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China's Nine Dotted Lines in the South China Sea: The 2011 Exchange of Diplomatic Notes Between the Philippines and China

NGUYEN-DANG THANG

Faculty of Law
University of Cambridge
Cambridge, England
and
Centre for South China Sea Studies
Diplomatic Academy of Vietnam
Hanoi, Vietnam

NGUYEN HONG THAO

Faculty of Law
Vietnam National University
Hanoi, Vietnam

Important events relating to the sovereignty dispute over the Spratly Islands have arisen by fits and starts since 2009, marking the start of a new phase in the legal battle over territorial and maritime claims in the South China Sea. While the exchange of legal arguments between the parties has gradually laid bare their maritime claims, much still remains shrouded in uncertainty. Among the obscure claims wanting clarification is China's infamous nine-dotted-line map, which in 2011 elicited a response and counterresponse between the Philippines and China. This article examines the maritime and territorial claims of the Philippines and China as revealed in the recent discord over the nine-dotted-line map.

Keywords China, the Philippines, South China Sea

Introduction

The South China Sea (SCS) is notorious for the protracted sovereignty dispute over the Spratly Islands—a group of hundreds of features lying at the heart of the SCS and claimed

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Address correspondence to Nguyen Hong Thao, Associate Professor (National Title), Faculty of Law, Vietnam National University, Hanoi. E-mail: nghongthao2003@yahoo.com

in whole or in part by five states; namely, Brunei, China (including Taiwan),[1] Malaysia, the Philippines, and Vietnam. The intractability of this sovereignty dispute at times overshadows the more important issue and arguably its raison d'être; that is, the entitlement to maritime zones in the SCS.[2] The latter issue has resurfaced in the controversy over the joint and unilateral submissions by Malaysia and Vietnam regarding their extended continental shelf claims to the Commission on the Limits of the Continental Shelf (CLCS)[3] in May 2009.[4] The diplomatic correspondence relating to these submissions has revealed in detail the conflicting maritime claims of the five claimant states in the Spratly Islands dispute.[5] Thus, 2009 can be considered as marking a new phase in the legal battle of the Spratly Islands dispute. Notable among these conflicting maritime claims is the infamous nine-dotted-line claim of China, which has been described as "one of the most extraordinary assertions of jurisdiction anywhere."[6] The nine dotted lines that had hitherto existed in the twilight on China's domestic maps[7] were officially introduced to the international community for the first time in China's Notes Verbale protesting the Malaysia-Vietnam submissions to the CLCS.[8]

China's nine-dotted-line claim has elicited responses from claimant[9] as well as nonclaimant states.[10] Given China's silence on the meaning of the nine dotted lines,[11] it is not surprising that states in their responses have interpreted the nine dotted lines differently. Vietnam considers the nine dotted lines as a sovereignty claim of China over "the islands and the adjacent waters" in the South China Sea.[12] Understandably Vietnam, embroiled in other sovereignty disputes with China,[13] refuted such a claim as having "no legal, historical or factual basis, and therefore [being] null and void."[14] Indonesia, a nonclaimant state in the Spratly Islands dispute, has cautiously preempted the possibility that the nine dotted lines depict the maritime zones of the disputed small features in the SCS.[15] Indonesia commented that China's claim "clearly lacks international legal basis and is tantamount to upset the UNCLOS 1982"[16] because "those remote or very small features [. . .] do not deserve exclusive economic zone or continental shelf of their own."[17]

On 5 April 2011, the Philippines lodged a Note Verbale registering its position on China's nine dotted lines.[18] China felt obliged to respond and delivered a Note Verbale 10 days later.[19] This article is primarily focused on an assessment of the 2011 Notes Verbale of the Philippines and China.

The Situation Prior to the 2011 Sino-Philippine Exchange of Notes

The history of the SCS has been recounted well elsewhere[20] and it is beyond the limit of this article to discuss in detail the SCS-related claims of both China and the Philippines.[21] It suffices here to summarize their claims to give context to the discussion that follows.

China

China claims sovereignty over the islands in the SCS that include, inter alia, the Spratly Islands[22] on the basis of discovery by Chinese fishermen and historic usage.[23] According to Chinese literature, China made some efforts to define the geographical scope of the islands in the SCS, including the Spratly Islands in the 1930s by ascertaining their coordinates and toponyms.[24] It was not until the late 1940s[25] that the nine dotted lines appeared on a map of islands in the SCS published by China (then the Republic of China).

Lying to the north of the SCS China cannot, in accordance with the United Nations Convention on the Law of the Sea (LOS Convention), project a maritime claim from its

mainland to the center of the SCS where the Spratly Islands are located.[26] However, if the Spratly Islands were under Chinese sovereignty, China would be entitled to claim large maritime zones, the extent of which would be dependent on the classification of these features as rocks or islands under Article 121 of the LOS Convention.[27] In this connection it should be noted that China's 1998 Exclusive Economic Zone and Continental Shelf Act defines its continental shelf as comprising "the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory,"[28] which includes the Nansha (Spratly) Islands according to the definition of the "territorial land" for the purpose of drawing baselines under the 1992 Law on the Territorial Sea and the Contiguous Zone.[29] Thus, it is arguable that China may consider the features in the Spratly Islands as meeting the criteria of "islands" under Article 121 and, therefore, entitled to an exclusive economic zone (EEZ) and continental shelf.

In addition to maritime claims made in accordance with the law of the sea, China also hints at a claim of historic rights in the SCS. This is inferred from the wording of Article 14 of China's 1998 EEZ and Continental Shelf Act, which stipulates that "[t]he provisions of [the] Act shall not affect the historical rights of the People's Republic of China."[30] However, neither the geographical scope[31] nor the legal connotation[32] of this claim has been defined.

Besides domestic legislation, China's maritime claims could also be understood by examining its diplomatic correspondence; in particular are China's 2009 Notes Verbale with respect to the Malaysia-Vietnam CLCS submissions, each of which contains in the attachment the nine-dotted-line map.[33] It has been interpreted that the map denotes the relevant waters and their seabed and subsoil in the SCS over which China claims to enjoy sovereign rights and jurisdiction.[34] On that basis, one commentator, based on his assessment of China's more recent position that small insular features are not capable of generating EEZ and continental shelf,[35] tentatively suggests that the nine dotted lines involve China's historic water claim[36] and that Chinese appear to rely on historical title to claim maritime zones in the SCS rather than on the generative power of the Spratly Islands.[37]

The Philippines

The Philippines claims most of the Spratly Islands,[38] which it calls the Kalayaan Island Group (KIG).[39] Its early contact with the Spratly Islands was of private nature and it was not until 1971 that the Philippines officially made its sovereignty claim to the Spratly Islands.[40] Philippine military forces began to occupy features in the Spratly Islands during roughly the same period and expanded their presence there until the end of the 1970s.[41] The first legislation specifically declaring the Philippine claim to the KIG is Presidential Decree No. 1596 of 11 June 1978, in which the KIG is defined by geographic coordinates.[42] According to this decree, the Philippines not only claims sovereignty over the insular features within the KIG but also over the seabed, subsoil, continental margin, and space of the KIG.[43] The Preamble of the decree supplies the arguments for Philippine sovereignty over the KIG which include, inter alia, a claim based on geographical proximity and contiguity.

Being an archipelagic state, the Philippines is permitted to draw archipelagic baselines from which other maritime zones are measured.[44] While the Philippines was a staunch advocate for the archipelagic state concept,[45] it was slow in adopting archipelagic baselines. It was not until February 2009 that the Philippines' Archipelagic Baselines Act was adopted by the Philippine parliament.[46] It should be noted that, during the deliberations of this act, there were proposals from the Philippine House of Representatives to include the KIG, or part thereof, in the Philippines' archipelagic baseline system.[47] Though technically it is possible to include part of the Spratly Islands within the archipelagic baselines system of

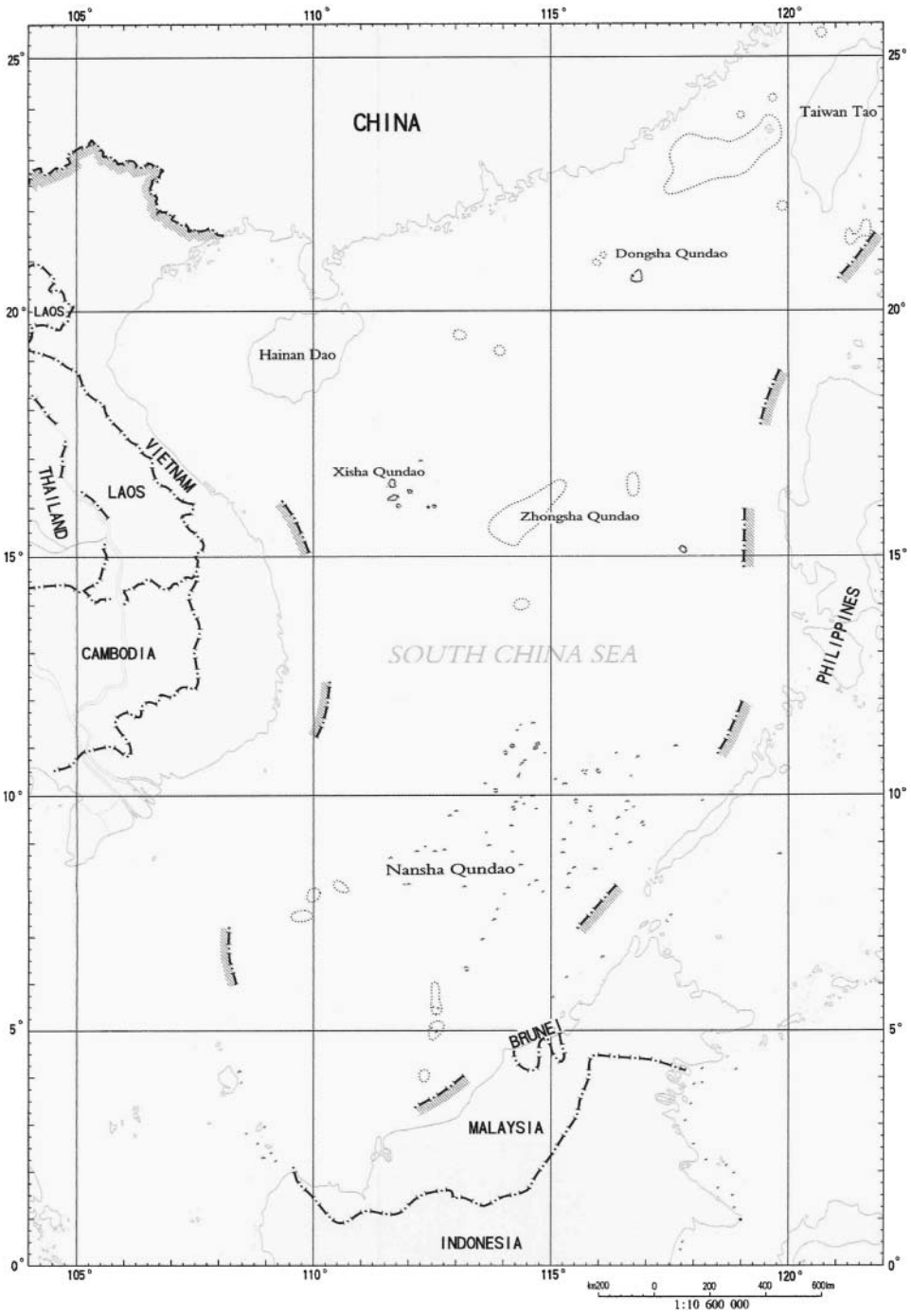

Figure 1. Nine-dotted-line map attached to China's 2009 Notes Verbale. *Source:* Web site of the Commission on the Limits of the Continental Shelf.

the Philippines while still meeting the criteria of the LOS Convention,[48] the proposals of the House of Representatives were considered controversial and provocative.[49] The proposals were dropped in favor of the Senate's version according to which the KIG and another contested feature, the Scarborough Shoal, were put in a separate regime. The baselines for the KIG are to "be determined as 'Regime of Islands' under the Republic of the Philippines consistent with Article 121 of the [LOS Convention]."[50] As such, the features within the KIG will be treated separately for the purposes of drawing the baselines and not all the features are necessarily entitled to an EEZ and a continental shelf. But the Baselines Act stops short of clarifying which features, if any, in the KIG are considered as not being classified as a rock according to Article 121(3) and hence not entitled to an EEZ and a continental shelf. It appears that the Philippines has modified its original position on the KIG, abandoning the claim of sovereignty over the entire KIG under the 1978 Kalayaan Decree, which was arguably excessive.[51]

On the other hand, a different interpretation may be inferred from the Philippines' reactions to the Malaysia-Vietnam CLCS submissions.[52] One of the reasons for the Philippine protest is the view that the extended continental shelf areas claimed in these submissions overlap with those claimed by the Philippines.[53] It has been argued, albeit with caution, that the Philippines is also making a continental shelf claim from its mainland coast rather than from the features in the KIG.[54]

Before looking at the 2011 Notes Verbale of China and the Philippines, it should be noted that between China and the Philippines inter se there exists a bilateral sovereignty dispute over the Scarborough Reef that lies further to the north of the SCS and includes several rocks.[55] China considers this feature as part of Zhongsha Qundao[56] and gives broadly the same historical and legal arguments for its sovereignty claim over this feature as that in the case of the Spratly Islands.[57] Likewise, for the Philippines, the claim to the Scarborough Reef has similar bases as the claim to the Kalayaan, which includes the proximity argument,[58] though the claims were officially made at different times.[59]

Parsing the 2011 Notes Verbale of the Philippines and China

The Philippines' Note Verbale

As noted above, China's Notes Verbale to which the Philippines responded in 2011 were reactions on the partial and joint submission for the extended continental shelf in the SCS by Vietnam and Malaysia. The Philippines was fully aware of this fact but still felt obliged to respond not to the substance of the reactions as such but to their legal basis, apparently due to the contention that China's claims are "widely known by the international community."[60] The Philippines thus challenged the justification for China's 2009 Notes Verbale on three points; namely, "the sovereignty of the islands," their "the adjacent waters" in the SCS, and the claim of "relevant waters as well as the seabed and subsoil thereof" as indicated in the map attached to the two Chinese Notes Verbale.[61] These points were refuted by the Philippines respectively in three separate sections.

The first section of the Philippines' Note Verbale has two sentences under the heading: "On the Islands and Other Geological Features," which reiterates the Philippines' claim to the KIG. While the first sentence states that the KIG is "an integral part of the Philippines," the second sentence somewhat qualifies this statement. The second sentence clarifies that the Philippines "has sovereignty and jurisdiction over the geological features in the KIG." No definition of geological features is provided, however. But since these features are subject to the "sovereignty and jurisdiction" of the Philippines, it is arguable that an examination of

the latter term, especially through the lenses of the Filipinos, may aid in better understanding the Philippines' claim to the KIG.

At first blush, the use of the conjunction "and" seems to imply that "sovereignty" and "jurisdiction" are elements of the same concept, denoting the Philippines' legal authority over the geological features in the KIG. But if it is so, it appears to be somewhat tautological since sovereignty and jurisdiction are, in international legal parlance, used to describe different aspects of state competence. To put it more specifically, jurisdiction is always subsumed within the concept of sovereignty.[62] According to a leading treatise on international law, the former is "the normal complement of state rights, the typical case of legal competence" while the latter refers to "particular rights, or accumulation of rights *quantitatively less than the norm*."[63] Therefore, the phrase "sovereignty and jurisdiction" should be understood in a cumulative sense (i.e., denoting two different concepts). Such an interpretation is corroborated by an examination of the Philippine legislation. The same phraseology appears in section 3 of the Philippine 2009 Archipelagic Baselines Act, which "affirms that the Republic of the Philippines has dominion, sovereignty *and* jurisdiction over all portions of the national territory as defined in the Constitution [. . .]."[64] The notion of national territory defined in the Philippine constitution[65] embraces not only areas under full sovereignty, but also areas of less than sovereignty (i.e., the insular shelves).[66] Such a distinction between two types of national territory is emphasized by the disjunctive use of the two terms "sovereignty" and "jurisdiction."[67]

Having established the meaning of the term "sovereignty and jurisdiction," it is possible to come back to the term "geological features." As noted above, geological features should be understood as those features that are subject to the sovereignty or jurisdiction of the Philippines. It has been well established that only high-tide elevations (i.e., islands and rocks)[68] are susceptible to appropriation[69] and, hence, can be placed under the sovereignty of a state. It is now also settled in the jurisprudence of the International Court of Justice that low-tide elevations (i.e., naturally formed areas of land surrounded by and above water at low tide but submerged at high tide)[70] are different from islands and are not subject to the rules and principles of territorial acquisition.[71] The same rule arguably applies to permanently submerged features, including the seabed and subsoil.[72] On the other hand, these submerged features (i.e., low-tide elevations and permanently submerged features) may still fall under the competence of the coastal state not because it has title over them as such, but because it has competence over the entire area where the features are located. In particular, under the international law of the sea, low-tide elevations and permanently submerged features that lie within a coastal state's territorial seas are subject to the sovereignty of that state by virtue of its sovereignty over the territorial sea.[73] By the same token, these submerged features, if lying on the continental shelf of a coastal state, are considered as subject to the jurisdiction of the coastal state by virtue of its sovereign rights in relation to the seabed and subsoil thereof.[74] It follows that the spatial sphere of the Philippines' sovereignty and jurisdiction as mentioned in its 2011 Note Verbale is interpreted broadly to cover not only high-tide elevations and its territorial seas, but also submerged features and seabed and subsoil beyond the territorial seas.[75] Thus, it appears the term "geological features" is used in a generic sense, denoting not only high-tide elevations but also submerged features, be it at high tide or permanently, within the KIG.

Having said that, it appears that the Philippines has rolled back its more excessive sovereignty claim over the entire KIG put forward under the 1978 Presidential Decree.[76] The new claim is consistent with the Philippines' view that the regime of islands is applicable to the Kalayaan under the Archipelagic Baselines Act.[77] This claim is arguably more defensible under contemporary international law since it is now clear that it is not possible

for a state to have sovereignty over low-tide and submerged elevations beyond its territorial seas.

A broad definition of the term "geological feature" based on a cumulative understanding of the term "sovereignty and jurisdiction" is, as will be shown below, further corroborated in examining the second section of the Philippines' 2011 Note Verbale.

In the second section, "On the 'Water Adjacent' to the Islands and Other Geological Features," the Philippines posits two interrelated arguments. In the first paragraph of this section, the Philippines argues that "under the Roman notion of *dominium maris* and the international law principle of '*la terre domine la mer*' which states that the land dominates the sea,"[78] it "necessarily exercises sovereignty and jurisdiction over the waters around or adjacent to *each relevant geological feature* in the KIG as provided for under" the LOS Convention (emphasis added). While it is not difficult to understand such an argument, which constitutes a logical extension of the claim in the first section, it is noteworthy that the term "geological features" is qualified by the phrase "each relevant," which calls for some observations. First, the determiner "each" suggests that the Philippines treats the KIG features separately rather than as an integral whole. To put it more specifically, the maritime zones generated by the KIG features will be measured not from the baselines connecting the outermost features of the KIG, but from the baselines of each individual feature. This also explains why there exists not only waters around but also waters adjacent to the geological features–an image of possible overlap of the features' entitlement. Secondly, the adjective "relevant" implies that not all "geological features" in the KIG are entitled to have maritime zones. A distinction between "geological features" that can generate maritime zones and those that cannot corroborates the interpretation of the term "geological features" as a generic one. In particular, the "relevant" geological features which have "waters around or adjacent to" are high-tide elevations (i.e., islands and rocks) while submerged features, either at low tide or permanently, become irrelevant.

The above understanding of the "relevant geological features" as high-tide elevations is confirmed by the second paragraph in this section, which states "the extent of the waters that are 'adjacent' to the relevant geological features are definite and determinable under UNCLOS, specifically under Article 121 (Regime of Islands) of the said Convention." Although this argument does not say clearly how definite the waters are (an issue discussed below), it at least indicates that the regime of islands which contains a definition of islands and rocks is applicable to "the relevant geological features" and determines the extent of their adjacent maritime jurisdictional zones.

The second section of the Philippines 2011 Note Verbale, on its face, particularly the second argument, represents a reasonable application of the LOS Convention to the Spratly Islands. The argument, however, is not novel since it bears a close resemblance to the content of the Philippines' Archipelagic Baselines Act, which put the KIG under the regime of islands.[79] On the other hand, it is submitted that the second argument is not a model of clarity. A statement of principle on the applicability of Article 121 of the LOS Convention, which is itself notoriously difficult to interpret,[80] contains little helpful guidance as to which "relevant geological features" of the KIG can be classified as a rock under Article 121(3) and hence not entitled to an EEZ or continental shelf. Be that as it may, it is highly probable that given the absence of an express statement to the contrary all of Article 121, and not just its paragraph 3, should be considered as applicable to determine the adjacent waters to the relevant features within the KIG. In other words, the adjacent waters are not limited to the territorial seas, which are subject to the Philippines' sovereignty, but may also cover the EEZs where the Philippines can exercise only functional jurisdiction. Such a broad understanding of the term "adjacent waters" also

ensures the consistent use of the term "sovereignty and jurisdiction" in a generic sense as in the first section. More importantly, the various bills from the House of Representatives of the Philippines purporting to incorporate the KIG features into the archipelagic baselines system demonstrate that a dramatic rollback from the previous claim to the KIG features is not something that happens overnight.

Given the fact that the Philippines does not specify the extent of the waters that are "adjacent" to the relevant geological features, leaving them "determinable" under the LOS Convention,[81] one may wonder whether these waters are identical to or different from the waters within China's nine dotted lines. To answer this question, it is necessary to move to the third section of the Philippines' 2011 Note Verbale.

The third section entitled "On the Other Relevant Waters, Seabed and Subsoil" addresses China's infamous nine dotted lines.[82] Given the absence of an official Chinese explanation of the nine dotted lines, it was necessary for the Philippines to decide upon the character of the nine dotted lines. Between two alternatives of the meaning of the nine dotted lines (i.e., demonstrating either China's "relevant waters as well as the seabed and subsoil thereof" or China's sovereignty claim over the islands in the SCS), the Philippines chose the former and, in sentence one, rebutted it on the basis of the international law of the sea. It is interesting to note that the Philippines' rebuttal concerns only the waters "outside of the [. . .] relevant geographical features in the KIG and their 'adjacent waters."' There is an internal logic here. Since the Philippines already has, as it believes, sovereignty and jurisdiction over the relevant geographical features in the KIG and their adjacent waters, there is no question of China's claim to these features and area.

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

> With respect to these areas, sovereignty and jurisdiction or sovereign rights, as the case may be, necessarily appertain or belong to the appropriate coastal or archipelagic state—the Philippines—to which these bodies of waters as well as seabed and subsoil are appurtenant, either in the nature of the Territorial Sea, or 200 M Exclusive Economic Zone (EEZ) or Continental Shelf (CS) in accordance with Articles 3, 4, 55, 57, and 76 of UNCLOS.[83]

It is evident that the Philippines continued to use the principle of "land dominates the sea" to challenge China's nine dotted lines as a claim to maritime zones. This principle arguably provides the strongest ground to challenge the validity of the nine dotted lines because China sits to the north of the SCS. As already explained, China has not pronounced upon the legal basis of its nine dotted lines, thus leaving open the possibility that China claims only historic rights within the lines. If so, the Philippines' argument based singularly on the law of the sea will be inadequate.

The Philippines' argument may also be subject to two further criticisms. First, the nine dotted lines do not relate to the Spratly Islands area alone, but cover a large part of the SCS including waters the title to which quite clearly belongs exclusively to China. Secondly, since the geographical scope of the KIG is not the same as that of the Spratly Islands, the Philippines cannot disregard those features outside the KIG that are not claimed by the Philippines but have the waters of their own outside the "adjacent waters" relating to the KIG. Notable among the features outside the KIG is Spratly Island proper—the fourth largest feature of the Spratly Islands.[84] This feature arguably also generates maritime zones under "sovereignty and jurisdiction" in the same way as the features within the KIG. In other words, at least Spratly Island proper may have an EEZ and a continental shelf of its

own.[85] It follows that the waters outside the relevant geographical features in the KIG and their "adjacent waters"' do not necessarily belong to the coastal or archipelagic state only as the Philippines argues; they may belong to the state having title to the features outside the KIG.

It turns out the Philippines is also not that clear regarding its claim over the "adjacent waters" of the KIG features.[86] Had it defined with exactitude its claim (i.e., the extent of its "sovereignty and jurisdiction" in the SCS), more rigorous arguments against the nine dotted lines could have been articulated. In this connection, it should be noted that the term "sovereignty and jurisdiction" in the third section of the 2011 Note Verbale is juxtaposed with term "sovereign rights," which necessarily assumes jurisdiction, as two alternatives. It follows that the former term can only mean sovereignty to make sense in this section and hence differs from the term "sovereignty and jurisdiction" used to refer to "adjacent waters" in the two preceding sections. Given the unqualified use of all the three terms: sovereignty, sovereign rights, and jurisdiction in the Philippines' Note Verbale, there must be either inconsistency or tautology. An inconsistency in the use of those terminologies, however, should not surprise anyone. As observed by an eminent international lawyer, the terms sovereignty and jurisdiction are "not employed very consistently in legal resources such as works of authority or the opinions of law officers, or by statement, who naturally place political meanings in the foreground."[87] Furthermore, it is only by accepting the terms as inconsistent that the third section of the Philippines' Note Verbale makes sense. As argued elsewhere, if the Spratly Islands only have adjacent 12-nautical-mile territorial seas, there would be a pocket of high seas in the middle of the SCS, which would not belong to either a coastal state or archipelagic state as the Philippine argues.[88]

China's 2011 Note Verbale

In responding to the Philippines' three-section Note Verbale, China's Note Verbale[89] also contains three main paragraphs besides the courtesy phrase and complementary close.

The first paragraph addresses the Philippine Note Verbale as a whole expressing the view in the third sentence that its contents are "totally unacceptable." In the first paragraph China reiterated its pro forma position as usually used in diplomatic correspondence such as the 2009 Notes Verbale protesting the Malaysia- Vietnam CLCS submissions.[90] The 2011 Note Verbale states that "China has indisputable sovereignty over the islands in the SCS and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof."[91] But in contrast to the two previous notes, this time China did not mention the publicity of its claims. Instead, China laid down the basis for its claims in the South China Sea as:

> China's sovereignty and *related rights* and jurisdiction in the South China Sea are supported by *abundant historical and legal evidence*.[92]

On the face of it, the above sentence is reminiscent of China's well-known historical arguments for its sovereignty over the Spratly Islands. Closely read, however, the sentence conveys some subtle nuances. First, it should be noted that the term "related rights" is deliberately used rather than the term "sovereign rights" as in the preceding sentence.[93] But nowhere in the Note Verbale is the term "related rights" defined. Since sovereignty is omnipotent, both the "related rights" and "jurisdiction" would be redundant unless they relate to a geographical area different from China's territory. In other words, the conjunctive "and" is used here cumulatively just like in the Philippines' Note Verbale. It follows that

the "abundant historical and legal evidence" is not only related to sovereignty, but possibly to "related rights" and "jurisdiction" as well. If so, the "related rights" seem to be "historic rights." It is an open possibility that China is not relying on the law of the sea, but making use of the exceptional doctrine of historic rights to defend its claims in the SCS.[94] If such an interpretation is correct, then there is some difference between the legal bases invoked by the Philippines and China to respectively reject and defend the nine-dotted-line claim.

After reaffirming its claims in the SCS, the second paragraph of China's 2011 Note Verbale is a rebuttal of the Philippines' claim of sovereignty over the KIG which is, as China points out, "in fact part of China's Nansha Islands." China recounts the historical facts to refute the Philippine sovereignty over the KIG. China argues that the original international treaties and Philippine domestic legislation prior to 1970s, which defined the Philippine territory, did not include any claim to the Spratlys and that the Philippines only "started to invade and occupy some islands and reefs of China's Nansha Islands and made relevant territorial claims" after the 1970s. China then concludes in sentence four that the Philippines' "occupation of some islands and reefs of China's Nansha Islands as wll [sic] as other related acts constitutes infringement upon China's territorial sovereignty." These arguments echo China's official positions as stated with respect to the SCS island sovereignty disputes, both in the wider territorial dispute with the Philippines, which includes the Scarborough Reef,[95] and in the context of the Spratly Islands dispute in which Malaysia and Vietnam are also named and blamed.

The second part of the second paragraph appears to be a tit-for-tat reply involving technical jargon to rebut the Philippine arguments. China uses the Latin maxim *ex injuria jus non oritur*[96] to argue that the Philippines "can in no way invoke [. . .] illegal occupation to support its territorial claims." Interestingly, China also invokes the same principle of *la terre domine la mer*[97] used by the Philippines to argue that coastal states' EEZ and continental shelf claims "shall not infringe upon the territorial sovereignty of other states." The use of these maxims has the advantage that China may give to them more than one interpretation. These maxims can be read as rebutting the Philippine claim of sovereignty and jurisdiction over the waters around or adjacent to the relevant features in the KIG because the Philippines does not have sovereignty over the KIG, a counterargument against section two of the Philippine 2011 Note Verbale. Thus, if the *injuria* China criticizes were the Philippines' title over the KIG, the *jus* would relate to the maritime claims. Likewise, if China had sovereignty over the Nansha Islands it would necessarily have title to their relevant maritime zones, which the Philippines could not encroach upon. On the other hand, these two statements can also be considered as focusing solely on rebutting the Philippine claim to sovereignty over the KIG. The latter interpretation is plausible given the fact that China has previously rejected the Philippine claim to the KIG on the basis of proximity as being contrary to the principle that land dominates the sea.[98]

It appears to be logical that, after a rebuttal of the Philippine sovereignty over the KIG, China's *Note Verbale* would continue with a statement on maritime areas relating to the Nansha Islands. It is also expected that China would clarify the nine dotted lines as a response to the critique in section three of the Philippines' Note Verbale. It is with these considerations that the three sentences of the third paragraph in China's Note Verbale are analyzed. The first two sentences of this paragraph read:

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

For the uninitiated, these sentences are presumed to clarify the meaning of the nine dotted lines; that is, to define the geographical scope of China's claim in the SCS in general and in the Nansha Islands in particular. However, a retrospective look at the history of China's territorial claims in the SCS and of the publication of the nine dotted lines suggests otherwise. It is to be recalled that it was not until the late 1940s that China first published the infamous dotted lines in the SCS.[99] The 1930s was, as mentioned above, actually the period when China began to project its claim to the SCS by naming and defining islands in the SCS.[100] It is thus unwise to infer from the above two sentences any meaning regarding the status of the nine dotted lines.

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

> In addition, under the relevant provisions of the 1982 United Nations Convention on the Law of the Sea, as well as the Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone (1992) and the Law on the Exclusive Economic Zone and Continental Shelf of the People's Republic of China (1998), China's Nansha Islands is fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ) and Continental Shelf.[101] (emphasis in original)

This sentence is helpful in the sense that it states publicly for the first time the Chinese official position on the status of the Nansha Islands.[102] Specifically, in China's view, the Nansha Islands meet the requirements of Article 121 to have their own EEZ and continental shelf. The insightful comment of one learned scholar with regard to China's less pronounced previous position on the status of the Spratly Islands resonates here: "it would be unwise to dismiss totally the insular features of the Spratlys as being the basis of ocean claims to an adjacent EEZ and continental shelf beyond 200 NM, particularly in the case of China."[103]

The evident purpose of the third sentence is to reject the Philippines' contention that the area outside the Philippine maritime areas of the KIG is to be delimited between the coastal states concerned, which do not include China. In the face of the ambiguous language in the Philippines' Note Verbale regarding the application of Article 121 to the KIG features, China preempts any suggestion that the features of the Spratly Islands are entitled only to a territorial sea of 12 nautical miles. In so doing, China also gives an indirect response to the Indonesia's 2010 Note Verbale.[104]

This being said, China's claim regarding the nine dotted lines remains elusive. China's statement as to the status of the Spratly Islands gives rise to a number of questions. First, what would be the baselines from which the respective maritime jurisdiction zones of the Spratly Islands are to be measured? Given the fact that straight baselines were drawn around the Paracel Islands by connecting the outermost points,[105] the possibility of adopting a similar system in the case of the Spratly Islands should not be ruled out. If so, China's version of the maritime jurisdiction zones of the Spratly Islands will be different from that of the Philippines, which treats the features of the Spratly Islands separately even though it agrees with China as to the application of Article 121 of the LOS Convention to the SCS.

Given China's continued silence as to the status of the nine dotted lines, the more important question is: What is the relationship between the lines and the maritime zones generated by the Spratly Islands? Or to frame it differently, should the nine dotted lines be the expression of the extent of these maritime zones? It has been argued by a number of Chinese scholars that the nine dotted lines are the equidistance line between the outermost features of the Spratly Islands and the relevant coasts around the SCS.[106] According to this interpretation, the answer to the latter question will be in the positive. But such an

interpretation can be rebutted as a matter of fact and principle. It is visually clear the lines do not coincide with the equidistance lines drawn between the outermost features of the Spratly Islands and their opposite coasts.[107] As a matter of principle, the Chinese position on the delimitation of overlapping EEZs and continental shelves is that delimitation must be based on equitable principles rather than equidistance principle.[108] Thus, if the nine dotted lines are the extent of the Spratly Islands' EEZ and continental shelf, they must be drawn on a different basis, which has yet to be made known.[109]

On the other hand, one should not eliminate entirely the possibility that the nine dotted lines have a special status, different from the maritime zone entitlements of the Spratly Islands. It is recalled that China's 1998 EEZ and Continental Shelf Law provides that the regimes of the EEZ and continental shelf provided for do not affect China's "historical rights."[110] An inference of historic rights in China's 2011 Note Verbale is also possible based on the undefined term "related rights" that are supported by historic evidence. Thus, if the nine dotted lines delimit the extent of China's historical rights in the SCS,[111] they are unaffected by the existence of the EEZ and continental shelf of the Spratly Islands. The existence of such historical rights appear to be necessary given the fact that the Spratly Islands will have limited effect in comparison with the relevant coastal states should delimitation of the overlapping maritime zones be conducted.[112] In other words, China's maintenance of historical rights might be a fallback option in its bargain with neighboring states in the SCS over the right to control marine resources.

Conclusion

The above analysis shows that the 2011 exchange of diplomatic notes between the Philippines and China does clarify their maritime claims in the South China Sea to a certain extent. But there is still significant uncertainty over critical issues.

The Philippines through its 2011 Note Verbale reaffirms the application of Article 121 of the LOS Convention to the KIG. While this position has already been stated in the Philippines Archipelagic Baselines Act, the significance of the 2011 Note Verbale cannot be overestimated. The Archipelagic Baselines Act, as domestic legislation, is a discretionary act and subject to the vagaries of the Philippine legislature. The Philippine Note Verbale, by contrast, arguably constitutes an international undertaking by the Philippines at least vis-à-vis China.[113] It is now unlikely that the Philippines will revert to including the KIG features within its archipelagic baseline system. By reaffirming the position in the Archipelagic Baselines Act, the Note Verbale indicates that the Philippines is retreating from its sovereignty claim over the whole KIG and modifying its claim into one more consistent with international law and the LOS Convention. In this sense, the 2011 Note Verbale is a welcome move by the Philippines in the context of the SCS disputes. The Philippines does not lose much, however. Insofar as the question of sovereignty over islands in the SCS is to gain control over marine resources, title to maritime jurisdictional zones is enough to protect the Philippines' interest.[114] On the other hand, the 2011 Note Verbale sheds little light on the Philippine position regarding the more controversial issue (i.e., the classification of the features that are part of the Spratly Islands under Article 121 of the LOS Convention). Thus, the exact geographical scope of the "adjacent waters" claimed by the Philippines, arguably an issue of greater importance in the context of the SCS dispute, remains undefined.

As to China's 2011 Note Verbale, its purpose was to reject the Philippines' claim to the KIG. However, it does clarify China's position as to the status of the features of the Spratly Islands—an issue that hitherto remained one of speculation. China is now the only claimant

state making clear its position as to how the Spratly Islands should be classified under Article 121 of the LOS Convention. On the other hand, the status of the nine dotted lines, the subject matter of the recent controversies in the SCS, remains shrouded in obscurity.

There have been now three different interpretations—by Indonesia, the Philippines, and Vietnam—regarding the possible meanings of the nine dotted lines. China, however, neither approves nor disapproves any interpretation. Nor has it offered any explanation as to the legal basis of the nine dotted lines. In this connection, it is noted that the fundamental principle in international litigation is that "a party which advances a point of fact in support of its claim must establish that fact."[115] China, insofar as it states that its position on its sovereignty and sovereign rights in the SCS "is widely known by the international community,"[116] has the burden of proof. And the first step for China in discharging this burden is to clarify the exact meaning of the nine dotted lines. Only then will it be possible to engage in a meaningful discussion of the legal bases of these lines.

Appendix 1

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

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

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

On the Islands and other Geological Features

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

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

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

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

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

THIRD, since the adjacent waters of the relevant geological features are definite and subject to legal and technical measurement, the claim as well by the People's Republic of China on the *"relevant waters as well as the seabed and subsoil thereof"* (as reflected in

the so-called 9-dash line map attached to Notes Verbales CML/17/2009 dated 7 May 2009 and CML/18/2009 dated 7 May 2009) outside of the aforementioned relevant geological features in the KIG and their "adjacent waters" would have no basis under international law, specifically UNCLOS. With respect to these areas, sovereignty and jurisdiction or sovereign rights, as the case may be, necessarily appertain or belong to the appropriate coastal or archipelagic state—the Philippines—to which these bodies of waters as well as seabed and subsoil are appurtenant, either in the nature of the Territorial Sea, or 200 M Exclusive Economic Zone (EEZ) or Continental Shelf (CS) in accordance with Articles 3, 4, 55, 57, and 76 of UNCLOS.

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

New York, 05 April 2011

Appendix 2

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

New York, 14 April 2011

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

China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof. China's sovereignty and related rights and jurisdiction in the South China Sea are supported by abundant historical and legal evidence. The contents of the *Note Verbale* No.000228 of the Republic of Philippines are totally unacceptable to the Chinese government.

The so-called Kalayaan Island Group (KIG) claimed by the Republic of Philippines is in fact part of China's Nansha Islands. In a series of international treaties which define the limits of the territory of the Republic of Philippines and the domestic legislation of the Republic of Philippines prior to 1970, the Republic of Philippines had never made any claims to Nansha Islands or any of its components. Since 1970s, the Republic of Philippines started to invade and occupy some islands and reefs of China's Nansha Islands and made relevant territorial claims, to which China objects strongly. The Republic of Philippines' occupation of some islands and reefs of China's Nansha Islands as well as other related act constitutes infringement upon China's territorial sovereignty. Under the legal doctrine of "*ex injuria jus non oritur*", the Republic of Philippines can in no way invoke such illegal occupation to support its territorial claims. Furthermore, under the legal principle of "*la terre domine la mer*", coastal states' Exclusive Economic Zone (EEZ) and Continental Shelf claims shall not infringe upon the territorial sovereignty of other states.

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

China's Nansha Islands is fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ) and Continental Shelf.

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

Notes

1. Since the People's Republic of China (China) and the Republic of China (Taiwan) maintain broadly similar claims on the South China Sea (SCS) issues, the discussion in this article focuses on the positions of the former and highlight, where necessary, the views of the latter. For comparison of the claims, see Yann-Huei Song and Zou Keyuan, "Maritime Legislation of Mainland China and Taiwan: Developments, Comparison, Implications, and Potential Challenges for the United States," *Ocean Development and International Law* 31 (2000): 303–345. For a recent study on the Taiwanese claim, see Kuan-Hsiung Wang, "The ROC's Maritime Claims and Practices with Special Reference to the South China Sea," *Ocean Development and International Law* 41 (2010): 237–252.

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

3. The Commission on the Limits of the Continental Shelf (CLCS) was established pursuant to the United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, 1833 *U.N.T.S.* 396 (LOS Convention), see the CLCS Web site at www.un.org/Depts/los/clcs_new/clcs_home.htm.

Annex II, Article 4, provides that a coastal state is to make its submission with respect to the outer limit of its continental shelf beyond 200 nautical miles to the CLCS no later than 10 years after the entry into force of the Convention in relation to that state. Given the difficulty that developing countries face in meeting this original timeline, the states parties to the LOS Convention set 13 May 1999, the date of the CLCS's adoption of the Scientific and Technical Guidelines, as the starting date for the calculation of the 10-year time limit. See "Decision regarding the date of commencement of the ten-year period for making submissions to the Commission on the Limits of the Continental Shelf set out in article 4 of Annex II to the United Nations Convention on the Law of the Sea," SPLOS/72, 29 May 2001, paragraph a, available at the Web site of the UN Division for Ocean Affairs and the Law of the Sea (DOALOS), www.un.org/Depts/los/index.htm. For background on the issue, see "Issues with respect to article 4 of Annex II to the Convention (ten-year time limit for submissions)," at the DOALOS Web site.

4. Malaysia-Vietnam, "Executive Summary: Joint Submission to the Commission," 6 May 2009; and Vietnam, "Executive Summary: Submission to the Commission Concerning the North Area," 7 May 2009, available at the CLCS Web site, supra note 3.

5. For a comprehensive assessment of the situation in the SCS after 2009, see Ted L. McDorman, "The South China Sea After 2009: Clarity of Claims and Enhanced Prospects for Regional Cooperation?" *Ocean Yearbook* (2010): 507–535.

6. Clive Schofield, and Ian Townsend-Gault, "Brokering Cooperation Amidst Competing Maritime Claims: Preventative Diplomacy in the Gulf of Thailand and South China Sea," in *The Future of Ocean Regime-Building: Essays in Tribute to Douglas M Johnston*, eds. A. E. Chircop, T. L. McDorman, and S. Rolston (Leiden: Martinus Nijhoff, 2009), 643–670, 652.

7. See, generally, Li Jinming, and Li Dexia. "The Dotted Line on the Chinese Map of the South China Sea: A Note," *Ocean Development and International Law* 34 (2003): 287–95.

8. See China, Note Verbale No. CML/17/2009, 7 May 2009 relating to the Malaysia-Vietnam Joint Submission to the Commission; and Note Verbale No. CML/18/2009, 7 May 2009, relating to the Vietnam Submission to the Commission concerning the Northern Area (China's 2009 Notes Verbale), available at the CLCS Web site, supra note 3.

9. Malaysia, though stating that its submission to the Commission constituted a legitimate undertaking under the LOS Convention, refrained from addressing directly China's nine-dotted-line claim and stated only that the submission was without prejudice to, inter alia, "the position [sic] of States which are parties to a land or maritime dispute in consonance with Paragraph (5) of Annex I to the [CLCS's] Rules of Procedure." Malaysia, Note Verbale No. HA 24/09, 20 May 2009, available at the CLCS Web site, supra note 3.

For Vietnam's reaction, see Note Verbale No. 86/HC-2009, 8 May 2009, available at the CLCS Web site, supra note 3.

10. Indonesia, Note Verbale No. 480/POL-703/VII/10, 8 July 2010, available at the CLCS Web site, supra note 3. See also "Remarks by Secretary Hilary Clinton at the 17th ARF Meeting in Hanoi on 23 July 2010," where she stated that "consistent with customary international law, legitimate claims to maritime space in the South China Sea should be derived solely from legitimate claims to land features," available at www.state.gov/secretary/rm/2010/07/145095.htm (accessed 27 May 2011).

11. No official position has been revealed as to the meaning and legal basis of the lines. Reportedly Taiwan is of the view that the nine dotted lines delineate historic waters. See Nien-Tsu Alfred Hu, "South China Sea: Troubled Waters or a Sea of Opportunity?" *Ocean Development and International Law* 41 (2010): 203–213, 207. Chinese scholars have been active in their discussion of the lines, but their arguments are deeply divided on both the validity and meaning of the lines. Even among those who think that the lines are defensible under international law, opinions differ and change over time. See, for example, Gao Zhiguo, "The South China Sea: From Conflict to Cooperation," *Ocean Development and International Law* 25 (1994): 345–359, and Kuan-Hsiung Wang, supra note 1 (for the view that the dotted lines serve to allocate island sovereignty rather than to delimit maritime boundary); Zou Keyuan, "The Chinese Traditional Maritime Boundary Line in the South China Sea and Its Legal Consequences for the Resolution of the Dispute over the Spratly Islands," *International Journal of Marine and Coastal Law* 14 (1999): 27–55 (for the view that the nine dotted lines define islands under China's sovereignty and their adjacent waters that are not yet defined); Zou Keyuan, "Historic Rights in International Law and in China's Practice," *Ocean Development and International Law* 32 (2001): 149–168 (for the view that the maps depict the scope of Chinese historic rights, which do not amount to full sovereignty but only "tempered sovereignty" in the SCS); Ji Guoxing, "Outer Continental Shelf Claims in the South China Sea: A New Challenge to China's U-Shaped Line," in *International Workshop on Non-traditional Security Cooperation in the South China Sea* (Haikou, 2010) (supporting the "tempered sovereignty" view); Peter Kien-Hong Yu, "The Chinese (Broken) U-shaped Line in the South China Sea: Points, Lines, and Zones," *Contemporary Southeast Asia: A Journal of International and Strategic Affairs* 25 (2003): 405–430 (for the view that the line delimit China's historic waters); and Li Jinming and Li Dexia, supra note 7 (for the view that the lines are a traditional maritime boundary with dual functions to define China's sovereignty over the Paracel and Spratly Islands and to delimit according to the median line principle the maritime zones of China and the coastal states concerned). See also Zou Keyuan, "The Chinese Traditional Maritime Boundary Line in the South China Sea and Its Legal Consequences for the Resolution of the Dispute over the Spratly Islands," *International Journal of Marine and Coastal Law* 14 (1999): 27–55, and Zou Keyuan, "South China Sea Studies in China: Achievements, Constraints and Prospects," *Singapore Year Book of International Law* 11 (2007): 88–92 (for a useful summary of conflicting views in the Chinese literature on this issue).

12. See Vietnam's 2009 Note Verbale, supra note 9. Vietnam, like Malaysia, also states that its submissions constituted legitimate undertakings in implementation of the obligations of the states parties to the LOS Convention.

13. Besides the Spratly Islands dispute, there is a bilateral sovereignty dispute over the Paracel Islands that lie to the north of the SCS. For an account of island disputes in bilateral relations between China and Vietnam, see Monique Chemillier-Gendreau, *Sovereignty over the Paracel and Spratly Islands* (The Hague: Kluwer Law International, 2000).

14. Vietnam's 2009 Note Verbale, supra note 9.

15. Indonesia's 2010 Note Verbale, supra note 10, para. 2. In acknowledging that "there is no clear explanation as to the legal basis, the method of drawing, and the status of those separated

dotted-lines," Indonesia formulated its proposition in a tentative manner, using "it seems that" as the introductory phrase. Such prudence is necessary because Indonesia, a third party in the SCS island disputes, could not challenge the nine dotted lines were they only to denote China's sovereignty over islands, a view long held by Indonesia. See H. Djalal, "South China Sea Island Disputes," *Raffles Bulletin of Zoology Supplement* 8 (2000): 9–21.

16. Indonesia's 2010 Note Verbale, supra note 10, para. 4.

17. *Ibid.*, para. 3.

18. Philippines, Note Verbale No. 000228, 5 April 2011, available at the CLCS Web site, supra note 3. The Philippine Note Verbale is reproduced in Appendix 1 of this article.

19. China, Note Verbale No. CML/8/2011, 14 April 2011, available at the CLCS Web site, supra note 3. The Chinese Note Verbale is reproduced in Appendix 2 of this article. The text used for the discussion is the English translation. Where necessary, the corresponding Chinese terms will be highlighted.

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

21. A useful summary and review of claims to the Spratly Islands is in Daniel J. Dzurek, "The Spratlys Island Dispute: Who's on First?" *Maritime Briefings* 2 (1996): 1; Mark J. Valencia, Jon M. Van Dyke, and Noel A. Ludwig, *Sharing the Resources of the South China Sea* (The Hague: Martinus Nijhoff, 1997), chap. 3; Ralf Emmers, *Geopolitics and Maritime Territorial Disputes in East Asia* (London: Routledge, 2009), chap. 4; and McDorman, supra note 5, at 512–521.

22. Other islands claimed by China include the Paracel Islands (also claimed by Taiwan and Vietnam), the Pratas Islands (controlled by Taiwan), and Scaborough Reef (also claimed by the Philippines). See Jeanette Greenfield, *China's Practice in the Law of the Sea* (Oxford: Clarendon Press, 1992), 149–59. Regarding the Scarborough Reef, see infra note 55 and accompanying text.

23. The official position is stated in China, "Historical Evidence to Support China's Sovereignty over Nansha Islands," 17 November 2000, available at www.fmprc.gov.cn/eng/topics/3754/t19231.htm (accessed 14 February 2009).

24. See *ibid.*; and Li Jinming and Li Dexia, supra note 7, at 289.

25. For an account of the history of the nine dotted lines, see Zou Keyuan, "The Chinese Traditional Maritime Boundary," supra note 11, 32–34; and Li Jinming and Li Dexia, supra note 7. The early maps depicted eleven lines, but the two lines in the Gulf of Tonkin have been removed since 1953.

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

27. LOS Convention, supra note 3, Article 121 makes a distinction between an island and a rock. The former is entitled to an EEZ and continental shelf while the latter is not.

28. China, Exclusive Economic Zone and Continental Shelf Act of 26 June 1998, available at the DOALOS Web site, supra note 3.

29. China, Law on the Territorial Sea and the Contiguous Zone of 25 February 1992, available at the DOALOS Web site, supra note 3.

30. EEZ and Continental Shelf Act, supra note 28.

31. The dominant view among Chinese scholars is that the geographic scope of China's historic rights in the SCS is defined by the nine dotted lines. Many scholars also argue that the lines are the median line between China's islands on the one hand and the relevant coasts of the other states on the other. See Li Jinming and Li Dexia, supra note 7, at 294; and Kuan-Hsiung Wang, supra note 1. But see infra note 107 and accompanying text.

32. Zou Keyuan, "Historic Rights," supra note 11, suggests that the contents of the historic rights are first "sovereign rights to the water column." But he does not explain how these rights have crystallized. It is improbable that such historic fishing rights were claimed in 1947 when China adhered to the view that the territorial sea could not extend beyond 3 nautical miles, leaving much of the SCS open to fishing. On the other hand, it is unreasonable to think that China reduced its sovereignty-like historic rights to something less than sovereignty.

33. China's 2009 Notes Verbale, supra note 8.

34. McDorman, supra note 5, at 514. This interpretation appears to treat the phrase "see attached map" bracketed at the end of the sentence to complement the immediate preceding phrase where China claims that it "enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof." China's 2009 Notes Verbale, supra note 8. An alternative interpretation is that the map depicts the scope of China's claims stated in the entire sentence; that is, to include "sovereignty over the islands in the SCS and the adjacent waters."

35. This was expressed in China's reaction to Japan's 2008 submission to the CLCS. Japan, "Executive Summary: Submission to the Commission," 12 November 2008, available at the CLCS Web site, supra note 3. China, Note Verbale No. CML/2/2009, 6 February 2009, available at the CLCS Web site, supra note 3. See also McDorman, supra note 5, at 514–515, for a discussion. Indonesia's 2010 Note Verbale, supra note 10, also mentioned two statements by Chinese representatives at Law of the Sea Conferences where the same position was stated.

36. McDorman, supra note 5, at 514.

37. *Ibid.*, at 515.

38. The most significant feature not claimed by the Philippines is the Spratly Island. See Valencia, Van Dyke, and Ludwig, supra note 21, at 33.

39. This name was considered a tactic by the Philippines to distinguish its claim from other claims to the Spratly Islands. This distinction is no longer maintained by the Philippines. See Dzurek, supra note 21, at 21. The name Kalayaan, which means Freedomland, is however believed to have been coined by Thomas Cloma. See infra note 40.

40. In 1956, Thomas Cloma, a Filipino businessman, took the opportunity of Taiwanese withdrawal from the region to "discover" some features in the Spratly Islands and called them Kalayaan, which originally included Spratly Island. The Philippine government showed considerable hesitancy in approving Cloma's discovery. It changed its attitude in 1971 only after Taiwan reportedly fired on one of its boats. The Philippines' diplomatic note in protest of this incident is considered the first official notice of the claim made by the Philippines to the Spratly Islands. In the note, the Philippines demanded that Taiwan withdraw from Itu Aba Island and declared ownership of 53 islands, cays, shoals, and reefs. See Samuels, supra note 21, at 81–86, 89–91; and Gerardo M. C. Valero, "Spratly Archipelago Dispute: Is the Question of Sovereignty Still Relevant?" *Marine Policy*, 18 (1994): 314–344, 341–343.

41. It is reported that the Philippine forces first occupied three Spratly Islands in 1970–1971. See Dzurek, supra note 21, at 21. The Philippines continued its occupation until 1978. See Valencia, Van Dyke, and Ludwig, supra note 21, at 34–35.

42. "Declaring Certain Area Part of the Philippine Territory and Providing for Their Government and Administration," Section 1, Presidential Decree No. 1596 of 11 June 1978. The text is reproduced in Raphael Perpetuo M. Lotilla, ed., *The Philippine National Territory: A Collection of Related Documents* (Diliman, Quezon City: Institute of International Legal Studies, University of the Philippines Law Center; Foreign Service Institute, Department of Foreign Affairs, 1995), 465. It is arguable that a claim to the Spratly Islands can be inferred from the oblique phrase ". . . all other territories belong to the Philippines by historic right or legal title" in Article 1 on The National Territory of the 1973 Philippine Constitution. See Joaquin G. Bernas, *The 1987 Constitution of the Republic of the Philippines: A Commentary* (Manila: Rex Book Store, 2009), 16.

43. Section 1, Presidential Decree No. 1596 of 11 June 1978, *ibid.*

44. LOS Convention, supra note 3, art. 48.

45. See Donald R Rothwell and Tim Stephens, *The International Law of the Sea* (Oxford: Hart, 2010), 175–181.

46. Philippines' Republic Act No. 9522: An Act to Amend Certain Provisions of Republic Act No. 3046, as Amended by Republic Act No. 5446, to Define the Archipelagic Baselines of the Philippines, and for Other Purpose[s], *Law of the Sea Bulletin* 70 (2009): 32.

47. See, for example, Bill No. HB03216 proposed by Antonio V. Cuenco, which proposed 135 basepoints with 4 long baselines enclosing the main archipelago, the Scarborough Shoal and the Kalayaan Island Group; Bill No. HB04834 proposed by Rufus B. Rodriguez, which sought to define the Philippine territory in accordance with international laws and to include the Kalayaan Island

Group and Sabah; and Bill No. HB05206 proposed by Teodoro L. Locsin Jr., which sought to define the archipelagic baselines of the Philippines by simply enumerating the geographic coordinates for the Scarborough Shoal. Information retrieved from the Philippine House of Representatives Legislative Information System.

48. See J. R. V. Prescott, *Limits of National Claims in the South China Sea* (London: ASEAN 1999), 30–3, for a careful examination of how the Philippines could draw archipelagic baselines incorporating features in the Spratly Islands while still being in conformity with the LOS Convention. See also Victor Prescott, "Sharpening the Geographical and Legal Focus on the Potential Regional Conflict in the Spratly Islands," in *Workshop on the Spratly Islands: A Potential Regional Conflict* (Singapore: Institute of Southeast Asian Studies, 1993), summarized in Valencia, Van Dyke, and Ludwig, supra note 21, at 46–47.

49. Senator Santiago, in introducing the bill finally adopted as the Philippine Archipelagic Baselines Act, is reported as stating: "The very core of this bill is that it rejects moves to include the contested islands in drawing up our modern baselines. Otherwise, the bill would not only be useless but also harmful, because we would incur the unnecessary ire and possible retribution of our neighbour states, who are also claimants." See Editorial, "Baselines," *Philippine Daily Inquirer*, 19 February 2009. This view appears congruent with the Philippine objection to China's drawing baselines around the Paracel Islands because this group of islands is in dispute. See "Philippines: Statement of the Department of Foreign Affairs on the Ratification by China of the United Nations Convention on the Law of the Sea," *Law of the Sea Bulletin* 32 (1996): 88.

50. Philippine Archipelagic Baselines Act, supra note 46, sec. 2(a).

51. See further discussion below.

52. Philippines, Note Verbale No. 000819, 4 August 2009; and Note Verbale No. 000818, 4 August 2009, available at the CLCS Web site, supra note 3.

53. *Ibid.*

54. McDorman, supra note 5, at 520.

55. See Zou Keyuan, "Scarborough Reef: A New Flashpoint in Sino-Philippine Relations?" *Boundary and Security Bulletin* 7 (1999): 71–81, 71, for a brief geographical description.

56. *Ibid.*, at 71–72. The Chinese official name of this reef is now Huang Yan Island. See *ibid.*, at 71. See also China, "Spokesperson on the Claim that the Huang Yan Island Is a Part of the Philippine Territory," 22 March 2001 available at www.fmprc.gov.cn/eng/topics/3754/t19236.htm# (accessed 7 May 2011).

57. "Spokesperson on the Claim that the Huang Yan Island Is a Part of the Philippine Territory," supra note 56. China's claim to Scarborough Reef can also be considered within its larger claim of the islands in the SCS.

58. Keyuan, supra note 55, at 74–76.

59. See *ibid.*, at 71, 73, stating that the dispute over the Scarborough Reef between China and the Philippines surfaced in 1997. But see Selig S. Harrison, *China, Oil and Asia* (New York: Columbia University Press, 1977), 191, for the view that the potential dispute over this feature had already been acknowledged in a study in 1977.

60. See Philippines' 2011 Note Verbale, supra note 18, paragraph 2, quoting China's 2009 Notes Verbale, supra note 8.

61. The Philippines' *2011 Note Verbale*, supra note 18, para. 2.

62. *Legal Status of Eastern Greenland (Denmark v. Norway)*, Judgment, 5 April 1933, *P.C.I.J., Series A/B, No. 53*, 45, 48, states that jurisdiction is "one of the most obvious forms of the exercise of sovereign power."

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

64. Philippine Archipelagic Baselines Act, supra note 46.

65. The present Constitution of the Republic of the Philippines was adopted in 1987, Article 1 of which is based on the formulation of the 1973 constitution. See Jay L. Batongbacal, "The Maritime Territories and Jurisdiction of the Philippines and the United Nations Convention on the Law of the Sea," *Philippine Law Journal* 76 (2001): 123–168, 154. For a succinct summary of

major modifications in Article 1 of the 1987 Philippine constitution, see Bernas, supra note 42, at 28–32. The text of the relevant articles of the 1973 and 1987 Philippine constitutions are reproduced in Lotilla, supra note 42, at 411 and 554, respectively; and also in Batongbacal, at 138 and 153, respectively.

66. 1987 Philippine constitution, supra note 65, art.1. This term is interpreted in an authoritative commentary of the Philippine constitution to denote, inter alia, "the seabed and subsoil of the submarine areas adjacent to the coastal state but outside the territorial sea [. . .]." Bernas, supra note 42, at 28.

67. The conjunction "or" is deliberately inserted to accommodate the view of Conception, who was fully aware of the difference between sovereignty and jurisdiction and objected to a draft of Article 1 for the reasons, inter alia, that the draft the phrase "sovereignty or jurisdiction" was deleted while the insertion of the phrase "sovereign jurisdiction" implied that sovereignty was only an adjective qualifying jurisdiction. See Deliberations of 10 July 1986 in "Committee Report No. 3 on Proposed Resolution No. 263 on National Territory," reproduced Lotilla, supra note 42, 555 at 589. For the intervention of Conception, see Deliberations of 9 July 1986, *ibid.*, at 584.

68. LOS Convention, supra note 3, Article 121(1) defines an island as being "a naturally formed area of land, surrounded by water, which is above water at high tide." This definition is also applicable to rock. The distinction between islands and rock is not geographically based.

69. See *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahrain)*, [2001] *I.C.J. Reports* 40, para. 206: " [i]t has never been disputed that islands constitute terra firma, and are subject to the rules and principles of territorial acquisition . . . ."

70. LOS Convention, supra note 3, art.13(1).

71. *Qatar/Bahrain Case*, supra note 69, paras. 205–206; reaffirmed in *Case Concerning Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)*, Judgment of 8 October 2007, [2007] *I.C.J. Reports*, para. 141; and *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v. Singapore)*, Judgment of 23 May 2008, [2008] *I.C.J. Reports*, para. 296. These dicta put an end to the disagreement between states as to whether islands include low-tide elevations.

72. With the inception of the doctrine of the continental shelf, the seabed, and its subsoil are considered as subject to sovereign rights of the coastal states. Though the term "sovereign rights" may be considered as no less than sovereignty at the time of the 1958 Geneva Convention on the Continental Shelf, 499 *U.N.T.S.* 311, such an understanding has now fallen into disrepute. For the history of the concept of sovereign rights, see D. P. O'Connell, *The International Law of the Sea*, vol. 1 (Oxford: Clarendon Press, 1982), 477 ff. The Arbitral Court in the *Guinea/Guinea-Bissau Maritime Delimitation Case*, 77 *International Law Reports* (1985): 635, para. 124, declared the continental shelf (and the EEZ) not to be a zone of sovereignty.

73. LOS Convention, supra note 3, art. 2(1). For low-tide elevations, see *Qatar/Bahrain Case*, supra note 69, para. 204 cited in *Malaysia/Singapore Case*, supra note 71, para. 295. The submerged elevations can be considered as part of the seabed to which the coastal state sovereignty in the territorial sea extends. See also LOS Convention, Article 2(2).

74. LOS Convention, supra note 3, arts. 76(1) and 77(1). It is not difficult to agree that sovereignty rights necessarily include jurisdiction. See "Articles Concerning the Law of the Sea with cCommentaries," *Yearbook of the International Law Commission* 2 (1956): 265–301, 297, (commentary on Article 68).

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

76. See supra notes 42–43 and accompanying text.

77. Philippine Archipelagic Baselines Act, supra note 46.

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

79. Philippine Archipelagic Baselines Act, supra note 46.

80. See, generally, Barbara Kwiatkowska and Alfred H. A Soons, "Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own," *Netherlands Yearbook of International Law* 21 (1990): 139–181.

81. See Philippines' 2011 Note Verbale, supra note 18, sec. 2, para. 2.

82. *Ibid.*, the term "nine-dash map" is used.

83. *Ibid.*, sec. 3, sentence 2.

84. Spratly Island proper is occupied by Vietnam. Features in the region larger than Spratly Island are, in the order of size, Itu Aba (occupied by Taiwan), Thi Tu (occupied by the Philippines), and West York Island (occupied by the Philippines). The last feature is, according to some sources, not bigger than Spratly Island. For a useful compilation of geographical information relating to the Spratly Islands, see Valencia, Van Dyke, and Ludwig, supra note 21, Appendix 1, at 227–235.

85. For the view that Amboyna Cay, which also lies outside the KIG and is smaller than Spratly Island, can also be classified as an island capable of generating an EEZ and continental shelf, see Lan-Anh Thi Nguyen, "The South China Sea Dispute: A Reappraisal in the Light of International Law," PhD thesis, 2008, School of Law, University of Bristol, Bristol, 60–61, 179.

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

87. Brownlie, supra note 63, at 106.

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

89. China's 2011 Note Verbale, supra note 19.

90. China's 2009 Notes Verbale, supra note 8.

91. China's 2011 Note Verbale, supra note 19.

92. *Ibid.*, para. 1, sentence 2 (emphasis added).

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

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

95. "Spokesperson on the Claim that the Huang Yan Island Is a Part of the Philippine Territory," supra note 56.

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

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

98. China, "Jurisprudential Evidence to Support China's Sovereignty over the Nansha Islands," 17 November 2000, available at www.fmprc.gov.cn/eng/topics/3754/t19234.htm (accessed 14 February 2009), last paragraph.

99. See Li Jinming and Li Dexia, supra note 7, at 289.

100. See Zou Keyuan, "The Chinese Traditional Boundary," supra note 11, at 32–34.

101. China's 2011 Note Verbale, supra note 19.

102. China's position may have been inferred from a close and combined reading of Articles 2 of the 1992 and 1998 laws. The 1992 Law on the Territorial Sea, supra note 29, defines China's "territorial land" to include the Nansha Islands. The 1998 EEZ and Continental Shelf Act, supra note 28, defines the continental shelf of China as comprising "the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its *land territory* [. . .]" (emphasis added).

103. McDorman, supra note 5, at 522.

104. Indonesia's 2010 Note Verbale, supra note 10.

105. China, Declaration of the Government of the People's Republic of China on the Baselines of the Territorial Sea, 15 May 1996, *Law of the Sea Bulletin* 32 (1996): 37–40, 39–40.

106. See Li Jinming and Li Dexia, supra note 7, at 294; and Kuan-Hsiung Wang, supra note 1.

107. See Valencia, Van Dyke, and Ludwig, supra note 21, at 254, for maps depicting as distinct both China's nine dotted lines and the equidistance line.

108. 1998 EEZ and Continental Shelf Act, supra note 28, art. 2.

109. See Kien-Hong Yu, supra note 11, 405–430, at note 8, where it is reported that Bai Manchu who drew the lines did not remember the reasons for his actions.

110. 1998 EEZ and Continental Shelf Act, supra note 28, art. 14.

111. For the argument that the nine dotted lines define China's historical rights in the SCS, see Zou Keyuan, "Historic Rights," supra note 7.

112. See, for example, Jon Van Dyke, "Disputes over Islands and Maritime Boundaries in East Asia," in *Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea*, eds. S.-Y. Hong and J. M. Van Dyke (Leiden: Martinus Nijhoff, 2009), 39–75, 73; and Clive Schofield and Ian Townsend-Gault, supra note 6, at 659, 666.

113. On unilateral acts of state, see generally International Law Commission, "Unilateral Acts of States: Report of the Working Group—Conclusions of the International Law Commission relating to Unilateral Acts of States," A/CN.4/L.703, 20 July 2006.

114. See Henry Rhoel R. Aguda and Jesusa Loreto A. Arellano-Aguda, "The Philippine Claim over the Spratly Group of Islands: An Application of Article 76 of the UNCLOS," *Philippine Law Journal* 83 (2009): 573–608, for the argument that the Philippines' extended continental shelf covers the whole KIG's seabed and subsoil. See also Schofield and Arsana, supra note 88, at 49–50, for the report that the Philippines determined that it may claim a continental shelf beyond 200 nautical miles in the vicinity of the KIG area.

115. See *Malaysia/Singapore Case*, supra note 71, paragraph 45, and the jurisprudence cited therein.

116. China's 2009 Notes Verbale, supra note 8.