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CLCS Submissions and Claims in the South China Sea

by

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INTRODUCTION

The sovereignty claims to features in the Spratly Archipelago in the South China Sea have been a source of friction and potential conflict for the past 30 years. All (or some) of the features are claimed by China, Vietnam, the Philippines, Malaysia, Brunei Darussalam, as well as Taiwan. In addition, it has not been clear in most cases what maritime zones the claimants intended to claim from these features. Although all of the claimants States became parties to 1982 United Nations Convention on the Law of the Sea (UNCLOS),¹ they failed to issue maps or geographic coordinates setting out the limits of their maritime zones (territorial seas, exclusive economic zones and continental shelves) from their mainland or from the features in the Spratly Archipelago as required under the Convention.² In addition, the possibility of their claiming a continental shelf beyond the outer limit of their 200 nm exclusive economic zone does not appear to have been considered.

This situation changed to a significant degree in 2009 as a result of submissions made to Commission on the Limits of the Continental Shelf (CLCS). The impetus for the change was the deadline of 13 May 2009. Under the rules of procedure adopted by the CLCS, this was the date by which the claimant States in Southeast Asia had to submit information to the CLCS if they intended to make a claim for a continental shelf beyond 200 nm pursuant to Article 76 (8) of the UNCLOS.³

We will first briefly outline the claims to islands in the South China Sea prior to 2009. We will then examine the official documents submitted to the CLCS relating to the South China Sea claims. This will include not only the submissions, but also the Notes Verbales sent to the UN Secretary-General relating to the submissions. We will then examine the significance of these developments, especially how they have resulted in several of the claimants bringing their claims into conformity with their rights and obligations under UNCLOS. We will then examine the impact these

¹ China ratified UNCLOS on 7 June 1996; Viet Nam ratified UNCLOS on 25 July 1994; Philippines ratified UNCLOS on 8 May 1984; Malaysia ratified UNCLOS on 14 October 1996; Brunei ratified UNCLOS on 5 November 1996. Taiwan is not able to ratify UNCLOS as it is not considered a 'State' under Article 306 of UNCLOS. See Status of UNLCOS at UN Treaty Collection Database at http://treaties.un.org/pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI~6&chapter=21&Temp=mtdsg3&lang=en.

² See Articles 16, 75 and 84 of UNCLOS.

³ Under Article 4 of Annex II of the United Nations Convention on the Law of the Sea 1982 (UNCLOS), a coastal State intending to establish the outer limits to its continental shelf beyond 200 nautical miles pursuant to Article 76 (8) of UNCLOS, had to do so within 10 years of entry into force of UNCLOS for that State. However, after concerns were expressed by developing States regarding the difficulty in complying with the ten year time limit in light of the significant resources, capacity and expertise required in order to submit scientific and technical data with the submission, the time limit was amended. Pursuant to a Decision adopted by the Meeting of States Parties (SPLOS/72), a State for which UNCLOS entered into force before 13 May 1999, the date of commencement of the 10 year time limit for making submissions is 13 May 1999. See Commission on the Limits to the Continental Shelf (CLCS) website available at http://www.un.org/Depts/los/clcs_new/issues_ten_years.htm.

developments have on China's claim in the South China Sea, and the reasons why China is likely to come under increasing pressure to clarify its claim and bring it into conformity with UNCLOS. We will conclude by explaining how China might be able to protect its national interests in the South China Sea while at the same time clarifying its claim to bring it into conformity with its rights and obligations under UNCLOS.

CLAIMS PRIOR TO 2009 IN THE SOUTH CHINA SEA

The dispute in the South China Sea between China (and Taiwan), Viet Nam, Philippines, Malaysia and Brunei (the claimant States) relates to the Spratly Archipelago (which takes its name from one of the features, namely Spratly Island). The Spratly Archipelago consists of about 100 or so islets, coral reefs, and sea mounts scattered over an area of nearly 410,000 sq km of the central South China Sea.⁴ There is no generally accepted definition of the Spratly Archipelago, *i.e.*, it is not clear which features constitute the Archipelago and the claimant States are generally inconsistent in its depiction and definition of the Spratly Archipelago.⁵

As mentioned above, the claimant States either claim sovereignty over all or some of the features in the Spratly Archipelago. UNCLOS does not deal with sovereignty over territory. Under international law sovereignty claims are governed by the rules and principles of customary international law on acquisition of territory.

UNCLOS is relevant, however, to the extent that it allows States to claim maritime zones from the territory over which it has sovereignty. Article 121 also allows islands to generate maritime zones (territorial sea, contiguous zone, exclusive economic zone and continental shelf) if they are "a naturally formed area of land, surrounded by water, which is above water at high tide."⁶ However, rocks which cannot sustain human habitation or economic life of their own are not entitled to an exclusive economic zone or continental shelf of their own.⁷

It is not clear how many of the features in the Spratly Archipelago will meet the definition of island as being "a naturally formed area of land, surrounded by water, which is above water at high tide." Neither is it clear how many of these features are capable of sustaining human habitation or economic life of their own so as to generate an exclusive economic zone and continental shelf of their own, and how many are only rocks entitled to no more than 12 nm territorial sea and a contiguous zone.

⁴ See CIA World Fact Book available at <https://www.cia.gov/library/publications/the-world-factbook/geos/pg.html>.

⁵ Daniel J DZUREK, *The Spratly Islands Dispute, Who's on First*, 2 (1) Maritime Briefing, International Boundaries Unit (1997) at 3.

⁶ Article 121 (1), UNCLOS.

⁷ Article 121 (3), UNCLOS.

Some of the naturally formed features in the Spratly Archipelago are “low-tide elevations” which are above water at low tide but submerged at high tide. Such features do not generate any maritime zones of their own, not even a 12 nm territorial sea.⁸ In fact, it is not clear whether low-tide elevations are even subject to a claim of sovereignty.⁹

The following discussion will examine first, the basis and status of each of the claims prior to 2009, and second, the basis of the establishment of the maritime zones of each of the claimant States prior to 2009.

China/Taiwan

Due to the fact that most members of the international community now follow a ‘One China’ Policy, we have not treated Taiwan as a separate claimant. Historically, its claim to the features in the Spratly Archipelago is almost the same as that of China. It should be noted that Taiwan occupies Itu Aba, the largest island in the Spratly Archipelago.

Sovereignty Claim of China

China claims sovereignty over all the features in the Spratly Archipelago. However, China has never officially declared which features it is claiming or marked them clearly by geographical coordinates, although it has incorporated the whole Spratly Archipelago into its provincial administrative system.¹⁰

China bases its claims on discovery, historical usage and effective occupation and control.¹¹ It claims that Chinese navigators were the first to reach the islands and exercised effective occupation and control after discovery from the twelfth to the seventeenth century.¹² During the western colonial period from the eighteenth to nineteenth century, China claims that it asserted its’ claims to the Spratly Archipelago but that military weakness and internal upheavals meant that it could do no more than protest the actions of other States, particularly the western colonial powers such as France who claimed sovereignty over the Spratly Archipelago in the 1930s.¹³ After

⁸ Article 13, UNCLOS

⁹ Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, ICJ Reports 2008, p 12.

¹⁰ In 1984, for example, the Chinese Parliament of the People’s Republic of China (PRC) established a special administrative zone including the island of Hainan and the Spratly and Paracel Archipelagos: See Monique CHEMILLIER-GENDREAU, *Sovereignty over the Paracel Islands*, (Netherlands: Kluwer Law International, 2000) at 45

¹¹ For a more comprehensive discussion of China’s sovereignty claim, see generally Mark VALENCIA, Jon M. VAN DYKE, Noel A. LUDWIG, *Sharing the Resources of the South China Sea* (Netherlands: Kluwer Law International, 1997) at 20 -24; Marwyn S. SAMUELS, *Contest for the South China Sea* (New York: Methuen & Co., 1982); Stein TONNESSON, “Why are the disputes in the South China Sea so intractable? A Historical Approach,” 30 (3) *Asian Journal of Social Sciences* 570.

¹² Tonneson, *ibid.*, at 574.

¹³ *ibid.*

the collapse of the Government of the Republic of China (ROC) and the establishment of the People's Republic of China (PRC) in 1950, the PRC became more assertive in its claims to the Spratly Archipelago but it was only in 1988 that it actually started occupying features in the Spratly Archipelago.¹⁴ To date, it reportedly occupies seven features of the Spratly Archipelago.¹⁵

Maritime Zones of China prior to 2009

It is not clear which features in the Spratly Archipelago that China claims would meet the definition of "islands" under Article 121 of UNCLOS and what maritime zones they intend to claim from them. Some reports indicate that several of the seven features which they occupy have small portions sticking up above water at high tide while other reports indicate that none of them are high tide elevations in their natural state.¹⁶

China's legislation does not preclude it from claiming an exclusive economic zone and continental shelf from the features it claims in the Spratly Archipelago, but it has not done so to date. Under its 1992 Law on the Territorial Sea and Contiguous Zone,¹⁷ China expressly claims a 12 nautical mile territorial sea around the Spratly Archipelago.¹⁸ In contrast, China's 1998 Exclusive Economic Zone and Continental Shelf Act does not expressly refer to the Spratly Archipelago. Article 2 states:

The exclusive economic zone of the People's Republic of China is an area beyond and adjacent to the territorial sea of the People's Republic of China extending to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

The continental shelf of the People's Republic of China comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.

¹⁴ *Ibid* at 587.

¹⁵ These are Cuarteron Reef, Fiery Cross Reef, Gaven Reef, Hughes Reef, Johnson Reef, Mischief Reef and Subi Reef: See Global Security Website available at <http://www.globalsecurity.org/military/world/war/spratly-claims.htm>.

¹⁶ Valencia et al, *supra* note 11 at 22

¹⁷ *Law on the Territorial Sea and Contiguous Zone* of 25 February 1992 available at the UNDOALOS National Legislation Database at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN_1992_Law.pdf

¹⁸ See Article 2 of the *Law on the Territorial Sea and Contiguous Zone* of 25 February 1992, *ibid.*, which states:

The PRC's territorial sea refers to the waters adjacent to its territorial land.

The PRC's territorial land includes the mainland and its offshore islands, Taiwan and the various affiliated islands including Diaoyu Island, Penghu Islands, Dongsha Islands, Xisha Islands, Nansha (*Spratly*) Islands and other islands that belong to the People's Republic of China (*emphasis added*).

China's 1996 Declaration on the Baselines of the Territorial Sea¹⁹ only declares a part of China's baselines in relation to its mainland and the Paracel Archipelago. China has not declared its baselines in respect of the Spratly Archipelago. It states that the remaining baselines will be announced at another time.²⁰

It is pertinent to note that China's legislation suggests that it will use *straight baselines* to draw the baselines of the territorial sea, including the territorial sea adjacent to the Spratly Islands.²¹ It has used straight baselines in relation to its mainland and the Paracel Archipelago,²² an action which has been protested by other countries including other claimant States, Philippines and Vietnam²³ as being contrary to the requirements for straight baselines under UNCLOS.²⁴

China's nine dashed lines

The Chinese nine dashed lines first appeared in a Chinese map in 1914 by Chinese cartographer Hu Jin Jie.²⁵ It was only in 1947 that the Government of the ROC published an official map of the archipelago of the South China Sea using 11 interrupted lines drawn in a 'u-shape' around most of the features of the Spratly Archipelago.²⁶ Two of these lines in the Tonkin Gulf area were later deleted and so this line has come to be known as the "interrupted lines" or "nine dashed lines".

Prior to 2009, the official position of the Government of the PRC on the significance of the nine dashed lines was not clear. Some commentators opined that the nine dashed lines was intended to represent the limits of the Chinese territorial claim towards the whole area, thus including the islands, the sea, the airspace, the seabed and all the resources contained therein, otherwise known as "the historic

¹⁹ Declaration of the Government of the People's Republic of China on the Baselines of the Territorial Sea of the People's Republic of China on 15 May 1996 available at the UNDOLAOS National Legislation Database at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/chn_1998_eez_act.pdf.

²⁰ *Ibid.*

²¹ See Articles 2 and 3 of *Law on the Territorial Sea and Contiguous Zone* of 25 February 1992, *supra* note 17.

²² Declaration of the Government of the People's Republic of China on the Baselines of the Territorial Sea of the People's Republic of China on 15 May 1996, *supra* note 19.

²³ Yann-Huei SONG and ZOU Keyuan, "Maritime Legislation of Mainland China and Taiwan: Developments, Comparisons, Implications and Potential Challenges for the United States" (2000) 31 *Ocean Development and International Law* 303 at 322 – 323

²⁴ United States "Straight Baseline Claim: China," (1996) *Limits in the Seas*, No. 117, US Department of State, Bureau of Oceans and Environmental and Scientific Affairs available at <http://www.state.gov/documents/organization/57692.pdf>

²⁵ ZOU Keyuan "The Chinese Traditional Maritime Boundary Line in the South China Sea and its Legal Consequences for the Resolution of the dispute over the Spratly Islands" 14 *International Journal of Marine and Coastal Law* 1 (1999) 27 – 55 at 52

²⁶ Valencia et al, *supra* note 11 at 25

waters claim.” Others maintained that the nine dashed lines are simply a short hand way to indicate that China claims all of the islands inside nine dashed lines.²⁷

Adding further confusion was Article 14 of the 1998 Exclusive Economic Zone and Continental Shelf Act²⁸ which stated that “the enjoyment of the historic rights of the PRC shall not be in any way affected by the regulations provided in this law.” The PRC Government has not clarified what is meant by “historic rights” or whether it was referring to historic rights in the ocean space inside the nine dashed lines.

Vietnam

Sovereignty claim of Vietnam

Viet Nam claims sovereignty over all the features in the Spratly Archipelago. Viet Nam has never officially declared which features it is claiming sovereignty over nor defined geographical co-ordinates. Viet Nam has, however, incorporated the whole Spratly Archipelago into its provincial administrative system.²⁹

Viet Nam’s sovereignty claims are based on discovery, historic title, succession of title from France, and effective occupation and control. Viet Nam has asserted that, based on historical evidence, it has maintained effective occupation and control over the Spratly Archipelago since the 17th Century.³⁰ Viet Nam also claims sovereignty to the Spratly Archipelago through succession of title from France, the colonial power in Indochina, who in the 1930s, had reportedly occupied some islets in the Spratly Archipelago and made declarations of sovereignty over them.³¹ Viet Nam also claims sovereignty through effective occupation and control. It reportedly occupies twenty-one features to date.³²

²⁷ For a general discussion on the different interpretations accorded to the nine dashed line, see Zou, *supra* note 25.

²⁸ *Exclusive Economic Zone and Continental Shelf Act* of 26 June 1998 available at the UNDOLAOS National Legislation Database at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/chn_1998_eez_act.pdf.

²⁹ For example, in 1982, the Vietnamese government established the Troung Sa district (the Vietnamese name for the Spratly Island Archipelago) belonging to Phui Khanh Province: See LUU Van LOI, *The Sino-Vietnamese Difference on the Hoang Sa and Truong Sa Archipelagos* (Hanoi: The Goi Publishers, 1996) at 114.

³⁰ Valencia et al, *supra* note 11 at 32.

³¹ Tonnesson, *supra* note 11 at 577. While there is clear evidence that France officially transferred control of the Paracel Archipelago to South Vietnam in 1950, there are conflicting reports as to whether France also transferred control over the Spratly Archipelago: see Chemillier- Gendreau, *supra* note 10 at 41 which suggests that France ceded control over the Spratly Archipelago at the same time as the Paracel Archipelago and Dzurek, *supra* note 5 at 18 which states that “there is no record of a similar devolution of French rights in the Spratly islands when they withdrew from Indochina.”

³² These are Alison Reef, Amboyna Cay, Barque Canada Reef Central London Reef, Cornwallis South Reef, Da Gri-San, Da Hi Gen, East London Reef, Great Discovery Reef, Ladd Reef, Lansdowne Reef, Namyit Island, Pearson Reef, Petley Reef, Sand Cay, Sin Cowe Island, South Reef, South West Cay, Spratly

Maritime zones of Vietnam prior to 2009

As with China, it was not clear which of the features in the Spratly Archipelago that Viet Nam claims sovereignty over would meet the definition of “islands” under Article 121 of UNCLOS and generate an exclusive economic zone and a continental shelf. It has been documented that at least nine of the twenty-one features which they currently occupy are naturally exposed at high tide.³³

Prior to 2009, Viet Nam had not claimed any maritime zones from the Spratly Archipelago although there were indications that it intended to do so. In 1977, Vietnam published its Statement on the Territorial Sea, the Contiguous Zone, the Exclusive Economic Zone and the Continental Shelf³⁴ where it established a 200 nautical mile exclusive economic zone from the breadth used to measure the breadth of Viet Nam’s territorial sea, Paragraph 5 of which stated:

The islands and archipelagos, forming an integral part of the Vietnamese territory and beyond the Vietnamese territorial sea mentioned in paragraph 1, have their own territorial seas, contiguous zones and continental shelves, determined in accordance with the provisions of Paragraphs 1, 2, 3 and 4 of this Statement (emphasis added).

This was further supported by the 1982 Statement on the Territorial Sea Baseline of Viet Nam³⁵ whereby Viet Nam established straight baselines from which its territorial sea was to be measured. Paragraph 4 of this Statement also stated:

The baseline for measuring the breadth of the territorial sea of the Hoang Sa (Paracel) and Truong Sa (Spratly) Archipelagos will be determined in a coming instrument in conformity with paragraph 5 of the 12 May 1977 Statement of the Government of the Socialist Republic of Vietnam (emphasis added).

Viet Nam’s system of straight baselines was protested vigorously by other States on the basis that Vietnam did not meet the criteria established in Article 7 of UNCLOS.³⁶

Island, Tennent Reef, West London Reef. See Global Security.org available at <http://www.globalsecurity.org/military/world/war/spratly-claims.htm>.

³³ These are Spratly Island, West London Reef, Amboyna Cay, Pearson Reef, Sin Cowe Island, Namyit Island, Sand Cay, Barque Canada Reef and Southwest Cay. Vietnam has maintained garrisons on at least five of these islands, namely Spratly Island, Amboyna Cay, Sin Cowe, Namyit and Southwest Cay: See Valencia et al, *supra* note 11 at 31.

³⁴ *Viet Nam’s Statement on the Territorial Sea, the Contiguous Zone, the Exclusive Economic Zone and the Continental Shelf* of 12 May 1977 available at UNDOALOS National Legislation Database at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/VNM_1977_Statement.pdf.

³⁵ *Statement by the Government of the Socialist Republic of Viet Nam on the Territorial Sea Baseline of Viet Nam* of 12 November 1982 available at the UNDOALOS National Legislation Database at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/VNM_1982_Statement.pdf.

³⁶ The islands used as basepoints for Vietnam’s claimed straight based lines are said to be “small, scattered and largely distant from the mainland coast, such that of the nine turning points defined, five are more than 50 nautical miles offshore” and it is therefore difficult to see how Viet Nam’s baselines conform to the requirement in Article 7 (1) of UNCLOS that straight baselines can be used “if there is a fringe of islands in its immediate vicinity.” See Sam BATEMAN and Clive SCHOFIELD, “State Practice Regarding Straight Baselines in East Asia – Legal, Technical and Political Issues in a

Viet Nam also made the following Declaration when it ratified UNCLOS on 25 July 1994 which would seem to imply that it will be claiming the relevant maritime zones from the Spratly Archipelago:

The National Assembly reiterates Viet Nam's sovereignty over the Hoang Sa and Truong Sa archipelagos...and of the sovereign rights and jurisdiction of the coastal states over their respective continental shelves and exclusive economic zones...

The National Assembly emphasizes that it is necessary to identify between the settlement of dispute over the Hoang Sa and Truong Sa archipelagos and the defense of the continental shelf and maritime zones falling under Viet Nam's sovereignty, rights and jurisdiction, based on the principles and standards specified in [UNCLOS] (*emphasis added*).³⁷

There are reports that by 1995, the position of Vietnam had changed and that it now took the stand that the features in the Spratly Archipelago do not generate exclusive economic zones and continental shelves and that any zones around these islands should be limited to territorial seas.³⁸ However, these reports are based on interviews with Vietnamese government officials and there appears to be no official publication of this view prior to 2009.

Prior to 2009, Viet Nam had also not established the outer limits of its exclusive economic zone in relation to the Vietnamese mainland nor had it deposited the corresponding list of geographical coordinates as required by Article 75 (2) of UNCLOS. It has only established the outer limits of its exclusive economic zone and deposited the list of geographical coordinates with the UN Secretary-General in relation to its exclusive economic zone in the Gulf of Tonkin pursuant to the "Agreement between the Socialist Republic of Viet Nam and the People's Republic of China on the Delimitation of the Territorial Sea, the Exclusive Economic Zone and Continental Shelf in the Gulf of Tonkin" signed by the two countries in 2000.³⁹

Changing Environment" Presented at *Difficulties in Implementing the Provisions of UNCLOS*, organized by the Advisory Board on the Law of the Sea (ABLOS), in Monaco on 16 – 17 October 2008 available at <http://www.gmat.unsw.edu.au/ablos/ABLOS08Folder/Session7-Paper1-Bateman.pdf>

³⁷ See Vietnam's Declaration dated 25 July 1994 on its Ratification of UNCLOS at the UN Treaty Collection Database available at http://treaties.un.org/pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI~6&chapter=21&Temp=mtdsg3&lang=en#13.

³⁸ See Valencia et al, *supra* note 11 at 31 quoting Interviews with Nguyen Qui Binh, Legal Adviser to the Vietnamese Foreign Ministry in 1995 and with Huynh Minh Chinh, Vice Chair of Vietnam's Continental Shelf Committee in 1996

³⁹ See Law of the Sea Information Circular No. 21, April 2005 at 10 available at <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/losic/losic21e.pdf>

Philippines

Sovereignty Claim of Philippines

The Philippines do not claim sovereignty over the whole of the Spratly Archipelago but rather a group of islands known as the Kalayaan Island Group (KIG) which consists of fifty-three features in eastern South China Sea excluding Spratly Island itself. Unlike China and Vietnam, the Philippines have published definite geographical co-ordinates showing the features in the KIG which it claims sovereignty over.

The Philippines' claim over the KIG is based on discovery, and to a certain extent on proximity, as well as effective occupation and control. Its' discovery claim is based on the discovery and occupation of certain features in the KIG by one of its citizens, Tomas Cloma, who in 1956, asserted ownership over fifty-three features in the South China Sea, naming them "Freedomland."⁴⁰ These features were claimed on his own behalf and not on the behalf of the Filipino Government.⁴¹ In 1971, Cloma's claim was formally endorsed by the Filipino Government which claimed that the fifty-three features in the South China Sea, *exclusive of the Spratlys*, which were occupied by Tomas Cloma in 1956 are "regarded as res nullius and may be acquired according to the modes of acquisition recognized under international law, among which are occupation and effective administration."⁴² In 1972, KIG was officially made part of Palawan Province.⁴³ In 1978, features in the KIG within defined co-ordinates were formally declared to be subject to the sovereignty of the Philippines by Presidential Decree (PD) 1596 including:⁴⁴

The sea-bed, sub-soil, continental margin and air space shall belong and be subject to the sovereignty of the Philippines. Such area is hereby constituted as a distinct and separate municipality of the Province of Palawan and shall be known as "Kalayaan."

The Philippines has also reportedly claimed that the continental shelf of the KIG is a natural prolongation of the Palawan Province although this is arguably undermined by the fact that the deep Palawan Trough separates the Spratly Islands from the Philippines archipelago.⁴⁵

⁴⁰ See Samuels, *supra* note 11 at 82.

⁴¹ *Ibid.*

⁴² *Ibid.*, at 89.

⁴³ *Ibid.*, at 91.

⁴⁴ Presidential Decree No. 1596 Declaring Certain Areas Part of the Philippine Territory and Providing for their Government and Administration, 11 June 1978. The rationale was that "these areas do not legally belong to any state or nation but, by reason of history, indispensable need and effective occupation and control established in accordance with international law, such areas must now deemed to belong and subject to the sovereignty of the Philippines."

⁴⁵ Valencia et al, *supra* note 11 at 35.

The Philippines also bases its claim on effective occupation and control. It presently occupies eight features in the KIG.⁴⁶

Philippines “international treaty limits”

Before exploring Philippines’ maritime zones, it is first important to address what Philippines has described as “international treaty limits” established under three international treaties, namely the 1898 Treaty of Paris,⁴⁷ the Cession Treaty of 1900⁴⁸ and the 1930 Treaty of Washington.⁴⁹ Under Section 1 of the 1935 Philippines Constitution, the territory of Philippines is described as consisting of:

[A]ll the territory ceded to the United States by the Treaty of Paris concluded between the United States and Spain on the tenth day of December, eighteen hundred and ninety-eight, the limits which are set forth in Article III of the said Treaty, together with all the islands embraced in the treaty concluded at Washington between the United States and Spain on the seventh day of November, nineteen hundred and the treaty concluded between the United States and Great Britain on the second day of January, nineteen hundred and thirty, and all territory over which the present Government of the Philippine Islands exercises jurisdiction.⁵⁰

Philippines claims that the treaty limits established by these treaties, which form a rectangle around the main archipelago of Philippines, provide the territorial borders of Philippines and all waters from the baselines to the international treaty limits are considered the territorial sea of Philippines.⁵¹

Apart from the islands lying within the international treaty limits, Philippines also claims sovereignty over three other territories, the Bajo de Masinloc group of Islands (also known as Scarborough Shoal) and the KIG. With regards to the KIG (which for present purposes, is the most important island group), as mentioned above, in 1978,

⁴⁶ These are Kota or Loaita Island, Lawak or Nansham Island, Likas or West York Island, Panata or Lamkian Cay, Pag-a-sa or Thitu Island, Parola or North East Cay, Patag or Flat Island, Rizal or Commodore Reef: See Global Security.org available at <http://www.globalsecurity.org/military/world/war/spratly-claims.htm>.

⁴⁷ The Treaty of Paris between Spain and the United States, signed at Paris, 10 December 1898, TS No. 343.

⁴⁸ The Treaty between Spain and the United States for the Cession of Outlying Islands for the Philippines, signed at Washington, 7 November 1900, T.S. No. 345.

⁴⁹ Convention between the United States and Great Britain Delimiting the Philippine Archipelago and the State of Borneo, signed at Washington, 2 Jan 1930, TS No. 856.

⁵⁰ While the 1987 Philippines Constitution does not make any reference to the 1898 Treaty of Paris, the 1900 Cession Treaty and the 1930 Treaty of Washington, constitutional deliberations show that Philippines relies on these international treaties as the basis for the territorial borders of the Philippines: See Mary Ann PALMA, “The Philippines as an Archipelagic and Maritime Nation: Interests, Challenges and Perspectives,” RSIS Working Paper No. 182, 21 July 2009 at 3 available at <http://www.rsis.edu.sg/publications/workingpapers/wp182.pdf>.

⁵¹ *Republic Act No. 3046, An Act to Define the Baselines of the Territorial Sea of the Philippines*, 17 June 1961 at the UNDOALOS National Legislation Database available at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/PHL_1961_Act.pdf.

features in the KIG within defined co-ordinates were formally declared to be subject to the sovereignty of Philippines by Presidential Decree (PD) 1596 including:⁵²

The sea-bed, sub-soil, continental margin and air space shall belong and be subject to the sovereignty of the Philippines. Such area is hereby constituted as a distinct and separate municipality of the Province of Palawan and shall be known as “Kalayaan.”

The territorial boundaries for the KIG provided in Presidential Decree 1596 of 1978 represent a polygon area adjacent to the international treaty limits.⁵³

Maritime Zones of Philippines prior to 2009

The question is whether prior to 2009, the Philippines claimed maritime zones (territorial sea, exclusive economic zone and continental shelf) from the KIG. As mentioned above, it presently occupies eight features.⁵⁴ It is reported that at least six of them are fully or partially elevated at high tide.⁵⁵ As with the claims of China and Viet Nam, it is not clear whether features which are claimed and those which are occupied would fall within the definition of “islands” in Article 121 of UNCLOS.

The Philippines enacted straight baseline legislation in 1961 drawing straight baselines from which its territorial sea is determined prior to Philippines’ ratification of UNCLOS on 8 May 1984.⁵⁶ The straight baseline legislation provided that all waters within the baselines are considered inland or internal waters of the Philippines and as mentioned above, provided that all the waters from the baselines to the international treaty limits form part of the territorial sea of the Philippines.⁵⁷ These provisions met with protest when enacted⁵⁸ and are considered to contravene UNCLOS provisions on straight baselines⁵⁹ and to be contrary to UNCLOS provisions on archipelagic waters.⁶⁰

⁵² Presidential Decree No. 1596 Declaring Certain Areas Part of the Philippine Territory and Providing for their Government and Administration, 11 June 1978.

⁵³ See Palma, *supra* note 50 at 2.

⁵⁴ These are Kota or Loaita Island, Lawak or Nansham Island, Likas or West York Island, Panata or Lamkian Cay, Pag-a-sa or Thitu Island, Parola or North East Cay, Patag or Flat Island, Rizal or Commodore Reef: See Global Security.org available at <http://www.globalsecurity.org/military/world/war/spratly-claims.htm>.

⁵⁵ These are Rizal or Commodore Reef, Patag or Flat Island, Kota or Loaita Island, Lawak or Nansham Island, Parola or North East Cay, Pag-a-sa or Thitu Island, Likas or West York Island: See Valencia et al, *supra* note 11 at 232 – 234.

⁵⁶ The Republic Act No. 3046 of 1961, An Act to Define the Baselines of the Territorial Sea of the Philippines, 17 June 1961, *supra* note 50.

⁵⁷ *Ibid.*

⁵⁸ R.R CHURCHILL and A.V. LOWE, *The Law of the Sea*, 3rd ed., (United Kingdom: Manchester University Press, 1999) at 119.

⁵⁹ See Article 7, UNCLOS.

⁶⁰ See Part IV, UNCLOS. Indeed, when ratifying UNCLOS, Philippines made a declaration that the “the concept of archipelagic waters is similar to the concept of internal waters under the Constitution of Philippines,” which was objected to by Australia, Belarus, Bulgaria, Czechoslovakia, Russia, Ukraine and the USA on the grounds that it amounted to a reservation which was impermissible under

The Philippines appear to be claiming a continental shelf from the KIG. Presidential Decree 1596 of 1978 mentioned above, which established Philippines sovereignty over the KIG also established sovereignty over the seabed, subsoil and continental margin. In 1978, by Presidential Decree 1599 (enacted on the same day as Presidential Decree 1596 mentioned above), Philippines established a 200 nautical mile exclusive economic zone measured from the baselines from which the territorial sea is measured.⁶¹ The exclusive economic zone of Palawan Province will overlap with the KIG. It is also not clear whether Philippines exclusive economic zone law (Presidential Decree 1599) means that the Philippines is claiming an exclusive economic zone around the KIG although it has been argued that it can be interpreted this way⁶² and interestingly, Presidential Decree 1599 on the EEZ of Philippines was enacted the same day as PD 1596 which formally claimed sovereignty over the KIG.

The Philippines, however, has not deposited charts or lists of geographical coordinates of the outer limits of the exclusive economic zone of either the main Philippines archipelago or the KIG pursuant to Article 75 (2) of UNCLOS.⁶³

Malaysia

Sovereignty Claim of Malaysia

Malaysia claims sovereignty over eleven features in the Spratly Archipelago.⁶⁴ Malaysia has asserted two legal bases for its claims, that these features are found on its extended continental shelf and effective occupation and control.

With regards to its claim based on extended continental shelf, Malaysia passed its Continental Shelf Act in 1966 defining its continental shelf as:

the sea-bed and subsoil of submarine areas adjacent to the coast of Malaysia but beyond the limits of the territorial waters of the States, the surface of

UNCLOS and contravened UNCLOS on archipelagic waters. In response, Philippines said that it intended to harmonize its domestic legislation with UNCLOS: See Declaration by Philippines and Objections by other Countries at the United Nations Treaty Collection available at http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI~6&chapter=21&Temp=mtdsg3&lang=en.

⁶¹ *Presidential Decree No. 1599 establishing an Exclusive Economic Zone and for other purposes* of 11 June 1978 at the UNDOALOS National Legislation Database available at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/PHL_1978_Decree.pdf

⁶² See Valencia et al, *supra* note 11 at 35. Section 1 of *Presidential Decree 1599* states that the “exclusive economic zone shall extend to a distance of two hundred nautical miles beyond and from the baseline from which the territorial sea is measured.”

⁶³ See Table of Maritime Claims available at the UN Division of Ocean Affairs and Law of the Sea Website at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/table_summary_of_claims.pdf.

⁶⁴ These are Ardasier Reef, Dallas Reef, Louisa Reef, Mariveles Reef, Royal Charlotte Reef, Swallow Reef, Erica Reef, Investigator Reef, Commodore Reef, Amboyna Cay and Barque Canada Reef: See Valencia et al, *supra* note 11 at 36.

which lies at a depth no greater than 200 metres below the surface of the sea, or where the depth of superadjacent waters admits of the exploitation of the natural resources of the said areas, at any greater depth.⁶⁵

In 1979, Malaysia made its first official claim to features in the Spratly Island Archipelago by publishing the *Peta Baru Menunjukkan Sempadan Perairan dan Penlantar Benua Malaysia*⁶⁶ (hereinafter “the 1979 Map”) in which it defined the limits of its continental shelf and claimed all features arising from it as under its sovereignty.⁶⁷ The 1979 Map specifically claims five features in the Spratly Archipelago.⁶⁸

Malaysia also bases its claim on effective occupation and control. It presently occupies eight features⁶⁹ and the other three features which it claims are occupied by either Philippines or Viet Nam.⁷⁰

Maritime Zones of Malaysia prior to 2009

It is not clear whether the nine features it occupies meet the definition of islands and are capable of generating a territorial sea, exclusive economic zone and continental shelf under Article 121 of UNCLOS. Out of the nine features it occupies, there are reports five of them are either above water at high tide or are partially above water at high tide.⁷¹

Prior to 2009, there was nothing to indicate that Malaysia would be claiming maritime zones (territorial sea, exclusive economic zone or continental shelf) from the features it claimed or occupied in the Spratly Archipelago. The 1979 Map showed a continental shelf boundary that does not appear to be drawn from any of the features but rather from the baselines from which the territorial sea is measured. There is also

⁶⁵ See Article 2 of the *Continental Shelf Act of 1966, Act No. 57* of 28 July 1966 as Amended by Act No. 83 of 1972 available on the UNDOALOS National Legislation Database at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/MYS_1966_Act.pdf

⁶⁶ New Map Showing the Territorial Waters and Continental Shelf Boundaries of Malaysia 1979.

⁶⁷ Asri SALLEH, Che Hamdan Che Mogn RAZIL and Kamaruzan JUSOFF, “Malaysia’s Policy towards its 1963 – 2008 territorial disputes” (2009) 1 (5) *Journal of Law and Conflict Resolution* 107 at 112 available at <http://www.academicjournals.org/jlcr/PDF/Pdf2009/Oct/Salleh%20et%20al.pdf>.

⁶⁸ These are Amboyna Cay, Ardasier Reef, Swallow Reef, Royal Charlotte Reef and Louisa Reef: See Mark J VALENCIA, *Malaysia and the Law of the Sea* (Malaysia: Institute of Strategic and International Studies, 1991) at 66. However, it has been pointed out that Malaysia’s sovereignty claim over the features on the basis that they are found on its continental shelf is legally untenable, as the continental shelf as defined under UNCLOS is not meant to pertain to land or rocks above sea level: See Valencia et al, *supra* note 11 at 37.

⁶⁹ These are Ardasier Reef, Dallas Reef, Erica Reef, Louisa Reef, Marivales Reef, Royal Charlotte Reef, Swallow Reef and Investigator Shoal: See Salleh et al, *supra* note 67 at 113.

⁷⁰ These are Commodore Reef (Philippines), Amboyna Cay (Viet Nam) and Barque Canada Reef (Viet Nam): See Salleh et al, *ibid*.

⁷¹ These are Barque Canada Reef, Commodore Reef, Louisa Reef, Mariveles Reef, Swallow Reef: See Valencia et al, *supra* note 11 at 230 – 233.

nothing in its 1984 Exclusive Economic Act⁷² that would suggest it is claiming an exclusive economic zone from any of the features in the Spratly Archipelago. The 1984 Act only states the exclusive economic zone of Malaysia is:

an area beyond and adjacent to the territorial sea of Malaysia and subject to subsections (2) and (4), extends to a distance of two hundred nautical miles from the baselines from which the breadth of the territorial sea is measured.⁷³

It should be noted that while Malaysia has not formally claimed straight baselines, the 1979 Map suggests that it has employed a system of straight baselines which is arguably inconsistent with Article 7 of UNCLOS.⁷⁴ While this has not been subject to objections from other States, “it appears that this has more to do with the fact that they have not been officially announced and publicised rather than because they necessarily meet the criteria set out in UNCLOS Article 7.”⁷⁵

Prior to 2009, Malaysia had also not officially published or deposited with the UN Secretary-General, lists of geographical coordinates for either its’ baselines, territorial seas, exclusive economic zone or continental shelf. However, its Baselines of Maritime Zones Act 2006 of 1 May 2007 provides for the declaration of geographical coordinates for basepoints from which the baselines of Malaysia will be measured⁷⁶ and that the outer limits of the maritime zones of Malaysia should be declared by the relevant Minister.⁷⁷ No geographical co-ordinates are specified and none have been declared.

Brunei

Sovereignty claim of Brunei

Brunei’s claim prior to 2009 is not entirely clear. It claims two features in the Spratly Archipelago, namely Louisa Reef (claimed by Malaysia) and Riflemen Bank. It is not clear whether it is claiming sovereignty over the two features or simply portions of the nearby sea as its exclusive economic zone or continental shelf.⁷⁸ Unlike the other claimants, it does not occupy any feature.

⁷² Exclusive Economic Zone Act of 1984, Act No. 311, An Act pertaining to the Exclusive Economic Zone and Certain Aspects of the Continental Shelf of Malaysia and to provide for the regulations of activities in the zone and on the continental shelf and for matters connected therewith (Exclusive Economic Zone Act of 1984) available on UNDOALOS National Legislation Database at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/MYS_1984_Act.pdf.

⁷³ Section 3 (1) of the Exclusive Economic Zone Act of 1984, *ibid*.

⁷⁴ Bateman and Schofield, *supra* note 36.

⁷⁵ *Ibid*.

⁷⁶ Section 5 of the *Baselines of Maritime Zones Act 2006* enacted on 1 May 2007.

⁷⁷ Section 6 of the *Baselines of Maritime Zones Act 2006*, *ibid*.

⁷⁸ See Valencia et al, *supra* note 11 at 38 which notes that at a 1992 ASEAN Meeting, the Brunei Foreign Minister said Brunei claims only the sea area.

In any event, Brunei objected to Malaysia's claim to Louisa Reef on the basis that Louisa Reef would fall within the 1958 delimitation of Brunei's continental shelf done by the United Kingdom (Brunei was part of the United Kingdom colonial empire).⁷⁹ In 1980, after Malaysia issued its 1979 Map claiming Louisa Reef as part of its continental shelf, the UK, on behalf of Brunei protested against the 1979 Map's depiction of Louisa Reef as part of the continental shelf of Malaysia.⁸⁰ After Brunei gained independence from the UK in 1984, it issued three maps⁸¹ which showed that Brunei's continental shelf claim enclosed both Louisa Reef and Riflemen Bank.⁸²

Maritime zones of Brunei prior to 2009

Prior to 2009, it was not clear whether Brunei was claiming maritime zones from either Louisa Reef or Riflemen Bank although it is argued that the claim to Riflemen Bank may be based on continental shelf from Louisa Reef.⁸³

2009 MEASURES RELATING TO SUBMISSIONS TO CLCS

The deadline for submissions to the CLCS

Under article 4 of Annex II to UNCLOS, a coastal State intending to establish the outer limits to its continental shelf beyond 200 nautical miles is obligated to submit particulars of such limits to the CLCS along with supporting scientific and technical data within 10 years of the entry into force of the Convention for that State. At a Meeting of States Parties to UNCLOS on 29 May 2001, it was decided that, for a State for which the Convention entered into force before 13 May 1999, the date of commencement of the 10-year time period for making submissions to the Commission was 13 May 1999.⁸⁴ The effect of this decision was that the deadline for making submissions to the CLCS for States with claims to islands in the South China Sea was 13 May 2009.

Because of the deadline of 13 May 2009 for making submissions to the CLCS, several States claiming sovereignty to the features in the South China Sea made submissions to the CLCS in order to meet the 13 May 2009 deadline. When such

⁷⁹ See United Kingdom, The North Borneo (Definition of Boundaries) Order in Council No. 1517, 11 September 1958 and United Kingdom, the Sarawak (Definition of Boundaries) Order in Council No. 1518, 11 September 1958.

⁸⁰ See Salleh et al, *supra* note 67 at 111.

⁸¹ These are: Maps Showing Fishery Limits of Brunei Darussalam (1983); Map Showing Territorial Waters of Brunei Darussalam (1987); Maps Showing Continental Shelf of Brunei Darussalam (1988): See Salleh et al, *ibid*.

⁸² The argument has been raised that Brunei cannot claim an extended continental shelf because the East Palawan Trough interrupts the natural prolongation of the continental shelf 60 to 100 miles off Brunei: See Valencia et al, *supra* note 11 at 38.

⁸³ See Valencia et al, *ibid*.

⁸⁴ See *supra* note 3.

submissions included areas surrounding features claimed by other States, the States affected, as would be expected, submitted Notes Verbale to the UN Secretary-General objecting to submissions in order to protect their legal interests.

The submissions to the CLCS and the Notes Verbale protesting the submissions were often portrayed by the media as assertive actions to solidify claims in the South China Sea. In fact, the Submissions and Notes Verbale were necessary actions in order for the States concerned to exercise their rights and protect their legal interests.

As will be explained later, one consequence of the submissions and protests was to clarify the claims of several of the States claiming sovereignty over features in the South China Sea.

2009 Archipelagic Baselines Law of the Philippines

In order to make a partial submission the Philippines first amended its baselines law to bring its archipelagic baselines into conformity with the requirements set out in Part IV of UNCLOS on Archipelagic States. In February 2009 the Philippines passed Republic Act No. 9522,⁸⁵ or the Philippine Archipelagic Baselines Law. As required by UNCLOS, the Philippines deposited a list of the geographic coordinates of the baselines in the 2009 Philippine Archipelagic Baselines Law with the UN Secretary-General, and they were circulated by the Secretariat to all members of the United Nations on 21 April 2009.⁸⁶

The amended baselines of the Philippines are from basepoints in its main archipelago. The islands claimed by the Philippines in the South China Sea were not used as basepoints for the archipelagic baselines. However, section 2 of the law refers to the islands in the South China Sea as follows:

Section 2. The baseline in the following areas over which the Philippines likewise exercises sovereignty and jurisdiction shall be determined as "Regime of Islands" under the Republic of the Philippines consistent with Article 121 of the United Nations Convention on the Law of the Sea (UNCLOS):

- a) The Kalayaan Island Group as constituted under Presidential Decree No. 1596; and
- b) Bajo de Masinloc, also known as Scarborough Shoal.

⁸⁵ Republic Act No. 387, An Act to Amend Certain Provisions of Republic Act No. 3046 As Amended by Republic Act 5446, to Define the Archipelagic Baselines of the Philippines, and for Other Purposes, 10 March 2009 at the UNDOALOS National Legislation Database available at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/phl_2008_act9522.pdf

⁸⁶ See Maritime Zone Notification 69 of 21 April 2009 at the UNDOALOS National Legislation Database available at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/phl_2008_act9522.pdf.

Diplomatic Note on China on the 2009 Philippines Baselines Law

The reference in Section 2 of the Baselines Law to geographic features in the South China Sea -- the Kalayaan Island Group and Bajo de Masinloc (Huangyan Island/Scarborough Shoal) -- provoked a formal protest by China. Its Note Verbale of 13 April 2009 to the UN Secretary-General included the following paragraph:⁸⁷

The above-mentioned Philippine Act illegally claims Huangyan Island (referred as "Bajo de Masinloc" in the Act) and some islands and reefs of Nansha Islands (referred as "the Kalayaan Island Group" in the Act) of China as "areas over which the Philippines likewise exercises sovereignty and jurisdiction". The Chinese Government hereby reiterates that Huangyan Island and the Nansha Islands have been part of the territory of China since ancient time. The People's Republic of China has indisputable sovereignty over Huangyan Island and Nansha Islands and their surrounding maritime areas. Any claim to territory sovereignty over Huangyan Island and Nansha Islands by any other State is, therefore, null and void.

Joint Submission of Malaysia and Vietnam and Submission of Vietnam

On 6 May 2009 Malaysia and Vietnam made a joint submission to the CLCS for a portion of the continental shelf of the two States into the South China Sea.⁸⁸ The area of the extended continental shelf is between the 200 nm limits of the two States measured from the baselines along the coasts of Vietnam and the East Malaysian states of Sarawak and Sabah. The area does not infringe on existing bilateral continental shelf agreements of the two States with Indonesia. The submission advises the Commission that of the existence of unresolved boundary disputes in the defined area of the submission, and that to the extent possible, the submission would not prejudice matters relating to the delimitation of boundaries in the area⁸⁹.

On 7 May 2009 Vietnam made a Submission to the CLCS⁹⁰ in the area north of its joint submission with Malaysia. The northern boundary in this submission is an equidistance line measured from the baselines of Vietnam and China. Vietnam stated

⁸⁷ See *Communication from the Government of China* dated 13 April 2009 at the UNDOALOS National Legislation Database available at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/communicationsreposit/mzn69_2009_chn.pdf.

⁸⁸ See *Joint submission of Malaysia and the Socialist Republic of Viet Nam* dated 6 May 2009 available at the Commission on the Limits of the Continental Shelf (CLCS) Website at http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/mys_vnm2009executivesummary.pdf

⁸⁹ See Section 4 of the Joint submission of Malaysia and the Socialist Republic of Viet Nam dated 6 May 2009, *ibid*.

⁹⁰ See *Submission of the Socialist Republic of Viet Nam* dated 7 May 2009 available at the CLCS Website at http://www.un.org/Depts/los/clcs_new/submissions_files/submission_vnm_37_2009.htm.

in its submission that it is of the view that the area of the continental shelf which is the subject of this submission is not subject to any overlap or dispute.⁹¹

Notes Verbale of Philippines on Joint Submission of Malaysia and Vietnam and on Submission of Vietnam

On 4 August 2009 the Philippines submitted separate Notes Verbale to the UN Secretary-General in response to the Joint Submission of Malaysia and Vietnam⁹² and on the Submission of Vietnam⁹³. The Note to the Joint Submission states that the extended continental shelf claim by Malaysia and Vietnam lays claim on areas that are disputed because they overlap with that of the Philippines and “because of the controversy arising from the territorial claims on some of the islands in the area including North Borneo.” The latter objection is a reference to the historical claim of the Philippines to what is now the East Malaysian State of Sabah, which was formerly known as North Borneo.

The note of the Philippines further pointed out that given the existence of maritime disputes, the Philippines requests that under paragraph 1(5) of Annex I of the rules of procedure of the Commission, “in cases where a land or maritime dispute exists, the Commission shall not consider and qualify a submission may by any of the States concerned in the dispute.” The note then requested the Commission to refrain from considering the Joint Submission unless and until after the parties have discussed and resolved their disputes.

One interesting point about the Note Verbale of the Philippines is that it failed to object to or even mention the fact that the maps included in the Joint Submission of Malaysia and Vietnam appear to include a 200 nm limit of the Philippines measured from their archipelagic baselines.

The Note on the Submission of Vietnam is similar in content. It states that Vietnam’s submission lays claim on areas that are disputed because they overlap with those of the Philippines, and it requests the Commission to refrain from considering the Submission unless and until after the parties have discussed and resolved their disputes.

⁹¹ See Section 4 of the Submission of the Socialist Republic of Viet Nam dated 7 May 2009, *ibid*.

⁹² See Note of Philippines No. 00818 dated 4 August 2009 available at the CLCS Website at http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/clcs_33_2009_los_phl.pdf.

⁹³ See Note of Philippines No. 00819 dated 4 August 2009 available at the CLCS Website at http://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/clcs_37_2009_los_phl.pdf.

Notes Verbale of Malaysia and Vietnam in Response to Philippines

Malaysia's reply⁹⁴ to the Note of the Philippines on the Joint Submission stated that the joint submission was made without prejudice to questions of delimitation of maritime boundaries and without prejudice to the position of States parties to a land or maritime dispute. Malaysia further pointed out that it had informed the Philippines of its position prior to the submission of the Joint Submission, and that both the Governments of the Vietnam and Malaysia had proposed to the Philippines that it consider joining the Joint Submission.

Vietnam replied to the Notes of the Philippines⁹⁵ by stating that its submissions have been made without prejudice to matters relating to the delimitation of boundaries as well as the positions of States which are parties to land or maritime disputes. Vietnam also took the opportunity to reaffirm its consistent position that it has indisputable sovereignty over the Hoang Sa (Paracels) and Troung Sa (Spratlys) archipelagoes.

Notes Verbale of China to Joint Submission of Malaysia and Submission of Vietnam

On 7 May 2009 China submitted a Note⁹⁶ to the UN Secretary-General concerning the Joint Submission of Malaysia and Vietnam. It included the following statements:

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

The continental shelf beyond 200 nautical miles as contained in the Joint Submission by Malaysia and the Socialist Republic of Viet Nam has seriously infringed China's sovereignty, sovereign rights and jurisdiction in the South China Sea. In accordance with Article 5(a) of Annex I to the Rules of Procedure of the Commission on the Limits of the Continental Shelf, the Chinese Government seriously requests the Commission not to consider the Joint Submission by Malaysia and the Socialist Republic of Viet Nam. The Chinese Government has informed Malaysia and the Socialist Republic of Viet Nam of the above position.

⁹⁴ See Note of Malaysia No. HA 41/09 dated 21 August 2009 available at the CLCS Website at http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/mys_re_phl_2009re_mys_vnm_e.pdf.

⁹⁵ See Note of Viet Nam No. 240HC-2009 dated 18 August 2009 available at the CLCS Website at http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/vnm_re_phl_2009re_mys_vnm_e.pdf.

⁹⁶ See Note of China No. CML/17/2009 dated 7 May 2009 available at the CLCS Website at http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf.

On the same day China submitted a Note Verbale⁹⁷ to the UN Secretary-General on the Submission of Vietnam which contained identical language.

Notes Verbale of Malaysia and Vietnam in Response to China

Malaysia's reply⁹⁸ to the Note Verbale of China was almost identical to its reply to the Philippines. It stated that the joint submission was made without prejudice to questions of delimitation of maritime boundaries and without prejudice to the position of States parties to a land or maritime dispute. Malaysia further pointed out that it had informed China of its position prior to the submission of the Joint Submission. It did not, however, state that it had proposed to China that it consider joining the Joint Submission.

Vietnam's reply⁹⁹ to the Notes Verbale of China concerning the Joint Submission and its own Submission did not state that the submissions were made without prejudice to matters relating to the delimitation of boundaries as well as the positions of States which are parties to land or maritime disputes. Rather, it reaffirmed its long-standing position on sovereignty over the island by stating that:

The Hoang Sa (Paracels) and Truong Sa (Spratlys) archipelagoes are parts of Viet Nam's territory. Viet Nam has indisputable sovereignty over these archipelagoes. China's claim over the islands and adjacent waters in the Eastern Sea (South China Sea) as manifested in the map attached with the Notes Verbale CLM/17/2009 and CLM/18/2009 has no legal, historical or factual basis, therefore is null and void.

Partial Submission submitted by Philippines

On 8 April 2009, the Republic of the Philippines submitted to CLCS information on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured in the Benham Rise region.¹⁰⁰ The Benham Rise region is east of the main island of Luzon, in the opposite direction of the South China Sea. As stated by the Philippines in the partial submission, the Benham Rise region is not subject to any maritime boundary disputes, claims or controversies. Therefore, this partial submission was of no significance to the disputes in the South China Sea.

⁹⁷ See Note of China No. CML/18/2009 of 7 May 2009 available at the CLCS Website at http://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/chn_2009re_vnm.pdf.

⁹⁸ See Note of Malaysia No. HA 24/2009 of 20 May 2009 available at the CLCS Website at http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/mys_re_chn_2009re_mys_vnm_e.pdf.

⁹⁹ See Note of Viet Nam No. 86/HC-2009 of 8 May 2009 available at the CLCS Website at http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/vnm_chn_2009re_mys_vn_m_e.pdf.

¹⁰⁰ See *Submission of the Republic of Philippines* dated 8 April 2009 available at the CLCS Website at http://www.un.org/Depts/los/clcs_new/submissions_files/phl22_09/phl_esummary.pdf.

In its partial submission the Philippines stated that this partial submission is without prejudice to the right of the Philippines to make other submissions for other areas at a future time.

Preliminary Information submitted by Brunei

On 12 May 2009 Brunei Darussalam submitted Preliminary Information to the CLCS.¹⁰¹ In the document Brunei stated that the maritime boundaries between Brunei and Malaysia out to 200 miles have been delimited by two series of agreements. First, the territorial sea and continental shelf between Brunei and Malaysia were delimited as far as the 100 fathom isobath by two 1958 British Orders in Council. Second, the territorial sea, the Exclusive Economic Zone and the continental shelf out to a distance of 200 nautical miles were delimited by an Exchange of Letters dated 16 March 2009.

In addition, Brunei stated that on the basis of technical studies carried out to date, Brunei's continental shelf extends beyond 200 nautical miles from the baselines from which the breadth of Brunei's territorial sea is measured and will similarly be the subject of Brunei's full submission to the Commission to be submitted at a later date. Brunei noted that there may exist areas of potential overlapping entitlements in respect of its continental shelf beyond 200 nautical miles, and that the Preliminary Submission is made without prejudice to any future delimitation of boundaries with other States.

Note Verbale of China to the Submission of Japan

China also submitted a Note Verbale¹⁰² on 6 February 2009 in response to the Submission of Japan to the CLCS¹⁰³ which is relevant to the South China Sea disputes because it raises an issue concerning the interpretation of Article 121 of UNCLOS on the regime of islands. China does not contest the fact that the Okinotorishima is an island that is under the sovereignty of Japan. China argues, however, that Okinotorishima as a "rock" within Article 121, paragraph 3. China's Note Verbale reads as follows:

The Chinese Government is of the view that, under the United Nations Convention on the Law of the Sea (hereinafter referred to as "the Convention"), States Parties shall have the right to submit information on the outer limits of the continental shelf beyond 200 nautical miles. While exercising such right in

¹⁰¹ See *Brunei Darussalam's Preliminary Submission concerning the Outer Limits of its Continental Shelf* dated 12 May 2009 available at the CLCS Website at http://www.un.org/Depts/los/clcs_new/submissions_files/preliminary/brn2009preliminaryinformation.pdf.

¹⁰² See China's Note No. CML/2/2009 of 6 February 2009 available at the CLCS Website at http://www.un.org/Depts/los/clcs_new/submissions_files/jpn08/chn_6feb09_e.pdf.

¹⁰³ See *Submission of Japan* dated 12 November 2008 available at the CLCS Website at http://www.un.org/Depts/los/clcs_new/submissions_files/submission_jpn.htm.

establishing the outer limits of the their continental shelf beyond 200 nautical miles, States Parties shall also have the obligation to ensure respect for the extent of the International Seabed Area (hereinafter referred to as “the Area”), which is the common heritage of mankind, and not to affect the overall interests of the international community as a whole. All States Parties shall implement the Convention in its entirety and ensure the integrity of the Convention, in particular, ensure that the extent of the Area is not subject to any illegal encroachment.

The Chinese Government has carefully studied the *Executive Summary* of Japan’s Submission, and has noted, in particular, of 200-nautical-mile extension of its continental shelf measured from the basepoint Oki-no-Tori Shima Island, as well as the three regions, namely, SKB, MIT and KPR, of the continental shelf extended beyond 200 nautical miles from the Oki-no-Tori Shima Island. It is to be noted that the so-called Oki-no-Tori Shima Island is in fact a rock as referred to in Article 121(3) of the Convention. Therefore, the Chinese Government wishes to draw the attention of the members of the Commission, the States Parties to the Convention as well as the Members of the United Nations to the inconformity with the Convention with regard to the inclusion of the rock of Oki-no-Tori in Japan’s Submission.

Note Verbale of Indonesia concerning the Note of China on the Joint Submission of Malaysia and Vietnam

The fact that China attached the 1947 nine dashed line map to its Notes Verbale responding to the Joint Submission of Malaysia and Vietnam was a cause for concern among some members of ASEAN. It was the first time that the PRC had included the map in an official communication to the United Nations. As a result Indonesia submitted a Note Verbale¹⁰⁴ to the UN Secretary-General on 8 July 2010 in which it expressed its concern about two issues. First, whether the map was consistent with UNCLOS. Second, whether China would follow the position it had taken with respect to Okinotorishima to the small geographic features in the South China Sea. The relevant paragraphs of Indonesia’s Note Verbale read as follows:

2) Indonesia also follows closely the debate over the above mentioned map which has also been referred to as the so-called "nine-dotted-lines map". Thus far, there is no clear explanation as to the legal basis, the method of drawing, and the status of those separated dotted-lines. It seems that those separated dotted lines may have been the maritime zones of various disputed small features in the waters of the South China Sea. Regardless of the owner of those features, Indonesia should like to take this opportunity to refer to the position of the People's Republic of China in matters relating to the maritime zone of very small islands and rocks as shown from the following statements:

a. The statement of the Head of Delegation of the People's Republic of China, H.E. Ambassador Chen Jinghua, at the 15th Session of the

¹⁰⁴ See Indonesia’s Note No. 480/POL-703/VII/10 of 8 July 2010 available at the CLCS Website at http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/idn_2010re_mys_vnm_e.pdf.

International Seabed Authority (ISBA) in Kingston, Jamaica on June 2009, in particular by mentioning that "Claim on exclusive economic zone and continental shelf with the rock [...] as the basepoint concerns important principles of the Convention and the overall interests of the international community". He further went on by referring to the statement of Ambassador Arvid Prado of Malia that "if a 200 mile limit of jurisdiction could be founded on the possession of uninhabited, remote or very small islands, the effectiveness of international administration of ocean space beyond national jurisdiction would be gravely impaired".

b. The statement of the Chinese delegation at the 19th meeting of the States Parties on the Law of the Sea (SPLOS) held on 22-26 June 2009 in New York, reiterating that "according to Article 121 of the UNCLOS, rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.

3) In this connection, the statements of these distinguished representatives of the People's Republic of China are also relevant to the situation in the South China Sea and thus it is only correct to state that those remote or very small features in the South China Sea do not deserve exclusive economic zone or continental shelf of their own. Allowing the use of uninhabited rocks, reefs and atolls isolated from the mainland and in the middle of the high sea as a basepoint to generate maritime space concerns the fundamental principles of the Convention and encroaches the legitimate interest of the global community.

4) Therefore, as attested by those statements, the so called 'nine-dotted-lines map' as contained in the above circular note Number: CMUI712009 dated 7-May 2009, clearly lacks international legal basis and is tantamount to upset the UNCLOS 1982.

Preliminary Information Submitted by China

On 11 May 2009 China submitted Preliminary Information¹⁰⁵ to the CLCS in the direction of Japan which has no relevance to the disputes in the South China Sea.

IMPACT OF SUBMISSIONS ON CLAIMS IN THE SOUTH CHINA SEA

The submissions for an extended continental shelf in the disputed areas

The CLCS is a body of scientists, not an arbitral tribunal or court. Therefore, its rules of procedure provide that it shall not consider a submission in cases where "a land or maritime dispute exists". Article 5(a) of Annex I to the Rules of Procedure of the Commission on the Limits of the Continental Shelf provides that:

¹⁰⁵ *Preliminary Information Indicative of the Outer Limits of the Continental Shelf Beyond 200 nautical miles of the People's Republic of China* dated 11 May 2009 available at the CLCS Website at http://www.un.org/Depts/los/clcs_new/submissions_files/preliminary/chn2009preliminaryinformation_english.pdf.

(a) In cases where a land or maritime dispute exists, the Commission shall not consider and qualify a submission made by any of the States concerned in the dispute. However, the Commission may consider one or more submissions in the areas under dispute with prior consent given by all States that are parties to such a dispute.¹⁰⁶

With respect to the Joint Submission of Malaysia and Vietnam and the Submission of Vietnam, the Notes Verbale of both the Philippines and China stated that “a maritime dispute exists” and the Notes referred specifically to Article 5(a). Therefore, the CLCS is not likely to consider either the Joint Submission of Malaysia and Vietnam or the Submission of Vietnam.

The Philippines has made a partial submission and reserved the right to make a submission in other areas. Both Brunei and China have submitted Preliminary Information to the CLCS. If any of these States make a submission for an extended continental shelf in the disputed areas of the South China Sea, other claimants States are likely to object on the ground that a maritime dispute exists. Therefore, the CLCS will not be able to consider such submissions either.

What then is the legal effect of the submissions of Malaysia and Vietnam? One could argue that they still have a legal effect even if the CLCS is not able to consider them. They still form the legal basis for the position of Malaysia and Vietnam on how the natural resources of the seabed and subsoil beyond their 200 nm limits should be determined. With respect to the living resources in the water column beyond their 200 nm limits, they would be considered high seas, and would be subject to the provision in UNCLOS on high seas fishing.

How claims have been clarified

As a result of the actions of the ASEAN claimant States with respect to the extended continental shelf, their claims have been clarified in several respects.

First, the 200 nm outer limits of the exclusive economic zones of Malaysia and Vietnam have been declared and their coordinates have been published and circulated. In addition, the adjacent boundaries within 200 nm between Brunei and Malaysia have been clarified by a bilateral agreement between Brunei and Malaysia.

Second, Malaysia, Vietnam and Brunei seem to have taken the position that the islands over which they claim sovereignty in the South China Sea are not entitled to more than a 12 nm territorial sea. This is implied from the fact that they did not claim an exclusive economic zone from any islands in the South China Sea, but only from the baselines along the coast of their mainland.

¹⁰⁶ Annex I of the *Rules of Procedure of the Commission on the Limits of the Continental Shelf* available at the CLCS Website at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/309/23/PDF/N0830923.pdf?OpenElement>

Third, Malaysia and Vietnam have claimed the area opposite the outer limits of their 200 nm exclusive economic zones as extended continental shelf, but left the maritime boundary between their extended shelves undefined. This would give the two States the sovereign right to explore and exploit the natural resources of the sea bed and subsoil on the shelf. The water above the extended continental shelf area would be high seas, and access to the fisheries resources in this area would be subject to the UNCLOS provisions on high seas fishing.

Fourth, the Philippines has established archipelagic baselines in conformity with the provisions in Part IV of UNCLOS. Therefore, it can be inferred that it has finally given up on its rectangular territorial claim based on the coordinates in the 1898 Treaty of Paris and has brought its archipelagic claim into conformity with UNCLOS.

Fifth, the Philippines has also clarified its claim to the islands in the KIG by stating that these islands will be governed by the regime of islands in Article 121 of UNCLOS. This means that that it will measure the 12 nm territorial sea from the islands using the general rule on baselines, which is the low water line along the coast, and not by archipelagic baselines. Therefore, the Philippines has also clarified that it will not be using the polygon shaped straight lines around the KIG group as a boundary for its maritime zones. This means that the polygon shaped strait lines were merely a convenient way for the Philippines to have indicated which islands in the Spratlys it claimed are under its sovereignty.

Sixth, the claim of China is clarified to a limited extent. By attaching the nine dashed lines map to their Note Verbale, the PRC has officially given notice to the international community that this map is significant to its claim in the South China Sea, including the Spratly Archipelago. Before 2009 it was not clear whether the PRC had officially based its claim on the map.

Seventh, the wording of China's Note Verbale also clarified its position in some respects. In its Note, China stated that it claimed "sovereignty" over the islands and their "adjacent waters". If China would clarify that by adjacent waters they mean a 12 nm territorial sea measured from the low-water line of each island, this would be consistent with UNCLOS. In its Note China also stated that it claimed "sovereign rights and jurisdiction" in the "relevant waters". If they would clarify that "relevant waters" means they are claiming only an exclusive economic zone in the waters adjacent to the territorial sea measured the baselines of each island, this would also be consistent with UNCLOS.

Finally, China's claim is clarified to some extent because of what is not stated in its Note Verbale. The Note Verbale makes no mention of "historic rights" or "historic waters". It uses only the language of UNCLOS, which is "sovereignty, sovereign rights and jurisdiction". Therefore, it seems that China is not asserting any historic rights to the waters inside the nine dashed lines and that China is not claiming that the waters inside the dotted lines are its historic waters. Given that some writers in China and

Taiwan had made such assertions when discussing the significance of the nine dashed line map, China's position is now clearer.

How the claims have not been clarified

The claim of the Philippines remains unclear in two respects. First, it has not set out the outer limit of its 200 nm exclusive economic zone in the direction of South China Sea. However, since it has established its archipelagic baselines, it is likely that it will measure the limit of its 200 nm exclusive economic zone from these archipelagic baselines. Second, the Philippines has stated that Scarborough Shoal and the Kalayaan Island Group will be governed by the regime of islands in Article 121. It has not clarified whether it intends to treat all of the features as "rocks" that are only entitled to a 12 nm territorial sea, or whether it intends to claim that some of the features are islands entitled to an exclusive economic zone and continental shelf of their own.

China's reference in the Note Verbale to "adjacent waters" and "relevant waters" left their claim ambiguous. However, the main problem with the Notes Verbale of China was the fact that they said "see attached map" after the vague language, and then attached the infamous nine dashed lines map. This raised serious concerns in many countries, including ASEAN countries, and rekindled old suspicions about the nature of China's claim and intentions in the South China Sea. Critics of China were quick to claim that by attaching the map China was in effect claiming 80-90% of the South China Sea as either its territorial sea or historic waters, and that such claims were not consistent with UNCLOS or international law. The media in the United States were quick to pick this point up, and observers in the US began to argue that China's assertive actions were a threat to the freedoms of navigation and overflight in the South China Sea.

China's claim is even more ambiguous when one considers the language it used in its Note Verbale protesting the 2009 Baselines Law of the Philippines. In that Note, China stated it has indisputable sovereignty over the Huangyan Island and Nansha Islands "and their surrounding maritime areas". The phrase "surrounding maritime areas" is even more ambiguous than "adjacent waters". Therefore, unless the true intent was lost in translation, it could be concluded that China's policy with respect to the nature of its claim to the waters in the South China Sea has been one of "deliberate ambiguity".

Even Indonesia, which is not a claimant State, believed it necessary to make an official statement concerning China's Notes Verbale. Indonesia's Note Verbale of 8 July 2010 raised two concerns. First, that the nine dashed lines map attached to China's Note Verbale lacks a basis in international law and upsets the balance established in UNCLOS. Second, that China should act consistently in applying UNCLOS, and follow the same reasoning on rocks and islands in the South China Sea as it had articulated with respect to the claim of Japan over Okinotorishima.

In summary, the measures taken by Malaysia, Vietnam and the Philippines have clarified their claims to a significant extent in a manner that is in conformity with UNCLOS. By contrast, the measures taken by China have reinforced fears and suspicions that its claim is inconsistent with UNCLOS and that it is being deliberately ambiguous about the legal basis for its claim. The result is that a large segment of the international community now views China's claims in the South China Sea as illegitimate. China's actions also raise questions as to whether it will act in conformity with UNCLOS only when it supports its political position (as with Okinotorishima), but ignore it when it does not support its position (as in the South China Sea).

How China can clarify its position

As one of the authors of this article has argued in a separate commentary¹⁰⁷, it would be possible for China to take steps to clarify its claims in the South China Sea in a manner that will protect its national interests and be consistent with UNCLOS. It could begin by stating that its position in the South China Sea is as follows:

First, China claims sovereignty over all the islands within the nine dashed lines, including those islands which are currently occupied by other states or by Taiwan, as well as sovereignty in a 12 nautical mile territorial sea adjacent to the islands;

Second, China claims an exclusive economic zone beyond 12 nm from those islands which are capable of sustaining human habitation or economic life of their own as set out in Article 121 of UNCLOS, and China has the sovereign right to explore and exploit the living resources in the water and the living and non-living resources of the sea-bed and subsoil in the exclusive economic zone;

Third, China recognises that all states enjoy high seas freedoms in the exclusive economic zone claimed from those islands, including the freedoms of overflight, navigation and the right to lay submarine cables and pipelines;

Fourth, sovereignty over the islands in the South China Sea is not governed by UNCLOS, and disputes concerning sovereignty over the islands in the South China Sea cannot be referred to any international court or tribunal without China's express consent;

Fifth, given the highly sensitive nature of the sovereignty claims, it is unlikely that China and the other claimant states will be able to agree to settle the issue of sovereignty over the islands in the foreseeable future;

¹⁰⁷ See Robert BECKMAN, "South China Sea: How China could clarify its claims," RSIS Commentary No. 116 /2010 dated 16 September 2010 available at <http://cil.nus.edu.sg/wp/wp-content/uploads/2009/08/RSIScommentaries-ProfBeckman-16Sep2010.pdf>.

Sixth, although Malaysia and Vietnam have made submissions to the CLCS in which they claim an extended continental shelf beyond the limits of their 200 nm exclusive economic zone claims, the CLCS cannot consider those submissions under its rules of procedure because of the existence of a maritime dispute in the area;

Seventh, China's claim to an exclusive economic zone from the islands in the South China Sea will overlap substantially with the exclusive economic zone claims and the extended continental shelf claims of Malaysia, Vietnam and the Philippines. Such overlapping maritime boundary claims cannot be referred to any international court or tribunal without the consent of all the parties, including China. This is because China has exercised its right under Article 298(1) to opt out of the compulsory binding dispute settlement procedures in UNCLOS for disputes relating to the delimitation of maritime boundaries. Furthermore, the overlapping maritime boundary claims cannot be agreed upon until the sovereignty claims over the islands in the South China Sea have first been resolved;

Eighth, pending final settlement of the sovereignty and maritime boundary claims, the states concerned have little choice but to enter into "provisional arrangements of a practical nature" as called for in the UNCLOS provisions on boundary delimitation, provided that such provisional arrangements are without prejudice to the final determination of the sovereignty claims and to the final agreements on maritime boundaries;

Ninth, China is willing to work with the ASEAN member states on the development of confidence-building measures and cooperative measures as called for in the 2002 China-ASEAN Declaration on the Conduct of Parties in the South China Sea; and

Finally, China reaffirms its position that the claimant states should agree to set aside the sovereignty and maritime boundary disputes, and negotiate a mechanism which allows for joint development of the natural resources.

If it wishes to clarify its position on the nine dashed lines map, China could follow the precedent of the Philippines. The rectangular claim of the Philippines based on the 1898 Treaty of Paris was similar in many respects to China's nine dashed line claim. It was supported by a significant portion of the domestic population for historic reasons, but it was not accepted as legitimate by the international community. In the case of the Philippines it was even more sensitive domestically because of provisions in its Constitution. When the Philippines signed and ratified UNCLOS, it attempted through a Unilateral Declaration to the UN Secretary-General to assert that UNCLOS shall not affect the sovereign rights

of the Philippines arising from its Constitution, its domestic legislation and any treaties to which the Philippines is a party.¹⁰⁸ However, formal objections to its declaration were submitted to the UN Secretary-General by the USSR, the USA and Australia.¹⁰⁹ In response to Australia's objection, the Philippines stated in a Declaration to the UN Secretary-General in 1988 that it was taking steps to harmonize its domestic legislation with the provisions of UNCLOS.¹¹⁰ However, it was not able to do so until it passed its new Baselines Law in 2009. It is interesting to note that the Philippines never formally abandoned its claim based on the 1898 Treaty. Instead, it simply passed the 2009 Baselines Law and brought its claim into conformity with UNCLOS.

China could also clarify the nine dashed lines map by following the precedent of the Philippines with respect to the KIG group of islands. The Philippines does not claim sovereignty over or sovereign rights in the waters inside the polygon shaped area. Rather, the Philippines asserts that the islands inside the polygon shaped lines are under its sovereignty. If the Philippines claims a territorial sea, exclusive economic zone or continental shelf from any of the islands, such zones will be measured from the low water line of each individual island, which is the normal rule for baselines.¹¹¹

CONCLUSIONS

The claims of most of the Claimant States in the South China Sea were unclear prior to 2009. In addition, although the claimant States became parties to UNCLOS, they were slow to amend their national laws and practices and bring their claims into conformity with UNCLOS.

¹⁰⁸ See Declaration of Understanding made by Philippines upon signature (10 December 1982) and confirmed upon ratification (8 May 1984). Paragraph 2 of the Declaration states:

Such signing shall not in any manner affect the sovereign rights of the Republic of the Philippines as successor of the United States of America, under and arising out of the Treaty of Paris between Spain and the United States of America of 10 December 1898, and the Treaty of Washington between the United States of America and Great Britain of 2 January 1930.

See Status of Treaties available at the United Nations Treaty Collection Website at http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI~6&chapter=21&Temp=mtdsg3&lang=en

¹⁰⁹ See USSR Objection of 25 February 1985 to Philippines Declaration; United States Objection of January 1986 to Philippines Declaration; Australian Objection of 3 August 1988 to Philippines Declaration: See Status of Treaties available at the United Nations Treaty Collection at http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI~6&chapter=21&Temp=mtdsg3&lang=en.

¹¹⁰ See Philippines Declaration of 26 October 1988 in reply to Australian Objection: Status of Treaties available at the United Nations Treaty Collection at http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI~6&chapter=21&Temp=mtdsg3&lang=en

¹¹¹ Article 5, UNCLOS.

As a result of the Submissions and Notes Verbale submitted to the CLCS in response to 13 May 2009 deadline, the situation has changed dramatically.

The measures taken by the claimant States with respect to an extended continental shelf have resulted in the claims of the ASEAN claimant States being clarified in a manner that is consistent with UNCLOS and international law.

The claim of China has been clarified to a limited extent. However, the measures taken by China in response to those taken by the ASEAN claimants have cast further doubt on the legitimacy of China's claim and on its consistency with international law. Consequently, China will be under increasing pressure to clarify its claim and bring it into conformity with UNCLOS. It will be difficult for the other claimants to negotiate with China on joint development arrangements so long as China's claim is viewed as inconsistent with UNCLOS.

If China were to clarify its claim in the South China Sea as outlined above, it would enhance the legitimacy of its claim and provide a setting for discussions with its neighbours on the only viable long-term solution in the South China Sea, namely, the setting aside of the sovereignty disputes and the establishment of provisional arrangements of a practical nature in the South China Sea, including joint development of the natural resources.