United States Department of State

Bureau of Oceans and International Environmental and Scientific Affairs

Limits in the Seas

No. 143

China:

Maritime Claims in the South China Sea

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CHINA

MARITIME CLAIMS IN THE SOUTH CHINA SEA

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Office of Ocean and Polar Affairs
Bureau of Oceans and International Environmental and Scientific Affairs
U.S. Department of State

This study is one of a series issued by the Office of Ocean and Polar Affairs, Bureau of Oceans and International Environmental and Scientific Affairs in the Department of State. The purpose of the series is to examine a coastal State's maritime claims and/or boundaries and assess their consistency with international law. This study represents the views of the United States Government only on the specific matters discussed therein and does not necessarily reflect an acceptance of the limits claimed.

This study, and earlier studies in this series, may be downloaded from http://www.state.gov/e/oes/ocns/opa/c16065.htm. Comments and questions should be emailed to LimitsInTheSeas@state.gov. Principal analysts for this study are Kevin Baumert and Brian Melchior.

Introduction

This study analyzes the maritime claims of the People's Republic of China in the South China Sea, specifically its "dashed-line" claim encircling islands and waters of the South China Sea.[1]

In May 2009, the Chinese Government communicated two Notes Verbales to the UN Secretary General requesting that they be circulated to all UN Member States.[2] The 2009 Notes, which contained China's objections to the submissions by Vietnam and Malaysia (jointly) and Vietnam (individually) to the Commission on the Limits of the Continental Shelf, stated the following:

> China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof (see attached map). The above position is consistently held by the Chinese government, and is widely known by the international community.

The map referred to in China's Notes, which is reproduced as Map 1 to this study, depicted nine line segments (dashes) encircling waters, islands, and other features of the South China Sea. Vietnam, Indonesia, and the Philippines subsequently objected to the contents of China's 2009 Notes, including by asserting that China's claims reflected in the dashed-line map are without basis under the international law of the sea.[3] In 2011, China requested that another Note Verbale be communicated to UN Member States, which reiterated the first sentence excerpted above, and added that "China's sovereignty and related rights and jurisdiction in the South China Sea are supported by abundant historical and legal evidence."[4]

China has not clarified through legislation, proclamation, or other official statements the legal basis or nature of its claim associated with the dashed-line map. Accordingly, this *Limits in the Seas* study examines several possible interpretations of the dashed-line claim and the extent to which those interpretations are consistent with the international law of the sea.

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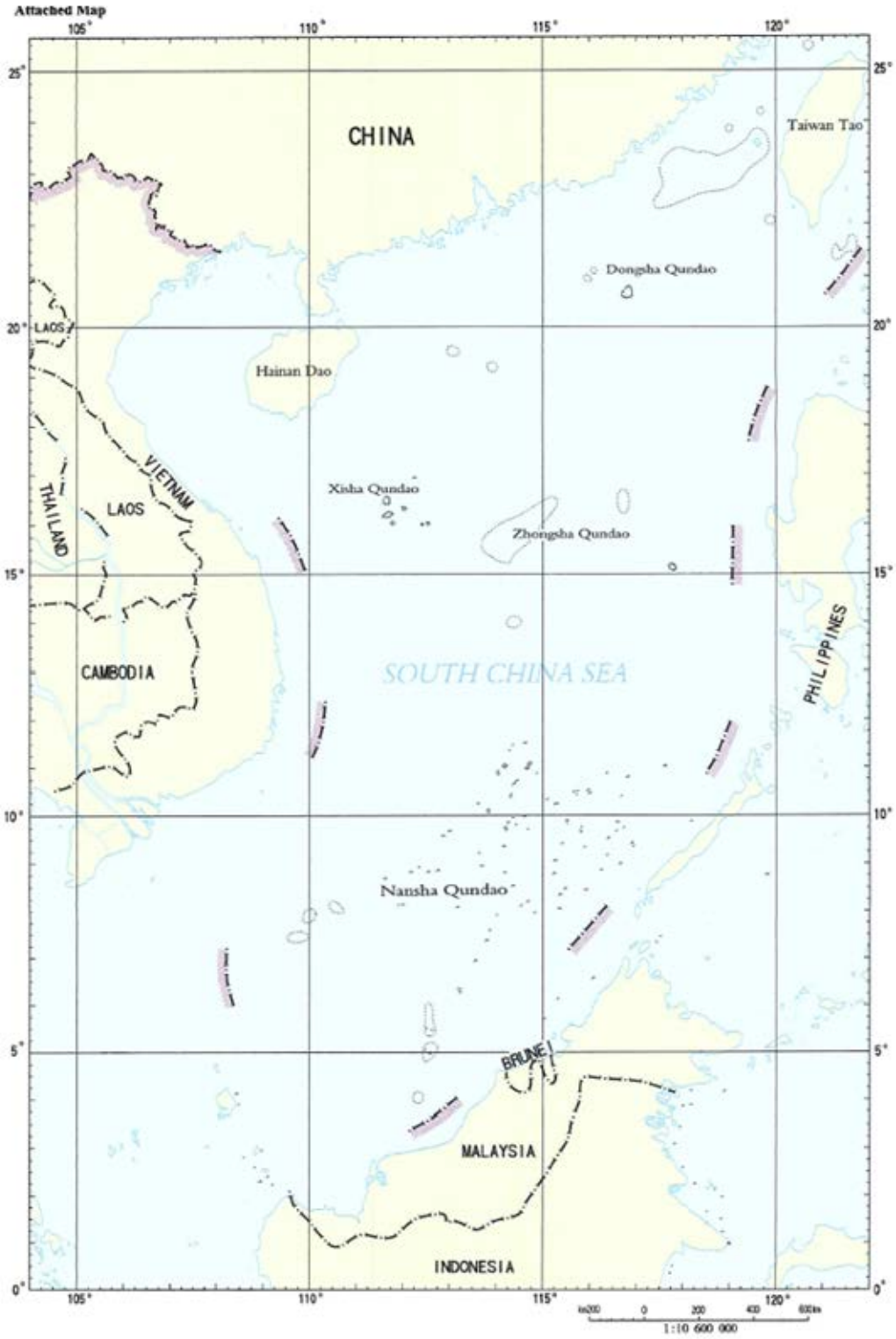
[1] This claim is referred to by commentators by various names, including the "Nine-Dash Line," "Dotted Line," "Cow's Tongue," and "U-Shaped Line."

[2] Permanent Mission of the People's Republic of China, Notes Verbales CML/17/2009 and CML/18/2009, May 7, 2009, available from the UN Division for Ocean Affairs and the Law of the Sea (DOALOS) at: http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf and http://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/chn_2009re_vnm.pdf.

[3] Notes available from DOALOS at: http://www.un.org/Depts/los/clcs_new/submissions_files/submission_mysvnm_33_2009.htm.

[4] Permanent Mission of the People's Republic of China, Note Verbale CML/8/2011, April 14, 2011, available from DOALOS at: http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2011_re_phl_e.pdf. This Note did not contain a dashed-line map.

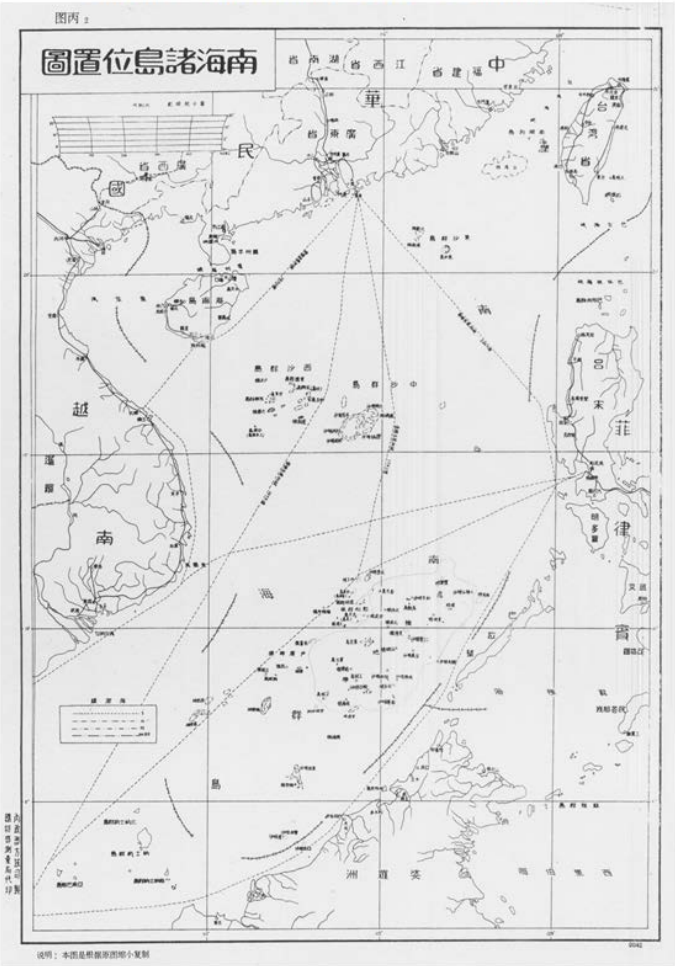
Map 1: China's Dashed-Line Map from Notes Verbales of 2009



The Dashed-Line Maps

Origins and Evolution

Map 2: China's (Kuomintang) 11-Dash Line Map of 1947 entitled "Map of South China Sea Islands"



Although China has not provided an official account, the first dashed-line map is widely reported by scholars and commentators to pre-date the existence of the People's Republic of China, having been published in 1947 by the Nationalist government of the Republic of China.[5] That map, which shows 11 dashes, is reproduced as Map 2 to this study. Scholarly accounts indicate that the 1947 map, titled "Map of South China Sea Islands," originated from an earlier one titled "Map of Chinese Islands in the South China Sea" (*Zhongguo nanhai daoyu tu*) published by the Republic of China's Land and Water Maps Inspection Committee in 1935, and that Chinese maps produced after the establishment of the People's Republic of China in 1949 "appear to follow the old maps."[6] The maps published by the People's Republic of China, however, removed the two dashes originally depicted inside the Gulf of Tonkin.[7] Although not visible on the 2009 map (Map 1), modern Chinese maps since at least 1984, including the vertically oriented maps published by China in 2013 and 2014,[8] also include a tenth dash located to the east of Taiwan.

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[5] Scholarly accounts place the publication date from 1946 to 1948. For simplicity, this study refers to the "1947 map." *See, e.g.*, M. Sheng-Ti Gau, "The U-Shaped Line and a Categorization of the Ocean Disputes in the South China Sea," Ocean Dev't & Int'l L., 43:1, 57-69 at 58 (2012) (stating the map was "first published" by the Republic of China in December 1946); K-H. Wang, "The ROC's Maritime Claims and Practices with Special Reference to the South China Sea," Ocean Dev't & Int'l L., 41:237-252 at 243 (2010) (stating the map was "released" in 1947); L. Jinming and L. Dexia, "The Dotted Line on the Chinese Map of the South China Sea: A Note," Ocean Dev't & Int'l L., 34:287-95 at 290 (2003) (stating the map was "printed" in 1947 and "published" in February 1948).

[6] Jinming and Dexia, *supra* note 5 at 289-90 (2003). *See also*, N. Alfred Hu, "South China Sea: Troubled Waters or a Sea of Opportunity?" Ocean Dev't & Int'l L., 41:203-213 (2010).

[7] This area was eventually partly delimited by China and Vietnam. Agreement on the Delimitation of the Territorial Seas, Exclusive Economic Zones and Continental Shelves in the Beibu Gulf [Gulf of Tonkin] between the People's Republic of China and the Socialist Republic of Vietnam, Beijing, Dec. 25, 2000, entered into force June 30, 2004, *Law of the Sea Bulletin* No. 56, at 137 (2004); V *International Maritime Boundaries* 3745-3758 (2005).

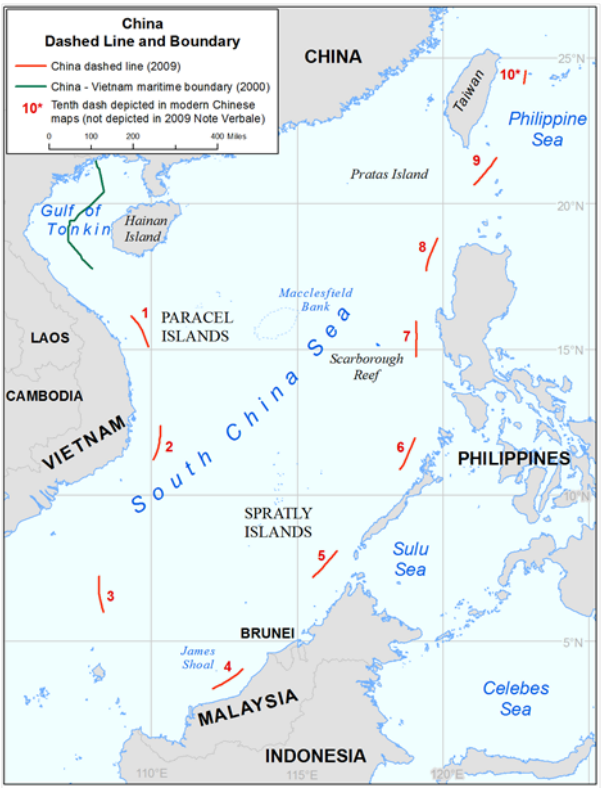
[8] *See, e.g.*, "China's New Weapon in the Battle for the South China Sea is … a Vertical Map," *Wall Street Journal*, ChinaRealTime blog, Jun. 25, 2014. This "vertical map" was first published by Sinomaps in 2013 and later reproduced by Hunan Map Publishing House in 2014.

Geographic Description[9]

The map included in China's 2009 Notes Verbales contains nine dashes that encircle islands, waters, and other features of the South China Sea. China has not published geographic coordinates specifying the location of the dashes. Therefore, all calculations in this study relating to the dashed line are approximate.[10]

The dashed line encompasses approximately 2,000,000 square kilometers of maritime space, an area equal to about 22 percent of China's land area. This constitutes a significant percentage of the maritime space in the South China Sea.[11] Excluding Taiwan and Pratas Island (referred to by China as *Dongsha Qundao*), the dashed line encompasses approximately 13 square kilometers of land area.[12] This land area includes the three groups of land features within the South China Sea: (1) the Paracel Islands (referred to by China as *Xisha Qundao*), (2) the Spratly Islands (*Nansha Qundao*), and (3) Scarborough Reef (*Huangyan Dao*). The largest of these islands is Woody Island in the Paracel Islands, with an area of 2.4 square kilometers. The dashes likewise encompass numerous submerged features such as Macclesfield Bank (*Zhongsha Qundao*) and James Shoal (*Zengmu Ansha*).[13]

Map 3: Illustrative Map of China's Dashed Line



Map 3 to this study depicts the dashed line with a number assigned next to each dash for descriptive purposes only. It should be noted that China does not assign numbers to the dashes. The dashes are not uniformly distributed and are separated from one another by between 106 (dashes 7 and 8) and 274 (dashes 3 and 4) nautical miles (nm). The

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[9] Calculations for this study were conducted in ESRI ArcMap 10. The dashes used in geographic depictions and calculations for this study were digitized from 1:10,600,000 scale (2009) and 1:12,000,000 (approx.) scale (1947) maps and assumed a Mercator projection.

[10] This same caveat applies to the calculations referring to the dashed line on the 1947 map, coordinates for which have also not been published by either the People's Republic of China or the Republic of China.

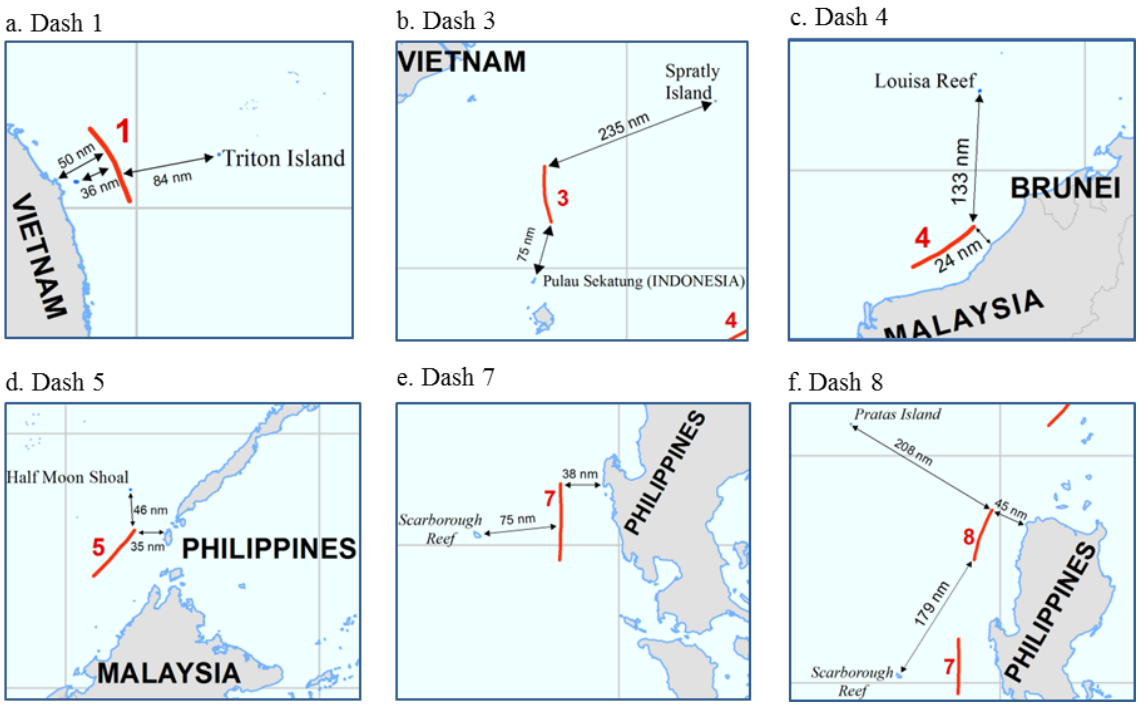
[11] Media reports frequently refer to estimates of 80 percent or higher. The exact percentage depends upon the assumed geographic extent of the South China Sea. The dashed line encompasses 62 percent of the waters in the South China Sea when using the limits that are described in the International Hydrographic Organization's (IHO) *S-23 Limits of the Oceans and Seas* (1953), available from IHO at: http://www.iho.int/iho_pubs/IHO_Download.htm#S-23. The *S-23* describes the limits for the South China Sea as including the Taiwan Strait, the Gulf of Tonkin, and what is sometimes referred to as the Natuna Sea.

[12] CIA *World Factbook* entries for Spratly and Paracel Islands, at: https://www.cia.gov/library/publications/the-world-factbook/.

[13] Nothing in this study is intended to take a definitive position regarding which features in the South China Sea are "islands" under Article 121 of the LOS Convention or whether any such islands are "rocks" under Article 121(3).

dashes are located in relatively close proximity to the mainland coasts and coastal islands of the littoral States surrounding the South China Sea. Dash 1 is 50 nm from the mainland coast of Vietnam and 36 nm from Vietnam's coastal island of Ly Son. Dash 3 is 75 nm from the closest Indonesian island, Pulau Sekatung. Dash 4 is 24 nm from the coast of Malaysia on the island of Borneo. Dash 5 is 35 nm from the closest point on the Philippines' southeastern island of Balabac. Dash 9 is 26 nm from Y'Ami Island, Philippines' northernmost island in the Luzon Strait.

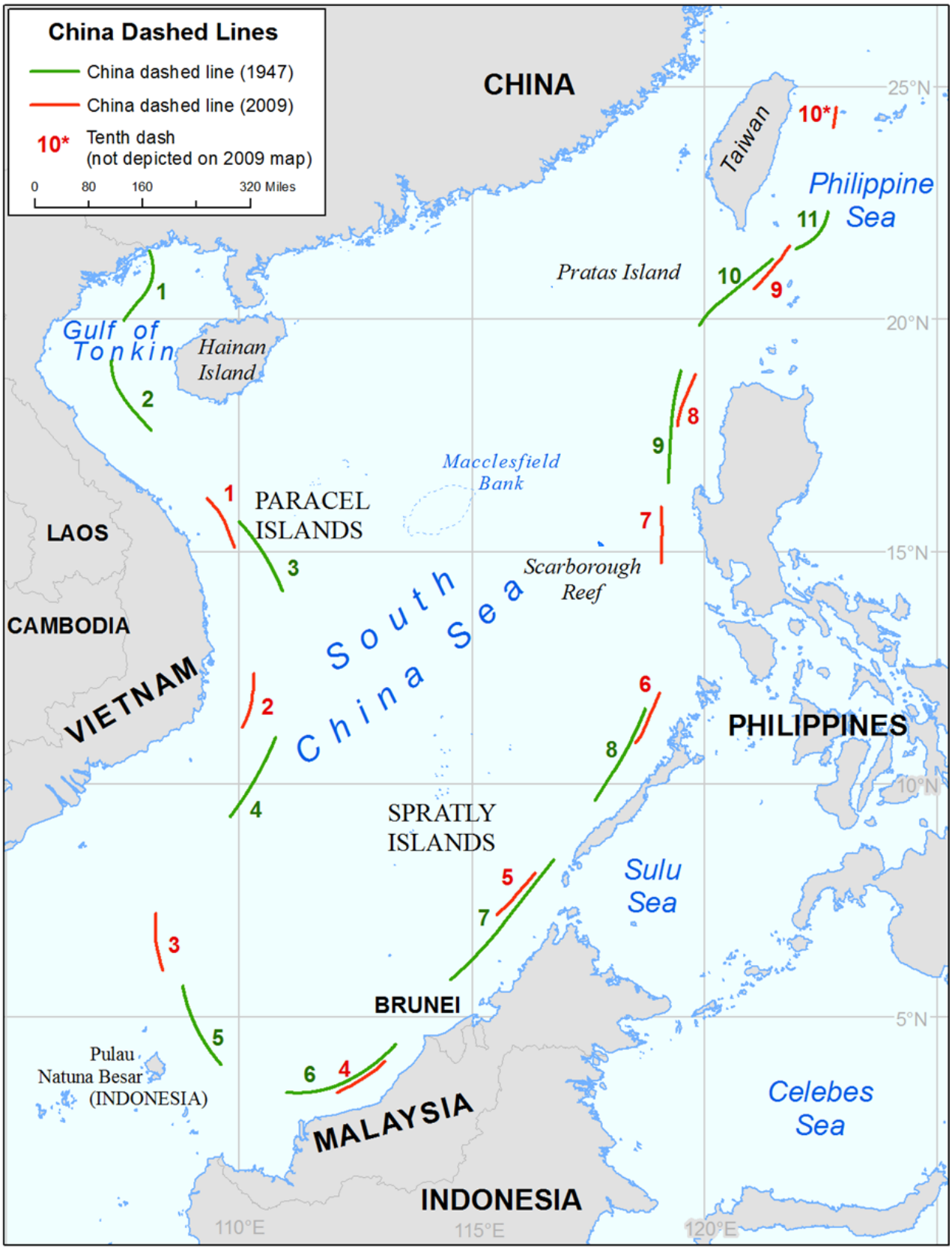
Map 4: Distances between Dashes and Land Features



As shown on Map 4 to this study, the dashes are generally closer to the surrounding coasts of neighboring States than they are to the closest islands within the South China Sea. In other words, the distances between the dashes and the islands are generally farther than the aforementioned distances to the surrounding coasts. At their closest points, the dashes are 84 nm from the nearest island within the Paracel Islands (dash 1 to Triton Island), more than 46 nm from the nearest island within the Spratly Islands (dash 5 to Half Moon Shoal), and nearly 75 nm from Scarborough Reef (dash 7). Some of the dashes are far from the nearest islands within the South China Sea. For instance, dash 3 is 235 nm from the nearest such island, which is Spratly Island. Dash 4 is 133 nm from Louisa Reef. Dash 8 is 179 nm from the closest island on Scarborough Reef.

A geographic description of China's dashed line is complicated by inconsistencies between China's 2009 map and other Chinese maps, such as the 1947 map. The geographic description above is applicable to the 2009 map, but not to the 1947 map or even contemporary Chinese maps because those maps appear to depict the dashes in varying sizes and locations. Map 5 to this study depicts the dashed line from both the 2009 and 1947 maps, indicating that the sizes and locations of the dashes from the 2009 map are generally shorter and closer to the coasts of

Map 5: Comparison of Dashed Line in 2009 and 1947 Maps



neighboring States than the dashes in the 1947 map. Near the Vietnam coast, dash 2 from the 2009 map is 45 nm closer to Vietnam's coast than the nearest dash on the 1947 map, and dash 1 is 15 nm closer. Dash 4 is closer (about 8 nm) to the Malaysian coast and dash 8 is likewise closer (about 19 nm) to the northern part of the Philippine island of Luzon. Additionally, dash 5 from the 1947 map is 15 nm closer to Indonesia's Pulau Sekatung than dash 3 from the 2009 map. Despite having a similar curvature to dash 5 of the 2009 map, dash 7 of the 1947 map is longer and slightly closer to the Philippine island of Palawan, as well as to Malaysia's and Brunei's coasts on the island of Borneo. The dashes used in the 1947 map are also spaced such that they are generally closer to one another than those of the 2009 map, with the exception of the distance between dashes 8 and 9, which is about 290 nm. Otherwise, the 1947 dashes are separated from one another by between 31 (dashes 10 and 11) and 225 (dashes 4 and 5) nm of sea.

Map 6: Dash 4 location in 2009 (solid red) & 1984 maps

The dashed-line map distributed by China to the international community in 2009 is also cartographically inconsistent with other published Chinese maps. The dashes from the 2009 map do not appear to be in the identical geographic locations as the dashes from the 2013-2014 maps published by Sinomaps and those of its predecessor, Cartographic Publishing House (Ditu Chubanshe), dating back to at least 1984. Map 6 to this study depicts the difference with respect to dash 4.

Basis of Analysis

Under international law, the applicable legal framework for assessing maritime claims is the international law of the sea, as reflected in the United Nations Convention on the Law of the Sea (LOS Convention).[14]

Maritime Zones

International law, as reflected in the LOS Convention, contains rules governing a coastal State's entitlement to maritime zones.

Part II of the Convention sets forth rules governing coastal baselines, from which the seaward limits of maritime zones are measured. The normal baseline is the low-water line along the coast, as described in Article 5 of the Convention. The Convention also permits the method of straight baselines to be used "[i]n localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity" (Article 7). Waters on the landward side of the baseline are internal waters (Article 8). Part IV of the Convention contains the rules regarding baselines enclosing archipelagic waters of archipelagic States such as Indonesia and the Philippines.[15]

Part II of the Convention also sets forth the rules governing the territorial sea, which may extend up to 12 nm from the baselines, and in which the coastal State exercises sovereignty subject to the right of innocent passage and other rules of international law. In addition, Part II describes a contiguous zone, extending beyond the territorial sea to a maximum of 24 nm from the baselines, within which a coastal State may exercise the control necessary to prevent and punish infringement of its customs, fiscal, immigration, or sanitary laws and regulations within its territory or territorial sea.

Part V of the Convention sets forth provisions related to the exclusive economic zone (EEZ), which may extend to a maximum of 200 nm from the baselines. Within the EEZ, the coastal State has enumerated rights, notably, "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources" and "jurisdiction as provided for" in the Convention with regard to "the establishment and use of artificial islands, installations and structures" as well as "marine scientific research" and "the protection and preservation of the marine environment" (Article 56). At the same time, the freedoms of navigation, overflight, laying and maintenance of submarine cables, and other uses related to these freedoms are preserved in the EEZ (Article 58).

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[14] United Nations Convention on the Law of the Sea, Montego Bay, opened for signature Dec. 10, 1982, entered into force Nov. 16, 1994, 1833 UNTS 397, available from DOALOS at: http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm. China ratified the Convention on June 7, 1996. The United States considers the substantive provisions of the LOS Convention cited in this study to reflect customary international law, as do international courts and tribunals. *See, e.g.*, J.A. Roach, "Today's Customary International Law of the Sea," Ocean Dev't & Int'l L., 45: 239-252 (2014).

[15] An "'archipelagic State' means a State constituted wholly by one or more archipelagos and may include other islands." LOS Convention, *supra* note 14, Art. 46(a). Archipelagic States therefore do not include continental States such as China or the United States.

Part VI of the Convention sets forth provisions relating to the continental shelf, which extends to the outer edge of the continental margin or to a distance of 200 nm from the baselines, as described in Article 76. The coastal State exercises sovereign rights for the purpose of exploring the continental shelf and exploiting its natural resources; these rights are "exclusive" and "do not depend on occupation, effective or notional, or on any express proclamation" (Article 77).

Part VIII of the Convention defines an island as "a naturally formed area of land, surrounded by water, which is above water at high tide" (Article 121(1)). It provides that islands have the same entitlements to the foregoing maritime zones as other land territory, except that "[r]ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf" (Article 121(3)).

Submerged features that do not emerge above water at high tide are not "islands" and are not entitled to maritime zones.[16] They form part of the seabed and subsoil, and are subject to the regime of the maritime zone in which they are found. The Convention also makes clear that "[a]rtificial islands, installations, and structures do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the [EEZ] or the continental shelf" (Article 60(8)). They too are subject to the regime of the maritime zone in which they are located.

Maritime Boundaries

Maritime boundary delimitation issues arise when the maritime zones of neighboring States overlap. Articles 15, 74, and 83 of the Convention set forth provisions regarding the delimitation of maritime boundaries between opposite and adjacent States. Article 15, concerning delimitation of the territorial sea, provides that "failing agreement . . . to the contrary," one State is not entitled "to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured." However, this provision "does not apply . . . where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith."

With respect to the delimitation of the EEZ and continental shelf, Articles 74 and 83 provide, respectively, that the delimitation "shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution." In recent years, international courts and tribunals have generally delimited the EEZ and continental shelf by drawing a provisional equidistance line and then adjusting that line if necessary in light of the coastal configuration and features, including rocks and other small islands.[17]

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[16] However, the LOS Convention, *supra* note 14, Art. 13, provides: "Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea." A "low-tide elevation" is defined as "a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide." *Id.*

[17] *See, e.g., Territorial and Maritime Dispute (Nicaragua v. Colombia)*, I.C.J., Judgment of Nov. 19, 2012.

"Historic" Bays and Title

The substantive provisions of the LOS Convention refer to "historic" bays or title in two instances. First, Article 10 ("Bays") provides that the provisions of that article concerning juridical bays "do not apply to so-called 'historic' bays." Second, Article 15, as mentioned above, provides that the general rule governing delimitation of overlapping territorial seas does not apply in instances of "historic title or other special circumstances." These provisions are substantially identical to those contained in Articles 7 and 12 of the 1958 Convention on the Territorial Sea and the Contiguous Zone.[18]

The burden of establishing the existence of a historic bay or historic title is on the claimant. The United States has taken the view that, in order to establish the existence of a historic bay or historic title, a State must demonstrate (1) open, notorious, and effective exercise of authority over the body of water in question; (2) continuous exercise of that authority; and (3) acquiescence by foreign States in the exercise of that authority.[19] These limitations are consonant with the views of influential international legal authorities, including the International Court of Justice and the 1962 study on the "Juridical Régime of Historic Waters, Including Historic Bays," commissioned by the Conference that adopted the 1958 Geneva Conventions on the law of the sea.[20] International jurisprudence addressing historic claims has been limited to (1) disputes concerning maritime boundaries and sovereignty over land territory[21] and (2) other disputes over near-shore waters which, under the current law of the sea, could be enclosed using the method of straight baselines.[22]

Articles 10 and 15 are strictly limited geographically and substantively. They apply only with respect to bays and similar near-shore coastal configurations, not in areas of EEZ, continental shelf, or high seas. In the past, prior to the emergence of today's maritime zones, the high seas regime applied very close to the low-water line along the coast, animating desires for broader protection of coastal State interests—desires which previously informed the "historic waters"[23] and other claims of coastal States in derogation of that classic high seas regime. The LOS Convention regimes and their geographic limits accommodated those desires, and set forth the framework governing all parts of the sea from which no reservations are permitted (Article 309).

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[18] Convention on the Territorial Sea and the Contiguous Zone, Geneva, Apr. 29, 1958, entered into force Sept. 10, 1964, 516 UNTS 205, available at: https://treaties.un.org/doc/Publication/UNTS/Volume%20516/v516.pdf.

[19] *See, e.g., Limits in the Seas* No: 112: "United States Responses to Excessive National Maritime Claims," U.S. Dep't. of State, Mar. 9, 1992; Memorandum from Bernard H. Oxman, Dep't of State Ass't Legal Adviser for Ocean Affairs (Sept. 17, 1973), *excerpted in Digest of U.S. Practice in International Law* 1973, at 244 (A.W. Rovine ed.).

[20] *Fisheries Case* (*U.K. v. Norway*), 1951 I.C.J. 116 (Dec. 18), p. 130, 133, 138, 142; *Land, Island and Maritime Frontier Dispute* (*El Salvador/Honduras*), 1992 I.C.J. 350 (Sept. 11), paras. 384, 394; Int'l Law Comm'n, *Juridical Régime of Historic Waters, Including Historic Bays*, [1962] 2 Y.B. Int'l L. Comm'n 1, U.N. Doc. A/CN.4/143 [hereinafter UN Study]. *See also* jurisprudence of the U.S. Supreme Court, *e.g., United States v. Louisiana*, 394 U.S. 11, 23 (1969), and *United States v. California*, 381 U.S. 139, 172 (1965).

[21] *See, e.g., El Salvador/Honduras, supra* note 20; *Continental Shelf* (*Tunisia/Libya*), 1982 I.C.J. 18 (Feb. 24); *Eritrea/Yemen*, Award in the First Stage of the Proceedings, (Perm. Ct. Arb. Oct. 9, 1998) and Award in the Second Stage of the Proceedings, paras. 103, 107 (Perm. Ct. Arb. Dec. 17, 1999), http://www.pca-cpa.org/showpage.asp?pag_id=1160.

[22] *Fisheries Case, supra* note 20.

[23] "By 'historic waters' are usually meant waters which are treated as internal waters but which would not have that character were it not for the existence of an historic title." *Fisheries Case, supra* note 20, p.130.

Analysis

China's possible claims related to the dashed-line maps can be divided into two categories: claims to land and claims to water. With respect to *land* claims, China's position is clear; it is claiming sovereignty over the islands within the dashed line. China's 2009 Notes Verbales state that "China has indisputable sovereignty over the islands in the South China Sea." This assertion, while disputed by neighboring States with competing sovereignty claims over these islands, is consistent with previous official pronouncements of the People's Republic of China, dating back to at least its 1992 territorial sea law.[24] Thus, it is apparent that China intends its dashed-line maps to indicate the islands in the South China Sea over which it claims sovereignty.[25]

With respect to *maritime* claims, China's position is unclear. Therefore, this study examines below three possible interpretations of the dashed-line claim and the extent to which those interpretations are consistent with the international law of the sea.[26] These alternative interpretations are identified with reference to primary sources, notably the official statements and acts of the People's Republic of China.[27]

1. Dashed Line as a Claim to Islands

Discussion

Under this possible interpretation, the dashed line indicates only the islands over which China claims sovereignty. It is not unusual to draw lines at sea on a map as an efficient and practical means to identify a group of islands. If the map depicts only China's *land* claims, then China's *maritime* claims, under this interpretation, are those provided for in the LOS Convention. China's statement accompanying the map in its 2009 Notes Verbales could be read to support this meaning:

> 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).

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[24] Law on the Territorial Sea and the Contiguous Zone of 25 February 1992, available from DOALOS at: http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN_1992_Law.pdf. See Article 2.

[25] This study makes no attempt to examine the merits of claims by China or other States to land features in the South China Sea. The United States has repeatedly reaffirmed that it takes no position as to which country has sovereignty over the land features of the South China Sea. *See, e.g.*, Statement by the Acting U.S. Dept. of State Spokesperson, May 10, 1995 ("The United States takes no position on the legal merits of the competing claims to sovereignty over the various islands, reefs, atolls and cays in the South China Sea"). This continues to be the position of the United States, and nothing in this study should be construed as a U.S. Government position regarding the merits of competing claims of sovereignty over any island in the South China Sea, which is not a matter governed by the law of the sea.

[26] *See id.*

[27] In assessing the position of the Government of China with respect to the scope of its maritime claims in the South China Sea, this study has, by necessity, focused on the views asserted by that Government and has not attempted to attribute to China the views or analysis of non-governmental sources, such as legal or other Chinese academics.

The "sovereignty" over the waters "adjacent" to the islands could refer to the 12-nm territorial sea, which is indeed a zone of "sovereignty" under international law.[28] Likewise, the "sovereign rights and jurisdiction" could be understood to refer to the legal regimes of the EEZ and continental shelf under the LOS Convention, which uses the same terminology to describe coastal State authority within those zones.[29] The "relevant waters" and the "seabed and subsoil thereof" likewise could be understood to refer to the EEZ and continental shelf.

Support for this interpretation can be found in China's laws and statements. Article 2 of China's 1992 territorial sea law claims a 12-nm territorial sea around the "Dongsha [Pratas] Islands, Xisha [Paracel] Islands, Nansha (Spratly) Islands and other islands that belong to the People's Republic of China."[30] China's 1958 Territorial Sea Declaration makes similar claims.[31] With respect to the "relevant" areas seaward of the territorial sea, China's 1998 EEZ and continental shelf law establishes a 200-nm EEZ and describes China's continental shelf rights and jurisdiction.[32] Indeed, China's 2011 Note Verbale clarified its view that "China's Nansha Islands is fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ), and Continental Shelf," and no mention was made of any other maritime claims.[33]

Cartographic evidence and official statements also provide support for an interpretation that China's dashed line describes island claims and not distinct maritime claims. As noted above, the original 1930s dashed-line map, on which subsequent dashed-line maps were based, was titled "Map of the *Chinese Islands* in the South China Sea." That map was apparently brought into use domestically by the Republic of China in the late 1940s during a time when the international law governing maritime claims by most accounts recognized only a narrow belt of territorial sea. Indeed, China's own Declaration on its territorial sea of 1958 states:

> This provision [a 12-nm territorial sea] 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 and all other islands belonging to China which are separated from the mainland and its coastal islands *by the high seas* [emphasis added].[34]

The reference to "high seas"—maritime space under no country's jurisdiction—separating China's mainland and coastal islands from "all other islands belonging to China" indicates that in 1958 China made no claim to the entirety of the ocean space within the dashed line.

Assessment

Setting aside issues related to competing sovereignty claims over land features and unresolved maritime boundaries in the South China Sea, if the above interpretation of China's dashed-line

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[28] LOS Convention, *supra* note 14, Art. 2.
[29] LOS Convention, *supra* note 14, Arts. 56, 77, 79, 80, and 81.
[30] Territorial Sea law, *supra* note 24.
[31] Declaration on China's Territorial Sea, reprinted in *Limits in the Seas* No. 43: "Straight Baselines: People's Republic of China," U.S. Dep't of State, July 1, 1972.
[32] Exclusive Economic Zone and Continental Shelf Act, adopted, June 26, 1998, available at: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/chn_1998_eez_act.pdf. See Article 2.
[33] Note Verbale, *supra* note 4.
[34] Declaration, *supra*, note 31, para. 1, at 2.

claim is accurate, then the maritime claims provided for in China's domestic laws could generally be interpreted to be consistent with the international law of the sea, as follows:

1. *China's mainland coast and Hainan Island* are entitled to a territorial sea, contiguous zone, EEZ, and continental shelf, including in areas that project into the South China Sea.[35]
2. *Other islands*, as defined by Article 121(1) of the LOS Convention, claimed by China in the South China Sea would likewise be entitled to the above-mentioned maritime zones. Under Article 121(3) islands that constitute "rocks which cannot sustain human habitation or economic life of their own" would not be entitled to an EEZ and a continental shelf.[36]
3. *Submerged features*, namely those that are not above water at high tide, are not subject to sovereignty claims and generate no maritime zones of their own.[37] They are subject to the regime of the maritime zone in which they are found.
4. *Artificial islands, installations, and structures* likewise do not generate any territorial sea or other maritime zones.[38]

This assessment is subject to several important caveats.

First, China's sovereignty claims over islands in the South China Sea are disputed.[39] The Paracel Islands are also claimed by Vietnam and Taiwan; Scarborough Reef is also claimed by the Philippines and Taiwan; and some or all of the Spratly Islands are also claimed by Vietnam, the Philippines, Malaysia, Brunei, and Taiwan. Because China's land claims are disputed, its maritime claims described above that are based on those land claims are likewise disputed.

Second, China has not yet clarified its maritime claims related to certain geographic features in the South China Sea. For instance, China has not clarified which features in the South China Sea it considers to be "islands" (or, alternatively, submerged features) and also which, if any, "islands" it considers to be "rocks" that are not entitled to an EEZ or a continental shelf under paragraph 3 of Article 121 of the LOS Convention. With respect to Scarborough Reef and certain features in the Spratly Islands, these issues are the subject of arbitration proceedings between the Philippines and China under Annex VII of the LOS Convention.[40]

Third, Vietnam, the Philippines, Malaysia, Indonesia, and Brunei have maritime zones that extend from their mainland shores into the South China Sea. Assuming for the sake of argument

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[35] These maritime zones must be drawn from baselines that are consistent with those set forth in the LOS Convention. The United States has protested China's use of straight baselines (including on its mainland, Hainan Island, and the Paracel Islands) as excessive and not consistent with the Convention. J.A. Roach and R.W. Smith, *Excessive Maritime Claims*, 3rd ed. (Nijhoff, 2012), at 98 and note 103. *See also, Limits in the Seas* No. 117: "Straight Baselines Claim: China," U.S. Dep't. of State, July 9, 1996.
[36] LOS Convention, *supra* note 14, Art. 121. With respect to United States views, *see supra* note 13.
[37] *See supra* note 16, referring to the measurement of maritime zones from low-tide elevations.
[38] LOS Convention, *supra* note 14, Art. 60.
[39] The United States takes no position regarding these sovereignty disputes. *See supra*, note 25.
[40] *See, e.g.*, "Notification and Statement of Claim," Jan. 22, 2013, available from the Philippines Department of Foreign Affairs at: http://www.dfa.gov.ph/index.php/component/docman/doc_download/56-notification-and-statement-of-claim-on-west-philippine-sea?Itemid=546. Materials related to this case are available from the Permanent Court of Arbitration at: http://www.pca-cpa.org/showproj.asp?pag_id=1529.

that China has sovereignty over all the disputed islands in the South China Sea, maritime zones generated by South China Sea islands would overlap with those generated by the opposing coastlines of the aforementioned States.

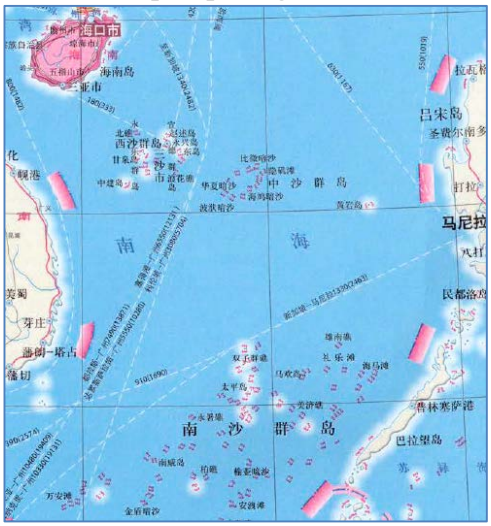
2. Dashed Line as a National Boundary

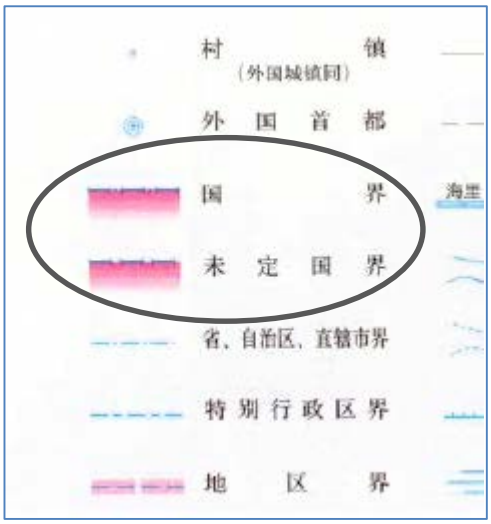
Discussion

Under this possible interpretation, the dashed line that appears on Chinese maps is intended to indicate a national boundary between China and neighboring States.

As shown on Map 7 to this study, modern Chinese maps and atlases use a boundary symbol to depict the dashed line in the South China Sea. Indeed, the symbology on Chinese maps for land boundaries is the same as the symbology used for the dashes, and the text in the legend of such maps translates the boundary symbol as either "national boundary" or "international boundary" (国界, romanized as *guojie*). These maps also use another boundary symbol, which is translated as "undefined" national or international boundary (未定国界, *weiding guojie*), but this symbology is not used for the dashed line. The placement of the dashes within open ocean space would suggest a *maritime* boundary or limit.

Map 7: Symbology on Modern Chinese Map Depicting Dashed Line





Assessment

Articles 74 and 83 of the LOS Convention provide with respect to the EEZ and continental shelf that boundary delimitation "shall be effected *by agreement* on the basis of international law . . . in order to achieve an equitable solution."[41] Because maritime boundaries under international law are created by agreement (or judicial decision) between neighboring States, one country may not unilaterally establish a maritime boundary with another country. Assuming for the sake of argument that China has sovereignty over all the disputed islands, the maritime boundaries delimiting overlapping zones would need to be negotiated with the States with opposing coastlines—Vietnam, the Philippines, Malaysia, Indonesia, and Brunei. The dashes also lack other important hallmarks of a maritime boundary, such as a published list of geographic coordinates and a continuous, unbroken line that separates the maritime space of two countries.

[41] Emphasis added. See discussion under Basis of Analysis, *supra*.

To the extent the dashed line indicates China's unilateral position on the proper location of a maritime boundary with its neighbors, such a position would run counter to State practice and international jurisprudence on maritime boundary delimitation. In determining the position of maritime boundaries, States and international courts and tribunals typically accord very small islands far from a mainland coast like those in the South China Sea equal or less weight than opposing coastlines that are long and continuous.[42] (Map 4 above shows selected locations where the dashes are considerably closer to the coasts of other States than to the South China Sea islands claimed by China.)

If the dashed line is intended to depict a unilateral maritime boundary claim, this interpretation also does not address the related question of what kind of rights or jurisdiction China is asserting for itself within the line. The dashed line, to be consistent with international law, cannot represent a limit on China's territorial sea (and, therefore, its sovereignty), as the dashes are located beyond the 12-nm maximum limit of the territorial sea of Chinese-claimed land features. Moreover, dashes 2, 3, and 8 are not only relatively close to the mainland shores of other States, all or part of those dashes are also beyond 200 nm from any Chinese-claimed land feature. The dashed line therefore cannot represent the seaward limit of China's EEZ consistent with Article 57 of the LOS Convention, which states that the breadth of the EEZ "shall not extend beyond 200 nautical miles" from coastal baselines.[43]

3. Dashed Line as a Historic Claim

Discussion

Under this possible interpretation, the dashed line that appears on Chinese maps is intended to indicate a so-called "historic" claim. A historic claim might be one of sovereignty over the maritime space ("historic waters" or "historic title") or, alternatively, some lesser set of rights ("historic rights") to the maritime space.

Some Chinese government statements and acts could be read to support a version of this historic claim interpretation.[44] Most notable is China's 1998 EEZ and continental shelf law, which states

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[42] *See, e.g., Continental Shelf (Libya /Malta),* 1985 I.C.J. 13, para. 73 (June 3) (considering both the "general geographical context in which the islands of Malta appear as a relatively small feature" and "the great disparity in the lengths of the relevant coasts of the two Parties."). *See also Nicaragua v. Colombia*, *supra* note 17. For a discussion of State practice and jurisprudence, *see, e.g.*, V. Prescott and G. Triggs, "Islands and Rocks and their Role in Maritime Delimitation," *International Maritime Boundaries*, 3245-3280 (ASIL, 2005).

[43] LOS Convention, *supra* note 14, Art. 76, paragraph 1, provides that continental shelf limits may extend beyond 200 nm. Considering the geomorphology of the seabed of the South China Sea and the absence of an assertion by China of entitlement to continental shelf beyond 200 nm in the South China Sea, this study assumes that China does not consider that continental shelf generated by Chinese-claimed islands within the SCS extends beyond 200 nm.

[44] Considering that the dashed-line maps pre-date the People's Republic of China, the views of Taiwan are also of interest. In 1993, Taiwan officially approved "Policy Guidelines for the South China Sea," which state the view that the waters within the dashed line are its "historic water limit" within which Taiwan "possesses all rights and interests." *Cited in* K-H. Wang, "The ROC's Maritime Claims and Practices with Special Reference to the South China Sea," Ocean Dev't & Int'l L., 41:237-252 (2010). Subsequent maritime legislation enacted by Taiwan and subsequent public statements, however, suggests that this view may no longer be officially held by Taiwan. See *id*. and *Limits in the Seas* No. 127: "Taiwan's Maritime Claims," U.S. Dep't. of State, Nov. 15, 2005.

without further elaboration that "[t]he provisions of this Act shall not affect the *historical rights* of the People's Republic of China."[45] China's 2011 Note Verbale states that China's position regarding its claims of "sovereignty and related rights and jurisdiction" in the South China Sea is "supported by abundant *historical* and legal evidence" (emphasis added). Although not attributable to the government of China, some Chinese institutions and commentators have considered that the dashed-line maps depict China's historic title or historic rights in the South China Sea.[46]

Furthermore, some of the Chinese government's statements and actions relating to the South China Sea are inconsistent with the LOS Convention. While such statements and actions do not amount to express assertions of a historic claim, they may indicate that China considers that it has an alternative basis—such as historic title or historic rights—for its maritime claims in the South China Sea.

For instance, the Chinese government has stated that China exercises "sovereignty" in certain areas, or even the entirety, of the South China Sea. China's Ministry of Foreign Affairs (MFA) spokesperson has referred to Second Thomas Shoal as under China's "sovereignty,"[47] despite its location beyond the limits of any territorial sea. More expansively, an MFA spokesperson has stated: "I would like to reaffirm that China enjoys *indisputable sovereignty over the South China Sea* and the island[s]."[48] Similarly, Chinese naval vessels reportedly conduct periodic oath-taking ceremonies at James Shoal to affirm "sovereignty" over this bank. Although James Shoal is a submerged feature far from any Chinese-claimed island, China apparently regards this feature as its "southernmost territory."[49] It is not clear that such references to Chinese "sovereignty" should be taken literally, but if so, their legal basis could not be the LOS Convention because a coastal State's "sovereignty" under the Convention cannot extend beyond the 12-nm limit of the territorial sea. Accordingly, it is possible that China considers the legal basis for its claimed maritime sovereignty in the South China Sea to be one of historic waters.

In 2012 the China National Offshore Oil Corporation (CNOOC) introduced lease blocks opposite the central coast of Vietnam that purport to be in "waters under [the] jurisdiction of the People's Republic of China."[50] However, as illustrated in Map 8 to this study, quite apart from questions

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[45] Act, *supra* note 32. Article 14 (emphasis added).

[46] *See, e.g.*, Xiamen University South China Sea Institute, "New map boosts China's claim in sea," *South China Sea Bulletin*, Vol. 2, No. 8, Aug. 1, 2014, at 1-2; Z. Gao and B.B. Jia, "The Nine-Dash Line in the South China Sea: History, Status, and Implications," Am. J. Int'l L. 107:98-124, 124 (2013); and Keyuan, *infra* notes 58 and 65.

[47] MFA Spokesperson Qin Gang's Regular Press Conference, Mar. 10, 2014, available at: http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1136288.shtml. "It is known to all that China has *sovereignty* over the Nansha Islands and their surrounding waters, including the *Ren'ai Reef*" (emphases added). Ren'ai is the Chinese name for Second Thomas Shoal.

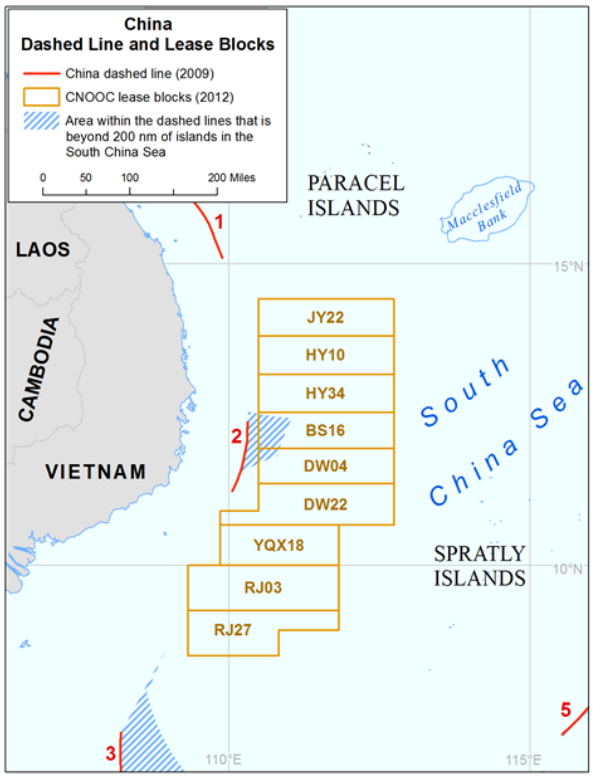
[48] "China warns on South China Sea oil," *Economic Times*, Sept. 15, 2011 (emphasis added).

[49] "Chinese ships patrol southernmost territory," *Xinhua*, Jan. 26, 2014. *See also*, B. Hayton, "How a non-existent island became China's southernmost territory," *South China Morning Post*, Feb. 9, 2013 and "Loss of James Shoal could wipe out state's EEZ," *Borneo Post*, Feb. 5, 2014. These ceremonies reportedly involve dropping steel markers or engraved stones over the side of the ship and onto the submerged bank. *Id*.

[50] CNOOC, "Notification of Part of Open Blocks in Waters under Jurisdiction of the People's Republic of China Available for Foreign Cooperation in the Year of 2012," available at: http://en.cnooc.com.cn/data/html/news/2012-06-22/english/322127.html. CNOOC is "a state-owned company operating directly under the State-owned Assets Supervision and Administration Commission of the State Council of the People's Republic of China." *Id*.

under Article 121 and questions of maritime boundary delimitation, portions of two of these blocks (BS16, DW04) extend without explanation to waters that are beyond 200 nm from any Chinese-claimed island (blue hatch). This is an assertion of maritime jurisdiction that exceeds what is provided for under the LOS Convention.

Map 8



The domestic laws of China also suggest that China asserts a legal basis for its maritime claims that is separate from, and additional to, the LOS Convention. For instance, China's 1999 Law on Marine Environmental Protection describes its scope of application as covering "internal waters, territorial sea, contiguous zone, exclusive economic zone, continental shelf of the People's Republic of China *and other sea areas under the jurisdiction of the People's Republic of China*."[51] Since coastal State jurisdiction under the LOS Convention is limited to the aforementioned maritime zones, it is unclear what "other sea areas" are contemplated, and perhaps this phrase refers to areas where China considers that it has historic claims.

The assessment below examines whether there is a basis under international law for a Chinese claim to historic waters or historic rights to the waters within the dashed line.

Assessment Part 1 – Has China Made a Historic Claim?

As a threshold matter, as the preceding discussion suggests, China has not actually made a cognizable claim to either "historic waters" or "historic rights" to the waters of the South China Sea within the dashed line.

A State making a historic claim must give international notoriety to such a claim.[52] As stated in a recent comprehensive study on historic waters, "*formal notification* of such [a historic] claim would seem normally to be necessary for it to attain sufficient notoriety; so that, at the very least, other States may have the opportunity to deny any acquiescence with the claim by protest etc."[53]

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[51] Law on Marine Environmental Protection, 1999. Articles 2 and 39. Similar references to "other sea areas under the jurisdiction of China" can be found in the Surveying and Mapping Law of the People's Republic of China, 2002 (Articles 2, 7, 32, 41, and 51) and the Regulations of the People's Republic of China on the Management of Foreign-Related Marine Scientific Research, 1996 (Articles 2, 4, 9 and 10).

[52] *See e.g.*, UN Study, *supra* note 20, at paras. 125-130 (concluding that there are "strong reasons for holding that notoriety of the exercise of sovereignty . . . is required . . . .") and para. 96.

[53] C.R. Symmons, *Historic Waters in the Law of the Sea: A Modern Re-Appraisal* (Nijhoff, 2008), at 145. Emphasis in original.

With respect to the South China Sea, there appears to be no Chinese law, declaration, proclamation, or other official statement describing and putting the international community on notice of a historic claim to the waters within the dashed line. The reference to "historic rights" in China's 1998 EEZ and continental shelf law is, as a legal matter, a "savings clause"; the statement makes no claim in itself, and the law contains no reference to the dashed-line map.[54] Although certain Chinese laws and regulations refer to "other sea areas under the jurisdiction of the People's Republic of China," there is no indication of the nature, basis, or geographic location of such jurisdiction, nor do those laws refer to "historic" claims of any kind. While China's 2011 Note Verbale states that "historical and legal evidence" support China's "sovereignty and related rights and jurisdiction," that Note, like the 1998 EEZ and continental shelf law, is not a statement of a claim itself. Furthermore, the "historical ... evidence" could refer to China's sovereignty claim to the islands, and not the waters.[55]

The mere publication by China of the dashed-line map in 1947 could not have constituted official notification of a maritime claim. China's "Map of South China Sea *Islands*" made no suggestion of a maritime claim, and its domestic publication in the Chinese language was not an act of sufficient international notoriety to have properly alerted the international community to such a claim, even if it had asserted one.[56] The various maps published by China also lack the precision, clarity, and consistency that could convey the nature and scope of a maritime claim. The International Court of Justice's (ICJ) "statement of a principle" in the *Frontier Dispute* between Burkina Faso and Mali describes the legal force of maps as follows:

> Whether in frontier delimitations or international territorial conflicts, maps merely constitute information which varies in accuracy from case to case; of themselves, and by virtue solely of their existence, they cannot constitute a territorial title, that is, a document endowed by international law with intrinsic legal force for the purpose of establishing territorial rights. Of course, in some cases maps may acquire such legal force, but where this is so the legal force does not arise solely from their intrinsic merits: it is because such maps fall into the category of physical expressions of the will of the State or States concerned. This is the case, for example, when maps are annexed to an official text of which they form an integral part. Except in this clearly defined case, maps are only extrinsic evidence of varying reliability or unreliability which may be used, along with other evidence of a circumstantial kind, to establish or reconstitute the real facts.[57]

China's 1958 Territorial Sea Declaration also contradicts the view that China has made a claim of either "historic waters" or "historic rights" within the dashed line. That declaration refers to the "high seas" separating China's mainland and coastal islands from "all other islands belonging to China." The notion of "high seas" as juridically distinct from any kind of national waters and not subject to national appropriation or exclusive use was an established rule of international law

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[54] Act, *supra* note 32, Art. 14 ("The provisions of this Act *shall not affect* the historical rights…." (emphasis added)).

[55] Indeed, historical evidence is relevant under the international law applicable to sovereignty disputes over land, and this body of law is separate and distinct from the law of the sea. *See, e.g.*, *Nicaragua v. Colombia*, *supra* note 17, paras. 66-84 (applying concepts of "critical date" and "*effectivités*" to the sovereignty dispute over islands).

[56] Emphasis added. *See also*, E. Franckx and M. Benatar, "Dots and Lines in the South China Sea: Insights from the Law of Map Evidence," Asian J. of Int'l L., 2 (2012), 89-118 (commenting on the dashed line that "the map is of doubtful probative value in the light of various factors fleshed out in international jurisprudence regarding map evidence").

[57] *Frontier Dispute (Burkina Faso/Republic of Mali)*, 1986 I.C.J. 554 (Dec. 22), para. 54. The Court's most recent assessment of the evidentiary value of maps is *Nicaragua v. Colombia*, *supra* note 17, paras. 96-102.

for centuries before China's 1958 Declaration. Further, to the extent the 1958 Declaration makes a historic claim, it is to a different body of water—Bo Hai (Pohai), a gulf in northeastern China.[58] Had China considered in 1958 that the waters within the dashed line published on its maps constituted China's historic waters, it would presumably have referenced this in its 1958 Declaration along with its claim regarding Bo Hai. Instead, the contents of that Declaration, particularly the reference to "high seas," indicate that China did not consider the waters within the dashed line to have a historic character.

The international community has largely regarded China's dashed-line map in a manner consistent with this view. Indeed, a comprehensive study on historic waters published in 2008 did not even discuss China's dashed line,[59] nor has the dashed line been identified in U.S. Government compendiums of historic waters claims in the public domain.[60] Formal international protest of the dashed line began only after China's issuance in 2009 of its Notes Verbales described earlier in this study.[61]

Assessment Part 2 – Would a Historic Claim have Validity?

China has not advanced a cognizable historic claim of either sovereignty over the maritime space within the dashed line ("historic waters" or "historic title") or a lesser set of rights ("historic rights") in that maritime space. If China nevertheless does consider that the dashed line appearing on its maps indicates a historic claim, such a claim would be contrary to international law.

Arguments in favor of China's historic claims often note that the LOS Convention recognizes such claims.[62] A Chinese claim of historic waters or historic rights within the dashed-line would not be recognized by the Convention, however. The text and drafting history of the Convention make clear that, apart from a narrow category of near-shore "'historic' bays" (Article 10) and "historic title" in the context of territorial sea boundary delimitation (Article 15), the modern international law of the sea does not recognize history as the basis for maritime jurisdiction. A Chinese historic claim in the South China Sea would encompass areas distant from Chinese-claimed land features, and would therefore implicate the Convention's provisions relating to the EEZ, continental shelf, and possibly high seas. Unlike Articles 10 and 15, the Convention's

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[58] Fu Chu, *Concerning the Question of Our Country's Territorial Sea* (in Chinese), Peking, 1959, translation provided in J.A. Cohen and H. Chiu, *People's China and International Law: A Documentary Study*, Princeton Univ. Press (1974), 470-79, 483-84 (stating "if bays or gulfs have important interest with respect to the national defense and economy of the coastal states and for a long time the coastal states have repeatedly exercised jurisdiction over the bays or gulf, they may be regarded as historic bays or gulf. . . . The Gulf of Pohai is . . . a historic bay of our country.") Keyuan refers to the Fu Chu document as "an official explanatory pamphlet published in China in order to justify China's Declaration on the Territorial Sea." Z. Keyuan, "Historic Rights in International Law and in China's Practice," Ocean Dev't & Int'l L., 32:149-168, at 156 (2001).

[59] Symmons, *supra* note 53.

[60] *See, e.g.*, *Limits in the Seas* No. 112, *supra* note 19, at 8-21. The Special Master in *U.S. v. Alaska* (545 U.S. 75) considered "the absence of publication [on lists] has significance in international disagreements about historic waters claims." No. 128 Original: *Report of the Special Master on Six Motions for Partial Summary Judgment and One Motion for Confirmation of a Disclaimer of Title*, Mar. 2004, at 111.

[61] Protests, *supra* note 3 and accompanying text.

[62] *See, e.g.*, Xiamen University South China Sea Institute, *supra* note 46 (describing China's maps as "high-lighting [China's] historic title. After all, reference to historic titles is part of the UNCLOS.");

provisions relating to these maritime zones do not contain any exceptions for historic claims in derogation of the sovereign rights and jurisdiction of a coastal State or the freedoms of all States.[63]

Because the Convention's provisions relating to the EEZ, continental shelf, and high seas do not contain exceptions for historic claims, the Convention's provisions prevail over any assertion of historic claims made in those areas. The 1962 study on historic waters commissioned by the Conference that adopted the 1958 Geneva Conventions reached this same conclusion with respect to interpretation of the 1958 Convention on the Territorial Sea and Contiguous Zone.[64] The 1982 LOS Convention continued this approach by retaining provisions related to historic bays and titles that are substantively identical to those contained in the 1958 Convention. Had the drafters of the LOS Convention intended to permit historic claims of one State to override the expressly stated rights of other States, the Convention would have reflected this intention in its text. Instead, as with the 1958 Convention, the LOS Convention limits the relevance of historic claims to bays and territorial sea delimitation.

Accordingly, with regard to possible Chinese "historic rights" in the South China Sea,[65] any such rights would therefore need to conform to the Convention's provisions that deal with the relevant activities. Rules of navigation are set out in the Convention, and these rules reflect traditional navigational uses of the sea. Rules related to oil and gas development are also set forth in the Convention, without exception for historic rights in any context. Also, rules for fishing are set out in the Convention, including limited rules pertaining to historic uses that do not provide a basis for sovereignty, sovereign rights, or jurisdiction.[66] As the *Gulf of Maine* Chamber of the International Court of Justice noted in its 1984 judgment, the advent of exclusive jurisdiction of a coastal State over fisheries within 200 nm of its coast overrides the prior usage and rights of other States in that area.[67]

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[63] In the parts of the Convention covering maritime zones, the Convention contains some provisions relating to historic or traditional uses of the sea. Article 62(3) requires coastal States to take into account "the need to minimize economic dislocation in States whose nationals have *habitually* fished" (emphasis added) in the EEZ. Article 51 also requires archipelagic States, within their archipelagic waters, to recognize "*traditional* fishing rights and other legitimate activities" (emphasis added) of immediately adjacent neighboring States. Such provisions might provide a basis for one coastal State to seek access to the fisheries of another coastal State based on prior usage. They do not, however, provide a basis for sovereignty, sovereign rights, or jurisdiction.

[64] UN Study, *supra* note 20, paras 72-76, discussing "'historic waters' as an exception to the rules laid down in the general [1958] convention," including how to interpret the 1958 Convention "in cases where the historic title has *not* been expressly reserved in the Convention." The Study states that, "if the provisions of an article should be found to conflict with an historic title to a maritime area, and no clause is included in the article safeguarding the historic title, *the provisions of the article must prevail* as between the parties to the Convention. This seems to follow *a contrario* from the fact that articles 7 and 12 [of the 1958 Convention] have express clauses reserving historic rights; *articles without such a clause must be considered not to admit an exception in favour of such rights*" (emphases added). *Id.*, para. 75.

[65] *See, e.g.*, references to historic rights by Z.Gao and B.B. Jia, *supra* note 46, at 124 (stating that the dashed line "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....") and Keyuan, *supra* note 58, at 162 (stating that the "most convincing [historic] rights that China could enjoy are fishing rights.").

[66] *See supra*, notes 63 and 64 and accompanying text.

[67] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, 1984 I.C.J. 246 (Oct. 12), paras. 233, 235. With respect to the "invocation of historic rights, though that expression has not been used [by the United States]…" the Chamber stated that "to the extent that [areas of U.S. historical fishing

It has also been argued that "historic title" and "historic rights" are "matters not regulated by this Convention [and thus] continue to be governed by the rules and principles of general international law" outside of the LOS Convention.[68] This position is not supported by international law and misunderstands the comprehensive scope of the LOS Convention. The Convention sets forth the legal regimes for all parts of the ocean. As discussed above, matters such as navigation, hydrocarbon development, and fishing are in fact "regulated by th[e] Convention." Therefore, a State may not derogate from the Convention's provisions on such matters by claiming historic waters or historic rights under "general international law." Although one may need to refer to "general international law" to identify the meaning of particular terms in the Convention—such as references to historic bays and historic title in Articles 10 and 15, respectively—the Convention does not permit a State to resort to "general international law" as an alternative basis for maritime jurisdiction that conflicts with the Convention's express provisions related to maritime zones.

Even assuming that a Chinese historic claim in the South China Sea were governed by "general international law" rather than the Convention, the claim would still need to be justified under such law. In this regard, a Chinese historic waters claim in the South China Sea would not pass any element of the three-part legal test described above under the Basis of Analysis:

(1) *No open, notorious, and effective exercise of authority over the South China Sea*. China did not communicate the nature of its claim within the dashed line during the period when China might purport to have established a historic claim; indeed, the nature of Chinese authority claimed within the dashed line still has not been clarified. Likewise, China has not established its claims with geographical consistency and precision. As such, it cannot satisfy the "open" or "notorious" requirements for a valid claim to historic waters.

(2) *No continuous exercise of authority in the South China Sea*. There has long been widespread usage of the South China Sea by other claimants in a manner that would not be consistent with Chinese sovereignty or exclusive jurisdiction. Many islands and other features in the South China Sea are occupied not just by China, but by Malaysia, the Philippines, Vietnam, and Taiwan, and the mainland maritime claims of Malaysia, the Philippines, Brunei, Indonesia, and Vietnam also project into the South China Sea. These countries have all undertaken activities, such as fishing and hydrocarbon exploration, in

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predominance] had become part of the exclusive fishery zone of the neighbouring State, no reliance could any longer be placed on that predominance. Clearly, *whatever preferential situation the United States may previously have enjoyed, this cannot constitute in itself a valid ground for its now claiming the incorporation into its own exclusive fishery zone of any area which, in law, has become part of Canada's*" (emphasis added). *Id*.

[68] LOS Convention, *supra* note 14, preamble ("*Affirming* that matters not regulated by this Convention continue to be governed by the rules and principles of general international law"). *See, e.g.*, Gao and Jia, *supra* note 46, at 123 (stating that the LOS Convention "…was never intended, even at the time of its adoption, to exhaust international law. On the contrary, it has provided ample room for customary law to develop and to fill in the gaps that the Convention itself was unable to fill in 1982 [which is confirmed] in the UNCLOS preamble, which states that "matters not regulated by this Convention continue to be governed by the rules and principles of general international law.")

their claimed maritime space that are not consistent with "effective" or "continuous exercise" of Chinese sovereignty or exclusive rights over that space.

(3) *No acquiescence by foreign States in China's exercise of authority in the South China Sea*. No State has recognized the validity of a historic claim by China to the area within the dashed line. Any alleged tacit acquiescence by States can be refuted by the lack of meaningful notoriety of any historic claim by China, discussed above. A claimant State therefore cannot rely on nonpublic or materially ambiguous claims as the foundation for acquiescence, but must instead establish its claims openly and publicly, and with sufficient clarity, so that other States may have actual knowledge of the nature and scope of those claims.[69] In the case of the dashed line, upon the first official communication of a dashed-line map to the international community in 2009, several immediately affected countries formally and publicly protested.[70] The practice of the United States is also notable with respect to the lack of acquiescence. Although the U.S. Government is active in protesting historic claims around the world that it deems excessive, the United States has not protested the dashed line on these grounds because it does not believe that such a claim has been made by China. Rather, the United States has requested that the Government of China clarify its claims.[71]

The fact that China's claims predate the LOS Convention does not provide a basis under the Convention or international law for derogating from the LOS Convention.[72] The Convention's preamble states that it is intended to "settle … all issues relating to the law of the sea" and establish a legal order that promotes stability and peaceful uses of the seas.[73] Its object and purpose is to set forth a comprehensive, predictable, and clear legal regime describing the rights and obligations of States with respect to the sea. Permitting States to derogate from the provisions of the Convention because their claims pre-date its adoption is contrary to and would undermine this object and purpose. Just as a State that claimed sovereignty over a 200 nm territorial sea in the 1950s cannot lawfully maintain such a claim today, neither China nor any other State could sustain a claim to historic waters or historic rights in areas distant from its shores. The Convention does not permit such claims, and unless the Convention textually recognizes historic claims—such as Article 10 concerning "bays"—the Convention's provisions prevail over any such historic claims. The advent of the LOS Convention, both as treaty law and as reflecting customary international law, requires States to conform their maritime claims to its provisions.

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[69] Symmons, *supra* note 53, at 245 ("In order to receive the required acceptance by other nations, the coastal State's acts of sovereignty must be known to foreign nations."). See also, UN Study, *supra* notes 20 and 52.
[70] Protests, *supra* note 3 and accompanying text.
[71] *See*, *e.g.*, Testimony of Scot Marciel, Dep. Asst. Sec'y of State, Subcomm. on East Asian and Pacific Affairs of the Senate Comm. on Foreign Relations, July 15, 2009, *Digest of U.S. Practice in International Law 2009*, at 460-63 ("It might be helpful to all parties if China provided greater clarity on the substance of its claims") and Testimony of Daniel Russel, Asst. Sec'y of State, Asia and the Pacific Subcomm. of the House Foreign Affairs Comm., Feb. 5, 2014 ("China could highlight its respect for international law by clarifying or adjusting its claim ...").
[72] Such a notion is reflected in, *e.g.*, Gao and Jia, *supra* note 46, at 123 (stating that "In the case of the South China Sea as enclosed by the nine-dash line, China's historic title and rights, which preceded the advent of UNCLOS by many years, have a continuing role to play.").
[73] LOS Convention, *supra* note 14, preamble.

Conclusion

China has not clarified its maritime claims associated with the dashed-line maps in a manner consistent with international law. China's laws, declarations, official acts, and official statements present conflicting evidence regarding the nature and scope of China's claims. The available evidence suggests at least three different interpretations that China might intend, including that the dashes are (1) lines within which China claims sovereignty over the islands, along with the maritime zones those islands would generate under the LOS Convention; (2) national boundary lines; or (3) the limits of so-called historic maritime claims of varying types.

As to the first interpretation, if the dashes on Chinese maps are intended to indicate only the islands over which China claims sovereignty then, to be consistent with the law of the sea, China's maritime claims within the dashed line would be those set forth in the LOS Convention, namely a territorial sea, contiguous zone, EEZ, and continental shelf, drawn in accordance with the LOS Convention from China's mainland coast and land features that meet the definition of an "island" under Article 121 of the Convention.[74] Because sovereignty over South China Sea islands is disputed, the maritime zones associated with these islands would also be disputed. In addition, even if China possessed sovereignty of the islands, any maritime zones generated by those islands in accordance with Article 121 would be subject to maritime boundary delimitation with neighboring States.

As to the second interpretation, if the dashes on Chinese maps are intended to indicate national boundary lines, then those lines would not have a proper legal basis under the law of the sea. Under international law, maritime boundaries are created by agreement between neighboring States; one country may not unilaterally establish a maritime boundary with another country. Further, such a boundary would not be consistent with State practice and international jurisprudence, which have not accorded very small isolated islands like those in the South China Sea more weight in determining the position of a maritime boundary than opposing coastlines that are long and continuous.[75] Moreover, dashes 2, 3, and 8 that appear on China's 2009 map are not only relatively close to the mainland shores of other States, but all or part of them are also beyond 200 nm from any Chinese-claimed land feature.

Finally, if the dashes on Chinese maps are intended to indicate the area in which China claims so-called "historic waters" or "historic rights" to waters that are exclusive to China, such claims are not within the narrow category of historic claims recognized in Articles 10 and 15 of the LOS Convention. The South China Sea is a large semi-enclosed sea in which numerous coastal States have entitlements to EEZ and continental shelf, consistent with the LOS Convention; the law of the sea does not permit those entitlements to be overridden by another State's maritime claims that are based on "history." To the contrary, a major purpose and accomplishment of the Convention is to bring clarity and uniformity to the maritime zones to which coastal States are entitled. In addition, even if the legal test for historic waters were applicable, the dashed-line claim would fail each element of that test.

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[74] LOS Convention, *supra* note 14, Article 121. Any limitations imposed by paragraph 3 of Article 121 regarding "rocks" would also apply.

[75] *See Libya/Malta*, *supra* note 42, *Nicaragua v. Colombia*, *supra* note 17, and Prescott and Triggs, *supra* note 42.

For these reasons, unless China clarifies that the dashed-line claim reflects only a claim to islands within that line and any maritime zones that are generated from those land features in accordance with the international law of the sea, as reflected in the LOS Convention, its dashed-line claim does not accord with the international law of the sea.