <http://www.history.navy.mil/faqs/faq71-1.htm>. On the evening of February 15, 1898, an explosion occurred aboard the battleship *USS Maine* while anchored in the harbor of Havana, Cuba. *Id.* The explosion killed 266 crewmembers and sunk the battle ship in Havana harbor. In the weeks thereafter, the U.S. Navy convened a board of inquiry which was inclusive in the determining the cause of the explosion. *Id.* In 1911, the Navy convened a second board of inquiry into the matter. *Id.* Finding that the bottom hull plates in the area of the reserve six-inch magazine were bent inward and back, the second board of inquiry concluded that a mine had detonated under the magazine, causing the explosion that

which led to Spanish-American War. It also did not rise to the level of the *USS Maddox* incident,⁹⁷ which resulted in the "Gulf of Tonkin" Resolution by Congress that authorized President Johnson to escalate the United States military's involvement in Vietnam. Unlike the North Korean unlawful capture of the *USS Pueblo*⁹⁸ conducting surveillance operations beyond its

destroyed the ship. *Id.* In 1976, Admiral Hyman Rickover, U.S. Navy, published a book *How the Battleship Maine Was Destroyed*, in which he concluded that the damage caused to the ship was inconsistent with an external explosion. *Id.* Instead, Rickover opined that the explosion was caused by a spontaneous combustion of coal in the bunker next to the magazine. *Id.* A definitive explanation for the destruction of the *Maine* remains "elusive." Nonetheless, the destruction of the *Maine* served as a catalyst for the eventual U.S. declaration of war on Spain on April 23, 1898. *Id.*

97. Naval History & Heritage Command, *USS Maddox* (DD-731), <http://www.history.navy.mil/photos/sh-usn/usnsh-m/dd731-k.htm> (last visited March 28, 2010).

Amid steadily rising tensions over North Vietnam's activities in Laos and South Vietnam, at the end of July 1964 *USS Maddox* entered the Gulf of Tonkin for a cruise along the North Vietnamese coast. As part of a general U.S. effort to collect intelligence in potential Far Eastern hot spots, this 'Desoto Patrol' was particularly focused on obtaining information that would support South Vietnamese coastal raids against North Vietnam. One of these had just taken place as *Maddox* began her mission. On the afternoon of 2 August 1964, while steaming well offshore in international waters, *Maddox* was attacked by three North Vietnamese motor torpedo boats. The destroyer maneuvered to avoid torpedoes and used her guns against her fast-moving opponents, hitting them all. In turn, she was struck in the after gun director by a single 14.5-millimeter machine gun bullet. *Maddox* called for air support from the carrier *Ticonderoga*, whose planes strafed the three boats, leaving one dead in the water and burning. Both sides then separated. *Maddox* was soon ordered to resume her patrol, this time accompanied by the larger and newer destroyer *Turner Joy*. On 3 August, the South Vietnamese conducted another coastal raid. Intelligence indicated that the North Vietnamese were planning to again attack the U.S. ships operating off their shores, although this interpretation was incorrect. During the night of 4 August, while they were underway in the middle of the Tonkin Gulf, *Maddox* and *Turner Joy* detected speedy craft closing in. For some two hours the ships fired on radar targets and maneuvered vigorously amid electronic and visual reports of torpedoes. Though information obtained well after the fact indicates that there was actually no North Vietnamese attack that night, U.S. authorities were convinced at the time that one had taken place, and reacted by sending planes from the carriers *Ticonderoga* and *Constellation* to hit North Vietnamese torpedo boat bases and fuel facilities. A few days later, the U.S. Congress passed the Tonkin Gulf Resolution, which gave the Government authorization for what eventually became a full-scale war in Southeast Asia.

Id.

98. See Naval History & Heritage Command, *USS Pueblo* (AGER-2), <http://www.history.navy.mil/photos/sh-usn/usnsh-p/ager2.htm> (last visited March 28, 2010).

territorial seas,⁹⁹ the PRC wisely did not breach the sovereign immune status of the *Impeccable* recognized under international law. Moreover, the PRC did not erroneously use force in this incident, as was done by Iraqi forces against the *USS Stark*¹⁰⁰ and Israeli forces against the *USS Liberty*.¹⁰¹ In short, the *Impeccable* incident thankfully did not start a war or lead to an unnecessary use of force resulting in injury or loss of life. Nonetheless, what happened on March 8, 2009—particularly, the actions of the PRC—still raises substantial concerns, including concerns for the United States, concerns for the PRC's neighbors in the region, and concerns for all nations of the world (outside of the PRC, of course).

In January 1968, *USS Pueblo* (AGER-2) was conducting electronic intelligence collection and other duties. *Id.* On January 23, 1968, North Korean forces attacked the *Pueblo* while it was conducting lawful operations beyond the territorial seas of North Korea. *Id.* During the attack, North Korean forces killed one crewmember and took the other eighty-two crewmembers as prisoner. *Id.* The North Koreans held the crewmembers captive for eleven months, finally repatriating them on December 23, 1968. *Id.* To date, the North Koreans have retained the *Pueblo* and have opened it as a museum its capital Pyongyang, even though the ship remains the property of the U.S. Navy. *Id.*

99. See Naval History & Heritage Command, *USS Pueblo* (AGER-2), <http://www.history.navy.mil/photos/sh-usn/usnsh-p/ager2.htm> (last visited March 28, 2010). In January 1968, *USS Pueblo* (AGER-2) was conducting electronic intelligence collection and other duties. *Id.* On January 23, 1968, North Korean forces attacked the *Pueblo* while it was conducting lawful operations beyond the territorial seas of North Korea. *Id.* During the attack, North Korean forces killed one crewmember and took the other eighty-two crewmembers as prisoner. *Id.* The North Koreans held the crewmembers captive for eleven months, finally repatriating them on December 23, 1968. *Id.* To date, the North Koreans have retained the *Pueblo* and have opened it as a museum its capital Pyongyang, even though the ship remains the property of the U.S. Navy. *Id.*

100. See generally Damage Control Museum, Naval Sea Systems Command, *USS Stark*, <http://www.dcfp.navy.mil/mc/museum/STARK/Stark3.htm> (last visited Mar. 17, 2010). In May 1987, during the Tanker War between Iraq and Iran, the frigate *USS Stark* (FFG 31) was conducting operations in the international waters of the central Persian Gulf. On May 17, 1987, a single Iraqi F-1 Mirage fighter fired two Exocet anti-ship cruise missiles at the *Stark*, apparently mistaking the frigate for an oil tanker en route to a port of call in Iran. *Id.* Both missiles hit the *Stark*—killing thirty-seven crewmembers, injuring five more, and causing significant damage to the ship. *Id.* The attack was unprovoked and indiscriminate. *Id.* The *Stark* never fired a weapon nor employed any countermeasures, either in self-defense or in retaliation. *Id.*

101. See Naval History & Heritage Command, *USS Liberty* (AGTR-5) 1964–1970, <http://www.history.navy.mil/photos/sh-usn/usnsh-l/agtr5.htm> (last visited March 28, 2010). In June 1967, during the “Six-Day War” between Israel and several Arab nations, *USS Liberty* (AGTR-5) was collecting electronic intelligence in the eastern Mediterranean Sea. *Id.* On June 8, 1967, the *Liberty* was conducting operations in international waters off the Sinai Peninsula. *Id.* Although the *Liberty* was clearly marked as a U.S. Navy ship, an Israeli military aircraft attacked the *Liberty* with gunfire, rockets, and bombs. *Id.* Thereafter, three Israeli Navy motor torpedo boats continued the attack. *Id.* Israel subsequently apologized for the incident, explaining that its air and naval force had mistaken the *Liberty* for a much smaller Egyptian Navy ship. *Id.* The attack killed thirty-four crewmembers, injured 170 others, and resulted in substantial damage to the ship. *Id.*

First, the PRC's actions in the March 8th incident generated significant safety concerns for the United States of what *could* have easily happened—as demonstrated by the tragic results of another historical confrontation. Instead of the *Maine*, the *Maddux*, the *Pueblo*, the *Stark* or the *Liberty*, the incident that is most similar to the *Impeccable* incident of March 2009 is—no surprise—a previous incident between U.S. and PRC forces. Specifically, despite the difference in air versus maritime platforms, there are haunting similarities between the *Impeccable* incident and the April 2001 incident between a U.S. Navy EP-3 and a PLA F-8.¹⁰² In both situations, the platforms were not armed with lethal munitions. In both situations, the PRC platforms involved were engaged in behavior that violated international safety norms and created substantial risk to themselves as well as the U.S. forces involved.

In the April 2001 incident, the PLA pilot's aggressive actions directly resulted in an accidental collision leading to his own death and jeopardized the lives of the U.S. Navy crew.¹⁰³ Fortunately, the difference between these two incidents is that in the *Impeccable* incident, no collision occurred and no personnel on either side were killed or injured—mostly due to the skilled control of the *Impeccable* by its master and crew. The reality to consider, however, is that the March 2009 confrontation created by the five PRC vessels *could* have easily led to different, more tragic results.

102. See CRS report RL30946, *supra* note 3. On April 1, 2001, a U.S. Navy EP-3E turboprop reconnaissance aircraft was conducting a routine, overt reconnaissance mission in international airspace off the coast of the PRC. *Id.* Shortly after 9:00 am, the EP-3 and a People's Liberation Army Navy (PLAN) F-8II jet fighter accidentally collided in international airspace about seventy miles off the PRC's Hainan island. *Id.* After the collision, the U.S. crew made an emergency landing of their damaged plane on the island at the PLAN's Lingshui airfield, and the PRC subsequently detained the twenty-four crew members for 11 days. *Id.* The PLAN's F-8 fighter crashed into the sea and the pilot was lost. *Id.*

103. *Id.* at 14.

U.S. officials believe that while the immediate cause of the collision was an accidental contact made by the F-8 fighter, the collision was also precipitated by increased aggressiveness in the PLA's interceptions of U.S. aircraft in international airspace. According to the Pentagon, the PLA began its recent pattern of aggressive interceptions of U.S. reconnaissance flights in December 2000. At his news conference on April 13, 2001, Secretary Rumsfeld revealed that, since December, there were 44 PLA interceptions of U.S. reconnaissance flights off the coast of China, with six coming within 30 feet, and two within 10 feet, occurring on December 17 and 19, 2000, January 24 and 30, 2001, March 21 and April 1. He also reported that the United States lodged a formal protest about the aggressive and dangerous interceptions on December 28, 2000. He showed a video taken aboard one of the U.S. reconnaissance planes on January 24 showing a F-8 flying very close.

Id.

Likewise, the 2001 aerial incident and the *Impeccable* incident also share a common link about the intended role of these forces and the responsibility of the chain of command. Traditionally, commanders of ground forces presumed that the actions of one junior enlisted soldier or Marine could only have minimal impact on the mission success of an entire force or military. Through time, however, the potential impact by individual service members has increased. Among U.S. ground forces, commanders have gradually come to recognize the role of the “Strategic Corporal.”¹⁰⁴ Due in part to the rise of the information age in modern military operations, U.S. military commanders now realize that a single soldier or a small group of soldiers are fully capable of negatively impacting a force’s mission in a substantial way. Anyone who disputes the concept of the “Strategic Corporal” only need consider, for example, the strategic setback in Operation Iraqi Freedom caused by a handful of soldiers mistreating enemy detainees in Abu Ghraib prison.¹⁰⁵

104. Gen. Charles C. Krulak, *The Strategic Corporal: Leadership in the Three Block War*, MARINES MAGAZINE, Jan. 1999, at 33, http://www.au.af.mil/au/awc/awcgate/usmc/strategic_corporal.htm.

The inescapable lesson of Somalia and of other recent operations, whether humanitarian assistance, peace-keeping, or traditional warfighting, is that their outcome may hinge on decisions made by small unit leaders, and by actions taken at the lowest level. The Corps is, by design, a relatively young force. Success or failure will rest, increasingly, with the rifleman and with his ability to make the right decision at the right time at the point of contact. As with Corporal Hernandez at CP Charlie, today’s Marines will often operate far “from the flagpole” without the direct supervision of senior leadership. And, like Corporal Hernandez, they will be asked to deal with a bewildering array of challenges and threats. In order to succeed under such demanding conditions they will require unwavering maturity, judgment, and strength of character. Most importantly, these missions will require them to confidently make well-reasoned and independent decisions under extreme stress—decisions that will likely be subject to the harsh scrutiny of both the media and the court of public opinion. In many cases, the individual Marine will be the most conspicuous symbol of American foreign policy and will potentially influence not only the immediate tactical situation, but the operational and strategic levels as well. His actions, therefore, will directly impact the outcome of the larger operation; and he will become, as the title of this article suggests—the Strategic Corporal.

Id. at 33.

105. See Tom Regan, *Six Morons Who Lost The War*, CHRISTIAN SCI. MONITOR, May 4, 2004, reprinted in CONGRESSIONAL RECORD, May 6, 2004, page H2674, available at <http://www.gpo.gov/fdsys/pkg/CREC-2004-05-06/pdf/CREC-2004-05-06-pt1-PgH2666.pdf>.

Regardless of the outcome of the now multiple investigations into prisoner abuse at Baghdad’s Abu Ghraib prison, politicians and media around the world say the United States’ image has suffered a serious blow. Sen. Joe Biden (D) of Delaware said on Fox News

In the maritime context, the U.S. military fully recognizes what it has tasked its forces to do in the South China Sea and has trained them and provided clear commander's guidance accordingly. The question must be asked: Does the PRC have the same appreciation for the situation? Apparently not, as indicated by the PRC vessels' long "leash" resulting in the reckless and embarrassing conduct by the five vessels involved in the incident. Thus, the U.S. government remains concerned that the PRC unwisely delegated the authority to dictate international law and establish national policy to a "Strategic Seaman."¹⁰⁶

Second, the PRC's actions in the March 8th incident should have also caused concern among nations other than the United States—especially among the PRC's neighbors in the South China Sea and East China Sea. First and foremost, these nations should be concerned whether the PRC has decided to abandon its legal obligations and political commitments to resolve maritime disputes by peaceful means. It is worth highlighting that the US-PRC dispute over the PRC's excessive maritime claim over purportedly restricting its EEZ is not the only international dispute involving PRC actions in the South China Sea and the East China Sea. Of note, nearly all of the PRC's neighbors in the region have competing territorial claims with the PRC regarding the outlying islands, continental shelf, and EEZ demarcation lines in those waters. As a party to UNCLOS,

Sunday that 'This is the single most significant undermining act that's occurred in a decade in that region of the world in terms of our standing.' The Associated Press reports that a senior Bush administration official, speaking on condition of anonymity, said the photos (of U.S. soldiers abusing Iraqi prisoners) hurt the U.S. efforts to win over an audience that is already deeply skeptical of U.S. intentions. Arabs and Muslims, the official added, 'are certain to seize upon the images as proof that the American occupiers are as brutal as ousted President Saddam Hussein's government.'

Officials at the Defense Department are also said to be 'livid,' and well aware of the damage that has been done by the incident, according to NBC News' Pentagon reporter Jim Miklaszewski. Speaking on the *Imus in the Morning* radio/MSNBC program Tuesday, Mr. Miklaszewski said he asked a Pentagon contact about the soldiers alleged to be involved, to which the Pentagon official replied, 'You mean the six morons who lost the war?'

Id. See also Neil MacKay, *The Pictures That Lost The War*, SUNDAY HERALD, May 2, 2004, available at <http://www.heraldscotland.com/the-pictures-that-lost-the-war-1.829223>.

106. John Pomfret, *U.S. Hopes to Strengthen Ties with China's Expanding Military*, WASH. POST, Oct. 15, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/14/AR2009101403715.html> ("Both confrontations [of U.S. Navy surveillance ships in March and May 2009 by PRC vessels] ended peacefully when the U.S. ships made it clear that they would leave; but the incidents highlighted 'the risk,' a senior Pentagon official said recently, 'of having the entire bilateral relationship unravel based on the decision-making of 18-year-old seamen.'").

the PRC has an obligation to resolve such competing territorial claims “by peaceful means.”¹⁰⁷ As a party to the Treaty of Amity and Cooperation (TAC), the PRC has an obligation to resolve international disputes in the Southeast Asian region—including territorial disputes with Association of Southeast Asian Nations (ASEAN) nations—without the “threat or use of force” and through “friendly negotiations.”¹⁰⁸ Pursuant to that TAC obligation, the PRC made a political commitment in 2002 with the ASEAN nations to resolve these disputes “without resorting to threat or use of force,” “by peaceful means,” and “through friendly consultations and negotiations.”¹⁰⁹ Yet some governments and international law of the sea experts in the Southeast Asian region have begun to question whether the PRC is truly committed to the 2002 Declaration, and instead “desire[s] for control of the South China Sea.”¹¹⁰ The question must be considered: does the PRC's aggressive actions in the March 8th incident also signal a deliberate abandonment by the PRC of those legal obligations and political commitments?

The unfortunate answer to that question is that nations of the world—especially the PRC's neighbors in the South China Sea and East China Sea—should be concerned that the PRC's actions in the March 8th incident

107. UNCLOS, Art. 279 (“Article 279 Obligation to settle disputes by peaceful means States Parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Article 2, paragraph 3, of the Charter of the United Nations and, to this end, shall seek a solution by the means indicated in Article 33, paragraph 1, of the Charter.”)

108. Treaty of Amity and Cooperation, Feb. 24, 1976, available at <http://www.aseansec.org/1217.htm>, Art. 13.

The High Contracting Parties shall have the determination and good faith to prevent disputes from arising. In case disputes on matters directly affecting them should arise, especially disputes likely to disturb regional peace and harmony, they shall refrain from the threat or use of force and shall at all times settle such disputes among themselves through friendly negotiations.

While the initial membership to TAC was limited to Southeast Asian nations, the PRC and other nations subsequently joined the TAC.

109. Association of Southeast Asian Nations (ASEAN) Nations and the PRC, Declaration on the Conduct of Parties in the South China Sea, Nov. 4, 2002, available at <http://www.aseansec.org/13163.htm>, Art. 4.

The Parties concerned undertake to resolve their territorial and jurisdictional disputes by peaceful means, without resorting to the threat or use of force, through friendly consultations and negotiations by sovereign states directly concerned, in accordance with universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea.

110. Nguyen Hong Thao and Ramses Amer, *A New Legal Arrangement for the South China Sea?*, 40 OCEAN DEVELOPMENT & INTERNATIONAL LAW, November 11, 2009, 333, 339, available at <http://www.informaworld.com/smpp/content~db=all?content=10.1080/00908320903077209>.

could be part of a greater anti-access strategy of the PRC. One year after the *Impeccable* incident, during testimony to the U.S. Senate Armed Services Committee, the Commander of U.S. Pacific Command discussed a “particular concern” to the United States that should also alarm other nations in the region as well.¹¹¹ Specifically, Admiral Willard stated that the PRC’s “evolving military capabilities . . . appear designed to challenge U.S. freedom of action in the region or exercise aggression or coercion of its neighbors, including U.S. treaty allies and partners.” While he was speaking specifically of the PRC’s military capabilities, he could have easily been speaking of the PRC’s apparent anti-access strategy driving those evolving capabilities, as well as the objective manifestation of that anti-access strategy in events like March 8th incident.

Third, the nations of the world should be concerned that the PRC’s actions in the March 8th incident reflect an effort by the PRC government to unilaterally renegotiate a widely-accepted body of international law. This is a concern for all nations, and not merely the United States or the PRC’s neighbors in the South China Sea and East China Sea. As discussed in this Article, the text and negotiating history of the applicable law undermine the PRC’s position. Despite a clear history of the UNCLOS parties rejecting an attempt by a few nations to insert security interests into the scope of the EEZ 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 it attempts to renegotiate the grand bargain reached by the nations of the world in the conclusion of UNCLOS.

This is not a hollow allegation, but rather an assessment based upon observations about the PRC words and deeds—including its words and actions surrounding the March 8th incident—that look a lot like typical PRC-style negotiating behavior. For example, the PRC government has been caught acting contradictory¹¹² on multiple occasions with its purported legal position that foreign military operations in another nation’s EEZ are restricted. Most notably, on June 11, 2009— only three months after the

111. Admiral Robert Willard, Testimony, U.S. Senate Armed Services Committee, March 26, 2010, available at <http://armed-services.senate.gov/statemnt/2010/03%20March/Willard%2003-26-10.pdf>.

112. Professor James Sebenius, 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 the stones underfoot.’

James K. Sebenius & Cheng Qian, *Cultural Notes on Chinese Negotiating Behavior* 7 (Harvard Business School Working Paper 09-076), available at <http://www.hbs.edu/research/pdf/09-076.pdf>.

March 8th incident—a PRC submarine hit an underwater towed array of the destroyer USS John McCain “near Subic Bay off the coast of the Philippines.”¹¹³ Similarly, the PRC's public statements immediately following the March 8th incident were deliberately ambiguous¹¹⁴ in pinpointing which specific provisions of UNCLOS purportedly restricted the *Impeccable's* right to operate in these waters beyond the PRC's territorial seas or gave the PRC the authority to require *Impeccable* to seek and receive its permission prior to conducting such operations.¹¹⁵

In light of the above assessment that the PRC is engaging in various methods of traditional PRC negotiating behavior, the reader might wonder: So what? Should other nations be concerned with such political bargaining by the PRC? The answer is: yes, all nations should be concerned because it puts the entire UNCLOS regime in jeopardy. UNCLOS, which took nearly a decade to negotiate, is signed and ratified by 159 of the 192 nations of the world. Many of the very points about the EEZ which the PRC raises now were addressed at the negotiating conferences. The juridical features of the new EEZ 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 EEZ. Thus, the PRC had their chance at the bargaining table, but the majority view prevailed and the PRC position was rejected.

More importantly, UNCLOS 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. The final terms of UNCLOS reflect a “proper, long-term balance between coastal interests and maritime interests.”¹¹⁶ Ironically, unlike the “unequal treaty” era which continues to sting in the psyche of Chinese history,¹¹⁷ the agreement reached

113. *Sub Collides With Sonar Array Towed By US Navy Ship*, CNN, June 12, 2009, <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. *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 the PRC nor the U.S. government side made any additional comments on the matter.

114. Sebenius & Oian, *supra* note 112.

115. See footnotes 63-67 *supra* and accompanying text.

116. PRESIDENTIAL TRANSMITTAL, *supra* note 77, at 23.

From the perspective of the United States, Part V (articles 55-75) provides a regime for the EEZ that achieves a proper, long-term balance between coastal interests and maritime interests. The provisions enable the coastal state to explore, exploit, conserve, and manage resources out to 200 miles from coastal baselines, while

in UNCLOS 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 of UNCLOS as agreed by the parties, then it could have chosen not to sign it; however, it voluntarily chose to do so. The international community must insist that it is too late in the game for the PRC to develop buyer's remorse on UNCLOS. China should then either comply with the treaty, or withdraw from the framework altogether.

It is also important to note that UNCLOS was intentionally structured as a "package"¹¹⁸ deal where nations were not allowed to selectively adopt

allowing other States to navigate, overfly, and conduct related activities in the EEZ.

Id.

117. MARGARET MACMILLAN, *NIXON AND MAO: THE WEEK THAT CHANGED THE WORLD* 31 (2007)) ("By 1872, . . . to add to China's misery, foreigners, greedy, demanding, unreasonable, and regrettably powerful, were tying a weak Chinese government up with a series of treaties, remembered to this day by the Chinese as the 'unequal treaties.' Chinese territory and Chinese independence were slowly being sliced away.").

Chinese efforts to preserve its isolation formally ended in August 1842 when China signed the first of what became known in China as the 'unequal treaties.' The Treaty of Nanjing allowed Western traders to begin carving out their first pieces of China. Hong Kong was ceded to Britain. Five Chinese ports – Canton (now Guangzhou), Amoy (Xiamen), Foochow (Fuzhou), Ningpo (Ningbo), and Shanghai – were opened to foreign residents and trade. A year later, Britain forced China to sign another treaty promising 'most favored nation' status so that if any other country got better trade concessions from China, Britain would automatically receive the same treatment. A year after that, the Americans forced China to grant American residents (and eventually all foreigners) extraterritoriality, giving them immunity from prosecution in Chinese courts [F]oreigners doing business in China must understand that there's nothing ancient about the last two hundred years and the humiliations they have held for the Chinese. They believe that foreigners strong-armed their way into China in the past two hundred years in order to plunder the country's wealth is deeply engrained in the Chinese psyche. They are taught from childhood that China was the world's mightiest empire, the best at everything, until the foreigners came knocking at the end of the eighteenth century to ruthlessly exploit a people who had done them no harm.

MCGREGOR, *supra* note 42, at 23–26.

118. Tommy T.B. Koh, President of the Third United Nations Conference on the Law of the Sea, *A Constitution for the Oceans*, Dec. 1982, available at http://www.un.org/Depts/los/convention_agreements/texts/koh_english.pdf.

The second theme which emerged from the statements [of delegates] is that the provisions of the Convention are closely interrelated and form an integral package. Thus it is not possible for a State to pick what it likes and to disregard what it does not like. It was also said that rights and obligations go hand in hand and it is not permissible to claim rights under the Convention without being willing to shoulder the corresponding obligations.

certain provisions, while disregarding others. If the PRC was concerned about the nature of the EEZ, 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. Regardless, the nations of the world should not allow the PRC to selectively honor certain provisions of UNCLOS to its benefit, while disregarding other provisions that benefit other nations. Otherwise, that effectively permits the PRC to renegotiate the treaty without ever returning to the multilateral bargaining table, thereby subverting this entire regime of international law.

In examining the factual accounts and legal arguments posited by the U.S. and PRC governments regarding the March 8th incident, this Article has reached several conclusions. First, the U.S. government was candid, clear, and consistent in its factual account of the March 8th incident and provided detailed corroboration to the international community; the PRC government, on the other hand, was cryptic at best, and misleading at worst. Of note, the statements of fact made by the U.S. government were not “sheer lies,” as alleged by a PRC Foreign Ministry spokesman; instead, they are true “lies,” as corroborated by multiple photos and video clips of the incident. Second, the operations and actions of the *Impeccable* on March 8, 2009 were wholly consistent with its rights and responsibilities afforded by applicable international law; the PRC government and PRC-flagged vessels involved, on the other hand, demonstrated utter disregard for those same bodies of law.

In short, neither the facts of the incident nor the applicable law supported the PRC’s actions and position—both in the specific incident of March 8th or in this EEZ dispute generally. Consequently, the PRC’s actions in the March 8th incident and in the EEZ dispute generally are a matter of concern to the United States, and *should* be a matter of concern to all nations.

As stated at the outset, this Article was intended to provide a detailed perspective from the United States on the March 8th incident. While it has highlighted official press statements by the PRC government and cited general legal arguments made by observers within the PRC which predate the March 8th incident, the international law and foreign affairs communities lack an equivalent detailed perspective on the March 8th incident from the PRC vantage point. Questions—both factual and legal—remain, many of which have been specifically identified in this Article. In the interest of transparency and mutual trust, a legal expert within the PRC should summon the intellectual courage to provide such a detailed perspective. Otherwise—to return one final time to the courtroom analogy—the PRC risks failing to appear in the courtroom of international public opinion and thereby losing the *Impeccable* case by a default judgment.