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China's Nine Dash Line Claim in Light of the Ruling by the Permanent Court of Arbitration (12 July 2016)

Ekrem Korkut

Woo Hyun Kang

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**CHINA'S NINE DASH LINE CLAIM IN
LIGHT OF THE RULING BY THE
PERMANENT COURT OF ARBITRATION
(12 JULY 2016)**

Ekrem Korkut & Woo Hyun Kang

TABLE OF CONTENTS

TABLE OF CONTENTS.....	426
I. INTRODUCTION.....	427
II. AN ANALYSIS OF THE CHINESE CLAIMS IN THE PERSPECTIVE OF ‘HISTORIC TITLE’ THEORY.....	429
A. Historic Title: Common Repute.....	431
1. <i>Whether the Parties Involved had a Common Perception of the Island’s Existence</i>	431
B. Historical Consolidation.....	432
C. Customary International Law.....	434
D. The Relationship Between the Historic Waters Regime and UNCLOS.....	438
E. An Analysis of the Chinese Claim.....	440
1. <i>Does China Have Historic Title Over the Waters Within the Nine-dash Line?</i>	441
2. <i>The Problem of Acquiescence</i>	442
3. <i>UNCLOS</i>	444
III. AN ANALYSIS OF THE CHINESE CLAIMS IN THE PERSPECTIVE OF ‘HISTORICAL RIGHTS’ THEORY.....	445
A. Legal Basis for Historical “Sovereign Rights”.....	445
B. The Relationship Between UNCLOS and the Historical “Sovereign Rights” Claim.....	446
C. An analysis of the Chinese claims.....	448
IV. AFFECT OF THE RULING BY PERMANENT COURT OF ARBITRATION ON THE DELIMITATION OF THE MARITIME AREAS IN THE SCS.....	450
A. The Insular Features of the SCS.....	450
B. Status of the Islands, Rocks and Low Tide Elevations under UNCLOS.....	451
C. Practice of States Regarding the Status of Insular Features and Effects of the SCS Arbitration over the Practice of States.....	457
D. Maritime Delimitations Involving Islands.....	460
V. CONCLUSION.....	463

I.INTRODUCTION

In 2009, Malaysia and Vietnam made a joint submission to the Commission on the Limits of the Continental Shelf (“CLCS”), to establish outer limits of the continental shelf beyond 200 nm.¹ China immediately objected to the submission, and sent a *note verbale* to the United Nations General Secretary to be delivered to the UN member States.² In its *note verbale*, China alleged that the insular features and maritime areas within the nine-dash line belonged to China and added “it has indisputable sovereignty over the islands in the South China Sea and the adjacent waters.”³ China said it enjoys “sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof.”⁴ The language used by China in the *note verbale* was ambiguous and did not indicate what kind of maritime jurisdiction China was claiming. There was also ambiguity in China’s position regarding the status of the insular features in the South China Sea (“SCS”) whether they are low tide elevations, rocks or islands. In another *note verbale*, China claimed sovereignty over the Spratly Islands and added they were islands under Article 121 of UNCLOS, therefore they were

¹ “Receipt of the joint submission made by Malaysia and the Socialist Republic of Viet Nam to the Commission on the Limits of the Continental Shelf,” CLCS.33.2009.LOS (Continental Shelf Notification) (7 May 2009). Article 4 of the Annex II of the Law of the Sea Convention provides:

Where a coastal State intends to establish, in accordance with article 76, the outer limits of its continental shelf beyond 200 nautical miles, it shall submit particulars of such limits to the Commission along with supporting scientific and technical data as soon as possible; but in any case, within 10 years of the entry into force of this Convention for that State. The coastal State shall at the same time give the names of any Commission members who have provided it with scientific and technical advice.

UN Convention on the Law of the Sea, adopted December 10, 1982, 1883 *UNTS* 396,

http://www.un.org/depts/los/convention_agreements/convention_overview_convention.htm [hereinafter “LOSC”].

² People’s Republic of China, Note Verbale CML/17/2009 of May 7, 2009.

³ *Id.*

⁴ *Id.* (China reiterated its position in the *note verbal* of 14 April 2011).

entitled to territorial sea, exclusive economic zone and continental shelf.⁵



Map 1. The nine-dash line map which China attached its note verbal in 2009

⁵ The nine-dash line if connected would cover ninety percent of the SCS. Ronald O'Rourke, *Maritime Territorial and Exclusive Economic Zone (EEZ) Disputes Involving China: Issues for Congress*, CONGRESSIONAL RESEARCH SERVICE, 21 (Dec. 22, 2015); see People's Republic of China, Note Verbale CML/8/2011 (April 14, 2011).

Assuming China owns all of the insular features in the SCS, this paper evaluates the China's nine-dash line claim under international law in light of the ruling by the Permanent Court of Arbitration over the dispute between the Philippines and China ("South China Sea Arbitration"),⁶ and evaluates the effect of the ruling on the delimitation of the maritime areas in the SCS. The ruling by the Permanent Court of Arbitration about the SCS is the first decision by an international tribunal attempting to clarify the difference between islands, rocks and low tide elevations.

II. AN ANALYSIS OF THE CHINESE CLAIMS IN THE PERSPECTIVE OF 'HISTORIC TITLE' THEORY

Some scholars argue that the Chinese claims can be justified in the perspective of "historic title" theory.⁷ Gao argues that "support for this view may be found in the resolution adopted at the 1947 inter-ministry meeting; the expression "limits of territory in the South China Sea" was employed in the resolution," and that "the precise meaning of the reference in Chinese Note I [*note verbale* of 2009]⁸ to "adjacent waters" over which it has sovereignty (...) has never been defined by China."⁹

The Arbitration Tribunal in *Government of the State of Eritrea and Government of the Republic of Yemen* has made an important distinction between the doctrine of "historic title" and "historical consolidation." It goes as follows:

The notion of historic title is well known in international law, not least in respect of 'historic bays', which are governed by rules exceptional to the normal rules about bays. Historic bays again rely upon a kind of "ancient title": a title that has so long been

⁶ *The South China Sea Arbitration*, PERMANENT COURT OF ARBITRATION (July 12, 2016), <https://pca-cpa.org/wp-content/uploads/sites/175/2016/07/PH-CN-20160712-Award.pdf>.

⁷ Zhiguo Gao and Bing Bing Jia, *The Nine-Dash Line in the South China Sea: History, Status, and Implications*, 107 *Am. J. of Int'l. L.* 98, 109 (Jan. 2013).

⁸ Note Verbale CML/17/2009, *supra* note 2.

⁹ *Id.*

established by common repute that this common knowledge is itself a sufficient title. But an historic title has also another and different meaning in international law as a title that has been created, or consolidated, by a process of prescription, or acquiescence, or by possession so long continued to have become accepted as law as a title. These titles too are historic in the sense that continuity and the lapse of a period of time is of the essence.¹⁰

This implies that 1) historic title is based on “common repute” that has been established since time immemorial, meaning that whoever inquires the existence of historic title will focus on historical documents documenting the perception of States and individuals in different historical times, and will be less focused on material evidence of effective control. 2) Whereas in historical consolidation a combination of modern titles, such as prescription and occupation, that has existed over long periods of time will be the determinant in a State’s land claim. So the doctrine of historical consolidation is more related to modern territorial titles recognized in international law today; this is probably why the International Court of Justice, in its *Land and Maritime Boundary between Cameroon and Nigeria* decision, noted that “The Court notes that the theory of historical consolidation is highly controversial and cannot replace the existing modes of acquisition of title in international law.”¹¹ Brownlie refers to historical consolidation as being “not much more than a compendium of pre-existing modes of acquisition”, and says that “the accepted view is that consolidation does not exist as a concept independent of the established rules governing effective occupation and prescription.”¹²

¹⁰ *Eritrea v. Yemen*, Territorial Sovereignty and Scope of Dispute, Reports of International Arbitral Awards, Vol. XXII pp. 209-332, para. 106 (Oct. 9, 1998).

¹¹ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea Intervening)*, Judgment, 2002 I.C.J. Reports 303, para. 103 (Oct. 10, 2002).

¹² JAMES CRAWFORD, *BROWNLIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 236 (8th ed., Oxford University Press, 2012); *See also* MALCOLM SHAW, *INTERNATIONAL LAW* 520 (6th ed., Cambridge University Press, 2008).

A. Historic Title: Common Repute

A state's claim to historic title, otherwise called "original title"¹³ or "ancient title,"¹⁴ as mentioned above, depends upon whether that State can establish that there was a common perception since time immemorial that a certain area of territory or water were within their possession. Examining a series of arbitral and judicial decisions on this issue reveals that courts take the following factors into account when examining whether a state's claim to historic title is valid:

1. *Whether the Parties Involved had a Common Perception of the Island's Existence*

The International Court of Justice ("ICJ") in its *Sovereignty Over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* case examined whether the islands under dispute between Malaysia and Singapore were *terra incognita* in the colonial periods when Britain and the Sultan of Johor were in existence as predecessor states to the disputing parties.¹⁵ This is important because in order to have a common perception that a certain piece of land or maritime territory belongs to some party, that piece itself has to be at least recognized as existing to all parties involved.

2. *The Territorial Regime of the Region and Time*

In the *Eritrea v. Yemen* case, the arbitral court noted that the "concept of territorial sovereignty was entirely strange to an entity such as medieval Yemen," and henceforth dismissed the Yemeni claims that it had "ancient title" over the disputed islands.¹⁶ This implies that in order for a State to claim ancient title over a land or maritime territory, the parties involved must share, at the very least, a common perception

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Sovereignty Over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment, 2008 ICJ Reports, 27 (May 23, 2008), available at <http://www.icj-cij.org/docket/files/130/14492.pdf>.

¹⁶ *Supra* note 11, at 248.

that a state have also been used by other States, whether there was something similar to a *condominium* arrangement or not.¹⁷

3. *The Existence of Rival Claims*

In the *Pedra Branca* case, the ICJ took into account that there was no challenge to the Sultanate of Johor's claim to the island, citing the lack of Norwegian claim to the lands in Eastern Greenland in the Permanent Court of International Justice's infamous *Legal Status of Eastern Greenland* case.¹⁸

B. Historical Consolidation

We have established above¹⁹ that historical consolidation is a mixture of pre-existing modes of territorial acquisition, namely prescription and occupation. The question to be raised here is could maritime territory be acquired in the same way as land territory? And, this question arises due to the following reason: In land territory, it is established that any piece of land that is not terra nullius belongs to a particular State, and that even terra nullius can be occupied by a State if that State fulfills all requirements of occupation prescribed in international law.²⁰ The concept of "res communis" or the modern "common heritage or mankind" has little place in land-territorial regimes, unless some States establish condominium agreements or other *sui generis* regimes in some of their territories.²¹

However, when it comes to maritime territory, or internal waters or territorial sea in terms of modern international law of the sea, there was always a conflict between the doctrine of open seas, known as the doctrine of *mare liberum*, which dictates that maritime areas be

¹⁷ Andrea Gioia, *Historic Titles*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, para. 13 (Oxford University Press, 2013); D.P. O'CONNELL, THE INTERNATIONAL LAW OF THE SEA: VOLUME 1 423 (Oxford University Press, 1982).

¹⁸ *Legal Status of Eastern Greenland (Den. v. Nor.)*, 1933 P.C.I.J. (ser. A/B) No. 53, 27 (Apr. 5, 1933).

¹⁹ See p. 5.

²⁰ Malcolm Shaw, *supra* note 12, at 503.

²¹ Lea Brilmeyer and Natalie Klein, *Land and Sea: Two Sovereignty Regimes in Search of a Common Denominator*, 33 N.Y.U. J. INT'L L. & POL. 703, 704 (2001).

open to all States for navigation and economic activities, and that of *mare clausum*, which argued for occupation of the seas by certain States. Dutch jurist Huig de Groot (known in common literature as Hugo Grotius) argued in his infamous booklet, *Mare Liberum*, that the sea must be free and not susceptible to occupation.²² Grotius, on the premise that only what is subject to occupation be subject to possession, made the aforementioned distinction between the land and the sea, saying that the limitlessness of the latter,²³ as well as the fact that the sea belongs to “all things which can be used without loss to anyone else.”²⁴ In contrast, John Selden published in 1635 a treatise named *Mare Clausum*, the main argument of which is that the territorial sea is indeed subject to occupation by a State.²⁵

The Grotian conception of the open seas was accepted in international law by the 18th and 19th centuries. In the 19th century Huebner tried to justify maritime blockades by championing a “territorial-occupation theory of blockade” Neff explains it to mean that “a blockading squadron occupies the portion of the sea which is enclosed within the line of the ships and consequently that a blockade involves a ‘substitution of sovereignty’ over the enveloped sea area.”²⁶ This notion, that enclosure might actually mean occupation of a certain patch of ocean water, is heavily criticized by British and American commentators such as Hall.²⁷ The consensus was actually possible due to the proposal of Cornelius van Bynkershoek- in his book, *De Dominio Maris Disseratio*, he based his argument on the premise that ‘no sea was (currently) possessed by anyone, and went on to suggest that “the control of the land extends as far as cannon will carry.” Bynkershoek’s proposal was accepted in State practice as the so-called “three-mile rule,”²⁸ which Great Britain, the United States,

²² RALPH VAN DEMIAN MCGOFFIN, *FREEDOM OF THE SEAS: A DISSERTATION BY HUGO GROTIUS* 32 (1916).

²³ *Id.* at 34.

²⁴ *Id.* at 27.

²⁵ John Selden, *MARE CLAUSUM: THE RIGHT AND DOMINION OF THE SEA IN TWO BOOKS* 72 (London, 1663).

²⁶ STEVEN J. NEFF, *THE RIGHTS AND DUTIES OF NEUTRALS: A GENERAL HISTORY* 92 (Manchester: Manchester University Press, 2000).

²⁷ *Id.* at 93.

²⁸ “The old rule of the cannon-shot, crystallized into the present three marine miles measured from low water mark, may be modified at a later period inasmuch as certain nations claim wider jurisdiction [...]. There is an obvious

and France accepted.²⁹ The Grotian concept still lives on in the modern law of the sea, subject to a few tweaks, such as the introduction of the “twelve-nautical-mile rule” and the introduction of the sovereign rights concept on the resources of the exclusive economic zone and continental shelf, which is a limitation of the States’ high-sea rights but actually conforms to the Grotian notion of the separability of *dominium* and *imperium*.³⁰ Also, the sovereign rights of States do not rely on occupation; they rely on rights *ab initio* and the proclamations of States, as established by the United Nations Convention on the Law of the Sea (“UNCLOS”).

An overview of this history on the of the seas reveals that (i) the seas are, not in principle, subject to any forms of occupation; (ii) whatever sovereignty enjoyed by states due to the seas derives from the concept of “the land dominates the sea” – in other words, it is the occupying of land, and the resulting need to assume control of some of the waters around it, that is the basis of sovereignty over the waters. Occupation of the waters themselves does not ensure sovereignty over the waters.³¹ Historical consolidation, as well as its subcomponents, cannot serve as the territorial title for oceans. This notion also applied to China when it was incorporated into the international legal order in the mid-19th century.

C. Customary International Law

Even though occupation or prescription cannot themselves serve as territorial title over the oceanic waters, there remains the

reason for that. The marginal strip of territorial waters based originally on the cannon-shot, was founded on the necessity of the riparian State to protect itself from outward attack, by providing something in the nature of an insulating zone, which very reasonably should be extended with the accrued possibility of offense due to the wider range of modern ordnance.” *North Atlantic Coast Fisheries Case (Great Britain, United States)*, Arbitral Award of Sept. 7, 1910, Reports of International Arbitral Awards (RIAA) XI, 167, 205.

²⁹ ROTHWELL ET AL., OXFORD HANDBOOK ON THE LAW OF THE SEA 26 (Oxford University Press, 2015).

³⁰ *Id.*

³¹ Lea Brilmeyer and Natalie Klein, *supra* note 21, at 707; *ee Report of the International Law Commission to the General Assembly*, U.N. GAOR, 11th Sess., Supp. No. 9, art. 68, Commentary, U.N. Doc. A/3159 (1956).

possibility that even without the existence of historic rights recognized by the relevant parties since the beginning of their respective nations, the relatively recent sovereign claim over the seas, accompanied by explicit or implicit acceptance by the relevant States, can alter the existing territorial sea regime and allow for additional patches of ocean water to fall under the sovereignty of a State. This possibility was recognized in the ICJ's *Anglo-Norwegian Fisheries Case* in 1951, in which Norway's argument that its straight-baseline system was acquiesced by the government of Britain and accepted by the Courts of other States.³² Shaw has confirmed that this case is irrelevant to the doctrine of historical consolidation.³³

Since this way of assuming sovereign control over a patch of water depends on the implicit consent or acquiescence of other States, the Claimant State's claims must satisfy a number of criteria to ensure that the other States can genuinely consent to that State's claim. Before jumping into the contents of each criterion one has to recognize the unique nature of acquiescence in modern law of the sea. On land, acquiescence or explicit acceptance is usually done by the state with competing claims to the particular piece of land in question; this means that the legal relationships arising under acquiescence tend to be bilateral. However, when it comes to expanding the internal waters or territorial sea, the relationship is rarely bilateral; all nations have an interest in the freedom of the high seas.³⁴ This means that the law of the sea is more general in nature than the system of land boundaries – which implies that changing this regime is akin to changing general rules of customary international law. So the scope of acceptance for a *sui generis* regime when it comes to internal waters or territorial sea has to be extensive and substantially uniform³⁵ – if one is to borrow from the terminology used in the *North Sea Continental Shelf* case.

The three commonly recognized criteria for acquiescence to the State's historic waters claim is stated as follows: (i) the claim has to be formally made by the appropriate governmental authorities and

³² *Fisberies Case (United Kingdom v. Norway)*, 1951 ICJ Reports 137 (1951).

³³ Shaw, *supra* note 12, at 507.

³⁴ CLIVE R. SYMMONS, HISTORIC WATERS IN THE LAW OF THE SEA: A MODERN RE-APPRAISAL 55 (2008).

³⁵ *Id.* at 57.

must be clear and consistent,³⁶ (ii) the claim has to be made public to other states,³⁷ (iii) the claim has to be continued long enough for other states to make implicit acceptance of that claim.³⁸ The first requirement is in place because no state can make implicit acceptance of another state's territorial claim if the original State never made an official claim to the international community. The United Nations study on the juridical regime of historic bays says that the declarations "must emanate from the State or its organs,"³⁹ and I) the claim must come from the authorities competent to state the official positions of that government, preferably the executive branch,⁴⁰ II) The official claim must be clear in its content- "the coastal State must leave no doubt about its intention to claim the water area as part of its national territory,"⁴¹ III) The claim must be consistent- the ICJ based its decision on the El Salvador/Honduras case on the "consistent claims of the three States."⁴²

Second, the claim must show sufficient "notoriety." If the claim is not made public, the other states, with a certain interest in the freedom of the seas in that area, would miss the chance to be aware of the other State's claim. This means that the fellow States would not develop the will to implicitly accept that other State's claim. Therefore, I) a claim has to be made *public* enough for States to make effective protests; claimed buried in domestic documents or voluminous pleadings is not sufficient to make a claim "public"⁴³; II) the claim may be made in *bilateral notifications to other states, or by unilateral declarations*;⁴⁴ III) *Open exercise of jurisdiction* might suffice, given that other states have other ways to be aware of the legal nature of that claim.

Third, the claim must have continued for a certain period of time long enough for acquiescence to occur. "Mere sporadic

³⁶ *Supra* note 34, at 117.

³⁷ *Id.* at 141.

³⁸ *Id.* at 151.

³⁹ United Nations, *Juridical Regime of Historic Waters, Including Historic Bays*, U.N. Doc. A/CN.4/143, 14 (1962)

⁴⁰ *Supra* note 34, at 121.

⁴¹ *Id.* at 128.

⁴² *El Salvador/Honduras*, 1992 ICJ Reports 601.

⁴³ *Supra* note 34, at 140.

⁴⁴ *Id.* at 144.

enforcement of sovereign rights in allegedly historic waters will not suffice.”⁴⁵ The exact extent of the time requirement is not clear, although, as the United Nations Juridical Regime study confirms, the extent is closely related to the “extent that an inference of acquiescence may be drawn from it.” If international reaction to the historic claim is strongly pointing toward implicit acceptance of that claim, then only a relatively short passage of time might be required. The ICJ accepted this interrelationship between the passage of time requirement and the acceptance of states requirement when it confirmed in the seminal North Sea Continental Shelf case that a norm of customary international law might be formed in a relatively short period of time if the States with an interest in that particular norm made an “extensive and virtually uniform” acceptance of that norm.⁴⁶

The logical questions that follow entail (i) the extent of knowledge that the States must have in acquiescing to the historic waters claim, and (ii) the number of the States that must be involved in the acquiescence. The accepted premise is that full knowledge of the claim’s ‘nature’ and ‘geographical extent’ must be known by the states making implicit acceptance. Libya argued during its Tunisia/Libya case before the ICJ that Tunisian actions on its claimed historic waters reflect[ed] substantial variations and fluctuations in the size of the territorial sea, methods of establishing baselines, and designations of a reserved and contiguous fishing zones⁴⁷ and therefore argued there could not be acquiescence on the part of Libya. As Regarding the requirement on the extent of the participation, since the historic waters claim entails an encroachment of the high seas and therefore means a limitation of fishing and navigation rights within that area, the states with a navigational or fishing interest in the area claimed as historic waters by another state must, at minimum, participate in the implicit acceptance.

⁴⁵ *Id.* at 152.

⁴⁶ *North Sea Continental Shelf*, 1969 ICJ Reports 38.

⁴⁷ *Continental Shelf (Tunisia/ Libyan Arab Jamahiriya)*, Judgment, 1982 I.C.J. Reports 45.

D. The Relationship Between the Historic Waters Regime and UNCLOS

The United Nations Convention on the Law of the Sea (UNCLOS) makes only few statements on historic waters – Article 10(6) of UNCLOS refers to historic bays, and Article 15 refers to historic title as constituting one of the “special circumstances” that allow states to derogate from the “equidistance” or “median” rule in territorial sea delimitation. In other rules regarding the territorial sea, UNCLOS sets quite clear and uniform rules on the extent of the territorial sea that coastal states may enjoy, meaning that exceptions to such uniform rules should be limited to those explicitly accepted in UNCLOS. Failure to limit such exceptions would result in unacceptable variations of claims in regard to baselines, which would mean a loss of limits on the states’ claims to its Exclusive Economic Zone (EEZ) and Continental Shelf areas, leading to uneven encroachment of the *res communis* principle. So this means that the historic waters regime would only have meaning in UNCLOS regimes with regard to (i) “historic bays” and (ii) territorial sea delimitation.

Even though Article 15 allows States to account for historic rights or waters in territorial sea delimitation, this provision actually limits the scope in which historical waters claims might be articulated. The premise of Article 15 is that states have overlapping claims in regard to its territorial sea, even when said claims are limited by Article 3 of UNCLOS, which limits its scope to 12 nautical miles from its baselines. So Article 15 would not apply when the length of maritime areas between states extends beyond 24 nautical miles between their respective baselines. A State might argue that their historic waters constitute internal waters, a scheme accepted by the ICJ in its Fisheries Jurisdiction (United Kingdom v. Iceland) case (which would mean that its historic waters would be actually “within” the baselines of that State). Even so, Articles 5 and 7 of UNCLOS explicitly limit the ways in which baselines are drawn with Article 7 accepting the formula developed by the ICJ in its Fisheries Case (United Kingdom v. Norway). So any historic “internal waters” claim that does not fit with the baselines regime developed by UNCLOS would be incompatible with the UNCLOS regime. These two limitations seriously limit the scope in which historic waters claims could be made in regard to internal waters or territorial sea. Even if one could pass through these

limitations, the historic waters claim would only serve as “special circumstances” in delimiting the territorial sea in which overlapping claims exist, meaning that such claims are subject to negotiations between two countries or judicial review based on equity.

One could argue that since Article 10(6) allows states to derogate from the definition of juridical bays, as defined in Article 10(2),⁴⁸ might fall into the scope of bays and thus be included in the list of historical waters regimes that UNCLOS explicitly proposes. Even though this might be true, especially with bays that do not have low-water marks of the natural entrance points that are more than 24 nautical miles apart, it would be satisfactory for our discussion here to point out that the most traditional definitions of bays was based on the so-called headland theory.⁴⁹ This theory requires bays to be enclosed “by reference to straight lines linking the headlands wherever the geographical situation really withdrew the waters within them for the traffic of nations.”⁵⁰ This is in line with the Grotian argument that enclosed features of the sea are exceptionally subject to occupation and, therefore, *imperium* by individual States.⁵¹ This means that maritime features not encompassed by straight lines between headlands cannot be regarded as bays, even in terms of Article 10(6) of UNCLOS.

A further argument is that the UNCLOS regime co-exists with the customary law regime regarding baselines and the territorial sea, which means that historic title may coexist with normal or straight baselines drawn up by UNCLOS. If this argument is to be valid, there has to be no legal conflict between the historical waters regime put forward by China and the regime for internal waters and territorial sea. However, such a proposition suffers from the fact that if the territorial sea boundaries of supposed historic waters exceed that of the 12-mile

⁴⁸ “For the purposes of this Convention, a bay is a well-marked indentation whose penetration is of such proportion to the width of its mouth as to contain land-locked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.”

⁴⁹ *Supra* note 17, at 380.

⁵⁰ *Id.* at 382.

⁵¹ *Supra* note 22.

limit set from the normal or straight baselines drawn up by UNCLOS, it conflicts with Article 3 of UNCLOS which has a clear intent of forbidding that exact phenomenon. This can be seen as a conflict between customary international law and new treaty law, in which the principle *lex posterior derogate legi priori* would apply. One might argue that the *lex specialis* principle would apply and so the special regime of historic waters might prevail over the general regime defined by UNCLOS, but UNCLOS, as stated above, is clearly intent on limiting the scope of historical regimes that could be used to derogate from its rules. Thus, rules that contradict this limitation of scope cannot be considered *lex specialis* rules that can derogate from UNCLOS.

Our conclusion is reinforced by the fact that Article 311(2) of UNCLOS stipulates “this Convention shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States parties of their rights and the performance of their obligations under this Convention.” As the *Philippines v. China* arbitral tribunal accurately pointed out, the logical corollary of this provision is that if the rights and obligations of a particular State Party are “incompatible with the Convention” or “affects the enjoyment by other States parties of their rights and the performance of their obligations,” those rights and obligations are altered by the provisions of UNCLOS.⁵²

E. An Analysis of the Chinese Claim

The arbitral tribunal in the *Philippines v. China* case did not rule on the possibility that China might be claiming the waters within the nine-dash line as part of their historical waters because China declared an optional exception according to Article 298(1)(a)(i) of UNCLOS on disputes regarding “historical bays or titles.”⁵³ The tribunal moved on to establish its jurisdiction (by virtue of its competence de a competence (French) or Kompetenz-Kompetenz (German) on this case by declaring that China’s claims are actually claims concerning historical rights, not historic title or historic waters.⁵⁴ In examining the

⁵² South China Sea Arbitration, *supra* note 6, para. 252.

⁵³ *Id.* at 21.

⁵⁴ *Id.* at 31.

validity of China's potential historic waters claims, therefore, it is not necessary to make an examination of the specific findings of the arbitral tribunal. However, some of the points made by the tribunal, such as the tribunal's findings on whether China's claims satisfied the criteria for acquiescence is worth a glance.

1. *Does China Have Historic Title Over the Waters Within the Nine-dash Line?*

China has never clearly explained the legal nature it holds on the islands or waters within the nine-dash line. Even though its reference to historic rights in its *notes verbales* simply that China is indeed making a historic waters or rights claim over the waters within that line, China, perhaps in an attempt to keep strategic ambiguity, never made clear whether it was claiming "historic rights" in the meaning similar to "sovereign rights" recognized under UNCLOS on its EEZ regime, or referring to the "historic waters" regime of internal waters or territorial sea. As a corollary, China has never officially presented evidence that backs up its claims for historic title over the waters within the nine-dash line.

Even though official presentations by the government of relevant evidence is scarce, a number of Chinese scholars have tried to back up its claims by presenting historical evidence that the waters in the SCS were perceived as Chinese waters since time immemorial. These scholars cite (i) records on fishing; (ii) records on sporadic military expeditions, particularly the one conducted by Zheng He during the Ming era; (iii) records on naming; and (iv) records on administrative boundaries.⁵⁵ The main weakness in the Chinese scholars' works is that they are only focused on records kept by the Chinese imperial government; it does not show enough records from neighboring countries, or countries that shared the maritime routes at time, to show that there was a "common perception" among China and other countries that the waters in question belonged to China.

Indeed, records on expeditions show that these expeditions were rather sporadic, and China did not amass a stationary army to

⁵⁵ Jianming Shen, *China's Sovereignty Over the South China Sea Islands: A Historical Perspective*, 1 CHINESE J. OF INT'L L. 103, 107 (2002).

solidify their new occupation; rather, the expeditions often resulted in a tributary relationship between the Chinese imperial house and the local residents residing in the islands in question. Zhang He's expeditionary fleet carried presents that were presented to the so-called "nomads," a tradition which was a distinctive feature of the Chinese tributary system in which the "Son of the Skies," the Chinese emperor, presented gifts to its underlying nomads in order to spread the culture of Chinese civilization to the so-called "uncivilized" areas.⁵⁶ Also, Zhang He's expeditions did not result in continuous military rule over the areas he covered; maritime expeditions were suspended shortly after the expeditions, allowing new influential civilizations to grow on the outer areas.⁵⁷

2. *The Problem of Acquiescence*

The other way China can justify its historic waters claims over the waters within the nine-dash line is to claim that other States surrounding the area have acquiesced its claims. This differs from the historic waters claim that mainly relies on recent evidence of implicit acceptance, opposed to the ancient evidence of common perception that traditional historic waters claims rely upon, which accompany the relatively recently formulated claim that the waters are historically part of that State's sovereignty.

Taking into account the above-mentioned criteria, there are a few problems that significantly undermine the persuasiveness of the possible Chinese claim of acquiescence. First, the Chinese claim of historic waters has not been geographically consistent, nor has it clearly identified the legal nature of its claim. The Atlas of the Administrative Areas of China, published by the *Kuomintang* government in 1948 refers to an "eleven-dash line,"⁵⁸ which differs from the "nine-dash line" published in *Notes Verbales* to Vietnam and the Philippines in 2009.⁵⁹

⁵⁶ JOO KYUNG-CHUL, *THE AGE OF MARITIME EXPANSION* 13 (Seoul National University Press, 2002).

⁵⁷ *Id.* at 17.

⁵⁸ United States State Department, *Limits in the Seas: No. 143, Maritime Claims in the South China Sea*, 3 (Dec. 5, 2014), available at <https://www.state.gov/documents/organization/234936.pdf>.

⁵⁹ *Id.*

These are the only two times in which China has officially identified the geographical scope of its claims, and they do not match each other geographically. The very notion that a series of dashes, and not a straight line, can mark a maritime territorial boundary seems odd and causes geographical ambiguity.

Even if one accepts that China was actually consistent geographically when making aforementioned claims, one needs to note that China has never made clear the legal basis on which it placed its claims. China, in its *Notes Verbales* to Vietnam and the Philippines claimed that waters within the nine-dash line are within its “sovereignty,” but it is not clear whether this means that the waters within the nine-dash line are China’s internal waters or territorial sea. Indeed, some Chinese scholars acknowledge that the Chinese claims can be interpreted as a case for historic “fisheries rights,”⁶⁰ not historic waters; which means that the notion of “sovereignty” in the Chinese documents can actually be interpreted to mean “sovereign rights,” which is based on the Grotian separation of dominium and imperium. Unless China makes its legal basis clear, it is difficult for other States to provide effective acquiescence to its claims.⁶¹

Second, the time in which China has placed its historic claims is insufficient for other States to make effective acquiescence. As mentioned above, only in 2009 did China clarify that its claims on the waters within the nine-dash line is subject to its “sovereignty”(subject to more ambiguity).

Third, there were actually serious protests by other States after the 2009 claim. Here, one has to note the previous discussion that acquiescence of maritime claims is different from the acquiescence of land claims because, unlike land claims, the interests involved are barely bilateral and many states share a common interest in maintaining freedom of navigation and overflight in the particular sea area. This is especially true in the case of the SCS, given its large proportion of global shipping that passes through this area and proximity to the Malacca Strait. This means that the position of global shipping power States, such as the United States, is of significance; the US, however, in

⁶⁰ Zou Keyuan and Liu Zinchang, *The Legal Status of the U-Shaped Line in the South China Sea*, 14 CHINESE J. OF INT’L L. 57, 63 (2015).

⁶¹ *Supra* note 58, at 22.

its *Limits in the Seas* report, made clear that if the Chinese claims are based on the notion of acquiescence, then China does not have a legal basis to support its claim.⁶²

3. UNCLOS

Even if the Chinese claim of historic waters can be justified by the traditional rules of acquiescence and historic title, it is reasonable to interpret this regime to have been overridden by the UNCLOS regime. First, the nine-dash line is not encompassed by headlands that mark the lands surrounding it, which means that the area is not an example of a “bay” in customary international law. This strips the area of the eligibility to be qualified as a “historic bay” in the meaning of Article 10(5) of UNCLOS. Second, the historic waters claim that the nine-dash line represents stretches far beyond the twelve-mile territorial sea zone that can be drawn up from its baselines, even if one assumes that all the islands and rocks within the nine-dash line belong to China and that the low-tide elevations that China claims to be “islands” are actually islands in the meaning of Article 121(1) of UNCLOS. This means that the overlapping sovereignty claims between China, Philippines and Vietnam are not overlapping twelve-mile claims envisioned by Article 15 of UNCLOS, which means that the “historic circumstances” cannot serve as “special circumstances” in territorial sea delimitation between these countries.

Article 311(2), explained above, reinforces this conclusion. The historic waters claims of China, for reasons explained above, is indeed incompatible with the territorial sea regime put forward by UNCLOS, and seriously affects the navigational rights of States within the area.

⁶² *Id.*

III. AN ANALYSIS OF THE CHINESE CLAIMS IN THE PERSPECTIVE OF 'HISTORICAL RIGHTS' THEORY

A. Legal Basis for Historical "Sovereign Rights"

Claims to historical sovereign rights means "a State is claiming to exercise certain rights, usually fishing rights, in what is usually deemed to be international waters."⁶³ This means that the State is not claiming exclusive sovereignty over the disputed waters, but arguing for historical rights over the resources of those waters. This lack of exclusivity in their claims makes historical rights claims different from those of the historical waters claims. As a logical corollary, this leads to two further differences: (i) the lack of exclusivity means that several "historical sovereign rights" can exist within the same body of water; (ii) claims to historic rights tend to be specific in its scope, such as specific rights to fish specific species or catch specific resources.

Despite the differences, any historical rights claims put forward by a State, just like historic waters claims, must be supported by customary international law. With both types of claims, the consent of the interested parties is rarely given explicitly through the form of a treaty. Even if relevant treaties are concluded, the treaties usually only mean a post facto acceptance of the historical right already established such as the boundary agreement between Australia and Papua New Guinea.⁶⁴ Therefore, the practice of the Claimant State must be supported by non-action or acceptance of the parties involved, followed by opinion juris of the involved parties. This consideration makes the criteria for acquiescence important for recognition of historic rights as well, which means the Claimant State must establish the criteria of acquiescence.

⁶³ Leonardo Bernard, *The Effect of Historic Fishing Rights in Maritime Boundaries Delimitation*, in *Securing the Ocean for the Next Generation*, LOSI Conference Papers, 2012.

⁶⁴ *Id.* at 9.

B. The Relationship Between UNCLOS and the Historical
“Sovereign Rights” Claim

Even if a States’ historical rights claims are established by international law, the question still arises as to whether the impending imposition of UNCLOS, and the resultant activation of the Exclusive Economic Zone (EEZ) and Continental Shelf regimes, actually nullifies States’ title to aforementioned historical rights. This question relates to the topic of legal conflicts between the EEZ or Continental Shelf regimes, and States’ historical rights Claims. If there is no conflict, Article 311(2) of UNCLOS ensures that the historical rights regime remains intact. If there is a conflict, as a reverse induction of the same article, the EEZ and Continental Shelf systems prevail over individual State’s continental shelf claims’.

In order to determine whether such a conflict exists, a deep probe is required on whether the sovereign rights over the natural resources in the EEZ or Continental Shelf is exclusive to the rights of other states. One can argue that since Article 56 of UNCLOS ensures that States enjoy sovereign rights over the totality of “resources” within the EEZ, and, since Article 62 allows the coastal State to determine its capacity to “harvest the living resources of the exclusive economic zone,”⁶⁵ and only allows other States to intervene when the coastal State “when the Coastal state does not have the capacity to harvest the entire allowable catch,” the EEZ regime envisions a total replacement of the pre-UNCLOS historical rights to that of the rights stipulated to in the EEZ regime. The same line of reasoning can be applied to the relationship between historical rights claims and the continental shelf regime because Article 77 of UNCLOS guarantees coastal states sovereign rights over the entirety of resources within its continental shelf, without the same type of limitations stipulated to in Article 62 in case of the EEZ. This is the exact line of reasoning adopted in the *Philippines v. China* case, where the Arbitral Tribunal

⁶⁵ “The coastal State shall determine its capacity to harvest the living resources of the exclusive economic zone. Where the coastal State does not have the capacity to harvest the entire allowable catch, it shall, through agreements or other arrangements and pursuant to the terms, conditions, laws and regulations referred to in paragraph 4, give other States access to the surplus of the allowable catch, having particular regard to the provisions of articles 69 and 70, especially in relation to the developing States mentioned therein.” Article 62(2), LOSC.

concluded that even if China's historical rights claims over the resources within the nine-dash line are valid, any historical rights held by China are overridden by the EEZ and continental shelf regimes envisioned by UNCLOS.⁶⁶

This argument suffers from two weaknesses. First, even though the sovereign rights envisioned in the EEZ and continental shelf regimes are deemed to be exclusive, there is nothing that stops the coastal state from entering into agreements that allow non-coastal state parties to harvest some of the non-living or living resources within the EEZ.⁶⁷ This is addressed in Article 62, where the coastal State can determine its own capacity to harvest the living resources within its EEZ, and allocate the leftover resources to other States. Article 62 essentially means that the coastal state enjoys wide discretion in the distribution of its resources to other States. If new distribution agreements are allowed under UNCLOS, maintaining old arrangements that are solidified under customary international law is permissible as well. Even though the provisions on the continental shelf lack distributive arrangements like those envisioned in Article 62, there is nothing in those provisions that blocks such arrangements from remaining intact under UNCLOS.⁶⁸

Secondly, in EEZ cases, UNCLOS envisions a regime of functional distribution of resources, signified by Article 62. In giving access to the EEZ, Article 62(3) stipulates that "the coastal State shall take into account all relevant factors, including, inter alia, ... the need to minimize economic dislocation in States whose nationals have habitually fished in the zone or which have made substantial efforts in research and identification of stocks." This means that the historical rights of States must be taken into account when allocating any living stock within the EEZ. Thus, the legal significance of historical rights held by a State remains a relevant consideration.

The Tribunal left open the possibility of the EEZ regime being amended or modified by customary international law after the conclusion of UNCLOS, adding, "such a claim would require the same

⁶⁶ *Supra* note 6, para. 262.

⁶⁷ *Supra* note 63, at 18.

⁶⁸ *Supra* note 63, at 18.

elements discussed above with respect to historic rights.”⁶⁹ This also leaves open the possibility that the regime could be modified by way of treaty, provided that the treaty satisfies the conditions aligned in Article 41 of the Vienna Convention on the Law of Treaties.⁷⁰

C. An analysis of the Chinese claims

As in the analysis of whether China’s claims are acceptable under the jurisprudence of historic waters, two determinative issues arise in establishing whether China has historical rights over the waters resources within the nine-dash line: (i) whether China’s historical rights’ were part of customary international law due to explicit acceptance or acquiescence by other States, and (ii) whether China’s historical rights, even if accepted under customary international law, are not overridden by the EEZ and Continental Shelf regimes envisioned by UNCLOS.

As to the first question, the criteria required to establish acquiescence in historic waters claims also applies to China’s claims’ for historical rights. As noted above,⁷¹ China’s historic waters Claims lack the requisite level of clarity, notoriety, and longevity to be accepted by other states adopting the theory of acquiescence. As it follows, the criteria for acquiescence will not be met for historical rights as well. In the *Philippines v. China* case mentioned above, the Arbitral Tribunal stated that China’s historical rights claims lack sufficient historical grounds to be justified under international law.⁷² The Tribunal ruled that the little evidence that exists can be evidence

⁶⁹ *Supra* note 6, para. 275.

⁷⁰ Article 41(1) of the Vienna Convention on the Law of Treaties reads: Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if: (a) the possibility of such a modification is provided for by the treaty; or (b) the modification in question is not prohibited by the treaty and; (i) does not affect the enjoyment by the other parties of their rights under the treaty and performance of their obligations; (ii) does not relate to a provision, derogation from which it is compatible with the effective execution of the object and purpose of the treaty as a whole.

⁷¹ *See* page 17.

⁷² *Supra* note 6, para. 275.

of sovereignty over the islands within the nine-dash line, but not evidence of historical rights.⁷³

Up to this point, the Tribunal's reasoning is acceptable. However, the Tribunal made an error by oversimplifying the situation when it declared that any historical rights China potentially had prior to UNCLOS are overridden by the EEZ and Continental Shelf regimes of the 1982 convention. The Tribunal based its judgment on the premise that UNCLOS establishes an exclusive sovereign rights regime that is wholly incompatible with the regime riddled by historical rights.⁷⁴ However, as demonstrated above, the Tribunal's reasoning was flawed: historical rights that predate the adoption of UNCLOS may still co-exist with the sovereign rights guaranteed under the EEZ and continental shelf.⁷⁵

The question remains of whether any historical rights held by China over resources within the nine-dash line stay intact under UNCLOS. To answer this question, one must look to the intent of the Chinese and Philippine delegations, the point at which the two parties acceded to the UNCLOS regime. Negotiation records show that China's delegates, unlike delegates from Australia and New Zealand, argued for a strong EEZ with little possibility of preservation of historical rights.⁷⁶ This was one of the decisive points that led the

⁷³ *Id.* at para. 267-271.

⁷⁴ *Id.* at para. 278.

⁷⁵ See page 23.

⁷⁶ *Summary Records of Meetings of the Second Committee, 24th Meeting*, U.N. Doc. A/CONF.62/C.2/SR.24 at para. 2 (Aug. 1, 1974), *Official Records of the Third United Nations Conference on the Law of the Sea, Volume II*, 187 (*Summary Records of Meetings of the First, Second and Third Committees, Second Session*); see also *Summary Records of Meetings of the Second Committee, 26th Meeting*, U.N. Doc. A/CONF.62/C.2/SR.26 at para. 108 (Aug. 5, 1974), *Official Records of the Third United Nations Conference on the Law of the Sea, Volume II*, 120 (*Summary Records of Meetings of the First, Second and Third Committees, Second Session*); *Summary Records of Meetings of the Second Committee, 30th Meeting*, U.N. Doc. A/CONF.62/C.2/SR.30 at para. 22 (Aug. 7, 1974), *Official Records of the Third United Nations Conference on the Law of the Sea, Volume II*, 228 (*Summary Records of Meetings of the First, Second and Third Committees, Second Session*); *Summary Records of the Meetings of the Second Committee, 48th Meeting*, U.N. Doc. A/CONF.62/C.2/SR.48 at para. 29 (May 2, 1975), *Official Records of the Third United Nations Conference on the Law of the Sea, Volume IV*, 77 (*Summary Records, Plenary, General Committee, First, Second and Third Committees, as well as Documents of the Conference, Third Session*).

tribunal to deny China the opportunity to invoke historical rights. According to the tribunal, China “was resolutely opposed to any suggestion that coastal States could be obliged to share the resources of the exclusive economic zone with other powers that had historically fished in those waters.”

IV. AFFECT OF THE RULING BY PERMANENT COURT OF ARBITRATION ON THE DELIMITATION OF THE MARITIME AREAS IN THE SCS

A. The Insular Features of the SCS

The SCS is a semi-enclosed or enclosed sea surrounded by Taiwan, China, Vietnam, Malaysia, Brunei and the Philippines.⁷⁷ The SCS measures about 550 to 650 nautical miles east-to-west and more than 1200 nautical miles north-to-south.⁷⁸ There are five groups of insular features located in the SCS, which are disputed by the riparian States regarding the ownership, status and the maritime entitlements of such features: the Spratly Islands, the Paracel islands, Scarborough Reef, the Pratas Islands and Macclesfield Bank.⁷⁹

The Spratly Islands are located in the southern quadrant of the SCS, and consist of 140 islets, rocks, reefs, shoals and sandbanks; all of which are currently claimed by China, Taiwan, Vietnam, the Philippines, Malaysia and Brunei.⁸⁰ The largest of the Spratly Islands is Itu Aba, is a mere 0.56 km² in size.

⁷⁷ Due to the disputed status of Taiwan, it has been excluded from all of the procedures relating to the South China Sea. Nien-Tsu Alfred Hu, *Semi-enclosed Troubled Waters: A New Thinking on the Application of the 1982 UNCLOS Article 123 to the South China Sea*, 41 OCEAN DEV. & INT'L L. 281, 301 (2010) (Taiwan is the only riparian state bordering the SCS that is not a party to UNCLOS).

⁷⁸ Robert Beckman, *The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea*, 107 AM. J. OF INT'L L. 142, 143 (2013).

⁷⁹ *South China Sea*, LOWY INSTITUTE, <https://www.lowyinstitute.org/issues/south-china-sea> (last accessed Mar. 6, 2017)

⁸⁰ *Supra* note 78, at 143.

The Paracels, which are under Chinese control, are located in the northwestern quadrant of the SCS and consist of 35 islets, shoals, sandbanks and reefs. Woody Island is the largest of the Paracel Islands and has an area of 2.1 km².⁸¹

The Scarborough Shoal, another feature of the SCS, is a “large atoll with a lagoon of about 150 km² surrounded by reef” and located 124 nautical miles from the Philippines. It is claimed by China, Taiwan and the Philippines.⁸² The Pratas Islands are located in the northern quadrant of the SCS and currently occupied by Taiwan. The Macclesfield Bank, in the middle of the SCS, is “a large atoll that is totally submerged at low tide,” and claimed by both Taiwan and China.⁸³

B. Status of the Islands, Rocks and Low Tide Elevations under UNCLOS

According to Article 121(1) of UNCLOS, “an island is a naturally formed area of land, surrounded by water, which is above water at high tide.”⁸⁴ Because of the word *naturally*, “artificially wrought changes in its elevation will not entitle a rock of naturally lower elevation to serve as a base point to generate various maritime zones (unless it qualifies, in its natural state, as a low-tide elevation, in which case it may have a limited effect on the baseline).”⁸⁵ China has been piling sand onto reefs and low-tide elevations located within the Spratly Islands and Scarborough Shoal. In addition, China has constructed military bases, airstrips, ports and radar facilities on those features.⁸⁶ Since these changes to the reefs are artificial and man-made,

⁸¹ *Id.* at 144.

⁸² *Id.* at 145.

⁸³ *Id.*

⁸⁴ Art. 121(1), UNCLOS.

⁸⁵ Jonathan I. Charney, *Rocks that cannot Sustain Human Habitation*, 93 AM. J. OF INT'L L. 863, 867 (1999).

⁸⁶ For an interactive feature that show construction activities by China in the SCS, see Derek Watkins, *What China Has Been Building in the South China Sea*, N.Y. TIMES, (Feb. 29, 2016), http://www.nytimes.com/interactive/2015/07/30/world/asia/what-china-has-been-building-in-the-south-china-sea-2016.html?ref=asia&_r=0

they will not change their legal status to “islands” or “rocks” as defined under UNCLOS.

Like land territory of a State, an island has the capacity to produce its own maritime zones: the territorial sea, the contiguous zone, the exclusive economic zone, and the continental shelf.⁸⁷

An island is distinguished from a low-tide elevation based on how water covers the land. A low-tide elevation is under water at a high-tide but above water at low tide. An island is never submerged under water during a low or high tide. A low-tide elevation is not entitled to any maritime zones. Nevertheless, a low-tide elevation can be used as a baseline for measuring the breadth of the territorial sea if it is situated within the territorial sea of the mainland or an island.⁸⁸ A low-tide elevation may not be appropriated because they are part of the territorial sea or the continental shelf of a State.

UNCLOS states that “rocks which cannot sustain human habitation or economic life of their own” do not produce any economic zone or continental shelf.⁸⁹ On the other hand, they have the capacity to produce a territorial sea and a contiguous zone. It can be understood that an island is capable of sustaining human habitation or economic life of its own.⁹⁰ A rock does not need to satisfy both requirements of “human habitation” and of “economic life of its own” to be called an island because the Article 121(3) uses the word “or” instead of “and” between these two requirements.⁹¹ While some commentators have argued that the key factors in determining whether a rock constitutes status as an island are “if it can provide fresh water, food, and shelter to human inhabitants and if the island possesses sufficient resources of its own to sustain economic life.”⁹² Additionally, Van Dyke and Brook look to “whether the island can in fact support a stable population” as a key factor, further stating that, “islands should

⁸⁷ Art. 121(2), UNCLOS.

⁸⁸ Art. 13, UNCLOS.

⁸⁹ Art. 121(3), UNCLOS.

⁹⁰ CRAIG H. ALLEN, INTERNATIONAL LAW FOR SEAGOING OFFICERS 70 (6th ed., New York: Naval Institute Press, 2014).

⁹¹ Marius Gjetnes, *The Spratlys: Are They Rocks or Islands?*, 32 OCEAN DEV. & INT'L L. 191, 199 (2001); Charney, *supra* note 85, at 868.

⁹² *Id.* at 199

generate ocean space if stable communities of people live on the island and use the surrounding ocean areas.”⁹³

Charney opposes those standards on the ground that nothing in the *travaux préparatoires* mentions such an interpretation.⁹⁴ Moreover, Charney infers from the *travaux préparatoires* of UNCLOS that “human habitation does not require that people reside permanently on the feature or that the economic life be capable of sustaining a human being throughout the year.”⁹⁵ He further stated that economic activity of a rock may be met by the exploitation of the living and non-living resources found in its territorial sea.⁹⁶

The case between the Philippines and China decided by the Arbitral Tribunal constituted under Annex VII to UNCLOS is the first decision by an international tribunal to elaborate on Article 121(3) of UNCLOS.⁹⁷ Accordingly, the Arbitral Tribunal concluded that the use of the term “rock” in Article 121(3) does not require a feature be composed of rock in the geologic sense.⁹⁸ The Tribunal also tried to explain the intent behind the use of the word “cannot” in Article 121(3) of UNCLOS as following:

The use of the word “cannot” in Article 121(3) indicates a concept of capacity...it (the enquiry) is concerned with whether, objectively, the feature is apt, able to, or lends itself to human habitation or economic life. That is the fact that a feature is currently not inhabited does not prove that it uninhabitable. The

⁹³ Jon M. Van Dyke and Robert A. Brooks, *Uninhabited Islands: Their Impact on the Ownership of the Oceans' Resources*, 12 OCEAN DEV. & INT'L L. 165, 286 (1983).

⁹⁴ See Charney, *supra* note 85, at 870.

⁹⁵ *Id.* at 868.

⁹⁶ *Id.* (“Consequently, a feature would not be subject to Article 121(3) disabilities if it were found to have valuable hydrocarbons (or other characteristics of value, e.g., newly harvestable fisheries in its territorial sea, or perhaps even a location for a profitable gambling casino) whose exploitation could sustain an economy sufficient to support that activity through the purchase of necessities from external resources”).

⁹⁷ South China Sea Arbitration Award, *supra* note 6.

⁹⁸ *Id.* at paras. 480-482.

fact that it has no economic life does not prove that it cannot sustain an economic life.

Nevertheless, historical evidence of human habitation and economic life in the past may be relevant for establishing a feature's capacity. If a known feature proximate to a populated land mass was never inhabited and never sustained an economic life, this may be consistent with an explanation that it is uninhabitable. Conversely, positive evidence that humans historically lived on a feature or that the feature was the site of economic activity could constitute relevant residence of a feature's capacity.⁹⁹

Regarding the "human habitation" requirement, the Tribunal said that "at a minimum, sustained human habitation would require that a feature be able to support, maintain and provide food, drink and shelter to some humans to enable them to reside there permanently or habitually over an extended period of time."¹⁰⁰ The term "habitation" is said to imply "the habitation of the feature by a group or community of persons."¹⁰¹ The Arbitral Tribunal said that the military or governmental personnel stationed on the Spratly Islands do "not suffice to constitute 'human habitation' for the purposes of Article 121(3)" because "these groups are heavily dependent on outside supply, and it is difficult to see how their presence on any of the SCS features can fairly be said to be sustained by the feature itself, rather than by a continuous lifeline of supply and communication from the mainland."¹⁰² The Tribunal pointed out that military or governmental personnel are actually deployed "in an effort to support the various claims to the sovereignty that have been advanced."¹⁰³

Like the scholars mentioned above, the Tribunal came to the conclusion that an island would be given an EEZ and a continental shelf if it is able sustain either human habitation or an economic life of its own.¹⁰⁴ However, the Tribunal indicated: "humans will rarely inhabit areas where no economic activity or livelihood is possible. The

⁹⁹ *Id.* at paras. 483-484.

¹⁰⁰ *Id.* at para. 490.

¹⁰¹ *Id.* at para. 491.

¹⁰² *Id.* at para. 620; *see also* para. 550.

¹⁰³ *Id.* at para. 620.

¹⁰⁴ *Id.* at para. 496.

two concepts are thus linked in practical terms, regardless of the grammatical construction of Article 121(3).¹⁰⁵

Regarding the criteria of “economic life of its own,” the Tribunal concluded that economic life must “pertain to the feature as ‘of its own’.”¹⁰⁶ According to the Tribunal, an economic life of its own does not cover activities from a possible EEZ or continental shelf, although economic activities from the territorial sea may be part of the economic life of a feature.¹⁰⁷ It was pointed out in the award:

Distant fishermen exploiting the territorial sea surrounding a small rock and making no use of feature itself, however, would not suffice to give the feature an economic life of its own. Nor would an enterprise devoted to extracting the mineral resources of the seabed adjacent to such a feature and making no use of the feature itself.¹⁰⁸

China has not released any information regarding the status of insular features in the SCS. In the *note verbale* of 2011, China said its Nansha (Spratly) Islands are “fully entitled to territorial sea, exclusive economic zone (“EEZ”) and Continental Shelf” without differentiating low tide elevations, rocks or islands from each other.¹⁰⁹ Since these insular features include low-tide elevations, rocks and islands, they cannot produce the same maritime zones. The Arbitral Tribunal in the South China Sea Arbitration concluded that the high tide elevations in the Spratlys were not capable of sustaining human habitation or economic life of their own, therefore they were rocks.¹¹⁰

Indeed, most of the features in the SCS are low-tide elevations. For example, all the formations in the Macclesfield Bank are permanently submerged.¹¹¹ Hence they may not be entitled to any

¹⁰⁵ *Id.* at para. 497.

¹⁰⁶ *Id.* at para. 543

¹⁰⁷ *Id.* at paras. 502-03.

¹⁰⁸ *Id.* at para. 503.

¹⁰⁹ For the *note verbal* of 2011, see *supra* note 4.

¹¹⁰ South China Sea Arbitration, *supra* note 6, para. 622.

¹¹¹ “The submerged bank at its shallowest is covered by some 30 feet of water. Of course China may claim it as part of its extended continental shelf but it has not yet done so.” Mark J. Valencia, *China’s Maritime Machinations: The Good, the*

maritime zones. The Arbitral Tribunal in the SCS Arbitration, said that Hughes Reef, the Gaven Reef (South), the Subi Reef, the Mischief Reef and the Second Thomas Shoal were low-tide elevations.¹¹² With regard to the Scarborough Shoal, the Tribunal concluded that it was a rock which cannot sustain human habitation or economic life of its own and went to say:

The protrusions above high tide at Scarborough Shoal are minuscule... They obviously could not sustain human habitation in their naturally formed state; they have no fresh water, vegetation, or living space and are remote from any feature possessing such features. Scarborough Shoal has traditionally been used as a fishing ground by fishermen from different States, but the Tribunal recalls that economic activity in the surrounding waters must have some tangible link to the high tide feature itself before it could begin to constitute the economic life of the feature. There is no evidence that the fishermen working on the reef make use of, or have any connection to, the high tide rocks at Scarborough Shoal. Nor is there any evidence of economic activity beyond fishing. There is, accordingly, no evidence that Scarborough Shoal could independently sustain economic life of its own.¹¹³

Similarly, the Tribunal reached the same conclusion regarding the Curteron reef, the Fiery Cross Reef, the Johnson Reef, the McKennan Reef, the Gaven Reef (north). It concluded that they were rocks which cannot sustain human habitation or economic life of their own.¹¹⁴ Therefore, they are not be entitled to any EEZ or continental shelf.

Bad and the Ugly, THE DIPLOMAT (Dec. 10, 2014), available at <http://thediplomat.com/2014/12/chinas-maritime-machinations-the-good-the-bad-and-the-ugly/>.

¹¹² South China Sea Arbitration, *supra* note 6, paras. 358, 366, 373, 378, 380.

¹¹³ *Id.* at para. 556.

¹¹⁴ *Id.* at paras. 557-570.

The Chinese position on Japanese claims over the Okinotorishima is worth mentioning here. Japan claims an EEZ and continental shelf around the Okinotorishima Atoll.¹¹⁵ Its area at high tide is the “size of a twin bed and of a small bedroom.”¹¹⁶ Since 2004, China has opposed Japanese claims concerning the legal status of the Okinotorishima on the grounds that it is a rock, which “on its natural conditions” cannot sustain human habitation or economic life of its own, and therefore cannot be entitled an EEZ or continental shelf.¹¹⁷ Most features in the SCS do not allow “on its natural conditions” the sustaining of human habitation, nor do they allow economic activity of their own. This situation highlights China’s inconsistent position taken with respect to its interpretation of Article 121(3) of UNCLOS. Smith said: “Yet, if China claims all the islands in the Spratly group with a view to claiming EEZs and continental shelves from them, then there must be some inconsistency in its position on Article 121, paragraph 3.”¹¹⁸

C. Practice of States Regarding the Status of Insular Features and Effects of the SCS Arbitration over the Practice of States

The Arbitral Tribunal stated, “there is no agreement based upon State practice on the interpretation of the Tribunal of Article 121(3) which differs from the interpretation of the Tribunal as outlined

¹¹⁵ See Yann-huei Song, *Okinotorishima: A “Rock or an “Island”?* Recent Maritime Boundary Controversy between Japan and Taiwan/China, in MARITIME BOUNDARY DISPUTES, SETTLEMENT PROCESSES, AND THE LAW OF THE SEA 145-76 (eds. Seoung-Yong Hong and Jon M. Van Dyke, 2009) (the writer said the island was unsuitable for human habitation and was not able to support economic activity of its own); see also Robert W. Smith, *Maritime Delimitation in the South China Sea: Potentiality and Challenges*, 41 OCEAN DEV. & INT’L L. 214, 223 (2010).

¹¹⁶ Herber Smith, *A Rock or an Island? The significance of Okinotorishima and its Status under the International Law of the Sea*, PUB. INT’L L. E-BULLETIN, available at <http://www.herbertsmithfreehills.com/-/media/HS/HKTSIBEBASHL0407122110.pdf> (last accessed May 2, 2016)

¹¹⁷ See China’s Note Verbale to the U.N. Secretary General, CML/2/2009 of Feb. 6, 2009, available at http://www.un.org/depts/los/clcs_new/submissions_files/jpn08/chn_6feb09_e.pdf; Note Verbale CML/59/2011 of Aug. 3, 2011, available at http://www.un.org/depts/los/clcs_new/submissions_files/jpn08/chn_3aug11_e.pdf

¹¹⁸ Robert W. Smith, *supra* note 115.

in the previous sections.”¹¹⁹ Several countries have claimed fully fledged EEZs around high tide elevations, which are actually incompatible with the SCS Arbitration award. Mark E. Rosen, in an article published in *the Diplomat*, gave examples of such proclamations established by the United States and France.¹²⁰ The United States claims an EEZ of 407,635 sq km around the Johnson Atoll, which is an uninhabited atoll and located 860 miles south of Hawaii.¹²¹ Accordingly, this feature has never had any indigenous populations and has no fresh water and tillable soil.¹²² Similarly Howland and Baker Islands, located in the equatorial Pacific, have no fresh water or arable land. However, they do have phosphorite and guano deposits, and they have an EEZ of 434,921 sq km.¹²³ Jarvin Island, another uninhabited American island located in the South Pacific, has scant vegetation but no fresh water, it is alleged that the island has never supported “a self-sustaining population.”¹²⁴ Yet, it produces an EEZ of 316,665 sq km.¹²⁵

Similarly, France has some tiny, uninhabited features, yet they generate fully entitled EEZs. Although the Austral Islands in French Polynesia are uninhabited, they were given effect in the EEZ generation.¹²⁶ Rosen argued that these features nearly gave rise to an increase of 4.7 sq km in the EEZ generation.¹²⁷ The French Clipperton Island, located 671 miles southwest of Mexico, is a ring-shaped atoll, which has no freshwater nor arable land, yet it has an EEZ of 431,263

¹¹⁹ South China Sea Arbitration, *supra* note 6, para. 553.

¹²⁰ Mark E. Rosen, *China Has Much to Gain From the South China Sea Ruling*, THE DIPLOMAT (July 18, 2016), <http://thediplomat.com/2016/07/china-has-much-to-gain-from-the-south-china-sea-ruling/>; Peter Coy, *Is it an Island or a Rock? Ruling Could Cost U.S. a Huge Swath of Ocean?*, BLOOMBERG (July 28, 2016), <http://www.bloomberg.com/news/features/2016-07-28/u-s-japan-and-other-nations-could-lose-exclusive-economic-zones>.

¹²¹ *Id.*, Rosen.

¹²² *Id.*

¹²³ The US District Court for the District of Guam in 2008 said that an insular feature does not have to satisfy both the requirement of “human habitation” and “economic life” to be called an island and ruled that Howland and Baker were islands in terms of Article 121(1) of the LOSC. *United States v. Marshalls* 201, 2008 U.S. Dist. LEXIS 38627 (D. Guam May 8, 2008).

¹²⁴ Rosen, *supra* note 120.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

sq km.¹²⁸ Similarly the French Crozet Islands, uninhabited tiny features between Africa and Antarctica, does not have any arable land or fresh water; their EEZs amount to 574,558 sq km.¹²⁹

Japan claims a 200 nautical miles EEZ zone around tiny Okinotorishima and the Senkakus features. As mentioned above, the Okinotorishima Island is uninhabited and does not have economic activity of its own. Japan has an EEZ of over 400,000 sq km around this feature.¹³⁰ Senkakus are also uninhabited islets that have no fresh water nor tillable soil.¹³¹

Most of the features above do not sustain human habitation in their natural conditions. Although some have economic resources like seabed mining and fishing, the Arbitral Tribunal in the SCS arbitration stated that "economic activity in the surrounding waters must have some tangible link to the high-tide feature itself before it could begin to constitute the economic life of the feature."¹³² People who make use of these resources actually have no connection to those features. The Arbitral Tribunal also stated: "Purely economic activities, which accrue no benefit for the feature or its population, would not amount to an economic life of the feature as 'of its own.'"¹³³ Therefore, those insular features do not sustain economic activity of their own. Following the Arbitral Tribunal decision, it is likely that most of the aforementioned States will receive objections from the international community regarding their EEZs around these insular features. However, one writer said that "it seems highly likely that these states will revise their legal position in light of the tribunal's award in the *South China Sea Arbitration* and treat these 'islands' in future as mere 'rocks' without an EEZ and continental shelf."¹³⁴

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² South China Sea Arbitration, *supra* note 6, para. 556

¹³³ *Id.* at para. 500.

¹³⁴ Stefan Talmon, *The South China Sea Arbitration and the Finality of 'Final' Awards*, 8 J. OF INT'L DISP. SETTLEMENT 388, 400 (2017).

Even if we assume the features in the SCS are regular islands under Article 121(1) of UNCLOS, maritime delimitations are required with States whose coasts are opposite or adjacent.

D. Maritime Delimitations Involving Islands

UNCLOS has parallel provisions regarding the delimitation of the continental shelf and the exclusive economic zone (EEZ). According to UNCLOS, “the delimitation of the continental shelf (and the EEZ) between States with opposite or adjacent coast 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 result.”¹³⁵ Unlike the 1958 Convention on the Continental Shelf, which applies the median line method, UNCLOS does not regulate a standard delimitation method but requires States to come to an equitable result.¹³⁶

According to UNCLOS, the outer border of the EEZ and the continental shelf may extend up to 200 nm from the baselines from which the breadth of the territorial sea is measured.¹³⁷ A State’s

¹³⁵ Art. 74 and 83, UNCLOS.

¹³⁶ Art. 6 of the 1958 Convention on the Continental Shelf provides:

1. Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.
2. Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.
3. In delimiting the boundaries of the continental shelf, any lines which are drawn in accordance with the principles set out in paragraphs 1 and 2 of this article should be defined with reference to charts and geographical features as they exist at a particular date, and reference should be made to fixed permanent identifiable points on the land.

¹³⁷ Art. 57 and 76(1), UNCLOS.

continental shelf may be wider than 200 miles if its continental margin extends beyond 200 nm, although such extension may not be longer than 350 nm from the baselines or longer than 100 nm from the 2,500-meter isobaths.¹³⁸ States that claim an extended continental shelf shall submit relevant information and data to the CLCS.¹³⁹

Article 2 of China's "Law on the Exclusive Economic Zone and the Continental Shelf" establishes a 200 nm limit of continental shelf and EEZ from the baselines.¹⁴⁰ The dash lines lay much closer to the coasts of other coastal States than to China's coastal line. For example, in the Filipino situation, the nine-dash line is 50 nm from the island of Luzon and 30 nm away from the island of Palawan.¹⁴¹ At its farthest point, the nine-dash line is 800 nm away from the Chinese mainland.¹⁴² Therefore, China's claims extend beyond the entitlement under UNCLOS. The ICJ said: "no maritime delimitation between States with opposite and adjacent coasts may be affected unilaterally by one of those States."¹⁴³ As Tanaka put it: "maritime delimitation is international by nature."¹⁴⁴

Regardless of the issue surrounding whether insular features are islands or rocks, international tribunals gave less or even no effect to islands in maritime delimitations, on the ground that the situation of the islands has disproportionately affected maritime delimitations disproportionately. In general, international tribunals have avoided addressing the issue of whether an insular feature is an island or a rock.

¹³⁸ Art. 76(6), UNCLOS.

¹³⁹ See *supra* note 2.

¹⁴⁰ Zhiguo Gao and Bing Bing Jia, *supra* note 9, at 105 (citing to the "Law on the EEZ and the Continental Shelf of China" of June 26, 1998).

¹⁴¹ Emma Kingdon, *A Case for Arbitration: The Philippines' Solution for the South China Sea*, 38 B.C. INT'L & COMP. L. REV. 129, 157 (2015) (citing Audio tape: A Discussion on the Philippines' South China Sea Arbitration Case, held by the Center for Strategic & International Studies (Dec. 3, 2013), available at <https://csis.org/multimedia/audio-discussion-philippines-south-china-sea-arbitration-case>, archived at <http://perma.cc/5XE7-SY35>).

¹⁴² *Id.*

¹⁴³ *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Judgment, 1984 I.C.J. Reports 299, para. 112.

¹⁴⁴ YOSHIFUMI TANAKA, *THE INTERNATIONAL LAW OF THE SEA* 197 (2nd ed., Cambridge University Press, 2015).

The following are some of the decisions reached by the ICJ and arbitral tribunals regarding maritime delimitation involving an island.

The Arbitral Tribunal in the Anglo-French maritime delimitation case applied a median line between the French and British mainland without taking into consideration the British Channel islands located in front of the French mainland and giving a 12 nm continental shelf area to the Channel Islands.¹⁴⁵

In the Tunisia-Libya maritime delimitation case,¹⁴⁶ the Kerkennah Islands were given half effect, as was the Seal Island in the Gulf of Maine Case.¹⁴⁷ In the 1985 Libya-Malta maritime delimitation case, the court stated that dependent islands would be given less effect than independent island States in maritime delimitation.¹⁴⁸

In the 1992 Canada-France maritime delimitation case, the Arbitral Tribunal observed that with respect to “western seaward projection (of the French islands located in front of the Canadian mainland), it is unavoidable that any seaward extension of the French coasts beyond their territorial sea would cause some degree of encroachment and cut off the seaward projection towards the south from points located in the southern shore of Newfoundland (the Canadian coast).”¹⁴⁹ The French islands St. Pierre and Miquelon, located in front of the Canadian mainland, were given a 24 nm maritime area and a narrow 200 nm EEZ towards the high seas.¹⁵⁰

¹⁴⁵ *Case concerning the Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*, 18 REP. OF INT'L ARB. AWARDS 3, para. 202 (June 30, 1977), available at http://legal.un.org/riaa/cases/vol_XVIII/3-413.pdf.

¹⁴⁶ *Supra* note 47, para. 129.

¹⁴⁷ *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, *supra* note 143, para. 222.

¹⁴⁸ *Continental Shelf (Libyan Arab Jamabiriya/ Malta)*, Judgment, I.C.J. Reports 1985, para. 53 (June 3, 1985), available at <http://www.icj-cij.org/docket/index.php?sum=353&p1=3&p2=3&case=68&p3=5>.

¹⁴⁹ *Court of Arbitration for the Delimitation of Maritime Areas Between Canada and France: Decision in Case Concerning Delimitation of Maritime Areas (St. Pierre and Miquelon)*, 31 I.L.M. 1145, para. 67 (Sept. 1992), <http://www.jstor.org/stable/20693736>.

¹⁵⁰ *Id.*

In the Romania-Ukraine maritime delimitation case, the Ukrainian Serpents' Island was only entitled to a 12 nm territorial sea and in the maritime delimitation, the court did not take into account the Serpents.¹⁵¹ The status of Serpents as to whether it was a rock was not addressed nor taken into consideration by the ICJ because the Court said that any reliance on the Serpents would create a disproportionate effect in the delimitation line.¹⁵²

V. CONCLUSION

All the above-mentioned islands in the delimitation cases satisfy the definition of an island under Article 121(1) of UNCLOS. Even so, they were not given a fully-fledged EEZ or continental shelf; in some cases, they were given no EEZ or continental shelf. Since most insular features in the SCS are disputed as to their island status, and since most of them are barely above water at high tide, they should not be taken into consideration in the maritime delimitation. Giving full effect to these features would affect the maritime delimitations disproportionately in the SCS. After the South China Sea Arbitration, in which the Tribunal decided that most of the insular features are not islands for the purposes of Article 121(3), even the equidistant/median line method may not be a defensible claim for China since most of the features will barely produce a territorial sea. Because the Chinese nine-dash line does not comply with UNCLOS, nor with prior and current decisions by the international tribunals, it is invalid under international law norms and should not be given any recognition or effect.

¹⁵¹ Serpents' Island has a 0.17 km² land area. *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, *I.C.J. Reports* 2009, 61.

¹⁵² *Id.* at 110.