

2011

A China In The Bull Shop? Comparing The Rhetoric Of A Rising China With The Reality Of The International Law Of The Sea

Jonathan G. Odom

Follow this and additional works at: <http://digitalcommons.maine.maine.edu/oclj>

Recommended Citation

Jonathan G. Odom, *A China In The Bull Shop? Comparing The Rhetoric Of A Rising China With The Reality Of The International Law Of The Sea*, 17 *Ocean & Coastal L.J.* (2011).

Available at: <http://digitalcommons.maine.maine.edu/oclj/vol17/iss2/4>

This Article is brought to you for free and open access by the Journals at University of Maine School of Law Digital Commons. It has been accepted for inclusion in Ocean and Coastal Law Journal by an authorized administrator of University of Maine School of Law Digital Commons. For more information, please contact mdecrow@maine.edu.

A CHINA IN THE BULL SHOP?^{*}
COMPARING THE RHETORIC OF A RISING CHINA
WITH THE REALITY OF THE INTERNATIONAL
LAW OF THE SEA

Jonathan G. Odom^{**}

I. INTRODUCTION

Since the end of the Cultural Revolution in the 1970s and the conclusion of Mao Zedong's reign, the People's Republic of China (PRC

* The idiom "a bull in a china shop" has long been used to describe "a very clumsy creature in a delicate situation." *Bull in a China Shop Definition*, THEFREEDICTIONARY.COM, <http://idioms.thefreedictionary.com/Bull+in+a+China+shop> (last visited Jan. 31, 2012). The actual origin of this idiom is unknown, although an early use of the phrase can be found in FREDERICK MARRYAT, JACOB FAITHFUL 130 (1895) ("I'm like a bull in a china shop."). Additionally, a slang English definition of the word "bull" includes "empty boastful talk." See "Bull," MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/bull>.

** Commander Jonathan G. Odom is an active-duty judge advocate in the U.S. Navy. Commander Odom earned his Bachelor of Arts with Distinction in History from Duke University, his Juris Doctor from Wake Forest University School of Law, and is a licensed member of the North Carolina Bar. Previously, he has served as a legal advisor for admirals and generals in the Pentagon, for afloat commanders during operational deployments to the Arabian Gulf and the Asia-Pacific region, and for multi-national ground force commanders in Iraq and Kosovo. Of note, he also completed a three-year assignment as an international law instructor at the U.S. Naval Justice School, during which he also taught international law at the U.S. Naval War College, Surface Warfare Officer School, Naval Submarine School, and Naval Chaplains School. Currently, he is serving as the Deputy Staff Judge Advocate (Deputy Legal Advisor) for Commander, U.S. Pacific Command, headquartered in Hawaii, with a legal portfolio focused on oceans law and policy, the law of armed conflict, and the legal aspects of maritime security. In his personal capacity, Commander Odom has spoken at international and U.S. academic forums and has been published on matters related to the law of the sea, the law of armed conflict, national security strategy, maritime policy, and homeland defense. He can be contacted at jonathan.odom@usa.com. The views presented are those of the author and do not necessarily represent the official policy or position of the U.S. Government, the U.S. Department of Defense, or any of its components.

or China) has made progress in its understanding of both domestic and international law.¹ In the domestic context, China has initiated improvements to its statutes and regulations, its law enforcement agencies, and its judicial system.² These steps forward have been offset by periodic missteps that have resulted in criticism from external organizations, including international human rights groups³ and foreign government entities,⁴ about continuing or lingering deficiencies in China's approach to the law. Regardless, in comparison to the Mao-era legal concepts of "rule by law" and "rule of man,"⁵ China's authoritarian regime has recently made some positive strides toward what outside observers hope could someday reflect a true rule-of-law system.⁶ Nevertheless, concerns remain and the proverbial jury is still out on

1. Jamie P. Horsley, *Rule of Law in China: Incremental Progress*, in *THE BALANCE SHEET IN 2007 AND BEYOND* 94 (C. Fred Bergsten, N. Lardy, B. Gill & D. Mitchell, eds., 2007), https://www.law.stanford.edu/display/images/dynamic/events_media/Panel%202%20090212_05rule_of_law.pdf.

2. *Id.* at 94-95.

3. See, e.g., AMNESTY INT'L, CHINA ANNUAL REPORT 2011 – THE STATE OF THE WORLDS HUMAN RIGHTS, available at <http://www.amnesty.org/en/region/china/report-2011>.

4. For a detailed discussion of legal developments in China, see generally CONG. EXEC. COMM'N ON CHINA, 112th CONG., ANNUAL REPORT (2011), available at <http://www.cecc.gov/>; for a detailed discussion of human rights developments in China, see U.S. DEP'T OF STATE, ANNUAL HUMAN RIGHTS REPORTS, available at <http://www.state.gov/g/drl/rls/hrrpt/>.

5. STANLEY B. LUBMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO 88 (1999) ("Chinese [legal] theory under Mao began from altogether different premises [than Western legal theory]. It saw law as the tool of a ruling class placed in the service of politics and rejected sharp differentiation among judicial, legal, and administrative processes."); see also BRIAN TAMANAHA, ON THE RULE OF LAW: HISTORY, THEORY, AND POLITICS 3 (2004).

Chinese leaders want rule by law, not rule of law . . . The difference . . . is that under the rule of law, the law is preeminent and can serve as a check against the abuse of power. Under rule by law, the law can serve as a mere tool for a government that suppresses in a legalistic fashion.

Id. (quoting Chinese law professor Li Shuguang).

6. LUBMAN, *supra* note 5, at 5; Horsley, *supra* note 1, at 94 ("No one claims that today's China is a 'rule of law' country. Nonetheless, most would acknowledge that China has moved a long way from the primarily 'rule of man' governance approach of traditional and Maoist China. This essay suggests that China is also moving beyond the instrumental 'rule by law' paradigm in which government merely uses law as a tool to control society. Instead, China is slowly establishing elements of a 'rule of law' system that increasingly provides mechanisms also to restrain the arbitrary exercise of state and private power and offers the promise, if not the guarantee, that Chinese citizens and other actors can assert their rights and interests in reliance on law.").

whether China's leaders will tolerate domestic legal reforms that would bring China's legal system closer to the liberal model.

Over the course of the past three decades, China has also made some progress in its understanding of international law and acceptance of the existing international legal order. Observers no longer read or hear mainstream Chinese legal experts use phrases such as the pejorative, Marxist-laden "bourgeois international law."⁷ Instead, modern Chinese legal scholars recognize the importance of all nations, including China, "understand[ing] and abide[ing] by the rules of the international community."⁸ Perhaps even more importantly, Chinese officials have begun to make more progressive statements about international law.⁹

In October 2006, the legal committee of the United Nations General Assembly discussed the subject of the rule of law. At that meeting of legal experts, Mr. Duan Jielong, the Director-General of the Treaty and Law Department of China's Ministry of Foreign Affairs, gave a speech regarding China's perspective on international law, during which he made several significant representations on the subject.¹⁰ First, Mr. Duan said that China's Government "attaches great importance to the rule of international law and puts it into actual practice."¹¹ Then, he assured the international audience that China's Government "faithfully fulfills all its obligations under international treaties."¹² Next, he said that China's Government "strictly abides by the provisions and principles of international law,"¹³ and that "relevant international treaties and principles of international customary law, as well as the binding decisions adopted by the Security Council should all be strictly adhered

7. JEROME A. COHEN & HUNGDAH CHIU, 1 *PEOPLE'S CHINA AND INTERNATIONAL LAW: A DOCUMENTARY STUDY* 29 (1974).

8. Wang Zonglai & Hu Bin, *China's Reform and Opening-Up and International Law*, 9 *CHINESE J. OF INT'L L.* 193 (2010) ("Since the adoption of the reform and opening-up policy three decades ago, China's relations with the world have undergone historic changes. International law has played a unique role in this process. As no country can remain completely isolated from the international system in today's world, it is imperative for countries to understand and abide by the rules of the international community.").

9. For example, Mr. Duan Jielong, the Director-General of the Treaty and Law Department of China's Ministry of Foreign Affairs, made elaborate statements to the international community supporting international law and the international legal order. See Duan Jielong, *Statement on the Rule of Law at the National and International Levels*, 6 *CHINESE J. INT'L L.* 185 (2007).

10. *Id.*

11. *Id.* at 186.

12. *Id.*

13. *Id.*

to,” presumably by all nations.¹⁴ With regard to interpreting international treaties, Mr. Duan said that “uniform application of international law should be ensured” and that such uniform application is “essential for the rule of law at the international level.”¹⁵ Such representations suggested that China has turned a corner in terms of understanding international law and accepting the existing international legal order.

A question that the world must consider, however, is whether these positive assurances by Chinese officials like Mr. Duan reflect a genuine acceptance of international law and the existing international legal order or whether such assurances are merely rhetoric. That question will be the focus of this Article, as viewed through the prism of a particular subspecialty of international law.

By its nature, international law can create challenges in any effort to assess whether a particular nation accepts the existing international legal order. One complication stems from the multiple sources of law that comprise international law. There is no single source of international law, rather it is composed of conventional law, customary law, judicial decisions, and learned treatise.¹⁶ Moreover, international law covers a wide range of activities between nations and organizations, including, but not limited to, international trade, international armed conflict, human rights, and environmental protection. Thus, any assessment of a nation’s acceptance of international law cannot be accomplished with a single, broad-brush stroke or general characterization. An additional complication derives from the fact that a particular nation, such as China, might make a deliberate decision to adhere to certain existing rule-sets of international law while simultaneously taking a different approach to other rule-sets.

In general, China has indicated its intent to work within existing international systems. For example, in a 2007 report, President Hu Jintao stated that China will “work to make the international order fairer and more equitable,” implicitly affirming that China will work within the existing international legal order.¹⁷ Similarly, the Assistant Minister of Foreign Affairs Shen Guofang stated in a 2007 speech that

14. *Id.* at 187.

15. *Id.*

16. Statute of the International Court of Justice art. 38 (June 26, 1945), *available at* <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>.

17. EVAN MEDEIROS, CHINA’S INTERNATIONAL BEHAVIOR 49 (2009), http://www.rand.org/pubs/monographs/2009/RAND_MG850.pdf (quoting Hu Jintao).

China should enhance its ability to determine the agenda and its ability to make use of the rules by playing a substantive role in all kinds of consultations and the writing of international rules. It should show even more initiative in participating in international affairs and in building the multilateral system.¹⁸

Thus, the world sees China operating within some specific rule-sets of the international legal order, such as rule-sets governing international trade.¹⁹

This does not necessarily mean that China has accepted all of the rule-sets within the greater body of international law. In his insightful 2009 study, *China's International Behavior*, China-expert and current-White House official Dr. Evan S. Medeiros assessed that “[t]here are more instances of China gradually accepting international rules than objecting to and then trying to revise them (and succeeding).”²⁰ Looking ahead, he further concluded that China is “focused far more on working within the current rules and institutions to accumulate power and influence than on opposing and revising them.”²¹ Ultimately, however, Medeiros recognized that China does not necessarily accept every rule-set of international law and, additionally, that its actual intent with respect to some rule-sets is unclear.²² Medeiros concisely framed the bottom-line question as follows: “does China accept the prevailing rules or does it seek to rewrite them?”²³

This Article considers the Medeiros question for a particular rule-set of international law—namely, the international law of the sea. Specifically, it examines China’s rhetoric²⁴ on law of the sea matters in

18. *Id.* at 42 (quoting Shen Guofeng).

19. Wang & Hu, *supra* note 8, at 194-95. For an analysis of China’s international trade behavior within the WTO system, see U.S. TRADE REPRESENTATIVE, REPORT TO CONGRESS ON CHINA’S WTO COMPLIANCE (2011), available at http://www.ustr.gov/webfm_send/3189.

20. MEDEIROS, *supra* note 17, at 204.

21. *Id.* at 214.

22. *Id.* at xxi.

23. *Id.* at 223.

24. Please note that this Article intentionally focuses upon rhetoric about international oceans law that has been derived from official statements and publications of the Chinese government, including articles and editorials in official Chinese newspapers. Some Chinese writers have criticized U.S. legal scholars for allegedly “misleading” readers about China’s position on law of the sea matters by referencing unofficial articles written by Chinese scholars. See, e.g., Zhang Haiwen, *Is It Safeguarding the Freedom of Navigation or Maritime Hegemony of the United States?—Comments on Raul (Pete) Pedrozo’s Article on Military Activities in the EEZ*, 9 CHINESE J. INT’L L. 31, 42 (2010) (“In order to illustrate the position of China on the EEZ, Pedrozo’s Article (paras.13-15)

recent years, along with its official actions and the realities of the law of the sea, and assesses whether China accepts the prevailing rules or seeks to rewrite them. Part II of this Article identifies some fundamental realities of the law of the sea, which helps frame the remainder of the discussion. Part III considers whether China's policy preferences are met by those realities, and identifies China's options for ameliorating any disconnects between those preferences and realities. Part IV examines some specific uses of rhetoric by China on law of the sea matters and evaluates the validity of that rhetoric. Part V discusses some potential concerns about China's use of this rhetoric and Part VI provides some specific recommendations on how China could reassure the world of its intentions on matters governed by the law of the sea. In the end, this Article will answer the Medeiros question and conclude whether or not China accepts this body of international law.

II. FUNDAMENTAL REALITIES OF THE LAW OF THE SEA

Before examining China's rhetoric about law of the sea matters, let us first identify some fundamental realities of the law of the sea. These realities include general truths about the law of the sea, as well as specific concepts, rules, authority, rights, obligations, responsibilities, and limitations reflected in that body of law.

refers to two articles of Chinese scholars. Pedrozo neither refers to Chinese official documents, nor checked the positions expressed by the competent ocean administrative authorities of the Chinese government or the naval authorities. To base one's interpretation of China's position on such sources reflects inadequate research at best, an attempt to mislead readers at worst."). The author of that criticism, Zhang Haiwen, is the Deputy Director-General of the China Institute for Marine Affairs (CIMA). *Id.* at 31 n.31. CIMA is a "research arm" of the State Oceanic Administration (P.R.C.). *Sponsors and Organizers*, SECOND INST. OF OCEANOGRAPHY, http://www.sio.org.cn/english/symposium/Organizers_and_Sponsors.asp (last visited Feb. 11, 2012). Of course, Zhang includes a disclaimer in the introductory footnote of that article that states: "Opinions expressed in this article are the author's personal academic views." Zhang, *supra*, at 31 n.31. Ironically, Dr. Zhang either misses a constructive opportunity or deliberately opts to avoid identifying or cataloging Chinese official documents that state and justify China's position on these matters. Thus, in many situations, outside observers like Professor Pedrozo have no option but to rely upon what Chinese scholars have written. In order to avoid similar criticism, this Article attempts to focus upon analyzing only official statements and publications of China.

A. Law of the Sea as International Law

The law of the sea is a subfield of international law. That reality, while simple and obvious, carries with it several significant legal effects that vary depending upon the source of international law, be it conventional law or customary law.

First, the law of the sea's status as international law affects how the law is interpreted. Much of the law of the sea is reflected in the United Nations Convention on the Law of the Sea (UNCLOS).²⁵ Nations must interpret UNCLOS as they would any other international treaty, convention, or agreement.²⁶ Specifically, the Vienna Convention on the Law of Treaties requires nations to interpret rules of international conventions, including those of UNCLOS, "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."²⁷ If the ordinary meaning of a convention's rule is "ambiguous or obscure," then nations may rely upon "supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion."²⁸ These basic rules of treaty interpretation are understandable and prudent: the text of a treaty or convention often reflects years of intense and deliberative negotiations between sovereign nations, often involving the efforts and accommodating the interests of many nations. If the established rules of treaty interpretation are casually ignored, then one nation or a discrete minority of nations could upset the will of the majority of state-parties to a treaty or convention. In effect, a minority would be able to unilaterally renegotiate the original bargain long after the parties have all departed the negotiating table.

Second, the law of the sea's status as international law affects how the rules of law are modified. As an international convention, UNCLOS is subject to the standard rules of formation and modification governing any other treaty, convention, or agreement.²⁹ For example, if a situation arises that was unforeseen at the time a convention was negotiated, the parties may negotiate a modification or amendment to the convention—but those situations require adherence to strict procedures.³⁰ Taken

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

26. *See generally* Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

27. *Id.* art. 31(1).

28. *Id.* art. 32.

29. *Id.*

30. *Id.* arts. 39-41.

together, these rules of formation, modification, and interpretation of treaty law are intended to promote “maintenance of international peace and security, the development of friendly relations and the achievement of cooperation among nations.”³¹ In layman’s terms, a single nation may not casually and unilaterally reinterpret provisions of a treaty or convention merely because that nation subsequently experiences “buyer’s remorse.”³²

Third, the law of the sea’s status as international law affects how uncodified, customary rules of law are developed. While much of the law of the sea is reflected in UNCLOS, an important portion of that body of international law is derived from custom and state practice.³³ In many ways, customary international law is a reflection of world history.³⁴ This includes both centuries of world history that predated the negotiation and conclusion of UNCLOS as well as the three decades of modern history after its conclusion. The practices of nations—both actions and inactions—thus shed light on the real meaning of the provisions of UNCLOS.³⁵ Therefore, if a nation fails to participate or deliberately opts not to participate in an era of world history, then it is extremely difficult for that nation to subsequently question or challenge the developments of customary international law that might have occurred during that period of time.

B. Specific Rights and Responsibilities of Coastal States and User States

Under the international law of the sea regime, the authority, rights, obligations, responsibilities, and limitations of individual states are defined by certain concepts, rules, and tenets that are also worth identifying at the outset of this discussion.

First, coastal states are entitled to draw baselines along their coasts.³⁶ In general, coastal states must draw their baselines at the low-water line along their coasts.³⁷ Alternatively, coastal states may draw straight baselines along their coastlines, but only in four limited situations: (1)

31. *Id.* at preamble.

32. See Gerald D. Bell, *The Automobile Buyer After the Purchase*, 31 J. MARKETING 12 (1967), for an explanation of the concept of “buyer’s remorse.”

33. See ROBIN R. CHURCHILL & VAUGHAN LOWE, *THE LAW OF THE SEA* 6-11 (Dominic McGoldrick ed., 3d ed. 1999).

34. See *id.* at 6-13.

35. See *id.* at 7-11 (noting that customary international law is reflected in state practice).

36. UNCLOS, *supra* note 25, arts. 7-10.

37. *Id.* art. 5.

where the state's "coastline is deeply indented and cut into,"³⁸ (2) "if there is a fringe of islands along the [state's] coast in its immediate vicinity,"³⁹ (3) "if a river flows directly into the sea,"⁴⁰ or (4) if the state has a juridical bay.⁴¹ In these limited situations, however, the "straight baselines must not depart to any appreciable extent from the general direction of the [state's] coast."⁴² Moreover, there must be a sufficiently close link between the sea areas lying within the straight baselines and the land domain of the coastal state.⁴³

Second, coastal states may claim historic waters only if three criteria are satisfied.⁴⁴ One, a coastal state must demonstrate an "effective exercise of sovereignty" over the waters as internal waters.⁴⁵ Two, the coastal state must demonstrate that this exercise of authority in the waters has been continuous "during a considerable time so as to have developed into a usage."⁴⁶ Three, the coastal state must demonstrate that the claim has received the "general toleration" or "acquiescence" of other states.⁴⁷ If any of these criteria are not satisfied, the coastal state lacks a legitimate basis under international law to assert a claim of historic waters.⁴⁸

Third, warships of user states enjoy the right of innocent passage through the territorial seas of a coastal state.⁴⁹ UNCLOS recognizes that ships of "all States enjoy a right of innocent passage."⁵⁰ Moreover, that right is enjoyed by "all ships,"⁵¹ including vessels and submarines⁵² that are capable of engaging in military-unique activities. It therefore follows that the right of innocent passage also is afforded to military vessels—so

38. *Id.* art. 7(1).

39. *Id.*

40. *Id.* art. 9.

41. *Id.* art.10.

42. *Id.* art. 7(3).

43. *Id.*

44. *Juridical Regime of Historic Waters, Including Historic Bays*, [1964] 2 Y.B. Int'l L. Comm'n 13, U.N. Doc. A/CN.4/SER.A/1962/Add.1, [http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes\(e\)/ILC_1962_v2_e.pdf](http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1962_v2_e.pdf). See also CHURCHILL & LOWE, *supra* note 33, at 43-44.

45. *Juridical Regime of Historic Waters, Including Historic Bays*, *supra* note 44, at 25.

46. *Id.*

47. *Id.*

48. *Id.* at 25-26.

49. UNCLOS, *supra* note 25, art. 17.

50. *Id.* art. 17.

51. See *id.* arts. 17-26.

52. *Id.* art. 20.

long as those transiting vessels do not engage in military activities while passing through the coastal state's territorial seas.⁵³ In fact, UNCLOS enumerates a specific set of rules for innocent passage that is applicable to warships and other government ships operated for non-commercial purposes.⁵⁴ Although coastal states may suspend temporarily the right of innocent passage, they may not discriminate "in form or in fact among foreign ships" when exercising their suspension power.⁵⁵ Finally, coastal states may not "impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage."⁵⁶

Fourth, coastal states have some limited authority to control activities in their contiguous zones.⁵⁷ In particular, coastal states may exercise control to prevent infringement of four—and only four—categories of laws and regulations: customs, fiscal, immigration, and sanitary.⁵⁸ Of note, these categories do not include an authority to generally exercise control necessary for "security."⁵⁹

Fifth, coastal states do not enjoy "sovereignty" in their exclusive economic zones like they do in their territorial seas and internal waters.⁶⁰ Instead, coastal states only enjoy "sovereign rights" in their exclusive economic zones.⁶¹ These sovereign rights are not unlimited in nature,⁶² but instead, are confined to "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources . . . with regard to other activities for the economic exploitation and exploration of the zone"⁶³ As indicated by the plain language of the name itself, the zone is an exclusive *economic* zone—not an exclusive *security* zone or an exclusive *military* zone.⁶⁴ In fact, when some nations at the UNCLOS negotiations attempted to insert an enforceable "security

53. *Id.* art. 19(2) (the list of activities includes: using force, exercising or practicing weapons, collecting intelligence, transmitting propaganda, launching, landing or taking on board aircraft, launching, landing, or taking on board any military device, or jamming communication systems of the coastal state).

54. *Id.* arts. 29-32.

55. *Id.* art. 25(3).

56. *Id.* art. 24(1)(a).

57. *Id.* art. 33.

58. *Id.* art. 33(a).

59. *See id.*

60. *See id.* arts. 2, 56.

61. *Id.* art. 56.

62. *See id.* art. 55.

63. *Id.* art. 56(1).

64. *See id.* Part V.

interest” into the exclusive economic zone regime, that proposal was deliberately considered and rejected by the nations assembled.⁶⁵

Sixth, user states may conduct military activities in the exclusive economic zones of coastal states.⁶⁶ For centuries of world history, nations have enjoyed freedom of the seas beyond the territorial seas of any coastal state.⁶⁷ These freedoms have included the collecting of

65. II *United Nations Convention on the Law of the Sea 1982: A Commentary* 558-560 (Satya N. Nandan and Shabtai Rosenne, eds. 2002); *see also* Third United Nations Conference on the Law of the Sea, Montego Bay, Jam., *Note by the Secretariat*, 243-4, U.N. DOC. A/CONF. 62/WS/37 (Dec. 10 1982), http://untreaty.un.org/cod/diplomaticconferences/lawofthesea-1982/docs/vol_XVII/a_conf-62_ws_37%20and%20add-1%20and%202.pdf

(“This [exclusive economic zone] concept, as set forth in the Convention, recognizes the interest of the coastal State in the resources of the zone and authorizes it to assert jurisdiction over resource-related activities therein. 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 exercised 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.”).

66. UNCLOS, *supra* note 25, art 58(1).

67. *See* William J. Clinton, Message From the President of the United States: Letter of Transmittal, S. TREATY DOC. NO. 103-39, at 3-4 (1994), *reprinted in* 6 BUREAU OF PUBLIC AFFAIRS, U.S. DEP’T OF STATE, 6 DISPATCH SUPPLEMENT, SUPP. 1 (1995), http://www.jag.navy.mil/organization/documents/Senate_Transmittal.pdf [hereinafter Clinton, UNCLOS Transmittal]; *see also* 66 J. ASHLEY ROACH & ROBERT W. SMITH, NAVAL WAR COLLEGE, INTERNATIONAL LAW STUDIES 1994: EXCESSIVE MARITIME CLAIMS 242 (1994); Raul “Pete” Pedrozo, *Preserving Navigational Rights and Freedoms: The Right to Conduct Military Activities in China’s Exclusive Economic Zone*, 9 CHINESE J. OF INT’L L. 9, 14 (2010) [hereinafter Pedrozo, *Preserving Navigational Rights*].

Similarly, military surveillance ships have historically collected intelligence seaward of the territorial sea as a matter of routine. During the Cold War, for example, Soviet surveillance ships (AGI) routinely collected intelligence on US and NATO warships at sea. Such surveillance activities were lawful and acceptable to the Alliance so long as they occurred seaward of the territorial sea and the AGIs complied with the obligations of the 1972 International Regulations for Preventing Collisions at Sea (COLREGS) and the 1972 US–USSR Agreement on the Prevention of Incidents on the High Seas (INCSEA). . . . Military aircraft have likewise flown thousands of missions beyond national airspace since the advent of aviation, to include intelligence collection missions and military exercises along the outer edge of the territorial sea. These activities were commonplace during the Cold War and continue today without the consent of the coastal States concerned. For instance, from May 2007 to May 2008, Russian TU-95 Bear bombers conducted operational flights just outside the 12-nm limit off Alaska and Canada on many occasions. US and Canadian fighters intercepted and

intelligence and the conducting of surveillance by militaries.⁶⁸ The text of UNCLOS expressly provides user states with the freedoms of navigation and overflight and “other internationally lawful uses of the sea related to these freedoms.”⁶⁹ Additionally, that same provision includes the language “such as,” a phrase the ordinary meaning of which denotes examples, but not necessarily an exhaustive list.⁷⁰ To that end, it was “the general understanding” of the UNCLOS negotiators that this language would permit “foreign military activities” in the exclusive economic zones of coastal states.⁷¹ During the three decades of modern

monitored the bombers, but each time the Russian aircraft were allowed to continue on their way.

Id. at 14-15.

68. ROACH & SMITH, *supra* note 67, at 242.

69. UNCLOS, *supra* note 25, art. 58(1).

70. *Id.* See Elliot L. Richardson, *Power, Mobility and the Law of the Sea*, 58 FOREIGN AFF. 902, 916 (1980) (In order to carry out the qualitative aspect of this understanding, the text identifies the safeguarded freedoms as those ‘referred to in Article 87,’ which is the article on “Freedom of the High Seas.” The quantitative aspect is satisfied by the phrase ‘such as,’ which makes clear that the reference to specific uses is illustrative but not exhaustive. Article 87 similarly defines ‘freedom of the high seas’ by setting forth a non-exhaustive list of freedoms.). Ambassador Richardson was the head of the U.S. Delegation to the Third U.N. Conference on the Law of the Sea. *Id.* at 902. Of note, he was the originator of the “other internationally lawful uses of the seas related to these freedoms, such as” language that was ultimately codified in the final text of Article 58(1). See Jorge Castaneda, *Negotiations on the Exclusive Economic Zone at the Third United Nations Conference on the Law of the Sea*, in *ESSAYS IN INTERNATIONAL LAW IN HONOUR OF JUDGE MANFRED LACHS* 603 (1984).

The maritime powers’ misgivings, concerning the restrictive character of the phrase ‘other internationally lawful uses of the sea related to navigation and communications,’ were dispelled through the inclusion of a new formulation, proposed by the representatives of the U.S., Ambassador Elliot Richardson, which reads as follows: “Other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of the Convention.”

Id. at 622. Ambassador Castaneda was the head of the Mexico delegation to the Third U.N. Conference on the Law of the Sea. *CONSENSUS AND CONFRONTATION: THE UNITED STATES AND THE LAW OF THE SEA CONVENTION* 302-03 (Jon M. Van Dyke ed., 1984) [hereinafter *CONSENSUS AND CONFRONTATION*].

71. *CONSENSUS AND CONFRONTATION*, *supra* note 70, at 302-303.

Koh: The question of military activities in the exclusive economic zone is a very difficult one. Bernie Oxman will remember that the status of the exclusive economic zone was one of the last questions to be wrapped up in the negotiations in Committee Two. We finally succeeded in wrapping up this question of the status of the exclusive economic zone thanks to the personal initiative of our friend Jorge Castaneda of Mexico. Before he became foreign minister, he was the leader

history after the negotiation of UNCLOS, naval forces of the world have continued to conduct non-economic, military activities beyond the territorial seas of any coastal state, including within the exclusive economic zones of those coastal states.⁷² Consequently, an overwhelming majority of nations in the world have either openly supported this freedom of the seas or taken no state action to restrict foreign military activities in their respective exclusive economic zones.⁷³

III. FACED WITH THESE REALITIES, CHINA OPTS FOR RHETORIC

The realities of international law, including the law of the sea, do not support many of China's desired positions. In other words, the meaning and intent of many key provisions of UNCLOS are not what China wishes they were, and the status of customary law of the sea is not where China wants it to be. For example, China wants to be able to draw

of the Mexican delegation. In 1977, I believe, Jorge Castaneda invited about 20 of us to dinner one evening. After dinner was over, he asked that the table be cleared and said, "Ladies and gentlemen, we have been grappling for the last three years with the question of the status of the exclusive economic zone. I have invited you here because I believe you represent a cross section of the points of view of the Conference and you are the leaders of the Conference. I suggest, if you all agree, that we commence informal consultations on this question." We agreed and sat down and worked, in fact, all night long. And we began to negotiate every night for two weeks and eventually wrapped up the issue. The solution in the Convention text is very complicated. *Nowhere is it clearly stated whether a third state may or may not conduct military activities in the exclusive economic zone of a coastal state. But, it was the general understanding that the text we negotiated and agreed upon would permit such activities to be conducted.* I therefore would disagree with the statement made in Montego Bay by Brazil, in December 1982, that a third state may not conduct military activities in Brazil's exclusive economic zone.

Id. at 302-03 (quoting Ambassador Tommy Koh) (emphasis added). Ambassador Koh from Singapore was the second and final president of the Third U.N. Conference on the Law of the Sea, presiding over the conclusion of the UNCLOS text; he made that statement a mere thirteen months after the final text of UNCLOS was concluded.

72. See Captain Raul Pedrozo, *Close Encounters at Sea: the USNS Impeccable Incident*, 62 NAVAL WAR C. REV. 101, 102 (2009).

73. For a collection of Declarations and Statements issued by coastal states upon acceding to UNCLOS, see U.N. Div. of Oceans Aff. and the Law of the Sea, *Declarations and Statements* (July 12, 2011), http://www.un.org/depts/los/convention_agreements/convention_declarations.htm [hereinafter *Declarations and Statements*]. For a summary of these national maritime claims by coastal states throughout the world, see U.S. DEP'T OF DEF., *DoD 2005. 1-M, MARITIME CLAIMS REFERENCE MANUAL* (2005) [hereinafter *MARITIME CLAIMS REFERENCE MANUAL*].

straight baselines along its entire coastline⁷⁴ and claim the significant amounts of resulting enclosed waters as off-limits to the ships of other nations.⁷⁵ Additionally, China wants to be able to draw straight baselines around the Paracel Islands and claim even more internal waters.⁷⁶ Still unsatisfied, China wants “indisputable sovereignty” and “historic rights” over eighty percent of the South China Sea with its nine unexplained dashes.⁷⁷ Regarding the rights, freedoms, and uses of the sea, China wishes that foreign warships did not have the right of innocent passage.⁷⁸ China also wants to control security in its contiguous zone.⁷⁹

74. See *Declaration of the Government of the People's Republic of China on the Baselines of the Territorial Sea* (May 15, 1996) http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN_1996_Declaration.pdf (last visited Feb. 11, 2012) [hereinafter *Declaration on the Baselines of the Territorial Sea*].

75. Law on the Territorial Sea and Contiguous Zone (promulgated by the Standing Comm. Nat'l People's Cong., Feb. 25, 1992, effective Feb. 25, 1992), art. 2, available at http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383846.htm [hereinafter Law on the Territorial Sea and Contiguous Zone].

76. *Declaration on the Baselines of the Territorial Sea*, supra note 74.

77. See Letter from Permanent Mission of China to H.E. Mr. Ban Ki-Moon, Secretary-General, United Nations (May 7, 2009), available at http://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf; see Law on the Exclusive Economic Zone and Continental Shelf (promulgated by the Standing Comm. Nat'l People's Cong., June 26, 1998, effective June 26, 1998, art. 14, available at http://www.npc.gov.cn/englishnpc/Law/2007-12/11/content_1383573.htm (“The provisions in this Law shall not affect the rights that the People's Republic of China has been enjoying ever since the days of the past.”).

78. See Tao Cheng, *Communist China and the Law of the Sea*, 63 AM. J. INT'L L. 47, 63 (1969) (The 1958 Declaration on China's Territorial Sea “requires permission for foreign vessels to exercise the right of innocent passage” whereas “the Geneva Convention [on the Territorial Sea and the Contiguous Zone of 1958] does not.”); see also Yann-Huei “Billy” Song, *China and the Military Use of the Ocean*, 20 OCEAN DEV. & INT'L L. 213, 216 (1990).

Because of failure to make passage of warships through territorial sea dependent on the coastal states' prior notification or authorization as well as because of the adoption of a provision giving “ships” as such in general the right of innocent passage through the territorial sea in the 1977 Informal Composite Negotiating Text, Shen Wei-liang, chairman of the Chinese delegation to the seventh session of the UNCLOS III, stated that “[T]he system of passage in territorial seas is an important and fundamental issue relating to the coastal states” sovereignty and security. All kinds of regulations in that regard must ensure that the sovereignty of the coastal state is not infringed and security not threatened. For the sake of the convenience for international trade, a system of innocent passage basically can be accepted. However, it is up to the decision of the coastal states, based on its laws and regulations, whether to entitle military vessels the right of innocent passage through the territorial seas. Without giving prior notification or receiving the coastal states “laws and regulations, the passage of foreign warships through the

territorial sea constructs an act of infringement on the coastal states' independence and security, which can never be permitted." During the final stages of UNCLOS III, the Chinese delegates continued to propose the incorporation of the requirement of prior notification and authorization into the draft Convention on the Law of the Sea, but without avail.

Id. See also *Declarations and Statements*, *supra* note 73; Law on the Territorial Sea and Contiguous Zone, *supra* note 75, art. 6; JEANETTE GREENFIELD, CHINA AND THE LAW OF THE SEA, AIR, AND ENVIRONMENT 38-39 (1979) ("Chinese representatives have been adamant concerning this principle of non-innocent passage for military vessels through territorial seas and particularly straits, and all statements indicate a resolute intention never to compromise it."); Michael Carr, *China and the Law of the Sea Convention*, 9 AUSTRAL. J. OF CHINESE AFF. 35, 35-36 (1983).

Section 3 of the Convention clearly recognizes the right of all ships, including warships, to "innocent passage" through the territorial sea. Passage is innocent so long as it is not prejudicial to the peace, order or security of the coastal state (Article 19). China, however, takes a more restrictive view of this right of navigation. Foreign non-military vessels can have the right of innocent passage but "must observe the relevant laws and regulations laid down by the Government of the People's Republic of China." Foreign military vessels must obtain prior authorization for passage. . . . That the passage of warships may be innocent was clearly established by the International Court of Justice in the *Corfu Channel Case*; the Chinese maintain, however, that from the point of view of security this is never so. . . . It is clear that the Chinese are unlikely to concede the right of innocent passage of warships through their territorial sea. However, if they sign and then ratify the Convention, they will have to reconcile their stand on this issue with their newly assumed international obligations.

Id. at 37-38. See also Zhiguo Gao, *China and the Law of the Sea*, in FREEDOM OF SEAS, PASSAGE RIGHTS, AND THE 1982 LAW OF THE SEA CONVENTION 273, 284-85 (Myron H. Nordquist, Tommy K.B. Koh & John Norton Moore, eds., 2009) ("It is China's view that only non-military vessels were entitled to the right of innocent passage; no consensus had been reached on the innocent passage of warships." Additionally, "[a] Chinese writer recently asserted that the general customary rule on the passage of warships through the territorial sea is: 'Coastal States may grant foreign warships innocent passage through the territorial sea without special requirements or make the passage subject to previous notification or authorization, or to some other requirements.'" While "[t]his assertion may be true in theory and practice[,] it is nevertheless "contrary to the provisions of UNCLOS" and "[t]herefore poses a major problem for China if it wishes to stay within the framework of the Convention."). Of note, at the time Gao wrote this chapter, he was the Executive Director of the China Institute for Marine Affairs, a research arm of China's State Oceanic Administration. Currently, Gao is a judge on the International Tribunal for the Law of the Sea. See *Judge Zhiguo Gao*, INT'L TRIBUNAL FOR LAW OF THE SEA, <http://www.itlos.org/index.php?id=92> (last visited Feb. 11, 2012).

79. Law on the Territorial Sea and Contiguous Zone, *supra* note 75, art. 13; Carr, *supra* note 78, at 41.

China was an early supporter of such a zone, and also recognized claims for the establishment of extensive zones for such purposes as peace and security. These zones would have represented an infringement of the rights of innocent passage

China wishes that a coastal state enjoyed sovereignty of its exclusive economic zone equivalent to that which it enjoys over its territorial seas and internal waters, versus merely having sovereignty rights.⁸⁰ China also wishes that coastal states enjoyed legally-protected and enforceable security interests in their respective exclusive economic zones.⁸¹ Finally, China wishes that it enjoyed 200 nautical mile territorial seas,⁸² that other states enjoyed only a limited freedom of passage through its exclusive economic zone,⁸³ and that other states be prohibited from conducting military activities in its exclusive economic zone.⁸⁴

and transit passage and of the doctrine of freedom of the high seas and were rejected by the [Third U.N.] Conference.

Id.

80. See, e.g., *Violation of China's Sovereignty Never Allowed*, CHINADAILY.COM.CN, Mar. 10, 2009, http://www.chinadaily.com.cn/china/2009-03/10/content_7564839.htm (This article reported the following statement by Major General Wang Dengping's, the political commissar of the Armament Department of the People's Liberation Army Navy, regarding the USNS Impeccable incident: "It is our sovereignty for Chinese vessels to conduct activities in the country's special economic zone, and such activities are justified."). For more information on the *USNS Impeccable* incident, see generally Jonathan G. Odom, *The True "Lies" of The Impeccable Incident: What Really Happened, Who Disregarded International Law, and Why Every Nation (Outside of China) Should be Concerned*, 18 MICH. ST. J. INT'L L. 411 (2010).

81. See *Spokesman Zhu Bangzao Gives Full Account of the Collision between US and Chinese Military planes*, XINHUA GENERAL NEWS SERV., Apr. 4, 2001, <http://news.xinhuanet.com/english/20010404/393124A.htm>.

82. GREENFIELD, *supra* note 78, at 56 ("While having always stressed the distance of twelve miles in respect of [China's] own territorial waters, [China] has continued to support a maximum breadth of two hundred miles."); Carr, *supra* note 78, at 35-36.

83. See, e.g., *Violation of China's Sovereignty Never Allowed*, *supra* note 80 (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."); see also Huang Zuoping, *Troubled Waters*, BEIJING REVIEW, June 7, 2009, http://www.bjreview.com.cn/world/txt/2009-06/07/content_199369.htm ("These navigation rights refer to 'innocent passage,' on which point the U.S. Navy obviously cannot stand. Therefore, it is necessary and perfectly justifiable for China to dispel U.S. Navy surveillance ships from its EEZs to protect its marine environment and resources.").

84. Ma Zhaoxu, Spokesman, Ministry of Foreign Affairs (P.R.C.), Regular Press Conference, Mar. 10, 2009, <http://www.fmprc.gov.cn/eng/xwfw/s2510/2511/t541713.htm> ("[Engaging] in activities in China's exclusive economic zone in the South China Sea without China's permission, [the US navy surveillance ship] broke the international law as well as Chinese laws and regulations."); see also *China Opposes Any Military Acts in Its Exclusive Economic Zone Without Permission*, XINHUA GENERAL NEWS SERV., Nov. 26, 2010, http://news.xinhuanet.com/english2010/china/2010-11/26/c_13624036.htm (quoting Hong Lei, Spokesman, Ministry of Foreign Affairs (P.R.C.) as saying "We hold

Recognizing the significant number of disconnects between reality and China's preferences, the question becomes: What are China's options for realizing its goals?

One option, since foreclosed, would have been for China to decline binding itself as a signatory to UNCLOS. A fundamental principle of international law is that treaties are based upon the "free consent"⁸⁵ of the parties—no nation can be forced to enter a particular treaty or convention.⁸⁶ In fact, not every nation in the world is a party to UNCLOS.⁸⁷ China, however, chose the path of compromise and voluntarily ratified UNCLOS in 1996.⁸⁸ This decision, while laudable, does not *ipso facto* immunize China from criticism when it acts inconsistent with the terms of the convention. To the contrary, China's ratification of UNCLOS increases the international community's expectations that China will abide by its terms.

A second option, also now foreclosed, would have been for China to submit declarations upon ratifying UNCLOS that addressed its disconnects with the UNCLOS regime. Although UNCLOS, unlike many other treaties and conventions,⁸⁹ expressly prohibits member-states from submitting reservations upon ratification,⁹⁰ it does permit the submission of declarations or statements.⁹¹ Thus, many nations have

a consistent and clear-cut stance on the issue. We oppose any party to take any military acts in our exclusive economic zone without permission."); Zuoping, *supra* note 83.

85. Vienna Convention on the Law of Treaties, *supra* note 26, at preamble.

86. *Id.* art. 52.

87. For a list of the 162 nations that have acceded to UNCLOS, see U.N. Div. For Ocean Affairs and Law of the Sea, *Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements as at 03 June 2011*, UN.ORG, http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm last visited Apr. 16 2012). Nations that have not yet acceded to UNCLOS include: Afghanistan, Cambodia, Colombia, Ecuador, El Salvador, Iran, Ireland, Lichtenstein, Niger, Turkey, United Arab Emirates, and the United States. *Id.* The United States, however, has long considered the legal regime reflected in UNCLOS to be customary law. See Statement on United States Ocean Policy, 1 Pub. Papers 378, 378-79 (Mar. 10, 1983).

88. See Gao, *supra* note 78, at 278 ("Due to the comprehensiveness of the LOS Convention and its spirit of compromise, no State is completely satisfied with all the provisions. Every country has to cede on one point before gaining on another. So despite its dissatisfaction with some of the articles of the Convention, China ratified it in 1996."); Declarations Upon Ratification of UNCLOS (P.R.C.) (June 7, 1996), http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#China.

89. Vienna Convention on the Law of Treaties, *supra* note 26, art. 19.

90. UNCLOS, *supra* note 25, art. 309.

91. *Id.* art. 310.

submitted declarations at their respective times of accession.⁹² Unfortunately, some of those declarations look very similar to reservations and, therefore, have questionable effect. In fact, China submitted several declarations at the time it joined UNCLOS, including one regarding the right of innocent passage afforded to foreign warships.⁹³ That notwithstanding, China failed to submit declarations on other significant issues, including attempts to restrict foreign military activities in China's exclusive economic zone⁹⁴ as a handful of other states have done.⁹⁵ Recently, PRC officials have started to use rhetoric, such as "[w]e hold a consistent and clear-cut stance on the issue,"⁹⁶ implying that China's position on the issue of foreign military activities in its exclusive economic zone has been long-standing. In reality, however, China did not publicly adopt that stance until years after it acceded to UNCLOS.⁹⁷ In essence, despite China's affinity for past events over a span of 5,000 years, it does not acknowledge the legal significance of events over the past forty years in world history and international law—including its actions and, in this case, inaction.

A third option is for China to pursue the invalidation of UNCLOS. Less than a century ago, China waged a rhetorical battle of invalidation on a significant number of bilateral treaties and conventions that it had entered into during the 1800s. Believing these agreements to be unfavorable to China's interests, China successfully employed the novel

92. See Declarations Upon Ratification of UNCLOS, *supra* note 88.

93. *Id.*

94. *Id.*

95. See *id.* For example, Bangladesh, Brazil, India, Malaysia, Pakistan, and Uruguay submitted Declarations at the time of their accession to UNCLOS that claimed the right to restrict military activities in their respective exclusive economic zones; however, Germany, Italy, and Netherlands submitted Declarations that coastal states lacked the right to do so. *Id.*

96. *China Opposes Any Military Acts in Its Exclusive Economic Zone Without Permission*, *supra* note 86 (Quoting Hong Lei, Spokesman, Ministry of Foreign Affairs (P.R.C.)).

97. During the negotiations of UNCLOS, China was apparently silent on the specific issue of foreign military activities in a coastal state's exclusive economic zone. See, e.g., Carr, *supra* note 78, at 40 ("The nature of this exclusive jurisdiction has been defined by China as 'the right of the coastal States to protect, use and exploit all the natural resources in the zone, to adopt necessary measures and regulations to prevent those resources being plundered, encroached on, damaged or polluted, and to exercise overall control and regulation of the marine environment and scientific research within the zone.'"); see also Brian Wilson, *An Avoidable Maritime Conflict: Disputes Regarding Military Activities in the Exclusive Economic Zone*, 41 J. OF MAR. L. & COMMERCE 421, 429-30 (2010).

doctrine of “unfair treaties”⁹⁸ to abandon them. However, the likelihood of success in a similar battle against UNCLOS is drastically lower. Unlike the “unfair treaties” of the 1800s, UNCLOS is not a bilateral agreement, but rather a multilateral one with 162 other state-parties whom China would need to convince of its invalidity. Politically, international relations during the 1920s are significantly different than modern international relations. Assuming *arguendo* that China was an “unequal party” at the time of the 19th century agreements, China is hardly an “unequal party” with respect to UNCLOS. The multilateral agreement reached in UNCLOS was not a forced deal between unequal nations, but rather the result of equal bargaining among participating nations of all sizes and influence. Consequently, China would be hard pressed to resurrect its “unfair treaty” strategy from the 1920s and invalidate UNCLOS on such grounds, without generating further international concern over whether China accepts the existing international legal order.

A fourth option is for China to unilaterally withdraw from UNCLOS. Just as entering a treaty or convention is based upon the “free consent” of the parties, international law affords state-parties the right to withdraw from a particular treaty or convention.⁹⁹ By the express terms of UNCLOS, the right of denunciation is available to state-parties.¹⁰⁰ However, China is highly unlikely to denunciate, as this too would generate further international concern over whether China truly accepts the existing international legal order.

A fifth option is for China to pursue amending UNCLOS. Like the standard procedures for amending other treaties and conventions,¹⁰¹ UNCLOS fully contemplated that the Convention might need to be modified in the future.¹⁰² By the express terms of the Convention, a party may propose specific amendments and request the convening of a conference to consider such proposed amendments.¹⁰³ If less than a majority of UNCLOS state-parties (currently, 82 of 162) do not reply favorably within twelve months of a proposed amendment, then the U.N. Secretary-General will not convene a conference to consider the proposed amendments.¹⁰⁴ Because fewer than eighty-two state-parties

98. For a comprehensive discussion of this historical movement, see generally DONG WANG, CHINA'S UNEQUAL TREATIES: NARRATING NATIONAL HISTORY (2005).

99. Vienna Convention on the Law of Treaties, *supra* note 27, arts. 54, 56.

100. UNCLOS, *supra* note 25, art. 317.

101. Vienna Convention, *supra* note 26, art. 32.

102. See UNCLOS, *supra* note 25, art. 312.

103. *Id.*

104. *Id.*

support China's preferences on these law of the sea matters,¹⁰⁵ it is unlikely that China could succeed in having any proposed amendments to UNCLOS seriously considered.

With these five options off the table, China appears to be pursuing a sixth option. This option consists of using rhetoric designed to allow China to retain the benefits of the provisions it likes, while repudiating those it does not. For those UNCLOS rules that China dislikes but cannot legally or politically reserve-, declare-, invalidate-, withdraw-, or amend-away, it must create and encourage doubt in the meaning of those rules. Accordingly, China argues that the text of UNCLOS is flawed. For example, at the final session of UNCLOS negotiations, the head of China's delegation stated that "[t]here are still quite a number of articles in the Convention which are imperfect or even have serious drawbacks. We are not entirely satisfied with the Convention."¹⁰⁶ More recently, in regard to the exclusive economic zone regime, China has argued that the regime has "shortcomings" that lead to "unclear and differing conceptions,"¹⁰⁷ implying that these shortcomings should be perfected through other means. Whether this sixth option of legal rhetoric is acceptable is discussed later in this Article. But first, let us examine

105. See MARITIME CLAIMS REFERENCE MANUAL, *supra* note 73.

106. Paul C. Yuan, *The New Convention on the Law of the Sea from the Chinese Perspective*, in CONSENSUS AND CONFRONTATION: THE UNITED STATES AND THE LAW OF THE SEA CONVENTION 185 (Jon M. Van Dyke ed., 1985) (citing PEOPLE'S DAILY, December 11, 1982, at 2); see also Gao, *supra* note 78, at 277 ("The head of the Chinese delegation pointed out at the final session that 'there are quite a number of articles in the LOS Convention which are imperfect or even have serious drawbacks.'").

107. See Ren Xiaofeng & Cheng Xizhong, *A Chinese Perspective*, 29 MARINE POL'Y 139, 139 (2005). Earlier, the author indicated that rhetoric would be derived from official statements and publications of China's Government. See *supra* note 24. Throughout the remainder of this Article, the Ren and Cheng article will be assumed to be an official perspective of China's Government for several valid reasons. First, at the time of publication, both authors were members of the People's Liberation Army (PLA). Specifically, Dr. Ren was a Senior Captain in the PLA Navy, while Cheng was a Senior Colonel in the PLA. Of note, Senior Captain Ren has served as the legal advisor to many Chinese delegations for many official international meetings regarding law of the sea matters. Second, unlike some articles and publications by Chinese authors who are coincidentally employees of the Chinese Government, this 2005 article does not include a disclaimer that the authors are writing in only their personal capacities. Third, during an international law conference hosted by U.S. Pacific Command several years ago, when a panel discussion on law of the sea matters included a presentation on the 2001 EP-3 incident in the South China Sea, Chinese attendees at the conference distributed a copy of the Ren and Cheng article to the attendees as the one source of information representing the Chinese position.

some of the specific rhetoric China has employed regarding the law of the sea since its accession to UNCLOS in 1996.

IV. SPECIFIC ISSUES OF CHINA'S RHETORIC ON LAW OF THE SEA MATTERS

It would be easy to simply accuse China of not complying with international law or not accepting the existing international legal order. It might be more worthwhile, however, to consider whether what China says about the law of the sea matches up with the reality of what China believes, what other nations believe and do, and what the law of the sea actually means. Accordingly, this Part compares what China says to the world with what it says internally to Chinese audiences; considers whether, as China alleges, the United States is singling China out for criticism on law of the sea matters; evaluates whether China's words and actions on law of the sea matters are truly consistent with one another, especially regarding freedom of navigation; and analyzes whether China is sufficiently transparent on law of the sea matters and can be trusted on these matters.

A. The Real China Is Revealed "At Home"

A disparity sometimes exists between rhetoric and reality in some types of relations, including personal relations such as marriage. The author once heard a Navy chaplain tell a room full of married couples, "[w]e are who we are when we are at home."¹⁰⁸ What he meant was that while married couples often hold out a polished image of themselves to the public, the reality of the relationship is revealed through couples' behavior and statements to one another inside the sanctuary of their own homes.

Likewise, a similar disparity can exist between rhetoric and reality in international relations. For China, a potential disparity exists between what China says to the world and what China really thinks about international law, including the law of the sea. Although there is admittedly some value to examining the rhetorical words of China's leaders spoken to the world to see what it thinks about international law, including the law of the sea, the true measure of reality is what China says within its national "household" on that same subject. An optimist would compare the PRC's dismissive attitude towards "bourgeois

108. Lieutenant Commander Richard Bonnette, Chaplain Corps, U.S. Navy, Remarks at CREDO Marriage Enrichment Retreat (Jan. 19, 2001).

international law” in the 1960s and 1970s to its more recent statements on the subject, like those made by Mr. Duan in 2006,¹⁰⁹ and see progress. But, a realist would caution the world to not compare such positive words only with words spoken by a China that was closed off to the world in the 1950s, 1960s and 1970s. Instead, the world should compare China’s recent public statements to international audiences on matters of international law with what China has recently offered for consumption to its own internal audiences on that same subject.

With respect to the statements China has made regarding international law within the comfort of its “home,” the world should consider what China’s military leaders have taught their rank and file officers. For example, the People’s Liberation Army (PLA) handbook on international law instructs PLA officers that, “[t]he Chinese government is . . . obliged to adhere *strictly* to all international laws”¹¹⁰ But three pages later, that same official publication admonishes its officers to “be *flexible* in the application of international laws.”¹¹¹ It explains

in practice, while we should adhere to the fundamental principles and relevant regulations contained in international laws, we *should not feel completely bound* by specific articles and stipulations detrimental to the defense of our national interests. We should therefore always apply international laws *flexibly* in the defense of our national interests and dignity, appealing to those aspects beneficial to our country while evading those detrimental to our interests.¹¹²

Such internal direction for selective compliance of international law calls into question the sincerity of Director General Duan’s statements to the United Nations about strict adherence to international law.

Statements by China’s national leadership to the legal experts within the Chinese Communist Party are also telling. At a 1996 seminar on international law, then-President Jiang Zemin addressed his comrades in attendance in a manner consistent with the Chinese Communist’s long-standing perspective of law as an instrument of state policy and

109. Duan Jielong, *Statement on the Rule of Law at the National and International Levels*, 6 CHINESE J. INT’L L. 185, 185-88 (2007).

110. BASICS OF INTERNATIONAL LAW FOR MODERN SOLDIERS 3 (Zhao Peiying ed., 1996) (P.R.C.).

111. *Id.* at 6.

112. *Id.*

international law as an instrument of foreign policy.¹¹³ Jiang Zemin urged, “[o]ur leaders and cadres, especially those of high rank, ought to take note of international law and enhance their skills in applying it We must be adept at *using international law as ‘a weapon’* to defend the interests of our state and maintain national pride.”¹¹⁴ Although President Jiang’s words about “using international law as a weapon” might have been merely use of rhetoric,¹¹⁵ the PLA has since turned that rhetoric into a strategic reality.

Since 2003, the PLA has been operationalizing a doctrinal concept it has named “Legal Warfare.”¹¹⁶ Consistent with former-President Jiang’s

113. COHEN & CHIU, *supra* note 7, at 32 (“During the anti-rightist campaign, for example, an article published in the authoritative *People’s Daily*, the newspaper of the Chinese Communist Party, stated: ‘International law is one of the instruments for settling international problems. If this instrument is useful to our country, to the socialist cause, or to the cause of peace of the people of the world, we will use it. However, if this instrument is disadvantageous to our country, to the socialist cause, or to the cause of peace of the people of the world, we will not use it and should create a new instrument to replace it’”); GREENFIELD, *supra* note 78, at 6 (“Since the establishment of the People’s Republic emphasis has been given to Marxist-Leninist concept of law as an instrument of State policy, and international law as an instrument of foreign policy.”); Carr, *supra* note 78, at 35-36 (“In considering China’s stance on the various issues which arose during the [Third U.N.] Conference [on the Law of the Sea] it is important to bear in mind that since the establishment of the People’s Republic emphasis has been given to Marxist-Leninist concept of law as an instrument of state policy, and international law as an instrument of foreign policy. China regards the concept of state sovereignty as the most fundamental principle of international law, and this attitude clearly emerges in its approach to some of the issues considered here.”); Yuan, *supra* note 101, at 185, 198 (“China does not stress the distinction between law and politics as Western nations do. In the United States, there are so many law schools and law is separated from politics. In China, however, when we establish a law school, it is a political-legal institution, and students must study Marxism. The name of the school is usually School of Law and Politics—China regards the two as inseparable.”).

114. WANG, *supra* note 98, at 128 (emphasis added). *See also Jiang Zemin Urges International Law Studies*, XINHUA NEWS AGENCY (P.R.C.), Dec. 9, 1996 (“Chinese President and Communist Party of China (CPC) General Secretary Jiang Zemin today called on leading cadres, especially those at high levels, to study international law and improve their ability to use these rules. Jiang urged cadres to utilize international law” in a variety of fields and emphasized the importance of employing international law “to safeguard China’s national interests and dignity so that the country can take the initiative in international cooperation and competition, when presiding at a lecture on international law.”).

115. WANG, *supra* note 98, at 126.

116. U.S. DEP’T OF DEF., ANNUAL REPORT TO CONGRESS: MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE’S REPUBLIC OF CHINA 26 (2011), http://www.defense.gov/pubs/pdfs/2011_cmpr_final.pdf [hereinafter U.S. DEP’T OF DEF., ANNUAL REPORT TO CONGRESS].

call to use international law as a weapon, one of the PLA's official textbooks, *Under Informatized Conditions: Legal Warfare*, defines "Legal Warfare" to include "activities conducted by *using the law as the weapon* and through measures and methods such as legal deterrence, legal attack, legal counterattack, legal restraint, legal sanctions, and legal protections."¹¹⁷ The textbook further discusses "legal restraint" in terms of "shrink[ing] enemy's political space" and "restrain[ing] and limit[ing] enemy's combat operations"¹¹⁸—implying that China should use law to restrain the actions of other nations geospatially, as in the maritime and air domains. In fact, the PLA textbook then expressly notes that Legal Warfare "involves" the "international laws of . . . the ocean."¹¹⁹ Additionally, the textbook specifically identifies domestic maritime laws, such as China's "Laws of Territorial Waters and Their Adjacent Areas," that also serve as the "armory of legal warfare."¹²⁰

The stark contrast between China's external rhetoric, that it is strictly bound by international law, and its internal guidance, that it must use "international law as a weapon"¹²¹ and that the PLA should not "feel completely bound by specific articles" of international law,¹²² reveals China's true thoughts on international law.¹²³ When the world witnesses China's military leaders indoctrinating its military forces with notions that the international law of the ocean and China's maritime and other domestic laws form the "armory of legal warfare,"¹²⁴ the world begins to detect the reality of Chinese strategy in the law of the sea arena. And what the world sees is a strategy designed to control and deny other nations' lawful access to the waters of the Western Pacific.

117. UNDER INFORMATIZED CONDITIONS: LEGAL WARFARE 7 (Song Yunxia ed., 2007) (P.R.C.) [hereinafter UNDER INFORMATIZED CONDITIONS] (emphasis added). See also, Jin Hongbing, *Legal Warfare: Sharp Tool to Seize the Opportunity to Grab the Initiative*, RENMIN HAIJUN [PEOPLE'S NAVY], May 29, 2006 ("Legal warfare refers to using law as a weapon and adopting methods and means including legal intimidation, legal attacks, legal counterattacks, legal restraint, legal sanctions, and legal protection to compete for political initiative and legal superiority according to the strategic needs of the country and military combat missions.").

118. UNDER INFORMATIZED CONDITIONS, *supra* note 117, at 124.

119. *Id.* at 23.

120. *Id.* at 24.

121. WANG, *supra* note 98, at 128.

122. BASICS OF INTERNATIONAL LAW FOR MODERN SOLDIERS, *supra* note 104, at 6.

123. WANG, *supra* note 98, at 126.

124. UNDER INFORMATIZED CONDITIONS, *supra* note 117, at 24.

B. It's Bigger Than China

In the past two years, senior leaders of the U.S. Government have made a series of statements about the law of the sea in East Asia,¹²⁵ some of which have been subjected to rhetorical criticism by senior leaders of the PRC Government. For example, U.S. Secretary of State Hillary Clinton delivered remarks at the 2010 ASEAN Regional Forum meeting that called for nations to respect international law and preserve freedom of navigation.¹²⁶ In response, China's Minister of Foreign Affairs, Yang Jiechi, issued a statement which characterized Clinton's statements as "seemingly impartial remarks" that "were in effect an attack on China."¹²⁷ To the contrary, the U.S. interest in upholding the law of the sea is global and long-standing—and much bigger than China.

In fact, the United States has upheld the law of the sea since the nation's founding and consistently thereafter, including in oceans and seas distant from U.S. shores. During the first half-century of U.S. history, there were "depredations" against U.S. commercial shipping in

125. See President Barack Obama, Press Conference with President Obama and President Hu of the People's Republic of China (Jan. 19, 2011), *available at* <http://www.whitehouse.gov/the-press-office/2011/01/19/press-conference-president-obama-and-president-hu-peoples-republic-china> (President Barack Obama stated, "[w]ith regard to regional stability and security in East Asia, I stressed [to President Hu] that the United States has a fundamental interest in maintaining freedom of navigation, unimpeded commerce, respect for international law and the peaceful resolution of differences."); see also Secretary of State Hillary Clinton, Comments by Secretary Clinton in Hanoi, Vietnam (July 23, 2010) [hereinafter Clinton, Hanoi Remarks], *available at* <http://www.america.gov/st/texttrans-english/2010/July/20100723164658su0.4912989.html>; Secretary of State Hilary Clinton, Clinton Statement on South China Sea (July 23, 2011), *available at* <http://iipdigital.usembassy.gov/st/english/texttrans/2011/07/20110723125330su0.9067433.html#axzz1YkIMZEit>; Secretary of Defense Robert M. Gates, Remarks at International Institute For Strategic Studies (Shangri-La—Asia Security) (June 5, 2010), *available at* <http://www.defense.gov/speeches/speech.aspx?speechid=1483> (Secretary Gates told an international audience that, "[i]n Asia, we have placed a particular importance on maritime commons for many years—for security, for trade and commerce, and free passage. . . . Our policy is clear: It is essential that stability, freedom of navigation, and free and unhindered economic development be maintained. We do not take sides on any competing sovereignty claims, but we do oppose the use of force and actions that hinder freedom of navigation.").

126. Clinton, Hanoi Remarks, *supra* note 125 (Secretary Clinton stated, "[t]he United States, like every nation, has a national interest in freedom of navigation, open access to Asia's maritime commons, and respect for international law in the South China Sea.").

127. *Foreign Minister Yang Jiechi Refutes Fallacies on the South China Sea Issue*, MINISTRY OF FOREIGN AFF. OF THE PEOPLE'S REPUBLIC OF CHINA (July 26, 2010), <http://www.mfa.gov.cn/eng/zxxx/t719460.htm>.

the Atlantic Ocean, the Mediterranean Sea, and adjoining seas. In response, a series of early U.S. Presidents requested, the U.S. Congress authorized, and the U.S. Navy executed operations to protect the freedom of navigation guaranteed to these U.S. vessels under international law.¹²⁸ During the final phases of World War I, U.S. President Woodrow Wilson made his famous “Fourteen Points” speech¹²⁹ to the U.S. Congress, during which he championed, as one of the universal principles for which the United States and others were fighting, “[a]bsolute freedom of navigation upon the seas, outside territorial waters, alike in peace and in war, except as the seas may be closed in whole or in part by international action for the enforcement of international covenants.”¹³⁰ Three months before the United States entered World War II, President Franklin D. Roosevelt delivered his “Freedoms of the Seas” radio address to the American people, in which he declared,

Generation after generation, America has battled for the general policy of the freedom of the seas. And that policy is a very simple one, but a basic, a fundamental one. It means that no nation has the right to make the broad oceans of the world at great distances from the actual theatre of land war, unsafe for the commerce of others.¹³¹

Ultimately, Roosevelt concluded, “Upon our naval and air patrol -- now operating in large number over a vast expanse of the Atlantic Ocean -- falls the duty of maintaining the American policy of freedom of the seas.”¹³² All of these words and actions by the United States in defense of the law of the sea occurred many years ago—long before the PRC was established in 1949.

For the past three decades, the U.S. Government has executed a multi-agency Freedom of Navigation (FON) program to uphold the law of the sea against excessive maritime claims by coastal states—not just

128. Act of May 28, 1798, ch. 48, 1 Stat. 561 (An Act More Effectually to Protect the Commerce and Coasts of the United States); Act of July 9, 1798, ch. 68, 1 Stat. 578 (An Act Further to Protect the Commerce of the United States); Act of February 6, 1802, ch. 4, 2 Stat. 129 (An Act for the Protection of the Commerce and Seamen of the United States Against the Tripolitan Cruisers); Act of March 3, 1815, ch. 90, 3 Stat. 230 (An Act for the Protection of the Commerce of the United States against the Algerine Cruisers).

129. President Woodrow Wilson, Speech on the Fourteen Points (Jan. 8, 1918), available at <http://www.fordham.edu/halshall/mod/1918wilson.html>.

130. *Id.*

131. President Franklin D. Roosevelt, Freedom of the Seas Radio Address to American People (Sept. 11, 1941).

132. *Id.*

in the East Asia Sea, but throughout the world. Composed of informal consultations, diplomatic protests, and operational assertions, the U.S. FON program is focused on the excessive nature of some maritime claims, rather than on the U.S. relationship with any particular coastal state.¹³³ In other words, the United States challenges excessive claims asserted by close U.S. allies, by competitors, and by potential adversaries.¹³⁴ For instance, in 1961—nearly two decades before the U.S. Government formally established its FON program—the United States diplomatically protested a maritime claim by treaty-ally Republic of Philippines as excessive under the law of the sea.¹³⁵ Thus, despite the recent rhetoric of Chinese officials such as Foreign Minister Yang, China has not been singled out by the long-standing U.S. FON program.

Additionally, the implication of China's rhetoric that the United States has a newfound concern over the law of the sea, and in the South China Sea in particular, is also inconsistent with the reality of U.S. history. To the contrary, the U.S. Government has repeatedly issued statements and taken actions over the past three decades to uphold the law of the sea in the South China Sea region. Throughout the 1980s, 1990s, and 2000s, the U.S. State Department has diplomatically protested, and the U.S. Navy has operationally challenged, excessive maritime claims asserted by South China Sea nations.¹³⁶ In 1992, U.S. Undersecretary of State Robert Zoellick publicly stated that the U.S. Government's position on the South China Sea remained unchanged, including that it "wanted freedom of navigation to be preserved. . . ."¹³⁷ In 1995, a U.S. State Department spokesman stated, "[m]aintaining freedom of navigation is a fundamental interest of the United States. Unhindered navigation by all ships and aircraft in the South China Sea is essential for the peace and prosperity of the entire Asia-Pacific region, including the United States."¹³⁸ All of these statements and actions

133. See ROACH & SMITH, *supra* note 67, at 4, 6.

134. *Id.* For example, the excessive maritime claims challenged diplomatically and operationally by the U.S. FON Program have included claims by treaty allies, such as Australia, Japan, Republic of Korea, Republic of the Philippines, and Thailand. See MARITIME CLAIMS REFERENCE MANUAL, *supra* note 73, at 35, 327, 349, 463.

135. MARITIME CLAIMS REFERENCE MANUAL, *supra* note 73, at 463; see also ROACH & SMITH, *supra* note 67, at 134-38 (providing the text of the 1961 and 1986 U.S. diplomatic protests of the Philippines' excessive maritime claims).

136. MARITIME CLAIMS REFERENCE MANUAL, *supra* note 73, at 80, 280, 373, 463, 548, 689 (regarding the Phillipines, Malaysia, Brunei, Indonesia, Singapore, and Vietnam).

137. Ang Cheng Guan, *The South China Sea Dispute Re-visited* 14-15 (INST. OF DEF. & STRATEGIC STUDIES, Working Paper No. 4, 1999).

138. Christine Shelly, Briefer, U.S. Dep't of State, Daily Press Briefing (May 10, 1995).

occurred long before July 2010. Thus, it is clear that the United States did not first start caring about the law of the sea, including in the South China Sea, on the day that Secretary Clinton made her remarks two summers ago in Hanoi.

*C. China Behaves Like It Wants to Hinder
Freedom and Safety of Navigation*

PRC Foreign Minister Yang has factually disputed concerns that the law of the sea might be at risk in the South China Sea. In response to Secretary Clinton's remarks in July 2010, Foreign Minister Yang rhetorically asked, "has navigation freedom and safety been hindered in the South China Sea?"¹³⁹ To which he quickly answered, "[o]bviously not."¹⁴⁰ As the official newspaper *China Daily* summarized Foreign Minister Yang's point, "[t]he South China Sea is currently a peaceful area with navigational freedom."¹⁴¹ Given the litany of state actions in the South China Sea, however, these statements by the PRC are woefully inaccurate.

In reality, a majority of the coastal states bordering the South China Sea have taken actions evidencing an intent to hinder other nations' lawful rights, freedoms, and uses of the South China Sea. Of the five nations bordering the South China Sea, Vietnam,¹⁴² Malaysia,¹⁴³ the Philippines,¹⁴⁴ and China¹⁴⁵ assert maritime claims that are excessive under the law of the sea. China, however, is the only one that has a "full house" of excessive claims. That is, China has established one or more excessive claims for every maritime zone potentially available to a coastal state: it has improperly drawn straight baselines with excessive internal waters, restricted innocent passage in its territorial seas, asserted a security interest in its contiguous zone, and restricted non-economic activities in its exclusive economic zone.¹⁴⁶ In fact, China is one of only seven nations in the entire world that has infamously adopted a "full

139. *Foreign Minister Yang Jiechi Refutes Fallacies on the South China Sea Issue*, *supra* note 127.

140. *Id.*

141. Li Xiaokun and Zhang Ting, *Foreign Minister Warns of South China Sea Issue*, CHINA DAILY, July 26, 2010, http://www.chinadaily.com.cn/china/2010-07/26/content_11046544.htm.

142. MARITIME CLAIMS REFERENCE MANUAL, *supra* note 73, at 689-92.

143. *Id.* at 373-77.

144. *Id.* at 463-72.

145. *Id.* at 126-33.

146. *Id.*

house” of excessive maritime claims.¹⁴⁷ Therefore, the PRC Foreign Minister’s rhetoric that freedom of navigation is “obviously not hindered” in the South China Sea does not match the reality that his nation maintains one of the most comprehensive regimes of excessive maritime claims of any coastal state in the entire world.

Through the years, the United States has diplomatically protested and operationally challenged all of these excessive maritime claims by South China Sea coastal states, including China. Unfortunately, none of these coastal states have rescinded their excessive maritime claims, so the United States has no choice but to continue exercising its permissible rights, freedoms, and uses of the seas in order to preserve them under international law. Thus, one of the primary reasons why China can even begin to rhetorically assert that freedom of navigation is “obviously not hindered” in the South China Sea area is *precisely because* the U.S. military forces have routinely operated in those waters and helped preserve those lawful rights, freedoms, and uses of the seas in that region for over one hundred fifty years.¹⁴⁸

In addition to enacting its comprehensive regime of excessive maritime claims, China attempts to hinder freedom of navigation by hindering safety of navigation. Like most of the nations of the world, China is a party to the Convention on the International Regulations for Preventing Collisions at Sea (COLREGS).¹⁴⁹ COLREGS obligate member-nations to ensure their government and flagged vessels alike operate safely at sea through adherence to a detailed regime of specific safety rules.¹⁵⁰ Nevertheless, in March of 2009, five PRC-flagged vessels unsafely surrounded USNS *Impeccable* in the South China Sea to the point that they would likely have caused a collision and endangered the lives of nationals from both nations, but for the heroic emergency all-stop maneuver of the *Impeccable*’s master and crew.¹⁵¹ In doing so, at

147. Only six other nations in the world have a “full house” of excessive maritime claims: Bangladesh, Burma, India, Iran, North Korea, and Pakistan. *See id.* at *passim*.

148. Robert M. Gates, Sec. of Def., Remarks by Secretary Gates at Vietnam National University (Oct. 11, 2010), *available at* <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=4697>.

149. Convention on the International Regulations for Preventing Collisions at Sea (COLREGS), Oct. 20, 1972, 28 *U.S.T.* 3459, 1050 *U.N.T.S.* 16, *as 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.

150. It is worth noting that, unlike some international treaties and conventions (e.g., UNCLOS), there is no exception or exemption in the COLREGS for sovereign immune vessels. *Id.*

151. Odom, *supra* note 80, at 427.

least some of those five PRC vessels clearly violated the COLREGS.¹⁵² Similarly, in the summer of 2011, another PRC-flagged fishing vessel clearly violated the COLREGS in the South China Sea when it cut the underwater equipment of a Vietnamese commercial survey vessel.¹⁵³ Given those COLREGS violations, rhetoric by PRC officials stating that “navigation safety” is not “hindered” in the South China Sea is inconsistent with the reports of repeated occurrences of unsafe conduct by PRC vessels, in addition to the corresponding inaction by the PRC Government to hold those PRC-flagged vessels to account.

D. China Expects Others to Do as China Says, but not as China Does

For the past decade, China has made rhetorical statements characterizing activities conducted by foreign militaries beyond China’s territorial seas, including activities in and over China’s exclusive economic zone, as violations of the international law of the sea. In April 2001, after the collision between a U.S. Navy EP-3 plane and a PLA Navy F-8 fighter jet over China’s exclusive economic zone, a PRC spokesman stated that the EP-3’s military activities “violated” the law of the sea.¹⁵⁴ In a 2005 article, the PLA Navy’s leading maritime lawyer argued that foreign military activities in a coastal state’s exclusive economic zone violated various rules and principles of the law of the sea.¹⁵⁵ In March 2009, after five Chinese vessels harassed USNS *Impeccable* approximately seventy miles off the coast of China, a PRC spokesman stated, “[e]ngaging in activities in China’s exclusive economic zone in the South China Sea without China’s permission, US navy [sic] surveillance ship *Impeccable* broke relevant international law as well as Chinese laws and regulations.”¹⁵⁶ Read together, these statements indicate that China asserts that foreign military activities in and over a coastal state’s exclusive economic zone violates the international law of the sea.

152. *Id.*

153. *Vietnam Says Chinese Boat Harassed Survey Ship; China Disputes*, BLOOMBERG BUSINESSWEEK, June 9, 2011, <http://www.businessweek.com/news/2011-06-09/vietnam-says-chinese-boat-harassed-survey-ship-china-disputes.html>; *Vietnam Says China Fishing Boat Rams Research Ship, China Disputes*, STRAITS TIMES, June 9, 2011, http://www.straitstimes.com/BreakingNews/SEAsia/Story/STIStory_678024.html.

154. *Chinese FM Spokesman Gives Full Account of Air Collision*, XINHUA NEWS SERV., Apr. 4, 2001, <http://news.xinhuanet.com/english/20010404/393124A.htm>.

155. See generally Ren & Cheng, *supra* note 107, at 139.

156. Ma, *supra* note 84.

During that same period of time, however, China has conducted military activities in the exclusive economic zones of other nations. Maritime legal scholars,¹⁵⁷ and some of China's neighbors,¹⁵⁸ have catalogued through open sources a series of PRC state actions in recent years where China's military forces have repeatedly operated in waters off the coast of third-party nations like Japan and the Philippines. These waters are the equivalent of those off the Chinese coast where the PRC has attempted to restrict the military activities of the United States and other nations. While the United States has demonstrated a consistent position of word and deed on these law of the sea issues,¹⁵⁹ the rhetoric

157. See generally Peter Dutton, *Scouting, Signaling, and Gatekeeping: Chinese Naval Operations in Japanese Waters and the International Law Implications*, CHINA MARITIME STUDIES INSTITUTE (Feb. 2009); Pedrozo, *Preserving Navigational Rights*, *supra* note 67, at 16-17.

158. See, e.g., *Defense of Japan 2010*, MINISTRY OF DEF. 61-62, http://www.mod.go.jp/e/publ/w_paper/pdf/2010/11Part1_Chapter2_Sec3.pdf ("China has been intensifying its maritime activities in recent years. With regard to activity in waters near Japan, Chinese naval vessels have been observed conducting what appeared to be exercises or information gathering activities. Chinese government ships have also been observed engaging in apparent oceanographic research within the exclusive economic zone of Japan. . . . [I]n April 2010, 10 naval vessels, including Kilo-class submarines and Sovremenny-class destroyers, passed the channel between Okinawa Island and Miyako Island and headed to the waters west of Okinotori Island, before engaging in apparent exercises. At the time, Chinese shipborne helicopters flew near the Japanese destroyers monitoring the vessels a couple of times. In addition, a submerged Chinese nuclear-powered submarine navigated in Japanese territorial waters in November 2004, breaching international law. In September 2005, it was confirmed that a total of five Chinese naval vessels, including one Sovremenny-class destroyer, were sailing near the Kashi gas field (Tianwaitian in Chinese) in the East China Sea and some of them circled around the said gas field. In October 2006, a Chinese Song-class submarine surfaced in the vicinity of the U.S. aircraft carrier *Kitty Hawk* in international waters reportedly near Okinawa.").

159. Consider two recent examples involving Russian military forces operating near the United States. In the summer of 2009, there were reports in the *Washington Post* that Russian submarines were operating off the coast of the United States. Philip P. Pan, *Russian General Calls Submarine Patrols Near U.S. East Coast Routine*, *Wash. Post*, Aug. 6, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/04/AR2009080402863.html>. In response to these Russian submarine operations, a U.S. Department of Defense spokesman said, "Did we have an indication that they were coming this way? Sure. . . . The larger question is, is it of concern to us. And the answer to that is -- no." *Id.* More recently, in the summer of 2010, the *Washington Times* reported that Russian bombers were conducting air operations over U.S. airspace. Bill Gertz, *Inside the Ring*, *WASH. TIMES*, July 7, 2010, <http://www.washingtontimes.com/news/2010/jul/7/inside-the-ring-404830028/>. In response to those Russian bomber operations, the head of U.S. Northern Command told the media, "we intercept them when we feel like we ought to, and we have various criteria that we use for that, to include just rehearsing our own skills to be able to do that. [However, in general]

of China—that foreign militaries lack the legal right to operate within China’s exclusive economic zone—is undermined by similar Chinese military activities in the exclusive economic zones of other nations. Apparently, China expects the world to do as China says, and not as China does.

E. It’s a Matter of Transparency and Maturity

“Legal transparency” is a critical principle of the rule of law, both domestically and internationally.¹⁶⁰ In the international law context, legal transparency means that the legal position of a nation on a particular issue is identified and justified; thereafter, other nations in the consent-based international legal order can consider that position and its purported justification, scrutinize it, and choose to consent or object to that position.¹⁶¹ Transparency is also related to maturity. In international relations, diplomatic or political dialogues between nations have been characterized as mature and immature, with mature political dialogues being those in which the parties move beyond rehashed talking

we just leave them alone.” *Id.* In both situations, there is no evidence to indicate that the United States diplomatically objected to these lawful military activities, or that U.S. forces reacted unsafely or unprofessionally. This demonstrates an alternative reality: that of a nation that honestly believes in its legal position on matters involving the law of the sea, and does not challenge the right of other nations to exercise those same navigational freedoms in its maritime zones.

160. U.N. Secretary-General, *Report of the Secretary General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 6, U.N. Doc. S/2004/616 (Aug. 23, 2004), available at <http://daccess-ods.un.org/access.nsf/Get?Open&DS=S/2004/616&Lang=E&Area=UNDOC> (“The rule of law is a concept at the very heart of the Organization’s mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and *legal transparency*.”) (emphasis added).

161. Because international law is a consent-based regime, nations cannot provide informed consent to the official actions of other nations if those actions and the legal justification for those actions are not transparent. In fact, that sequential process is what underlies the long-accepted concept of customary international law known as the “persistent objector.” IAN BROWNLEE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 11 (6th ed. 2003).

points.¹⁶² Similarly, in the international law context, legal dialogues between nations can also be characterized as mature and immature: mature legal dialogues are those in which all parties clearly identify their respective legal positions, justify those legal positions based upon sound legal methodology (e.g., ordinary meaning, context, negotiating history of conventions, and respect for custom), concede points of convergence, recognize points of divergence, and attempt to refute those points of divergence through sound legal methodology.¹⁶³ Ultimately, only through mutual legal transparency can nations attain mature legal dialogues in their relations with other nations. In other words, if one nation is transparent in its legal positions and justifications, but another nation chooses not to be equally transparent and instead continues to rely upon superficial rhetoric, then a mature legal dialogue between those nations becomes extremely difficult, if not impossible.

In recent years, nations such as the United States,¹⁶⁴ Australia,¹⁶⁵ Japan,¹⁶⁶ and Vietnam¹⁶⁷ have expressed concern over China's lack of

162. See, e.g., Kathrin Hille, *US Warns Over Beijing's "Assertiveness,"* FIN. TIMES, May 25, 2010, <http://www.ft.com/cms/s/0/0a97c53a-681a-11df-a52f-00144feab49a.html#axzz1jVctPVgG> (quoting Admiral Robert Willard as saying, "What was very striking yesterday was my impression of the very advanced, sophisticated and *mature dialogue* that's occurring across a wide range of subjects [at the Strategic and Economic Dialogue] between China and the US. . . . That is in contrast with a very *immature* military-to-military relationship.") (emphasis added); see also Yoichi Kato, *U.S. Commander Says China Aims to Be a "Global Military" Power*, ASAHI SHIMBUN, Dec. 28, 2010, <http://luckybogey.wordpress.com/category/travel/page/category/aviation/page/3> (quoting Admiral Robert F. Willard, Commander, U.S. Pacific Command as saying, "There is an effort on the part of the United States to engage China. I think there is an effort on the part of China to engage the United States. And I think that it's very broad. At the Strategic and Economic Dialogue that I attended with Secretary Clinton, I was struck by the very rich and *mature engagement* across many of our secretariats and many of China's ministries and the depth of commitment that they both had to their dialogue. On the military side, we're *relatively immature* and behind in our relationship, and I think it affects the perception of that strategic relationship between the two nations.") (emphasis added).

163. To illustrate the difference between mature and immature legal perspectives, consider an analogy to statutory interpretation. To a non-lawyer, a rule means what it says on its face, and nothing more. This is an immature perspective. In contrast, a seasoned lawyer can extract a deeper understanding of the meanings from that same statute, from its text, its context, its legislative history, and related case law. This is a mature perspective.

164. See, e.g., U.S. DEP'T OF DEF., ANNUAL REPORT TO CONGRESS, *supra* note 116, at I (stating that many uncertainties remain regarding how China will use its expanding military capabilities, and that China's limited transparency in its military and security affairs enhances uncertainty and increases the potential for misunderstanding and miscalculation.); see also China: Military And Security Developments: Hearing Before

“transparency” in matters involving international affairs. Similarly, on law of the sea matters, China has also demonstrated a lack of transparency. For example, after the *Impeccable* incident in March 2009, a PRC spokesman made a declarative statement that the U.S. Navy’s activities “broke international law,” but deliberately refused to provide news reporters with a transparent explanation of *how* foreign military activities in China’s exclusive economic zone violated international law.¹⁶⁸ Similarly, China unilaterally draws a nine-dash line on its South

the H. Comm. on Armed Services 111th Cong. 59 (2010) (statement of Wallace C. Gregson, Assistant Secretary of Defense, Asian and Pacific Security Affairs), http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_house_hearings&docid=f:58169.pdf (stating that the United States “remain[s] concerned over the relative lack of transparency from China into the military capabilities it is acquiring, the intentions that motivate those acquisitions, and the resources dedicated to the task”); Hillary Rodham Clinton, Secretary of State, Inaugural Richard C. Holbrooke Lecture: A Broad Vision of U.S.-China Relations in the 21st Century (Jan. 14, 2011), *available at* <http://www.state.gov/secretary/rm/2011/01/154653.htm> (“The United States and the international community have watched China’s efforts to modernize and expand its military, and we have sought clarity as to its intentions. As Secretary Gates stressed in Beijing this week, both sides would benefit from sustained and substantive military-to-military engagement that increases transparency. We need more high-level visits, more joint exercises, more exchanges from our professional military organizations, and other steps to build that trust, understanding of intentions, and familiarity.”).

165. DEP’T OF DEF. (AUSTL.), *DEFENDING AUSTRALIA IN THE ASIA-PACIFIC CENTURY: FORCE 2030*, 95 (2009), *available at* http://www.defence.gov.au/whitepaper/docs/defence_white_paper_2009.pdf (emphasizing the need for greater military-to-military engagement with China in order to “encourage transparency about Chinese military capabilities and intentions.”).

166. MINISTRY OF DEF. (JAPAN), *DEFENSE OF JAPAN 2010*, 55 (2010), *available at* http://www.mod.go.jp/e/publ/w_paper/pdf/2010/11Part1_Chapter2_Sec3.pdf (“China has not yet achieved the levels of transparency expected of a responsible major power in the international society.”).

167. Greg Terode, *A Flash of Steel and Velvet Glove From Vietnam*, *SOUTH CHINA MORNING POST*, July 29, 2010, http://viet-studies.info/kinhte/NguyenChiVinh%20_steel_and_velvet.htm (Quoting Lieutenant General Nguyen Chi Vinh, Deputy Defence Minister of Vietnam as saying, “No confidence-building measure [by the Chinese military] could be better than transparency.”).

168. Ma, *supra* note 84 (“Engaging in activities in China’s exclusive economic zone in the South China Sea without China’s permission, US navy surveillance ship *Impeccable* broke relevant international law as well as Chinese laws and regulations.”). The reporters present at the March 10th press conference immediately realized that this official statement by Mr. Ma was purely conclusory in nature. *Id.* Thus, a follow-up question was asked by a reporter that requested specificity:

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

China Sea maps and declares “indisputable sovereignty”¹⁶⁹ in the area, but refuses to officially clarify to other nations what those nine dashes specifically mean or how international law justifies them. Consequently, nations such as the United States,¹⁷⁰ Indonesia,¹⁷¹ and Singapore¹⁷² have called upon China to be transparent and clarify its claim in the South China Sea.

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

Id. Mr. Ma’s non-discussion of the law avoided specificity at the outset, and when questioned thereafter, he referred back to the previous statements of non-specificity. *Id.* The reporters present were still not satisfied with this superficial response on the law, as indicated by a second follow-up question, again requesting specificity:

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

[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.

Id. Here again, Mr. Ma implied that the rules of law in UNCLOS are so clear on their face that the reporters should be able to see that China is correct, merely by reading the Convention’s text. Through all of these statements, however, China never specified which provision of international law restricted the *Impeccable*’s right to operate in these waters beyond China’s territorial seas. *Id.* Moreover, China failed to specify which rule of international law gave it the authority to require the *Impeccable* to seek and receive China’s permission prior to conducting operations beyond its territorial seas. *Id.*

169. Letter from Permanent Mission to the United Nations (Indon.) to Ban Ki-moon, Secretary General, United Nations (July 8, 2010), *available at* http://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/idn_2010re_mys_vnm_e.pdf [hereinafter Letter from Permanent Mission].

170. *See* Maritime Disputes and Sovereignty Issues in East Asia: Hearing Before the S. Subcomm. on E. Asian and Pac. Affairs, 111th Cong. (2009) (statement of Scot Marciel, Deputy Assistant Secretary, Bureau of East Asian and Pacific Affairs), *available at* <http://www.foreign.senate.gov/imo/media/doc/MarcielTestimony090715p1.pdf>.

171. *See* Letter from Permanent Mission, *supra* note 169.

172. *Comments in Responses to Media Queries*, MINISTRY OF FOREIGN AFFAIRS, SINGAPORE (June 20, 2011), http://app.mfa.gov.sg/2006/press/view_press.asp?post_id=7070.

Unfortunately, China has not explained its lack of transparency on these law of the sea matters. China might still be learning how to fit into the existing international legal order after opting out of it for many years.¹⁷³ Alternatively or additionally, China might be afraid of revealing or conceding the weakness of its legal positions.¹⁷⁴ Regardless of China's reasons, it is impossible for nations to engage China in mature legal dialogue when it refuses to reciprocate the transparency of legal positions and justifications provided by nations like the United States on law of the sea matters.¹⁷⁵ Yet transparency and mature dialogue by all

173. In the fall of 2010, the late Professor Jon Van Dyke of the University of Hawaii's William S. Richardson School of Law hosted a South China Sea workshop that included a group of Chinese legal scholars and which this author attended. During an informal lunch at the workshop, the author asked one of the Chinese scholars—who was a “visiting scholar” from China's Ministry of Foreign Affairs—why Chinese scholars repeatedly state that the nine-dash line *could have* one of several meanings, but China's Government continues to refrain from stating the true meaning of the line. After a little back and forth discussion, he finally asked, “What do *you* think would be a reasonable meaning of the line?” The author's response: “That's not how international law works. Rather, your government has to explain the line, justify it under the established international law regime, and then other nations in the world will consider that explanation and justification, and take a position on it.” In reality, that is the way the international legal order has functioned for many years, and that is the way the world should insist it continue to function—in the interest of stability and transparency in international rule of law.

174. The question should be asked: Why does China's Government refuse to be more transparent on stating the meaning of and providing legal justification for state actions, such as drawing its nine-dashed line in the South China Sea? To answer this question, we should consider a common refrain of China's reluctance to be more transparent about its military in general as a possible mindset for their reticence to be more transparent in international law matters. See, e.g., Lu Yin, *Relativity of Military Transparency*, CHINA DAILY (P.R.C.), Oct. 29, 2009, http://www.chinadaily.com.cn/opinion/2009-10/29/content_8865633.htm (“[T]ransparency has also become an instrument of the strong to exert pressure on the weak. Obviously, transparency is in favor of the strong, as deterrence. For the weak, transparency means revealing weaknesses and becoming more vulnerable.”) In the context of legal transparency, perhaps China is concerned that if it tries to provide a detailed explanation and justification for such tenuous legal positions like its purported restriction of its exclusive economic zone or its nine-dash line claim, such transparency will “reveal weakness” and its rhetorical house of cards will quickly collapse.

175. The United States supports transparency about matters involving international law, including the law of the sea. See, e.g., Clinton, UNCLoS Transmittal, *supra* note 67; MARITIME CLAIMS REFERENCE MANUAL, *supra* note 73; U.S. DEP'T OF DEFENSE, ANNUAL REPORTS OF FREEDOM OF NAVIGATION OPERATIONAL ASSERTIONS: FISCAL YEARS 2000-2010, available at <http://policy.defense.gov/gsa/cwmd/fon.aspx>; U.S. DEP'T. OF NAVY ET AL., NWP 1-14 M, COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS (2007), available at <http://www.usnwc.edu/getattachment/a9b8e92d-2c8d->

nations is essential to the functioning of the existing international legal order. Therefore, the world should insist that China demonstrate genuine support for the established international legal order, by improving its transparency and openness on law of the sea matters.

F. It's Also a Matter of Trust

Candor is also a fundamental prerequisite of any mature legal dialogue. For example, consider what the ethical rules and codes of professional conduct require from practicing attorneys. Lawyers shall never make false or incorrect statements of fact or law to a judge or tribunal.¹⁷⁶ Lawyers shall never make false or incorrect statements of fact or law to a third party.¹⁷⁷ They shall never induce or assist their

4779-9925-0defea93325c/1-14M_(Jul_2007)_(NWP).pdf [hereinafter U.S. DEP'T OF NAVY ET AL., COMMANDER'S HANDBOOK].

176. For the rule of professional conduct of U.S. attorneys that requires candor to a tribunal, *see, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.3(a), *available at* http://www.abanet.org/cpr/mrpc/rule_3_3.html ("A lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer."). For rules of professional conduct for attorneys appearing before international tribunals, *see, e.g.*, CODE OF PROF'L CONDUCT FOR COUNSEL, INT'L CRIM. CT. art. 24(3), *available at* http://www.icc-cpi.int/NR/rdonlyres/BD397ECF-8CA8-44EF-92C6-AB4BEBD55BE2/140121/ICCASP432Res1_English.pdf ("Counsel shall not deceive or knowingly mislead the Court. He or she shall take all steps necessary to correct an erroneous statement made by him or her or by assistants or staff as soon as possible after becoming aware that the statement was erroneous."); *id.* art. 25(1) ("Counsel shall at all times maintain the integrity of evidence, whether in written, oral or any other form, which is submitted to the Court. He or she shall not introduce evidence which he or she knows to be incorrect."). *See also* CODE OF PROF'L CONDUCT FOR COUNSEL APPEARING BEFORE THE INT'L TRIBUNAL, INT'L CRIM. TRIBUNAL FOR FORMER YUGOSLAVIA, art. 23(B), *available at* http://www.icty.org/x/file/Legal%20Library/Defence/defence_code_of_conduct_june2006.pdf; *id.* art. 23(2) ("Counsel shall not knowingly: (i) make an incorrect statement of material fact or law to the Tribunal; or (ii) offer evidence which counsel knows to be incorrect."); *id.* art. 23(D) ("Counsel shall take all necessary steps to correct an incorrect statement of material fact or law by counsel in proceedings before the Tribunal as soon as possible after counsel becomes aware that the statement was incorrect."). Interestingly, the International Tribunal for the Law of the Sea has not adopted a code or rules of professional conduct for attorneys appearing before the Tribunal. *See* Laurel S. Terry, Codes of Conduct for International Tribunals and Arbitration (May 11, 2009), *available at* http://www.personal.psu.edu/faculty/l/s/lst3/presentations%20for%20webpage/ASIL_Terry_Codes_International_Tribunals.pdf.

177. MODEL RULES OF PROF'L CONDUCT R. 4.1, *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_4_1_truthfulness_in_statements_to_others ("In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of

client or witnesses to make false statements.¹⁷⁸ They shall never falsify evidence.¹⁷⁹ More generally, they shall not “engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”¹⁸⁰ Therefore, as critical as transparency might be in fostering a mature legal dialogue, honesty and truthfulness on matters of fact and law are equally important¹⁸¹ to ensure that a legal dialogue is mature. Candor, honesty and truthfulness by the attorneys and other representatives of parties will foster trust between the parties; likewise, deception and misleading statements of fact and law by representatives can perpetuate mistrust between nations.

In recent years, the United States¹⁸² and China’s neighbors¹⁸³ have expressed concerns about trusting China on matters of international affairs as well as law of the sea matters. While some in China allege that the United States and other nations attempt to plant “seeds of distrust,”¹⁸⁴

material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.”).

178. MODEL RULES OF PROF’L CONDUCT R. 3.4(b) (“A lawyer shall not . . . falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law.”).

179. *Id.*

180. *Id.* at 8.4(c) (“It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”).

181. At the outset of their legal education, practicing lawyers learn that deceiving the judge about the facts or the law of the case at hand is a cardinal sin—it destroys your credibility before the tribunal and will not be easily forgotten. See JAMES W. MCELHANEY, MCELHANEY’S LITIGATION 12 (1995) (“Nothing devastates your credibility more than looking like you deliberately created a false impression.”).

182. See, e.g., U.S. DEP’T OF DEFENSE, ANNUAL REPORT TO CONGRESS ON MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE’S REPUBLIC OF CHINA I (2010), <http://www.defense.gov/pubs/pdfs/070523-china-military-power-final.pdf> (“Sustained and reliable U.S.-China military-to-military relations support this goal by *reducing mistrust*, enhancing mutual understanding and broadening cooperation.”) (emphasis added).

183. *Asia’s Mistrust of China: Fear of Beijing is Based On Its Past Behavior and Strategic Culture*, WALL ST. J., July 22, 2011, <http://online.wsj.com/article/SB10001424053111903461104576459660040607374.html>.

184. These “seeds of distrust” appear to be a common refrain when Beijing wishes to cast blame on the United States for any problems of trust arising in international relations with China. See, e.g., *Strategic Trust Needed*, CHINA DAILY, Jan. 11, 2011, http://www.chinadaily.com.cn/opinion/2011-01/11/content_11823273.htm (“The US arms sales to Taiwan, which have been ongoing for more than 30 years, are the biggest impediment, but intensive reconnaissance and surveillance of the Chinese mainland from the South China Sea and East China Sea and Washington’s growing penchant for

the reality is that China's own actions provide "fertile ground" for other nations to mistrust China.¹⁸⁵ The rhetoric employed by the PRC Government in ongoing law of the sea disputes provides ample cause for mistrust; it has been deficient on both statements of fact and statements of law.

Some of the PRC's statements of material facts pertaining to incidents involving the law of the seas have been inaccurate. For example, after the *Impeccable* incident of March 2009, a PRC spokesman characterized the U.S. factual account of the incident as "flatly inaccurate," "gravely in contravention of the facts," "groundless accusations," and ultimately "sheer lies."¹⁸⁶ These rhetorical characterizations, however, were soon refuted by a series of photographs¹⁸⁷ and video clips¹⁸⁸ taken during the incident that corroborated the U.S. account. Similarly, after the December 2010

projecting its military power in the Asia Pacific have also sowed the seeds of distrust between the two militaries.").

185. *They Have Returned: China Should Worry Less About America's "Containment" Strategy and More About Why the Neighbours Welcome It*, THE ECONOMIST, Aug. 12, 2010, <http://www.economist.com/node/16791842>.

186. Ma, *supra* note 84; *China Lodges Representation as U.S. Naval Ship Breaks Int'l, Chinese Laws*, XINHUA GENERAL NEWS SERV., Mar. 11, 2009, http://news.xinhuanet.com/english/2009-03/11/content_10990180.htm; *Defense Ministry Urges U.S. to Respect China's Security Concern*, XINHUA NEWS AGENCY, Mar. 11, 2009, http://news.xinhuanet.com/english/2009-03/11/content_10994295.htm; Regular Press Release, Spokesman of Ministry of Foreign Affairs Qin Gang (Mar. 25, 2009), *available at* <http://www.fmprc.gov.cn/eng/xwfw/s2510/2511/t553628.htm>.

187. *Chinese Vessels Shadow, Harass Unarmed U.S. Surveillance Ship*, NAVY.MIL, (Mar. 9, 2009), http://www.navy.mil/view_single.asp?id=69478 (photo depicting the Chinese vessels accompanying article).

188. Periodicvideo, *Chinese Ships Approach USNS Impeccable RAW*, YOUTUBE (Mar. 8, 2009), <http://www.youtube.com/watch?v=G59796asqIs> (last visited Mar. 26, 2010); Periodicvideo, *Chinese Ships Approach USNS Impeccable RAW # 2*, YOUTUBE (Mar. 8, 2009), <http://www.youtube.com/watch?v=F8nZjDrj4qY> (last visited Mar. 26, 2010); Periodicvideo, *Chinese Ships Approach USNS Impeccable RAW # 3*, YOUTUBE (Mar. 8, 2009), <http://www.youtube.com/watch?v=Dn4mPtIjEY> (last visited Mar. 26, 2010); Periodicvideo, *Chinese Ships Approach USNS Impeccable RAW # 4*, YOUTUBE (Mar. 8, 2009), <http://www.youtube.com/watch?v=aBBwr6EQAYc> (last visited Mar. 26, 2010); Periodicvideo, *Chinese Ships Approach USNS Impeccable RAW # 5*, YOUTUBE (Mar. 8, 2009), <http://www.youtube.com/watch?v=9SyTz4q2r5k>; Periodicvideo, *Chinese Ships Approach USNS Impeccable RAW # 6*, YOUTUBE (Mar. 8, 2009), <http://www.youtube.com/watch?v=6e55hrHZLm8> (last visited Apr. 18, 2012); Periodicvideo, *Chinese Ships Approach USNS Impeccable RAW # 7*, YOUTUBE (Mar. 8, 2009), http://www.youtube.com/watch?v=ye-BEi5_QC8 (last visited Apr. 18, 2012); Periodicvideo, *Chinese Ships Approach USNS Impeccable RAW # 8*, YOUTUBE (Mar. 8, 2009), <http://www.youtube.com/watch?v=J7D-Kfza58s> (last visited Apr. 18, 2012).

collision between a PRC-flagged fishing vessel and a ROK Coast Guard vessel, a PRC spokesman called upon the ROK to “punish [ROK Coast Guard] perpetrators to the full extent of law,” “make compensation for the loss of our crew and property,”¹⁸⁹ and “take concrete measures to prevent reoccurrences of such incidents.”¹⁹⁰ Here again, this PRC rhetoric regarding the ROK’s alleged culpability was refuted when the Chinese fishermen confessed¹⁹¹ to intentionally colliding with the ROK Coast Guard vessel and the ROK released video evidence of the incident that “showed a brawl in which iron pipes were used as weapons by fishermen.”¹⁹² In both situations, the rhetoric employed by China after these incidents was subsequently undermined by evidence of what really happened.

Additionally, China has also made misleading statements of law on these matters. In legal arguments, lawyers must disclose legal authorities that are “directly adverse” to their client’s case.¹⁹³ On matters of international law like the law of the sea, this includes not using the words and phrases within treaties and conventions out of context.¹⁹⁴ Contrary to that expectation, China’s standard approach to the law is to “assembl[e] . . . legal clauses to frame . . . political arguments and . . .

189. *China Demands Compensation over Collision in Yellow Sea*, KYODO NEWS INTERNAT’L, Dec. 27, 2010, http://www.breitbart.com/article.php?id=D9K87Q380&show_article=1.

190. Regular Press Conference, Ministry of Foreign Affairs Spokesman (Dec. 22, 2010), available at <http://www.fmprc.gov.cn/eng/xwfw/s2510/t780909.htm>.

191. *S. Korea Releases 3 Chinese Fishermen Without Indictment*, KYODO NEWS INT’L, Dec. 27, 2010, http://www.breitbart.com/article.php?id=D9KAMQE81&show_article=1 (“During questioning by the South Korean Coast Guard, the three Chinese fisherman admitted that their ship intentionally collided with the patrol boat to prevent it from tracking another Chinese fishing vessel.”).

192. *S. Korea Releases Chinese Fishermen*, UNITED PRESS INT’L, Dec. 25, 2010, http://www.upi.com/Top_News/World-News/2010/12/25/S-Korea-releases-Chinese-fishermen/UPI-57581293286587/.

193. See MODEL RULES OF PROF’L CONDUCT R. 3.3 cmt. 4 (2010) noting that:

A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore...an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

194. Vienna Convention, *supra* note 26, at art. 31(1) (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty *in their context* and in the light of its object and purpose.”) (emphasis added).

propaganda campaign[s].”¹⁹⁵ For example, China argues to the world that foreign military activities in its exclusive economic zone violate UNCLOS because they are not, in China’s view, a “peaceful use” of the ocean or intended for a “peaceful purpose.”¹⁹⁶ This stance, however, takes these two phrases out of their appropriate context within UNCLOS,¹⁹⁷ as those phrases also apply to the high seas, and the negotiators of UNCLOS clearly had no intent of demilitarizing the oceans of the world.¹⁹⁸ Additionally, China has argued that foreign military activities in its exclusive economic zone are illegal because they threaten the coastal state’s environment.¹⁹⁹ This position, however,

195. See, e.g., JAMES MCGREGOR, *ONE BILLION CUSTOMERS: LESSONS FROM THE FRONT LINES OF DOING BUSINESS IN CHINA* 150-151 (2005) (McGregor recounts his negotiations with China’s official news service *Xinhua* and the Chinese Government for access to reporting financial news in China. McGregor identified a classic Chinese bargaining technique:

We also used the law as a political weapon, just as the Communist Party does. We searched through international and domestic statutes and trade pacts to find language we could turn into noble weapons that put us on the side of the angels [W]e weren’t building a legal case. We didn’t have a clear one. Instead, we used this assemblage of legal clauses to frame our political arguments and our propaganda campaign.

196. See Ren & Cheng, *supra* note 107, at 142-144.

197. UNCLOS, *supra* note 25, at arts. 88, 301. The reference to “peaceful uses” in Article 301, however, is not within the text of the article, but rather the title of the article itself.

198. Bernard Oxman, *The Regime of Warships Under the United Nations Convention on the Law of the Sea*, 24 VA. J. INT’L L. 809, 831-832 (1984)

If there is anything that is clear from the legislative record of the Conference on the Law of the Sea, it is that one of the primary motivations of the major maritime powers in negotiating a new Convention was to protect the broadest possible freedom to conduct military activities at sea. It is unlikely that they would have agreed to legal restraints on those very activities without significant negotiation and detail.

See also George V. Galdorisi & Alan G. Kauffman, *Military Activities in the Exclusive Economic Zone: Preventing Uncertainty and Defusing Conflict*, 32 CAL. W. INT’L L.J. 253, 294 n.238.

[T]he Chinese analysis is “based on a flawed understanding of the meaning of article 301 of the United Nations Convention on the Law of the Sea by which the writer inflates the meaning of article 58 to include security concerns. . . . Taken to its logical conclusion, the argument would exclude the operation of warships and military aircraft everywhere, even on the high seas.”

Id. (quoting Ivan Shearer, *Military Activities in the Exclusive Economic Zone: The Case of Aerial Surveillance*, 17 OCEAN Y.B. 548, 560-61 (2003))

199. See Ren & Cheng, *supra* note 107, at 140; see also Zuoping, *supra* note 87, at 2 noting that UNCLOS

ignores the “directly adverse” provision of UNCLOS that expressly exempts sovereign immune vessels, including warships, from compliance with coastal states’ environmental regulations that govern their exclusive economic zones.²⁰⁰

V. RHETORIC AS A CAUSE FOR CONCERN

Rhetoric is “the art of speaking or writing effectively.”²⁰¹ Effectiveness is not synonymous with accuracy or truthfulness. Rather, words or actions are effective if they produce a desired or intended effect. Therefore, in assessing whether China’s use of rhetoric is effective, we must consider the desired or intended effect of its rhetoric. At its core, the purpose of China’s rhetoric on law of the sea matters is the same as that behind China’s employment of “legal warfare” in the law of the sea—using domestic and international law to restrain the activities of other nations by shrinking their political and physical space.²⁰²

Should China’s use of such rhetoric worry other nations? Perhaps it is true that a nation’s use of words has no tangible effect and that only actions pose a risk to international security and stability, but should the world dismiss China’s rhetoric on law of the sea matters as “just words” that pose no risk to the community of nations?

By its nature, laws—be they domestic or international, conventional or customary—are composed of words. Anyone who assumes that rules of law are “just words” need only consider the actions that domestic statutes and international conventions authorize or limit, as well as the consequences for violating laws such as criminal statutes. Likewise, statements of law and interpretations of law must be accurate and grounded in accepted legal methodology. For example, conventions

indeed stipulates that countries have navigation rights in other countries’ EEZs. But the convention also states that a coastal country has sole ownership of the biological and non-biological resources inside its EEZs, as well as sovereign rights of exploitation, exploration, maintenance and management. A coastal country can also enact its own laws to prevent, control and reduce pollution. These navigation rights refer to ‘innocent passage,’ on which point the U.S. Navy obviously cannot stand. Therefore, it is necessary and perfectly justifiable for China to dispel U.S. Navy surveillance ships from its EEZs to protect its marine environment and resources.

200. UNCLOS, *supra* note 25, at art. 236. *See also* Oxman, *supra* note 198, at 820.

201. *Rhetoric Definition*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/rhetoric> (last visited Apr. 18, 2012).

202. *See supra* Part III.A.

such as UNCLOS must be read with the aid of established rules of interpretation, such as respecting the ordinary meaning, the context, and the drafters' intent of the words contained in those rules of law. Additionally, the rules of customary law should be respected as much as those of conventional law, even if a particular nation did not participate during the period when the law developed. If a particular nation manipulates the rules of a convention or ignores the long-standing customs and practices of nations, that is not simply a harmless matter of "just words." Instead, such "verbal acts"²⁰³ of official statements and interpretations of international law are forms of state action that are intended to have a negative effect on an international legal regime and the existing international order.

When the realities of the law of the sea are compared to China's rhetoric, it appears that modern China behaves as if the world is stuck in an international version of "Groundhog Day,"²⁰⁴ where nations are unaware of yesterday or tomorrow in the international legal order and where the actions of one nation (i.e., China) have no long-term consequences. PRC rhetoric undervalues the significance of centuries of state practice, disregards the history of treaty negotiations under UNCLOS, and ignores the fact that China voluntarily acceded to the treaty with few written declarations, none of which interpreted the exclusive economic zone concept in the manner China seeks to now. It is not realistic for China to operate as if the nations of the world live only in the here and now, where the law stands still in deference to a rising China.

On the contrary, the other nations of the world know that the existing international legal order and system, including the law of the sea, does not function in that way. In terms of conventional law, a convention that was deliberately negotiated and concluded by more than one hundred nations three decades ago still matter. In terms of customary international law, the practices of states over a period of decades—and even centuries—still matter. Actions, as well as inactions, by nation-states have consequences. PRC's deliberate decision to largely isolate itself for the first several decades of its existence, while the body of international law continued to develop, is now resulting in conflict between the realities of current international law and PRC's interests.

203. The concept of "verbal acts" is manifested in various subspecialties of law (e.g., contract law, rules of evidence), and focuses on how some verbal statements should be construed as actions.

204. For a synopsis of the movie, see *Plot Summary for Groundhog Day*, IMDB.COM, <http://www.imdb.com/title/tt0107048/plotsummary> (last visited Mar. 21, 2012).

Plain and simple, international law was not born when the PRC started to care about it.

As discussed, China's rhetoric does not fully match up with the reality of international law. Moreover, there is not merely one disconnect between over what the international law of the sea says versus what China wishes it said. Rather, there are many disconnects. For this reason, the only reasonable answer to the Mederios question whether China accepts or seeks to rewrite the prevailing rules of the law of the sea is: China does not accept the prevailing rules of the international law of the sea, instead China seeks to rewrite them.

The effect of that conclusion should be concerning to the world. China's efforts jeopardize the entire UNCLOS regime, which took nearly a decade to negotiate and has been ratified by 162 of the 192 nations of the world.²⁰⁵ The legal regime reflected in UNCLOS was a grand bargain between all of the states, the United States and China among them, who had a seat at the bargaining table during those ten plus years of peaceful and deliberate negotiations. Like any bargain, no nation at the UNCLOS negotiations received everything it wanted. At the final session in Montego Bay in December 1982, Ambassador Tommy Koh from Singapore identified several common observations shared among the negotiators that highlight the nature of the bargained deal. One observation was that no individual nation was "fully satisfied" with the UNCLOS bargain as it was structured to accommodate competing interests.²⁰⁶ Another observation was that UNCLOS was a "package" deal where nations were not allowed to selectively follow certain provisions and disregard others.²⁰⁷ In short, no compromise is perfect. But, as pointed out by Ambassador Koh, these compromises are the strengths, not weaknesses, of the Convention.²⁰⁸

Many of the points about the law of the sea that China seeks to raise now were addressed at previous negotiating conferences where China had an opportunity to press its views. However, the majority view prevailed and China's position on many of these issues was rejected.²⁰⁹ Thus, if China is permitted to ignore the realities of the international law

205. For a list of the 162 nations that have acceded to UNCLOS, see U.N. Div. for Ocean Affairs and Law of the Sea, *supra* note 87.

206. See generally Ambassador Tommy T.B. Koh, President, Third U.N. 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.

207. *Id.*

208. *Id.* at xxxvii.

209. See, e.g., Oxman *supra* note 198, at 831-832 (discussing the freedom of military navigation).

of the sea—including the ordinary meaning, context, and intent of these UNCLOS’s rules—then nothing prevents other nations from emulating China’s rhetorical approach of selective compliance in the name of imperfections, drawbacks, or shortcomings,²¹⁰ potentially undermining almost ten years of extensive multilateral negotiations and possibly jeopardizing the UNCLOS regime. Such noble-sounding rhetoric ignores the reality that no treaty or convention can ever be perfected. The only way a treaty can be perfected is when one nation receives everything it wants and then it is only perfect for that nation—which sounds a lot like the “unequal treaties” of the nineteenth century which the China has scorned for nearly a century.

VI. WAYS CHINA CAN REASSURE THE WORLD

Actions and inaction by nation-states do have consequences. Accordingly, the reader might ask: What specifically could China do, or abstain from doing, to yield a positive result in its relations with other nations in regard to the law of the sea? Several suggestions follow.

First, China’s Government could make better efforts to publish its official legal interpretations and manuals on international law, including those focused on the law of the sea. By comparison, the U.S. Government has been transparent for decades in its interpretation of various matters of international law, including the law of the sea.²¹¹ The U.S. Government has effectuated such transparency by publishing its legal positions and explanations and widely disseminating those materials on the internet for the world to see.²¹² For example, documents such as the 1994 Transmittal Package that President Clinton submitted to the U.S. Senate regarding the ratification of UNCLOS included a forty-seven-page, section-by-section “Commentary” of analysis and interpretation of the convention.²¹³ The Chinese Government, however,

210. UNCLOS is not the first law of the sea convention that China has criticized as flawed. See GREENFIELD, *supra* note 78, at 55 (“In a statement calling for a new and comprehensive convention to meet current needs, Chinese delegate Shen Wei-Liang said of the Convention on the Territorial Sea and the Contiguous Zone that it contained many unjustifiable provisions, which only served to preserve certain interests.”).

211. See generally Carl-Sebastian Zoellner, *Transparency: Analysis of an Evolving Fundamental Principal of International Economic Law*, 27 MICH. J. INT’L L. 579, 594 (2006).

212. See, e.g., U.S. Dep’t of State, *Major State Dep’t Publications*, U.S. DEP’T OF STATE, <http://www.state.gov/r/pa/ei/rls/dos/221.htm> (last visited Apr. 22, 2012) (providing a directory of State Department papers).

213. See Clinton, UNCLOS Transmittal, *supra* note 67.

has not released any similar materials pertaining to its deliberations on and accession to UNCLOS in 1996. If such documents exist, China should consider releasing these legal analyses to the public.²¹⁴

The United States has also disseminated publications providing the U.S. perspective on a wide range of international law issues, such as the *U.S. Navy's Commander's Handbook on the Law of Naval Operations*, a recurring twelve-chapter publication that includes four chapters focused on the law of the sea.²¹⁵ The U.S. Navy has also published an *Annotated Supplement to the Commander's Handbook* that provides specific citations to the legal and policy authorities from which its assertions or interpretations are derived.²¹⁶ Additionally, the U.S. Navy has made strides toward increasing the worldwide accessibility of the Commander's Handbook—a Spanish translation of the handbook is currently available²¹⁷ and there are plans to translate it further into other languages.²¹⁸ Admittedly, the PLA should be commended for publishing some manuals like *Basics of International Law for Modern Soldiers*.²¹⁹ But more is needed—similarly detailed annotations and translations of PLA manuals like *Basics of International Law for Modern Soldiers* would aid outsiders in better understanding China's legal positions.

Second, China's Government could join the peaceful and professional efforts of the United States to challenge the excessive maritime claims of other nations; it is in China's long-term interest to help preserve the rights, freedoms, and uses of the sea around the world. As previously discussed in Part III.B of this Comment, the United States routinely issues diplomatic protests and conducts operational assertions against improperly drawn straight baselines, restrictions on the navigational right of innocent passage, unpermitted security restrictions on contiguous zones, and non-economic restrictions on exclusive economic zones. As China's PLA Navy continues to operate more

214. As the Author is unable to read Mandarin Chinese this criticism may be unfounded or inaccurate. If any reader is aware of resources on law of the sea matters that have been published by China's government, it is respectfully requested that the reader inform this Author at the email address provided at the outset of the article.

215. U.S. DEP'T OF NAVY ET AL., *COMMANDER'S HANDBOOK*, *supra* note 175.

216. *ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS* (A. R. Thomas & James C. Duncan, eds. 1999), *available at* <http://www.usnwc.edu/Research---Gaming/International-Law/RightsideLinks/Studies-Series/documents/Navel-War-College-vol-73.aspx>.

217. *LEY DE OPERACIONES NAVALES MANUAL DEL COMANDANTE (2007)*, *available at* [http://www.usnwc.edu/getattachment/f267a652-85d9-4fa9-b959-2665b61a0d32/NWP-1-14M-\(Spanish\)1](http://www.usnwc.edu/getattachment/f267a652-85d9-4fa9-b959-2665b61a0d32/NWP-1-14M-(Spanish)1).

218. ROACH & SMITH, *supra* note 67, at 257.

219. *BASICS OF INTERNATIONAL LAW FOR MODERN SOLDIERS*, *supra* note 108.

globally, it could send a constructive message to other nations that China respects international law by peacefully and professionally challenging excessive maritime claims that contravene international law. At the same time, however, China's Government would need to reexamine its own excessive maritime claims. China must either rescind or modify those claims, or at least make honest efforts to justify them under international law in an open and detailed fashion.

Third, the Chinese Government should go "on the record" and specifically explain its legal positions on many of the contested issues of international law, including those involving the law of the sea. Admittedly, China has made some efforts in the past ten years to be more transparent on some legal matters. For example, the *Chinese Journal of International Law* includes not only law review articles by Chinese academics, but also occasionally public statements by PRC officials on matters involving international law as well as annual summaries of China's practice in public international law.²²⁰ Official analyses or interpretations by the Chinese Government on issues like the purported authority to restrict military activities in its exclusive economic zone or the actual meaning and legal justification of its nine-dash line in the South China Sea would be a valuable overture to the global community and would demonstrate that China honestly believes that international law supports its position and that China is not being intentionally vague in order to hide the weaknesses of its legal arguments. Additionally, China could make efforts to gather and publish its nation's practices in a public international law journal. But because this did not occur prior to the inaugural publication of the *Chinese Journal of International Law* in 2001, foreign nations have neither an understanding nor appreciation for what customary international law developed in China prior to that year.

Fourth, the Chinese Government should consider abandoning tenuous legal arguments. When Chinese officials and academics take clauses of treaties out of context, ignore the negotiating history of treaties, or disregard a consensus view, China loses credibility with the global community. That loss of credibility occurs not only with the specific issue at hand, but also with respect to China's overall standing as a nation that claims to respect and strictly comply with international law. An effective trial advocate knows that successful advocacy for one's client means picking one's battles—that is, refraining from making every possible argument. Similarly, a rising China should be confident enough

220. See *About this Journal*, CHINESE J. INT'L L., http://www.oxfordjournals.org/our_journals/cjilaw/about.html (last visited Feb. 17, 2012).

to admit that the existing state of international law on a particular point is not on China's side.

Fifth, the Chinese Government should consider doing "over the table" what it is apparently attempting to do "under the table"—namely, changing the final text of UNCLOS. As previously discussed, the Convention expressly allows state parties to propose amendments. Because China admitted before the ink fully dried on the 1982 text that the Convention was "imperfect" and had "serious drawbacks,"²²¹ China would be well within its rights as a state party to propose amendments to correct the perceived imperfections. Although other state parties might not support China's proposed amendments, they would at least respect China for adhering to the procedural rule of law established in this international legal regime.

Sixth, the Chinese Government should consider expressing its disfavor of other nation's actions solely as a matter of policy, rather than as a matter of law. Without mischaracterizing the lawful activities of other nations as illegal and undermining China's credibility within the existing international legal order, China could diplomatically encourage other nations to modify their behavior, with the caveat that both sides should enter into any bilateral understandings voluntarily, absent undue pressure or coercion from China's economic or military power. Moreover, the fact that China approaches another nation to reach such a common understanding does not mean that the other nation should, must, or will agree to do so.²²² Regardless, the risk that China might fail to persuade another nation to reach such a bilateral diplomatic

221. See Gao, *supra* note 78, at 277.

222. See generally Patrick J. Neher et al., *In Defense of High Seas Freedoms*, RSIS COMMENTARIES, Mar. 24, 2009, <http://www.rsis.edu.sg/publications/Perspective/RSIS0312009.pdf>, stating that:

From the Chinese perspective, when they asked the US to stop surveillance activities in the East and South China Seas and the US refused, it signified a lack of respect. The irony, of course, is that there is no surer sign of greatness in a nation or its Navy than to acknowledge and accept the exercise of navigational rights and freedoms by others. But why shouldn't the US curtail its military activities in and above the Chinese EEZ, in the interests of comity?

The answer is two-fold. First, it is an exceedingly thin line between comity and acquiescence to an excessive claim. Second, the navigational rights and freedoms established in the law of the sea are fundamental to the maintenance of public order and the development of international trade upon which depends our shared economic prosperity. As China expands its naval capability, we hope it will join other nations of the world as guarantors of freedoms of the seas.

understanding should not cause China to continue its self-discrediting rhetoric of assembling legal clauses to make political arguments.

VII. CONCLUSION

As a subspecialty of international law, the same rules of interpretation and modification and processes of development that apply to international law also apply to the law of the sea. Pursuant to those rules and processes, a robust legal regime for the law of the sea has been developed; yet many of the existing realities of the law of the sea do not align with China's desires. While China could have opted otherwise, it voluntarily chose to join UNCLOS in 1996 without simultaneously exercising its right to enter Declarations on some of the provisions of UNCLOS. Rather than attempting to invalidate or unilaterally withdraw from UNCLOS, China appears to be addressing these disconnects through other means. Specifically, China has employed a robust rhetoric on law of the sea matters—rhetoric which appears to be consistent with the existing international legal order, but which actually questions that order.

The flaws in China's rhetoric on law of the sea matters are significant. China's rhetoric is inconsistent with what China is saying to internal audiences; it ignores the reality that the United States has valued and upheld the rights, freedoms, and uses of the sea guaranteed to all nations under international law; it disregards the reality that China poses a substantial risk to freedom of navigation, holding a "full house" of excessive claims in every possible maritime zone; it overlooks the reality that China has conducted and continues to conduct similar military activities in the exclusive economic zones of other nations; it exhibits a lack of transparency; and has also been less than trustworthy on statements of fact about recent incidents and misleading on citations to law.

Some observers might consider China's use of rhetoric to be "just words" with no actual effect. But the reality is that this use of rhetoric is state action and can have negative effects, especially given that the goal of using legal rhetoric is to appear in compliance with an existing law, while actually exploiting that law by unilaterally changing it to the user's benefit or advantage. The potential second and third order effects are troubling. If a nation such as China is allowed to play "fast and loose" with the standards and terminology of the established legal order, then other nations in the world might follow that negative example. This

could result in an “arms race”²²³ of legal warfare—where rival nations increase the quantity or quality of legal restraints in attempts to deter, deny, or dominate rival nations. The innocent victim or collateral damage in such legal warfare is the rule of law itself. Bodies of law, such as that reflected in UNCLOS, were the product of years of intense, but peaceful, negotiations by many nations. Hence, the world cannot afford to allow one nation, or a handful of nations, to disregard their legal obligations merely because it is not “perfect” in their self-interested eyes. Despite China’s highly-concerning use of rhetoric on law of the sea matters, there are ways that China could reassure the world in the immediate future that it does, in fact, respect international law, including the law of the sea.

Ultimately, representatives and supporters of China might take umbrage with one or more assertions throughout this Article. The response to such umbrage is this: Alternative views from China are welcome and encouraged—so long as they provide specific disagreements and detailed law-based explanations, instead of simply providing more rhetorical and recycled platitudes. Only then can any legal discussion, official or otherwise, advance beyond recurring talking points toward a truly “mature” dialogue.

At the same time, those in China must understand and appreciate that the truth of the assertions in this Article are, to some extent, immaterial. In other words, the legal advisors in China’s Government might very well have developed and already possess on file detailed analysis underlying their legal conclusions on some of its law of the sea issues. Trust, and more importantly, mistrust is often a matter of perception. If China continues not to share its legal analysis of international law issues

223. See, e.g., Bradford A. Lee, *Arms Race*, HISTORY.COM, <http://www.history.com/topics/arms-race> (last visited Feb. 9, 2012).

Over the past century, the arms race metaphor has assumed a prominent place in public discussion of military affairs. But even more than the other colorful metaphors of security studies—balance of power, escalation, and the like—it may cloud rather than clarify understanding of the dynamics of international rivalries. . . . A close examination of the historical evidence reveals a different picture. Political purposes almost always drive and govern arms races. It is common for a major race to be initiated by a state interested in changing the political status quo. In some cases, the response of states content with the status quo is swift and resolute, but in other cases it is constrained by domestic political or economic considerations or diverted by diplomatic calculations. The course of an arms race has frequently exacerbated a sense of rivalry and occasionally even determined the timing of a war; but most often it has ended in a political settlement between rivals or in a decision by one side to moderate its buildup.

Id.

with the world, other nations will continue to interpret such opaqueness in the worst possible light, adding to their express concerns over whether they can ever trust China.

Absent China changing its course in substantive ways like those suggested in this Article, the author is concerned that the global community of nations will continue to perceive China as attempting to unilaterally rewrite or manipulate an established body of international law and restrict the lawful uses of the oceans—all while it rhetorically reassures the world, in the words of Director-General Duan, that China “strictly complies” with that body of law. That duplicity, actual or perceived, will continue until the nations of the world, individually and collectively, send a consistent message to China: Rhetoric about international law means nothing. Genuine respect for the law, and actions that demonstrate compliance with the law, is what matters most.