Where's the Stake? U.S. Interests in the South China Sea[*]

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Introduction

Much of the legal discussion about the ongoing situation in the South China Sea focuses upon the United Nations Convention on the Law of the Sea (UNCLOS)[1], a convention that was concluded in 1982. During that early 1980's timeframe, there was an iconic television commercial[2] in the United States promoting the fast-food chain of restaurants known as Wendy's. The commercial showed three little old ladies standing at a cash register of a fictional restaurant that was competing with Wendy's. Behind the ladies was a sign on the wall that read, "Home of the Big Bun." On the countertop was a large hamburger bun with an extremely small meat patty. Each of the old ladies stared intensely at the bun. Two of the ladies were admiring the bun. The middle lady said, "It certainly is a big bun. It's a very big bun. It's a big fluffy bun. It's a very big fluffy bun." The lady on the right, however, was wholly unimpressed with the large bun. Over and over, she kept yelling "Where's the beef?" across the counter to anyone who might listen. At the conclusion of the television commercial, as the screen faded to black, the

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[1]United Nations Convention on the Law of the Sea (UNCLOS), December 10, 1982, 1833 U.N.T.S. 397.
[2] The "Where's the Beef?" commercial can be viewed on the internet at http://www.youtube.com/watch?v=Ug75diEyiA0.

viewer could hear the third lady doubtfully telling her colleagues, "I don't think there is anybody back there."

This 1980's commercial reminds this author of an aspect of the ongoing South China Sea situation. In recent years, international observers have highlighted the interplay between the United States and China about the South China Sea situation, including statements made by senior diplomats from the two nations at the Association of Southeast Asian Nation (ASEAN) Regional Forum (ARF) meeting in Hanoi, Vietnam, during July of 2010. At that meeting, U.S. Secretary of State Hillary Clinton made remarks about U.S. policy on the South China Sea situation.[3] Days thereafter, China's Ministry of Foreign Affairs (MOFA) released a statement about the matter, alleging that Secretary Clinton had "played up" the issue and that her remarks "were designed to give the international community a wrong impression that the situation in the South China Sea is a cause for grave concern."[4]The MOFA statement then recounted how China's Foreign Minister Yang Jiechi "made an intervention" at the ARF meeting by "raising a row of questions."

Foreign Minister Yang's "row of questions" at the 2010 ARF meeting was as if the old lady on the Wendy's television commercial had yelled, "Hey, United States, where's the stake?" Apparently, China doubts either that the United States has interests in the South China Sea, that those U.S. interests are at risk, or all of the above. Thus, instead of talking more about hamburgers, this paper will talk about stakes. These are not beef steaks, but rather the stakes or interests that a nation holds in a given situation. More specifically, this paper will considerthe questions: Does the United States, in fact, have interests in the South China Sea. If so, what exactly are those U.S. interests and what are theelements or components of those interests? And, given the current circumstances of the South China Sea situation, are those U.S. interests truly at risk?

The discussion in this paper will be divided into two parts. First, it will identify the interests that the United States holds in the South China Sea. Second, it will provide some personal insights and opinions of the author about two of those interests. This second part will also highlight and examine actions and inactions by other nations in the region that, in the author's opinion, might be putting those U.S. interests at risk.

I. Identifying U.S. National Interests

Over the past two years, senior U.S. officials have made public remarks that specified the U.S. interests in the South China Sea. For example, U.S. President Barack Obama identified those U.S. interests during a meeting with ASEAN leaders in September 2010[5] and during a press conference with China President Hu Jintao in January 2011.[6] Similarly, U.S. Secretary of

[3] U.S. Secretary of State Hillary Clinton, "Remarks at Press Availability," Hanoi, Vietnam, July 23, 1010.
[4]People's Republic of China (PRC) Ministry of Foreign Affairs, "Foreign Ministry Yang Jiechi Refutes Fallacies on the South China Sea Issue," July 26, 2010.
[5]Joint Statement of the 2nd United States-ASEAN Leaders Meeting, Office of the Press Secretary, White House, Washington, DC, September 24, 2010.
[6] Press Conference with U.S. President Obama and PRC President Hu, White House, Washington, DC, January 19, 2011.

State Hillary Clinton has identified those interests at the ASEAN Regional Forum, first during the July 2010 meeting[7] and then during the July 2011 meeting.[8] Additionally, then-U.S. Secretary of Defense Robert Gates identified them at the Shangri-La Dialogue in Singapore in June 2010.[9]More recently, the current U.S. Secretary of Defense Leon Panetta discussed the U.S. interests at the ASEAN-Defense Ministers Plus meeting in Bali, Indonesia in October 2011.[10] Based upon these public statements by U.S. senior officials at international meetings and forums with their counterparts in the Asia-Pacific region, the interests asserted by the United States in the South China Sea can be distilled to four interests: (1) Respect for international law, (2) Freedom of navigation, (3) Security and stability in the region, and (4) Unimpeded commerce and economic development.

What is clear is that these senior U.S. officials have consistently identified these national interests. To a certain extent, however, what they have not explained, in substantial detail, is the nature of these interests. Therefore, this paper will share some personal insights and opinions of the author about these interests. *Again, it should be emphasized that these insights are the author's personal views provided in the author's personal capacity, and do not necessarily reflect the official policy or position of the U.S. Government, the U.S. Department of Defense, or any of its components.* Due to space limitations, this paper will focus upon two of these four interests – specifically, respect for international law and freedom of navigation.

II. The U.S. Interest in "Respect for International Law"

The overarching interest in "respect for international law" can be somewhat vague to understand, overwhelming to grasp, and difficult to assess. Thus, it might be helpful to break down this interest of "respect for international law" into quantifiable and assessable components. This part will discuss several components of this interest, and identify some concerns about how each of those components might be at risk by the actions or inactions of other nations.

A. Accepting All Sources of the Law

Respect for international law includes accepting all sources of international law. Of the possible sources[11] of international law, conventional law and customary law are generally recognized as the most important ones.[12] Much of the law of the sea – the subset of international law governing many of the South China Sea issues -- is derived from the text of UNCLOS, but an important portion is derived from customary law. In many ways, customary international law

[7] U.S. Secretary of State Hillary Clinton, "Remarks at Press Availability," Hanoi, Vietnam, July 23, 1010.
[8] U.S. Secretary of State Hillary Clinton, "Statement on South China Sea," Hanoi, Vietnam, July 23, 2011.
[9] U.S. Secretary of Defense Robert Gates, "Remarks by Secretary Gates at the Shangri-La Dialogue, International Institute for Strategic Studies," Singapore, June 4, 2010.
[10] U.S. Secretary of Defense Leon Panetta,"Statement to ASEAN Defense Ministers," Bali, Indonesia, October 23, 2011.
[11] Statute of the International Court of Justice, Article 38(1).
[12]Ian Brownlee, *Principles of Public International Law*, 6th Ed., (Oxford: Oxford University Press, 2003), 5; Lori Fisler Damrosch, Louis Henkin, Richard Crawford Pugh, Oscar Schacter, and Hans Smit, *International Law: Case and Materials*, 4th Ed.. (St. Paul, Minnesota: West Group Publishing, 2001), 59.

is a reflection of world history. For centuries of world history, nations have enjoyed freedom of the seas beyond the territorial seas of any coastal state.[13] These freedoms have included the collecting of intelligence and the conducting of surveillance by militaries.[14] In the three decades of modern history after the negotiation of UNCLOS and its establishment of the exclusive economic zone (EEZ) as a new, economic-focused maritime zone, naval forces of the world have continued to conduct non-economic activities beyond the territorial seas of any coastal state, including within the EEZs of those coastal states. Consequently, an overwhelming majority of nations in the world have either openly supported this freedom of the seas, or have taken no state action[15] to restrict foreign military activities in their respective EEZs.[16]

Unfortunately, a discrete minority of nations in the world[17] claim to have the authority as coastal states to restrict foreign military activities in their respective EEZs. Of note, two of the South China Sea claimants hold this view, China and Malaysia.[18]For China, an observer might assume that a nation that often reveres its 5,000 years of history[19]would be predisposed to recognize the world history reflected in customary international law of the sea. For example, when China discusses its separate, but somewhat related, territorial claims in the South China Sea, it frequently cites historical arguments that purportedly render those territorial claims "indisputable."[20]When it comes to China's maritime claims and the issue of foreign military activities beyond its territorial seas, however, China's national reverence for history apparently ends at the water's edge -- literally. In fact, one positional weakness which China must eventually address is the significant period of modern history between 1949 and 2000,[21] during

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[13]U.S. President Bill Clinton, *Message from the President of the United States Transmitting United Nations Convention on the Law of the Sea*, Senate Treaty Document. No. 103-39 (1994), reprinted in U.S. Department of State Bureau of Public Affairs, *Dispatch Supplement*, vol. 6, supp. 1, February 1995; Ashley Roach & Robert W. Smith, *Excessive Maritime Claims*, 66 International Law Studies, U.S. Naval War College (1994), 242.

[14]U.S. President Bill Clinton, *Message from the President of the United States Transmitting United Nations Convention on the Law of the Sea*, Senate Treaty Document. No. 103-39 (1994), reprinted in U.S. Department of State Bureau of Public Affairs, *Dispatch Supplement*, vol. 6, supp. 1, February 1995; Ashley Roach & Robert W. Smith, *Excessive Maritime Claims*, 66 International Law Studies, U.S. Naval War College (1994), 242.

[15] States actions would include submitting declarations when acceding UNCLOS, enacting domestic laws, issuing domestic regulations or decrees, delivering diplomatic demarches, or conducting operational challenges by military forces or law enforcement agencies.

[16]U.S. Department of Defense, *Maritime Claims Reference Manual*, DOD 2005.1-M, June 23, 2005.

[17] In total, only about twenty nations in the world have taken official state action that purports to restrict foreign military activities within its exclusive economic zone. Jonathan G. Odom, "The True `Lies' of the Impeccable Incident: What Really Happened, Who Violated International Law, and Why Every Nation (Outside of China) Should be Concerned,"18 *Michigan State University Journal of International Law* 411, 440 (2010).

[18] Malaysia, *Declarations Upon Ratification*, October 14, 1996.

[19]PRC President Jiang Zemin, quoted in"President Jiang Zemin Interviewed by Washington Post,"*Xinhua General News Service*, March 26, 2001; Li Changchun, Member of the Standing Committee of the Political Bureau of the China Communist Party Central Committee, quoted in "Senior CPC leader urges to support more folk craftsmen," *Xinhua General News Service*, February 18, 2009; "China's 5,000-Year Old Civilization Is No Bluff – Prehistoric Relics Provides New Evidence," *Broadcasting Corporation of China*, March 19, 2005.

[20]PRC Ministry of Foreign Affairs, *Basic Stance and Policy of the Chinese Government in Solving the South China Sea Issue*, November 11, 2000; Embassy of the PRC in the Republic of the Philippines, *Basic Stance and Policy of the Chinese Government in Solving the South China Sea Issue*, April 8, 2004.

[21] The year 2000 is identified here because an admiral from the People's Liberation Army Navy once identified it to this author as the year when China started to claim that it had the authority under international law to restrict foreign military activities in its EEZ. Moreover, it marks a year bookended between two critical dates of modern history – 1996 and 2001. On June 7, 1996 -- the date when China acceded to UNCLOS without making a specific declaration

which China elected to not actively participate in the international legal order, an order that recognizes these freedoms of the seas. In asserting the minority position, however, neither China nor Malaysia has specifically indicated how customary international law supports their position. Moreover, neither nation has attempted to refute the historical evidence of customary law that supports the opposing view asserted by the majority of nations.

B. Acceding to Conventions – or Otherwise Acting In Conformity With Them

Respect for international law includes joining applicable treaties and conventions. In this author's opinion, the United States should join UNCLOS as a state party. More important than what this author believes, the Executive Branch of the U.S. Government supports and has long supported U.S. accession to UNCLOS. These supporters have included the current U.S. President Obama,[22] as well as the previous two U.S. Presidents Bush[23] and Clinton.[24] In fact, senior U.S. officials have expressly recognized the importance of the United States ratifying UNCLOS in discussing the South China Sea situation.[25] Nonetheless, in the U.S. constitutional system, the U.S. Senate makes the final decision on ratifying treaties and conventions[26] and, to date, has not yet ratified UNCLOS.[27]

If joining an applicable convention is not possible for whatever reason, then the executive branch of a national government should demonstrate its respect for international law in other ways. In particular, this includes taking all possible actions to incorporate the customary rules of a convention into national policy. Ever since UNCLOS was concluded,[28] U.S. presidents of both political parties have taken the maximum possible action within their legal authority to respect the law of the sea, by declaring that the rules contained in UNCLOS reflect customary international law. Moreover, U.S. military commanders and forces are directed to adhere to the customary law, including the international law reflected in UNCLOS.[29]

On a more practical level, this author always has a copy of UNCLOS on his office desk and routinely relies upon the rules of law contained therein when advising his military commander-clients and their staffs on law of the sea matters. Similarly, U.S. military and civilian attorneys faithfully advise civilian decision-makers and military commanders at every other link of the U.S. chain of command on maritime issues based upon those same rules of customary law reflected in UNCLOS. This constant and widespread use of these rules of law is

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about restricting foreign military activities in its EEZ People's Republic of China. PRC, *Declaration Upon Ratification*, June 7, 1996. On April 1, 2001 -- the date when China asserted that the reconnaissance operations conducted by a U.S. Navy EP-3 over China's EEZ were illegal at the time it collided with a Chinese fighter jet.

[22] U.S. President Barack Obama, *National Security Strategy*, May 2010.

[23] U.S. President George W. Bush, *President's Statement on Advancing U.S. Interests in the World's Oceans*, May 15, 2007.

[24] U.S. President Bill Clinton, *UNCLOS Transmittal Message*.

[25] U.S. Secretary of State Hillary Clinton, "Remarks at Press Availability," Hanoi, Vietnam, July 23, 1010.

[26] U.S. Constitution, Art. II, Sect. 2, Cl. 3.

[27] BillGertz, "Inside the Ring – Sea Law Treaty Push,"*Washington Times*, July 27, 2011.

[28] U.S. President Ronald Reagan, *Statement on United States Oceans Policy*, March 10, 1983.

[29] *Commander's Handbook on the Law of Naval Operations*, U.S. Naval Warfare Publication 1-14M (2007), Preface and Para. 1.2.

a practical testament to the long-standing faith of the Executive Branch of the U.S. Government in that international legal regime.

C. Upholding Obligations of All Treaties and Conventions

Respect for international law includes upholding legal obligations that arise from all of the conventional law to which a nation is a party, not merely to some of it. For maritime activities throughout the world, UNCLOS is not the only source of conventional law that applies. Another set of obligations arise from the Convention on the International Regulations for Preventing Collisions at Sea (COLREGS).[30] As one of the most widely-joined international conventions, the COLREGs obligate member-nations to ensure their government[31] and flagged vessels alike operate safely at sea through adherence to a detailed regime of specific safety rules. The U.S. Government has demonstrated its respect for the international law set forth in the COLREGs in multiple ways, to include: codifying those legal obligations into national laws and regulations,[32] directing U.S. Navy and Coast Guard personnel to follow them,[33] imposing civil penalties against civilian mariners of U.S.-flagged, non-government vessels who violate them,[34] setting a leadership expectation that commanders at sea will follow them,[35] instituting a robust educational and training program for its Navy officers,[36] and holding Navy commanders and personnel to account for violations.[37]

Unfortunately, there is substantial grounds for concern whether some nations, notably China, are similarly upholding their legal obligations arising from the COLREGs in the South China Sea and other waters of East Asia. For example, in March of 2009, five China-flagged vessels unsafely surrounded USNS *Impeccable* in the South China Sea and several of those Chinese vessels clearly violated the COLREGS to the point that they would likely have caused a collision at sea and endangered the lives of nationals from both nations, but for the heroic emergency all-stop maneuver of the *Impeccable*'s master and crew.[38] In September of 2010, a China-flagged fishing vessel clearly violated the COLREGs as it rammed the side of a Japanese Coast Guard vessel in the East Sea.[39]In the summer of 2011, another China-flagged fishing

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[30] Convention on the International Regulations for Preventing Collisions at Sea (COLREGs), October 20, 1972, 28 U.S.T.3459, 1050 U.N.T.S. 16, amended by Amendments to the International Regulations for Preventing Collisions at Sea, November 19, 1981, 35 U.S.T. 575, 1323 U.N.T.S. 353.

[31] It is worth noting that, unlike some international treaties and conventions like UNCLOS, there is no exception or exemption in the COLREGs for sovereign immune vessels.

[32] Title 33, U.S. Code (U.S.C.),Sections 1601 to 1606.

[33]U.S. Navy Regulations (1990), Article 1139; U.S. Coast Guard Regulations, COMDTINST M5000.3.

[34]33 U.S.C. 1608 and 46 U.S.C. 2301.

[35]"Interview Transcript: Admiral Gary Roughead,"*Financial Times*, January 18, 2011.

[36]*Course Material -- Navigation, Seamanship, & Ship Handling*, Surface Warfare Officers School, U.S. Department of the Navy, accessed November 28, 2011, http://www1.netc.navy.mil/swos.

[37] U.S. Chief of Naval Operations, *Memorandum for All Flag Officers and Officers in Command*, October 2, 1976;Commander, U.S. Pacific Fleet, *Court Of Inquiry Into The Circumstances Surrounding The Collision Between USS GREENVILLE (SSN 772) And Japanese M/V Ehime Maru That Occurred Off The Coast Of Oahu, Hawaii On 9 February 2001*, April 13, 2001; "Greeneville's Skipper Reprimanded, Allowed To Retire,"*Cable News Network.com*, April 23, 2001.

[38]Odom, "True Lies," 427-432.

[39] Mure Dickie and Kathrin Hille "Video Leaked Of Sino-Japanese Boat Incident,"*Financial Times*, November 5, 2010.

vessel clearly violated the COLREGS in the South China Sea when it cut the underwater equipment of a Vietnamese commercial survey vessel.[40] What these incidents have in common is that all involved significant violations of the COLREGs, the violations were committed by China-flagged vessels, and China's government apparently ignored its legal obligations under a maritime-related convention to which it is a party.

D. Quoting Legal Terminology Precisely

Respect for international law includes quoting the terminology of the law precisely. Words matter, especially because words compose the rules of law. Anytime one attempts to use words and phrases that are not generally accepted in a body of law, there is a risk that the substance of the law is diluted or lost, and the intended meaning of those rules could be manipulated. On the other hand, if all nations force themselves to use terminology found only in the applicable body of law, then it will help ensure that they remain faithful to the rules found in the law. This need for the use of precise terminology is important in law of the sea matters. Unfortunately, there are some phrases that some nations and international observers are using in law of the sea matters that are imprecise and, therefore, unhelpful to the legal discussion and the potential for resolving the ongoing disputes. This includes legal discussions involving the South China Sea situation.

One example of animprecise phrase is "international waters." Through the years, some official[41] and unofficial[42] voices in the United States, as well as other nations,[43]have occasionally used the phrase "international waters" to describe all waters that are not under the sovereignty of any coastal state. For several decades, the U.S. Navy has used and defined the phrase in legal doctrine to help non-lawyers understand[44] that the rights, freedoms, and uses of the seas are

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[40]"Vietnam Says Chinese Boat Harassed Survey Ship; China Disputes,"*Bloomberg Businessweek*, June 9, 2011; "Vietnam Says China Fishing Boat Rams Research Ship,"*The Straits Times* , June 9, 2011.

[41] For example, consider all of the official statements by U.S. government officials and spokesman following the involving *USNS Impeccable* and five Chinese vessels in the South China Sea, approximately 70 miles off the coast of Hainan Island, in March 2009. "RAW DATA: Pentagon Statement on Chinese Incident with U.S. Navy,"*Fox News*, March 9, 2009; White House Press Secretary Robert Gibbs, Press Briefing, White House, Washington, DC, March 9, 2009; Jim Garamone, "Discussions Aim to Resolve U.S. Survey Ship Incident," *Armed Forces Press Service*, March 11, 2009; U.S. State Department Press Secretary Robert Wood, Daily Press Briefing, State Department, Washington, DC, March 10, 2009; U.S. Seventh Fleet, *Press Release, Naval Readiness Exercise Announced*, November 24, 2010.

[42]Lieutenant Colonel Christopher M. Petras, U.S. Air Force, "The Law Of Air Mobility--The International Legal Principles Behind The U.S. Mobility Air Forces' Mission,"66 *Air Force Law Review* 1 (2000); Lieutenant Colonel Andrew S. Williams, U.S. Air Force, "The Interception of Civil Aircraft over the High Seas in the Global War on Terror," 59 *Air Force Law Review*73 (2007); Commander John Astley, III, U.S. Coast Guard, and Lieutenant Colonel Michael N. Schmitt, U.S. Air Force, "The Law of the Sea and Naval Operations, 42 *Air Force Law Review* 119 (1997).

[43] For example, see India Defense Minister A.K. Antony, quoted in "India Upholds Freedom of Navigation in International Waters" *The Times of India*, November 4, 2011.

[44] See Annotated Supplement to the Commander's Handbook on the Law of Naval Operations," 73*U.S. Naval War College, International Law Studies* (1997), 14, footnote 27.

relatively greater in areas beyond the territorial seas of any coastal state.[45] Additionally, the phrase has been used in a significant number of international documents, including: several multilateral conventions and protocols tangentially related to maritime matters;[46] international regulations implementing the Safety of Life at Sea Convention;[47] and international agreements involving maritime matters, such as a series of bilateral shipboarding agreements with other nations to suppress the proliferation of weapons of mass destruction, their delivery systems, and related materials at sea, other shipboarding agreements to suppress illicit trafficking of drugs, to interdict illegal migrants, and to otherwise cooperate in maritime law enforcement. Of particular note, the phrase has even been used in a bilateral charter[48] for military maritime discussions between the United States and China.

Despite this occasional usage and the express clarification of what the phrase "international waters" is intended to encompass, the phrase is noticeably absent from other international conventions. These noticeable absences include the four law of the sea conventions that were concluded in 1958,[49] as well as the text of UNCLOS itself. While it is not illegal to use the phrase, this author personally believes that official and unofficial voices of all nations, including the United States, should move away from using that phrase in the interest of staying true to the terminology of UNCLOS.

Precision in the language of a legal discourse, however, is a two-way street. For example, there are also phrases used by official and unofficial voices from China that are neither codified nor defined in the 1958 conventions or UNCLOS. These phrases include "Chinese waters,"[50] "Waters Under Chinese Jurisdiction,"[51] "Territorial Waters,"[52] "Special Economic

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[45]*Commander's Handbook on the Law of Naval Operations*, U.S. Naval Warfare Publication 1-14M (2007), Para. 1.5; *Commander's Handbook on the Law of Naval Operation*s, U.S. Naval Warfare Publication 1-14M (1995), Para. 1.4.

[46] Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Heavy Metals, June 24, 1998,Preamble; Convention on the Physical Protection of Nuclear Materials, October 28, 1979, Article 4(4).

[47] Regulations Under the Safety at Life at Sea Convention,November 1, 1974, 32 U.S.T. 47.

[48] Military Maritime and Air Safety Working Group Charter Under the Agreement on Establishing a Consultation Mechanism to Strengthen Military Maritime Safety Between the Department of Defense of the United States of America and the Ministry of National Defense of the People's Republic of China, April 12, 2002, paragraph 4.d. (emphasis added), quoted in Summary of Proceedings of the [Calendar Year] 2003 Annual Meeting under the Agreement on Establishing a Consultation Mechanism to Strengthen Military Maritime Safety Between the Ministry of National Defense of the People's Republic of China and the Department of Defense of the United States of America, April 10. 2003.

[49] Convention on the Territorial Sea and Contiguous Zone, April 29, 1958, 516 U.N.T.S. 205; Convention on the High Seas, April 29, 1958, 450 U.N.T.S. 11; Convention on the Continental Shelf, April 29, 1958, 499 U.N.T.S. 311; Convention on Fishing and Conservation of the Living Resources of the High Seas, April 29, 1958, 559 U.N.T.S. 285.

[50] Ministry of External Affairs, Government of India, "Press Statement: Incident involving INS Airavat in South China Sea," September 1, 2011;"India Makes Waves With South China Sea Oil And Gas Exploration,"*Global Times*, September 18, 2011; "China Navy's Escorting Missions in Gulf of Aden, Somali Waters,"*People's Daily Online*; Li Heng, "What's US Vessel up to on Chinese Waters?"*People's Daily Online*, September 30, 2002; Yu Zhirong, "Jurisprudential Analysis of the U.S. Navy's Military Surveys in the Exclusive Economic Zones of Coastal Countries," in *China's Maritime Rights and Interests, in Military Activities in the EEZ: A U.S.-China Dialogue on Security and International Law in the Maritime Commons*, 7 China Maritime Study, Peter Dutton, Ed., December 2010; "China to Beef Up Maritime Forces,"*Xinhuanet*, June 17, 2011.

[51]Yu, "Jurisprudential Analysis," 41; Zhao Peiying, Ed., *Basics Of International Law For Modern Soldiers* (Beijing: PLA Press, 1996), 118-119.

Zone,"[53] "China's Coastal Waters,"[54] "Near Seas," (*jinhai*),[55] "blue-colored territory,"[56] and "Freedom of Passage."[57]Recently, several voices[58] in China have even used the phrase "international waters"; however, they apparently consider it to include only the high seas, even though UNCLOS clearly does not extend coastal state sovereignty to EEZs. Likewise, just as voices in the United States should move away from using the phrase "international waters," voices in China should also move away from these other imprecise phrases, in the collective interest of remaining true to the terminology of the legal regime reflected in UNCLOS.

E. Acknowledging the Intent of the Law

Respect for international law includes acknowledging the intent of the law. The rules for treaty interpretation state that the terms of a treaty should be given their "ordinary meaning."[59] If the text of the treaty is "ambiguous or obscure," then "supplementary means of interpretation" may be consulted.[60] Such supplementary means include "the preparatory work of the treaty" and

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[52]"China to Beef Up Maritime Forces,"*Xinhuanet*, June 17, 2011; Michael Swaineand M. Taylor Fravel,"China's Assertive Behavior, Part Two: The Maritime Periphery,"35 *China Leadership Monitor*, Summer 2011; "Violation of China's Sovereignty Never Allowed,"*Xinhua News Agency*, March 10, 2009; "Navy Lawmaker: Violation of China's Sovereignty Not Allowed,"People's Daily, March 11, 2009; "China spokesman gives full account on US-China Air Collision*,"Xinhua News Agency*, April 3, 2001*;* Senior CaptainRen Xiaofeng & Cheng Xizhong, "A Chinese Perspective," 29 Marine Policy, 2005, 139, 140; "China Focus: Support For Likely Deployment Of Chinese Fleet Against Pirates,*"Xinhua Economic News Service*, December 18, 2008; Cui Xiaohuo, "Encounters at Sea Set for `Game Rules',"*China Daily*, June 25, 2009; Zhu Lijiang "*Chinese Practice in Public International Law: 2009,"*9 *Chinese Journal of International Law*, September 2010, 607, 612-613;*Basics Of International Law For Modern Soldiers*, 28, 45, 51, 70-71.

[53]"Violation of China's Sovereignty Never Allowed," *Xinhua News Agency*, March 10, 2009; "Navy Lawmaker: Violation of China's Sovereignty Not Allowed," *People's Daily*, March 11, 2009; Ian Ransom, "China Says U.S. Navy Ship Breaking Law,"*Reuters News Service*, March 9, 2009; Jane Macartney, "China Accuses U.S. Naval Ship of Illegal Surveying,"*Times of the U.K.*, March 10, 2009; "Military Activities in Special Economic Zone Must Respect Rights of Coastal Nations," in *Analysis of 100 Cases of Legal Warfare*, Cong Wensheng, Ed. (Beijing: People's Liberation Army Publishing House, 2005); *Basics Of International Law For Modern Soldiers*, 79.

[54] People's Republic of China Ministry of Foreign Affairs, *Yang Jiechi Meets with U.S. Secretary of State Clinton and Canadian Foreign Minister Cannon*, July 23, 2010; PRC Ministry of Foreign AffairsSpokesperson Qin Gang, *Regular Press Conference*, July 8, 2010; "U.S. Seriously Violates International Law: Signed Article,"*Xinhua General News Service*, April 16, 2001.

[55]PRC Ministry of Foreign AffairsSpokesperson Qin Gang, "Regular Press Conference," July 8, 2010; Rear Admiral Zhang Huachen, Deputy Commander of the East Sea Fleet, quoted in Michael D. Swaine and M. Taylor Fravel, "China's Assertive Behavior, Part Two: The Maritime Periphery," 35 China Leadership Monitor, Summer 2011. For a thorough discussion of China's use of the phrase "near seas" in its defense strategy, see Nan Li,"The Evolution of China's Naval Strategy and Capabilities: From `Near Coast' and `Near Seas' to `Far Seas' *"Asian Security*, May 1, 2009..

[56]Maj. Gen. Peng Guangqian, People's Liberation Army (Ret.), "*China's Maritime Rights and Interests, inMilitary Activities in the EEZ: A U.S.-China Dialogue on Security and International Law in the Maritime Commons,"* in7 China Maritime Study, Peter Dutton, Ed., December 2010.

[57] PRC Ministry of Foreign Affairs, *Basic Stance and Policy of the Chinese Government in Solving the South China Sea Issue*, November 11, 2000; Embassy of the PRC in the Republic of the Philippines, *Basic Stance and Policy of the Chinese Government in Solving the South China Sea Issue*, April 8, 2004; *Analysis Of 100 Cases Of Legal Warfare.*

[58] Rear Admiral (retired) Yang Yi, "China Must Have a Strong Navy," *China Daily*, December 2, 2011; Professor Pan Guoping, quoted in J. Michael Cole, "South China Sea All PRC's, OP-ED Claims," *Taipei Times*, November 29, 2011.

[59] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, Article 31(1).

[60] Vienna Convention on the Law of Treaties, Article 32.

"the circumstances" of the treaty's conclusion. Permitting consideration of supplementary means to interpret a treaty is understandable and prudent. Otherwise, one nation or a discrete minority of nations could – after the fact -- upset the will of the majority of state-parties to a convention by unilaterally imposing that minority's self-interests and, in effect, re-negotiating the original bargain long after the parties have all left the bargaining table.

A formal preparatory work for UNCLOS was never published. Other resources of the negotiating history of UNCLOS, however, have been compiled and should be consulted in ascertaining the intent of words, phrases, and rules that might arguably be ambiguous or obscure. These resources include the comprehensive commentary compiled by the Center for Oceans Law and Policy at the University of Virginia's School of Law.[61] These commentaries show a circumstance of how, for example, the EEZ concept was intended to accommodate a trend among some coastal states to expand the breadth of their territorial seas in order to control the economic resources.[62] It also records how the nations negotiating UNCLOS considered and deliberately rejected the effort by a group of nations to incorporate a coastal state "security interest" into the EEZ regime.[63] Both of these points are significant in understanding what UNCLOS says – and does not say – about foreign military activities in the EEZs of the world.[64]

Unfortunately, some opponents of foreign military activities in EEZs, including critics in China, seek to have it both ways. On the one hand, they argue that the UNCLOS text has "shortcomings"that lead to "unclear and differing conceptions" of the EEZ legal regime, implying that they should be perfected through other means.[65] On the other hand, they ignore the established rules of treaty interpretation that permit consideration of the convention's negotiating history to clarify these alleged ambiguities, especially when that history undercuts the position they wished the world would have adopted at the bargaining table, but did not do so.

F. Honoring the Context of the Law

Respect for international law includes honoring the context of the law. The rules of treaty interpretation state, "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."[66] In other words, it means that a nation must not take and use the words and terminology of a treaty out of context. On a more practical level, licensed attorneys know they

[61] *United Nations Convention on the Law of the Sea 1982: A Commentary*, Myron Nordquist, Editor-in-Chief (Boston/London : Martinus Nijhoff Publishers, 1985-2010), 7 vols.
[62] *United Nations Convention on the Law of the Sea 1982: A Commentary*, Satya N. Nandan and Shabtai Rosenne, Volume Editors, (Boston/London : Martinus Nijhoff Publishers, 2002), vol. II, 491-510.
[63] *United Nations Convention on the Law of the Sea 1982: A Commentary*, Satya N. Nandan and Shabtai Rosenne, Volume Editors, (Boston/London : Martinus Nijhoff Publishers, 2002), vol. II, 558-560.
[64] Tommy Koh, in *Consensus and Confrontation: the United States and the Law of the Sea Convention*, Jon Van Dyke, Ed.(Honolulu: Law of the Sea Institute, 1985), 303-304.
[65] Ren and Cheng, "A Chinese Perspective."
[66] Vienna Convention on the Law of Treaties, Article 31(1)(emphasis added).

must never argue the law out of its proper context,[67] lest they instantly lose credibility in the courtroom and the presiding judge will doubt any future representations made by that counsel.

In the South China Sea, regarding the legality of foreign military activities in China's EEZ, China appears to be taking UNCLOS terms out of context to serve its purpose. For example, China argues to the world that military activities in its EEZ violate UNCLOS because such activities are not, in China's view, a "peaceful use" of the ocean or intended for a "peaceful purpose."[68] These two phrases "peaceful use"[69] and "peaceful purpose,"[70] however, are found outside of the section of UNCLOS focused on the EEZ regime[71]and also apply to the high seas. Additionally, one of these articles clarifies that "peaceful" simply means to follow the purpose of Article 2(4) of the United Nations Charter and refrain from the threat or use of force. Essentially, China expects the world to believe that these two broad-brush, aspirational references to "peaceful" summarily trump the detailed and complex legal regime established by the Convention in its entirety. However, any reasonable reader of UNCLOS reads these provisions in their proper context and knows that these two "peaceful" references were never intended to bar all military activities in the EEZ, much less all military activities on the high seas. Otherwise, nations, including China, would in effect be prohibited from having deployable militaries.

G. Interpreting the Law Transparently

Respect for international law includes interpreting the law transparently. A critical component of the domestic and international rule of lawis the element of transparency. As theU.N. Secretary General stated in 2004, the rule of law requires measures to ensure what he called "legal transparency."[72] While he was referring to domestic rule of law, international law also depends upon transparency in its own special way. 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. This sequential process requiring transparency is what underlies the long-accepted "persistent objector"[73]concept of customary international law.

The United States supports transparency about matters involving international law, including the law of the sea. Evidence of the U.S. Government's transparency on law of the sea matters includes the publication of its 99-page article-by-article UNCLOS "Commentary,"[74] its

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[67]Model Rules of Professional Conduct, Rule 3.3(a); Code of Professional Conduct for Counsel, International Criminal Court, Articles 24(3) and 24(1).
[68] Ren and Cheng, "A Chinese Perspective,"142-144; Ji Guoxing, "The Legality of the Impeccable Incident," 5 *China Security*, No. 2, Spring 2009.
[69] UNCLOS, Article 301.
[70] UNCLOS, Article 88.
[71] UNCLOS, Part V (Articles 55-75).
[72]U.N. Secretary-General Kofi Annan, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societie*s, August 23, 2004.
[73] Ian Brownlee, *Principles of Public International Law*, 6th Ed. (Oxford: Oxford University Press, 2003), 11.
[74]U.S. President Bill Clinton, *UNCLOS Transmittal Message*.

Maritime Claims Reference Manual,[75] its annual Freedom of Navigation Reports,[76] and the Commander's Handbook on the Law of Naval Operations.[77]All of these official U.S. publications are freely available on the internet. In the South China Sea situation, Secretary Clinton called upon all of the claimants, including China, to "clarify their claims"[78] under international law – an exhortation for legal transparency from all of the nations involved. In this author's opinion, it is difficult to understand how the claimant nations could ever resolve their differences, if they don't even know the legal positions of the other claimant nations, as well as the underlying legal justification for those positions.

Unfortunately, China has not been fully transparent on matters involving law of the sea, but merely makes conclusory statements about the law without legal analysis. For example, the statements made by China's government following the March 2009 incident involving the *USNS Impeccable* in the South China Sea lacked transparency.[79] Additionally, China's nine unexplained dashes on its South China Sea maps and the corresponding claim of "indisputable sovereignty" lack transparency. As U.S. Deputy Assistant Secretary of State for East Asian and Pacific Affairs Scot Marciel told a subcommittee of the U.S. Congress,

> There is considerable ambiguity in China's claim to the South China Sea, both in terms of the exact boundaries of its claim and whether it is an assertion of territorial waters over the entire body of water, or only over its land features. In the past, this ambiguity has had little impact on U.S. interests. It has become a concern, however, with regard to the pressure on our energy firms, as some of the offshore blocks that have been subject to Chinese complaint do not appear to lie within China's claim. It might be helpful to all parties if China provided greater clarity on the substance of its claims.[80]

Similarly, other neutral nations in the region, including Indonesia[81] and Singapore,[82] have criticized China's lack of legal transparency of its nine dashes and called upon China to clarify its claim.

H. Applying the Law Uniformly and Consistently

Respect for international law includes applying the law uniformly and consistently. As Reverend Desmond Tutu from South Africa opined, "[I]f we want international law to hold any

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[75]U.S. Department of Defense, *Maritime Claims Reference Manual*, DOD 2005.1-M, June 23, 2005.
[76] Office of the U.S. Secretary of Defense, *Freedom of Navigation Operational Assertions Reports*.
[77]*Commander's Handbook on the Law of Naval Operations*, U.S. Naval Warfare Publication 1-14M, 2007, 1–9.
[78] U.S. Secretary of State Hillary Clinton, "Statement on South China Sea," July 23, 2011.
[79] Odom, "True Lies," 436-437.
[80] U.S. Deputy Assistant Secretary Scot Marciel, Bureau of East Asian and Pacific Affairs, "Maritime Issues and Sovereignty Disputes in East Asia," *Statement Before the Subcommittee on East Asian and Pacific Affairs, Senate Foreign Relations Committee*, Washington, DC, July 15, 2009.
[81] Permanent Mission of the Republic of Indonesia, *Letter to the United Nations to the Secretary General of the United Nations*, July 8, 2010.
[82] Singapore Ministry of Foreign Affairs, *MFA Spokesman's Comments in Responses to Media Queries on the Visit of Chinese Maritime Surveillance Vessel Haixun 31 to Singapore*, June 20, 2011; Raju Gopalakrishnan, "Singapore Asks China to Clarify Claims on S.China Sea,"*Reuters*, June 20, 2011.

meaning," the international community must begin by ensuring international law is "applied uniformly across all countries."[83] In terms of the international law of the sea, the President of the International Tribunal for the Law of the Sea (ITLOS) told the U.N. General Assemblythe importance of "ensuring uniform and consistent application of the United Nations Convention on the Law of the Sea."[84]Similarly, the Legal Advisor to the United Nations has also emphasized "the importance of uniform and consistent application" of UNCLOS.[85]Uniform application and interpretation of the international law arguably includes two elements – first, the body of law applies equally to all nations, and second, each nation must be internally consistent in its application of the rules of that body of law. In then-U.S. Secretary of Defense Robert Gates' Shangri-La speech in June 2010, he highlighted the importance of this precept with the use of an interesting choice of words. Specifically, Gates characterized it as "[a] just international order that emphasizes rights and responsibilities of nations and fidelity to the rule of law."[86] By definition, fidelity means a state of continuous faithfulness or loyalty.[87] In terms of international law and relations, fidelity could mean faithfully and consistently following a particular rule of international law when it promotes the nation's interests, but also following it when that same rule of law arguably undermines that nation's interests.

The U.S. commitment to this concept of uniformity and consistency has been doubted by some in the world, including voices from China. For example, retired-Rear Admiral and military strategist Yang Yi from China has asked, "Just imagine if China were to send submarines into an American Exclusive Economic Zone. America's reaction would be even more intense, and it would be all over the major news media."[88] Admiral Yang's assumption, however, is mistaken. For example, as recent as the summers of 2009 and 2010, the United States has not challenged the right of Russian air[89] and maritime[90] forces to operate in and over the U.S. EEZ. More recently, the issue arose again regarding potential military operations by the Iranian Navy near the United States. When the Commander of the Iranian Navy recently threatened to conduct operations off the U.S. coast, a Pentagon spokesman publicly stated, "We've been pushing freedom of the seas for years and the Iranian navy can go wherever it wants."[91] Such U.S. words and actions about foreign military activities demonstrate another reality: specifically, a nation that honestly believes in its legal position on matters involving the law of the sea, to the extent

[83] Rev. Desmond Tutu, "Antiwar Thinking: Acknowledge Despair, Highlight Progress on 'Moral Preemption'," Christian Science Monitor, March 20, 2003.
[84] P. Chandrasekhara Rao, President of the International Tribunal for the Law of the Sea, *Statement on Agenda Item 40 (A): Oceans and Law of the Sea* , the Plenary of the Fifty-Fourth Session of the United Nations General Assembly, November 22, 1999.
[85] See ; see also "Technical Assistance Provided by the Division of Oceans Affairs and Law of the Sea," United Nations, Office of Legal Affairs, Division of Oceans Affairs and Law of the Sea."
[86] U.S. Secretary of Defense Robert Gates, "Remarks by Secretary Gates at the Shangri-La Dialogue, International Institute for Strategic Studies," Singapore, June 4, 2010.
[87] "Fidelity," *Webster's II New Riverside University Dictionary* (Boston, MA: Houghton Mifflin Company, 1984), 475.
[88] Wang Wen and Huang Fei, "Rear Adm. Speaks to U.S. Officials: U.S. is Greatest Threat to China," Translated by Brian Tawney, April 23, 2010.
[89] Bill Gertz, "Russian Bomber Incursions," *Washington Times*, July 7, 2010.
[90] Phillip P. Pan, "Russian General Calls Submarine Patrols Near U.S. East Coast Routine," *Washington Post*, August 6, 2009.
[91] Justin Fishel, "Iranian Navy Sending Ships Near U.S. Waters," *Fox News*, September 28, 2011; Hashem Kalantari, "Iran Says Could Deploy Navy Near U.S. Coast: Report," *Reuters*, September 27, 2011.

that it does not challenge the right of other nations to exercise those same rights, freedoms and uses of the sea in and over its maritime zones.

Unfortunately, China apparently prefers to maintain a double-standard practice of "do as I say, not as I do." For example, China protests U.S. military operations in China's EEZ, but China has been known to conduct military activities in other nations' EEZs.[92] Additionally, China claims that the Spratlys are islands that are entitled to surrounding an EEZ.[93] On the other hand, China criticizes the Japan's claim of Okinotorishima and its surrounding maritime zones, countering that it is a rock and not entitled to a surrounding EEZ. Unfortunately, China conveniently ignores that many of the Spratlys are just as uninhabitable or unsustainable as Okinotorshima. Consequently, neutral nations like Indonesia[94] have highlighted this inconsistency of China's legal position.

I. Adhering to Specific Rules of Law

Respect for international law includes strictly adhering to specific rules of law. At its most fundamental level, respect for law means complying with the rules. Some of China's leaders have publicly stated the importance of strictly complying with international law. For example, the head of the Treaty and Law Department of China's Ministry of Foreign Affairs told a U.N. meeting of legal experts that China "strictly abides by the provisions and principles of international law."[95] In publications like the People's Liberation Army (PLA) handbook on international law, the PLA leadership instructs its officers, "[T]he Chinese government is…obliged to adhere *strictly* to all international laws…"[96]

Unfortunately, what China says externally about complying with specific rules of law does not match up with what it says internally about it. For example, the same PLA handbook on international law, merely three pages after directing Chinese military officers to strictly adhere to international law, tells them that "we should be *flexible* in the application of international laws."[97] It then 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."[98] Such internal direction for selective compliance of international

[92] Peter Dutton, "Scouting, Signaling, and Gatekeeping: Chinese Naval Operations in Japanese Waters and the International Law Implications," in 2 *China Maritime Study*, U.S. Naval War College, China Maritime Studies Institute, February 2009; Pete Pedrozo, "Preserving Navigational Rights and Freedoms: The Right to Conduct Military Activities in China's Exclusive Economic Zone," 9 *Chinese Journal of International Law*, 2010, 16-17.
[93] PRC Mission to United Nations, *Note Verbale Response to Republic of the Philippines' Response to Vietnam Submission on Extended Continental Shelf*, April 14, 2011.
[94] Permanent Mission of the Republic of Indonesia, *Letter to the United Nations to the Secretary General of the United Nations*, July 8, 2010.
[95] Duan Jielong, "Statement on the Rule of Law at the National and International Levels," 6 *Chinese Journal of International Law*, 2007, 185.
[96] *Basics of International Law for Modern Soldiers*, 3 (emphasis added).
[97] *Basics of International Law for Modern Soldiers*, 6 (emphasis added).
[98] *Basics of International Law for Modern Soldiers*, 6 (emphasis added).

law calls into question the sincerity of external statements like China Treaty Director-General's statements to the United Nations about strict adherence to international law.

In the South China Sea, an example of China not "feel[ing] completely bound by specific articles" of international law involves the Paracel (or Xisha) Islands. Specifically, China has elected to draw straight baselines around the group of islands. Because China is not a state constituted wholly of islands, however, it clearly does not satisfy that definition of an archipelagic state[99] eligible to draw such baselines. Moreover, the Paracel Islands clearly do not involve a deeply indented coastline, nor do they involve islands that follow along the Chinese mainland in immediate vicinity.[100] Because these straight baselines and the resulting claim of internal waters are not in conformity with the specific rules of UNCLOS, the United States has diplomatically protested and operationally challenged this excessive maritime claim around the Paracels.[101]

III. The U.S. Interest in "Freedom of Navigation"

When Secretary Clinton discussed U.S. interests in the South China Sea at the July 2010 ARF meeting, China's Minister of Foreign Affairs Yang Jiechi criticized Secretary Clinton's remarks as a "scheme" to "internationalize the South China Sea issue."[102] He alleged they were "designed to give the international community a wrong impression that the situation in the South China Sea is a cause for grave concern." In particular, he criticized her remarks about the "importance and urgency of maintaining navigation freedom in the South China Sea."He asked, "[H]as navigation freedom and safety been hindered in the South China Sea?" To which he answered, "Obviously not." Taken together, these criticisms by China's Foreign Minister imply one or more of the following: (1) that non-claimants cannot possibly have interests in the South China Sea; (2) that the United States, in particular, lacks a national interest in freedom of navigation in the South China Sea, (3) that the interest in freedom of navigation asserted by Secretary Clinton was only recently conjured up, and/or (4) that the U.S. interest in freedom of navigation is not, in fact, at risk. Therefore, this part will assess the accuracy of these implied criticisms.

A. Freedom of Navigation is a Long-Standing U.S. Interest

First, it important to understand that the United States has asserted a national interest in freedom of navigation from 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, in response to "depredations" against U.S. commercial shipping in the Atlantic Ocean, the Mediterranean Sea and adjoining seas, a series of early U.S. presidents requested, the U.S. Congress authorized, and

[99]UNCLOS, Article 47(1).
[100] UNCLOS, Article 7.
[101]"China,"*Maritime Claims Reference Manual*, Department of Defense 2005.1-M, June 23, 2005.
[102] "Foreign Ministry Yang Jiechi Refutes Fallacies on the South China Sea Issue," July 26, 2010.

the U.S. Navy executed operations to protect the freedom of navigation of these U.S. vessels.[103] During the twentieth century, in the final phases of World War I, U.S. President Woodrow Wilson made his famous "Fourteen Points" speech[104] to the U.S. Congress, recognizing one of the universal principles for which the United States and others were fighting was "[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." Later, three months before the United States entered World War II, President Franklin D. Roosevelt delivered his "Freedoms of the Seas" radio address[105] 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." 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." More recently, for the past three decades, a succession of U.S. presidents has executed a multi-agency Freedom of Navigation (FON) Program to preserve the nation's rights and freedoms against excessive maritime claims throughout the world.

Of note, this U.S. interest in freedom of navigation has included maintaining that freedom in the South China Sea, as demonstrated by a combination of public statements, diplomatic correspondence, and operational activities. For example, in 1961 – fifty years ago and nearly two decades before the U.S. Government formally established its FON Program -- the United States diplomatically protested a Republic of Philippines maritime claim as excessive under international law.[106] Through the 1980's, 1990's, 2000's, 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. 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."[107] In 1995, a U.S. State Department spokesman stated, "Maintaining 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." All of these U.S. statements and actions occurred long before July 2010. In short, the United States did not start caring about freedom of navigation, including freedom of navigation in the South China Sea, on the day that Secretary Clinton made her remarks two summers ago in Hanoi.

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[103] An Act more effectually to protect the Commerce and Coasts of the United States. Act of May 28, 1798, ch. 48, 1 Stat. 561; An Act further to protect the Commerce of the United States, Act of July 9, 1798, ch. 68, 1 Stat. 578; An Act for the protection of the Commerce and Seamen of the United States, against the Tripolitan Cruisers, Act of February 6, 1802, ch. 4, 2 Stat.129; An Act for the protection of the commerce of the United States against the Algerine cruisers, Act of March 3, 1815, ch. 90, 3 Stat. 230.

[104] U.S. President Woodrow Wilson, Fourteen Points Speech, January 8, 1918.

[105] U.S. President Franklin D. Roosevelt, "Freedom of the Seas" Fireside Chat, September 11, 1941

[106] "Philippines,"*Maritime Claims Reference Manual*, Department of Defense 2005.1-M, June 23, 2005; for the text of the 1961 and 1986 U.S. diplomatic protests of the Philippines' excessive maritime claims, see Roach and Smith, *Excessive Maritime Claims*, 134-138.

[107]Ang Cheng Guan, "The South China Sea Dispute Re-visited," Institute of Defence and Strategic Studies, Working Paper No. 4, August 1999, p. 14-15, citing "Washington's Priorities" in *Far Eastern Economic Review*, August 13, 1992, 18.

B. Freedom of Navigation Means More than Merely Freedom of Passage

Second, the phrase "freedom of navigation" includes more than just a limited freedom of passage. In reality, the interest in freedom of navigation is significantly broader than mere passage. Otherwise, the navigational right of innocent passage for the territorial seas would have simply been copied and pasted into the EEZ provisions of UNCLOS – which it was not. Instead, the phrase is often used to capture a broader, overarching interest of rights, freedoms, and uses of the seas reflected in UNCLOS. For example, during the final days of the Third U.N. Conference in 1982, then-Conference President Tommy Koh of Singapore delivered his famous "A Constitution of the Oceans" speech, describing how the grand bargain of the convention preserved "the world community's interest in the freedom of navigation." Likewise, when the U.S. Government has used the phrase "freedom of navigation," it has also intended for it to encompass the myriad of rights, freedoms, and uses of the seas guaranteed to all nations under international law. Throughout U.S. history, the umbrella term chosen by U.S. leaders has fluctuated between "freedom of navigation"[108] and "freedom of the seas."[109]

Similarly, the Obama Administration has made statements about freedom of navigation – both in general and specifically about the South China Sea – that could be reasonably interpreted to reference an overarching interest of freedom of navigation, vice a singular freedom of passage. First, the Administration's statements begin with the phrase "a national interest in" before using the phrase "freedom of navigation."[110] Second, some of those statements imply more than merely navigating through waterways of the world, with phrases like "open access to," "freedom to maneuver" and "freedom of action" within the maritime domain of Asia, along with the U.S. military's responsibility to help "preserve" or "safeguard" that "access."[111] Third, some of these statements discuss the passage rights of commercial vessels, but also the rights of military vessels to operate in the maritime domain as well.[112] Fourth, the statements occasionally expound on the greater breadth of freedoms, to include not merely the freedoms of navigation, but also freedom of overflight[113] and "other internationally lawful uses of the seas."[114] Fifth, these statements occasionally use the phrase "freedom of the seas" in conjunction with or in lieu

[108] U.S. President Woodrow Wilson, Fourteen Points Speech, January 8, 1918; U.S. President Ronald Reagan, *Freedom of Navigation Program* , National Security Decision Directive (NSDD) 265, March 16, 1987.
[109] U.S. President Franklin D. Roosevelt, "Freedom of the Seas" Fireside Chat, September 11, 1941; U.S. President George H.W. Bush, *National Security Strategy*, August 2011; U.S. President George W. Bush, *Arctic Region Policy*, National Security Presidential Directive (NSPD) 66, January 9, 2009.
[110]"Press Conference with U.S. President Obama and PRC President Hu," White House, Washington, DC, January 19, 2011; U.S. Secretary of State Hillary Clinton, "Remarks at Press Availability," Hanoi, Vietnam, July 23, 2010;Marciel, "Maritime Issues and Sovereignty Disputes in East Asia."
[111] U.S. President Barack Obama, *National Security Strategy*, May, 2010; U.S. Secretary of State Hillary Clinton, "Remarks at Press Availability," Hanoi, Vietnam, July 23, 2010; U.S. Department of Defense, *Report to Congress on Arctic Operations and the Northwest Passage*, May, 2011.
[112] "Briefing by Admiral Mullen on National Security Strategy," July 25, 2011.
[113]U.S. Secretary of Defense Leon Panetta, "Statement to ASEAN Defense Ministers," Bali, Indonesia, October 23, 2011.
[114] Office of the Press Secretary, "White House Fact Sheet: East Asia Summit," November 19, 2011.

of "freedom of navigation."[115] Read together, these statements by U.S. officials can only be interpreted to mean one thing: the United States considers the phrase "freedom of navigation" to encapsulate more than the mere passage of commercial vessels.

While nations should make efforts to quote UNCLOS terminology precisely,[116] there is unfortunately no single term within the text of UNCLOS that fully captures the "freedom of navigation" interest. The phrase "freedoms of navigation and overflight, and other internationally uses of the seas"[117] is good, but omits the navigational rights provided in the territorial seas, international straits, and archipelagic sea lanes. Therefore, the most concise, yet all-inclusive, phrase possible might be a consolidation of terminology found throughout the convention: the rights, freedoms and uses of the seas. This phrase would acknowledge the rights (i.e., the rights of innocent passage, transit passage, and archipelagic sea lanes passage), the freedoms (i.e., the freedoms of navigation and overflight, freedom to lay submarine cables and pipelines, freedom to construct artificial islands and installations, freedom of fishing, and freedom of scientific research), and the uses (i.e., the other internationally lawful uses of the sea) identified throughout the UNCLOS.

Regardless, it is deeply concerning when voices[118] from China imply that the interest of other nations in the South China Sea in freedom of navigation is not at risk merely because China does not purportedly seek to prevent the "freedom of passage" of commercial vessels. In fact, while many nations commonly use the phrase "freedom of navigation" in discussions with other South China Sea claimants in ASEAN,[119] the world has recently witnessed China instead insist upon using an entirely new phrase: "freedom of commerce."[120] To the contrary, freedom of navigation is much greater than freedom of commerce, whatever that phrase is intended to mean. Therefore, any proper assessment of the status or condition of freedom of navigation in a region of the world – be it the South China Sea or wherever – cannot be limited to whether commercial vessels are currently permitted by the coastal states to pass through the region.

C. Freedom of Navigation Cannot Co-exist with Excessive National Claims

Third, freedom of navigation -- at its core -- means that no nation restricts or attempts to restrict the rights, freedoms, and uses of the seas of any other nation or nations. To be sure, coastal states may enact national laws and regulations governing their respective maritime zones. Those national legal authorities, however, must fit within the rights and jurisdiction afforded to

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[115] "Briefing by Admiral Mullen on National Security Strategy," July 25, 2011; Captain John Kirby, Pentagon spokesman, quoted in Justin Fishel, "Iranian Navy Sending Ships Near U.S. Waters,"*Fox News*, September 28, 2011.

[116]See discussion Section II.D*supra*.

[117] UNCLOS, Article 58.

[118] PRC Ministry of Foreign Affairs, "Basic Stance and Policy of the Chinese Government in Solving the South China Sea Issue," November 17, 2000; John Pomfret, "China Renews Claim To South China Sea, Vows Freedom Of Passage," Washington Post, July 31, 2010.; "Joint Press Conference of Admiral Mike Mullen and General Chen Bingde," Beijing, PRC, July 11, 2011.

[119]Joint Statement of the 2nd United States-ASEAN Leaders Meeting, Office of the Press Secretary, White House, September 24, 2010; Joint Declaration ForEnhancing ASEAN-Japan Strategic Partnership For Prospering Together (Bali Declaration), November 18, 2011.

[120]Joint Statement Of China-ASEAN Commemorative Summit, November 19, 2011.

coastal states under the international law of the sea.[121] In fact, UNCLOS specifically uses the phrase "in conformity with this Convention" or words to that effect on at least eleven occasions as a prerequisite for laws and regulations of a coastal state that must be followed by other states.[122] If a coastal state asserts one or more claims in its maritime zones that are inconsistent with the legal regime reflected in UNCLOS, then those excessive maritime claims[123] could possibly impede the freedom of navigation of other nations.

Unfortunately, several of the coastal states bordering the South China Sea have enacted national laws or regulations through the years that establish maritime claims that are not in conformity with the legal regime reflected in UNCLOS. These include Vietnam,[124] Malaysia,[125] the Philippines,[126] and China.[127] The good news is that at least two of these South China Sea nations, the Philippines[128] and Vietnam,[129] are engaged in the process of "getting their legal house in order" when it comes to maritime claims. As of the publication of this paper, these two nations arerespectively considering national legislation that, if enacted,would modify maritime claims that pre-dated the 1982 conclusion of UNCLOS in order to confirm their national claims to international law. If finalized, these noble efforts by two of the South China Sea claimants should be praised by other nations, as the Philippines and Vietnam demonstrate a warming respect for international law and freedom of navigation. However, these legislative efforts by the Philippines and Vietnam must be officially enacted and the corresponding excessive claims repealed before those nations can receive "full credit" for these efforts.

Meanwhile, another South China Sea nation – China -- has unfortunately established and maintains a comprehensive regime of excessive maritime claims. In fact, China is one of only a few nations[130] in the entire world that has what this author calls a "full house" of excessive maritime claims. That is, China has established one or more excessive maritime claims in each of its maritime zones.[131] Worse yet, unlike the Philippines and Vietnam, China exhibits no interest in changing any of its excessive maritime claims into conformity with the legal regime reflected in UNCLOS. Therefore, China's Foreign Minister ironically tells the international community at the ASEAN Regional Forum that freedom of navigation is "obviously not

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[121] UNCLOS, Articles 2, 21(1), and 34(2).
[122] UNCLOS, Article 19(1), 21(1), 24(1), 41(1), 69(1), 70(1), 73(1), 240(d), 254(3), 256, and 257.
[123] Roach and Smith, *Excessive Maritime Claims*.
[124] "Vietnam," *Maritime Claims Reference Manual*.
[125] "Malaysia," *Maritime Claims Reference Manual*.
[126] "Philippines," *Maritime Claims Reference Manual*.
[127] "China," *Maritime Claims Reference Manual*.
[128] For the text of the proposed national legislation, see "An Act to Establish the Archipelagic Sea Lanes in the Philippine Archipelagic Waters, Prescribing the Rights and Obligations of Foreign Ships and Aircraft Exercising the Right of Archipelagic Sea Lanes Passage Through the Established Archipelagic Sea Lanes and Providing for the Associated Protective Measures Therein," Senate Bill No. 2738, Fifteenth Congress, First Session, Republic of the Philippines, March 10, 2011.
[129] "Vietnam-China Agreement Conforms to DOC," *Vietnam News Agency*, October 21, 2011.
[130] Only six other nations in the world have a "full house" of excessive maritime claims: Bangladesh, Burma, India, Iran, North Korea, and Pakistan. See Maritime Claims Reference Manual.
[131] In particular, China has the following excessive maritime claims: improperly-drawn straight baselines along its entire mainland coast (including the portion bordering the South China Sea) resulting in excessive internal waters; improper baselines around the Paracel Islands; unlawful restrictions on the right of innocent passage of foreign vessels; unauthorized security jurisdiction in its contiguous zone; and unlawful restrictions on non-resource activities by other nations in and over its EEZ. "China," *Maritime Claims Reference Manual*.

hindered" in the South China Sea, while his nation maintains one of the most comprehensive regimes of excessive maritime claims of any coastal state in the entire world. In general, the United States and other nations have expressed concern about China's area-denial capability;[132] yet, when it comes to China's excessive maritime claims, it appears to be engaged in another form of denial – the kind of denial that must be overcome in the first step of many twelve-step personal recovery programs. Therefore, until all of the South China Sea nations conform their maritime claims to the legal regime reflected in UNCLOS, it would be highly questionable to say that freedom of navigation is not at risk in the South China Sea.

In the personal opinion of this author, freedom of navigation in the South China Sea is weakened by these excessive maritime claims, but is fortunately not dead. It is still alive due, in large part, to the efforts of the U.S. Government over the past fifty years. Under international law, an excessive maritime claim asserted by one nation cannot become a part of customary law if others "persistently object"[133] to it through state actions. Consequently, through the long-standing U.S. FON Program, the United States diplomatically and operationally challenges excessive maritime claims asserted by coastal states around the world to prevent these claims from becoming a part of international custom. These activities are conducted routinely and professionally, and without regard to the nature of the U.S. relationship with the coastal state. Dating back to a U.S. diplomatic protest of a Philippines' maritime claim in the early 1960's, the United States has issued diplomatic protests and/or conducted operational assertions that have successfully challenged all of the above-mentioned excessive maritime claims asserted by South China Sea nations. Thus, ironically, some of the voices that have criticized the U.S. diplomatic efforts as "internationalizing"[134] what should remain regional disputes and the U.S. operational presence in the region as being "provocative"[135] need to realize that they are enjoying freedoms of navigation in the South China Sea *because of* the U.S. diplomatic and operational efforts through the years to preserve freedom of navigation in the region.

D. If You Don't Like Someone Else's Freedom, Exercise Yours (But Safely)

In some respects, the disagreement between the United States and nations like China over the scope of freedom of navigation might reflect a fundamental difference in their perspectives on the concept of freedom itself. Outside of the freedom of navigation context, the divergence of perspectives over the concept of freedom becomes clearer when we consider how the two forms of government handle undesirable exercises of freedom within their respective geographic borders. While China's domestic legal system restricts undesirable expressions of freedom in the name of "state security,"[136] U.S. domestic jurisprudence holds that the solution to undesirable

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[132] U.S. Chairman of the Joint Chiefs of Staff Admiral Mike Mullen, *National Military Strategy of the United States*, February 8, 2011, 3; "Press Briefing by National Security Advisor for Strategic Communications Ben Rhodes and Admiral Robert Willard, U.S. Pacific Command," November 13, 2011.

[133] Ian Brownlee, *Principles of Public International Law*, 6th Ed. (Oxford: Oxford University Press, 2003), 11.

[134] PRC Ministry of Foreign Affairs, "Foreign Ministry Yang Jiechi Refutes Fallacies on the South China Sea Issue," July 26, 2010.

[135] Liang Jun, "US Must Restrain Provocative Military Actions," *People's Daily Online*, June 12, 2010.

[136] "China's Security State," *The Economist*, March 10, 2011.

expressions of freedom is not for the government to restrict individual expressions, but rather to preserve the opportunity for competing expressions of freedom.[137]

Unfortunately, in the context of freedom of navigation, China has likewise attempted to characterize undesirable exercises of U.S. freedom of navigation beyond its territorial seas as illegal.[138]Much like China's domestic efforts to restrict undesirable exercises of freedom in the name of "security," China asserts that foreign military activities in and over its EEZ, including portions of its EEZ located in the South China Sea, violate China's security interests.[139]

Make no mistake: a nation may identify security interests in the areas approaching its territory. For example, in a region proximate to U.S. territory (i.e., the Arctic), the United States has also stated that it has a "broad and fundamental national security interests."[140] At the same time, however, that U.S. Arctic Region Policy opens with an overarching caveat that this policy "shall be implemented in a manner consistent…with customary international law as recognized by the United States, including with respect to the law of the sea." Regarding security interests of coastal states, the negotiating history of UNCLOS is clear: a handful of nations attempted to insert a reference to the coastal state's security interests in the "due regard" clause of the EEZ, but that effort was roundly defeated during the negotiations.[141] Thus, nations like the United States and China might have a security interest in the water and airspace near their respective sovereign territory, but they must find ways to legally protect those security interests, without violating the freedoms of other nations.

One proper way to preserve those interests without violating the freedom of others is for coastal states to exercise their own freedoms. Of note, the freedoms of navigation and overflight and other internationally lawful uses of the sea reflected in UNCLOS are afforded "all States," including to coastal states.[142] Just as a foreign military vessel or aircraft may conduct operations or activities in and over the EEZ of a coastal state, so too may that coastal state conduct military interceptions of foreign military vessels and aircraft operating in those same areas.[143] Consequently, the United States military reserves and occasionally exercises the right to intercept foreign military vessels and aircraft, like those from Russia, that are conducting operations in and over the U.S. maritime zones.[144]

At the same time, the United States is committed to a just international order that emphasizes not only the rights of nations, but also their responsibilities.[145] Such responsibilities include the obligation of all States to exercise "due regard" for foreign vessels and aircraft

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[137] Abrams v. United States, 250 U.S. 616 (1919) (Holmes, J. dissenting); Lamont v. Postmaster General, 381 U.S. 301, 308 (1965)(Brennan, J., concurring).
[138]Ma Zhaoxu, Ministry of Foreign Affairs of the PRC, "Press Conference," March 12, 2009.
[139]Ren and Cheng,"A Chinese Perspective."
[140] Bush, *Arctic Region Policy*.
[141] UNCLOS Commentary, Nandan and Rosenned, Eds., 558-560.
[142] UNCLOS, Articles 58(1) and 87(1).
[143] Federal Aviation Administration, *Aeronautical Information Manual*, Chapter 5, Section 6 ("National Security and Interception Procedures"), February 11, 2011.
[144] See discussion II.H. *supra*.
[145]U.S. Secretary of Defense Robert Gates, "Remarks by Secretary Gates at the Shangri-La Dialogue, International Institute for Strategic Studies," Singapore, June 4, 2010.

exercising their lawful freedoms and uses in and over a coastal state's EEZ. The negotiating history of UNCLOS shows that the standard of due regard requires all States "to refrain from activities that interfere with the exercise of" other States' freedoms.[146] In particular, this means nations must comply with other safety obligations like those reflected in the COLREGs[147] and other internationally-developed safety standards like the Code for Unalerted Encounters at Sea (CUES). In short, freedom of navigation and safety of navigation go hand in hand. Therefore, freedom of navigation is at risk when a coastal state like China either authorizes or fails to punish the masters and crews of its government and flagged vessels for unsafe navigational practices that jeopardize the lives, property, and freedom of navigation of vessels and aircraft from other states.[148]

E. Freedom of Navigation Is Not Free If Market Decides to Charge More

Often, the South China Sea situation of competing territorial claims between the six claimants is portrayed as "nation against nation" dispute in which only one nation can win territory and another nation or nations must correspondingly lose it. In terms of freedom of navigation, however, there is a real risk that all nations could lose. More importantly, whether that risk becomes a reality might be out of the hands of any of the nations involved in a territorial dispute. Instead, it could be determined by the market. More specifically, the international system of marine insurance for commercial shipping is controlled by insurers, such as Lloyds of London, and reflects the reality of the marketplace and the valuation of risk. Commercial vessels are generally uninsured against perils like war, or they are subject to increased rates if they transit through areas of increased risk. These risk areas of the world where insurance rates are elevated, however, include not only areas of international armed conflict (i.e., war), but also areas where there are other levels of unmanageable risk to commercial shipping. When risk goes up, insurance rates can increase accordingly.

Voices in China say that it does not seek to impede or threaten the freedom of navigation for commercial vessels through the South China Sea region. That determination, however, is not a determination that will be made solely by China or by any other South China Sea claimant, but can be based upon the unintended consequences of their assertive actions in the region. Instead, the market will look at the regional situation and determine whether the risk level warrants increased insurance rates. Much of "Asian miracle" in recent decades can be attributed to the global economy fostered by efficiencies gained in international shipping. If a sufficient number of skirmishes occurred or tensions rose to a certain level in the region, insurers would raise the insurance rates for transiting into, out of, or through the South China Sea. Consequently, shippers would be forced to either pay more to ship their goods (which would increases the prices of goods for the consumers worldwide) or, worst yet, they would avoid the region's sea lanes and ports all together. In that unintended sequence of events, freedom of navigation would clearly become less "free" for all nations.

[146] UNCLOS Commentary, Nandan and Rosenned, Eds., 86.
[147] See discussion Section II.C *supra*.
[148] See discussion Section II.C *supra*.

Conclusion

In the Introduction, this paper compared the competition of hamburger restaurants to the competition in international relations. To conclude, this paper will consider a lesson drawn from another form of competition. Competition is a word more often used to describe sports than it is used in the context of international relations. Sports have the benefit of teaching many lessons in life.Thus, in international relations situations like the South China Sea, the nations involved might be well-served to consider lessons from the world of sports on how to compete fairly. This idea came to mind while the author recently attended a "Friendship Game" in Beijing between China's Olympic basketball team and a team from Duke University, the author's *alma mater*.

Like any sport, there are rules to the game of basketball. But, like many sports that are played at multiple age- and skill-levels and in multiple geographic locations, there can be various sets of rules that could be applied to basketball. For example, in many youth leagues, the basketball goals are eight feet tall, vice ten feet tall; otherwise, many games played by the younger players would remain scoreless. Even at the adult level of play, however, the rule sets of basketball can still vary. Consider, for example, the different rules for U.S. collegiate and professional basketball leagues of play, to include the distance of the 3-point line and the length of the shot clock. Thus, a fundamental question prior to playing any competitive sport like basketball is identifying the appropriate set of rules for the teams or competitors to follow.

In the summer of 2011, the United States and China experienced such a competitive situation. Three U.S. basketball teams from Duke University, Georgetown University and University of Hawaii travelled to China and played a series of Friendship Games against basketball teams from the host nation. These U.S. college teams were familiar with and accustomed to playing by U.S. national rules established by the National Collegiate Athletic Association (NCAA) for their league games. Likewise, the professional Chinese teams were familiar with and accustomed to playing by China's national rules established by the Chinese Basketball Association (CBA). Thus, for these exhibition games between teams from different nations and leagues, the teams had to collectively determine what would be the appropriate rule-set to follow. Obviously, requiring the teams from both nations to follow a rule-setunilaterally established by only one nation could have unfairly favored that nation. Therefore, the fairest approach would be for all of the teams to follow a common set of international rules.[149]That is exactly what the teams did, which required the teams to adjust their respective styles of play[150]in accordance the international rule-set.[151]

During this series of the Friendship Games, the Duke team and China's Olympic team played three games against one another. For those three games, there was a healthy level of fair competition. Ultimately, the team from Duke demonstrated its status as a traditional collegiate powerhouse from the nation where basketball was invented, winning all three games in the

[149]Such international rules have been established by the International Basketball Federation (FIBA).
[150] Chris Cusack, "Krzyzewski: Trip to China, UAE Will Make Duke 'a Better Basketball Team'," *The Duke Chronicle*, August 12, 2011.
[151] "Blue Devils Scrimmage at Practice with Officials and International Rules to Prepare for the Trip to China/Dubai," *DukeBluePlanet.com*, August 12, 2011, accessed November 28, 2011.

international series. At the same time, however, the Chinese Olympic team noticeably demonstrated the significant progress Chinese players have made in their level of play over the past few years.

Likewise, in the realm of international relations, the world is witnessing a similar situation between the United States and China, including "competition" in the South China Sea. Since the end of the Cold War, the United States has been recognized as the one remaining global superpower. In recent years, however, China's role in the world has demonstrably grown. It has developed capabilities, power and influence through the employment of various instruments of national power, including diplomacy, military, and economics. Yet, in what China wishes to call its "peaceful rise," the question becomes: as China exercises that newfound national power,what rules or rule-sets must China follow in the competition of international relations?

When a nation is operating in a purely domestic or internal setting, each nation mayunilaterally choose and develop what rules it desires to follow. That is a fundamental tenet of international law, as the United Nations Charter emphasizes sovereignty, territorial integrity, and political independence of each member state.[152] Likewise, China has stated that its core interests include: "state sovereignty,""national security," and "territorial integrity."[153] A perfect example of China preserving what it considers to be its national interests is exhibited in Tiananmen Square, one of the largest public squares in the world. During the author's several trips to Beijing, he has noticed that this large, public square is often "carved" up, and some portions of the square are physically barricaded and placed off limits to Chinese citizens and foreign visitors alike. As a matter of sovereignty and territorial integrity, China is obviously allowed to take such actions in a purely domestic setting.

Change the setting or venue to an international one beyond China's borders, however, and the rules and rule-sets are different. That variation is what some in China appear to have difficulty realizing as China rises and becomes more integrated into the existing international order. While China may play its domestic security"game" and cordon off parts of its sovereign territory in Tiananmen Square, it cannot take similar actions and make its EEZ off limits for non-economic activities by other nations through domestic laws or skewed interpretations of existing international law. Similarly, it also cannot draw nine dashes on a map and make 80 percent of the South China Sea off limits to its neighbors and other nations in the world. To the contrary, the international rules of the "game" reflected in UNCLOS are clear: coastal states have sovereignty over their land and their territorial seas, but they lack sovereignty beyond those geographic areas. The legal regime reflected in UNCLOS provides China with only "sovereign rights" and jurisdiction over the economic resources in its EEZ, just as it equally provides those same limited rights and jurisdiction to every other coastal state in its respective EEZ. At the same time, those same international rules of UNCLOS fairly provide rights, freedoms, and uses of the sea to the United States, China, and every other nation of the world. In short, the international rules reflected in conventions like UNCLOS and the COLREGs, as well as customary law of the sea, constitute a balanced rule-set for nations to follow in the "sea game."

[152] United Nations Charter, Articles 2(4) and 2(7).
[153] Information Office of the State Council, People's Republic of China, *China's Peaceful Development*, September 2011.

Because some of these international rules of the "sea game" do not say or mean what some voices in China want them to say or mean, they noticeably do not like some of those rules. Nonetheless, all nations, including China, have an obligation to follow those rules, just as a sports team must follow all of the rules of game. Returning to the analogy of basketball, Duke's coach and players could have complained in the Friendship Game in Beijing about the 24-second shot clock in the international rules (vice the 35-second shot clock under NCAA rules), but that rule in the international match-up with China would have nonetheless applied and the referee would have justifiably whistled a shot-clock violation at the 25th second of a Duke possession of the ball.Plain and simple, nations must play by the international rules. With this sports analogy in mind, perhaps it is no coincidence that the same U.S. president who is known for his love of basketball[154] and recently attended the first-ever college basketball game held on the flight deck of a U.S. Navy aircraft carrier on Veteran's Day[155] is the same president who told the world less than 24 hours later at the Asia-Pacific Economic Cooperation (APEC) meeting in Hawaii that China must "play by the rules"[156] in international relations.

More importantly, rising and developing nations like China should understand that the applicable rule-sets of international relations were not dictated by the United States or any other single nation, but rather were developed by the community of nations in a fair and orderly process over an extended period of history. In fact, the first principle of Article 2 of the United Nations Charter states, "The Organization is based on the principle of the sovereign equality of all its Members." This "sovereign equality" of nations is reflected in the legal regime of UNCLOS. That is, the rules of this "sea game" were developed deliberately and fairly by the community of nations over more than a decade of fair negotiations. The customary law component of the law of the sea developed over decades and, for some rules, over centuries. That international rule-set incorporated and balanced the interests of coastal states and user states alike, and of large states and small states alike.[157] Consequently, thereis one set of rules that equally applies to all nations beyond their territory. Therefore, all nations must adhere to them consistently and uniformly, including in both "home games" (i.e., situations in their geographic regions) and "away games" (i.e., situations outside of their geographic regions). Otherwise, there is truly no international legal order.

The United States recognizes this truism, as demonstrated by its words and deeds, including the words and deeds identified and discussed in this paper. It demonstrates its respect for international law by how it follows all sources of international law, adheres to rules reflected in UNCLOS even though it is not a member state, applies all treaties and conventions including the COLREGs, honors the negotiating history and context of the law like UNCLOS, conforms its domestic legislation to international standards, and complies with the specific rules of international law. In the context of freedom of navigation, the United States further demonstrates its respect for international law by how it uniformly and consistently follows the

[154] "U.S. President Obama Joins Millions in Filling Out College Basketball Tournament Brackets in ESPN Exclusive," *ESPNMediaZone.com*, March 16, 2011, accessed November 28, 2011.
[155]Ben Feller, "Troops and Hoops for Obama, on a Navy Warship," *Associated Press*, November 11, 2011.
[156]David Nakamura, "Obama at APEC Summit: China Must 'Play by the Rules'," *Washington Post*, November 12, 2011.
[157]Amb. Tommy T.B. Koh, "A Constitution for the Oceans," December 10, 1982.

rules of the international game, regardless of whether it is playing a "home game" in or near its maritime zones (e.g., areas along its Pacific coastline, along its Atlantic coastline, or in the Arctic region), or an "away game" in or near the maritime zones of other nations (e.g., the South China Sea situation). Consistency and uniformity – that is how a responsible stakeholder should operate in the international legal order. Only then can international relations be conducted fairly. In short, nations must realize something many athletes are taught at an early age about good sportsmanship: It doesn't matter whether you win or lose -- it truly is about how you play the game.