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A Legal Analysis of China's Historic Rights Claim in the South China Sea

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Source: *The American Journal of International Law*, Vol. 107, No. 1 (January 2013), pp. 124-141

Published by: [American Society of International Law](#)

Stable URL: <http://www.jstor.org/stable/10.5305/amerjintelaw.107.1.0124>

Accessed: 26/03/2013 04:21

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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.

as well as the seabed and subsoil thereof.”<sup>3</sup> In support of this declaration, China produced a map of the South China Sea, which had the peculiarity of showing a dashed line composed of nine segments encompassing virtually all islands in the South China Sea and most of its waters. As per China’s *notes verbales*, this “nine-dash,” or “U-shaped,” line was meant to illustrate the limits of its sovereignty in the South China Sea.<sup>4</sup>

Although the May 7, 2009, declaration was essentially echoing repeated assertions made by China since the 1950s, it seems to have exacerbated tensions in the region. Countries such as Malaysia, the Philippines, and Vietnam have vigorously criticized the Chinese legal position for its irrationality and the two wobbly pillars on which it rests: China’s alleged historic title over the South China Sea and the nine-dash-line map.

The South China Sea is a semi-enclosed sea located south of mainland China and Taiwan, east of Vietnam, west of the Philippines, and north of Brunei and Malaysia. The South China Sea has hundreds of insular features (islands, islets, shoals, reefs, banks, rocks), most of them uninhabited. The most important groups of islands are the Paracel Islands and the Spratly Islands, followed by the Pratas Islands and the Macclesfield Bank.

The South China Sea islands have been the subject of competing sovereignty claims by the surrounding states for several decades. China has long had the largest claim, and Taiwan has claimed sovereignty over the same areas. The claim extends over all islands in the South China Sea (including their surrounding waters), an area stretching hundreds of miles south and east from China’s most southerly province, Hainan. China has repeatedly asserted this claim, which, since 2009, has been officially embodied in the nine-dash-line map. In support of China’s claim, its proponents have placed repeated emphasis on the notion of “historic rights.”<sup>5</sup> In a nutshell, China appears to claim that it ought to enjoy sovereignty over the vast majority of the South China Sea, as established through China’s long-standing historical presence and display of authority in the region.

The second-largest claim is that of Vietnam, which claims sovereignty over the entirety of the Paracel and Spratly Islands. This claim was most recently asserted in Vietnam’s May 3, 2011, *note verbale* to the UN secretary-general.<sup>6</sup> The Philippines claims only the western section of the Spratlys, known in the Philippines as the Kalayaan Island Group.<sup>7</sup> Brunei and Malaysia have similarly limited claims, which cover only the parts of the Spratlys that are closest to their respective coasts.

<sup>3</sup> Note Verbale No. 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); Note Verbale No. CML/18/2009 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/vnm37\\_09/chn\\_2009re\\_vnm.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/chn_2009re_vnm.pdf).

<sup>4</sup> This nine-dash line can be seen on the map printed with the Editors’ Introduction, 107 AJIL 95 (2013).

<sup>5</sup> Although the term *historical rights* rather than *historic rights* has occasionally been used on the Chinese side, we shall prefer not to attach too much importance to this lexical variation, which may result from translation issues, rather than from an actual intent. We shall use *historic rights*, which is the term normally used in international law.

<sup>6</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/vnm37\\_09/vnm\\_2011\\_re\\_phlchn.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/vnm_2011_re_phlchn.pdf).

<sup>7</sup> See Note Verbale No. 000228 from the Permanent Mission of the Republic of the Philippines to the UN Secretary-General (April 5, 2011), at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/vnm37\\_09/phl\\_re\\_chn\\_2011.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/phl_re_chn_2011.pdf).

These competing claims have inevitably created tensions. The South China Sea is of strategic importance for the entire region because the subsoil contains potentially substantial reserves of natural resources (oil and gas).<sup>8</sup> It is also one of the region's main shipping lanes and is home to a fishing ground that supports the livelihoods of millions of people and provides valuable export products for the states in the region.

In this article we focus on China's claim in order to understand the articulation of its "historic rights" argument and to assess its merits in light of the principles of public international law. Our main purpose is to explore the potential relevance of such an argument if it came to be invoked by China in the context of an international dispute-settlement procedure.

This study has two parts: in part I, we define the geographical and legal contours of China's historic rights claim as expressed by state practice and the secondary literature, and in part II we analyze and assess the merits of the Chinese position.

## I. THE CONTOURS OF CHINA'S "HISTORIC RIGHTS" CLAIM IN THE SOUTH CHINA SEA

In drawing the geographical and legal contours of China's official position regarding the extent of its sovereignty in the South China Sea, our initial step is to summarize the geographical scope of China's claims. We will then set out the legal principles on which China appears to rely.

### *The Scope of China's Claim*

To establish the precise geographical scope of China's claims in the South China Sea, one should first look at the official declarations that China has made on the international level during the past decades. In the interest of clarity, we shall examine territorial and maritime claims separately.

### *Extensive Territorial Claim*

China made its first official claim—to practically all islands of the South China Sea—in its Declaration on China's Territorial Sea of September 9, 1958,<sup>9</sup> in the wake of the first generation of codification conventions on the law of the sea.<sup>10</sup> Although China itself was not a party to the conventions, it seized the opportunity to assert the limits of its own maritime sovereignty and, by the same token, the geographical scope of its territorial sovereignty. Thus, in this 1958 declaration China affirmed its sovereignty over most islands in the South China Sea—in particular, the Pratas (Dongsha), Paracels (Xisha), Macclesfield Bank (Zhongsha), and Spratlys (Nansha):

<sup>8</sup> Although there has been little detailed exploration of the area, some estimates put possible oil reserves as high as 213 billion barrels, see <http://www.eia.gov/countries/regions-topics.cfm?fips=SCS>), which would be roughly ten times the proven reserves of the United States, see <http://www.eia.gov/countries/country-data.cfm?fips=US&trk=p1#pet>.

<sup>9</sup> This English translation is available on the website of the Asian Law Information Institute, at <http://www.asianlii.org/cn/legis/cen/laws/rotscotnpcotaotdotgocts1338/>. Note, however, that China had already asserted its claim over the Spratly Islands on May 29, 1956, in response to the Philippines' claim over some islands of this group. See, e.g., Edmond D. Smith Jr., *China, Technology and the Spratly Island: The Geopolitical Impact of New Technology* (March 1994) (unpublished Ph.D. dissertation, Salve Regina University), at <http://www.dtic.mil/dtic/tr/fulltext/u2/a280214.pdf>.

<sup>10</sup> Geneva Conventions on the Law of the Sea, Apr. 29, 1958, 2 OFFICIAL REC. 146, UN Doc. A/CONF.13/L.58.

The breadth of the territorial sea of the People's Republic of China shall be twelve nautical miles. This provision applies to all territories of the People's Republic of China including the Chinese mainland and its coastal islands, as well as Taiwan and its surrounding islands, the Penghu Islands, the Dongsha Islands, the Xisha Islands, the Zhongsha Islands, the Nansha Islands and all other islands belonging to China which are separated from the mainland and its coastal islands by the high seas.<sup>11</sup>

The territorial claims as set out in this declaration have remained relatively stable up to the present day and have been reasserted on several occasions. On February 25, 1992, China promulgated its Law on the Territorial Sea and the Contiguous Zone, of which Article 2 provides:

The land territory of the People's Republic of China includes the mainland of the People's Republic of China and its coastal 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 belonging to the People's Republic of China.<sup>12</sup>

China thus reiterated its sovereignty claim over the South China Sea islands, including the Pratas, Paracel, and Spratly Islands.

The claim was confirmed again on the occasion of China's ratification of the UN Convention on the Law of the Sea<sup>13</sup> (UNCLOS) in 1996, by express reference to its 1992 law.<sup>14</sup>

In two *notes verbales* filed in 2009<sup>15</sup> and one filed on April 14, 2011—in the aftermath of submissions of Malaysia and Vietnam to the UN Commission on the Limits of the Continental Shelf—China reaffirmed its territorial pretensions in an even broader fashion, stating that “China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters.”<sup>16</sup>

### *Uncertain Maritime Claim*

As noted above, part of China's maritime claim directly derives from its territorial claim: by applying the principles of UNCLOS to the claimed islands (primarily the Paracels and Spratlys), China has recently made clear that it claims not only the territorial waters and contiguous zones around the islands but also, for each island, its exclusive economic zone (EEZ) and continental shelf.<sup>17</sup> This broad assertion obviously raises a problem, as China does not distinguish between insular features that qualify as “islands” within the meaning of UNCLOS

<sup>11</sup> Declaration on China's Territorial Sea, *supra* note 9, para. 1.

<sup>12</sup> An official translation of the Law [of the People's Republic of China] on the Territorial Sea and the Contiguous Zone is reproduced in Annex 2 of U.S. DEP'T OF STATE, LIMITS IN THE SEAS NO. 117, STRAIGHT BASELINE CLAIM: CHINA (1996), available at <http://www.state.gov/documents/organization/57692.pdf>.

<sup>13</sup> UN Convention on the Law of the Sea, opened for signature Dec. 10, 1982, 1833 UNTS 397, reprinted in 21 ILM 1261 (1982) [hereinafter UNCLOS].

<sup>14</sup> See paragraph 3 of China's declaration upon ratification of UNCLOS, at [www.un.org/depts/los/convention\\_agreements/convention\\_declarations.htm](http://www.un.org/depts/los/convention_agreements/convention_declarations.htm): “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 . . . .”

<sup>15</sup> See *supra* note 3 and accompanying text.

<sup>16</sup> Note Verbale No. 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>17</sup> China declared in Note Verbale No. CML/8/2011, *supra* note 16, that “China's Nansha Islands is fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ) and Continental Shelf.” Note that the statement is limited to the Spratly (Nansha) Islands because it is a response to a note by the Philippines, which does not have any claim

(and which would thereby generate rights to a full EEZ and continental shelf) and those qualifying as “rocks” (which would thereby generate rights only to internal and territorial waters).<sup>18</sup>

Moreover, a great deal of uncertainty remains, mainly as a result of the introduction of the nine-dash-line map, combined with occasional references to “historic waters.” As we shall discuss below, it remains unclear whether the function of the nine-dash line is to delimit the waters claimed by China. If the line does have such a function, then some ambiguity still remains as to the geographical coordinates of the line. The nine-dash line would even seem to suggest that, at least in certain areas, China’s EEZ should prevail over the EEZs of other countries.

A further ambiguity has resulted from the absence of any reference to the nine-dash-line map in China’s most recent official declaration, its *note verbale* of April 14, 2011.<sup>19</sup>

As a result, the overall geographical scope of China’s maritime claim remains essentially unclear. Possible interpretations of China’s position in this respect will be discussed below.

### *The Legal Justifications for China’s Claim*

To our knowledge, the basis for China’s broad sovereignty claim in the South China Sea has never been officially set out in clear legal terms. As a consequence, one can only attempt to decrypt the underlying legal reasoning, either by speculating about the meaning of official state declarations and state conduct or by referring to the Chinese legal literature supporting the official claim.

As a starting point, it can be stated with relative certainty that China’s position with respect to its sovereignty over the vast majority of the South China Sea rests on the notion that it must enjoy some sort of entitlement based on history. This understanding takes into account not only China’s official statements and practice, but also, more directly, the numerous publications in which Chinese scholars have sought to provide legal support for China’s claims. What is notable in this context is the recurrence of phrases making reference to history, such as “historic rights,”<sup>20</sup> “historical rights,”<sup>21</sup> “historic title,”<sup>22</sup> and “historic waters.”<sup>23</sup>

The use of this kind of language raises two central questions: In China’s view, what is the legal relevance of historical factors? More generally, does China, by using such ambiguous and changing terminology, intend to articulate territorial claims, maritime claims, or both?

in respect of other islands. Presumably, however, China would make the same claim in relation to the Paracel Islands.

<sup>18</sup> See UNCLOS, *supra* note 13, Art. 121.

<sup>19</sup> See *supra* note 16 and accompanying text.

<sup>20</sup> See, e.g., 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 (2003); Zou Keyuan, *Historic Rights in International Law and in China’s Practice*, 32 OCEAN DEV. & INT’L L. 149, 160 (2001).

<sup>21</sup> See, e.g., Su Hao, *China’s Positions and Interests in the South China Sea: A Rational Choices [sic] in Its Cooperative Policies* (2011), at <http://csis.org/publication/chinas-positions-and-interests-south-china-sea-rational-choices-its-cooperative-policies>; Nozomu Hayashi, *Official Says Beijing Has ‘Historical Rights’ over South China Sea*, ASAHI SHIMBUN, Jan. 26, 2012, at <http://ajw.asahi.com/article/asia/china/AJ201201260061>.

<sup>22</sup> See, e.g., Li Jinming & Li Dexia, *supra* note 20; Li Guoqiang, *Claim over Islands Legitimate*, CHINA DAILY, July 22, 2011, at [http://www.chinadaily.com.cn/cndy/2011-07/22/content\\_12956340.htm](http://www.chinadaily.com.cn/cndy/2011-07/22/content_12956340.htm); Jianming Shen, *International Law Rules and Historical Evidences Supporting China’s Title to the South China Sea Islands*, 21 HASTINGS INT’L & COMP. L. REV. 1 (1997); Pan Shiyong, *South China Sea and the International Practice of the Historic Title* (American Enterprise Institute for Public Policy Research, 1994).

<sup>23</sup> See, e.g., Yann-Huei Song & Peter Kien-hong Yu, *China’s “Historic Waters” in the South China Sea*, AM. ASIAN REV., Winter 1994, at 83, available at <http://paracelspratlyislands.blogspot.com.au/2008/01/chinas-historic-waters-in-south-china.html>; Li Jinming & Li Dexia, *supra* note 20.

We shall examine China's official claims and its reliance on the nine-dash-line map, and then turn to Chinese secondary literature in order to find elements that may assist in clarifying the legal basis for China's claims.

*1958–1996: No Official Justification*

As noted above, China first expressed its intentions regarding the South China Sea in the international arena in its September 4, 1958, Declaration on China's Territorial Sea.<sup>24</sup> Although paragraph 1 clearly indicates that China considered the Pratas Islands, Paracel Islands, Macclesfield Bank, and Spratly Islands to belong to its territories, the declaration provided no legal explanation. Its sole purpose was, it seems, to define the limits of its sovereignty as a pure fact.

Similarly, in promulgating the 1992 Law on the Territorial Sea and the Contiguous Zone,<sup>25</sup> China merely reiterated (in Article 2, quoted earlier) its position regarding its sovereignty over land features in the South China Sea and their surrounding waters, without explaining the legal basis for such a position.

Yet again, in its 1996 declaration upon ratifying UNCLOS, China reiterated its claim by reference to Article 2 of the 1992 law but provided no further elaboration.

*1998: First Official Reference to Historical Factors*

The first chronological reference to "historic rights" is found in China's Exclusive Economic Zone and Continental Shelf Act of June 26, 1998.<sup>26</sup> While the primary object of this act is to affirm China's sovereignty over its EEZ and continental shelf and to specify its rights within these zones, Article 14 provides that the "provisions of this Act shall not affect the historical rights of the People's Republic of China."

Leaving aside for now the issue of a possible distinction between "historical rights" and "historic rights," Article 14 demonstrates that China believes that it enjoys certain rights regarding maritime sovereignty that are based on historical factors. The precise meaning of Article 14 nevertheless remains unclear and has given rise to multiple interpretations and to speculation as to whether its purpose was to refer tacitly to China's territorial and maritime claims in the South China Sea.<sup>27</sup>

According to one Vietnamese scholar, it is likely that Article 14 "tacitly refers to other interests that China has claimed, such as the traditional right of fishing in maritime zones of other countries and the nine broken lines claiming over 80 per cent of area of the East Sea."<sup>28</sup> Similarly, another possible interpretation, identified by Zou Keyuan, is that "certain sea areas to

<sup>24</sup> See *supra* note 9 and accompanying text.

<sup>25</sup> See *supra* note 12 and accompanying text.

<sup>26</sup> As quoted later in this paragraph, the expression actually used in the act, as translated, is "historical rights." An English translation of the act is available at [http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/chn\\_1998\\_eez\\_act.pdf](http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/chn_1998_eez_act.pdf). Note, however, that earlier references to "historic waters" can be seen in declarations made on behalf of Taiwan as early as 1993. See Kuan-Ming Sun, *Policy of the Republic of China Towards the South China Sea*, 19 MARINE POL'Y 401, 408 (1995).

<sup>27</sup> See, for example, the various interpretations proposed by Zou Keyuan, *supra* note 20, at 162.

<sup>28</sup> Nguyen Hong Thao, *China's Maritime Moves Raise Neighbors' Hackles*, VIETNAM L. & LEGAL F., July 1998, at 21.

which China's historical rights are claimed go beyond the 200 nautical mile limit."<sup>29</sup> Vietnam has actually lodged an official protest against China's 1998 act, stating that Vietnam "shall not recognize any so-called 'historical interests' which are not in consistence with international law and violate the sovereignty, the sovereign rights of Viet Nam and Viet Nam's legitimate interests in its maritime zones and continental shelf in the Eastern Sea as mentioned in article 14."<sup>30</sup>

Even assuming that Article 14 refers to China's territorial claims as set out in the 1992 Law on the Territorial Sea and the Contiguous Zone, the reference to the notion of "historical rights" hardly provides any clarification as to how this concept can be used to support China's position. As we shall see, such language has the further effect of blurring the distinction between maritime claims, to which "historic rights" traditionally apply, and territorial claims, to which China may also seek to apply such rights.

### *The 2009 and 2011 Declarations*

China's subsequent declarations have done little to clarify the legal basis for its sovereignty claims in the South China Sea. In the May 7, 2009, *note verbale* (no. CML/17/2009) to the UN secretary-general,<sup>31</sup> filed in reaction to a joint submission by Malaysia and Vietnam to the UN Commission on the Limits of the Continental Shelf, China claimed to have "indisputable sovereignty over the islands in the South China Sea and the adjacent waters," but it again failed to provide any legal justification for such claim. The only fact invoked to support the claim was the nine-dash-line map attached to the *note verbale*. (The implications of China's reliance on the map will be discussed later.)

After the Philippines lodged its own protest against China's note in 2011, China filed its *note verbale* of April 14, 2011,<sup>32</sup> in which it reiterated its claim and indicated that "China's sovereignty and related rights and jurisdiction in the South China Sea are supported by abundant historical and legal evidence." China further pointed out that "prior to the 1970s, the Republic of Philippines had never made any claims to Nansha [that is, Spratly] Islands or any of its components," and that "[s]ince 1930s, the Chinese Government has given publicity several times [to] the geographical scope of China's Nansha Islands and the names of its components." Again, although the note is too vague to indicate the underlying legal reasoning, it confirms China's perception that the limits of its sovereignty must be assessed by reference to historical evidence.

In line with China's official declarations, Wu Shicun, the president of China's National Institute for South China Sea Studies (an academic institute affiliated with the Chinese Ministry of Foreign Affairs), stated in a recent interview that the "widely accepted view (in China) . . . holds that all islands lying within the 'cow's tongue' belong to China, and that China has 'historical rights,' including fishing rights, over the surrounding waters."<sup>33</sup> While the terms used in this statement should not be taken too strictly on the legal level, the repeated

<sup>29</sup> Zou Keyuan, *supra* note 20, at 162.

<sup>30</sup> *Vietnam: Dispute Regarding the Law on the Exclusive Economic Zone and the Continental Shelf of the People's Republic of China Which Was Passed on 26 June 1998*, UN LAW OF THE SEA BULL., No. 38, 1998, at 55.

<sup>31</sup> See *supra* note 3 and accompanying text.

<sup>32</sup> See *supra* note 16 and accompanying text.

<sup>33</sup> Nozomu Hayashi, *supra* note 21.



reference to “historical rights” is striking, as is the continuing lack of clarity in the Chinese official position.

For the above reasons, a review of China’s official discourse inevitably leads to the conclusion that the Chinese position is and remains essentially ambiguous. While it is beyond doubt that the recurring references to “historic rights” or “historical rights” are aimed at emphasizing China’s long-standing claim to the area as the determining factor in establishing its sovereignty, the meaning and legal relevance that China attributes to such language remain obscure. For instance, although claims invoking “fishing rights” could potentially be analyzed in terms of the fishing zones traditionally allowed to Chinese fishermen, claims invoking “historical rights,” while seemingly referring to long-established legal titles to the islands in question, provide no clear indication as to their origin, form, and geographical scope.

### *Legal Relevance of the Nine-Dash-Line Map*

The second pillar of China’s claim in the South China Sea is the now-famous nine-dash-line map. Although the map is said, according to Chinese sources, to have been published in 1947 or 1948 by the Chinese Ministry of Interior (that is, prior to the creation of the People’s Republic of China),<sup>34</sup> China first officially relied on the map in its 2009 *notes verbales*. To this day, the purpose behind the recent production of the map remains uncertain, as China has not clarified whether the map is to be understood as evidence supporting its claim or merely as a graphical depiction of it. More generally, it is uncertain whether the map has any legal relevance to the delimitation of China’s boundaries in the South China Sea.

The emergence of the map—the source and author of which remain unknown—thus raises two sets of centrally important questions in the context of China’s historic rights claim. First, does the map have any effect on the contours—the geographical scope and legal justification—of China’s claim? Put in another way, does the map, which was attached to China’s 2009 *notes verbales*, change or clarify that claim? Second, does the map constitute legally relevant support for the Chinese claim? That is, does the map make the claim more persuasive from the perspective of an international court’s or tribunal?

We shall consider these two sets of questions in turn.

### *Does the Map Affect the Contours of China’s Claim?*

A glance at the map quickly reveals that, for a number of reasons, it does little to provide any real clarification as to the contours, either geographical or legal, of China’s claim.

*The map’s intrinsic meaning is ambiguous.* In the context of the ongoing, indeterminate geographical scope of China’s maritime claim in the South China Sea, the production of the nine-dash-line map in 2009 was perhaps an attempt to clarify the scope of that claim. However, far from providing helpful, additional information, the map has cast additional doubts as to the geographical scope and legal justification of the claim.

<sup>34</sup> See, e.g., Li Jinming & Li Dexia, *supra* note 20; Su Hao, *supra* note 21, at 3; Jianming Sheng, *China’s Sovereignty over the South China Sea Islands: A Historical Perspective*, 1 CHINESE J. INT’L L. 94, 129 (2002), at <http://chinese.jil.oxfordjournals.org/content/1/1/94.full.pdf>.

First, China has never provided any explanation as to the meaning of the nine-dash line—and, in particular, as to whether it is meant to delimit China's waters or to encircle insular features belonging to China. While the geographical scope of the territorial claims is certainly confirmed by the map (it can be assumed that all islands within the nine-dash line are claimed by China), it is uncertain whether it must be interpreted as also indicating the scope of China's maritime claims. As we shall see, various conflicting interpretations of the map have been advanced.

Second, the nine-dash line can hardly serve as the basis of a maritime delimitation since it does not have geographical coordinates and, more generally, is not defined with sufficient precision to be implemented. The line is drawn in a rather rough, approximate way and cannot be interpreted as the result of applying any standard method for delimiting maritime spaces (such as drawing a median line between the islands and islets claimed by China and the geographical features of foreign, opposite territories).

*The relation between the map and historic rights is unclear.* The second ambiguity created by the map concerns China's intention in providing it: did China see the map as merely illustrating the geographical scope of its claim or as providing substantive support for it?

This uncertainty raises, in turn, the question of how the map and the argument based on historic rights are related, if at all. In particular, is the map considered as evidence of a historic title? It is also uncertain whether the map's supposed age (approximately sixty-five years according to Chinese sources) is taken by China to be the very foundation for China's claim to historic title. Is it China's position that the map can serve such a purpose because the map itself is relatively old and because the nine-dash line, according to China, has not been contested by other states?

The texts of the two *notes verbales* of May 7, 2009, fail to make any reference to historic rights or historical factors and thus do not clarify the possible relation between the nine-dash-line map and historic rights. Indeed, the way in which the two notes introduce the map ("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).")<sup>35</sup> would seem to indicate that it was produced as a mere cartographic illustration of the claim that the notes assert in writing; that is, the maps have only informative, rather than probative, value.

Nevertheless, the insistence in Chinese commentaries on the long-standing existence of the map<sup>36</sup> suggests that Chinese scholars attribute historical value to the map and that they consider the map to play a substantial role in China's initial acquisition of its South China Sea claims. Under such a view, the map would not only have probative value but also play a key role in establishing China's legal title over the claimed territorial and maritime areas. For example, Li Jinming & Li Dexia observe:

Upon the declaration of the nine-dotted line, the international community at no time expressed dissent. None of the adjacent states presented a diplomatic protest. This silence

<sup>35</sup> See *supra* note 3 and accompanying text.

<sup>36</sup> See *supra* notes 20–23 and accompanying text.

in the face of a public declaration may be said to amount to acquiescence, and it can be asserted that the dotted line has been recognized for half a century.<sup>37</sup>

The uncertainties surrounding the relationship between the map and the historic rights claim only increased in the wake of China's subsequent, 2011 *note verbale*, in which it reaffirmed the same basic claim (even broadening the geographical scope of the maritime claim), this time including reference to historical factors but without any reference to the nine-dash line.<sup>38</sup> While it appears difficult to draw any conclusions from this omission, it could be seen as an indication that the map is unrelated to the historic rights argument—or even that China has dropped any reliance on the map.

Again, the inevitable conclusion is that, far from providing any clarification, the map only reinforces the confusion surrounding China's claim.

### *Could the Map Be Considered as Evidence in Support of China's Claim?*

A related question is whether an international court or tribunal would agree to take into account the nine-dash-line map in adjudicating a potential sovereignty claim by China regarding the South China Sea.

*Maps do not constitute titles in international law.* The principle that emerges from international jurisprudence and doctrinal discussions is that cartographic materials do not by themselves have any legal value.<sup>39</sup> The leading case on this point is *Frontier Dispute* (Burkina Faso/Republic of Mali). In its 1986 judgment, the International Court of Justice (ICJ) stated that in frontier delimitations “maps merely constitute information” and that “of themselves, and by virtue solely of their existence, they cannot constitute a territorial title.”<sup>40</sup> They constitute extrinsic evidence of varying reliability that might, depending on the circumstances, be used together with other evidence to establish a fact.

This rule is deeply rooted in public international law adjudication and has been confirmed in the context of sovereignty disputes over islands. Max Huber, sole arbitrator in the famous *Island of Palma* case, already stated in 1928 that “only with the greatest caution can account be taken of maps in deciding a question of sovereignty.”<sup>41</sup> Huber went on to elaborate on the factors that may confer legal value on a map, including the geographical accuracy of the map, the cartographer's sources of information, and whether the map had been commissioned by a government involved in the dispute.

<sup>37</sup> Li Jinming & Li Dexia, *supra* note 20, at 290. See also, from a Taiwanese perspective, Yann-huei Song & Kien-hong Yu, *supra* note 23, at 83:

Because no protests or opposition were expressed by the states concerned or the international community in general after the map was published, and the legal status of the enclosed waters has never been clarified by [China], questions concerning the nature of this “U”-shaped boundary line continue to be raised.

<sup>38</sup> See *supra* note 6 and accompanying text.

<sup>39</sup> See, e.g., DURWARD SANDIFER, EVIDENCE BEFORE INTERNATIONAL TRIBUNALS 229 (rev. ed. 1975) (“The principles applicable to the use of maps in international arbitral proceedings constitute a collateral, rather than a principal, part of the best evidence rule . . .”); see also A. OYE CUKWURAH, THE SETTLEMENT OF BOUNDARY DISPUTES IN INTERNATIONAL LAW 224 (1967) (“With regard to maps as such, the popular approach, arising from their inherent limitations, is not to treat them as conclusive, but of relative value.”).

<sup>40</sup> *Frontier Dispute* (Burkina Faso/Mali), 1986 ICJ REP. 554, para. 54 (Dec. 22).

<sup>41</sup> *Island of Palmas* (Neth./U.S.), 2 R.I.A.A. 829, 852 (Perm. Ct. Arb. 1928).

*A number of factors weaken the probative value of the nine-dash-line map.* International jurisprudence thus shows that the two central factors applied by international courts and tribunals in deciding whether maps can have any probative value are (1) their geographical accuracy and reliability and (2) their neutrality in relation to the dispute and the parties involved. Only if a map constitutes the true and accurate manifestation of the will of a competent national authority or if it reflects an agreement between the states potentially concerned (in this case, China and its neighbors) can a map be seriously considered by a court.

In this context, the nine-dash-line map is a poor piece of evidence in favor of China's claim. The main factor that undercuts the probative value of the map is its origin. The nine-dash-line map is not, and has never been alleged to be, the product of independent cartographers. Even Chinese scholars, who argue that the map was first published in 1948 by the then Republic of China's Ministry of Interior, thereby admit that the map has always been a unilateral illustration of the limits of China's sovereignty.

As noted by Charles Cheney Hyde in 1933 in "Maps as Evidence in International Boundary Disputes," "When a cartographer possessed of requisite geographical data proceeds to make a map setting out political as well as physical situations, his trustworthiness as a witness must depend upon the impartiality with which he paints his picture."<sup>42</sup> In other words, the map itself reflects the biased view of the party seeking to rely on it and cannot, as such, be taken into account by an international court or tribunal seeking to establish objective facts.

The second reason for the lack of reliability of the map is that it does not provide a clear picture of the alleged limits of China's sovereignty: not only, as already noted, is the meaning of the line indeterminate, but the line is drawn in the most inaccurate possible way: the thickness of the line, its lack of precision (due, in particular, to the empty spaces between the nine dashes), and the absence of geographical coordinates make it impossible to determine the precise area enclosed by it.

In light of the principles identified by Max Huber in the *Island of Palma* case and by the ICJ in the *Burkina Faso/Mali* case, and in light of further developments and applications of this case law to maritime spaces,<sup>43</sup> it appears highly unlikely that any international court or tribunal charged with assessing the Chinese claim would attribute any substantial value to the map, let alone rely on it as the main basis for China's title.

At most, it could be argued that the map constitutes evidence that China's claim has continued intact since the map's first publication. However, the uncertain origins of the map and its apparent lack of official endorsement by China on the international level before 2009 will most likely undermine any potential attempt to rely on the map in this way.

### *Legal Justifications Offered by Secondary Literature*

Several Chinese commentators have attempted to clarify and substantiate the official Chinese claims by reference to notions linked to the concept of "historic rights." A review of such writings, however, shows that even within China, the reference to historic rights has given rise to multiple interpretations.

<sup>42</sup> Charles Cheney Hyde, *Maps as Evidence in International Boundary Disputes*, 27 AJIL 311, 314 (1933).

<sup>43</sup> See, e.g., *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon./Malay.)*, 2002 ICJ REP. 625, para. 88 (Dec. 17); *Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hond.)*, 2007 ICJ REP. 659, para. 219 (Oct. 8).

Chinese commentators usually place considerable emphasis on historical evidence alleged to prove the ancientness of China's sovereignty over the South China Sea, and agree that such evidence provides substantial support for China's legal position. The structure of the underlying legal argument, however, remains enigmatic. We shall here seek to provide an overview of the leading views prevailing in China.

First, some Chinese commentators have analyzed the historic rights claim as one over "historic waters"—that is, as a claim to the entire maritime area within the nine-dash line as China's historic waters. Thus, according to Jiao Yongke, "The water areas within China's Southern Sea boundary line constitute water areas over which China has a historic proprietary title, they constitute China's specific exclusive economic zone, or historic exclusive economic zone, hence it ought to have the same status as the EEZ under UNCLOS provisions."<sup>44</sup>

Prima facie, this interpretation would appear to be the most coherent with the reference to historic rights in the 1998 Exclusive Economic Zone and Continental Shelf Act: since the act's purpose is to define the limits of Chinese sovereignty over maritime areas, it would seem to make sense that the reference to "historical rights" in Article 14 is a reference to rights over waters, not over land. As we shall discuss below, however, the main problem with this interpretation lies in the inherent contradiction of speaking about "historic waters" (which are by definition either internal or territorial waters) in relation to the EEZ or continental shelf.

Another group of commentators have opted for the view that the reference to historic rights is used to establish sovereignty over land (that is, islands and rocks of the South China Sea). Under this interpretation, China's main concern would be to establish its sovereignty over the relevant islands. Its maritime claims would then simply derive from the application of the principles of UNCLOS. For example, Li Jinming and Li Dexia have relied on an article by Yehuda Blum to come to the following conclusion:

For over half a century, the Chinese government has continuously reasserted through domestic legislation that the islands within the line are part of Chinese territory. On the basis of Blum's quote, after such a long time China can be said to have historic rights as regards the islands in this region.<sup>45</sup>

As we shall see, while this approach has the advantage of clarifying the geographical scope of the claimed areas (all islands and their adjacent waters), it also poses a problem because it is based on the questionable assumption that historic rights over land is a recognized category of public international law.

Yet another group of Chinese scholars have emphasized the historical character of China's rights in the South China Sea, though without specifying whether they considered such rights to relate to waters, land, or both. Thus, Su Hao of the Center for Strategic and Conflict Management, China Foreign Affairs University, observes that "China's claim for rights and interests in the South China Sea is based on its historical rights and international law."<sup>46</sup> In a similar vein, Pan Shiyong states that "[i]t is beyond question that the '9-discontinued-and-dotted line'

<sup>44</sup> Jiao Yongke, [*There Exists No Question of Redelimiting Boundaries in the Southern Sea*], 17 OCEAN DEV. & MGMT. 52 (2000), translated in Michael Strupp, *Maritime and Insular Claims of the PRC in the South China Sea Under International Law*, 11 ZEITSCHRIFT FÜR CHINESISCHES RECHT 1, 16 (2004).

<sup>45</sup> Li Jinming & Li Dexia, *supra* note 20, at 293 (relying on Blum, *infra* note 54).

<sup>46</sup> Su Hao, *supra* note 21, at 1.

marked on the Chinese map of the South China Sea is the sign/designation of China's 'historic title.'<sup>47</sup>

Some authors appear to base their analyses on the questionable assumption that the "first come, first served" rule applies to the acquisition of sovereignty, and view the reference to historic rights as an overarching assertion that abundant historical evidence supports China's position, without entering the slippery slopes of legal qualification. For example, in "China's Sovereignty over the South China Sea Islands: A Historical Perspective,"<sup>48</sup> Jianming Sheng focuses on historical evidence alleged to prove that China was the first country to discover, name, explore, and document the islands, as well as the first to display authority in the region, but fails to offer a satisfactory legal analysis based on these elements.

To add to the confusion, some commentators have referred to the phrases "historic rights" or "historical rights" in support of the theory that China has acquired sovereignty in accordance with the established modes of acquiring title under international law.<sup>49</sup> As we shall see, the use of such language is inappropriate in the context of established modes of acquiring title because it usually denotes derogation from the otherwise applicable regime—that is, the acquisition of sovereignty over areas that would not accrue to the interested state by application of the traditional modes of acquiring land.

As will have become apparent from this brief overview, Chinese scholarly writings provide little clarification as to the legal justification for China's official sovereignty claim in the South China Sea, though they do suggest the possible stances that China might take in addressing this matter. We shall therefore address the main possible interpretations separately in order to assess their respective tenability under public international law.

## II. THE MERITS OF CHINA'S CLAIM IN LIGHT OF THE PRINCIPLES OF INTERNATIONAL LAW

Before assessing the relative merits of China's claim in light of the established principles of public international law, we will provide a concise overview of the origins and role of "historic rights" in international law.

### *The Limited Role of "Historic Rights" in International Law*

*Origins of the concept: Historic rights over water.* The term *historic right* is essentially ambiguous. In particular, authors use the same term in respect of a state's possession of a legal title of ancient origin and also, by contrast, in respect of a process of historical creation or consolidation of the same title through the actual, continuing display of authority by the claiming state and acquiescence by third states. While the former refers to a legal instrument, such as a treaty of cession, the latter consists in a series of converging forms of conduct. Considered in

<sup>47</sup> Li Jinming & Li Dexia, *supra* note 20, at 291 (quoting PAN SHIYING, *Spratly Islands, Oil Politics and International Law*, in *THE PETROPOLITICS OF THE NANSHA ISLANDS: CHINA'S INDISPUTABLE LEGAL CASE* (1996)).

<sup>48</sup> See *supra* note 34.

<sup>49</sup> See, e.g., Su Hao, *supra* note 21, who refers to China's "historical rights" but then presents an argument for China's sovereignty over the South China Sea that relies on traditional international law principles for acquiring sovereignty, with no reliance on such rights.

aggregate, however, the two may jointly constitute evidence of territorial possession in conformity with the rules of public international law. One should also distinguish between a historic “title” of full territorial sovereignty (whether or not consolidated by state conduct) and historic “rights,” which may include rights falling short of sovereignty, such as exceptional fishing rights<sup>50</sup> or the right of passage.

In the law of the sea, the term *historic rights* originates from the narrower category of “historic waters”—a category that has “its roots in the historic fact that States through the ages claimed and maintained sovereignty over maritime areas which they considered vital to them without paying much attention to divergent and changing opinions about what general international law might prescribe with respect to the delimitation of the territorial sea.”<sup>51</sup> There is no generally accepted definition of “historic waters,” however, and the legal regimes of “historic bays” and “historic waters” have never been spelled out in an international convention, including UNCLOS; it is significant that neither Article 7 on straight baselines nor Article 10 on bays contains any definition of these concepts.

According to the study on historic rights by the International Law Commission secretariat in 1962, three factors must be taken into account to determine whether a given state can claim sovereignty over certain maritime areas as its “historic waters”: “(i) The authority exercised over the area by the State claiming it as ‘historic waters’; (ii) The continuity of such exercise of authority; (iii) The attitude of foreign States.”<sup>52</sup> Thus, a state that exercised jurisdiction over its coastal waters—as considered vital to its security or to its economy—would, after some time, be considered to have historic title over the relevant waters, provided that the other concerned states had continuously tolerated such circumstances. It should be noted, however, that the entry into force of UNCLOS (to which all states involved in the South China Sea dispute are parties)<sup>53</sup> has considerably reduced uncertainties concerning the legal status of the seas and has, to that extent, limited the practical relevance of historic waters.

*Historic title over land versus traditional modes of acquiring territory.* In the second half of the twentieth century, some authors attempted to extend the category of historic rights, as discussed above, to the acquisition of land territory by suggesting that sovereignty over land could equally be acquired by a process of “consolidation by historic title.”<sup>54</sup> Under this theory, which has been explained by reference to the “fundamental interest of the stability of territorial situations from the point of view of order and peace,”<sup>55</sup> a state’s sovereignty over a given territory could be established by focusing on factors such as the state’s long-standing vital interests and the general tolerance or recognition by other states of the claim to sovereignty, rather than on effective and continuing exercise of authority *à titre souverain* (“*effectivités*”).<sup>56</sup>

<sup>50</sup> See *Continental Shelf (Tunis. v. Libya)*, 1982 ICJ REP. 18 (Feb. 24).

<sup>51</sup> *Juridical Regime of Historic Waters, Including Historic Bays*, [1962] 2 Y.B. INT’L L. COMM’N 1, 2, UN Doc. A/CN.4/SER.A/1962/Add.1, reprinted in UN Doc. A/CN.4/143, available at [http://untreaty.un.org/ilc/guide/8\\_4.htm](http://untreaty.un.org/ilc/guide/8_4.htm).

<sup>52</sup> *Id.* at 25.

<sup>53</sup> Although Taiwan cannot ratify UNCLOS because the United Nations does not recognize it as a state, Taiwan is taking steps to bring its domestic legislation into conformity with UNCLOS.

<sup>54</sup> Yehuda Blum, *Historic Rights*, in 7 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 120 (Rudolf Bernhardt ed., 1984); CHARLES DE VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* 199 (1957).

<sup>55</sup> ROBERT YEWDALL JENNINGS, *THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW* 24 (1963).

<sup>56</sup> If, however—as suggested by some authors—*effectivité* is one of the constitutive elements of historic rights (see Andrea Gioia, *Historic Title*, in *THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* (Rüdiger

As a mode of acquiring territory, however, consolidation by historic title remains highly controversial<sup>57</sup> and has been expressly rejected by the ICJ on several occasions. In *Land and Maritime Boundary Between Cameroon and Nigeria*, for example, the Court noted that “the notion of historical consolidation has never been used as a basis of title in other territorial disputes, whether in its own or in other case law,” and 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.”<sup>58</sup>

In any event, reference to an ancient title or a title consolidated by long use of a territory cannot allow a court to dispense with the essential requirement of effective and continuing exercise of authority *à titre souverain*, along with acquiescence by third states concerned. It should also be stressed that the theory of “acquisitive prescription,” which can be considered as equivalent to historical consolidation, can be argued only in a situation where a state’s effective display of sovereignty over a determined space remains peaceful, in the sense that it does not provoke protests or opposite claims by any other potentially interested countries.

#### *Possible Legal Interpretations of China’s Historic Rights Claim*

In light of the above and the Chinese literature discussed in part I, three possible interpretations of the historic rights claim should be considered in assessing the merits of China’s position. On the first interpretation, China would claim the entire maritime area within the nine-dash line as its historic waters. On the second, China would claim to have a historic title over the insular features of the South China Sea. On the third, the reference to “historic rights” would simply be taken as indicating that the Chinese claim is based on historical evidence. Of course, other interpretations—for instance, that the claimed historic rights are limited to rights of fisheries in the area delimited by the nine-dash line—are available but should be dismissed in the circumstances of China’s assertive conduct.

*First interpretation: The maritime zones within the nine-dash line are part of China’s historic waters.* Although some commentators have argued that the only possible interpretation of the nine-dash-line is that it represents China’s claim to its historic waters, a careful analysis of this position reveals various difficulties. First, the understanding that China bases its maritime claim on historic rights is equivalent to the assumption that the principles of UNCLOS should not apply. As noted above, UNCLOS does not recognize historic rights as a basis for claiming sovereignty over waters. This difficulty is a serious one since China has now been a party to UNCLOS for over fifteen years. China would therefore have to justify the non-applicability of UNCLOS to defining the limits of its sovereignty over the South China Sea.

Wolfrum ed., online ed. 2008), at <http://www.mpepil.com>; Blum, *supra* note 54), then the usefulness of the concept, compared to established modes of acquiring sovereignty, is questionable.

<sup>57</sup> A majority of authors have questioned the usefulness of recognizing historic rights in the context of sovereignty over land. See, e.g., MARCELO G. KOHEN, POSSESSION CONTESTÉE ET SOUVERAINETÉ TERRITORIALE 40–43 (1997); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 157 (7th ed. 2008).

<sup>58</sup> *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nig.; Eq. Guinea intervening)*, 2002 ICJ REP. 303, para. 65 (Oct. 10); see also *Minquiers and Ecrehos (Fr./UK)*, 1953 ICJ REP. 47 (Nov. 17).



Second, the suggestion that waters situated hundreds of nautical miles away from the coasts of China could be considered its historic waters blatantly contradicts the very concept of historic waters—a special category of either internal waters or territorial sea—as always pertaining to waters close to the coast of the interested state. As the International Law Commission secretariat noted in its study on historic waters:

The legal status of “historic waters”, i.e., the question whether they are to be considered as internal waters or as part of the territorial sea, would in principle depend on whether the sovereignty exercised in the particular case over the area by the claiming State and forming a basis for the claim, was sovereignty as over internal waters or sovereignty as over the territorial sea.<sup>59</sup>

In other words, historic waters can only be an extension of internal or territorial waters.<sup>60</sup>

The third problem with this interpretation is that, assuming that the line is meant to delimit the boundaries of Chinese waters, no explanation has been provided for the way in which it has been drawn—that is, to explain why particular baselines and calculations were used in drawing the line. Even if the limits of China’s historic waters were determined on the assumption that all islands in the South China Sea belong to China, then two problems would remain: first, it would beg the question as to the legitimacy of the claim in question, and second, part of the claimed waters would still be more than twelve nautical miles away from the said islands (thereby exceeding the limit of a territorial sea under Article 3 of UNCLOS).

*Second interpretation: China has sovereign historic rights over the islands in the South China Sea.* Under the second interpretation, China’s position would be understood as a claim that China has a historic title over the islands in the South China Sea, but this approach also presents numerous difficulties. As briefly addressed above, the existence of a general category of historic rights, encompassing rights over land, is controversial and has, indeed, been advocated only by a tiny segment of the international legal community.<sup>61</sup>

It appears that commentators<sup>62</sup> upholding this interpretation of China’s claim have based their analysis entirely on the writings of one scholar, Yehuda Blum, who wrote in 1984:

[T]he application of the doctrine of historic rights has by no means been confined to maritime areas. Historic rights have been claimed also over land areas, either in remote parts of the world where sovereignty was not exercised in a continuous and intensive manner . . . , or in the regions of the globe in a state of political upheaval and transition conducive to the emergence of conflicting territorial claims.<sup>63</sup>

While Blum’s article provides a possible basis to a claim of historic rights over the islands in the South China Sea, his theory must be treated with extreme caution. Not only are his

<sup>59</sup> *Supra* note 37, at 25.

<sup>60</sup> Some Chinese scholars have even acknowledged as much—for example, Li Jinming and Li Dexia, *supra* note 20, at 293, who observe that “China no longer regards the waters within the dotted line as historic waters, because historic waters can only be treated as internal waters or territorial seas, but cannot be included in exclusive economic zones and continental shelves.”

<sup>61</sup> The notion that a state may have historic rights in respect of land has been advocated mainly by one state (Israel), one leading scholar (Yehuda Blum), and a small group of writers who have followed in his wake.

<sup>62</sup> See Li Jinming & Li Dexia, *supra* note 20; Zou Keyuan, *supra* note 20.

<sup>63</sup> Blum, *supra* note 54, at 121.

views contested by the vast majority of scholars, but the ICJ has rejected this view on several occasions, either explicitly or implicitly. As noted above, the Court rejected the notion of historical consolidation as a basis of territorial titles in *Land and Maritime Boundary Between Cameroon and Nigeria*, in which Nigeria had invoked historical consolidation of title to assert its sovereignty over the Bakassi Peninsula. Similarly, in *Minquiers and Ecrehos*,<sup>64</sup> although both parties had based their claims over the disputed islands on ancient title, the ICJ took the view that it was “not necessary to solve these historical controversies,” considering that what was of decisive importance was “not indirect presumptions deduced from events in the Middle Ages, but the evidence which relates directly to the possession of the Ecrehos and Minquiers groups.”<sup>65</sup>

In any event, even assuming that a general theory of historic rights would exist in public international law, it cannot be assumed lightly that a state can acquire sovereignty over land territory simply by providing evidence that it has treated the said territory as its own for a long time.

*Third interpretation: Historical evidence shows that China is the natural sovereign in the South China Sea.* Finally, some Chinese authors appear to suggest that the reference to historic rights in the Chinese discourse should not be understood in a strict legal sense but as an indication that historical factors ought to weigh heavily in assessing how sovereignty is apportioned in the South China Sea.

In this context it is noteworthy that numerous Chinese sources use the term *historical rights* rather than *historic rights*. Although the importance of this distinction should not be overstated, it should be kept in mind that *historic* means “of great historical importance or fame,” whereas *historical* simply means “of, belonging to, or pertaining to history.”<sup>66</sup> Accordingly, the phrase “historical rights” could be understood in a nontechnical sense, as referring to rights pertaining to history rather than to rights created by a process of historical consolidation. For example, Su Hao seems to have this meaning in mind when he observes, “China’s claim for rights and interests in the South China Sea is based on its historical rights and international law. China’s rights over South China Sea have a long history.”<sup>67</sup> In using the term “historical rights,” Su does not seek to establish the existence of rights in derogation of established modes for acquiring sovereignty under international law, but simply to stress that the rights enjoyed by China in the past should have an important role in determining its present rights in the region.

This approach has the advantage of being more easily reconcilable with the traditional modes of acquiring title under international law—which focus on effective and continuing exercise of governmental authority by the interested state and acquiescence by third states. Nevertheless, one might question the usefulness of relying on such language; it introduces considerable uncertainty rather than providing any clear way of determining the merits of China’s claim.

<sup>64</sup> *Minquiers and Ecrehos*, *supra* note 58.

<sup>65</sup> *Id.* at 56–57.

<sup>66</sup> 1 THE NEW SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES (1993).

<sup>67</sup> Su Hao, *supra* note 21, at 1.

### III. CONCLUSION: CHINA'S CLAIM DOES NOT MEET THE STANDARDS OF PUBLIC INTERNATIONAL LAW

In light of the above, one cannot but be puzzled by the striking contrast between China's assertive stance and far-reaching pretensions in the South China Sea, on the one hand, and the indeterminacy of its legal position as evidenced by the deliberate use of ambiguous terminology and tacit reliance on principles not recognized by international law, on the other.

While the position that China would adopt in a hypothetical dispute settlement procedure is unknown, no international court or tribunal would agree to base its decision on arguments and contested evidence to the effect that China was the first country (several hundred years ago) to explore the South China Sea and discover, name, and administer its islands. Mere reliance on alleged historical evidence of the kind invoked by Chinese commentators is insufficient to establish sovereignty over the waters enclosed by the nine-dash line or the islands of the South China Sea.

Although historical factors should, of course, be taken into account to a certain extent, their relevance must be limited to establishing whether a given state has exercised and still exercises authority *à titre souverain* over a defined area in an effective and continuing manner, and whether such exercise of authority has been accompanied by acquiescence by the third states concerned. None of these elements have been established by China. In particular, it is well known that other states in the region—notably, the Philippines and Vietnam—have consistently contested China's claim.<sup>68</sup> For example, several acts of protest can be taken as illustrating Vietnam's consistent rejection of the Chinese claim: as early as 1932, France (on behalf of colonial Vietnam) lodged a protest with China over a plan of the Guangdong province authorities to invite tenders for exploiting guano in the Paracel Islands; on June 4, 1956, South Vietnam's secretary of state for foreign affairs protested against China's May 29, 1956, declaration claiming sovereignty over the Spratly Islands; South Vietnam reiterated its claim on April 20, 1971, in a protest lodged against Malaysian claims, and again in 1975, when the Ministry of Foreign Affairs of the new Republic of Vietnam published its "White Paper on the Hoang Sa (Paracel) and Truong Sa (Spratly) Islands."<sup>69</sup> More recently, Vietnam lodged a protest in 1998 against China's Exclusive Economic Zone and Continental Shelf Act<sup>70</sup> and submitted a *note verbale* to the UN secretary-general on May 3, 2011, in which it claimed to exercise sovereignty over the Spratly and Paracel Islands.<sup>71</sup> In the context of such repeated displays of disagreement by the states in the region, China's assertiveness and its reiteration of indeterminate claims do not constitute, from a legal perspective, a position that is even minimally persuasive.

<sup>68</sup> See, e.g., MONIQUE CHEMILLIER-GENDREAU, *LA SOUVERAINETÉ SUR LES ARCHIPELS PARCELS ET SPRATLEYS* 120 (1996).

<sup>69</sup> Ministry of Foreign Affairs, Republic of Vietnam, *White Paper on the Hoang Sa (Paracel) and Truong Sa (Spratly) Islands* (1975), at <http://www.bchuvanann.com/resources/White%20Papers%20of%20Republic%20of%20Vietnam.pdf>

<sup>70</sup> *Vietnam: Dispute Regarding the Law on the Exclusive Economic Zone and the Continental Shelf of the People's Republic of China Which Was Passed on 26 June 1998*, *supra* note 30, at 54–55.

<sup>71</sup> Note Verbale No. 77/HC-2011, *supra* note 6.