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DEEP DANGER: INTENSIFIED COMPETITION IN THE SOUTH CHINA SEA AND IMPLICATIONS FOR CHINA

*Guifang (Julia) Xue**

I. INTRODUCTION

The South China Sea (SCS) has long been regarded as a major source of tension and instability in the region. Over the years, numerous attempts to manage the SCS, prevent regional confrontation, and foster cooperation among concerned states have been recorded, but no promising results have been observed. Since 2009, an upsurge in tension has sparked concern that the area may become a flashpoint with the potential for global consequences.¹

This Article examines the underlying issues surrounding the intensified competition in the SCS, and analyzes the implications of the ongoing tension for Chinese interests in the region. Part II explains the significance of the SCS's natural resources, strategic position, and international navigation routes, while also providing a portrait of the competing claims to SCS resources. Part III illustrates the intensified competition triggered by the continental shelf submissions of some claimants, unilateral actions, maritime conflicts in disputed areas, and the involvement of non-regional states. Part IV conducts a preliminary examination of the legal value of China's maritime boundary—commonly referred to as the U-Shaped Line—based on its evolution and

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1. See, e.g., THE SOUTH CHINA SEA: COOPERATION FOR REGIONAL SECURITY AND DEVELOPMENT: PROCEEDINGS OF THE INTERNATIONAL WORKSHOP (Tran Truong Thuy ed., 2010) [hereinafter SOUTH CHINA SEA], available at http://nghiencuubiendong.vn/en/database-on-south-china-sea-study/doc_details/36-the-south-china-sea-cooperation-for-regional-security-and-development.

Chinese legislation. Finally, Part V concludes that as the largest state bordering the SCS, and core party to the dispute, it is vital for China to define its claims based on international law, by bringing its claims into conformity with the United Nations Law of the Sea (UNCLOS), in order to serve its long term national interests.

II. SIGNIFICANCE OF THE SCS AND MARITIME DISPUTES

A. Features of the SCS

The SCS is a large semi-enclosed marginal ocean basin with a total area of 3.5 million square kilometers and an average depth of over 2000 meters.² The SCS contains four archipelagoes: the Dongsha Islands (Pratas), Zhongsha Islands (Macclesfield Bank), Xisha Islands (Paracels), and Nansha Islands (Spratlys).³

The SCS is boarded by the East China Sea to the northeast, the Pacific Ocean and Sulu Sea to the east, and the Java Sea and Indian Ocean to the southwest. Lying between the Pacific and Indian Oceans, the SCS serves the function of a “maritime super highway” and “vital international passage.”⁴ The SCS is “one of the world’s most important and densely used straights for international navigation.”⁵

The states bordering the SCS vary greatly in size, geography, social and cultural structures, and economic and political systems.⁶ Many of the states have contested claims to different parts of the SCS, particularly islands.⁷ Of the disputed claims, the status of the Spratlys has been the most contentious and has resulted in several military clashes in the past forty years, particularly between China and Vietnam.⁸ The international

2. *South China Sea*, CHINA OCEANIC INFO. NETWORK, <http://www.coi.gov.cn/scs/introduction/gaikuang.htm> (last visited Mar. 17, 2012).

3. Mark J. Valencia, *The South China Sea: Prospects for Marine Regionalism*, 2 MARINE POL’Y 87, 88 (1978).

4. David Rosenberg, *Why a South China Sea Website?*, SOUTH CHINA SEA, <http://www.southchinasea.org/why-a-south-china-sea-website-an-introductory-essay> (last visited Feb. 23, 2012).

5. See Choon-ho Park, EAST ASIA AND THE LAW OF THE SEA 283-84 (1983).

6. Besides China, countries bordering the SCS include: Taiwan, Vietnam, Cambodia, Thailand, Malaysia, Singapore, the Philippines, Brunei Darussalam, Laos, and Indonesia. See generally Valencia, *supra* note 3, at 87.

7. See Christopher C. Joyner, *The Spratly Islands Dispute: Rethinking the Interplay of Law, Diplomacy, and Geo-Politics in the South China Sea*, 13 INT’L J. MARINE & COASTAL L. 193, 195 (1998).

8. See Choon-ho Park, *The South China Sea Disputes: Who Owns the Islands and the Natural Resources?*, 5 OCEAN DEV. & INT’L L. 27, 30 (1978) (discussing disputes

Exclusive Economic Zone (EEZ) regime has intensified these claims, making the disputes, and therefore the solutions, more complex and demanding.⁹

Bordered by the world's rapidly industrializing countries and growing economies, the SCS also functions as a central component of the Southeast Asian and world economies.¹⁰ The SCS natural resources are of significance both globally and worldwide.¹¹ Accordingly, ongoing disputes and competition over resources in the SCS have attracted global attention in the past decades.¹²

Because the SCS extends across tropical and semi-tropical zones with a typical monsoon climate, the SCS has a large and complex marine ecosystem and an abundant variety of resources.¹³ This has attracted coastal states to develop fisheries industries.¹⁴ Among coastal states bordering the SCS, China harvests the largest quantity of fish.¹⁵ Because of the population of its coastal provinces, the fishing grounds of the SCS are an important part of China's fisheries.¹⁶

The SCS is also rich in oil and gas.¹⁷ The abundance of vital resources is one of the most important considerations sparking the territorial disputes.¹⁸ The intensified competition for SCS resources has seen a rise in the number of disputes.¹⁹ These disputes, mixed with

over the Spratly Islands); *see also* GREG AUSTIN, CHINA'S OCEAN FRONTIER: INTERNATIONAL LAW, MILITARY FORCE AND NATIONAL DEVELOPMENT 131-61 (1998) (discussing China's claims in the SCS).

9. *See* Joyner, *supra* note 7, at 194.

10. *See* Energy Info. Admin., *Country Analysis Briefs: South China Sea*, ENERGY INFO. ADMIN., http://www.eia.gov/emeu/cabs/South_China_Sea/pdf.pdf (last updated Mar. 11, 2008).

11. *See id.*

12. *See, e.g.*, Zhiguo Gao, *The South China Sea: From Conflict to Cooperation?* 25 OCEAN DEV. & INT'L L. 345, 345 (1994). *See also* Ji GUOXING, MARITIME JURISDICTION IN THE THREE CHINA SEAS: OPTIONS FOR EQUITABLE SETTLEMENT 3-29 (2005), available at <http://escholarship.org/uc/item/7rq2b069>.

13. Joyner, *supra* note 7, at 194; *see also* Park, *supra* note 9, at 37.

14. *See* GUIFANG XUE, CHINA AND INTERNATIONAL FISHERIES LAW AND POLICY, 207-8 (2005).

15. *See* SHIFU XIA ET AL., CHINA FISHERY DIVISIONS: A SURVEY AND DIVISION ON CHINA'S FISHERY RESOURCES 166-71 (1982) (providing an overview of China's fishing grounds in the SCS).

16. *Id.*

17. *See* Energy Info. Admin., *supra* note 10.

18. *See* GAO, *supra* note 12, at 349.

19. Park, *supra* note 8, at 37.

overlapping territorial claims, have resulted in numerous clashes.²⁰ These clashes often result in the loss of property and life.²¹ As a consequence, the SCS has become a site of tension with the potential for greater conflict. This has made access to SCS waters problematic and dangerous.

B. Maritime Disputes in the SCS

Over the decades, the SCS has drawn global attention not only for its strategic location, resource competition, and security considerations, but also for its multiple sovereignty and maritime jurisdictional disputes.

Until 1958, there were no sovereignty disputes in the SCS.²² Since the 1960s, with the creation of an international law of the sea regime by four Geneva Conventions, disputes over insular features started to emerge, causing stress between relevant states.²³ When UNCLOS's negotiation began in the 1970s, it increased these stresses, and some SCS states started to make claims and take unilateral actions to control the features near their coast.²⁴ Since the 1970s, China's maritime neighbors have taken control over some of the Spratlys features.²⁵ When UNCLOS was signed in 1982 and entered into force in 1994, SCS disputes were irrevocably intensified.²⁶

Six claims are presently asserted to the SCS islands or waters. China and Taiwan both claim sovereignty over the four groups of insular features—an area enclosed by a U-Shaped Line based on discovery, historical usage, and effective occupation and control.²⁷ China controls

20. See, e.g., Daojiong Zha, *China's Exploitation of South China Sea Resources: The Case of Hainan Province* (IUJ Research Institute Working Paper: Asia Pacific Series No. 15, 2000), available at http://www.iuj.ac.jp/research/workingpapers/PIRS_2000_03.html.

21. See generally Nguyen Hong Thao, *Vietnam and the Code of Conduct for the South China Sea*, 32 OCEAN DEV. & INT'L L. 105 (2001).

22. See generally MARWYN S. SAMUELS, CONTEST FOR THE SOUTH CHINA SEA (1982) (discussing the evolution of the SCS disputes).

23. See U.N., NATIONAL LEGISLATION AND TREATIES RELATING TO THE LAW OF THE SEA, ST/LEG/SER.B/18 (1980).

24. See SAMUELS, *supra* note 22, at 75-93.

25. See MARK J. VALENCIA, JON M. VAN DYKE, & NOEL A. LUDWIG, SHARING THE RESOURCES OF THE SOUTH CHINA SEA 17-40 (1997) [hereinafter SHARING THE RESOURCES].

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

27. *Jurisprudential Evidence to Support China's Sovereignty Over the Nansha Islands*, MINISTRY OF FOREIGN AFF. OF THE PEOPLE'S REPUBLIC OF CHINA (Nov. 17, 2000), <http://www.fmprc.gov.cn/eng/topics/3754/t19234.htm> 2000.

the Paracels and seven features of the Spratlys.²⁸ Taiwan controls the Pratas, the largest archipelago in the SCS, and Taiping Island (Itu Aba), the largest island in the Spratlys.²⁹ The Chinese claims have been challenged by other SCS coastal states making similar claims based on EEZ and continental shelf principles established by UNCLOS.³⁰

Far more prominent has been the long-simmering dispute between China and Vietnam over both the Paracels (Hoang Sa in Vietnamese) and Spratlys (Truong Sa in Vietnamese).³¹ Vietnam claims that it discovered and has actively ruled over both since the seventeenth century, and currently controls twenty-one features of the latter.³² Vietnam hotly disputes China's historical account, and insists that China never claimed sovereignty over the islands until the 1940s, although it officially recognized the sovereignty claim to the four SCS archipelagos by the Chinese government in 1958.³³

The Philippines maintains separate claims to a portion of the Spratlys and controls eight of them, known as the Kalayaan Island Group (KIG), based on discovery, occupation, and geo-proximity.³⁴ Malaysia lays its claim over certain parts of the Spratly islands and reefs also on geo-proximity and controls eight islands that they fall within their continental shelf.³⁵ Brunei claims two reefs and a maritime zone based on natural prolongation of its continental shelf.³⁶

Among the numerous territorial disputes, the Spratlys dispute is probably the most serious to date. The Spratlys are a group of small islands, reefs and atolls, cays, shoals, and sandbars in the SCS believed to be sitting atop vast oil and gas reserves.³⁷ These disputes mainly

28. The seven features are: Chigua Jiao (Johnson Reef), Huanyang Jiao (Cuarteron Reef), Yongshu Jiao (Fiery Cross Reef), Zhubi Jiao (Subi Reef), Meiji Jiao (Mischief Reef), Dongmen Jiao (Hughes Reef), and Nanxun Jiao (Gaven Reef). Wendy N. Duong, *Following the Path of Oil: The Law of the Sea or Realpolitik—What Good Does Law Do in the South China Sea Territorial Conflicts?*, 30 *FORDHAM INT'L L.J.* 1098, 1148 (2007).

29. Christopher C. Joyner, *The Spratly Islands Dispute: What Role for Normalizing Relations Between China and Taiwan?*, 32 *NEW ENG. L. REV.* 819, 835 (1998).

30. Duong, *supra* note 28, at 1115.

31. See HAN ZHENHUA, *COLLECTIONS OF THE INVESTIGATION ON HISTORICAL AND GEOGRAPHICAL DOCUMENTATIONS OF THE SOUTH CHINA SEA ISLANDS* 182 (1981).

32. See SHARING THE RESOURCES, *supra* note 25, at 20-29.

33. See Richard D. Beller, Note, *Analyzing the Relationship Between International Law and International Politics in China's and Vietnam's Territorial Dispute Over the Spratly Islands*, 29 *TEX. INT'L L.J.* 293, 309 (1994).

34. See SHARING THE RESOURCES, *supra* note 25, at 34.

35. *Id.* at 36.

36. *Id.* at 38.

37. Duong, *supra* note 28, at 1102.

concern the ownership of some mid-ocean islets of the Spratlys, most of which are reefs without much value in themselves, but the owner of the Spratlys islets will be entitled to sovereign rights in a number of maritime zones, and natural resources may be developed from the offshore waters of the islets.³⁸ None of these islets had been inhabited historically, but in the recent half century the competing claimants, except Brunei, have built up structures and garrisoned most of their controlling features.³⁹ Another appealing feature of ownership over the Spratleys is the sea lane between the archipelagoes is the major route that links East Asia with Africa and Europe.⁴⁰

The fact that the competing claims of several states overlap makes the situation more difficult than relatively simple bilateral disputes. The issue is further complicated by the expansion of the dispute in recent years to include boundary delimitation, entitlement of islands and rocks, navigational freedoms, and military activities involving states from outside the region.⁴¹ Besides a host of disputes and competition, the SCS is presently facing problems of security challenges and dreadful conditions of state relations. It is difficult to reach any consensus with such a complex situation. Accordingly, no conclusive answer readily available.

III. INTENSIFIED COMPETITION OVER THE SCS DISPUTES

The SCS claimants can rarely find agreement on any issue relating to the archipelagos, especially in the latter half of the past century. Negotiations remain deadlocked due to divergent views in their claims, including what to call the disputed islets.⁴² Despite little progress in resolving contradictory claims, the regional seascape has witnessed several additional features since the new century.⁴³ Competition has been intensified due to a number of factors including the various submissions of claims to the outer limit of the continental shelf, the resulting barrage of protests and assertions via diplomatic notes,

38. *Id.*

39. *Id.* at 1138.

40. *Id.* at 1105.

41. *See generally id.* at 1122.

42. For general information on the national interests of states bordering the SCS, see generally BOB CATLEY & MARKMUR KELIAT, *SPRATLYS: THE DISPUTE IN THE SOUTH CHINA SEA* (1997).

43. Nguyen Hong Thao, *South China Sea—Three Stages, Four Challenges, Two Regional Approaches and One Belief*, in *THE SOUTH CHINA SEA: TOWARDS A REGION OF PEACE, SECURITY AND COOPERATION* 269 (Tran Truong Thuy ed., 2011).

unilateral enforcement actions resulting in at-sea conflicts, and the involvement of non-regional states putting extra pressure on international relations.⁴⁴ All these factors have adversely affected the operating system for dispute settlement. Therefore, a description of the various forms of ongoing competition follows.

*A. War of Diplomatic Notes Triggered by Extended
Continental Shelf Submissions*

The key impetus for the seascape change in the SCS was the final rush towards the May 13, 2009 deadline for the submission of claims to an extended continental shelf (ECS) to the United Nation's Commission on the Limits of the Continental Shelf (CLCS).⁴⁵ On April 8, 2009, the Philippines made the first submission among the SCS claimants to the CLCS.⁴⁶ The Philippine claim concerned the Benham Rise region.⁴⁷ Next, on May 6, 2009, Malaysia and Vietnam submitted a joint proposal concerning the southern part of the SCS.⁴⁸ The next day, Vietnam also lodged a submission in the area north of that covered by its joint submission with Malaysia.⁴⁹ Unlike the Philippine submission, the Malaysian and Vietnamese submissions immediately attracted the attention of China and aroused a sequence of protests in the form of note

44. *See supra* Parts I, II.

45. This deadline was set according to article 4 of Annex II of UNCLOS and a Decision adopted by the Meeting of States Parties (SPLOS/72). Oceans & Law of the Sea, U.N., Issues With Respect to Article 4 of Annex II to the Convention (Ten-year Time Limit for Submissions), http://www.un.org/Depts/los/clcs_new/issues_ten_years.htm (last visited May 5, 2012).

46. U.N. Secretary-General, Receipt of the Submission Made by the Republic of the Philippines to the Commission on the Limits of the Continental Shelf, U.N. Doc. 09/132 (Apr. 8, 2009), *available at* http://www.un.org/Depts/los/clcs_new/submissions_files/submission_phl_22_2009.htm.

47. *Id.*

48. See U.N., Commission on the Limits of the Continental Shelf (CLCS) Outer Limits of the Continental Shelf Beyond 200 Nautical Miles from the Baselines: Submissions to the Commission: Joint Submission by Malaysia and the Socialist Republic of Viet Nam (May 6, 2009), http://www.un.org/Depts/los/clcs_new/submissions_files/submission_mysvnm_33_2009.htm [hereinafter Joint Submission].

49. *See* SOCIALIST REPUBLIC OF VIET., SUBMISSION TO THE COMMISSION ON THE LIMITS OF THE CONTINENTAL SHELF PURSUANT TO ARTICLE 76, PARAGRAPH 8 OF THE UNITED NATIONS CONVENTION ON THE LAW OF SEA 1982: PARTIAL SUBMISSION IN RESPECT OF VIETNAM'S EXTENDED CONTINENTAL SHELF: NORTH AREA (VNM-N) (2009), *available at* http://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/vnm2009n_executivesummary.pdf.

verbales contesting the various claims.⁵⁰ As a result, numerous assertions, responses, and protests from nations throughout the SCS ensued in the form of diplomatic notes.⁵¹

On May 7, 2009, China strongly objected to the Malaysian and Vietnamese submissions by submitting two note verbales to the CLCS.⁵² China asserted that it possessed “indisputable sovereignty over the islands in the [SCS] and the adjacent waters, and enjoy[ed] sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil.”⁵³ Further, China claimed that the Malaysian and Vietnamese submissions “seriously infringed [on] China’s sovereignty, sovereign rights and jurisdiction in the [SCS],” and requested that the CLCS not consider the two submissions.⁵⁴

The Philippines had a similar reaction as China to the Malaysian and Vietnamese submissions.⁵⁵ On August 4, 2009, the Philippines filed two note verbales with the CLCS to protest the submissions.⁵⁶ The Philippines stated that both submissions “la[id] claim on areas that are disputed . . . because they overlap with [those] of the Philippines.”⁵⁷ The Philippines also mentioned its historical claim to North Borneo (the present day East Malaysian State of Sabah).⁵⁸

It is worth mentioning that, with the two May 7, 2009 notes, China attached its U-Shaped Line map to specify the boundary of its claim in

50. See Robert C. Beckman & Tara Davenport, *CLCS Submissions and Claims in the South China Sea*, EAST SEA (SOUTH CHINA SEA) STUDIES (Aug. 16, 2010), <http://nghiencuubiendong.vn/en/conferences-and-seminars-/second-international-workshop/608-clcs-submissions-and-claims-in-the-south-china-sea-by-robert-c-beckman-a-tara-davenport>.

51. *Id.*

52. See People’s Republic of China, Note Verbale CML/17/2009 (May 7, 2009) [hereinafter CML/17/2009], available at http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf; People’s Republic of China, Note Verbale CML/18/2009 (May 7, 2009) [hereinafter CML/18/2009], available at http://www.un.org/depts/los/clcs_new/submissions_files/vnm37_09/chn_2009re_vnm.pdf.

53. See CML/17/2009, *supra* note 52, ¶ 2; CML/18/2009, *supra* note 52, ¶ 2.

54. See CML/17/2009, *supra* note 52, ¶ 3; CML/18/2009, *supra* note 52, ¶ 3.

55. See Republic of Philippines, Note Verbale 000819 (Aug. 4, 2009) [hereinafter Note 000819], available at http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/clcs_33_2009_lop_phl.pdf, and Republic of Philippines, Note Verbale 000818 (Aug. 4, 2009) [hereinafter Note 000818], available at http://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/vnm_re_phl_2009re_mys_vnm_e.pdf.

56. Note 000819, *supra* 55, ¶ 2; Note 000818, *supra* note 55, ¶ 2.

57. Note 000819, *supra* 55, ¶ 2; Note 000818, *supra* note 55, ¶ 2.

58. Note 000819, *supra* note 55, ¶ 2.

the SCS.⁵⁹ These two Chinese notes—and particularly the attached map—have generated additional concerns and protests.⁶⁰ Claimants (such as Vietnam and Malaysia) and non-claimants (such as Indonesia) have filed diplomatic notes to protest China’s claims.⁶¹

Vietnam quickly rejected China’s claim via a note verbale submitted to CLCS on May 8, 2009, in response to China’s May 7, 2009 note.⁶² In defending its earlier submissions as “legitimate undertakings,” Vietnam reaffirmed its claim concerning its “indisputable sovereignty” over the Paracels and Spratlys archipelagoes.⁶³ Vietnam further declared that “China’s claim over the islands and adjacent waters in the Eastern Sea (South China Sea) as manifested in the map . . . has no legal, historical or factual basis.”⁶⁴

Vietnam also responded to the Philippine notes in its August 18, 2009 note.⁶⁵ Vietnam stated that its submissions were “legitimate undertakings” consistent with the provisions of UNCLOS and made without prejudice to boundary delimitations with relevant States.⁶⁶ It also took the “opportunity to reaffirm its consistent position that Viet Nam has indisputable sovereignty over the Paracels and Spratlys archipelagoes.”⁶⁷

On May 20, 2009, Malaysia submitted a note verbale in response to China’s note.⁶⁸ The Malaysian note stated that its joint submission was a legitimate undertaking and was made without prejudice to boundary delimitations or the positions of maritime disputes.⁶⁹ Furthermore, Malaysia noted that it had informed “China of its position prior to the

59. CML/17/2009, *supra* note 52; CML/18/2009, *supra* note 52.

60. See Tessa Jamandre, *China Accuses PH of “Invasion,”* ABS-CBN NEWS (Apr. 19, 2011, 11:10 PM), <http://www.abs-cbnnews.com/-depth/04/19/11/china-accuses-ph-%E2%80%98invasion%E2%80%99>.

61. Beckman & Davenport, *supra* note 50.

62. Socialist Republic of Vietnam, Note Verbale No. 86/HC-2009 (May 8, 2009), http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/vnm_chn_2009re_mys_vnm_e.pdf [hereinafter 86/HC-2009].

63. *Id.* ¶ 3.

64. *Id.*

65. Socialist Republic of Vietnam, Note Verbale No. 240 HC-2009 (Aug. 18, 2009), http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/vnm_re_phl_2009re_mys_vnm_e.pdf.

66. See *id.* ¶¶ 2-3.

67. *Id.* ¶ 4.

68. Malaysia, Note Verbale HA 24/09 (May 20, 2009), http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/mys_re_chn_2009re_mys_vnm_e.pdf.

69. *Id.* ¶¶ 2-3.

submission,” but did not mention if China had been invited to join the joint submission.⁷⁰

On August 21, 2009, Malaysia also filed a note verbale in response to the Philippines’ note.⁷¹ In addition to stating that its undertakings were legitimate, Malaysia pointed out that it had informed the Philippines of its position prior to the joint submission, and that both Vietnam and Malaysia had proposed that the Philippines join them in that submission.⁷² Malaysia also firmly denied the Philippines’ claim to North Borneo.⁷³

Although Indonesia is not an SCS claimant, on July 8, 2010, it submitted a note verbale to the CLCS expressing its concerns about China’s U-Shaped Line.⁷⁴ The note questioned the map’s consistency with international law, specifically attacking its “legal basis, the method of drawing, and the status of th[e] separated dotted-lines.”⁷⁵ The Indonesian note also expressed concern as to whether China would adopt the same position it openly expressed regarding the Okinotorishima rocks to the other small insular features in SCS.⁷⁶ Indonesia stated that the “remote or very small features in the South China Sea do not deserve exclusive economic zones or continentals shelf of their own.”⁷⁷ Indonesia argued that allowing these small features to generate such zones would “concern[] the fundamental principles of the Convention and encroach[] on the legitimate interest of the global community.”⁷⁸

Almost ten months after the Indonesian note, the Philippines filed a note verbale with the CLCS protesting China’s U-Shaped Line.⁷⁹ This protest was lodged on April 5, 2011, nearly two years after China submitted its map to the CLCS.⁸⁰ Additionally—and more

70. *Id.* ¶ 4.

71. Malaysia, Note Verbale HA 41/09 (Aug. 21, 2009), http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/mys_re_phl_2009re_mys_vnm_e.pdf.

72. *Id.* ¶¶ 2, 4.

73. *Id.* ¶ 5.

74. Republic of Indonesia, Note Verbale No. 480/POL-703/VII/10 (July 8, 2010), http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/idn_2010re_mys_vnm_e.pdf (last visited Feb. 26, 2012).

75. *Id.* ¶ 2.

76. *Id.* ¶ 2-3.

77. *Id.* ¶ 3.

78. *Id.*

79. Republic of the Philippines, Note Verbale 000228 (Apr. 5, 2011), http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/phl_re_chn_2011.pdf [hereinafter Note 000228].

80. *Id.* Cf. CML/17/2009, *supra* note 52.

importantly—this note relates to a much earlier argument between the two.⁸¹

In February 2009, China and the Philippines sparred over the sovereignty and jurisdiction over Huangyan Island (Scarborough Shoal, also referred to as Bajo de Masinloc by the Philippines) as well as some islands and submerged reefs of the KIG in the SCS.⁸² Tensions rose when the Philippines enacted its Archipelagic Baseline Act,⁸³ on March 11, 2009, which amended its baselines law to prepare for its partial ECS submission.⁸⁴ The Act claims an island regime under the UNCLOS article 121 for the KIG.⁸⁵

The Archipelagic Baseline Act was vigorously protested by China's note verbale of April 13, 2009.⁸⁶ China argued that, "Huangyan Island and Nansha Islands have been part of the territory of China since ancient time," and that China has indisputable sovereignty over the islands and the surrounding areas.⁸⁷

Instead of immediately replying, the Philippines postponed its response for two years.⁸⁸ On April 5, 2011, the Philippines submitted a note verbale to protest China's claim.⁸⁹ The note is quite lengthy for its nature, and confronts China's claim to the SCS islands and other geological features, as well as their adjacent waters, seabed, and subsoil.⁹⁰ Among their challenges, the Philippines made it clear that KIG "constitutes an integral part of the Philippines," and that the Philippines has "sovereignty and jurisdiction over . . . [KIG's] geological features."⁹¹ The Philippines also argued that it exercises sovereignty and jurisdiction over the waters adjacent to each geological feature in the KIG under

81. *Id.*

82. See Henry Goa, *Sino-Philippines Dispute (Not Trade-Related)*, WTO AND CHINA (Feb. 21, 2009, 11:24AM), <http://wtoandchina.blogspot.com/2009/02/sino-philippines-dispute-not-trade.html>.

83. 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 Purposes, Rep. Act No. 9522, (Mar. 11, 2009) (Phil.), *available at* http://www.congress.gov.ph/download/ra_14/RA09522.pdf.

84. *Id.*

85. *Id.* § 2; UNCLOS, *supra* note 26, art. 121, at 578.

86. People's Republic of China, Note Verbale CML/12/2009 (Apr. 13, 2009), *available at* http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/communicationsredeposit/mzn69_2009_chn.pdf.

87. *Id.* ¶ 2.

88. Note 000228, *supra* note 79.

89. *Id.*

90. *Id.*

91. *Id.* ¶ 3.

UNCLOS's principle that the land dominates the sea.⁹² The Philippines argued that this principle applied to "the extent [that] the waters that are 'adjacent' to the relevant geological features [if they] are definite and determinable under UNCLOS, specifically under Article 121 (Regime of Islands) of the said Convention."⁹³ The Philippines argued that because waters adjacent to the geological features in the KIG are definite and subject to legal and technical measurement, China's claims "on the relevant waters as well as the seabed and subsoil" outside of the geological features have "no basis under international law, specifically UNCLOS."⁹⁴

China promptly replied to this protest on April 14, 2011 by submitting a note verbale to the CLCS.⁹⁵ In the note, China branded the contents of the Philippine note as "totally unacceptable" to China's "indisputable sovereignty over the islands in the South China Sea and the adjacent water."⁹⁶ Moreover, China claimed that "since the 1970s, the Philippines has invade[d] and occup[ied] some islands and reefs of China's Nansha Islands and made relevant territorial claims, to which China objects strongly."⁹⁷ China went further, stressing that under UNCLOS, "China's Nansha Islands is fully entitled to Territorial Sea, [EEZ] and Continental Shelf."⁹⁸

In addition to asserting sovereignty and jurisdiction in the SCS, China also contended that in the "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 1970s. . . . [the] Philippines had never made any claims to Nansha Islands or any of its components."⁹⁹ China also clarified that "[t]he so-called [KIG] claimed by the Republic of Philippines is in fact part of China's Nansha Islands," and that this fact has been "given publicity" since the 1930s.¹⁰⁰

Refuting the Philippines's assertion of sovereignty and jurisdiction over the waters adjacent to the relevant features of the KIG, China stated

92. Shi Jiuyong, *Maritime Delimitation in the Jurisprudence of the International Court of Justice*, 9 CHINESE J. OF INT. L. 271, 275 (2010).

93. Note Verbale 000228, *supra* note 79, at ¶¶ 4-5.

94. *Id.* ¶ 6.

95. People's Republic of China, Note Verbale CML/8/2011 (Apr. 14, 2011), http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2011_re_phl_e.pdf [hereinafter Note Verbale CML/8/2011].

96. *Id.* ¶ 2.

97. *Id.* ¶ 3.

98. *Id.* ¶ 4.

99. *Id.* ¶ 3.

100. *Id.* ¶¶ 3-4.

that the Philippines cannot, “[u]nder the legal doctrine of ‘*ex injuria jus non oritur*’¹⁰¹ . . . invoke such [an] illegal occupation to support its territorial claims.”¹⁰² China asserted that by virtue of “the legal principle of ‘*la terre domine la mer*,’¹⁰³ coastal states’ [EEZ] and Continental Shelf claims shall not infringe upon the territorial sovereignty of other States.”¹⁰⁴ In addition, China argued that under UNCLOS, as well as China’s domestic laws, “China’s Nansha Islands is [sic] fully entitled to Territorial Sea, [EEZ] and Continental Shelf.”¹⁰⁵

This exchange between China and the Philippines regarding SCS islands generated a subsequent reaction from Vietnam.¹⁰⁶ Vietnam submitted a new note on May 3, 2011 in response to Philippine Note No. 000228 and Chinese Note CML/8/2011.¹⁰⁷ The Vietnamese note did not raise any new issues, but simply reiterated Vietnam’s claims to the Paracel and Spratly archipelagoes in identical language.¹⁰⁸

In summation, the submissions for an ECS in the disputed areas of the SCS have caused a series of strong protests through the exchange of diplomatic notes. According to the Rules of Procedure of the Commission, the CLCS is not likely to consider either the joint submission of Malaysia and Vietnam or the submission of Vietnam.¹⁰⁹ “While the submissions and accompanying objections are very complex, the practical effect of these submissions has the potential to have a significant impact on the South China Sea disputes.”¹¹⁰ The diplomatic notes submitted to the CLCS not only function as assertive actions to form the legal basis for the states’ respective positions, but also result “in several of the claimants bringing their claims into conformity with their rights and obligations under UNCLOS.”¹¹¹ However, the war of diplomatic notes also reveals the complexity of the SCS disputes and the difficulties in addressing them.

101. “Law does not arise from injustice.”

102. *Id.* ¶ 3.

103. “The land dominates the sea.”

104. *Id.*

105. *Id.* ¶ 4.

106. Socialist Republic of Viet Nam, Note Verbale FF/HC-2011 (May 3, 2011), http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/vnm_2011_re_phlchn.pdf.

107. *Id.*

108. *Id.* ¶ 2.

109. Rules of Procedure of the Commission on the Limits of the Continental Shelf, Annex I 5(a), U.N. Doc. CLCS/40/Rev. 1 (Apr. 17, 2008).

110. Robert Beckman, *South China Sea: Worsening Dispute or Growing Clarity in Claims?*, RSIS COMMENT., Aug. 16, 2010, at 1, 1.

111. Beckman & Davenport, *supra* note 50.

B. “Heavy Smoke” Caused by Unilateral Actions and At-Sea Conflicts

In addition to diplomatic protests, the SCS has seen an increase in the number of unilateral actions and maritime conflicts; all the SCS claimants have endeavored to build up naval capabilities and enhance maritime surveillance in the claimed areas.¹¹² For example, some claimants have conducted live-fire drills in disputed waters resulting in escalated tensions.¹¹³ “Incidents at sea involving clashes between vessels of the different . . . [states] have become regular occurrences in the South China Sea.”¹¹⁴

China has sought to enhance its naval forces and increase its enforcement capacity. China’s fisheries laws and policies—implemented to deal with depletion of fisheries resources—have also caused concern in the SCS.¹¹⁵ Specifically, China’s annual fishing ban has been under constant challenge in the SCS.¹¹⁶ Despite the fact that the annual fishing ban applies mainly to China’s traditional fishing grounds, it has long been a problem for its maritime neighbors, particularly Vietnam.¹¹⁷

China and Vietnam share both land and maritime boundaries and have been engaged in a longstanding dispute over both boundaries.¹¹⁸ The two governments settled their land boundary in 1999, finally putting to rest a centuries-old border issue.¹¹⁹ “The maritime boundary between China and Vietnam extends seaward from the termination of the land

112. See generally Duong, *supra* note 28, at 1173.

113. See US, *Vietnam Hold Military Drills in South China Sea*, GLOBAL TIMES, June 25, 2011, <http://www.globaltimes.cn/NEWS/tabid/99/ID/663217/US-Vietnam-hold-military-drills-in-South-China-Sea.aspx>.

114. Rajaratnam Sch. of Int’l Studies, *Ensuring Safety at Sea: The Southern Ocean and the South China Sea*, EURASIA REVIEW (Jan. 3, 2010), <http://www.eurasiareview.com/03012012-ensuring-safety-at-sea-the-southern-ocean-and-the-south-china-sea-analysis/>.

115. China’s fisheries management in the SCS basically follows the same rules as that of the Yellow Sea and the East China Sea. Its annual fishing ban has been practiced since 1995 in the Yellow Sea and East China Sea and since 1999 in the northern section (north of 12°N) of the SCS. See XUE, *supra* note 14, at 122-26.

116. *Id.*

117. See XIA ET AL., *supra* note 15, 166-71.

118. See Mark J. Valencia & Jon M. Van Dyke, *Vietnam’s National Interests and the Law of the Sea*, 25 OCEAN DEV. & INT’L L. 217, 217-19 (1994); see also Zou Keyuan, *Maritime Boundary Delimitation in the Gulf of Tonkin*, 30 OCEAN DEV. & INT’L L. 235, 248 (1999).

119. The Sino-Vietnam Land Border Treaty between China and Vietnam was signed in December 1999 and came into effect in July 2000. See *Sino-Vietnam Border Treaties Equal to Both Countries*, PEOPLE’S DAILY ONLINE, http://english.peopledaily.com.cn/200201/24/eng20020124_89291.shtml (last updated Jan. 25, 2002).

border into the Gulf of Tonkin and out to the [SCS].”¹²⁰ Based on UNCLOS’s framework, the two governments settled their maritime boundary in the Gulf of Tonkin on December 25, 2000.¹²¹

China and Vietnam are the most vocal in their sovereignty claims over the SCS archipelagos.¹²² These competing claims have complicated their bilateral relations.¹²³ Over the years, the two have been involved in armed disputes, diplomatic disputes, and conflicts involving fishing vessels and maritime surveillance ships.¹²⁴ In 2010, six incidents occurred between China and Vietnam, mostly regarding fishing vessels.¹²⁵

China and the Philippines have also maintained a certain level of conflict, manifesting itself in regard to gas exploration and survey ship confrontations.¹²⁶ The Reed Bank Incident serves as a good example. The Reed Bank is part of the KIG and is claimed by both China and Vietnam. On March 2, 2011, two Chinese patrol vessels approached a Philippine survey ship conducting a seismic survey near Reed Bank and ordered it to cease its activities because the area was under Chinese jurisdiction.¹²⁷ In response, the Philippine military deployed a warplane and two coastguard vessels to escort the survey ship “until its survey activities had been completed.”¹²⁸

Following the incident, the Philippines undertook a number of measures including strengthening the Armed Forces of the Philippines (AFP) presence in the Spratlys, conducting unilateral actions to enhance its claim in the SCS, and protesting China’s sovereignty claims in the

120. Guifang Xue, *Sino-Vietnamese Fisheries Agreement for the Gulf of Tonkin*, 21 INT’L J. OF MARINE & COASTAL L. 217, 218 (2005).

121. See generally Zou Keyuan, *The Sino-Vietnamese Agreement on Maritime Boundary Delimitation in the Gulf of Tonkin*, 36 OCEAN DEV. & INT’L L. 13 (2005).

122. See generally J. Li, *The Boundary Dispute Between China and France and the Boundary Delimitation for the Gulf of Tonkin*, in STUDIES ON ISSUES OF THE SOUTH CHINA SEA 76-89 (2000); J. Li, *Disputes Over the Islands and Boundary of the South China Sea and International Sea Laws*, in South China Sea Studies and DEVELOPMENT 3-4 (1998).

123. See generally Hungdah Chiu & Choon-ho Park, *Legal Status of the Paracel and Spratly Islands*, in THE LAW OF THE SEA: PROBLEMS FROM THE EAST ASIAN PERSPECTIVE 456 (Choo-ho Park & Jae Kyu Park eds., 1987).

124. See Keyuan, *supra* note, 121, at 14.

125. Carlyle A. Thayer, *Recent Developments in the South China Sea: Grounds for Cautious Optimism?*, RSIS WORKING PAPER, Dec. 14, 2010, at 24-25.

126. Edward Wong, *Beijing Warns U.S. About South China Seas Disputes*, N.Y. TIMES, June 22, 2011, <http://www.nytimes.com/2011/06/23/world/asia/23china.html>.

127. Ian Storey, *China and the Philippines: Implications of the Reed Bank Incident*, CHINA BRIEF, May 6, 2011, [http://www.jamestown.org/single/?no_cache=1&tx_ttnews\[tt_news\]=37902](http://www.jamestown.org/single/?no_cache=1&tx_ttnews[tt_news]=37902).

128. *Id.*

SCS.¹²⁹ The Philippines also strengthened its air force presence in the KIG by upgrading its military airfield, observation planes, and vessels to escort survey ships.¹³⁰ In May 2011, the Philippines removed China's markers and construction material from Boxhall Reef, Amy Douglas Bank, and Reed Bank.¹³¹ Additionally, Philippine lawmakers visited Pagasa (Hope) Island, the largest Filipino-occupied feature in the SCS on July 20, 2011. There, they pledged funds to improve the islet's infrastructure, including allocations for a water purification system, a cold storage facility, harbor and pier improvements, and runway improvements.¹³²

China has responded to some of these unilateral actions, as well as to live-fire military exercises, by stating that they will impair bilateral ties.¹³³ China has also called on other parties to stop exploiting resources in areas where China claims sovereignty.¹³⁴ Nevertheless, some claimants have strengthened ties with non-regional states, particularly with the U.S.¹³⁵

Recognizing the growing military and economic importance of the SCS, the United States has been paying greater attention to the region. On July 23, 2010, the U.S. Secretary of State, Hillary Clinton, made a spoke at the seventeenth Association of Southeast Asian Nations Regional Forum, expressing the U.S.' views on its "national interest" in freedom of navigation (FON) and continued open access to the SCS.¹³⁶ This event marked a turning point concerning the SCS, reframing the issues from hypothetical discussions on whether it is one of China's "core interests" into a diplomatic subject matter for the Asian-Pacific region.¹³⁷

The United States has supported the operations of FON rights in the international waters and air space of the SCS.¹³⁸ However, the United

129. *Id.*

130. *Id.*

131. Dona Z. Pazzibugan, *Philippines Pulls Spratlys "Foreign" Posts*, INQUIRER NEWS, June 16, 2011, <http://newsinfo.inquirer.net/15230/philippines-pulls-spratlys-foreign-posts>.

132. Storey, *supra* note 127.

133. Julie M. Aurelio, *US Not Coming to Philippines' Aid vs China*, ASIAN NEWS NETWORK, June 12, 2011, <http://ph.news.yahoo.com/us-not-coming-philippines-aid-vs-china-052002211.html>.

134. Julie M. Aurelio, *China to Neighbors: Keep Out of Spratly*, INQUIRER NEWS, June 10, 2011, <http://newsinfo.inquirer.net/13613/china-to-neighbors-keep-out-of-spratlys>.

135. *Id.*

136. Thayer, *supra* note 125, at 13.

137. *See id.* at 2-6 (discussing China's "core interests").

138. *See, e.g.*, S. Res. 217, 112th Cong. (2011).

States believes that FON is much broader than transiting the waters, and includes other lawful uses of the sea, such as military activities, counter-piracy operations, and counter-proliferation operations.¹³⁹

Regarding military activities, UNCLOS does not clearly provide for military uses by non-coastal states in another state's EEZ.¹⁴⁰ The United States holds the position that UNCLOS in no way limits military activities in the EEZ, so long as they are compatible with the reservation of the seas for peaceful purposes.¹⁴¹ As a result, several serious incidents involving U.S. air and naval reconnaissance in China's EEZ have occurred, such as the *Impeccable* Incident on March 9, 2009, which have strained bilateral relations and affected China's SCS claim.¹⁴²

Concerning EEZ enforcement, China recently adopted domestic measures to control the activities of other states in its EEZ, resulting in some debate about these measures' legality.¹⁴³ According to UNCLOS, EEZs are areas of shared rights and responsibilities between coastal states and foreign states.¹⁴⁴ China holds the view that a coastal state is entitled to control its EEZ, as provided by UNCLOS.¹⁴⁵ The EEZ is a special regime, and referred to as neither a territorial sea nor a high sea.¹⁴⁶ Further, China considers the EEZ to serve as a buffer zone for defense.¹⁴⁷ The EEZ is a relatively new regime in international law, and

139. See, e.g., Raul Pedrozo, *Close Encounters at Sea: The USNS Impeccable Incident*, 62 NAVAL WAR COL. REV. 101, 108 (2009).

140. See generally 5 CTR. FOR OCEANS LAW & POL'Y, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 153-54 (Myron H. Nordquist et al. eds., 1989).

141. *Id.* at 89. See also UNCLOS, *supra* note 26, art. 301, at 516.

142. See generally Pedrozo, *supra* note 139, at 101.

143. See Mark J. Valencia, *Summary of the Bali Dialogue*, 28 MARINE POL'Y 7, 12 (2004).

144. See UNCLOS, *supra* note 26, art. 58, at 419.

145. China is of the view that the use of the EEZ for non-peaceful purposes such as military and electronic intelligence gathering is illegal. See Cheng Xizhong, *A Chinese Perspective on 'Operational Modalities'*, 28 MARINE POL'Y 25, 27 (2004). See also *id.*

146. See U.N., THE LAW OF THE SEA: NATIONAL LEGISLATION ON THE EXCLUSIVE ECONOMIC ZONE, THE ECONOMIC ZONE AND THE EXCLUSIVE FISHERY ZONE 13 (1986) ("[The] EEZ is subject to a 'special regime.' The regime is specific in the sense that the legal regime of the EEZ is different from both the territorial sea and the high seas. It is a zone which partakes of some of the characteristics of both regime but belong to neither.").

147. JOSEPH R. MORGAN, THE REGIME OF THE YELLOW SEA-ISSUES AND POLICY OPTIONS FOR COOPERATION IN THE CHANGING ENVIRONMENT 61 (1990).

the precise nature and scope of a nation's rights and responsibilities within an EEZ are still evolving.¹⁴⁸

IV. IMPLICATIONS FOR CHINA: THE NEED TO BRING ITS CLAIM INTO CONFORMITY WITH UNCLOS

While SCS disputes intensify, some legal and political issues have been raised in current discussions. There is heightened interest in China's theory and practice of international law, and inquiries have been assembled about legal principles for China to sustain its claims over islands, adjacent waters, seabed, and subsoil in the SCS.¹⁴⁹ China has been under mounting pressure to define its claims.¹⁵⁰

A. Clarifying Claims within the U-shaped Line

China's U-Shaped Line is composed of nine dashes and extends to the southern part of the SCS.¹⁵¹ It generally follows a median-line pattern adjacent to the shores of Vietnam, Indonesia, Malaysia, Brunei, and the Philippines.¹⁵² The original version of the U-Shaped Line first appeared in a Chinese map in 1914, drawn by Chinese cartographer Hu Jin Jie.¹⁵³ This version of the line was officially confirmed by China in 1947.¹⁵⁴ It was composed of eleven dashes and titled *The Location Map of the South China Sea Islands*.¹⁵⁵ In 1953, China removed two dashes from the Gulf of Tonkin.¹⁵⁶

Although the U-Shaped Line was on official Chinese maps, China neither explained the exact legal value of the line nor the status of the

148. For a summary of states' EEZ legislation and practice, see U.N., THE LAW OF THE SEA: PRACTICE OF STATES AT THE TIME OF ENTRY INTO FORCE OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 9-13 (1994); MARK J. VALENCIA ET AL., THE REGIME OF THE EXCLUSIVE ECONOMIC ZONE: ISSUES AND RESPONSES, A REPORT OF THE TOKYO MEETING (2003), available at <http://www.eastwestcenter.org/fileadmin/stored/pdfs/EEZTokyoMeeting.pdf>.

149. See generally SOUTH CHINA SEA, *supra* note 1.

150. *Id.*

151. See generally CML/17/2009, *supra* note 52.

152. CML/18/2009, *supra* note 52, ¶ 2.

153. Zou Keyuan, *The Chinese Traditional Maritime Boundary Line in the South China Sea and Its Legal Consequences for the Resolution of the Dispute Over the Spratly Islands*, 14 INT'L J. MARINE & COASTAL L. 27, 51 (1999).

154. Li Jinming & Li Dexia, *The Dotted Line on the Chinese Map of the South China Sea: A Note*, 34 OCEAN DEV. & INT'L L. 287, 290 (2003).

155. *Id.*

156. *Id.*

waters inside the line.¹⁵⁷ In the past decades, the origin and evolution of the U-Shaped Line has been thoroughly examined and mostly agreed upon,¹⁵⁸ but views on the legal status of the U-Shaped Line have been divided as to its historical waters or title line, territorial border or maritime boundary line, and island attribution line.¹⁵⁹ In recent decades, the legislative practice of the Chinese government relating to the U-shaped line and SCS archipelagos has been somewhat neglected.¹⁶⁰ Nevertheless, China's fundamental laws in this field have important implications for China's sovereignty claims in the SCS, and they merit a discussion.

China's first national statement regarding its territorial sea was in its *Declaration of the Government of PRC on Territorial Sea* which was announced on September 4, 1958 (1958 Declaration).¹⁶¹ It was announced five months after the first United Nations' Conference on the Law of the Sea and reflected the general principles of the Geneva Conventions.¹⁶²

The 1958 Declaration contains four paragraphs.¹⁶³ The first paragraph declares that a twelve nautical-mile territorial sea surrounds all Chinese territories 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 high seas.¹⁶⁴

157. One possible explanation could be concern over further complicating the situation in the region.

158. Yu Jia, *On the Law Status of Duanxuxian of South China Sea*, in CHINA'S BORDERLAND HISTORY AND GEOGRAPHY STUDIES 112-49 (2005).

159. Jinming & Dexia, *supra* note 154, at 291-93.

160. Duong, *supra* note 28, at 1158.

161. See *Declaration of the People's Republic of China on the Territorial Sea*, in COLLECTION OF THE SEA LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA 197 (3d ed. 2001) [hereinafter 1958 Declaration].

162. The adoption of some Geneva principles indicates China's intention to stay within the broad framework of the Geneva Conventions. See CHOON-HO PARK, EAST ASIA AND THE LAW OF THE SEA 17 (1983).

163. 1958 Declaration, *supra* note 161, at 197.

164. *Id.*

From this paragraph, it is clear that the Chinese government was confident about its sovereignty over the four SCS archipelagos, despite their distance from its mainland and being separated by high seas.¹⁶⁵

The second and third paragraphs establish a straight baseline method for the territorial sea of China and establish restrictions on foreign military vessels and aircraft entering its territorial sea and adjacent air space, noting the relevant laws and regulations of China.¹⁶⁶ The fourth paragraph emphasizes that the principles provided in the second and third paragraphs also apply to 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.¹⁶⁷ This indicates that straight baseline methods and territorial sea restrictions are also applicable to the archipelagos of the SCS.

China's general positions, enunciated in its 1958 Declaration, were effectively carried out on matters concerning its territorial seas. For example, in 1992 China's Congress enacted the Law on the Territorial Sea and the Contiguous Zone,¹⁶⁸ which maintained the principles of the 1958 Declaration.¹⁶⁹ Article two of this law specifies that China's land territory includes "the Dongsha Islands, the Xisha Islands, the Zhongsha Islands and the Nansha Islands."¹⁷⁰ By specifically mentioning the names of these SCS islands, China has once again confirmed its sovereignty over these archipelagos. The Law on the Territorial Sea and the Contiguous Zone also sets forth China's twelve nautical mile

165. It is worth mentioning that the Democratic Republic of Vietnam filed an official note signed by Prime Minister Pham Van Dong on September 14, 1958, and agreed to the terms of China's 1958 Declaration concerning China's territorial sea claim in the East Sea (SCS). *But cf.*, Vietnam Recognizes Prime Minister Pham Van Dong's Diplomatic Note as a Political Declaration and Recognizes the Legality and Legitimacy of Republic of South Vietnam (2012), available at <http://www.eyedrd.org/2011/07/vietnam-recognizes-prime-minister-pham-van-dongs-diplomatic-note-as-a-political-declaration-and-recognizes-the-legality-and-legitimacy-of-republic-of-south-vietnam.html>.

166. 1958 Declaration, *supra* note 161, at 197.

167. *Id.*

168. For the Chinese and English Version, see Liyu Wang & Peter H. Pearse, *The New Legal Regime for China's Territorial Sea*, 25 OCEAN DEV. & INT'L L. 431, 434 (1994); Max Herriman, *China's Territorial Sea and the Contiguous Zone Law and International Law of the Sea*, 92 MARITIME STUDIES 15, 15-19 (1997); Yann-Huei Song & Zou Keyuan, *Maritime Legislation of Mainland China and Taiwan: Developments, Comparison, Implications, and Potential Challenges for the United States*, 31 OCEAN DEV. & INT'L L. 303, 306-08 (2000).

169. See *Territorial Sea and the Contiguous Zone*, ASIAN LEGAL INFO. INST., <http://www.asianlii.org/cn/legis/cen/laws/tsatz392/> (last visited on Apr. 8, 2012).

170. *Id.* art. 2.

territorial sea and twenty-four nautical mile contiguous zone measured by straight baselines.¹⁷¹

In May 1996, upon ratifying UNCLOS, China declared two sets of baseline coordinates—one set for its mainland and one set for the Paracels.¹⁷² The baselines for the mainland consist of a series of straight lines linking forty-nine coordinates surrounding its mainland.¹⁷³ The baselines for the Paracels consist of a series of straight lines linking twenty-eight coordinates.¹⁷⁴ China's declaration of coordinates marked a concrete step in its exercise of sovereignty over the SCS archipelagos and brought an end to most of the uncertainty surrounding China's territorial sea baseline. However, some uncertainty remains due to the 1996 announcement expressly stating that the remaining baselines will be announced at some unspecified future time.¹⁷⁵

China established its EEZ and continental shelf in 1998 by enacting the Law on the Exclusive Economic Zone and the Continental Shelf.¹⁷⁶ Although this law does not expressly refer to the SCS archipelagos, two *note verbales* clarified the U-Shaped Line includes “sovereignty over the islands in the South China Seas and the adjacent waters” and “sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil.”¹⁷⁷ Note CML/8/2011, dated April 14, 2011, further spelled out China's right to maritime zones generated by the Spratlys Islands—specifically, a territorial sea, contiguous zone, EEZ, and continental shelf.¹⁷⁸ These diplomatic notes marked the first times China included a map in its official communication to the United Nations.¹⁷⁹ By virtue of these notes, China has officially declared to the world its claims within the U-Shaped Line.

171. The 1992 Law reaffirms the twelve nautical mile breadth of its territorial sea, straight baselines, prior approval of foreign military vessels, and sovereignty over China's archipelagos and islands claimed in the 1958 Declaration. *See id.* arts. 2, 3, 6.

172. Declaration of the Government of the People's Republic of China on the Baselines of the Territorial Sea (May 15, 1996), http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/CHN_1996_Declaration.pdf.

173. *Id.*

174. *Id.*

175. *Id.*

176. Law on the Exclusive Economic Zone and the Continental Shelf (promulgated by the Standing Comm. Nat'l People's Cong., June 26, 1998, effective June 26, 1998) (China) [hereinafter Law on the EEZ and CS], *available at* <http://www.asianlii.org/cn/legis/cen/laws/lotprocoteezatcs790>.

177. *See generally* CML/18/2009, *supra* note 52; CML/17/2009, *supra* note 52.

178. *See generally* CML/8/2011, *supra* note 95.

179. *See generally* CML/18/2009, *supra* note 52.

B. Determining the Legal Status of the Waters in the U-shaped Line

Having clarified its claimed sovereignty over the islands of the SCS, China must provide further notice to the international community by delimiting the specific maritime zones within the U-Shaped Line. As it stands, it is unclear whether China is claiming the bounded waters as internal waters, territorial sea, EEZ, continental shelf, or as some other status with its own unique features. This Section attempts to provide a preliminary assessment of the legal status of the waters in the U-Shaped Line.

First, the waters in the U-Shaped Line cannot be internal waters. Internal waters require full sovereignty and prescriptive control, yet the Chinese government has never interfered with non-Chinese ships sailing through these waters.¹⁸⁰ In addition, the U-Shaped Line has been marked with unresolved boundary symbols, which are less fixed than a land border.

Second, the waters contained within the U-shaped Line are not part of China's territorial sea. China's 1958 Declaration set forth a twelve nautical mile territorial sea with straight baselines, applying to all of China's territories—including the SCS islands.¹⁸¹ Therefore, the territorial sea of China is the belt of water extending up to twelve nautical miles as measured from the baselines of the SCS islands. The majority of the water in the U-Shaped Line, however, lies beyond twelve nautical miles. Consequently, the majority of the water within the U-Shaped Line is not a part of China's territorial sea.

Third, the waters in the U-Shaped Line do not constitute high seas. If the waters beyond the twelve mile territorial sea measured from the baselines of the SCS islands, why did the Chinese government undertake a series of legal procedures and make pronouncements to the world? The U-shaped Line was drawn to roughly follow the median line between the coasts of adjacent states, indicating a specified scope of China's jurisdictional boundary in the SCS. Thus, the waters in the U-shaped Line can not constitute high seas.

Lastly, should the water inside the U-shaped Line be considered some other maritime zone? The only other possibilities under UNCLOS

180. Nong Hong, *US-China Perception Gap on Messy South China Sea Dispute: Assessment of Post-2009 Developments*, US CHINA FOCUS.COM (Sept. 22, 2011), www.chinausfocus.com/slider/u-s-china-perception-gap-on-the-messy-south-china-sea-dispute-assessment-of-post-2009-developments.

181. 1958 Declaration, *supra* note 156, at 197.

are archipelagic waters, contiguous zone, EEZ, or continental shelf.¹⁸² These waters certainly should not be considered archipelagic waters. Existing primarily on continental mainland, China has never claimed archipelagic status. Additionally, the waters within the U-Shaped Line should not be considered a contiguous zone, EEZ, or continental shelf because China has not yet determined any territorial sea baseline coordinates for islands other than the Paracels. Indeed, no established maritime zone is a good fit for the waters within the U-shaped Line of the SCS; these waters bear unique status attached with historical features.¹⁸³

China's claim within the U-Shaped Line is often described as "historical sovereignty" and its legitimacy has been questioned against modern law of the sea.¹⁸⁴ If this description refers to the waters inside the line, the misconception might have originated from China's statement that "[n]o provisions of [the 1998 EEZ and Continental Shelf Law] can prejudice [the] *historical rights*" that China enjoys.¹⁸⁵ However, this statement does not specify what provisions might affect China's historical rights, and it is not clear what "historical rights" the law references.¹⁸⁶ Arguably, historical rights referred to are the waters within the U-Shaped Line.¹⁸⁷

UNCLOS recognizes historic title or historic waters in articles 10(6), 15, and 46(b), but does not define them.¹⁸⁸ Commentators have observed that the UNCLOS regime for such waters is to be determined "in accordance with customary international law."¹⁸⁹ In the SCS, China's history of occupation, natural resource exploitation, and administrative control of the SCS archipelagos has its earliest recordings

182. UNCLOS, *supra* note 26, art. 46, at 414.

183. Zou Keyuan, *Historic Rights in International Law and in China's Practice*, 32 OCEAN DEV. & INT'L L. 149, 160 (2001) (explaining that China's claim "may . . . be called historic rights with tempered sovereignty"). See also Li & Li, *supra* note 154, at 292-93 (discussing "historical rights").

184. Brice M. Claget, *Completing Claims of Vietnam and China in the Vanguard Bank and Blue Dragon Areas of the SCS*, 13 J. OIL & GAS L. & TAXATION REV. 10, 10-11 (1995).

185. Law on the EEZ and CS, *supra* note 176, art. 14 (emphasis added).

186. See *id.*; Keyuan, *supra* note 186, at 149-68 (providing a comprehensive discussion on how there was no explanation of this provision during the legislative process).

187. See AUSTIN, *supra* note 8, at 206-10.

188. UNCLOS, *supra* note 26, arts. 10(6), 15, & 46(b), at 402, 403, 414; 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?*, 32 OCEAN DEV. & INT'L L. 169, 172 (2001).

189. *Id.*

in the Han Dynasty.¹⁹⁰ Since the Song Dynasty, China has exercised authority over the waters—albeit with some interruptions. Moreover, China has demonstrated its political will to retain authority over the islands through diplomatic and military means.

The waters in the U-Shaped Line have a unique status given historical characteristics and traditional rights. Accordingly, these considerations justify different management. Although China did not mention “historic rights” or “historic waters” in its note verbales, the specific status of the waters in the U-Shaped Line needs to be determined in accordance with recognized principles of international law and state practice. China’s foremost task is to comply with UNCLOS by issuing maps or geographic coordinates setting out the limits of the maritime zones (territorial seas, contiguous zones, EEZs, and continental shelves) for the features in the SCS, as it did with the Paracels.

Regarding the entitlement of islands or rocks to maritime zones, it is important to note that the majority of the SCS insular features are reefs and, thus, are subject to questions of whether these features are capable of or entitled to generate maritime zones on their own, such as an EEZ or continental shelf. Once the maritime status of these islands and rocks are defined, appropriate maritime zones may be delimited. If overlapping boundaries between China and other claimants result, then issues of resource exploitation and joint development may be properly negotiated.

V. CONCLUDING REMARKS: UNCLOS AND DISPUTE SETTLEMENT

There are numerous disputes in the SCS, and the situation has become increasingly complex. Considerable disagreement exists between China and its maritime neighbors over questions of fact and law. Additionally, the involvement of non-regional states has only increased the level of complexity in the SCS.

As the largest state bordering the SCS and a core party to the dispute, China’s territorial sovereignty and integrity to Spratlys Islands has been seriously affected. Yet, there are lessons for China to take away from the disputes. Over the years, China’s lack of concrete action in clarifying its claims in the SCS has created a very politically troublesome situation. China has not only missed opportunities in enhancing its control of the Spratlys, but also faced the challenge to gain support from the

190. ZHENHUA HAN, COLLECTIONS OF HISTORICAL DOCUMENTATIONS ON THE SOUTH CHINA SEA ISLANDS OF CHINA 15-22 (1988).

international community for its sovereignty.¹⁹¹ China must take effective steps to protect its national interests and secure its sovereignty claim.¹⁹²

To achieve its desired protection, it is important that China clarify its SCS claims in a manner consistent with UNCLOS. UNCLOS is not a magic document that will swiftly resolve all the problems encountered by the states, and it does not provide readily available answers that will immediately settle the SCS disputed claims; however, it does provide useful guidelines for states seeking a solution.

191. Zheng Yongnian, *How Can China Change Its Difficult Position in the South China Sea Issue?*, DEFENCE TIMES, Oct. 26, 2011, at 20.

192. *Id.*