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## THE NINE-DASH LINE IN THE SOUTH CHINA SEA: HISTORY, STATUS, AND IMPLICATIONS

*By Zhiguo Gao and Bing Bing Jia\**

The South China Sea has generally been a calm area of sea since ancient times. Until the late twentieth century, it had provided a fertile fishing ground for local fishermen from China and other littoral states, and a smooth route of navigation for the nations of the region and the rest of the international community. This tranquility has been disturbed, however, by two recent developments. The first was the physical occupation of the Nansha, or Spratly, Islands by some of the coastal states in the 1970s. This process continued through the rest of the century. Now, nearly all the islands and insular features within the Spratly Islands have been subjected to physical control by one littoral state or another.

The second development occurred more recently: under Article 76(8) of the UN Convention on the Law of the Sea (hereinafter UNCLOS),<sup>1</sup> states around the world submitted the limits of their claims to the continental shelf beyond two hundred nautical miles from their coastal baselines to the Commission on the Limits of the Continental Shelf. The joint submission of Malaysia and Vietnam in May 2009 was followed by exchanges of *notes verbales* among the littoral states that appear to have shifted the focus of the controversy to debates about the role of the nine-dash line drawn by China in the South China Sea, as depicted on the map that China attached to its initial response to Malaysia and Vietnam.

Several interrelated issues have emerged. First, what is the function of the nine-dash line and its design? Second, how did it come about, and does it have a foundation in international law? Third, if it is equivalent to an assertion of sovereignty, what is the scope of that assertion, as reflected in Chinese practice over the years? Fourth, is there a role for historic title to play in this situation? If so, what rights are underpinned by that title?

This article attempts to address these important questions by exploring and weighing the historical, legal, and other relevant evidence, with a view to providing some elaboration of its legal nature, current status, and possible implications. To this end, part I contains a brief introduction to the geography and significance of the South China Sea. Part II traces the historical evolution of the nine-dash line in Chinese practice during different periods of history. Part III examines the purpose and status of the line. Part IV addresses various relevant legal issues. Part V sets forth some policy considerations and prospects with respect to dispute resolution. The final part offers some concluding remarks.

The overall position of the authors is that the nine-dash line has always had a foundation in international law, including the customary law of discovery, occupation, and historic title, as well as UNCLOS itself. The article attempts to show that the line, albeit based in customary law,

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<sup>1</sup> UN Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 UNTS 396, *available at* <http://www.un.org/Depts/los/index.htm> [hereinafter UNCLOS].

does not in its current form contradict China's obligations under UNCLOS; rather, by virtue of the wider scope of the rules of customary international law, the line supplements what is provided for under UNCLOS. In this context, the article argues that historic title provides the basis for China's possession of certain historic rights in addition to the rights granted under UNCLOS.

## I. GEOGRAPHY AND ITS SIGNIFICANCE

In geographical terms, the South China Sea covers an area of sea of some 3.5 million square kilometers, semi-enclosed by Brunei, China,<sup>2</sup> Indonesia, Malaysia, the Philippines, and Vietnam.<sup>3</sup> It is dotted by numerous islands, islets, shoals, cays, reefs, and rocks that, in the area surrounded by China's nine-dash line, are conveniently gathered into island groups. Four island groups, including more than two hundred islands, islets, reefs, shoals, and rocks, are pertinent to the present context, known to both Chinese and foreign sources as the Xisha, or Paracel, Islands;<sup>4</sup> Dongsha, or Pratas, Islands; Zhongsha Islands, including Macclesfield Bank and certain reefs, sandbanks, and shoals; and Nansha, or Spratly, Islands.<sup>5</sup> Those four groups fall within an area with the coordinates of 3° 57' to 21° N and 109° 30' to 117° 50' E, stretching for a distance of approximately 1800 km from the north to the south, and about 900 km from the east to the west.<sup>6</sup> By virtue of its geographic position, the South China Sea forms part of the vital route of maritime trade and transport for East Asian and Southeast Asian states and their trading partners in Asia, Africa, and beyond.<sup>7</sup> There are rich fisheries in the South China Sea,<sup>8</sup> along with expanding prospects for oil and natural gas in the seabed and

<sup>2</sup> In this article, the term *China* refers to the state of China both before and after 1949, when the People's Republic of China was founded.

<sup>3</sup> See the map printed with the Editors' Introduction, 107 AJIL 95 (2013). See also INTERNATIONAL HYDROGRAPHIC ORGANIZATION, LIMITS OF OCEANS AND SEAS 30–31 (3d ed. 1953), available at [http://www.iho.int/iho\\_pubs/standard/S-23/S23\\_1953.pdf](http://www.iho.int/iho_pubs/standard/S-23/S23_1953.pdf); CHINA INSTITUTE OF MARINE AFFAIRS, STATE OCEANIC ADMINISTRATION, ZHONG GUO HAI YANG FA ZHAN BAO GAO [CHINA'S OCEAN DEVELOPMENT REPORT] 19–20 (2011). This report, published in Chinese as one volume in an annual series, contains a more detailed description of the geography of the South China Sea than the International Hydrographic Organization publication, with coordinates of major turning points all clearly given. On the semi-enclosed sea status of the South China Sea, see Hasjim Djalal, *Indonesia and the South China Sea Initiative*, 32 OCEAN DEV. & INT'L L. 97, 98 (2001).

<sup>4</sup> The term *islands* in the pinyin romanization of Chinese is spelled as *qun dao*, which in connotation can also include an archipelago.

<sup>5</sup> CHINA INSTITUTE OF MARINE AFFAIRS, *supra* note 3, at 20. The report also provides, at page 24, the following details: the Xisha Islands comprise 32 islands and islets, each possessing a surface area larger than five hundred square meters; the Zhongsha Islands are composed of rocks, sandbanks, and reefs, among which, by virtue of two rocks, only Huang Yan Island (or Scarborough Shoal or Reef) rises above sea level at high tide; the Nansha Islands consist of over 230 islands, islets, rocks, banks, and shoals, among which 25 are islands. Another Chinese publication describes the Dongsha Islands as comprising Dongsha, or Pratas, Island, the Dongsha, or Pratas, Reef, and two banks. See GEOGRAPHICAL NAMES COMMISSION, GUANG DONG PROVINCE, NAN HAI ZHU DAO DI MING ZI LIAO HUI BIAN [COLLECTION OF MATERIALS REGARDING THE GEOGRAPHICAL NAMES OF THE ISLANDS IN SOUTHERN CHINA SEA] 164–68 (1987). Useful references with regard to the geography and names of those islands may also be found in publications in English. See MARWYN S. SAMUELS, CONTEST FOR THE SOUTH CHINA SEA 183–94 (1982).

<sup>6</sup> CHINA INSTITUTE OF MARINE AFFAIRS, *supra* note 3, at 20.

<sup>7</sup> Nguyen Hong Thao & Ramses Amer, *A New Legal Arrangement for the South China Sea?* 40 OCEAN DEV. & INT'L L. 333, 334 (2012).

<sup>8</sup> Zhao Lihai, *Guan Yü Nan Hai Zhu Dao De Ruo Gan Fa Lü Wen Ti* [Certain Legal Questions Concerning Islands in the South China Sea], 4 FA ZHI YÜ SHE HUI FA ZHAN [RULE L. & SOCIETAL DEV.] 50, 51–52 (1995); Tao Cheng, *The Dispute over the South China Sea Islands*, 10 TEX. INT'L L.J. 265, 266–67 (1975).

subsoil.<sup>9</sup> While their location provides the littoral states of the South China Sea with the opportunity to become seafaring nations, their proximity to one another surrounding a semi-enclosed sea<sup>10</sup> can also fuel disputes for regional control and influence.<sup>11</sup> The South China Sea's strategic and economic significance is by no means of recent origin; it can be traced back two millennia. The developments in the South China Sea and the major disputes now festering among the region's littoral states have a long history indeed, upon which a long shadow has been cast by a heavy Chinese influence.

## II. HISTORIC EVOLUTION OF THE NINE-DASH LINE IN CHINESE PRACTICE

### *The Pre-1935 History of Chinese Activities in the South China Sea: Peaceful and Effective Use*

In 1935, a commission appointed by the then Chinese government published a list of geographical names for islands in the South China Sea. Prior to that, however, the South China Sea had been known to Chinese fishermen and seafarers from time immemorial. There are historical accounts aplenty.<sup>12</sup>

The early history of Chinese use of the South China Sea and its islands includes accounts of tributes made to the Imperial Court of various dynasties before the third century AD by "barbarians" from the southern seas.<sup>13</sup> The term *Nan Hai* (Southern Sea) appeared in the classic poetry book *Shi Jing* (The Classic of Poetry), a publication of the Spring and Autumn Period (475–221 BC),<sup>14</sup> and it has remained the standard appellation in Chinese for the South China Sea ever since. In later Chinese dynasties—from the fifth century AD forward, as knowledge of the seas was increasingly corroborated by travelers and other seafarers—references to the southern seas and islands became more frequent in geographical and literary works.<sup>15</sup> The clarification of the location and environs of the South China Sea and beyond, together with advances in shipbuilding and the navigational use of compass, enabled regular journeys to other states in the region<sup>16</sup> and inspired, among others, the famed "Seven Voyages"

<sup>9</sup> See *infra* part II.

<sup>10</sup> Article 122 of UNCLOS, *supra* note 1, provides that "'enclosed or semi-enclosed sea' means a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States."

<sup>11</sup> John O'Callaghan, *Southeast Asia Splashes Out on Defense, Mostly Maritime*, REUTERS, Oct. 7, 2012, at <http://www.reuters.com/article/2012/10/07/us-defence-southeastasia-idUSBRE8960JY20121007> (between 2002 and 2011, defense spending by Southeast Asian countries grew by 42 percent in real terms).

<sup>12</sup> WO GUI NAN HAI ZHU DAI SHI LIAO HUI BIAN [COLLECTION OF HISTORICAL MATERIALS CONCERNING OUR COUNTRY'S ISLANDS IN THE SOUTH CHINA SEA] (Han Zhenhua, Lin Jinzhi & Wu Fengqi eds., 1988) [hereinafter COLLECTION OF HISTORICAL MATERIALS]; NAN HAI WEN TI WEN XIAN HUI BIAN [COLLECTION OF DOCUMENTS ON THE ISSUE OF THE SOUTH CHINA SEA] (Wu Shicun, Li Xiuling, Zhong Tianxiang, Wu Yan & Fu Yu eds., 2001) [hereinafter COLLECTION OF DOCUMENTS ON THE ISSUE OF THE SOUTH CHINA SEA].

<sup>13</sup> Jianming Shen, *China's Sovereignty over the South China Sea Islands: A Historical Perspective*, 1 CHINESE J. INT'L L. 94, 102–05 (2002). In the present article, translations from the Chinese are given by the authors unless otherwise indicated.

<sup>14</sup> *Id.* at 104.

<sup>15</sup> Ministry of Foreign Affairs of the People's Republic of China, *Nan Hai Zhuan Ti* [The Issue of the South China Sea], pt. II (Nov. 22, 2000), at <http://www.fmprc.gov.cn/chn/pds/ziliaol/z/ywzt/wzzt/2305/>.

<sup>16</sup> Shen, *supra* note 13, at 119–20 (relating to a Chinese publication in the year 1178 that described the tributary routes to and from China in the South China Sea). But the more impressive account was by Zhao Rushi of Southern Song Dynasty in his *Zhu Fan Zhi* [Records of Foreign Peoples], compiled in the years 1225 to 1242, which provided

by the “Three-Jewel Eunuch,” Zheng He, in the Ming dynasty of the early fifteenth century.<sup>17</sup> The voyages, conducted between 1405 and 1433, were official in nature, as Zheng was appointed fleet admiral by the Ming emperor, Yong Le, with a mandate to spread overseas the knowledge of the emperor’s “majesty and virtue.”<sup>18</sup> Although records of his voyages were destroyed or lost in the late Ming dynasty due to anti-maritime policies, other Chinese written records reported on the activities of Chinese nationals in parts of the South China Sea along the routes of those voyages; “the local gazetteers for Hainan infer[red] that all offshore areas, including the Sea of Banks east of Wan-chou, were part of an extended tortoise-gathering, fishing and guano collection zone.”<sup>19</sup>

The so-called Silk Road on the Sea was first used in the Qin and Han dynasties (221 BC–220 AD) and flourished in popularity in the Tang and Song dynasties (618–1279 AD). This maritime route of trade and commerce not only preceded its counterpart on land but also extended farther to reach the northern shores of the Mediterranean.<sup>20</sup> It may well be the most enduring maritime trade route in history. It did not decline in use until the late Ming and early Qing emperors issued a ban on maritime trade between 1474 and 1551. After the (first) Opium War broke out in 1840 between China and Great Britain, the Silk Road on the Sea fell into disuse.

The South China Sea lay at the center of this famous route. Chinese ships, loaded with silk, porcelain, tea, and other commodities, set sail from southeast China and navigated along the coasts of the Philippines, Vietnam, Malaysia, and Thailand and through the Malacca Strait to India and the Mediterranean.<sup>21</sup>

Early in the twentieth century, the geographical scope of the Chinese state’s dominion increasingly came to attract the attention of both cartographers and the government itself.<sup>22</sup> In 1914, a continuous boundary line enclosing part of the South China Sea, along with two island groups, appeared in a Chinese national atlas compiled by two private cartographers.<sup>23</sup> No later than 1935, the boundary line was extended (again by private cartographers) to include the four island groups in the South China Sea.<sup>24</sup> In January 1935, a government-appointed

“locational coordinates” that left little doubt about the objects of his account: the Xisha and Zhongsha Islands. See SAMUELS, *supra* note 5, at 16–17.

<sup>17</sup> BRICE SWANSON, EIGHTH VOYAGE OF THE DRAGON: A HISTORY OF CHINA’S QUEST FOR SEAPOWER 37–38 (1982), *cited in* Shen, *supra* note 13, at 121–22.

<sup>18</sup> SAMUELS, *supra* note 5, at 20–22.

<sup>19</sup> *Id.* at 22.

<sup>20</sup> Chen Yan, *Lun Hai Shang Xi Chou Zhi Lu Yu Zhong Wai Wen Hua Jiao Liu* [The Maritime Silk Road and Sino-Foreign Cultural Relations], in ZHONG GUO YU HAI SHANG SI CHOU ZHI LU [CHINA AND THE MARITIME SILK ROUTE: PROCEEDINGS OF THE UNESCO QUANZHOU INTERNATIONAL SEMINAR ON CHINA AND THE MARITIME ROUTES OF THE SILK ROADS] 1, 1–4 (1991). The naval expeditions by Admiral Cheng He demonstrated the great importance of the “Silk Road of the Sea” and represented the peak of its popularity. See Wu Ding Guo, *Zheng He Xia Xi Yang Zai Hang Hai Shang De Wei Da Cheng Jiu* [Great Achievement of Zheng He in Seafaring by His Voyages], in CHINA AND THE MARITIME SILK ROUTE, *supra*, at 266, 270.

<sup>21</sup> Li Zhi Yan, *Hai Shang Si Chou Zhi Lu De Kai Tuo Dui Zhong Guo Tao Ci Fa Zhan De Gong Xian* [The Contribution of the Opening of the Maritime Silk Road to the Development of China’s Porcelain Industry], in CHINA AND THE MARITIME SILK ROUTE, *supra* note 20, at 86, 87, 89, 91–92.

<sup>22</sup> For early published maps, see Shen, *supra* note 13, at 126–28 (commenting that although the “ancient maps lack precision due to limitations on map drawing techniques, they do establish that China not only considered the South China Sea Islands her territory by action and words, but also illustrated her sovereignty over these areas through visual devices”).

<sup>23</sup> COLLECTION OF HISTORICAL MATERIALS, *supra* note 12, at 355.

<sup>24</sup> *Id.* at 356.

commission, which was established to examine maps and atlases produced by private sources in China, published its list of 132 names, in both English and Chinese, for islands and other insular features in the South China Sea.<sup>25</sup> In April 1935, the commission's gazette published an atlas of the islands in the South China Sea.<sup>26</sup>

### *Developments Between 1936 and 1956*

In 1946, China, pursuant to the Cairo Declaration and the Potsdam Proclamation, recovered the Xisha and Nansha Islands in the South China Sea from Japan.<sup>27</sup> There was no reaction from Vietnam or any other state, and the Chinese naval contingent sent to the islands for the task erected stone markers on Yong Xing, or Woody, Island, of the Xisha Islands and Tai Ping, or Itu Aba, Island of the Nansha Islands.<sup>28</sup>

Following further inspections and surveys, the Chinese government internally circulated an atlas in 1947, drawing an eleven-dash line to indicate the geographical scope of its authority over the South China Sea, right down to the Zengmu Ansha, or James Shoal, at 3° 58' N, 112° 17' E.<sup>29</sup> In the same year, the Ministry of the Interior published a list of 172 geographical names, in both Chinese and English, for the islands in the South China Sea.<sup>30</sup> It may be recalled from the discussion in the preceding section that ministry personnel were included in the

<sup>25</sup> COLLECTION OF DOCUMENTS ON THE ISSUE OF THE SOUTH CHINA SEA, *supra* note 12, at 13–19 (reproducing the commission's bulletin, especially the pages on which the list of names was set forth). The commissioners were drawn from the foreign ministry, ministry of the interior, ministry of education, ministry of the navy, chiefs of staff, and Mongolian-Tibet Commission.

<sup>26</sup> *Id.* at 14. It may be that the incentive for establishing the commission was the confusion caused by an incident in which France took possession of nine small islets in the Nansha group by force on July 25, 1933: see Hungdah Chiu & Choon-Ho Park, *Legal Status of the Paracel and Spratly Islands*, 32 OCEAN DEV. & INT'L L. 1, 12–13 (1975). Deciding to protest, China immediately notified the French ambassador, on August 4, 1933, that it reserved its right in connection with this incident, pending further information required of the French side as to the location and coordinates of the seized islets. See COLLECTION OF HISTORICAL MATERIALS, *supra* note 12, at 261 (reporting the statement by the spokesperson of the Chinese Foreign Ministry); COLLECTION OF DOCUMENTS ON THE ISSUE OF THE SOUTH CHINA SEA, *supra* note 12, at 8 (the original Chinese *note verbale*).

<sup>27</sup> The Cairo Declaration stated that it was the "purpose" of the "Three Great Allies" that

Japan shall be stripped of all the islands in the Pacific which she has seized or occupied since the beginning of the first World War in 1914, and that all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and the Pescadores, shall be restored to the Republic of China. Japan will also be expelled from all other territories which she has taken by violence and greed.

Point 8 of the Potsdam Proclamation stated that the "terms of the Cairo Declaration shall be carried out and Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku and such minor islands as we determine." See U.S. DEPARTMENT OF STATE, THE AXIS IN DEFEAT: A COLLECTION OF DOCUMENTS ON AMERICAN POLICY TOWARD GERMANY AND JAPAN 4–5, 27–28 (1946).

<sup>28</sup> COLLECTION OF HISTORICAL MATERIALS, *supra* note 12, at 180–81 (reproducing, in a publication of May 1948, an account by the Chinese naval command of the Chinese navy's action on the islands, which included a surrender ceremony and the hoisting of the national flag, firing of gun salutes, and erecting of commemorative stone tablets).

<sup>29</sup> COLLECTION OF MATERIALS REGARDING THE GEOGRAPHICAL NAMES OF THE ISLANDS IN SOUTHERN CHINA SEA, *supra* note 5, at 45 (showing the atlas (as produced by the Ministry of the Interior's Frontier Department), which was the first to contain the dashed lines); COLLECTION OF HISTORICAL MATERIALS, *supra* note 12, at 181–82 (reproducing a resolution by the Ministry of the Interior, Foreign Ministry, Defense Ministry, and Naval Command to confirm Chinese sovereignty over the Xisha and Nansha Islands, among others); see also Chiu & Park, *supra* note 26, at 14 & n.66.

<sup>30</sup> COLLECTION OF DOCUMENTS ON THE ISSUE OF THE SOUTH CHINA SEA, *supra* note 12, at 28–36.

1935 government commission in devising the earlier list of 132 names for islands in the South China Sea, resulting in significant continuity between the two lists. In February 1948, China published an atlas of national administrative districts through the Commerce Press, Beijing, reflecting the 1947 atlas that was internally circulated.<sup>31</sup> In May 1949, the four island groups in the South China Sea and other attached islands were placed under the authority of the Hainan District of Guang Dong Province.<sup>32</sup>

The underlying reason for the eleven-dash line was presumably to reaffirm and reiterate China's sovereignty over the island groups in the South China Sea at the beginning of a new, postwar era.<sup>33</sup>

In early 1949, news reports indicated that the Philippines, which gained independence in July 1946, began to show interest in the Nansha Islands. In response to an inquiry by China that referred to "China's Tai Ping Island," the Philippines explained that it was concerned only with protecting its fishermen in the waters adjacent to that island.<sup>34</sup>

On May 29, 1956—seven years after the founding of the People's Republic of China on October 1, 1949—China issued a statement in response to a suggestion by the Philippines that some islands of the Nansha Islands "should" belong to the Philippines because of their proximity to it.<sup>35</sup> This 1956 statement repeated the statement by the Chinese foreign minister, Zhou Enlai, dated August 15, 1951, that "the Xisha Islands and Nanwei Dao [Spratly Islands] are inherently Chinese territory, just like the whole of the Nansha Islands, Zhongsha Islands and Dongsha Islands. They fell during the war of aggression waged by Japanese imperialists, but were fully recovered by the then Chinese Government upon Japan's surrender."<sup>36</sup>

In 1953, two dashes were removed from the eleven-dash line, leaving nine segments, and in that same year the new line made its first appearance in atlases produced on the mainland of China.<sup>37</sup>

<sup>31</sup> COLLECTION OF MATERIALS REGARDING THE GEOGRAPHICAL NAMES OF THE ISLANDS IN SOUTHERN CHINA SEA, *supra* note 5, at 212.

<sup>32</sup> COLLECTION OF DOCUMENTS ON THE ISSUE OF THE SOUTH CHINA SEA, *supra* note 12, at 37–38.

<sup>33</sup> DANIEL J. DZUREK, THE SPRATLY ISLANDS DISPUTE: WHO'S ON FIRST? 12, 14, 46–47, 49 (1996) (suggesting that the dashed lines roughly followed the 200-meter isobath). The 1945 Truman Proclamation on the continental shelf was based on a rough estimate of 100 fathoms, or 600 feet of depth, for the water column above the seaward edge of the shelf. See 4 MARJORIE WHITEMAN, DIGEST OF INTERNATIONAL LAW 757–58 (1965) (reproducing a White House press release of September 28, 1945, commenting on the proclamation). The same idea is reflected in the reference to the slightly deeper, 200-meter isobath in the definition of the continental shelf in Article 1 of the 1958 Convention on the Continental Shelf, Apr. 29, 1958, 499 UNTS 311.

<sup>34</sup> COLLECTION OF HISTORICAL MATERIALS, *supra* note 12, at 270–71 (reproducing *notes verbale* of the two states).

<sup>35</sup> 4 ZHONG HUA REN MIN GONG HE GUI DUI WAI GUAN XI WEN JIAN JI [COLLECTION OF DOCUMENTS ON THE FOREIGN RELATIONS OF THE PEOPLE'S REPUBLIC OF CHINA] (1956–1957), at 61–62 (1961) [hereinafter COLLECTION OF DOCUMENTS ON THE FOREIGN RELATIONS OF THE PEOPLE'S REPUBLIC OF CHINA].

<sup>36</sup> 2 COLLECTION OF DOCUMENTS ON THE FOREIGN RELATIONS OF THE PEOPLE'S REPUBLIC OF CHINA (1951–1953), *supra* note 35, at 30 (1961).

<sup>37</sup> Jia Yu, *Nan Hai "Duan Xu Xian" De Fa Lü Di Wei* [Legal Status of the "Broken Line" in the South China Sea], 15 ZHONG GUO BIAN JIANG SHI YAN JIU [CHINA'S BORDERLAND HISTORY AND GEOGRAPHY STUDIES] 112, 113 (2005). As for the reason of this reduction, it likely reflected a warming in relations between China and Vietnam in the 1950s. The first two lines lay within the Beibu Gulf, or Gulf of Tonkin, bordered by Vietnam and China, and they were taken as effective during the pre-1949 period. When the nine-dash line emerged in the 1950s, the two states were politically close, with each having a three-mile territorial sea. Although political circumstances have changed again since the two dashes were removed, the nine-dash line has remained the norm for Chinese-published maps and atlases. *Id.* at 115, 120.

*The Evolution of the Nine-Dash Line: 1958–2011*

*Relevant Chinese legislations and administrative measures.* On September 4, 1958, China promulgated its Declaration on the Territorial Sea, which has since become the foundation for China's maritime order.<sup>38</sup> Article 1 not only provided for a twelve-nautical-mile territorial sea for China but applied that breadth both to the mainland and the coastal islands and to the off-lying islands of Dongsha, Nansha, Penghu, Taiwan, Xisha, and Zhongsha, among others.

In 1959, the Hainan District established an administrative office on Yong Xing Island to administer the affairs of the Xisha, Zhongsha, and Nansha Islands. The office was transferred to Guang Dong Province in 1969.<sup>39</sup> In 1984, the National People's Congress included within the territorial scope of the newly established Hainan Administrative Region "the islets, reefs and sea areas of Xisha, Nansha, and Zhongsha islands."<sup>40</sup>

In anticipation of the ratification of UNCLOS, China promulgated its Law on the Territorial Sea and the Contiguous Zone on February 25, 1992.<sup>41</sup> Article 2 includes within the land territory of China the four island groups in the South China Sea, as well as other islands,<sup>42</sup> to which China's twelve-mile territorial sea attaches. Article 3 authorizes the use of straight baselines for measuring the breadth of the territorial sea.

On June 7, 1996, on depositing its instrument of ratification of UNCLOS, China stated that "the People's Republic of China reaffirms its sovereignty over all its archipelagos and islands as listed in article 2 of the Law of the People's Republic of China on the territorial sea and the contiguous zone, which was promulgated on 25 February 1992."<sup>43</sup> On May 15, 1996, China promulgated base points for measuring its territorial sea, which included those on the Xisha Islands.<sup>44</sup>

<sup>38</sup> 5 COLLECTION OF DOCUMENTS ON THE FOREIGN RELATIONS OF THE PEOPLE'S REPUBLIC OF CHINA (1958), *supra* note 35, at 162–63 (1959). The declaration was approved by the Standing Committee of the People's Congress on September 4, 1958, thus making it part of Chinese law.

<sup>39</sup> COLLECTION OF MATERIALS REGARDING THE GEOGRAPHICAL NAMES OF THE ISLANDS IN SOUTHERN CHINA SEA, *supra* note 5, at 163.

<sup>40</sup> LEGISLATIVE AFFAIRS COMMISSION OF THE STANDING COMMITTEE OF THE NATIONAL PEOPLE'S CONGRESS OF THE PEOPLE'S REPUBLIC OF CHINA, THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA (1983–1986), at 146 (1987). The region was under the authority of the Guang Dong Province. This arrangement was reaffirmed when Hainan became a province in April 1988. *See* THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA (1987–1989), *supra*, at 249 (1990).

<sup>41</sup> THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA (1990–1992), *supra* note 40, at 343 (1993).

<sup>42</sup> It provides, in relevant part:

The land territory of the People's Republic of China includes the mainland of the People's Republic of China and its offshore islands, Taiwan and all islands appertaining thereto including the Diaoyu Islands; the Penghu Islands; the Dongsha Islands; the Xisha Islands; the Zhongsha Islands and the Nansha Islands; as well as all the other islands that belong to the People's Republic of China.

This English translation is available at <http://www.lehmanlaw.com/resource-centre/laws-and-regulations/general/law-of-the-peoples-republic-of-china-concerning-the-territorial-sea-and-the-contiguous-zone-1992.html>.

<sup>43</sup> *See* United Nations, Division for Ocean Affairs and Law of the Sea, Declarations and Statements, at [http://www.un.org/Depts/los/convention\\_agreements/convention\\_declarations.htm](http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm).

<sup>44</sup> OFFICE OF POLICY, LEGISLATION AND PLANNING, STATE OCEANIC ADMINISTRATION, ZHONG HUA REN MIN GONG HE GUO HAI YANG FA GUI XUAN BIAN [COLLECTION OF SELECT MARITIME LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA] 8 (1998).

On June 26, 1998, China promulgated its Law on the Exclusive Economic Zone (EEZ) and the Continental Shelf.<sup>45</sup> Article 14 provides that the provisions of this law do not prejudice “historic rights” enjoyed by China.

### *Chinese Action at the International Level*

It is a common (and correct) view that tensions in the South China Sea began to emerge in the late 1960s as the potential of oil and natural gas in this area came to be appreciated.

The situation in the area changed quickly in the early 1970s. In July 1971, the Philippines declared possession of the so-called Kalayaan Group.<sup>46</sup> In January 1974, China took back the Xisha Islands after a successful, but minor, war with the then Republic of Vietnam (South Vietnam), which earlier had also announced the inclusion within Vietnamese territory of more than ten islands and islets from the Nansha Islands.<sup>47</sup> Vietnam was more assertive in later years and, by 2004, had managed to occupy twenty-nine of the Nansha Islands.<sup>48</sup> Malaysia has claimed about five reefs in the Nansha Islands.<sup>49</sup>

China has consistently protested against foreign challenges to its sovereignty over the affected islands and other insular features in the South China Sea, including adjacent waters. In addition, China asserted its position during the sessions of the Third United Nations Conference on the Law of the Sea.<sup>50</sup>

One episode deserves special attention. On December 25, 2000, China and Vietnam concluded the Agreement on the Delimitation of the Territorial Seas, Exclusive Economic Zones, and Continental Shelves in the Beibu Gulf/Bac Bo Gulf (or Tonkin Gulf).<sup>51</sup> In the course of the negotiations, the two parties debated the appropriateness of using the meridian drawn in

<sup>45</sup> LAWS OF THE PEOPLE’S REPUBLIC OF CHINA (1998), *supra* note 40, at 61 (1999).

<sup>46</sup> Cheng, *supra* note 8, at 270–71 (citing a *New York Times* report, July 11, 1971, at A18, on the content of the note); see also Diane C. Drigot, *Oil Interests and the Law of the Sea: The Case of the Philippines*, 12 OCEAN DEV. & INT’L L. 23, 24, 36 & n.65, 41 (1982). This declaration was followed by Presidential Decree No. 1596, June 11, 1978. See SAMUELS, *supra* note 5, at 89 & n.60.

<sup>47</sup> SAMUELS, *supra* note 5, at 99. In June 1956, Vietnam’s vice foreign minister stated to the Chinese chargé d’affaires in Hanoi that according to Vietnam’s historical records, the Xisha and Nansha Islands belong to China. See *The Issue of the South China Sea*, *supra* note 15, pt. V. In September 1958, the premier of the Democratic Republic of Vietnam wrote a letter to his Chinese counterpart, Zhou Enlai, to inform the latter of Vietnam’s recognition of, and respect for, the Chinese Declaration on the Territorial Sea. That declaration included the four island groups within Chinese territory. See also COLLECTION OF HISTORICAL MATERIALS, *supra* note 12, at 542–43 (reproducing a news report published in the REN MIN RI BAO [PEOPLE’S DAILY], Sept. 22, 1958, at 3). As for the legitimacy of the Democratic Republic of Vietnam in representing the people of Vietnam and the merger of South Vietnam with North Vietnam, see JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 476–77 (2d ed. 2006). As regards the representation of the state of Vietnam by North Vietnam, see Communiqué of the Political Consultative Conference on National Reunification, in *THE REUNIFICATION OF VIET NAM (DOCUMENTS OF THE POLITICAL CONSULTATIVE CONFERENCE ON NATIONAL REUNIFICATION)* 99, 101 (1975).

<sup>48</sup> Gao Zhiguo, *The South China Sea: From Conflict to Cooperation?* 25 OCEAN DEV. & INT’L L. 345, 348 (1994). Vietnam had occupied twenty-one islands and the like by 1993 and had taken another eight by 2004.

<sup>49</sup> COLLECTION OF MATERIALS REGARDING THE GEOGRAPHICAL NAMES OF THE ISLANDS IN SOUTHERN CHINA SEA, *supra* note 5, at 381–82 (citing CAN KAO XIAO XI [REFERENCE NEWS], Mar. 31, 1983; the newspaper has been published by the New China News Agency since 1931).

<sup>50</sup> COLLECTION OF DOCUMENTS ON THE ISSUE OF THE SOUTH CHINA SEA, *supra* note 12, at 63–69 (citing the statement by the head of the Chinese delegation to UNCLOS III on July 2, 1974).

<sup>51</sup> 2336 UNTS 179. The treaty entered into force on June 30, 2004, upon exchange of instruments by the parties in Hanoi in accordance with Article 11 of the Agreement.

the 1887 treaty between France and China.<sup>52</sup> Vietnam proposed using the meridian as the maritime boundary in the Tonkin Gulf.<sup>53</sup> China opposed the proposal because, in its view, the line was drawn in the 1887 treaty for the purpose of allocating islands.<sup>54</sup> In other words, the boundary between the two states' maritime spaces in the Tonkin Gulf was not fixed by the 1887 treaty. The meridian in question, if adopted as the boundary as Vietnam wished during the negotiations leading to the 2000 agreement, would have been too close to the coast of China's Hainan Island, resulting in inequity. It is interesting that neither party rejected the line as such.

In respect of the May 6, 2009, joint submission by Malaysia and Vietnam to the Commission on the Limits of the Continental Shelf (of whose content Malaysia had informed China before filing it),<sup>55</sup> China stated in its *note verbale* of May 7 [hereinafter Chinese Note I]:

China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof (see attached map). . . .

The continental shelf beyond 200 nautical miles as contained in the Joint Submission . . . has seriously infringed China's sovereignty, sovereign rights and jurisdiction in the South China Sea.<sup>56</sup>

The map attached to Chinese Note I showed the nine-dash line.

In its *note verbale* of May 8,<sup>57</sup> Vietnam stated:

The Hoang Sa (Paracels) and Truong Sa (Spratlys) archipelagoes are parts of Viet Nam's territory. Viet Nam has indisputable sovereignty over these archipelagoes. China's claim over the islands and adjacent waters in the Eastern Sea (South China Sea) as manifested in the map attached with the Notes Verbale CML/17/2009 and CML/18/2009 has no legal, historical or factual basis, therefore is null and void.

In its note of May 20,<sup>58</sup> Malaysia stated that the submission was made "without prejudice to the delimitation of the continental shelf between States with opposite or adjacent coasts in

<sup>52</sup> Convention Concerning the Delimitation of the Border Between China and Tonkin, June 26, 1887, at <http://www.chinaforeignrelations.net/node/167>.

<sup>53</sup> Ted L. McDorman, *Central Pacific, East Asia, Southeast Asia*, in 5 INTERNATIONAL MARITIME BOUNDARIES 3446 (David A. Colson and Robert W. Smith eds., 2005).

<sup>54</sup> See SINANET interview with Director of the Law of the Sea, Department of Treaties and Law, Ministry of Foreign Affairs of the People's Republic of China (Aug. 3, 2004), at <http://news.sina.com.cn/c/2004-08-03/04203274593s.shtml>, on the effect of the delimitation agreement on Chinese fishing rights, in which he confirmed China's view on the effect of the 1887 treaty's dividing line of longitude 108° 03' 13" E. See also Nguyen Hong Thao, *Maritime Delimitation and Fishery Cooperation in the Tonkin Gulf*, 36 OCEAN DEV. & INT'L L. 25, 26–28 (2005).

<sup>55</sup> Joint Submission by Malaysia and the Socialist Republic of Vietnam to the Commission on the Limits of the Continental Shelf, May 6, 2009, at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/submission\\_mysvnm33\\_2009.htm](http://www.un.org/Depts/los/clcs_new/submissions_files/submission_mysvnm33_2009.htm). In a written communication addressed to the UN secretary-general, the commission, and all states parties to UNCLOS, filed on May 20, 2009, Malaysia acknowledged that it had informed China of its position before the filing of the joint submission, at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mysvnm33\\_09/mys\\_re\\_chn\\_2009re\\_mys\\_vnm\\_e.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/mys_re_chn_2009re_mys_vnm_e.pdf).

<sup>56</sup> Note Verbale CML/17/2009 from the Permanent Mission of the People's Republic of China to the UN Secretary-General (May 7, 2009), at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mysvnm33\\_09/chn\\_2009re\\_mys\\_vnm\\_e.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf).

<sup>57</sup> Note Verbale No. 86/HC-2009 from the Permanent Mission of the Socialist Republic of Viet Nam to the UN Secretary-General (May 8, 2009), at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mysvnm33\\_09/vnm\\_chn\\_2009re\\_mys\\_vnm\\_e.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/vnm_chn_2009re_mys_vnm_e.pdf).

<sup>58</sup> Note Verbale HA 24/09 from the Permanent Mission of Malaysia to the UN Secretary-General (May 20, 2009), at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mysvnm33\\_09/mys\\_re\\_chn\\_2009re\\_mys\\_vnm\\_e.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/mys_re_chn_2009re_mys_vnm_e.pdf).

consonance with Article 76(10) of UNCLOS 1982” and “to the position of States which are parties to a land or maritime dispute in consonance with Paragraph 5(b) of Annex I to the Commission’s Rules of Procedure.” It did not engage with the substance of Chinese Note I.<sup>59</sup>

Another party to the South China Sea saga, the Philippines, initially did not comment on the Chinese note. In its *note verbale* of August 4, 2009, the Philippines expressed disquiet over the joint submission by Malaysia and Vietnam.<sup>60</sup> Vietnam, in its *note verbale* of August 18, while responding to the Philippines’ note, reaffirmed its position regarding the Nansha and Xisha Islands, and indicated a commitment to peaceful negotiations in accordance with international law, in general, and UNCLOS and the 2002 Declaration on the Conduct of Parties in the South China Sea, in particular.<sup>61</sup>

In July 2010, Indonesia entered the debate by filing its own *note verbale* with the United Nations,<sup>62</sup> focusing on the implications of Chinese Note I. While maintaining that it was not a claimant state in the sovereignty dispute in the South China Sea, Indonesia was nonetheless attentive to the substantive issues in respect of the map attached to Chinese Note I. It challenged the entitlement of “remote or very small features in the South China Sea” to an EEZ or continental shelf “of their own” and concluded that “the so called ‘nine-dotted-lines map’ . . . clearly lacks international legal basis and is tantamount to upset the UNCLOS 1982.”

On April 5, 2011, the Philippines submitted a *note verbale* (Philippine Note) in response to Chinese Note I.<sup>63</sup> First, the Philippines claimed that “the Kalayaan Group (KIG) constitutes an integral part of the Philippines.” Second, it claimed “sovereignty and jurisdiction over the waters around or adjacent to each relevant geological feature in the KIG as provided for” by UNCLOS. The extent of the waters “adjacent” to the features was “definite and determinable under UNCLOS, specifically under Article 121.” Third, “the relevant waters as well as the seabed and subsoil thereof,” as shown in the “so-called 9-dash line map attached to” the Chinese *note verbale*, “would have no basis under international law, specifically UNCLOS.” In the Philippines’ view, sovereignty and jurisdiction or sovereign rights over those areas

necessarily appertain or belong to the appropriate coastal or archipelagic state—the Philippines—to which these bodies of waters as well as seabed and subsoil are appurtenant, either in the nature of Territorial Sea, or 200 [mile] Exclusive Economic Zone (EEZ), or Continental Shelf (CS) in accordance with Articles 3, 4, 55, 57, and 76 of UNCLOS.

<sup>59</sup> Malaysia has so far claimed some of the shoals of the Nansha Islands. See HUNGDAH CHIU, XIAN DAI GUO JI FA [MODERN INTERNATIONAL LAW] 565 (2d rev. ed. 2006); see also Gao, *supra* note 48, at 346.

<sup>60</sup> Note Verbale No. 000819 from the Permanent Mission of the Republic of the Philippines to the UN Secretary-General (Aug. 4, 2009), at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mysvnm33\\_09/clcs\\_33\\_2009\\_los\\_phl.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/clcs_33_2009_los_phl.pdf).

<sup>61</sup> See Note Verbale No. 240HC-2009 from the Permanent Mission of the Socialist Republic of Viet Nam to the UN Secretary-General (Aug. 18, 2009), at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mysvnm33\\_09/vnm\\_re\\_phl\\_2009re\\_mys\\_vnm\\_e.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/vnm_re_phl_2009re_mys_vnm_e.pdf). The declaration is available at <http://www.asean.org/asean/external-relations/china/item/declaration-on-the-conduct-of-parties-in-the-south-china-sea>.

<sup>62</sup> Note Verbale No. 480/POL-703/VII/10 from the Permanent Mission of the Republic of Indonesia to the UN Secretary-General (July 8, 2010), at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mysvnm33\\_09/idn\\_2010re\\_mys\\_vnm\\_e.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/idn_2010re_mys_vnm_e.pdf).

<sup>63</sup> Note Verbale No. 000228 from the Permanent Mission of the Republic of the Philippines to the UN Secretary-General (Apr. 5, 2011), at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mysvnm33\\_09/phl\\_re\\_chn\\_2011.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/phl_re_chn_2011.pdf).

China responded on April 14, 2011, in a *note verbale* (Chinese Note II).<sup>64</sup> Reiterating what had been stated in Chinese Note I, China further stated that its claims “are supported by abundant historical and legal evidence” and that the Philippine Note was “totally unacceptable” to it. In addition, China noted that the KIG group to which the Philippine Note referred was part of China’s Nansha Islands and that the treaties that defined the limits of the Philippines’ territory had never claimed the Nansha Islands or any of its components. The Philippine invasion and occupation of some of the islands in question since the 1970s constituted a violation of Chinese sovereignty, whereas China had since 1930s given publicity to its claim to the islands.

Vietnam’s *note verbale* of May 3, 2011, responded to both the Philippines and China.<sup>65</sup> Vietnam reasserted its sovereignty over the Xisha and Nansha Islands, and claimed to have “sufficient historical evidences and legal foundation to assert her sovereignty over these two archipelagoes.”

The exchanges among those states highlighted the significance of international law in the formulation of their respective positions, and in this respect the exchanges also highlighted the issue to which this article is addressed.

### III. THE LEGAL PURPOSE AND STATUS OF THE NINE-DASH LINE: SOVEREIGNTY AND JURISDICTION

The nine-dash line is known by many other names.<sup>66</sup> What interests lawyers and governments alike is its purpose and status. Does it indicate ownership, sphere of influence, a shorthand for maritime zones established under international law, or something else?<sup>67</sup>

The reasonable proposition—in the view of the authors of this article—is that the nine-dash line, after sixty years of evolution, has become synonymous with a claim of sovereignty over the island groups that always belonged to China and with an additional Chinese claim of historical rights of fishing, navigation, and other marine activities (including the exploration and exploitation of resources, mineral or otherwise) on the islands and in the adjacent waters. The lines may also have a residual function as potential maritime delimitation boundaries.

The proposition is based on a consideration of several factors.

First, the consistent line of Chinese legislation adopted since 1958 has shown convincingly that China enjoys sovereignty over the Dongsha, Nansha, Xisha, and Zhongsha Islands, as well as over other islands in the South China Sea. The nine-dash line, in the light of that body of national law, is not intended to assert a *historic* title of sovereignty over the sea areas, as enclosed by the lines, beyond what is allowed under international law. Chinese Note I, of 2009, explains this point clearly. The straight baselines drawn around the Xisha Islands, promulgated by

<sup>64</sup> Note Verbale CML/8/2011 from the Permanent Mission of the People’s Republic of China to the UN Secretary-General (Apr. 14, 2011), at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mysvnm33\\_09/chn\\_2011\\_re\\_phl\\_e.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2011_re_phl_e.pdf).

<sup>65</sup> Note Verbale No. 77/HC-2011 from the Permanent Mission of the Socialist Republic of Viet Nam to the UN Secretary-General (May 3, 2011), at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mysvnm33\\_09/vnm\\_2011\\_re\\_phlchn.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/vnm_2011_re_phlchn.pdf).

<sup>66</sup> Zou Keyuan, *China’s U-Shaped Line in the South China Sea Revisited*, 43 OCEAN DEV. & INT’L L. 18, 18 (2012) (including “dotted-line,” “tongue-shaped line,” “U-shaped line,” and “nine-interrupted-lines”).

<sup>67</sup> See *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (Malay./Sing.), 2008 ICJ REP. 12, para. 222 (May 23) (deeming “ownership” equivalent to sovereignty).

China in June 1996, further prove the point.<sup>68</sup> The consistency in China's legislative and administrative practice is also matched by its maps.<sup>69</sup>

Second, the disputes with other states in this area have always concerned sovereignty over islands or insular features in the South China Sea. That could be why the concerns with the dashed lines, unlike with the ownership of the islands, were raised only recently in the *notes verbales* of the relevant states.<sup>70</sup>

Third, while the precise meaning of the reference in Chinese Note I to "adjacent waters" over which it has sovereignty and "relevant waters as well as the seabed and subsoil thereof" over which it enjoys sovereign rights and jurisdiction has never been defined by China, its claim over such waters—in view of China's ratification of UNCLOS—is necessarily conditioned by Convention's relevant provisions.<sup>71</sup> There has also been no evidence that China has enforced its domestic law in those waters as if they were part of internal waters.<sup>72</sup>

Fourth, while it is certainly not the case today, it may be that at some time in the past, the nine-dash line and its predecessors had embraced the idea of historic waters.<sup>73</sup> Support for this view may be found in the resolution adopted at the 1947 inter-ministry meeting; the expression "limit of territory in the South China Sea" was employed in the resolution, which extended that limit to Zengmu Ansha, or James Shoal.<sup>74</sup> It may also be the case, however, that the expression simply implied that the *land* territory of the state extended to that shoal—which is an entirely possible interpretation of the original Chinese.

Finally, there is evidence that the dashed lines were designed at a time with the nascent notion of the continental shelf in mind; they might be dictated by the geographical reality of the South China Sea in that the 200-meter isobath runs close to the shores of the coastal states except for China and, to a lesser extent, Vietnam.<sup>75</sup> Thus, it has been suggested that the dashed lines were drawn in the 1948 atlas as if they were median lines between the islands and the opposite coasts of the neighboring states,<sup>76</sup> thus serving a potential delimitation purpose. The selection of these lines is also said to reflect a reasonable and mild approach by the then Chinese government to the growing clamor among states for the continental shelf following the Truman Proclamation.<sup>77</sup>

All of the above suggests that the proposition presented in this article is a reasonable one—that is, that the nine-dash line is in the nature of a potential maritime boundary between China and opposite states and that within the line, China claims sovereignty over the island groups under international law. In addition, to these rights conferred by UNCLOS, China can assert

<sup>68</sup> See *supra* note 44 and accompanying text.

<sup>69</sup> DZUREK, *supra* note 33, at 12.

<sup>70</sup> See *supra* part II.

<sup>71</sup> See Note Verbale CML/8/2011, *supra* note 62 (citing UNCLOS in support of the Nansha Islands having a territorial sea, EEZ, and continental shelf).

<sup>72</sup> *The Issue of the South China Sea*, *supra* note 15, pt. IV.

<sup>73</sup> DZUREK, *supra* note 33, at 14; Michael Sheng-Ti Gau, *The U-Shaped Line and a Categorization of the Ocean Disputes in the South China Sea*, 43 OCEAN DEV. & INT'L L. 57, 62 (2012).

<sup>74</sup> COLLECTION OF HISTORICAL MATERIALS, *supra* note 12, at 181–82.

<sup>75</sup> Chiu & Park, *supra* note 26, at 5.

<sup>76</sup> Li Jinming & Li Dexia, *The Dotted Line on the Chinese Map of the South China Sea: A Note*, 34 OCEAN DEV. & INT'L L. 287, 290 (2003) (noting that this information came from an interview with one of the employees of the Ministry of the Interior who was involved in producing the 1948 atlas that first showed the eleven lines).

<sup>77</sup> KUEN-CHEN FU, NAN (ZHONG GUO) HAI FA LÜ DI WEI ZHI YAN JIU [LEGAL STATUS OF THE SOUTH (CHINA) SEA], 43–44 (1995).

historic rights within the nine-dash line—under Article 14 of its 1998 law on the EEZ and the continental shelf<sup>78</sup>—in respect of fishing, navigation, and exploration and exploitation of resources.

Another related point, if only for the sake of completeness of our discussion, is that in delineating the national borders, the authoritative atlases currently produced in China show a ten-dash line, with the traditional nine dashes located in the South China Sea and one additional one in the East China Sea.<sup>79</sup>

Having examined the nature and scope of the nine-dash line, attention is now turned to a brief discussion of several legal issues associated with the line and their continuing relevance to the situation in the South China Sea.

#### IV. ISSUES OF LAW IN THE PRESENT CONTEXT

##### *Discovery and Occupation*

The dispute regarding sovereignty over the islands in the South China Sea, as it stands, chiefly concerns three states (China, the Philippines, and Vietnam) and two island groups (the Xisha and Nansha Islands). The Philippines and Vietnam rely heavily on the law of occupation, including a nod to the mode of discovery, in developing their respective arguments.<sup>80</sup> The problem with their approaches, however, is that they may easily be undone by a holistic view of the law, as will be explained below.

Two points need to be made in respect of the significance of discovery. First, at the early stages of modern international law, discovery might have been sufficient to establish title to sovereignty.<sup>81</sup> The evidence of China's discovery of the islands in the South China Sea, which preceded the Philippines' and Vietnam's discovery of them by many years, is simply overwhelming.<sup>82</sup>

Second, by the early twentieth century, as in the 1928 arbitration in *Island of Palmas*, international law came to see discovery as creating an inchoate title that needs to be maintained through peaceful and continuous acts of the claimant state.<sup>83</sup> Such later actions cannot be taken to be effective in maintaining title, however, unless an inchoate title had already been in place.

The legal effect of occupation was well established after the *Island of Palmas*,<sup>84</sup> *Legal Status of Eastern Greenland*,<sup>85</sup> and *Minquiers and Ecrehos* decisions.<sup>86</sup> Acts of occupation by a sovereign state of a piece of land territory must be preceded by a finding of *terra nullius* with respect

<sup>78</sup> See *supra* note 40.

<sup>79</sup> See, e.g., NATIONAL ADMINISTRATION FOR SURVEYING, MAPPING AND GEO-INFORMATION, JI CHU DI TU: GUO JIE [BASIC MAP: NATIONAL BORDERS] (2005), at <http://www.webmap.cn/basicmap/index.php?&embedded=&map=guojie>. This map, with a scale of 1:4,000,000, was itself based on the topographical *Atlas of the People's Republic of China* that the National Administration of Surveying, Mapping and Geo-Information and Foreign Ministry produced in 2004.

<sup>80</sup> Cheng, *supra* note 8, at 276.

<sup>81</sup> IAN BROWNLEE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 140 (7th ed. 2008).

<sup>82</sup> Chiu & Park, *supra* note 26, at 20; Fu, *supra* note 77, at 57–108.

<sup>83</sup> *Island of Palmas* (Neth./U.S.), 2 R.I.A.A. 829, 869 (Perm. Ct. Arb. 1928).

<sup>84</sup> *Id.*

<sup>85</sup> *Legal Status of Eastern Greenland* (Den. v. Nor.), 1933 PCIJ (Ser. A/B) No. 53 (Apr. 5).

<sup>86</sup> *Minquiers and Ecrehos* (Fr./UK), 1953 ICJ REP. 47 (Nov. 17).

to the territory concerned.<sup>87</sup> The finding of *terra nullius* is for the occupying state to make at the time of occupation, and it cannot be lightly assumed.<sup>88</sup> When *terra nullius* is said to occur due to lapse of authority or abandonment, there must be a showing of “definite renunciation” on the part of the abandoning state.<sup>89</sup> Abandonment or dereliction is “effected through the owner-state completely abandoning territory with the intention of withdrawing from it forever, thus relinquishing sovereignty over it.”<sup>90</sup> Once occupation commences, it is required to be peaceful and continuous.<sup>91</sup>

In this connection, the form of occupation known as symbolic annexation may also play a role in the case of the South China Sea, where “very little in the way of the actual exercise of sovereign rights” may equally suffice to establish the Chinese title by discovery and occupation.<sup>92</sup> As in the *Isle of Clipperton* arbitration,<sup>93</sup> if a territory was completely uninhabited and “from the first moment when the occupying State made its appearance there, was at the absolute disposition of that state, the possession of the territory must from that moment be considered as accomplished and the occupation by that State of the territory is complete.”<sup>94</sup>

When France acted on the pretext of *terra nullius* in seizing the nine islets of the Nansha Islands in 1933, that seizure could not lead to title since the islets were not *terra nullius*; among other things, China had previously discovered and exercised authority over them.<sup>95</sup> Nor was the seizure likely to be peaceful or effective, given China’s prompt objection and the advent of the world war in the Pacific. In September 1947, when the then Chinese Ministry of the Interior formally decreed to have the four island groups included under the authority of the Guang Dong Province, neither France nor any other state reacted.<sup>96</sup> Indeed, from 1933 to 1956, when it departed from Indochina, France performed no further sovereign acts in the region.<sup>97</sup> It is therefore not surprising that by 1974, France conceded to England that its title to the Nansha Islands had lapsed.<sup>98</sup>

<sup>87</sup> See Legal Status of Eastern Greenland, *supra* note 85, at 44; see also Western Sahara, Advisory Opinion, 1975 ICJ REP. 12, para. 79 (Oct. 16) (“it was a cardinal condition of a valid ‘occupation’ that the territory should be terra nullius”).

<sup>88</sup> Western Sahara, *supra* note 87.

<sup>89</sup> Legal Status of Eastern Greenland, *supra* note 85, para. 102; see also Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nig.; Eq. Guinea, intervening), 2002 ICJ REP 303, para. 223 (Oct. 11).

<sup>90</sup> 1 OPPENHEIM’S INTERNATIONAL LAW 717 (Robert Jennings & Arthur Watts eds., 9th ed. 1996); see also Jon Van Dyke and Robert A. Brooks, *Uninhabited Islands: Their Impact on the Ownership of the Ocean’s Resources*, 12 OCEAN DEV. & INT’L L. 265, 267–70 (1983).

<sup>91</sup> See Island of Palmas, *supra* note 83, at 867.

<sup>92</sup> Legal Status of Eastern Greenland, *supra* note 85, para. 98 (“[I]n many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries.”).

<sup>93</sup> Island of Clipperton (Mex. v. Fr), 2 R.I.A.A. 1105 (Mar. 2, 1909).

<sup>94</sup> *Id.* at 1110 (English translation by present authors).

<sup>95</sup> When the French landed, they were met by Chinese fishermen living on the islets. *FU*, *supra* note 77, at 91.

<sup>96</sup> *Id.* at 94.

<sup>97</sup> Chiu & Park, *supra* note 26, at 18.

<sup>98</sup> E. M. Denza, Legal Adviser’s Re-examination of Claims to Sovereignty over the Spratly Islands in a Minute of 1 February 1974 from Mrs Denza to Mr Chapman in South-East Asia Department (annex to “The Spratly Islands,” a memorandum of the British Foreign & Commonwealth Office, Research Department, South and South East Asia Section, D.S. No. 5/75, FCO 51/411 (Jan. 21, 1975)).

Of course, it must be noted that France had never acquired a title to some of the Nansha Islands that they occupied back in the 1930s; among the various obstacles was the 1887 Sino-French treaty that had allocated the islands, together with the other island groups in the South China Sea, to China.<sup>99</sup> In addition, China's 1902, 1908, and 1928 official inspections of the Xisha Islands, in addition to China's administrative absorption of them into Guang Dong Province in 1911,<sup>100</sup> perfected the Chinese claim to these latter islands during the same period.<sup>101</sup> Yet another factor undercutting France's acquisition of title is that China had always disputed, by action and protests, later French encroachments on the Xisha Islands.<sup>102</sup>

The same general reasoning applies equally to the Philippines' move on the Nansha Islands in 1971.<sup>103</sup> As correctly pointed out by an informed writer, "The Philippine position that the Kalayaan area was *terra nullius* following World War II is obviously false."<sup>104</sup> Besides, the Chinese claim to the islands had already withstood the French onslaught of 1933 and was significantly enhanced by the publication of the 1948 atlas.<sup>105</sup> Moreover, occupation by force, on a disingenuous pretext of *terra nullius*, may well constitute an illegal use or threat of force in the post-1945 world.

A word should also be said of the situation with Huang Yan Island, or Scarborough Shoal—part of the Zhongsha Islands. Since 2009, the Philippines has sought to base its claim to the feature on effective occupation since Philippine independence in 1946.<sup>106</sup> The Philippines has made no finding, however, of *terra nullius* in respect of the feature. The Philippine claim is *not* based on Treaty of Paris of 1898 between the United States and Spain<sup>107</sup>—which is exactly where the claim goes awry. Given that the claim seeks to show that in the eighteenth century, Spain discovered and included the feature in the boundary of the Philippines,<sup>108</sup> it would mean that the feature was not *terra nullius* in 1898, thus preventing a claim based on the classic doctrine of occupation. The claim by the Philippines is further weakened by the fact that the 1898 treaty actually defined the boundary of the Philippines with such accuracy that it leaves no room for interpretation with regard to the feature in question: it was not part of the territory

<sup>99</sup> See *supra* note 52 and accompanying text.

<sup>100</sup> Liu Wenzong, *Yue Nan De Wei Zheng Yu Zhong Guo Dui Xi Sha Qun Dao He Nan Sha Qun Dao Zhu Quan De Li Shi He Fa Li Yi Ju* [Forged Evidence of Vietnam vis-à-vis Historical and Legal Grounds for China's Sovereignty over the Xisha and Nansha Islands], 1989 CHINESE Y.B. INT'L L. 336, 344.

<sup>101</sup> SAMUELS, *supra* note 5, at 53–54, 57–60; see also COLLECTION OF HISTORICAL MATERIALS, *supra* note 12, at 196–208 (reproducing original official documents on the inspections of the Xisha Islands, including the plan for inspection as approved by the Guang Dong provincial government, and relevant official reports, such as the report on the inspection filed with the Guang Dong provincial government by the Department of the Civil Administration and published in the *Guang Dong Government Gazette* of July 27, 1928. The report stated that "Xisha Islands have always been our territory, and, while desiring them, the Japanese have not dared to make a move.").

<sup>102</sup> COLLECTION OF DOCUMENTS ON THE ISSUE OF THE SOUTH CHINA SEA, *supra* note 12, at 9, 20–27 (in a series of *notes verbales* to France, between July 1934 and June 1947, China reaffirmed its sovereignty over the Xisha Islands).

<sup>103</sup> DIETER HEINZIG, DISPUTED ISLANDS IN THE SOUTH CHINA SEA 42 (1976).

<sup>104</sup> DZUREK, *supra* note 33, at 49.

<sup>105</sup> See *supra* note 31 and accompanying text.

<sup>106</sup> Department of Foreign Affairs, *Philippine Position on Bajo de Masinloc (Scarborough Shoal) and the Waters Within Its Vicinity*, OFFICIAL GAZETTE OF THE REPUBLIC OF THE PHILIPPINES, Apr. 28, 2012, available at <http://www.gov.ph/2012/04/18/philippine-position-on-bajo-de-masinloc-and-the-waters-within-its-vicinity/>.

<sup>107</sup> *Id.*; Treaty of Peace Between the United States and Spain, Dec. 10, 1898, at [http://avalon.law.yale.edu/19th\\_century/sp1898.asp](http://avalon.law.yale.edu/19th_century/sp1898.asp); see also 1 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 530 (1906).

<sup>108</sup> *Supra* note 106, at 3.

that Spain ceded to the United States by the treaty, and was therefore not part of the Philippines.<sup>109</sup> This boundary as defined by the treaty has also been reaffirmed in subsequent practice, including the Philippine Constitution of 1935.<sup>110</sup>

Also worth noting is that China can show a consistent line of legislative and administrative acts in respect of both the relevant areas of the South China Sea and the islands concerned,<sup>111</sup> together with other acts of sovereignty displayed down through the ages.<sup>112</sup> The same consistency is nonexistent with regard to the acts of both the Philippines and Vietnam.

### *Historic Title and Prescription*

China's claim can also be based on a historic title<sup>113</sup> that, as discussed in *Eritrea v. Yemen*,<sup>114</sup> can potentially be established through common knowledge of the possession of a territory.<sup>115</sup> Based on the survey of the history presented in this article, China's title appears to be the only one that could boast of genuine timelessness or that could be described as in place "from time immemorial"; no other claim can be so characterized. The earliest evidence of a sovereign act invoked by Vietnam, for instance, is the alleged 1816 occupation of some of the Xisha Islands. But since Vietnam remained a tributary to China until 1884,<sup>116</sup> it is difficult to regard that "occupation" as an independent act of state that supports a Vietnamese claim to that territory. Likewise, between 1887 and 1954, China dealt with France as the protecting power of Vietnam.<sup>117</sup> And it is not possible to see any historic title emerging since 1956 in favor of Vietnam.<sup>118</sup> In fact, the Vietnamese claim based on historic title was definitively deprived of any effect by the 1887 Sino-French treaty. The earliest evidence of the Philippine involvement would be the 1971 statement by its president—which was promptly met by protests from China.<sup>119</sup>

Given these facts, even assuming, hypothetically, that China's official claims to the island groups in the South China Sea became known only at the end of the nineteenth century in its military encounters with Western powers, the Philippines and Vietnam would assert no

<sup>109</sup> Treaty of Peace Between the United States and Spain, *supra* note 107, Art. III.

<sup>110</sup> Republic Act No. 3046 of 17 June 1961: An Act to Define the Baselines of the Territorial Sea of the Philippines, Art. 1, at [http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/PHL\\_1961\\_Act.pdf](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/PHL_1961_Act.pdf); see also Drigot, *supra* note 46, at 31 (the map showing the treaty boundary of the Philippines), 63 n.89 (on the history of the language change in Article 1 of the 1973 Constitution from the 1935 version).

<sup>111</sup> Legal Status of Eastern Greenland, *supra* note 85, at 48 ("Legislation is one of the most obvious forms of the exercise of sovereign power . . .").

<sup>112</sup> See *supra* part II.

<sup>113</sup> Shen, *supra* note 13, at 94–157 (note, in particular, pages 155–56).

<sup>114</sup> *Eritrea v. Yemen*, First Stage, Territorial Sovereignty and Scope of the Dispute, 114 ILR 2 (Perm. Ct. Arb. Oct. 9, 1998).

<sup>115</sup> This is the first type of historic title, based on common knowledge of the world. *Id.*, para. 106.

<sup>116</sup> OSCAR CHAPUIS, A HISTORY OF VIETNAM (FROM HONG BANG TO TU DUC) 182 (in 1803, the Qing emperor decreed Gia Long as king of Vietnam against a triennial tribute, and this king was the one who allegedly occupied some of the Xisha Islands in 1816), 195 (in 1849, the Qing emperor "enthroned" Tu Duc as emperor of Vietnam) (1995); see also Fu, *supra* note 77, at 152–58.

<sup>117</sup> See materials cited *supra* note 116.

<sup>118</sup> Indeed, there was no unified government to represent Vietnam as a whole between 1954 and 1976: see STEFAN TALMON, RECOGNITION OF GOVERNMENTS IN INTERNATIONAL LAW 98–99 (1998).

<sup>119</sup> COLLECTION OF HISTORICAL MATERIALS, *supra* note 12, at 450–51 (reproducing the protest as published in the REN MIN RI BAO (PEOPLE'S DAILY), July 17, 1971, at 5); SAMUELS, *supra* note 5, at 90.

competing claims for at least another sixty years. Additionally, in terms of acquiring territorial title, a lack of competing claims from interested parties at the time when the original claimant asserted its own claim would give the latter “a valid claim to sovereignty.”<sup>120</sup>

By way of historic title,<sup>121</sup> for instance, the Bohai Sea is considered Chinese internal waters on the strength of past practice,<sup>122</sup> including the 1958 Declaration on the Territorial Sea.<sup>123</sup> In support of the nine-dash line, Chinese lawyers have also considered the relevance of the doctrine of historic title.<sup>124</sup> But given what has been stated above about discovery and about peaceful and continuous display of sovereignty by China, the doctrine of historic title is mentioned here for its *supplementary* role in support of the long possession that is manifest in China’s practice and that has matured into a title by discovery and occupation.

The Chinese claim to historic title to the islands of the South China Sea and other historic rights within the dashed lines is further strengthened through the doctrine of *historical consolidation*. Relevant evidence includes China’s discovery and occupation of the islands, as already discussed in the preceding section, and the acquiescence by other states (to be shown in the next section). In this context, consolidation relies on peaceful holding of territory and the showing of toleration or acquiescence by other states.<sup>125</sup> It is not itself a mode of acquiring title as such; rather, it goes to the maintenance of a title publicly. The notion of consolidation has never itself been used in territorial disputes except in the *Fisheries* case.<sup>126</sup> In *Land and Maritime Boundary Between Cameroon v. Nigeria*,<sup>127</sup> the ICJ stated that

the theory of historical consolidation is highly controversial and cannot replace the established modes of acquisition of title under international law, which take into account many other important variables of fact and law. It further observes that nothing in the *Fisheries* Judgment suggests that the ‘historical consolidation’ referred to, in connection with the external boundaries of the territorial sea, allows land occupation to prevail over an established treaty title.

The supplementary nature of the doctrine, in comparison with established modes of acquiring territory, is plain to see.

The preceding discussion is not meant to say that international law knows not of a title which may be acquired by prescription, which is closely linked to the notion of historic title.<sup>128</sup> Prescription might, indeed, be relevant to the South China Sea dispute, as it seems to be all that is left for the Philippines and Vietnam to count on, given the preceding discussion on discovery, occupation, and historic title. Using force to take possession of another state’s territory, however, is no longer acceptable in the era of the UN Charter;<sup>129</sup> “No territorial acquisition

<sup>120</sup> Legal Status of Eastern Greenland, *supra* note 85, para. 115.

<sup>121</sup> JEANNETT GREENFIELD, CHINA AND THE LAW OF THE SEA 30–34 (1979).

<sup>122</sup> Wang Tiewa, *International Law in China: Historical and Contemporary Perspectives*, 221 RECUEIL DES COURS 195, 232–34 (1990-II).

<sup>123</sup> *Supra* note 38 and the accompanying text.

<sup>124</sup> MARK VALENCIA, JON VAN DYKE & NOEL LUDWIG, SHARING THE RESOURCES OF THE SOUTH CHINA SEA 24–28 (1997).

<sup>125</sup> BROWNLEE, *supra* note 81, at 157.

<sup>126</sup> *Fisheries* (UK v. Nor.), 1951 ICJ REP. 116, 137 (Dec. 18).

<sup>127</sup> *Land and Maritime Boundary Between Cameroon and Nigeria*, *supra* note 89, para. 65.

<sup>128</sup> *Eritrea v. Yemen*, *supra* note 114, para. 106.

<sup>129</sup> UN Charter, Art. 2(4). (“All Members shall refrain . . . from the threat or use of force against the territorial integrity or political independence of any state . . .”).

resulting from the threat or use of force shall be recognized as legal.<sup>130</sup> This prohibition applies especially in respect of the South China Sea situation, where Vietnam in about 1970 and the Philippines in about 1971 occupied some of the Nansha Islands.<sup>131</sup> In any event, acquisitive prescription, applied in a legitimate manner, requires (as in the case of occupation) peaceful and continuous possession *à titre de souverain*, uninterrupted by actions that dispute the legality of a prescriptive claim, and also requires “both a stricter proof of possession and a longer period of possession.”<sup>132</sup> Based on the history of the dispute over the islands in the South China Sea, prescription is simply not helpful as ground for a Philippine or Vietnamese title; a claim based on prescription cannot succeed in the face of prompt, consistent protests, such as those of China in the instant case,<sup>133</sup> from which no acquiescence or recognition can be inferred.

### *Acquiescence, Recognition, and Estoppel*

In the preceding sections, the role of recognition and acquiescence in the acquisition of territory has been shown to be significant for the perfection of a title, occupational or historic, through peaceful, effective, and continuous exercise of sovereignty. Likewise, when a claim to title concerns the possession of parts of a *res communis*, such as maritime spaces, acquiescence or recognition by other states must also be demonstrated.

As above—in the discussion of discovery, occupation, and prescription—the initial state act of taking possession of a territory is not sufficient to settle the matter of ownership. The right to possess the territory depends, in modern times, on the reaction of other states; the possession must be continuous, peaceful, and unopposed—the common requirements for claims by occupation, prescription and historic title. The two notions, recognition and acquiescence, do not create title, but they perpetuate actual control of territory and acts of state authority, so that the latter become the basis of a title *erga omnes*.

*Recognition* may take the form of a unilateral, express declaration or may occur in treaty provisions that one state was ceding to the other its control or authority over the territory. Thus, in *Legal Status of Eastern Greenland*, the Permanent Court of International Justice considered that Denmark could rely on other states’ recognition of its title to Greenland in the form of treaties concluded between them.<sup>134</sup> Those treaties showed a willingness on the part of those other states to admit Denmark’s right to Greenland. Even Norway was a party to some of those treaties. The Court then considered that Norway was, by its conduct, debarred or estopped from challenging Danish sovereignty over the disputed territory.<sup>135</sup>

A parallel case may be found in the French and Vietnamese recognition of China’s claim of sovereignty over the islands in the South China Sea between 1887 and 1959—in particular, by the 1887 Sino-French boundary treaty and the Vietnamese recognition of the 1958 Chinese

<sup>130</sup> GA Res. 2625 (XXV) (Oct. 24, 1970), Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations.

<sup>131</sup> DZUREK, *supra* note 33, at 46–47; Gao, *supra* note 48, at 348.

<sup>132</sup> D. H. N. Johnson, *Acquisitive Prescription in International Law*, 1950 BRIT. Y.B. INT’L L. 332, 345–46, 349.

<sup>133</sup> For example, the Chinese protest on February 18, 2009, over the archipelagic baselines adopted by the Philippine Parliament that included Huang Yan Island. See Ministry of Foreign Affairs of the People’s Republic of China, Press Release (Feb. 19, 2009), at <http://www.fmprc.gov.cn/chn/gxh/wzb/wjbxw/t537943.htm>.

<sup>134</sup> *Legal Status of Eastern Greenland*, *supra* note 85, at 51–52, 68.

<sup>135</sup> *Id.* at 68.

Declaration on the Territorial Sea.<sup>136</sup> It is illuminating that Vietnam has failed to provide any convincing explanation of that fact,<sup>137</sup> even though it began to lay claims to the Xisha and Nan-sha Islands after unification in 1975.<sup>138</sup> Also worth noting is that the Chinese ownership of the island groups in the South China Sea has been commonly indicated in maps produced worldwide,<sup>139</sup> including China Sea Pilot, produced by the British admiralty in 1912.<sup>140</sup> Apart from these obvious supporting materials, writers also seem to be in agreement to a view favorable to China.<sup>141</sup>

Although *acquiescence* has the same effect as recognition, it arises from conduct. It can be understood as tacit or implied consent. It exists when, despite the duty or expectation that the other state concerned should react, there is only silence,<sup>142</sup> thus implying either agreement or a waiver of rights.

It is clear that neither the Philippines nor Vietnam protested against the nine-dash line from 1948 to 2009—which was promulgated and maintained *à titre de souverain*. Other states concerned have also failed to protest or to register any interest in the line.<sup>143</sup> What results is a strong presumption that the states concerned have tolerated or acquiesced in the situation in the South China Sea, leading to a historical consolidation of the nine-dash line at the location and with the function that we know.<sup>144</sup> Similarly, the 1898 Treaty of Paris between Spain and the United States confined Philippine territory to an area defined by geographical coordinates—as recognized in Philippine law and other treaties until 2009. Taken together, the above could be taken to indicate the Philippines' acquiescence in its lack of ownership of Huang Yan Island.

Either of the two acts—recognition and acquiescence—may have the legal effect of estopping a state from denying its prior statement or action—one that recognizes or acquiesces in some fact or acts—on which other states rely for their action. In *Territorial Dispute*, estoppel

<sup>136</sup> *Supra* note 47; see also SAMUELS, *supra* note 5, at 53.

<sup>137</sup> See MINISTRY OF FOREIGN AFFAIRS OF THE SOCIALIST REPUBLIC OF VIETNAM, THE HOANG SA (PARCEL) AND TRUONG SA (SPRATLY) ARCHIPELAGOES AND INTERNATIONAL LAW 5 (1988). The evidence presented by Vietnam in this document followed up on what had been produced in a 1979 white paper, both of which documents have been translated into Chinese: CHINESE SOCIETY OF INTERNATIONAL LAW & THE INTERNATIONAL LAW INSTITUTE, COLLEGE OF FOREIGN AFFAIRS, 5 GUO JI FA ZI LIAO [INTERNATIONAL LEGAL MATERIALS], at 95–107, 121–44 (1990). The problem with the documents' evidence, however, is that it is geographically incorrect or from unproven origin. See COLLECTION OF DOCUMENTS ON THE ISSUE OF THE SOUTH CHINA SEA, *supra* note 12, at 107, 116–17 (reproducing a published statement, from January 30, 1980, by the Ministry of Foreign Affairs of the People's Republic of China).

<sup>138</sup> Zou Keyuan, *The Chinese Traditional Maritime Boundary Line in the South China Sea and Its Legal Consequences for the Resolution of the Dispute over the Spratly Islands*, 14 INT'L J. MARINE & C. L. 27, 37 (1999); CHIU, *supra* note 59, at 563–64.

<sup>139</sup> To give but a few examples: WELTATLAS: DIE STAATEN DER ERDE UND IHRE WIRTSCHAFT 71 (Enzyklopädie Leipzig 1957); *Map No. 5*, in STATE SURVEYING AGENCY (VIETNAM), *Tập Bản Đồ Viet Nam* [Vietnam Atlases] 3375 (1964); *Southeast Asia, No. 13B*, in ATLAS INTERNATIONAL LAROUSSE: POLITIQUE ET ECONOMIQUE (1965); REPUBLIC OF THE PHILIPPINES: POLITICAL MAP (Book House, 1970).

<sup>140</sup> UNITED KINGDOM, HYDROGRAPHIC DEPARTMENT, THE CHINA SEA PILOT 106 (1912) (where it was mentioned that the Paracel (Xisha) Islands and reefs were annexed by China in 1909). Subsequent editions of this publication in 1923 (2d ed., vol. 3, at 89) and 1937 (1st ed., vol. 1, at 107) repeated what had been stated at page 106 of the 1912 edition.

<sup>141</sup> Chiu & Park, *supra* note 26, 19–20; Cheng, *supra* note 8, 277; Drigot, *supra* note 46, at 45.

<sup>142</sup> Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge, *supra* note 67, para. 121.

<sup>143</sup> Zou, *supra* note 138, at 38 (on the reaction of Indonesia and Malaysia).

<sup>144</sup> *Cf.* Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge, *supra* note 67, para. 276.

was, in that context, considered of central importance.<sup>145</sup> The constituent elements of estoppel include (1) a clear and unambiguous statement of fact, which must be voluntary, unconditional, and legal, and (2) reliance in good faith upon the statement either to the detriment of the party relying on the statement or to the advantage of the party making the statement.<sup>146</sup> It is a rule that excludes a denial that a particular assertion might be correct and true; that is, the party concerned may not have accepted the relevant undertaking or obligation, or it may be uncertain whether it has done so, but in view of the party's actual conduct, it cannot be allowed to deny that undertaking or obligation.<sup>147</sup> In *Temple of Preah Vihear*, the ICJ recognized this effect against Thailand, whose conduct precluded it from contesting the validity of a frontier that was known to it, and whose representatives had affirmed and reaffirmed the frontier through their own actions.<sup>148</sup>

### *Title by Treaty*

The argument in the section above is that China's title is based on discovery and occupation, and, alternatively, on historic title. It is also suggested here that title may arise in yet another way in international law. In particular, title to territory may accrue through boundary treaties. In the context of this article, the 1887 Sino-French boundary treaty may be of significance. The treaty was concluded in 1887 between two states in actual and effective control of the respective areas subject to delimitation. It not only recognized China's sovereignty over the islands east of the relevant demarcation line but, more importantly, conferred a title by that recognition, in case any doubt remained as to the locus of sovereignty at the time that the treaty was concluded.

### *The Issue of Intertemporal Law*

As a rule of international law, a situation or an act must be appraised, and a treaty interpreted, in the light of the rules of international law as they were at the time when the situation or act materialized or the treaty was concluded.

In *Island of Palmas*, the sole arbitrator, Max Huber, stated that the "effect of discovery by Spain is therefore to be determined by the rules of international law in force in the first half of the 16th century."<sup>149</sup> On the question of whether Spanish sovereignty subsisted at the critical date in 1898, he stated:

As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called intertemporal law), a distinction must be made between the creation of rights and existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law.<sup>150</sup>

<sup>145</sup> Territorial Dispute (Libya v. Chad), 1994 ICJ REP. 6, 49, paras. 103–09 (sep. op. Ajibola, J.) (Feb. 3).

<sup>146</sup> BROWNIE, *supra* note 81, at 153.

<sup>147</sup> Temple of Preah Vihear (Cam. v. Thail.), 1962 ICJ REP. 6, 52, 63 (sep. op. Fitzmaurice, J.) (June 15).

<sup>148</sup> Temple of Preah Vihear at 32–33.

<sup>149</sup> Island of Palmas, *supra* note 83, at 845.

<sup>150</sup> *Id.*

The doctrine is one part of an inquiry into a situation that arose potentially long ago and that continues into the present, albeit in changed circumstances as to time and space.

In *Aegean Sea Continental Shelf*,<sup>151</sup> Turkey invoked Greek reservation (b), which excluded all disputes relating to the territorial status of Greece from the dispute settlement procedures of the General Act for the Pacific Settlement of International Disputes.<sup>152</sup> Greece argued that the reservation was inapplicable to the present dispute, which was concerned with a conception of the continental shelf that was wholly unknown in 1931, when the reservation was made. The Court concluded that the reservation

must be interpreted in accordance with the rules of international law as they exist today, and not as they existed in 1931. It follows that in interpreting and applying reservation (b) with respect to the present dispute the Court has to take account of the evolution which has occurred in the rules of international law concerning a coastal State's rights of exploration and exploitation over the continental shelf.<sup>153</sup>

The concept of intertemporal law is relevant for our purposes here. China is fully aware that the question of sovereignty over the islands in the South China Sea must be assessed in the light of the rules of international law prevailing at the time that China initially asserted its sovereignty, and that the maintenance of that title is a continuing process.<sup>154</sup> That understanding fits squarely with the requirements of the doctrine of intertemporal law as it has developed since 1928. This doctrine may explain, in part, why the initial meaning of the nine-dash line evolved to take on the meaning that China gives it today. When the eleven-dash-line map was promulgated in 1948, it might have been intended to be comprehensive in nature—in view of the extended claims that many states were making both to areas of the high seas and to the continental shelf. But the practice in the South China Sea has since demonstrated that China has never enforced a historic title to the sea itself, as opposed to the four island groups. While the geographical scope of the lines has been almost unchanged over the years, the content of the rights embraced by them may have evolved, with Chinese practice being informed by developments in the law of the sea, including its own ratification of UNCLOS.

It is important to remember, however, that a prerequisite for applying the doctrine of intertemporal law—insofar as it is relevant to disputes over territorial sovereignty—is that the present claimant state has, at an earlier time, asserted a claim of sovereignty. Evenhandedness is required in assessing the two elements suggested by Huber in *Island of Palmas* and then taken up by the ICJ in *Aegean Sea Continental Shelf*. It cannot be right that in light of the development of international law in the post-1945 era, efforts to *maintain* a claim to title are all that is required of a claimant state. In *Sovereignty over Pedra Branca*, the ICJ began by examining the original title to the islands in question and only then assessed the degree of *effectivités* that the parties exercised over the islands.<sup>155</sup> China's title to the island groups in the South China Sea, together with historic rights accruing to the Chinese nation, arose long ago by virtue of discovery and occupation—and, alternatively, through historic title—and has been maintained ever since in the face of challenges by other states.

<sup>151</sup> *Aegean Sea Continental Shelf* (Greece v. Turk.), 1978 ICJ REP. 103 (Dec. 19).

<sup>152</sup> Sept. 26, 1928, 93 LNTS 343.

<sup>153</sup> *Id.*, para. 80.

<sup>154</sup> See Note Verbale CML/17/2009, *supra* note 54; Note Verbale CML/8/2011, *supra* note 62.

<sup>155</sup> See *supra* note 67.

*The Issue of Two Legal Systems*

From the preceding discussion of the applicable law, one central point emerges. Given that the Philippines has tended to rely exclusively on UNCLOS in defining its position in relation to China's claim in the South China Sea,<sup>156</sup> an assessment of that position requires a further examination of the structure of the international legal order.

Neither historic title nor the law of discovery and occupation can be fundamentally understood in terms of treaty law; they are matters of customary international law. No treaty—not even UNCLOS—can exhaust the rules of international law; custom relies, for its existence and development, primarily on evidence of state practice. It is well known that the two types of rules do not necessarily subsume each other but may well exist in parallel.<sup>157</sup> If so, the search for solutions to the disputes in the South China Sea, whether through negotiation or litigation, will require reference both to treaty law and to customary law, beside the general principles of law recognized by civilized nations. Indeed, China has not disregarded the provisions of UNCLOS, to which it is a party.<sup>158</sup> It has relied on historical records only to show that its title to the four island groups in the South China Sea has a basis in law and fact.

UNCLOS does not deal with the acquisition of sovereignty over land territory, including islands and rocks. It creates title in its own way, as in the case of the territorial sea or archipelagic waters, but it does not allocate territorial sovereignty to the land that will generate sovereignty over those waters. The disputes in the South China Sea, however, are chiefly concerned with territorial sovereignty over certain island groups; the legal nature of the waters adjacent to them is mainly to be regulated by UNCLOS—as is important in understanding questions concerning the freedom of navigation in the South China Sea.

*Freedom of Navigation in the South China Sea*

The concern of nonlittoral states in respect of the South China Sea relates primarily to freedom of navigation and overflight.<sup>159</sup> China has never impeded that freedom in the past, with or without the nine- or eleven-dash lines, and will not interfere with such freedom in the future.<sup>160</sup> China recognizes and is committed to maintaining the international sea lanes of the South China Sea.<sup>161</sup> Article 11 of the 1998 Chinese law on the EEZ and the continental shelf states clearly that

<sup>156</sup> See Note Verbale No. 000228, *supra* note 63.

<sup>157</sup> Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 ICJ REP. 14, para. 177 (June 27); see also Bing Bing Jia, *The Relations Between Treaties and Custom*, 9 CHINESE J. INT'L L. 81, 92 (2010).

<sup>158</sup> See Note Verbale CML/17/2009, *supra* note 54; Note Verbale CML/8/2011, *supra* note 62.

<sup>159</sup> Hillary Rodham Clinton, Remarks at the ASEAN Ministerial Meeting, New York (Sept. 27, 2012), at <http://www.state.gov/secretary/rm/2012/09/198343.htm> (“As I have said many times, the United States does not take a position on competing territorial claim over land features, but we do have a national interest in the maintenance of peace and stability, respect for international law, freedom of navigation, and unimpeded lawful commerce in the South China Sea.”).

<sup>160</sup> *The Issue of the South China Sea*, *supra* note 15, pt. IV.

<sup>161</sup> REN MIN RI BAO [PEOPLE'S DAILY], May 18, 1995, at 1 (reporting the Chinese Foreign Ministry spokesman's statement); see also ZHONG GUO GUO JI FA SHI JIAN YU AN LI [PRACTICE AND CASES OF CHINA IN INTERNATIONAL LAW] 122–23 (Duan Jielong & the Treaty and Law Department, Ministry of Foreign Affairs of the People's Republic of China, eds., 2011) (on the protest of China against the USS *Impeccable's* conduct of a marine survey in the Chinese EEZ in the South China Sea in March 2009, a protest that included an explicit recognition of the freedom of navigation in the EEZ in accordance with UNCLOS); see also Kamlesh Kumar Agnihotri

[a]ll states shall, on the premise that they comply with international law and the laws and regulations of the People's Republic of China, enjoy the freedom of navigation in and flight over its exclusive economic zone, the freedom to lay submarine cables and pipelines and the convenience of other lawful uses of the sea related to the freedoms mentioned above

in the Chinese EEZ and continental shelf. Chinese Note II, issued in 2011, implicitly confirms this position. The current Chinese position is well summed up by the recent statement by the Chinese Foreign Ministry spokesperson that,

[a]s for China, the essence of the South China Sea issue is the territorial sovereignty dispute caused by others' invasion of some islands of China's Nansha Islands and overlapping claims to maritime rights and interests in relevant waters. China has the right to defend its territorial and maritime rights and interests as other countries do.<sup>162</sup>

The issue for the United States, for instance, is not so much one of taking sides in the region's sovereignty disputes as it is of determining what rights are included in the freedom of navigation in the waters of the South China Sea that are part of China's EEZ. The quarrel between the United States and China over this latter issue has been well known and ongoing with regard to the scope of Chinese competences in its EEZ over the surveys conducted by U.S. naval vessels.<sup>163</sup> But that legal dispute is no obstacle to China adhering to the regime of the EEZ as enshrined in UNCLOS; indeed, China's 1998 law and UNCLOS are fully consistent with one another.<sup>164</sup> In any case, that particular dispute is of a wider scope than the territorial disputes in the South China Sea addressed in this article.<sup>165</sup>

## V. POLICY CONSIDERATIONS AND FUTURE PROSPECTS

### *A Framework for Progress*

While the territorial disputes in the South China Sea are unresolved, certain common understandings are emerging among the states of the region, as recorded in the 2002 Declaration on the Conduct of Parties in the South China Sea.<sup>166</sup> The parties reaffirmed their commitment to, among others, the UN Charter, UNCLOS, and "other universally recognized principles of international law" (point 1), as well as freedom of navigation and overflight in the South China Sea area, as provided by universally recognized principles of international law, including UNCLOS (point 3). They "undertake to exercise self-restraint in the conduct of

& Sunil Kumar Agarwal, *Legal Aspects of Marine Scientific Research in Exclusive Economic Zones: Implications of the Impeccable Incident*, 5 MAR. AFF. 135, 135–36 (2009).

<sup>162</sup> Ministry of Foreign Affairs of the People's Republic of China, Foreign Ministry Spokesperson Hong Lei's Regular Press Conference on September 4, 2012 (Sept. 5, 2012), at <http://www.fmprc.gov.cn/eng/xwfw/s2510/2511/t966813.htm>.

<sup>163</sup> Raul (Pete) Pedrozo, *Preserving Navigational Rights and Freedoms: The Right to Conduct Military Activities in China's Exclusive Economic Zone*, 9 CHINESE J. INT'L. L. 9, 12–18 (2010); Zhang Haiwen, *Is It Safeguarding the Freedom of Navigation or Maritime Hegemony of the United States? Comments on the Raul (Pete) Pedrozo's Article on Military Activities in the EEZ*, 9 CHINESE J. INT'L. L. 31, 37–42 (2010).

<sup>164</sup> PRACTICE AND CASES OF CHINA IN INTERNATIONAL LAW, *supra* note 161, at 120.

<sup>165</sup> See, e.g., EEZ Group 21, *Guidelines of Navigation and Overflight in the Exclusive Economic Zone* (2005), at <http://www.sof.or.jp/en/report/index.php>.

<sup>166</sup> Ministry of Foreign Affairs of the People's Republic of China, *Declaration on the Conduct of Parties in the South China Sea*, Nov. 4, 2002, at <http://www.fmprc.gov.cn/eng/wjbl/zjzg/gjs/gjzzyhy/2608/2610/t15311.htm>.

activities that would complicate or escalate disputes and affect peace and stability including, among others, refraining from action of inhabiting on the presently uninhabited islands, reefs, shoals, cays and other features and to handle their differences in a constructive manner” (point 5). Diplomatic negotiation is understood to be the most desirable means of finding a solution (point 4). The declaration was adopted as a political undertaking, but the clarity of the wording and of the undertakings it contains leaves little doubt that the declaration would be the framework for all actions undertaken from that moment onward.

Since the littoral states are all parties to UNCLOS, the Convention itself provides for potentially other venues. That said, the system for the arbitrating or adjudicating disputes is optional in significant respects, and China has itself made a relevant declaration under Article 298.<sup>167</sup> Moreover, although states are obligated to settle disputes concerning “the interpretation or application” of UNCLOS by peaceful means (Article 279), this obligation does not extend to all of the issues addressed in this analysis, such as the question of sovereignty over land territory. Separately from UNCLOS, however, all littoral states of the South China Sea have an independent obligation under Article 33(1) of the UN Charter to pursue the peaceful settlement of “any dispute, the continuance of which is likely to endanger the maintenance of international peace and security.”

#### *The Validity of, and Respect for, Historic Rights*

In the search for solutions that may commend themselves to the littoral states of the South China Sea, China makes a basic underlying point that calls for respect. The Chinese people have, without challenge, enjoyed and exercised certain rights in the South China Sea throughout recorded history. Those rights do not derive from UNCLOS.<sup>168</sup> The nine-dash line reflects that long attachment of the Chinese nation to the South China Sea. The preceding section has demonstrated China’s historic title to the island groups, but the same historic title provides the foundation for an additional claim—namely, to the amenities of the sea in the area—on behalf of Chinese citizens who have, generation after generation, eked out a living from the waters of the South China Sea. The model that the tribunal embraced in the *Eritrea/Yemen* arbitration has much to recommend itself:

[T]he conditions that prevailed during many centuries with regard to the traditional openness of southern Red Sea marine resources for fishing, its role as means for unrestricted traffic from one side to the other, together with the common use of the islands by the populations of both coasts, are all important elements capable of creating certain “historic rights” which accrued in favour of both Parties through a process of historical consolidation as a sort of “*servitude internationale*” falling short of territorial sovereignty.<sup>169</sup>

<sup>167</sup> The declaration, of August 25, 2006, asserted that the “Government of the People’s Republic of China does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1 (a) (b) and (c) of Article 298 of the Convention.” See United Nations, Division for Ocean Affairs and Law of the Sea, Declarations and Statements, at [http://www.un.org/Depts/los/convention\\_agreements/convention\\_declarations.htm](http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm).

<sup>168</sup> See, e.g., LORD COMMISSIONER FOR THE ADMIRALTY, 2 THE CHINA SEA DIRECTORY 113–14, 116 (5th ed. 1906) (mentioning Hainan fishermen as conducting various activities on certain islands, with no mention of fishermen from any other states).

<sup>169</sup> *Eritrea v. Yemen*, First Stage, Territorial Sovereignty and Scope of the Dispute, *supra* note 114, para. 126.

In the tribunal's view, such rights would provide "a sufficient legal basis for maintaining certain aspects of a *res communis* that has existed centuries" for populations on both sides of the Red Sea.<sup>170</sup> In finding that each party to the arbitration had sovereignty over certain islands in question, the tribunal stressed that the finding included "the perpetuation of the traditional fishing regime in the region" and that, around the islands that the award assigned to Yemen, Yemen was expected to ensure the preservation of the existing regime of "free access and enjoyment for the fishermen of both Eritrea and Yemen" for the benefit of "this poor and industrious order of men."<sup>171</sup> The rationale was that the parties, as expressed through their agreement to arbitrate, sought to promote "the establishment and the development of a trustful and lasting cooperation between the two countries."<sup>172</sup>

The tribunal did not distinguish "historic rights" from "historic title," but as indicated by its statement quoted above, it accepted the notion of historic rights as something falling short of territorial sovereignty.<sup>173</sup> In *Continental Shelf* the ICJ stated that "[h]istoric titles must enjoy respect and be preserved as they have always been by long usage."<sup>174</sup> Such rights or titles were concerned with swimming species and sedentary species in the Mediterranean.<sup>175</sup> The issue of historic fishing rights, raised by Tunisia in the instant case, did not affect the delimitation of the continental shelf claimed by it and Libya,<sup>176</sup> but it did show the significance of historic fishing rights in the context of maritime claims in which access to resources is a central issue. The disputes in the South China Sea are obviously of such a kind.

In order to reach a viable solution here and in similar situations, a balance needs to be struck between history and reality. The historical argument is of particular relevance in this area of Asia, where civilizations have flourished since time immemorial. Respect for history is integral to the way of life for the peoples of this area—which is one of the deep realities that need to be incorporated into a comprehensive solution to the current impasse over the islands in the South China Sea.

### *Joint Development as a Provisional Arrangement*

Pending a solution acceptable to the littoral states concerned, the parties would do well to shelve the disputes and to work toward a temporary solution involving joint development. This suggestion is particularly relevant to resource exploitation, maritime safety, and security enhancement, in which not only the littoral states, but also the nonlittoral states, have an ongoing stake. This kind of temporary or provisional solution is encouraged by UNCLOS in the context of maritime delimitation.<sup>177</sup> Whether it could be applied successfully in the case of sovereignty disputes over islands remains to be seen. If it could, separate agreements for this

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*, para. 526.

<sup>172</sup> *Id.*, para. 525.

<sup>173</sup> Yehuda Z. Blum, *Historic Rights*, in 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 710 (1995).

<sup>174</sup> *Continental Shelf (Tunis. v. Libya)*, 1982 ICJ REP. 18, para. 100 (Feb. 24).

<sup>175</sup> *Id.*, para. 98.

<sup>176</sup> *Id.*, para. 105.

<sup>177</sup> UNCLOS, *supra* note 1. Article 74(3), identical to Article 83(3), provides:

Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.

purpose would need be concluded between the states concerned, but that may itself bring other issues to the fore. In the end, while affording a meaningful way forward for the time being, such an approach would still leave the disputes in the South China Sea unresolved.

## VI. CONCLUSION

The last few decades saw the emergence of overlapping national claims in the South China Sea to territorial sovereignty over islands and to jurisdiction over maritime space, despite China's long-standing and dominant history of fishing, navigation, and other activities in this semi-enclosed sea. It is evident from the preceding discussion, however, that the nine-dash line in the South China Sea cannot be relegated to the status of historical relic and that it has continued to evolve progressively from its initial appearance in the early twentieth century. In the wake of the Second World War, it was the subject of a Chinese governmental proclamation, and over the course of the next sixty years, it came to be consolidated as a statement combining title and rights. Most importantly, this consolidation was met, generally speaking—and until 2009—with both regional and international recognition or acquiescence during that entire period. Indeed, during the six decades in question, the nine-dash line, which defined and preserved China's territorial title and historic rights of various kinds, had never been protested by any state, either within and outside the region.

The nine-dash line always had a foundation in international law. With regard to the islands that the line encloses, the customary law of discovery, occupation, and historic title provides that foundation. With regard to the maritime space that the line surrounds, relevant provisions of UNCLOS in conjunction with historic rights provide the foundation. As elaborated in this article, the nine-dash line does not contradict the obligations undertaken by China under UNCLOS; rather, it supplements what is provided for in the Convention. While UNCLOS is a comprehensive instrument of law, it was never intended, even at the time of its adoption, to exhaust international law. On the contrary, it has provided ample room for customary law to develop and to fill in the gaps that the Convention itself was unable to fill in 1982—due to the inherent limitations of a multilateral process of drawn-out negotiations. This view has been confirmed in the UNCLOS preamble, which states that “matters not regulated by this Convention continue to be governed by the rules and principles of general international law.”<sup>178</sup>

The notions of historic title and, to a lesser extent, of historic rights are occasionally mentioned but not developed in UNCLOS.<sup>179</sup> In the case of the South China Sea as enclosed by the nine-dash line, China's historic title and rights, which preceded the advent of UNCLOS by many years, have a continuing role to play. This role has been ignored by the many governments and commentators whose legal positions are based almost entirely on UNCLOS.

The study carried out here reveals that, though termed differently, the nine-dash line can be best defined, in view of China's long-standing practice, as a line to preserve both its title to territory and its historic rights. It has three meanings. First, it represents the title to the island groups that it encloses. In other words, within the nine-dash line in the South China Sea, China has sovereignty over the islands and other insular features, and has sovereignty, sovereign rights, and jurisdiction—in accordance with UNCLOS—over the waters and seabed and

<sup>178</sup> UNCLOS, *supra* note 1, pmb., para. 9.

<sup>179</sup> *Id.*, Arts. 10, 15, 149, 298. There are also references to minimizing economic dislocation with regard to fishing. *Id.*, Arts. 61, 66, 69, 70.

subsoil adjacent to those islands and insular features. Second, it preserves Chinese historic rights in fishing, navigation, and such other marine activities as oil and gas development in the waters and on the continental shelf surrounded by the line. Third, it is likely to allow for such residual functionality as to serve as potential maritime delimitation lines.

The legal debate arising from the nine-dash line in the South China Sea represents perhaps a classic case of conflict between history and present reality. As exemplified in this article, while China relies heavily on its long and overwhelming history to justify its title to territorial sovereignty and maritime jurisdiction in the South China Sea, other claimant states repeatedly stress the imperative of their rights under UNCLOS. Nonetheless, the solution perhaps lies somewhere in the middle of these arguments. In the final analysis, it needs to be borne in mind that it is legally incorrect and politically unfeasible to deny and deprive a state of its historic title and rights—if they are rooted deeply in history and culture, acquired under customary international law, and based on consistent state practice. Nevertheless, the significance of UNCLOS in introducing new maritime zones such as the EEZ and the continental shelf should also be appreciated and embraced. Thus, in their search for a solution, the claimant states cannot escape the need to strike a careful balance between history and present reality in reaching an accommodation in the South China Sea.

## A LEGAL ANALYSIS OF CHINA'S HISTORIC RIGHTS CLAIM IN THE SOUTH CHINA SEA

*By Florian Dupuy and Pierre-Marie Dupuy\**

The recent turmoil created by the competing sovereignty claims of several countries over islands and waters in the South China Sea has caused the resurgence of the concept of “historic rights.”<sup>1</sup> Although the term *historic rights* (sometimes confusingly used in this context in combination with other germane notions, such as *historic waters* and *historic title*) has often been imbued with a certain degree of confusion and controversy in international law, it seems bound to play an important part in the arguments brought by states claiming sovereignty in this region and, in particular, by the People's Republic of China (China).<sup>2</sup> The vagueness of the legal terminology used by China raises the issue of whether that very vagueness is being used as an element of political strategy.

On May 7, 2009, China submitted two *notes verbales* to the UN secretary-general, in which it declared that “China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters

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<sup>1</sup> For a general overview of the dispute, see, for example, *Full Unclosure? As Oil-and-Gas Exploration Intensifies, So Does the Bickering*, ECONOMIST, Mar. 24, 2012, at 41, available at <http://www.economist.com/node/21551113>.

<sup>2</sup> We will generally use the term *China* to refer to the state we now know as the People's Republic of China. It will occasionally be useful to refer separately to Taiwan, either as a political entity that makes a claim to certain territory, see *infra* text accompanying note 5, or as a physical feature, an island off the coast of mainland China. It will always be clear from the context which of these two alternatives is intended.