

CHINA'S NINE-DOTTED LINES IN THE SOUTH CHINA SEA: THE 2011 EXCHANGE OF DIPLOMATIC NOTES*

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Important events relating to the sovereignty dispute over the Spratly Islands have arisen by fits and starts since 2009, marking the start of a new phase in the legal battle over territorial and maritime claims in the South China Sea. While exchange of legal arguments between parties in this battle has gradually laid bare their maritime claims, much still remains shrouded in uncertainty. Among the obscure claims wanting in clarification is China's infamous nine-dotted-line map, which has recently elicited response and counter-response between the Philippines and China. This article revisits the maritime and territorial claims of the Philippines and China as revealed in the recent discord over the nine-dotted-line map.

Introduction

The South China Sea (SCS) is notorious for the protracted sovereignty dispute over the Spratly Islands - a group of hundreds of features lying at its heart of the SCS and being claimed in whole or in part by five states, namely Brunei, China (including Taiwan),¹ Malaysia, the Philippines and

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Note on source: All the diplomatic notes referred to in the discussion are available on the webpage of the Commission on the Limits of the Continental Shelf established under the United Nations Convention on the Law of the Sea at <www.un.org/Depts/los/clcs_new/clcs_home.htm>, either relating to Malaysia-Vietnam joint Submission (No. 33) or Vietnam's unilateral submission (No. 37).

¹ Since the People's Republic of China (China) and the Republic of China (Taiwan) maintain broadly similar claims on the South China Sea (SCS) issues, the discussion will focus on the positions of the former and highlight, where necessary, the views of the latter. For comparison of these claims, see Yann-Huei Song, and Zou Keyuan. "Maritime Legislation of Mainland China and Taiwan: Developments, Comparison, Implications, and Potential Challenges for the United States" *ODIL* 31 (2000) 303 - 345. For a recent study on Taiwanese claim, see Kuan-Hsiung

Vietnam. The intractability of this sovereignty dispute at times overshadows the more important issue and arguably its *raison d'être*, that is, the entitlement to maritime zones in the SCS.² The latter issue however resurfaced in the controversy over the joint and unilateral submissions by Malaysia and Vietnam regarding their extended continental shelf claims (Malaysia-Vietnam CS Submissions) to the Commission on the Limits of the Continental Shelf (CLCS)³ in May 2009. The diplomatic correspondence relating to these submissions, which is not surprising,⁴ has revealed the conflicting maritime claims of the five claimant states in the Spratly Islands dispute.⁵ Thus, the year 2009 can be considered as marking a new phase in the legal battle of the Spratly Islands dispute in which maritime claims also become the very subject matter. Notable among these conflicting maritime claims is the infamous nine-dotted-line claim, which is considered as 'one of the most extraordinary assertions of jurisdiction anywhere'.⁶ The nine-dotted lines which had hitherto existed in the twilight on China's domestic maps⁷ were officially introduced to the international community for the first

Wang. "The ROC's Maritime Claims and Practices with Special Reference to the South China Sea" *ODIL* 41 (2010) 237-252. For the claim of China, see literature cited throughout this article.

² See Clive Schofield, "Dangerous Ground: A Geopolitical Overview of the South China Sea" in S. Bateman and R. Emmers (eds.) *Security and International Politics in the South China Sea: Towards a Co-operative Management Regime* (London: Routledge 2009), 7-25, 12-18, stating that the features of the Spratly Islands do not have much intrinsic value in themselves; at issue is the potential to generate large maritime zones and hence entitle claimant states to exploit marine natural resources there, particularly oil and gas.

³ The United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982 *UNTS* 1833, 396-581 (hereinafter LOS Convention). Under Article 4, Annex II on the Commission on the Limits of the Continental Shelf of the LOS Convention (hereinafter CLCS), a coastal state is supposed to make its submission to the CLCS no later than 10 years after the entry into force of the Convention in relation to that state. Given the difficulty developing countries face in meeting this 'original' deadline, the States Parties to the LOS Convention decided to set 13 May 1999, the date of the CLCS's adoption of the Scientific and Technical Guidelines, as the starting date for the calculation of the ten-year time limit. See 'Decision regarding the date of commencement of the ten-year period for making submissions to the Commission on the Limits of the Continental Shelf set out in article 4 of Annex II to the United Nations Convention on the Law of the Sea' *SPLOS/72*, 29 May 2001, paragraph a. For background on the issue, see *Issues with respect to article 4 of Annex II to the Convention (ten-year time limit for submissions)*, (Prepared by the Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations) available from http://www.un.org/depts/los/clcs_new/issues_ten_years.htm (last visited: 10 May 2011).

⁴ This situation has already been contemplated by the CLCS. See 'Rules of Procedure of the Commission on the Limits of the Continental Shelf' *CLCS/40/Rev.1*, 17 April 2008, Rule 46(1) and Annex I.

⁵ For a comprehensive assessment of the situation of the SCS after 2009, see Ted L. McDorman, "The South China Sea after 2009: Clarity of Claims and Enhanced Prospects for Regional Cooperation?" in M. McConnell, S. Coffen-Smout and A. Chircop (eds.) *Ocean Yearbook* 24 (Leiden: Martinus Nijhoff 2010), 507-35.

⁶ Clive Schofield, and Ian Townsend-Gault, "Brokering Cooperation Amidst Competing Maritime Claims: Preventative Diplomacy in the Gulf of Thailand and South China Sea" in A. E. Chircop, T. L. McDorman and S. Rolston (eds.) *The future of ocean regime-building: Essays in tribute to Douglas M Johnston* (Leiden: Martinus Nijhoff Publishers 2009), 643-70, 652.

⁷ No official position of the People's Republic of China has been revealed as to the meaning and legal basis of the lines. Meanwhile the Taiwanese 'Government' has reportedly indicated that nine-dotted lines delineate its historic waters. See Nien-Tsu Alfred Hu. "South China Sea: Troubled Waters or a Sea of Opportunity?" *ODIL* 41 (2010) 203-213, 207. Chinese scholars have been active in their discussion of the lines but their arguments deeply divide on both its validity and meaning. Even among those who think the lines are defensible under international law, opinions differ and change over time. See, e.g., Gao Zhiguo. "The South China Sea: From Conflict to Cooperation" *ODIL* 25 (1994) and Kuan-Hsiung Wang, n 1 above, (for the view that the dotted lines serve to allocate island sovereignty rather than to delimit maritime boundary); 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" *IJMCL* 14 (1999) 27-55 (for the view that the nine-dotted lines define islands under China's sovereignty and their adjacent waters which are not yet defined) cf the same author's view two years later: ———. "Historic Rights in International Law and in China's

time⁸ in China's *Notes Verbales* protesting the Malaysia - Vietnam CS submissions (China's 2009 *Notes Verbales*).⁹

China's nine-dotted-line claim has elicited responses from claimant¹⁰ as well as non-claimant states¹¹ in the Spratly Islands dispute. Given China's silence on the meaning of the nine-dotted lines, it is not surprising that states in their responses have interpreted the nine-dotted lines differently. Vietnam considers the nine-dotted lines as a sovereignty claim of China over 'the islands and the adjacent waters' in the South China Sea.¹² Not surprisingly, Vietnam, embroiled in other sovereignty disputes with China,¹³ understandably refutes such a claim as having 'no legal,

Practice" *ODIL* 32 (2001) 149-168 (for the view that the maps depict the scope of Chinese historic rights, which do not amount to full sovereignty but only 'tempered sovereignty' in the SCS); Ji Guoxing. 2010. Outer Continental Shelf Claims in the South China Sea: A New Challenge to China's U-Shaped Line. In *International Workshop on Non-Traditional Security Cooperation in the South China Sea*. Haikou. (supporting the 'tempered sovereignty' view); Peter Kien-Hong Yu. "The Chinese (Broken) U-shaped Line in the South China Sea: Points, Lines, and Zones" *Contemporary Southeast Asia: A Journal of International and Strategic Affairs* 25 (2003) 405-30 (for the view that the lines delimit China's historic waters); Li Jinming, and Li Dexia. "The Dotted Line on the Chinese Map of the South China Sea: A Note" *ODIL* 34 (2003) 287-95 (for the view that the lines are a *traditional maritime boundary* with dual functions to define China's sovereignty over Paracel and Spratly Islands and to delimit according to the median line principle the maritime zones of China and the coastal states concerned). See also 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" *IJMCL* 14 (1999) 27-55 and ———. "South China Sea Studies in China: Achievements, Constraints and Prospects" *Singapore Year Book of International Law* 11 (2007) , 88-92 (for useful summary of conflicting views in Chinese literature on this issue).

⁸ Cf China's arguments in the Vanguard Bank incidents in 1994-96 in which the nine-dotted lines were not mentioned. See Zou Keyuan. "The Chinese Traditional Maritime Boundary", n 7 above, 3; Nguyen Hong Thao, "China's 'nine broken lines' in the Bien Dong Sea (South China Sea) in the light of international law", *Vietnam News* 18 May 1997 N^o 2073 (265)6.

⁹ See *Note Verbale No. CML/17/2009 dated 07 May 2009 of the Permanent Mission of the People's Republic of China to the United Nations* (English translation) (protesting Malaysia-Vietnam Joint Submission to the Commission on the Limits of the Continental Shelf), *Note Verbale No. CML/18/2009 dated 07 May 2009 of the Permanent Mission of the People's Republic of China to the United Nations* (English translation) (protesting Vietnam Submission to the Commission on the Limits of the Continental Shelf) (China's 2009 *Notes Verbales*).

¹⁰ Malaysia, though stating that its submission constituted legitimate undertakings under the LOS Convention, refrained from addressing directly China's nine-dotted-line claim and only stated that the submission was without prejudice to, *inter alia*, 'the position [sic] of States which are parties to a land or maritime dispute in consonance with Paragraph (5) of Annex I to the [CLCS's] Rules of Procedure'. See *Note Verbale No. HA 24/09 dated 20 May 2009 of the Permanent Mission of Malaysia to the United Nations* (in response to Note Verbale No. CML/17/2009 of 07 May 2009 the Permanent Mission of the People's Republic of China to the United Nations). Cf Malaysia's lengthier response to the Philippine claim to North Borneo in the latter's *Note Verbale* protesting the same submission in *Note Verbale No. HA 41/09 of the Permanent Mission of Malaysia to the United Nations dated 21 August 2009*. For Vietnam's reactions, see *Note Verbale No. 86/HC-2009 dated 08 May 2009 of the Permanent Mission of the Socialist Republic of Vietnam to the United Nations* (in response to Notes Verbale No. CML/12/2009 of 13 April 2009, CML/17/2009 of 07 May 2009 and CML/18/2009 of 07 May 2009 of the Permanent Mission of the People's Republic of China to the United Nations) (Vietnam's 2009 *Note Verbale*).

¹¹ *Note Verbale No. 480/POL-703/VII/10 dated 08 July 2010 of the Permanent Mission of the Republic of Indonesia to the United Nations* (English translation) (in response to *Note Verbale No. CML/17/2009 dated 07 May 2009 of the Permanent Mission of the People's Republic of China*) (Indonesia's 2010 *Note Verbale*). See also 'Remarks by Secretary Hilary Clinton at the 17th ARF Meeting in Hanoi on 23 July 2010', where she stated that 'consistent with customary international law, legitimate claims to maritime space in the South China Sea *should be derived solely from legitimate claims to land features*', available from <http://www.state.gov/secretary/rm/2010/07/145095.htm> (last visited: 27 May 2011). (emphasis added)

¹² Vietnam, like Malaysia, also states that its submission constituted legitimate undertakings in implementation of the obligations of the States Parties to the LOS Convention. See Vietnam's 2009 *Note Verbale*.

¹³ Besides the Spratly Islands dispute, between China and Vietnam there is a bilateral sovereignty dispute over the Paracel Islands which lies to the North of the SCS. For an account of islands disputes in bilateral relations between

historical or factual basis, and therefore is null and void.’¹⁴ Indonesia, a non-claimant state in the Spratly Islands dispute, cautiously pre-empted the possibility that the nine-dotted lines depict the *maritime zones of the disputed small features* in the SCS.¹⁵ Indonesia states that China’s claim ‘clearly lacks international legal basis and is tantamount to upset the UNCLOS 1982’¹⁶ because ‘those remote or very small features [...] do not deserve exclusive economic zone or continental shelf of their own.’¹⁷ China, however, did not bother to counter either view,¹⁸ leaving the status of the nine-dotted lines shrouded in obscurity.

On 5 April 2011 the Philippines lodged a *Note Verbale* (Philippines’ 2011 *Note Verbale*), registering its position on China’s nine-dotted lines.¹⁹ While disregarding the positions expressed by Vietnam and Indonesia on the same issue, this time China felt obliged to respond to the Philippines’ views by sending a *Note Verbale* ten days later (China’s 2011 *Note Verbale*).²⁰ It will be of interest to see how much further the maritime claims of China and the Philippines in the SCS have been revealed and if there is any more light shed on the nine-dotted lines in their exchange of notes.²¹ This article is an attempt to make such an assessment by scrutinizing the 2011 *Notes Verbales* of the Philippines and China and contrasting them against their formerly held positions.

China and Vietnam, see Monique Chemillier-Gendreau, *Sovereignty over the Paracel and Spratly Islands* (The Hague: Kluwer Law International, 2000).

¹⁴ Vietnam’s 2009 *Note Verbale*.

¹⁵ Indonesia’s 2010 *Note Verbale*, paragraph 2. In acknowledging that ‘there is no clear explanation as to the legal basis, the method of drawing, and the status of those separated dotted-lines’, Indonesia formulates its proposition in a tentative manner, using ‘it seems that’ as the introductory phrase. Such prudence is necessary because Indonesia, a third state in the SCS islands disputes, should not challenge the nine-dotted lines were they only to denote China’s sovereignty over islands – a view Indonesia had previously held. See H. Djalal. "South China Sea Island Disputes" *The Raffles Bulletin of Zoology Supplement* 8 (2000) 9-21.

¹⁶ Indonesia’s 2010 *Note Verbale*, paragraph 4.

¹⁷ *Ibid.*, paragraph 3.

¹⁸ Though arguably, China, by its 2011 *Note Verbale*, did respond the precise points raised by Indonesia. See further below.

¹⁹ *Note Verbale No. 000228 dated 05 April 2011 of the Permanent Mission of the Republic of the Philippines to the United Nations* (in response to Note Verbale No. CML/17/2009 and CML/18/2009 dated 07 May 2009 of the Permanent Mission of the People’s Republic of China), reproduced in Annex I.

²⁰ *Note Verbale No. CML/8/2011 dated 14 April 2011 of the Permanent Mission of the People’s Republic of China to the United Nations* (in response to the Note Verbale No. 000228 of the Permanent Mission of the Republic of the Philippines), reproduced in Annex II. The text used for the discussion here is the English translation of the *Note Verbale*. Where necessary, the corresponding Chinese terms will be highlighted.

²¹ On 03 May 2011 Vietnam also sent to the Secretary-General of the United Nations its *Note Verbale* No. 77/HC-2011, expressing its views with regard to both the Philippines’ and China’s *Notes Verbales*. However since Vietnam’s note only reiterates its sovereignty claim to the islands without touching upon the maritime claims of either party or of itself, it will not be dwelled upon here.

The situation prior to the 2011 Sino-Philippine exchange of notes

The history of the SCS has been well recounted elsewhere²² and it is beyond the limit of this article to discuss in detail the SCS-related claims of both China and the Philippines.²³ It suffices here to summarize the relevant parts of their claims to give context to the discussion that follows.

China

China claims sovereignty over islands in the SCS, which include, *inter alia*, the Spratly Islands²⁴ on the basis of discovery by Chinese fishermen and historic usage.²⁵ According to Chinese literature, China made some efforts to define the geographical scope of the islands in the SCS, including the Spratly Islands, in the 1930s by ascertaining their coordinates and toponyms.²⁶ It was not until the late 1940s²⁷ that the nine-dotted lines appeared for the first time on a map of islands in the SCS published by China (then the Republic of China).²⁸

Lying to the North of the SCS, China cannot, in accordance with the LOS Convention, project a maritime claim from its mainland to the centre of the SCS, where the Spratly Islands is located.²⁹ However if the Spratly Islands were under Chinese sovereignty, China would be entitled to claim more maritime zones, the extent of which is of course dependent on the classification of these features under Article 121 of the LOS Convention.³⁰ In this connection it should be noted that China's 1998 Exclusive Economic Zone and Continental Shelf Act (China's 1998 EEZ & CS Act) defines its continental shelf as comprising 'the seabed and subsoil of the submarine areas that

²² The classic historical work is Marwyn S. Samuels, *Contest for the South China Sea* (New York: Methuen 1982).

²³ A useful summary and review of claims of parties to the Spratly Islands can also be found in Daniel J. Dzurek. "The Spratly Island Dispute: Who's on first?" *Maritime Briefings* 2 (1996) 1; Mark J. Valencia, Jon M. Van Dyke, and Noel A. Ludwig, *Sharing the resources of the South China Sea* (The Hague: Martinus Nijhoff 1997), ch 3; Ralf Emmers, *Geopolitics and maritime territorial disputes in East Asia* (London: Routledge 2009), ch 4; McDorman, n 5 above, 512-21.

²⁴ Other islands claimed by China include the Paracel Islands (also claimed by Taiwan and Vietnam), the Pratas Islands (controlled by Taiwan) and Scarborough Reef (also claimed by the Philippines). See Jeanette Greenfield, *China's Practice in the Law of the Sea* (Oxford: Clarendon Press 1992), 149-59. For the Scarborough Reef, see further n 62 below and the accompanying text.

²⁵ The official position of the Chinese Government is stated in China, *Historical Evidence To Support China's Sovereignty over Nansha Islands*, 17 November 2000 available from <http://www.fmprc.gov.cn/eng/topics/3754/t19231.htm> (last visited: 14 February 2009).

²⁶ See *Ibid.*; Li Jinming, and Li Dexia, n 7 above, 289.

²⁷ For a useful account of the history of the nine-dotted lines, see Zou Keyuan. "The Chinese Traditional Maritime Boundary", n 7 above; 32-34; Li Jinming, and Li Dexia, n 7 above. The early maps depicted eleven lines but the two lines in the Gulf of Tonkin have been removed since 1953.

²⁸ After being defeated by the Communist forces under Mao Tse Tung in 1949, the Republic of China retreated to Taiwan in 1949 and has remained there since then.

²⁹ The distance between Hainan Island, China's southernmost mainland area, and the nearest feature of the Spratly Islands is more than 500 nautical miles.

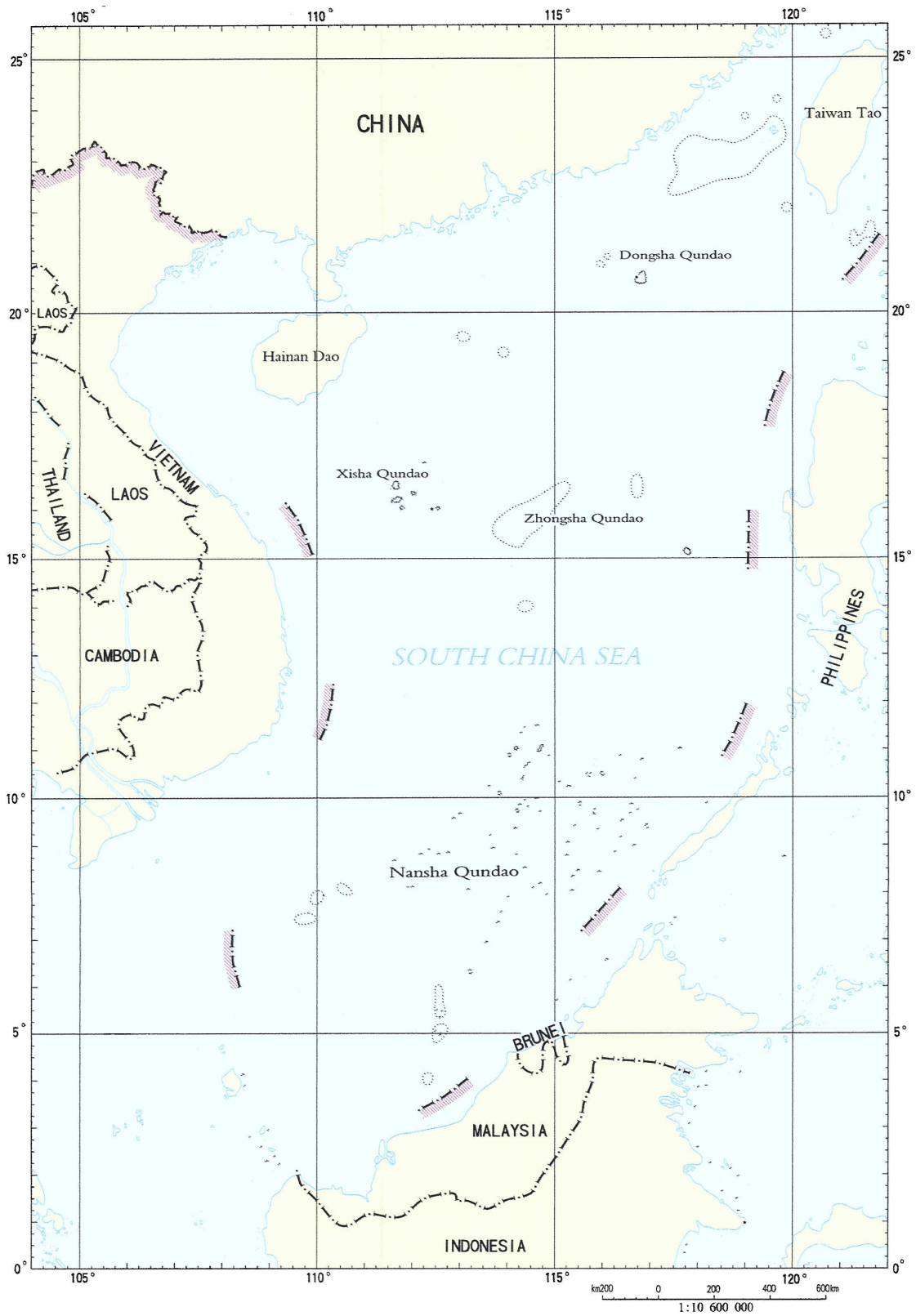
³⁰ Article 121 of the LOS Convention makes a distinction between island and rock; the former is entitled to EEZ and continental shelf while the latter is not.

extend beyond its territorial sea throughout the natural prolongation of its *land territory*,³¹ which include the Nansha (Spratly) Islands according to the definition of the ‘territorial land’ for the purpose of drawing baselines under the 1992 Law on the Territorial Sea and the Contiguous Zone.³² Thus, it is arguable that China may consider the features in the Spratly Islands as meeting the criteria of ‘islands’ under Article 121 of the LOS Convention to be entitled to exclusive economic zone (EEZ) and continental shelf (CS).

Nine-dotted-line Map attached to China’s 2009 Notes Verbales

³¹ *China: Exclusive Economic Zone and Continental Shelf Act of 26 June 1998*, available from http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/chn_1998_eez_act.pdf (last visited: 15 December 2010), Article 2.

³² *China: Law on the Territorial Sea and the Contiguous Zone of 25 February 1992*, available from http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN_1992_Law.pdf (last visited: 15 December 2010), Article 2.



(Source: website of the Commission on the Limits of the Continental Shelf)

In addition to maritime claims made in accordance with the law of the sea, China also hints at a claim of historic rights in the SCS. This is inferred from the wording of Article 14 of China's 1998 EEZ and CS Act which stipulates that '[t]he provisions of [the] Act shall not affect the

historical rights of the People's Republic of China.' (emphasis added) However, neither the geographical scope³³ nor the legal connotation³⁴ of this claim has been defined.

Besides domestic legislation, China's maritime claims could also be understood by examining its diplomatic correspondence. Relevant to the present discussion are China's 2009 *Notes Verbales* respecting the Malaysia - Vietnam CS submissions, each of which contains in the attachment the nine-dotted-line map. Yet China refrained from explaining the basis for the drawing of the map. It has been interpreted that the map denotes the relevant waters and their seabed and subsoil in the SCS over which China claims to enjoy sovereign rights and jurisdiction.³⁵ On that basis, one insightful commentator, from on his assessment of China's *more recent* position that small insular features are not capable of generating EEZ and continental shelf,³⁶ tentatively suggests that the nine-dotted lines involve China's historic water claim³⁷ and that Chinese appears to rely on historical title to claim maritime zones in the SCS rather than on the generative power of the Spratly Islands.³⁸

The Philippines

The Philippines claims most of the Spratly Islands³⁹ which it calls 'Kalayaan Island Group' (KIG).⁴⁰ Its early contact with the Spratly Islands was of private nature and it was not until 1971 that the Philippines officially made its sovereignty claim to the Spratly Islands.⁴¹ Philippine military forces

³³ The dominant view among Chinese scholars is that the geographic scope of China's historic rights in the SCS is defined by the nine-dotted lines. Many scholars also argue that the lines are the median line between China's islands on the one hand and the relevant coasts of the other states on the other. See Li Jinming, and Li Dexia, n 7 above, 294; Kuan-Hsiung Wang, n 1 above, But see n 108 below and the accompanying text.

³⁴ Zou Keyuan. "Historic Rights", n 7 above, suggests that the contents of the 'historic rights' are first 'sovereign rights to the water column'. But he does not explain how these rights have crystallized. It is improbable that such historic fishing rights were claimed in 1947 when Taiwan adhered to the view that the territorial sea could not extend beyond three nm, leaving much of the SCS open to fishing. On the other hand, it is unreasonable to think that China reduces its sovereignty-like historic rights to something less than sovereignty.

³⁵ McDorman, n 5 above, 514. This interpretation appears to treat the phrase 'see attached map' bracketed at the end of the sentence to be a complement of the immediate preceding phrase, where China claims that it 'enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof'. An alternative interpretation is that this map depicts the scope of China's claims stated in the whole sentence, i.e. to include 'sovereignty over the islands in the SCS and the adjacent waters'.

³⁶ Such a position is expressed in China's reaction to Japan's 2008 Submission to the CLCS, China's preliminary to the CLCS in 2009. Submission by Japan (No. 13) and China's Preliminary Information on the CLCS webpage. See also *ibid.*, 514-15, for discussion. Indonesia's 2010 *Note Verbale* also mentioned two statements by Chinese representatives at Law of the Sea Conferences where the same position was stated.

³⁷ *Ibid.*, 514.

³⁸ *Ibid.*, 515. Cf This reservation was quoted in the text accompanying at n 106 below.

³⁹ The most significant feature not claimed by the Philippines is the Spratly island. See Valencia, Van Dyke, and Ludwig, n 23 above, 33.

⁴⁰ This name was considered a tactic by the Philippines to distinguish its claim from other claims to the Spratly Islands. This distinction is no longer maintained by the Philippines. See Dzurek, n 23 above, 21. The name 'Kalayaan', which means 'Freedomland', is however believed to be coined by Thomas Cloma. See further n 41 below.

⁴¹ In 1956, Thomas Cloma, a Filipino businessman, took the opportunity of Taiwanese withdrawal from the region to 'discover' some features in the Spratly Islands and called them Kalayaan, which originally included Spratly Island. The Philippine Government showed considerable hesitancy in approving Cloma's 'discovery'. It only changed its attitude in 1971 after Taiwan reportedly fired on its boat. The Philippines' diplomatic note in protest of this incident was considered the first official claim made by the Philippines to the Spratly Islands. In the note, the Philippines demanded that Taiwan withdraw from the Itu Aba Island and declared ownership of 53 islands, cays, shoals and reefs. See Samuels, n 22 above, 81-86, 89-

also began to occupy features in the Spratly Islands during roughly the same period and expanded their presence there until the end of the 1970s.⁴² The first legislation⁴³ specifically declaring the Philippine claim to the KIG is the Presidential Decree No. 1596 of 11 June 1978 (1978 Kalayaan Decree), in which the KIG is defined by geographic coordinates.⁴⁴ According to this Decree, the Philippines not only claimed sovereignty over the insular features within the KIG but also over the sea-bed, sub-soil, continental margin and space, and subsoil of the KIG.⁴⁵ The Preamble of the Decree supplies the arguments for Philippine sovereignty over the KIG, which includes, *inter alia*, a claim based on geographical proximity or contiguity.

Being an archipelagic state, the Philippines is allowed to draw archipelagic baselines from which other maritime zones than archipelagic waters and internal waters are measured.⁴⁶ Ironically, the Philippines, a staunch advocate for the archipelagic state concept,⁴⁷ was slow in adopting its own archipelagic baselines.⁴⁸ It was not until February 2009 that the Philippines' Archipelagic Baselines Act was adopted by the Philippine Parliament.⁴⁹ It should be noted in this connection that during the deliberations of this Act, there were proposals from the Philippine House of Representatives to include the KIG or part thereof in the Philippines' new archipelagic baseline system.⁵⁰ Though technically it is possible to include part of the Spratly Islands within the new archipelagic baselines system of the Philippines while still meeting the criteria of the LOS

91; Gerardo M. C. Valero. "Spratly Archipelago Dispute: Is the Question of Sovereignty Still Relevant?" *MP* 18 (1994) 314-344, 341-43.

⁴² It is reported that the Philippine forces first occupied three Spratly Islands in 1970-71. See Dzurek, n 23 above, 21. The Philippines continued its occupation until 1978. See Valencia, Van Dyke, and Ludwig, n 23 above, 34-5.

⁴³ Though it is arguable that a claim to the Spratly Islands can be inferred from the oblique phrase '... all other territories belong to the Philippines by historic right or legal title' in Article 1 on 'The National Territory' of the 1973 Philippine Constitution. See Joaquin G. Bernas, *The 1987 Constitution of the Republic of the Philippines: A Commentary* (Manila: Rex Book Store 2009), 16.

⁴⁴ 'Declaring Certain Area Part of the Philippine Territory and Providing for Their Government and Administration', Section 1. Full text reproduced in Raphael Perpetuo M. Lotilla, *The Philippine National Territory: A Collection of Related Documents* (Diliman, Quezon City: Institute of International Legal Studies, University of the Philippines Law Center ; Foreign Service Institute, Dept. of Foreign Affairs 1995), 465.

⁴⁵ *Ibid.*

⁴⁶ LOS Convention, Article 48.

⁴⁷ See Donald R Rothwell, and Tim Stephens, *The International Law of the Sea* (Oxford: Hart Publishing 2010), 175-81.

⁴⁸ Before the adoption of the Archipelagic Baselines Act, the Philippine maritime zones were measured from straight baselines under 'Republic Act No. 5446: An Act to Amend Section 1 of Republic Act No. 3046, Entitled "An Act to Define the Baselines of the Territorial Sea of the Philippines" of 18 September 1968'. Acts No. 3046 and 5446 reproduced in Lotilla, n 44 above, 276, 365 respectively.

⁴⁹ "Philippines: Republic Act No. 9522: An Act to Amend Certain Provisions of Republic Act No. 3046, as Amended by Republic Act No. 5446, to Define the Archipelagic Baselines of the Philippines, and for Other Purpose[s] ?". *Law of the Sea Bulletin* 70 (2009) (Philippines' Archipelagic Baselines Act).

⁵⁰ See, e.g., Bill No. HB03216 by Antonio V. Cuenco (The bill proposes 135 base points with 4 long baselines which encloses the main archipelago, the Scarborough Shoal and the Kalayaan island Group.); Bill No. HB04834 by Rufus B. Rodriguez (Seeks to define the Philippine territory in accordance with international laws and to include the Kalayaan Island Group and Sabah) and Bill No. HB05206 by Teodoro L. Locsin Jr. (Seeks to define the archipelagic baselines of the Philippines by simply enumerating the geographic coordinates for the Scarborough Shoal. Also provides for Congress to determine the basepoints of the Kalayaan Islands Group at a later date). Information retrieved from the Philippine House of Representatives Legislative Information System, BIS Online Query, 'search keyword: 'archipelagic baselines'', made on 28 April 2011.

Convention,⁵¹ the House of Representatives' proposals were considered controversial and provocative.⁵² These proposals were therefore dropped in favour the Senate's version according to which the KIG and another contested feature, i.e. the Scarborough Shoal, were put in a separate regime. In particular, the baselines in the KIG will 'be determined as "Regime of Islands" under the Republic of the Philippines consistent with Article 121 of the [LOS Convention]'.⁵³ As such, the features within the KIG will be treated separately for the purposes of drawing the baselines and not all features are necessarily entitled to an EEZ and a CS.⁵⁴ But the Act stops short of clarifying which feature, if any, in the KIG is considered as not being classified as a rock according to Article 121(3)⁵⁵ and hence is entitled to an EEZ and a CS. In any event, it appears from this provision that the Philippines has modified its original position on the KIG, abandoning the claim of sovereignty over the whole KIG under the 1978 Kalayaan Decree, which was arguably excessive.⁵⁶

On the other hand, a different interpretation may be inferred from the Philippines' reactions to the Malaysia – Vietnam CS submissions.⁵⁷ One of the reasons for the Philippines' protest is the fact that the extended continental shelf areas claimed in these submissions overlap with those claimed by the Philippines.⁵⁸ It is therefore argued, albeit with caution, that the Philippines is also making a continental shelf claim from its mainland coast rather than from the features in the KIG.⁵⁹

Before going into the discussion of their 2011 *Notes Verbales*, it should be noted in passing that between China and the Philippines *inter se* there also exists a bilateral sovereignty dispute over the

⁵¹ See J. R. V. Prescott, *Limits of national claims in the South China Sea* (London: Asean 1999), 30-3, for a careful examination of how the Philippines can draw archipelagic baselines incorporating features in the Spratly Islands while still in conformity with the LOS Convention. See also Victor Prescott. 1993. Sharpening the Geographical and Legal Focus on the Potential Regional Conflict in the Spratly Islands. In *Workshop on the Spratly Islands: A Potential Regional Conflict*: Institute of Southeast Asian Studies (ISES, Singapore)., summarized in Valencia, Van Dyke, and Ludwig, n 23 above, 46-7.

⁵² Senator Santiago, in introducing the Bill finally adopted as the Philippine Archipelagic Baselines Act, is reported as stating "The very core of this bill is that it rejects moves to include the contested islands in drawing up our modern baselines. Otherwise, the bill would not only be useless but also harmful, because we would incur the unnecessary ire and possible retribution of our neighbour states, who are also claimants" See Editorial: Baselines. *Philippine Daily Inquirer*, 19 February 2009. This view appears congruent with the Philippine objection to China's drawing baselines around the Paracel Islands because this group of islands is in dispute. See "Philippines: Statement of the Department of Foreign Affairs on the ratification by China of the United Nations Convention on the Law of the Sea". *Law of the Sea Bulletin* 32 (1996) .

⁵³ Philippine Archipelagic Baselines Act, Section 2(a).

⁵⁴ Article 121 of the LOS Convention makes a distinction between 'island' and 'rock', only the former entitled to an EEZ and a CS. Article 121(1) of the LOS Convention defines: 'An island is a naturally formed area of land, surrounded by water, which is above water at high tide.' For definition of 'rock', see n 55 below.

⁵⁵ LOS Convention, Article 121(3) provides: 'Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.'

⁵⁶ See discussion further below.

⁵⁷ *Note Verbale No. 000819 dated 04 August 2009 of the Permanent Mission of the Republic of the Philippines to the United Nations* protesting the joint submission by Malaysia and Vietnam to the Commission on the Limits of the Continental Shelf, *Note Verbale No. 000818 dated 04 August 2009 of the Permanent Mission of the Republic of the Philippines to the United Nations* protesting the submission by Vietnam to the Commission on the Limits of the Continental Shelf (Philippines' 2009 *Notes Verbales*).

⁵⁸ The Philippines' 2009 *Notes Verbales*.

⁵⁹ McDorman, n 5 above, 520.

Scarborough Reef which lies further to the north of the SCS and includes several rocks.⁶⁰ China considers this feature as part of Zhongsha Qundao⁶¹ and gives broadly the same historical and legal arguments for its sovereignty claim over this feature as that in the case of the Spratly Islands.⁶² Likewise, for the Philippines, the claim to the Scarborough Reef has similar bases as the claim to the Kalayaan, which includes the proximity argument,⁶³ though the claims were officially made at different times.⁶⁴

Parsing the 2011 *Notes Verbales* of the Philippines and China

The Philippines' Note Verbale

As noted above, China's *Notes Verbales* to which the Philippines recently responded were reactions on the Unilateral and Joint Submission for the extended continental shelf in the SCS by Vietnam and Malaysia. The Philippines was fully aware of this fact but still felt obliged to respond not to the substance of the reactions as such but to their legal basis, apparently due to the contention that China's claims are 'widely known by the international community'.⁶⁵ The Philippines thus challenged the justification for China's 2009 *Notes Verbales* on three points, namely 'the sovereignty of the islands', their '*the adjacent waters*' in the SCS and the claim of '*relevant waters as well as the seabed and subsoil thereof*' as indicated in the map attached to the two *Notes Verbales*.⁶⁶ These points are refuted by the Philippines respectively in three separate sections that are now examined in order.

The first section with two sentences under the heading: 'On the Islands and other Geological Features' reiterates the Philippines' claim to the KIG. While the first sentence states that the KIG is 'an integral part of the Philippines', the second sentence somewhat qualifies this statement. In the second sentence, the *Note Verbale* clarifies that the Philippines 'has sovereignty and jurisdiction over the geological features in the KIG'. No definition of the term 'geological features' is provided, however. But since these features are subject to the 'sovereignty and jurisdiction' of the Philippines, it is arguable that an examination of the latter term, especially through the lenses of the Filipinos, may help us better understand the Philippines' claim to the KIG.

⁶⁰ See Zou Keyuan. "Scarborough Reef: a new flashpoint in Sino-Philippine relations?" *Boundary & Security Bulletin* 7 (1999) 71-81, 71, for brief geographical description.

⁶¹ See *Ibid.*, 71-2. The Chinese official name of this Reef is now Huang Yan Island. See *ibid.*, 71. See also *Spokesperson on the claim that the Huang Yan Island is a part of the Philippine territory*, 22 March 2001 available from <http://www.fmprc.gov.cn/eng/topics/3754/t19236.htm#> (last visited: 07 May 2011).

⁶² See *Spokesperson on the claim that the Huang Yan Island is a part of the Philippine territory*, 22 March 2001 available from <http://www.fmprc.gov.cn/eng/topics/3754/t19236.htm#> (last visited: 07 May 2011). China's claim to Scarborough Reef can also be considered within its bigger claim of the islands in the SCS. See n 24 above.

⁶³ See Zou Keyuan. "Scarborough Reef: a new flashpoint in Sino-Philippine relations?" *Boundary & Security Bulletin* 7 (1999) 71-81, 74-6.

⁶⁴ See *ibid.*, 71, 73. But see Selig S. Harrison, *China, Oil and Asia* (New York: Columbia University Press 1977), 191, for the view that potential dispute over this feature had already been acknowledged in a study in 1977.

⁶⁵ See Philippines' 2011 *Note Verbale*, paragraph 2, quoting China's 2009 *Notes Verbales*.

⁶⁶ The Philippines' 2011 *Note Verbale*, paragraph 2 (emphasis original).

At first blush, the use of the conjunction ‘and’ seems to imply that ‘sovereignty’ and ‘jurisdiction’ are elements of the same concept, denoting the Philippines’ legal authority over the ‘geological features’ in the KIG. But if it is so, it appears to be somewhat tautological since ‘sovereignty’ and ‘jurisdiction’ are, in international legal parlance, used to describe different aspects of state competence. To put it more specifically, jurisdiction is always subsumed within the concept of sovereignty.⁶⁷ According to a leading treatise on international law, the former is ‘the normal complement of state rights, the typical case of legal competence’ while the latter refers to ‘particular rights, or accumulation of rights *quantitatively less than the norm*’.⁶⁸ Therefore, the phrase ‘sovereignty and jurisdiction’ should be understood in a cumulative sense,⁶⁹ i.e. denoting two different concepts. Such an interpretation is corroborated by an examination of the Philippine legislation. It is noted that the same phraseology appears in the Philippine 2009 Archipelagic Baselines Act, which ‘affirms that the Republic of the Philippines has dominion, sovereignty *and* jurisdiction over all portions of the national territory as defined in the Constitution [...]’ (Section 3). The notion of national territory defined in the Philippine Constitution⁷⁰ embraces not only areas under full sovereignty but also areas of less than sovereignty, i.e. the insular shelves.⁷¹ Such a distinction between two types of national territory is emphasized by the disjunctive use of the two terms ‘sovereignty’ and ‘jurisdiction’.⁷²

Having established the meaning of the term ‘sovereignty and jurisdiction’, it is now possible to come back to the enquiry of the term ‘geological features’. As noted above, ‘geological features’ should be understood as those features which are subject to sovereignty and/or jurisdiction of the Philippines. It has been well established that only high-tide elevations, i.e. islands and rocks,⁷³ are

⁶⁷ See *Legal Status of Eastern Greenland (Denmark v. Norway)*, Judgement, 5 April 1933, *PCIJ, Series A/B, No. 53* 45, 48, stating that jurisdiction is ‘one of the most obvious forms of the exercise of sovereign power’.

⁶⁸ Ian Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press 2008), 106.

⁶⁹ By analogy, see *Prosecutor v Tadic (Case No. IT-94-1)*, Trial Chamber Decision, 7 May 1997, paragraph 713.

⁷⁰ The present Constitution of the Republic of the Philippines was adopted in 1987, Article 1 of which is based on the formulation of the 1973 Constitution. See Jay L. Batongbacal. "The Maritime Territories and Jurisdiction of the Philippines and the United Nations Convention on the Law of the Sea" *Philippine Law Journal* 76 (2001) 123-168, 154. For a succinct summary of major modifications in Article 1 of the 1987 Philippine Constitution, see Bernas, n 43 above, 28-32. The text of the relevant articles of the 1973 and 1987 Philippine Constitutions are reproduced in Lotilla, n 44 above, 411 and 554 respectively; also Batongbacal, *ibid.*, 138, 153 respectively.

⁷¹ 1987 Philippine Constitution, Article 1. This term is interpreted in an authoritative commentary of the Philippine Constitution to denote, *inter alia*, ‘the seabed and subsoil of the submarine areas adjacent to the coastal state but outside the territorial sea [...]’. See Bernas, n 43 above, 28.

⁷² The conjunction ‘or’ is deliberately inserted to accommodate the view of Mr. Conception, who was fully aware of the difference between sovereignty and jurisdiction and objected to a draft of Article 1 for the reasons, *inter alia*, that the draft the phrase ‘sovereignty or jurisdiction’ was deleted while the insertion of the phrase ‘sovereign jurisdiction’ implied that ‘sovereignty’ was only an adjective qualifying ‘jurisdiction’. See Deliberations of 10 July 1986 in ‘Committee Report No. 3 on Proposed Resolution No. 263 on National Territory’, reproduced Lotilla, n 44 above, 555 at 589. For the intervention of Mr. Conception, see Deliberations of 9 July 1986, in *ibid.* 584.

⁷³ LOS Convention, Article 121 (1) defines an island as being ‘a naturally formed area of land, surrounded by water, which is above water at high tide’. This definition is also applicable to rock. The distinction between islands and rock is not geographically based.

susceptible to appropriation⁷⁴ and hence can be placed under the sovereignty of state. It is now also settled in the jurisprudence of the ICJ that low-tide elevations, i.e. naturally formed areas of land surrounded by and above water at low tide but submerged at high tide,⁷⁵ are different from islands and hence are not subject to the rules and principles of territorial acquisition.⁷⁶ The same rule arguably applies to permanently submerged features, including the seabed and subsoil.⁷⁷ On the other hand, these submerged features, i.e. low-tide elevations and permanently submerged features, may still fall under the competence of the coastal state not because it has title over them as such but because it has competence over the whole area where the features are located. In particular, under the international law of the sea, low-tide elevations and permanently submerged features which lie within a coastal state territorial seas are subject to the sovereignty of that state by virtue of its sovereignty over the territorial sea.⁷⁸ By the same token, these submerged features, if lying on the continental shelf of a coastal state, are considered as subject to the coastal state jurisdiction by virtue of its sovereign rights in relation to the seabed and subsoil thereof.⁷⁹ It follows that the spatial sphere of the Philippines' sovereignty and jurisdiction as mentioned in its *Note Verbale* is interpreted broadly to cover not only high-tide elevations and its territorial seas but also submerged features and seabed and subsoil beyond the territorial seas.⁸⁰ Thus, it appears the term 'geological features' is used in a generic sense, denoting not only high-tide elevations but also submerged features, be it at high-tide or permanently, within the KIG.

⁷⁴ See *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, Judgment, *ICJ Reports* (2001) 40 (*Qatar/Bahrain Case*), paragraph 206: "[i]t has never been disputed that islands constitute terra firma, and are subject to the rules and principles of territorial acquisition...".

⁷⁵ LOS Convention, Article 13(1).

⁷⁶ *Qatar/Bahrain Case*, paragraphs 205-6; reaffirmed in *Case Concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)*, Judgment of 8 October 2007, <http://www.icj-cij.org/docket/files/120/14075.pdf>, paragraph 141, and *Sovereignty Over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v. Singapore)*, Judgment, 23 May 2008, full text available at <http://www.icj-cij.org/docket/files/130/14492.pdf> (*Malaysia/Singapore Case*), paragraph 296. These dicta put an end to the disagreement between states as to whether islands should include low-tide elevations.

⁷⁷ With the inception of the doctrine of the continental shelf, the seabed and its subsoil are considered as subject to sovereign rights of the coastal states. Though the term 'sovereign rights' may be considered as no less than 'sovereignty' around the time of the 1958 Geneva Convention on the Continental Shelf, such an understanding has now fallen into disrepute. For the history of the concept of 'sovereign rights', see D. P. O'Connell, *The International Law of the Sea* Vol 1 (Oxford: Clarendon Press 1982), 477 ff. The Arbitral Court in the *Guinea/Guinea-Bissau Maritime Delimitation Case*, Arbitral Award, 77 *ILR* (1985) 635, paragraph 124, declared the CS (and the EEZ) not to be zone of sovereignty.

⁷⁸ Article 2(1) of the LOS Convention. For low-tide elevations, see *Qatar/Bahrain Case*, paragraph 204; cited in *Malaysia/Singapore Case*, paragraph 295. The submerged elevations can be considered as part of the seabed to which the coastal state sovereignty in the territorial sea extends. See Article 2(2).

⁷⁹ LOS Convention, Articles 76 (1), 77(1). It is not difficult to agree that 'sovereignty rights' necessarily include jurisdiction. See "Articles concerning the Law of the Sea with commentaries". *Yb ILC* II [1956]: 265-301, 297 (Commentary on Article 68).

⁸⁰ Though this may be a stretched interpretation of the concepts 'continental shelf' and 'sovereign rights', which under the contemporary law of the sea, 'are only functional rights limited to the 'the exploration and exploitation of natural resources', such an interpretation is only plausible in light of the definition of national territory provided by the Philippine Constitution.

Having said that, it appears that the Philippines has rolled back from its more excessive sovereignty claim over the whole KIG under the 1978 Kalayaan Decree.⁸¹ The new claim is consistent with the Philippines' view that the regime of islands is applicable to the Kalayaan under the new Archipelagic Baselines Act. This claim is arguably more defensible under contemporary international law when it is now clear that it is not possible for a state to have sovereignty over low-tide and submerged elevations beyond its territorial seas.

A broad definition of the term 'geological feature' based on a cumulative understanding of the term 'sovereignty and jurisdiction' is, as will be seen below, further corroborated in examining Section 2 of the Philippines' *Note Verbale*, to which we now turn.

In the second section, 'On the "Water Adjacent" to the Islands and other Geological Features', the Philippines posits two interrelated arguments. In the first paragraph of this section, the Philippines argues that 'under the Roman notion of *dominium maris* and the international law principle of "*la terre domine la mer*" which states that the land dominates the sea'⁸² it 'necessarily exercises sovereignty and jurisdiction over the waters around or adjacent to *each relevant geological feature* in the KIG as provided for under' the LOS Convention (emphasis added). While it is not difficult to understand such an argument which constitutes a logical extension of the claim in the first section, it is noteworthy that the term 'geological features' is qualified by the phrase 'each relevant', which calls for some observations. First, the determiner 'each' suggests that the Philippines treats the KIG features separately rather than as an integral whole. To put it more specifically, the maritime zones generated by the KIG features will be measured not from the baselines connecting the outermost features of the KIG but from the baselines of each individual feature. This also explains why there exist not only waters *around* but also waters *adjacent* to the geological features - an image of possible overlap of the features' entitlement. Secondly, the adjective 'relevant' implies that not all 'geological features' in the KIG are entitled to have maritime zones. A distinction between 'geological features' which can generate maritime zones and those which cannot corroborates the interpretation of the term 'geological features' as a generic one. In particular, the *relevant* geological features which have 'waters around or adjacent to' are high-tide elevations, i.e. islands and rocks, while submerged features, either at low-tide or permanently, become *irrelevant*.

The above understanding of the 'relevant geological features' as high-tide elevations is confirmed by the second argument in this Section which states 'the extent of the waters that are "adjacent" to the relevant geological features are definite and determinable under UNCLOS, specifically under Article 121 (Regime of Islands) of the said Convention' (paragraph 2). Although

⁸¹ See n 45 above and the accompanying text.

⁸² This is somewhat of a tautology. It is not self-evident why the French phrase needs to go with a translation while the Latin maxim does not.

this argument does not say clearly how definite the waters are (an issue will be discussed below) it at least indicates that the regime of islands which contains definition of islands and rocks are applicable to ‘the relevant geological features’ and determine the extent of their maritime jurisdictional zones.

The second section, on its face, particularly the second argument, represents a sensible application of the LOS Convention to the Spratly Islands. Yet such an argument is hardly novel, bearing close resemblance to the Philippines’ Archipelagic Baselines Act which has already put the KIG under the regime of islands. On the other hand, it is submitted that the second argument is not a model of clarity. A statement of principle on the applicability of Article 121, which is itself notoriously difficult to interpret,⁸³ contains little helpful guidance as to *which* ‘relevant geological features’ of the KIG can be classified as rock under Article 121(3) and hence are not entitled to an EEZ. Be that as it may, it is highly probable that given the absence of an express statement to the contrary, the whole Article 121, and not its paragraph 3 only, should be considered as applicable to determine the adjacent waters to the relevant features within the KIG. In other words, the adjacent waters are not limited to the territorial seas, which are subject to the Philippines’ sovereignty, but may also cover the EEZs where the Philippines can only exercise functional jurisdiction. Such a broad understanding of the term ‘adjacent waters’ also ensures the consistent use of the term ‘sovereignty and jurisdiction’ in a generic sense as in the first section. More importantly, the various bills from the House of Representatives of the Philippines purporting to incorporate the KIG features into the archipelagic baselines system demonstrate that a dramatic rollback from the previous claim to the KIG features is not something that may happen overnight.

Given the fact that the Philippines does not specify the extent of the waters that are ‘adjacent’ to the relevant geological features, leaving them ‘determinable’ under the LOS Convention,⁸⁴ one may wonder whether these waters are identical or different from the waters within China’s nine-dotted lines. To answer this question, it is necessary to move to the third Section of the Philippines’ *Note Verbale*.

The third section entitled ‘On the Other “Relevant Waters, Seabed and Subsoil”’ addresses China’s infamous nine-dotted lines.⁸⁵ Given the absence of official Chinese explanation concerning the nine-dotted lines, it is necessary for the Philippines to decide upon the character of the nine-dotted lines. Between two alternatives of the meaning of the nine-dotted lines, i.e. demonstrating either China’s ‘relevant waters as well as the seabed and subsoil thereof’ or China’s sovereignty claim over the islands in the SCS, the Philippines chose former and rebutted it on the basis of the

⁸³ See generally Barbara Kwiatkowska, and Alfred H.A Soons. "Entitlement to Maritime Areas of Rocks which Cannot Sustain Human Habitation or Economic Life of Their Own" *NYIL* 21 (1990) 139-81.

⁸⁴ See the Philippines’ *Note Verbale*, Section 2, Paragraph 2.

⁸⁵ In the Philippines’ *Note Verbale*, the term ‘nine-dash map’ is used.

international law of the sea (sentence 1). It is interesting to note that the Philippines' rebuttal only concerns the waters 'outside of the [...] relevant geographical features in the KIG and their "adjacent waters"' (sentence 1). There is an internal logic here: since the Philippines *already* has, as it believes, sovereignty and jurisdiction over the relevant geographical features in the KIG and their adjacent waters, there is no question of China's claim there.

To rebut China's claim to the waters outside its sovereignty and jurisdiction, the Philippines argues that:

With respect to these areas, sovereignty and jurisdiction or sovereign rights, as the case may be, 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 the Territorial Sea, or 200 M Exclusive Economic Zone (EEZ) or Continental Shelf (CS) in accordance with Articles 3, 4, 55, 57, and 76 of UNCLOS.⁸⁶

It is evident that the Philippines continue to use the principle of 'land dominates the sea' to challenge China's nine-dotted lines as a claim to maritime zones. This principle arguably provides the strongest ground to challenge the validity of the nine-dotted lines because China, sitting to the north of the SCS, lacks standing to make a claim to the far south of the SCS. Yet China has not pronounced upon the legal basis of its nine-dotted lines, leaving open the possibility that China only claims historic rights within the lines. If so, the Philippines' argument based singularly on the law of the sea will become inadequate.

The Philippines' argument may also be subject to two further criticisms of its scientific accuracy. First, the nine-dotted lines do not relate the Spratly Islands area alone but cover a large part of the SCS and hence include some waters the title to which belongs *exclusively* to China. Secondly, since the geographical scope of the KIG is not the same as that of the Spratly Islands, the Philippines cannot disregard those features outside the KIG, which are not claimed by the Philippines but have the waters of their own outside the 'adjacent waters' relating to the KIG. Notable among the features outside the KIG is Spratly proper - the fourth largest feature of the Spratly Islands.⁸⁷ This feature arguably also generates maritime zones under 'sovereignty and jurisdiction' in the same way as the features within the KIG. In other words, at least Spratly proper may have an EEZ and a CS of its own.⁸⁸ It follows that the waters outside the relevant geographical

⁸⁶ See Philippines' *Note Verbale*, section 3, sentence 2.

⁸⁷ Spratly proper is occupied by Vietnam. Features larger than Spratly proper are, in the order of size, Itua Aba (occupied by Taiwan), Thi Tu (occupied by the Philippines) and West York Island (occupied by the Philippines). The last feature is, according to some sources, not bigger than Spratly proper. For useful compilation of geographical information relating to the Spratly Islands, see Valencia, Van Dyke, and Ludwig, n 23 above, Appendix 1, 227-35.

⁸⁸ For the view that Amboyna Cay, which also lies outside the KIG and is smaller than Spratly proper, can also be classified as island, i.e. capable of generating an EEZ and continental shelf. See Lan-Anh Thi Nguyen. 2008. *The South China Sea Dispute: A Reappraisal in the Light of International Law*. PhD Thesis, School of Law, University of Bristol, Bristol., 60-1, 179.

features in the KIG and their “adjacent waters” do not necessarily belong to the coastal or archipelagic state only as the Philippines argue; they may belong to the state having title to the features outside the KIG.

It turns out the Philippines is now suffering from lack of clarity regarding its own claim over the ‘adjacent waters’ of the KIG features.⁸⁹ Had it defined with exactitude its claim, i.e. the extent of its ‘sovereignty and jurisdiction’ in the SCS, more rigorous arguments against the nine-dotted lines could have been articulated. In this connection, it should be noted that the term ‘sovereignty and jurisdiction’ in the third Section is juxtaposed with term ‘sovereign rights’, which necessarily assumes jurisdiction,⁹⁰ as two alternatives.⁹¹ It follows that the former term can only mean ‘sovereignty’ to make sense in this Section and hence differs from the term ‘sovereignty and jurisdiction’ used to refer to ‘adjacent waters’ in the two preceding Sections. Given the unqualified use of all the three terms: ‘sovereignty’, ‘sovereign rights’ and ‘jurisdiction’ in the Philippines’ *Note Verbale*, there must be either inconsistency or tautology. An inconsistency in the use of those terminologies should however not surprise anyone. As observed by an eminent international lawyer, the term ‘sovereignty’ and ‘jurisdiction’ are ‘not employed very consistently in legal resources such as works of authority or the opinions of law officers, or by statement, who naturally place political meanings in the foreground.’⁹² Furthermore, it is only by accepting the terms as inconsistent that the third section of the Philippines’ *Note Verbale* makes sense. As argued elsewhere, if the Spratly Islands only have 12 NM territorial seas, there will be a pocket of high seas in the middle of the SCS, which cannot belong to either the coastal or archipelagic state as the Philippine argues in this Section.⁹³

China’s Note Verbale

In responding to the Philippines’ three-section *Note Verbale*, China’s *Note Verbale* also contains three main paragraphs besides the courtesy phrase and complementary close. It would be of interest to see if these paragraphs correspond exactly to the three points in the three sections of the Philippines’ *Note Verbale* as analyzed above.

The first paragraph, as expected, addresses the Philippine *Note Verbale* as a whole, considering its contents ‘totally unacceptable’ (sentence 3). In the first paragraph of the 2011 *Note*

⁸⁹ The Philippines is now at pains to explain that the Reed Bank, over which there was a dispute with China in March 2011, lies with its continental shelf and outside the KIG. See *Press Release by the Office of the Presidential Spokesperson on 23 May 2011*, available from <http://www.gov.ph/2011/05/23/the-presidential-spokesperson-makes-clarifications-on-reed-bank-and-kalayaan-islands-issue/> (last visited: 25 May 2011).

⁹⁰ See n 79 above.

⁹¹ This is emphasized by the phrase ‘as the case may be’.

⁹² Brownlie, n 68 above, 106.

⁹³ See Clive Schofield, and I Made Andi Arsana. "Beyond the Limits?: Outer Continental Shelf Opportunities and Challenges in East and Southeast Asia" *Contemporary Southeast Asia: A Journal of International and Strategic Affairs* 31 (2009) 28-63, 50.

Verbale, China reiterated its *pro forma* position as usually used in diplomatic correspondence such as the 2009 *Notes Verbales* protesting the Malaysia - Vietnam CS submissions. The 2011 note verbal thus states ‘China has indisputable sovereignty over the islands in the SCS and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof.’ (sentence 1) But in contrast to the two previous notes, this time China did not mention the publicity of its claims. Instead China laid down the basis for its claims in the SCS; the *Note Verbale* continues:

China’s sovereignty and *related rights* and jurisdiction in the South China Sea are supported by *abundant historical and legal evidence*.⁹⁴

On the face of it, the above sentence is reminiscent of China’s well-known historical arguments for its sovereignty over the Spratly Islands. Closely read, however, the sentence conveys some subtle nuances. First, it should be noted that the term ‘related rights’ is deliberately used rather than the term ‘sovereign rights’ in the preceding sentence.⁹⁵ But nowhere in the *Note Verbale* is the term ‘related rights’ defined. Since sovereignty is omnipotent, both the ‘related rights’ and ‘jurisdiction’ will be redundant unless they relate to a geographical area different from China’s territory. In other words, the conjunctive ‘and’ is used here *cumulatively* just like in the Philippines’ *Note Verbale*. It follows that the ‘abundant historical and legal evidence’ is not only related to sovereignty but possibly to ‘related rights’ and ‘jurisdiction’ as well. If so, the ‘related rights’ seem to be ‘historic rights’. Indeed, given the existence of a China’s claim to ‘historic rights’, such an interpretation should not be eliminated. It is therefore an open possibility that China is not relying on the law of the sea but making use of the exceptional doctrine of ‘historic rights’ to defend its claims in the SCS.⁹⁶ If such an interpretation is correct, then there is some difference between the legal bases invoked by the Philippines and China to respectively reject and defend the nine-dotted-line claim.

After reaffirming its claims in the SCS, the ***second paragraph*** is a contumelious rebuttal of the Philippines’ claim of sovereignty over the KIG, which is, as China points out, ‘in fact part of China’s Nansha Islands’ (sentence 1). China recounts the historical facts to refute the Philippine sovereignty over the KIG. Thus, China argues that the original international treaties and domestic legislation prior to 1970s, which defined the Philippine territory, did not include any claim to the Spratlys and that the Philippines only ‘started to invade and occupy some islands and reefs of China’s Nansha Islands and made relevant territorial claims’ after the 1970s (sentences 2, 3). China

⁹⁴ China’s *Note Verbale*, paragraph 1, sentence 2 (emphasis added).

⁹⁵ The terms 'sovereign rights' and 'related rights' are 主权权利 and 相关权利 respectively in Chinese text.

⁹⁶ The view of the majority of commentators is that ‘historic rights’ are an exceptional institution which permits derogation from the rules of general international law. See Clive Ralph Symmons, *Historic Waters in the Law of the Sea: A Modern Re-appraisal* (Leiden: Martinus Nijhoff Publishers 2008), 49; Andrea Gioia, "Historic Titles" in R. Wolfrum (eds.) *Max Planck Encyclopedia of Public International Law* (Online Edition: Oxford University Press 2008), paragraph 8.

then concluded that the Philippines' 'occupation of some islands and reefs of China's Nansha Islands as well [sic] as other related acts constitutes infringement upon China's territorial sovereignty.' (sentence 4) These arguments echo China's official positions as stated in the SCS island sovereignty disputes, both in the wider territorial dispute with the Philippines, which includes the Scarborough Reef,⁹⁷ and in the broader context of the Spratly Islands dispute in which Malaysia and Vietnam are also named and blamed.⁹⁸

The second part of this paragraph appears to be a tit-for-tat reply involving technical jargon to rebut the Philippine arguments.⁹⁹ China uses the Latin maxim '*ex injuria jus non oritur*'¹⁰⁰ to argue that the Philippines 'can in no way invoke [...] illegal occupation to support its territorial claims.' (sentence 5) Interestingly, China also invokes the same principle of '*la terre domine la mer*'¹⁰¹ used by the Philippines to argue that 'coastal states' Exclusive Economic Zone (EEZ) and Continental Shelf claims shall not infringe upon the territorial sovereignty of other states.' (sentence 6) The use of these maxims has the advantage that China may give to them more than one interpretation. These maxims can be read as rebutting the Philippine claim of sovereignty and jurisdiction over the waters around or adjacent to the relevant features in the KIG because the Philippines does not have sovereignty over the KIG, a counter-argument against section 2 of the Philippine *Note Verbale*. Thus, if the *injuria* China criticizes were the Philippines' title over the KIG, the *jus* would relate to maritime claims. Likewise, if China had sovereignty over the 'Nansha Islands' it would necessarily have title to their relevant maritime zones, which the Philippine could not *encroach* upon. On the other hand, these two statements can also be considered as focusing solely on rebutting the Philippine claim to sovereignty over the KIG. The latter interpretation is plausible given the fact that China used to reject the Philippine claim to the KIG on the basis of proximity as contrary to the principle that 'land dominates the sea'.¹⁰²

It appears to be logical that after a rebuttal of the Philippine sovereignty over the KIG, that China's *Note Verbale* would continue with a statement on maritime areas relating to the "Nansha Islands". It is also expected that China would clarify the nine-dotted lines as a response to the critique in Section 3 of the Philippines' *Note Verbale*. It is with these considerations that the three

⁹⁷ Cf *Spokesperson on the claim that the Huang Yan Island is a part of the Philippine territory*, n 62 above.

⁹⁸ Cf China, *Its Origin*, 17 November 2000 available from <http://www.fmprc.gov.cn/eng/topics/3754/t19233.htm#> (last visited: 14 February 2009), last paragraph.

⁹⁹ But this technical jargon in non-English languages is only used in the English translation of the *Note Verbale*. In the original *Note Verbale*, the jargons is still in Chinese.

¹⁰⁰ This maxim is translated literally into 非法行为不产生合法权利 in the original text.

¹⁰¹ The translation of this principle is 陆地支配海洋 in the original text.

¹⁰² Cf China, *Jurisprudential Evidence To Support China's Sovereignty over the Nansha Islands*, 17 November 2000 available from <http://www.fmprc.gov.cn/eng/topics/3754/t19234.htm> (last visited: 14 February 2009), last paragraph.

sentences of the third paragraph in China's *Note Verbale* are analyzed. The first two sentences of this paragraph read:

Since 1930s, the Chinese Government has given publicity several times the geographical scope of China's Nansha Islands and the names of its components. China's Nansha Islands is therefore clearly defined.

For the uninitiated, these sentences are presumed to clarify the meaning of the nine-dotted lines, that is, to define the geographical scope of China's claim in the SCS in general and in the Nansha Islands in particular. However, a retrospective look at the history of China's territorial claims in the SCS and of the publication of the nine-dotted lines soon suggests otherwise. It is recalled that it was not until the late 1940s that China first published the infamous dotted lines in the SCS.¹⁰³ The 1930s was, as mentioned above, actually the period when China began to project its claim to the SCS by naming and defining islands in the SCS.¹⁰⁴ It is thus unwise to infer from these two sentences any meaning or status of the nine-dotted lines.

That being said, what does the last sentence tell us about China's claims in the SCS? The last sentence is important and also worth quoting in full:

In addition, under the relevant provisions of the *1982 United Nations Convention on the Law of the Sea, as well as the Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone (1992) and the Law on the Exclusive Economic Zone and Continental Shelf of the People's Republic of China (1998)*, China's Nansha Islands is fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ) and Continental Shelf. (emphasis original)

This sentence is helpful in the sense that it states *publicly* for the first time the Chinese *official* position on the status of the Nansha Islands.¹⁰⁵ Specifically, in China's view, the Nansha Islands meet the requirements of Article 121 to have their own EEZ and CS. The insightful comment of a learned scholar with regard to China's less pronounced position on the status of the Spratly Islands in previous events resonates here: 'it would be unwise to dismiss totally the insular features of the Spratlys as being the basis of ocean claims to an adjacent EEZ and continental shelf beyond 200 NM, *particularly in the case of China.*'¹⁰⁶

The evident purpose of the third sentence is of course to reject the Philippines' contention that the area outside the Philippine maritime areas of the KIG is delimited between the coastal states concerned, which do not include China. In the face of the ambiguous language in the Philippines'

¹⁰³ See n 26 above.

¹⁰⁴ See n 27 above.

¹⁰⁵ Though China's position may have been inferred from a close and combined reading of Articles 2 of the 1992 and 1998 Laws. The former defines China's 'territorial land' to include Nansha Islands while the latter defines the continental shelf of China as comprising 'the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its *land territory* [...]' (emphasis added)

¹⁰⁶ McDorman, n 5 above, 522.

Note Verbale regarding the application of Article 121 to the KIG features, China pre-empts any suggestion that the features of the Spratly Islands are only entitled to a territorial sea of 12 NM. In so doing, China also gives an indirect response to the Indonesia's *Note Verbale* one year earlier.

That being said, China's claim regarding the nine-dotted-line, the very reason of the recent controversies between countries bordering the SCS, remains elusive. On the other hand, China's statement as to the status of the Spratly Islands may give rise to a number of questions. First, what would be the baselines from which the respective maritime jurisdiction zones of the Spratly Islands are measured. Given the fact that straight baselines were drawn around the Paracel Islands by connecting its outermost points,¹⁰⁷ the possibility of adopting a similar system in the case of the Spratly Islands should not be ruled out. If so, China's version of the maritime jurisdiction zones of the Spratly Islands will be different from that of the Philippines, which treats the features of the Spratly Islands separately even though it agrees with China as to the application of Article 121 to the SCS.

Given China's continued silence as to the status of the nine-dotted lines, the more important question is: what is the relationship between the lines and the maritime zones generated by the Spratly Islands? Or to frame it differently, should the nine-dotted lines be the expression of the extent of these maritime zone? It has been argued by a number of Chinese scholars that the nine-dotted lines are the equidistance line between the outermost features of the Spratly Islands and the relevant coasts around the SCS.¹⁰⁸ According to this interpretation, the answer to the latter question will be in the positive. But such an interpretation can be rebutted as a matter of fact and as a matter of principle. It is visually clear the lines do not coincide with the equidistance lines drawn between the outermost features of the Spratly Islands and their opposite coasts.¹⁰⁹ As a matter of principle, Chinese position on the delimitation of overlapping EEZ and CS is that delimitation must be based on equitable rather than equidistance principle.¹¹⁰ Thus, if the nine-dotted lines are the extent of the Spratly Islands' EEZ and CS, they must be drawn on a different basis, which has yet to be known to the public.¹¹¹

On the other hand, one should not eliminate entirely the possibility that the nine-dotted lines have a special status of their own, different from the maritime zone entitlements of the Spratly Islands. It is recalled that the 1998 EEZ & CS Law provides that the regimes of the EEZ and CS

¹⁰⁷ "Declaration of the Government of the People's Republic of China on the baselines of the territorial sea, 15 May 1996". *Law of the Sea Bulletin* 32 (1996) 37-40, 39-40.

¹⁰⁸ See n 33 above.

¹⁰⁹ Cf Valencia, Van Dyke, and Ludwig, n 23 above, 254 ff, for plates depicting as distinct both China's nine-dotted lines and the equidistance line.

¹¹⁰ 1998 Law, Article 2.

¹¹¹ See Kien-Hong Yu, n 7 above, 405-30, n 8, where it is reported that Bai Manchu who drew the lines did not remember the reasons for his actions.

provided under that law do not affect China's 'historical rights'.¹¹² An inference of 'historic rights' in China's *Note Verbale* is also possible from the undefined term 'related rights' which are supported by historical evidence. Thus, if the nine-dotted lines delimit the extent of China's historical rights in the SCS,¹¹³ they are unaffected by the existence of the EEZ and CS of the Spratly Islands. The existence of such historical rights appear to be necessary given the fact that the Spratly Islands will have limited effect in comparison with the relevant coastal states should delimitation of the overlapping maritime zones be conducted.¹¹⁴ In other words, China's maintenance of historical rights might be a fall back option in its bargain with neighbouring states in the SCS over the right to control marine resources.

Conclusion

The foregoing analysis shows that the recent exchange of diplomatic notes between the Philippines and China do clarify further their maritime claims in the South China Sea. But not much has been revealed and uncertainty over some critical issues remains.

The Philippines by its 2011 *Note Verbale* reaffirms the application of Article 121 to the KIG. While this position has already been stated in its Archipelagic Baselines Act, the significance of the *Note Verbale* of the Philippines cannot be overestimated. The Archipelagic Baselines Act, as a domestic legislation, is a discretionary act and subject to the vagaries of the Philippine legislature. The Philippine *Note Verbale*, by contrast, arguably constitutes an international undertaking by the Philippines at least *vis-à-vis* China.¹¹⁵ It is now unlikely that the Philippines will revert to the possibility of including the KIG features within its archipelagic baseline system. By reaffirming the position in the Archipelagic Baselines Act, the *Note Verbale* once again indicates that the Philippines has been retreating from an excessive sovereignty claim over the whole KIG and modifying its claim into one *more consistent* with international law and the LOS Convention. In that sense, the *Note Verbale* is a welcome move by the Philippines in the SCS disputes. With hindsight, the Philippines does not lose much. Insofar as the question of sovereignty over islands in the SCS is to gain control over marine resources,¹¹⁶ a title to maritime jurisdictional zones is enough to protect the Philippines' interest.¹¹⁷ On the other hand, the *Note Verbale* sheds little light on the

¹¹² 1998 Law, Article 14.

¹¹³ For the argument that the nine-dotted lines define China's historical rights in the SCS, see Zou Keyuan. "Historic Rights", n 7 above.

¹¹⁴ See, e.g., Jon . Van Dyke, "Disputes Over Islands and Maritime Boundaries in East Asia" in S.-Y. Hong and J. M. Van Dyke (eds.) *Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea* (Leiden: Martinus Nijhoff Publishers 2009), 39-75, 73; Clive Schofield, and Ian Townsend-Gault, n 6 above, 659, 666.

¹¹⁵ For unilateral act of state, see generally 'Unilateral Acts of States: Report of the Working Group - Conclusions of the International Law Commission relating to Unilateral Acts of States' *A/CN.4/L.703*, 20 July 2006.

¹¹⁶ See Schofield n 2 above.

¹¹⁷ See Henry Rhoel R. Aguda, and Jesusa Loreto A. Arellano-Aguda. "The Philippine Claim Over the Spratly Group of Islands: An Application of Article 76 of the UNCLOS" *Philippine Law Journal* 83 (2009) 573-608 for argument that the Philippines' extended continental shelf cover the whole KIG's seabed and subsoil. See also Clive

Philippine position regarding the more controversial issue,¹¹⁸ i.e. the classification of the Spratly Islands under Article 121 of the LOS Convention. Thus the exact geographical scope of the ‘adjacent waters’ claimed by the Philippines - arguably an issue of greater importance in the context of the SCS dispute,¹¹⁹ remains undefined.

As to China’s *Note Verbale*, its very purpose is to reject the Philippines’ claim to the KIG. This note however does clarify China’s position as to the status of the features of the Spratly Islands - an issue that hitherto remains in speculation. China is now the only claimant state making clear its position as to how the Spratly Islands should be classified under Article 121 of the LOS Convention. On the other hand, the status of the nine-dotted lines, the very subject matter of the recent controversies in the SCS, unfortunately remains shrouded in obscurity. There have been now three different ‘interpretations’ by Indonesia, the Philippines and Vietnam regarding the possible meanings of the nine-dotted lines. China however neither approves nor disapproves any interpretation. Nor has it offered any explanation as to the legal basis of the nine-dotted lines. In this connection, it is noted that the fundamental principle in international litigation is that ‘a party which advances a point of fact in support of its claim must establish that fact.’¹²⁰ China, insofar as it states that its position on its sovereignty and sovereign rights in the SCS ‘is widely known by the international community’,¹²¹ has the burden of proof. And the first step for China to discharge this burden is to clarify the exact meaning of the nine-dotted lines. Only then will it be possible to engage in a more *meaningful* discussion of the legal bases of these lines.¹²²

Annex I

Note Verbale No. 000223 of Philippine Mission to the United Nations

Schofield, and I Made Andi Arsana, n 86 above, 49-50, for the report that the Philippines determined that it may claim a CS beyond 200 NM in the vicinity of the KIG area.

¹¹⁸ It has been interpreted that the joint submission by Malaysia and Vietnam extending their continental shelf from coastlines indicates that Malaysia and Vietnam consider the features of the Spratly Islands as having 12 nm territorial seas only. See Robert Beckman. 2010. South China Sea: Worsening Dispute or Growing Clarity in Claims? In *RSIS Commentaries*. Singapore: S. Rajaratnam School of International Studies (RSIS), Nanyang Technological University. See also, McDorman, n 5 above, 516-17, 521. Indonesia, in its *Note Verbale* in response to the Chinese reactions on the submissions by Malaysia and Vietnam, also expressed the view that none of the Spratly islands is capable to generate an exclusive economic zone and continental shelf of its own. For the view that certain features of the Spratlys, including those occupied by the Philippines, meet the requirements to have their own EEZ and CS, see Nguyen, n 88 above, 55-61. See also Alex G. Oude Elferink. "The Islands in the South China Sea: How Does Their Presence Limit the Extent of the High Seas and the Area and the Maritime Zones of the Mainland Coasts?" *ODIL* 32 (2001) 169-190. For contrary view, Marius Gjetnes. "The Spratlys: Are They Rocks or Islands?" *ODIL* 32 (2001) 191-204.

¹¹⁹ See n 2 above.

¹²⁰ See *Malaysia/Singapore Case*, paragraph 45 and the jurisprudence cited therein.

¹²¹ China’s 2009 *Notes Verbales*.

¹²² The burden of proof also lies with China should it claim that the nine-dotted lines delineate its historic rights in the SCS. For discussion concerning the burden of proof, see Yehuda Z. Blum, "Historic Rights" in R. Bernhardt (eds.) *Encyclopedia of Public International Law* 2 (Amsterdam: North-Holland 1995), 710-15, 713-14. See also Yehuda Zvi Blum, *Historic Titles in International Law* (The Hague: Martinus Nijhoff 1965), 238; Symmons, n 96 above, 67 ff.

The Permanent Mission of the Republic of the Philippines to the United Nations presents its compliments to the Secretary-General of the United Nations (UN) and has the honor to refer to the People's Republic of China's Notes Verbales CML/17/2009 dated 7 May 2009 and CML/18/2009 dated 7 May 2009 addressed to the Secretary-General of the UN.

The Philippine Permanent Mission notes that the said Notes Verbales were reactions specifically on the Unilateral and Joint Submission for the extended continental shelves (ECS) in the South China Sea (SCS) by the Socialist Republic of Vietnam and Malaysia. However, since the justification invoked by the People's Republic of China in registering its reaction to the said submissions touched upon not only on the sovereignty of the islands *per se* and "*the adjacent waters*" in the South China Sea, but also on other "*relevant waters as well as the seabed and subsoil thereof*" as indicated in the map attached thereat, with an indication that the said claims are "*widely known by the international community*", the Government of the Republic of the Philippines is constrained to respectfully express its views on the matter.

On the Islands and other Geological Features

FIRST, the Kalayaan Island Group (KIG) constitutes an integral part of the Philippines. The Republic of the Philippines has sovereignty and jurisdiction over the geological features in the KIG.

On the "Waters Adjacent" to the Islands and other Geological Features

SECOND, the Philippines, under the Roman notion of *dominium maris* and the international law principle of "*la terre domine la mer*" which states that the land dominates the sea, necessarily exercises sovereignty and jurisdiction over the waters around or adjacent to each relevant geological feature in the KIG as provided for under the United Nations Convention on the Law of the Sea (UNCLOS).

At any rate, the extent of the waters that are "adjacent" to the relevant geological features are definite and determinable under UNCLOS, specifically under Article 121 (Regime of Islands) of the said Convention.

On the Other "Relevant Waters, Seabed and Subsoil" in the SCS

THIRD, since the adjacent waters of the relevant geological features are definite and subject to legal and technical measurement, the claim as well by the People's Republic of China on the "*relevant waters as well as the seabed and subsoil thereof*" (as reflected in the so-called 9-dash line map attached to Notes Verbales CML/17/2009 dated 7 May 2009 and CML/18/2009 dated 7 May

2009) outside of the aforementioned relevant geological features in the KIG and their “adjacent waters” would have no basis under international law, specifically UNCLOS. With respect to these areas, sovereignty and jurisdiction or sovereign rights, as the case may be, 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 the Territorial Sea, or 200 M Exclusive Economic Zone (EEZ) or Continental Shelf (CS) in accordance with Articles 3, 4, 55, 57, and 76 of UNCLOS.

The Permanent Mission of the Republic of the Philippines to the United Nations avails itself of this opportunity to renew to the Secretary-General of the United Nations the assurances of its highest consideration.

New York, 05 April 2011

Annex II

Note Verbale No. CML/8/2011 of the Chinese Mission to the United Nations (English Translation)

New York, 14 April 2011

The Permanent Mission of the People’s Republic of China to the United Nations presents its compliments to the Secretary-General of the United Nations and, with reference to the Republic of Philippines’ *Note Verbale* No.000228 dated 5 April 2011 addressed to the Secretary-General of the UN, has the honor to state the positions as follows:

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. China’s sovereignty and related rights and jurisdiction in the South China Sea are supported by abundant historical and legal evidence. The contents of the *Note Verbale* No.000228 of the Republic of Philippines are totally unacceptable to the Chinese government.

The so-called Kalayaan Island Group (KIG) claimed by the Republic of Philippines is in fact part of China’s Nansha Islands. In a series of international treaties which define the limits of the territory of the Republic of Philippines and the domestic legislation of the Republic of Philippines prior to 1970, the Republic of Philippines had never made any claims to Nansha Islands or any of its components. Since 1970s, the Republic of Philippines started to invade and occupy some islands and reefs of China’s Nansha Islands and made relevant territorial claims, to which China objects

strongly. The Republic of Philippines' occupation of some islands and reefs of China's Nansha Islands as well as other related acts constitutes infringement upon China's territorial sovereignty. Under the legal doctrine of "*ex injuria jus non oritur*", the Republic of Philippines can in no way invoke such illegal occupation to support its territorial claims. Furthermore, under the legal principle of "*la terre domine la mer*", coastal states' Exclusive Economic Zone (EEZ) and Continental Shelf claims shall not infringe upon the territorial sovereignty of other states.

Since the 1930s, the Chinese Government has given publicity several times to the geographical scope of China's Nansha Islands and the names of its components. China's Nansha Islands are therefore clearly defined. In addition, under the relevant provisions of the *1982 United Nations Convention on the Law of the Sea*, as well as the *Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone (1992)* and the *Law on the Exclusive Economic Zone and Continental Shelf of the People's Republic of China (1998)*, China's Nansha Islands are fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ) and Continental Shelf.

The Permanent Mission of the People's Republic of China to the United Nations avails itself of this opportunity to renew to the Secretary-General of the United Nations the assurance of its highest consideration.