

# THE LEGALITY OF THE NINE-DOTTED LINE IN THE SOUTH CHINA SEA: AN ANALYSIS OF HISTORIC WATERS

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## ABSTRACT

*China and Vietnam recently had a major crisis in May, 2014, when Beijing pressed in an oil rig in the disputed Spratly Islands, leading to anti-China riots in Vietnam<sup>2</sup>. Although the two nations, along with their neighbors, have been involved in both territorial and boundary disputes in the South China Sea since as early as 1914, at present, managing the territorial dispute has gained utmost importance. Analysis of the dispute based on international law, particularly on the ICJ case law, has been supposed by experts to help the two sides manage their dispute in a new perspective and generate political willingness to negotiate the joint development area. China's continuous assertion of its sovereignty over the disputed islands rests on the 'nine-dotted line' created by it, which China states has gained legality due to the force of history and time. The opposite side challenges the veracity of this claim itself, thus creating a legal impasse. Hence, before attempting to determine the sovereignty of the islands in the South China Sea, it is imperative to analyse the legality of China's nine-dotted line by first analyzing the concept of historic waters. This paper seeks to do exactly that.*

## INTRODUCTION

The South China Sea Islands ('*Nanhai zhudao weizhi tu*' in Mandarin) have been an area of contention for the past few decades in the Far East, with the legal status of the Pratas Islands, the Paracel Islands, the Macclesfield Bank, and the Spratly Islands remaining elusive. Over the past year, the situation has only become worse owing to China's assertiveness that borders on aggression, leaving the international community grappling for solutions for peaceful settlement, fearing further problems. Unsurprisingly, China and Vietnam recently had a major crisis in May, 2014, when Beijing pressed in an oil rig in the disputed Spratly Islands, leading to anti-China riots in Vietnam.

The dispute stems from the fact that China has claimed a part of the sea that includes the Paracels and Spratly Islands, which possibly violates Articles 14 and 15 of the United

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<sup>2</sup> For a pictorial representation of the dispute, see, Appendix 2.

Nations Convention on the Law of the Sea ('UNCLOS'), which speak of combination of methods for determining baselines, and delimitation of the territorial sea between States with opposite or adjacent coasts, respectively. This is because China has drawn a baseline, which according to Vietnam violates Articles 7 and 38 of UNCLOS.<sup>3</sup> Since the nine-dotted line blatantly disregards the accepted international laws pertaining to delimitation and the drawing of baselines, such as, for instance, the equidistant principle, it has clearly created a conundrum. Yet, China is as assertive as can be with guarding what it claims is its territory. Hence, the legal status of this line, referred to commonly as the nine-dotted line, must first be looked into, which is the objective of this paper.

### BACKGROUND TO THE SOUTH CHINA SEA DISPUTE

While the South China Sea dispute has been present in Far East Asia for quite some time, the growing number of competing legal interests of several states including China, Taiwan, the Philippines, Malaysia, Vietnam and Brunei has made matters especially complex over the past few years.<sup>4</sup> However, to fully understand the merits of the arguments of the affected sides, it is imperative to look into the history and background of the dispute. The multitude of claims over the islands or other landmasses present in the area involves both legal and non-legal issues.

China issued a map<sup>5</sup> marking its claims over the islands (using nine dashes, therefore earning it the name 'the nine dashed map) in 1947, which showed the two island groups, i.e., Paracels and Spratly Islands, falling entirely within the territory of China. These claims are paralleled by Taiwan, as the Republic of China. However, the nine-dotted line, which first made an appearance in as early as 1914, is believed to have been compiled by a Chinese cartographer named Hu Jinjie.<sup>6</sup> Similar versions have been seen through history in 1920 and 1930.<sup>7</sup>

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<sup>3</sup> UN Doc. A/51/645, 15 October 12, 1996.

<sup>4</sup> Alice D. Ba, *Staking Claims and Making Waves in the South China Sea: How Troubled Are the Waters?* in *Special Focus: The South China Sea Dispute*, 33, 3 CONTEMPORARY SOUTHEAST ASIA 269 (2011).

<sup>5</sup> Original image, part of the public domain of China

[http://news.bbcimg.co.uk/media/images/67616000/gif/\\_67616829\\_south\\_china-sea\\_1\\_464.gif](http://news.bbcimg.co.uk/media/images/67616000/gif/_67616829_south_china-sea_1_464.gif), UNCLOS & CIA; [http://upload.wikimedia.org/wikipedia/commons/4/43/1947\\_Nanhai\\_Zhudao.png](http://upload.wikimedia.org/wikipedia/commons/4/43/1947_Nanhai_Zhudao.png) ();

See also, Appendix 1.

<sup>6</sup> HAN ZHENHUA (ED.), *A COMPILATION OF HISTORICAL MATERIALS ON CHINA'S SOUTH CHINA SEA ISLANDS* 355 (Beijing, Oriental Press, 1988).

<sup>7</sup> 'The Chinese Map of Boundary Changes' in TU SHICHONG (ED.), *THE NEW CHINESE SITUATION ATLAS* (1927).

In 1933, France, the ally of Vietnam, occupied a nine of the Spratly Islands, which the old Chinese map had included as part of China's territory.<sup>8</sup> This was fiercely opposed by China, and the result of the protest was the further extension of the ostensible Chinese territory of the sea. This was clearly done with the intent of making it clear that China claimed this territory.

The dispute over these given islands is not restricted to politics, and extends even to geographical factors. For instance, the groups of small islands that the Chinese refer to as 'qundao' which literally translates to archipelago is geographically open to debate. However, many state that since some of these clusters of islands are completely submerged in water, they cannot be considered to be islands at all. However, this paper will not attempt to review the geographical debate, and proceed with the assumption that these allegedly submerged parts also constitute islands.

#### THE CONCEPT OF HISTORIC WATERS: IS IT ACCEPTED IN INTERNATIONAL LAW?

The concept of historic waters still remains vastly unclear in international law. This is mainly because the concept has not been clearly laid down in any international convention. However, in 1958, during the first UN Conference on the Law of the Sea ('UNCLOS I') held in Geneva, the issue of historic waters and bays was first raised by the delegations from various states including India, Japan and Panama. Due to the lack of information on the topic, UNCLOS I did not tackle the question concerning the definition of these two terms, but instead, it inserted safeguard provisions in the Convention on the Territorial Sea and the Contiguous Zone which was adopted in the Conference, thereby recognizing the legitimacy of both historic waters and historic bays. By the time of third UN Conference on the Law of the Sea ('UNCLOS III') however, the legal regimes of historic waters bays were not even taken into consideration during the Conference when put forth by Columbia.<sup>9</sup> Yehuda Z. Blum offers a beautiful piece of analysis regarding this result. According to him, this was probably due to the growing uniform recognition by States of the twelve mile limit of the territorial sea, the continental shelf, EEZ, and archipelagic waters, which probably brought

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<sup>8</sup> Zou Keyuan, *The Chinese Traditional Maritime Boundary Line in the South China Sea and Its legal Consequences for the Resolution of the Dispute over the Spratly Islands*, INTERNATIONAL JOURNAL OF 14 MARINE AND COASTAL LAW, (1997) in ZOU KEYUAN & JIANFU CHEN, INTERNATIONAL LAW IN EAST ASIA 220 (Ashgaten Publishing Limited) (2011).

<sup>9</sup> Third United Nations Conference on the Law of the Sea, Official Records, Vol. V, 202-203.

about gradual phasing out and what some scholars perceive the potential eventual elimination of the phenomenon of ‘historic’ claims.<sup>10</sup>

Like Yehuda Blum, other scholars too have offered some respite in this uncharted field. Bouchez states, “historic waters are waters over which the coastal State, contrary to the generally applicable rules of international law, clearly, effectively, continuously, and over a substantial period of time, exercises sovereign rights with the acquiescence of the community of States.”<sup>11</sup> Gidel offers a narrower interpretation of the when as he calls historic bays “those areas of water the legal status of which differs with the consent of other states – from what it ought to have been according to the generally recognised rules.”<sup>12</sup> D.P. O’Connell further elucidates this narrow reading:

“The terms ‘historic waters’ and ‘historic bays’ are not synonymous, as ‘historic waters’ has a wider scope than ‘historic bays’. Historic title can not only be applied to waters such as bays, but also to territorial seas, straits, archipelagos, and to all those waters which can generally be included in the maritime area of a coastal state.”<sup>13</sup>

Moreover, the Yearbook of the International Law Commission (‘ILC’) has elucidated on the concept as thus: “historic waters has its root in the historic fact that States through ages claimed and maintained sovereignty over maritime areas which they considered vital to them without paying much attention to divergent and changing opinions about what general international law might prescribe with respect to the delimitation of the territorial sea.”<sup>14</sup> The factors required for a historic claim as mentioned in this document of the ILC are stated as thus:

“(1) states which claim historic title should exercise sovereignty in the waters; (2) the exercise of sovereignty should have been continuous for a long time and should have become the usage; and (3) it should be tolerated by other states.”<sup>15</sup>

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<sup>10</sup> Yehuda Z. Blum, *Current Developments: the Gulf of Sidra Incident*, 80 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 677 (1986).

<sup>11</sup> L.J. BOUCHEZ, THE REGIME OF BAYS IN INTERNATIONAL LAW 281(Sythoff, Leyden 1964).

<sup>12</sup> G. GIDEL, LE DROIT INTERNATIONAL PUBLIC DE LA MER Vol. III, 623 (Paris, 1932-4).

<sup>13</sup> D.P. O’CONNELL, THE INTENTIONAL LAW OF THE SEA Vol. I, 417-418.

<sup>14</sup> Yearbook of the International Law Commission, *Juridical Regime of Historic Waters, Including Historic Bays*, Vol. 11 1962, 6-7.

<sup>15</sup> Id.

This is important in the context of the acquiescence of the neighbouring states. As a leading scholar from Taiwan, Zhao Guocai, explains:

“Since the declaration of the nine-discontinued-and-dotted line, the international society at that time had not put forward any dissents. Neither had the adjacent States raised any diplomatic protests on the nine-dotted line. These amounted to acquiescence. After that, quite a lot of maps produced abroad were all delineated in this way and indicated as pertaining to China. China owns the historic right of islands, reefs, shoals, banks, and waters within the nine-dotted line. The South China Sea is regarded as the historic waters of China, which was universally acknowledged at that time. So far it has lasted for half a century.”<sup>16</sup>

However, one cannot do without considering another side to the argument. Some scholars are of the belief that China has not made any claim that deviates from UNCLOS. The reasoning they give is that China is only considering the landmasses or islands in the South China Sea to be a part of its territory, and not the entire mass of water.<sup>17</sup> However, this view can be defeated both factually and legally. First, Taiwan has openly deemed that the entire area within the nine-dotted line to be China's historical waters, and this includes the water.<sup>18</sup> Second, this view goes against the UNCLOS concept of EEZ, and considering that according to UNCLOS, the islands form part of other States' EEZ, China will have no claim over the islands even if it places no claim over the water. Yet, these lapses have not been considered by some authors, who believe that the nine-dotted line plays a dual role in establishing China's territory: first, it defines China's sovereignty over the South China Sea Islands, and also plays the role of China's claimed maritime boundary in the South China Sea.<sup>19</sup> This is probably because some scholars deem it to be almost what one may refer to as a *sui generis* concept. Hence, it is important at this juncture to analyse the opinions of scholars on the subject and other experts to completely understand the issue at hand. Hasjim Djalal, a senior diplomat hailing from Indonesia states,

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<sup>16</sup> Zhao Guocai, 'Cong xianxing haiyangfa fenxi nanshaqundao de zhuquan zhengduan' *Analysis of the Sovereign Dispute over the Spratlys under the Present Law of Sea*, 9 ASIAN REVIEW 22 (Hong Kong, 1999).

<sup>17</sup> See, L. Jinming & L. Dexia, *The Dotted Line on the Chinese Map of the South China Sea: A Note*, 34 OCEAN DEV. & INT'L L. 287, 293 (2003).

<sup>18</sup> Cheng-yi Lin, *Taiwan's South China Sea Policy*, 37 ASIAN SURVEY 323-324 (1997).

<sup>19</sup> L. Jinming & L. Dexia, *The Dotted Line on the Chinese Map of the South China Sea: A Note*, 34 Ocean Dev. & Int'l L. 287, 293 (2003).

“There has been no definition of those dotted lines, and neither was their co-ordinates stated. Hence, the legality and the precise locations of those lines were not clear. It was however presumed, that what China intended on claiming, originally at least, was limited to the islands and the rocks, but not the whole sea enclosed by those undefined dotted lines.”<sup>20</sup>

## HISTORIC CLAIMS AT THE ICJ

The notion of historic waters being claimed by China is not solitary. In fact, there are around twenty claims being made for the declaration of historic bays, which are considered to be a narrower reading of historic waters.<sup>21</sup> The concept of historic waters has been accepted by the International Court of Justice (‘ICJ’) in the *Norwegian Fisheries* case as early as 1951.<sup>22</sup> Interestingly, the claim was made even before UNCLOS I, which recognised historic waters only seven years later, in 1958. In this case, the court found that Norway’s delimiting territorial waters was valid although the method in which it had done so was contrary to international law. The rationale employed by the court to arrive at such a conclusion was that the system employed by Norway had been consistently applied and unopposed by other states for close to sixty years. In Norway’s comments in this case, the word ‘historic’ derives its title from the fact that it has obtained “force from history” or the “passage of time”.<sup>23</sup> Similar to this case has been the ICJ’s treatment of the *Gulf of Fonseca* case in 1992,<sup>24</sup> where the court found that the Gulf of Fonseca was a historic bay and its waters were historic waters.

Slightly deviating from the realm of ‘territory’ and moving to ‘rights’ itself, one cannot simply disregard the *Fisheries Jurisdiction* case, which propounded the concept of historic rights as being claimable on the basis of peaceable and continued sovereignty, with the prolonged toleration of other states.<sup>25</sup> In this case, Tunisia made a claim that it possessed well-established historic rights with regard to fishing rights, or what it termed as “the fixed and sedentary fisheries’ in certain regions outside its territorial jurisdiction. The ICJ opined that the “antiquity and continuous exercise of the exploitation over fixed fisheries had been

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<sup>20</sup> Hasjim Djalal, *Spratly Dispute Needs Democratic Settlement*, THE JAKARTA POST January 2, 1995, at 5.

<sup>21</sup> R.R. CHURCHILL & A.V. LOWE, *THE LAW OF THE SEA* 37 (Manchester University Press, 1983).

<sup>22</sup> UK v. Norway [1951] ICJ Reports 116, 139. SURYA P. SHARMA, *TERRITORIAL ACQUISITION, DISPUTES AND INTERNATIONAL LAW* 174 (The Hague, Martinus Nijhoff, 1997).

<sup>23</sup> Pleadings of Norway, Vol. I (Counter Memorial), 452.

<sup>24</sup> Land, Island and Maritime Frontier Dispute (El Salvador/Honduras, Nicaragua intervening) 1992 ICJ Rep 351.

<sup>25</sup> Tunisia v. Libya, [1973] ICJ Reports 3.

recognised by other states for centuries” and that these rights could be labelled as “non-exclusive historic rights”.<sup>26</sup>

### POSSIBLE SOLUTIONS TO THE DISPUTE

One way of dealing with the crisis is Canada’s response to the US challenge to the Canadian historic claim of the Arctic waters. The two states entered into bilateral negotiations and Canada agreed to allow American ships the right to pass through the claimed waters. Although bilateral agreement did not specify America’s recognition of the Canadian claim, the historic claim remained unaffected.

Similar to the concept of historic waters is the concept of the presential sea, which was recently put forth by Chile along with the backing of many other countries. This concept however, is slightly different from a claim merely dependent on historic use, simply due to the fact that it is based on an already internationally accepted covenant, being the UNCLOS. The argument put forward by Chile is that, a coastal state may extend its rights to the high seas adjacent to its EEZ for the purpose of protecting its natural resources, which has been accepted by the court.

### CONCLUSION

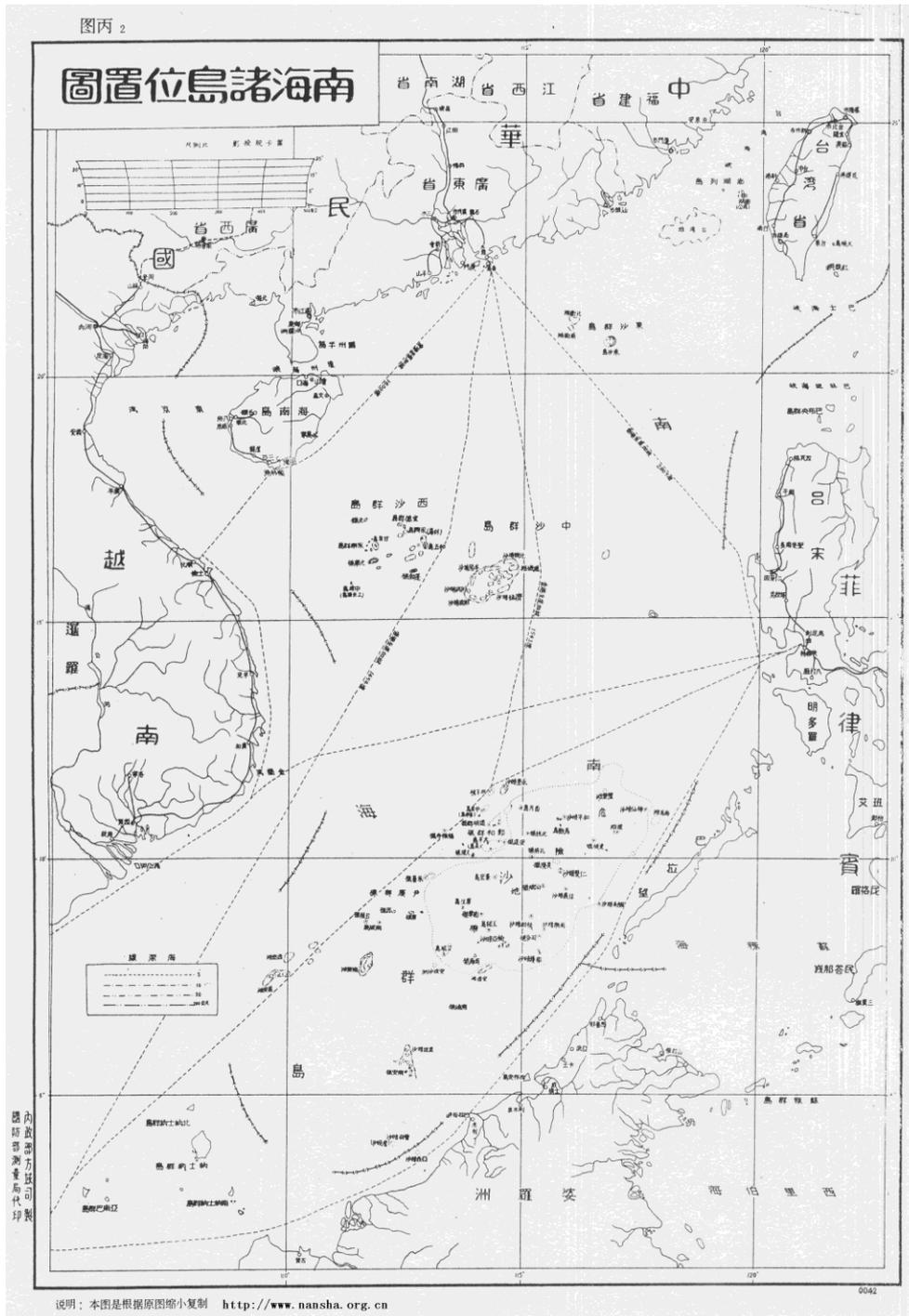
From the analysis of the literature available on historic claims, there remains no doubt that historic bays, rights and even historic waters are not completely elusive from the recognition of international law. The ICJ itself has attested to the fact that antiquity and tolerance add to strengthening the reason for deviating from the general principles followed by States. Yet, one cannot call this an open and shut case proving China’s sovereignty over the islands of the South China Sea. This is mainly because the basis of proving antiquity rests solely on fact, and not law. Due to evidentiary constraints, and the ironic problem of losing factual evidence over large periods of time, the matter still continues to be sitting on a wall. While the intention of the author was not to arrive at a conclusion as to whether China is right in establishing its sovereignty over the space enclosed by the nine-dotted line, this analysis shows that such a claim is not completely unfounded. Many opponents of China’s stance have stated in strong words that the drawing of the line itself is a grave departure from international law, be it treaty law such as UNCLOS, or even generally accepted principles of

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<sup>26</sup> Tunisia v. Libya, [1973] ICJ Reports 3, Para 98, 99.

delimitation, such as the equidistance principle. However, this analysis of the legality of historic rights shows not only through ICJ pronouncements, but also in the opinion of innumerable scholars, that the concept of historic waters is not something that China has simply conjured to suit its needs. Agreed, that historic claims have a legal basis in international law, but if China proceeds with the argument that its nine-dotted line amounts to a historic claim on the islands, it must match the claim with equally assertive facts.

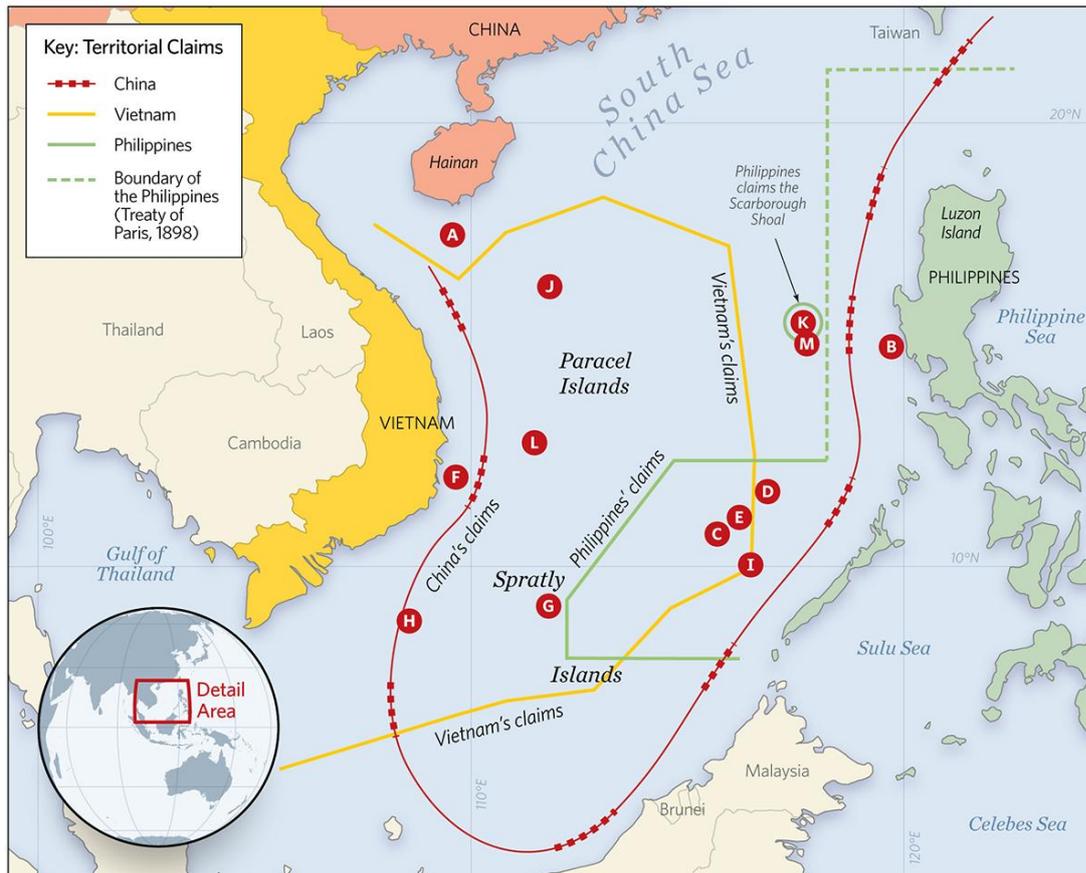
Appendix 1: HU's MAP OF 1947



## Appendix 2: CURRENT DISPUTE

### Area of Dispute: South China Sea

Since 2009, Chinese vessels have been involved in a number of aggressive incidents in the disputed waters of the South China Sea.



- A** **March 2009.** Chinese vessels harass USNS *Impeccable*
- B** **June 2009.** Chinese submarine collides with sonar cable of USS *John McCain*
- C** **February 2011.** Chinese frigate fires at Philippine fishing boats
- D** **March 2011.** Chinese patrol boats attempt to ram a Philippine government energy research vessel
- E** **May 2011.** Chinese vessels lay steel posts and buoys
- F** **May 2011.** Maritime security vessel from China cuts the cables of an exploration ship from Vietnam
- G** **May 2011.** Chinese military vessels threaten Vietnamese fishing boats
- H** **June 2011.** Three Chinese vessels disabled cables of a PetroVietnam oil survey ship, the *Viking 2*
- I** **December 2011.** Two Chinese civilian ships and Chinese naval vessel seen in Philippine territorial waters
- J** **March 2012.** China detains 21 Vietnamese fishermen in the Paracel Islands for seven weeks, sparking a diplomatic row
- K** **April 2012.** Chinese fishing at the Scarborough Shoal prompts an ongoing standoff between Philippine patrol vessels and Chinese surveillance ships. The shoal is 124 nautical miles from Luzon Island, well within the Philippine Exclusive Economic Zone (EEZ)
- L** **December 2012.** Chinese fishing boats sever seismic survey cables of Vietnamese ship, *Bin Minh 02*
- M** **August 2013.** Philippines Secretary of Defense displays photos of concrete blocks he calls prelude to Chinese construction at Scarborough Shoal

Sources: U.S. Department of Defense, "Military and Security Developments Involving the People's Republic of China 2010," [http://www.defense.gov/pubs/pdfs/2010\\_CMPR\\_Final.pdf](http://www.defense.gov/pubs/pdfs/2010_CMPR_Final.pdf) (accessed February 27, 2012); Martin Stuart-Fox, *A Short History of China and Southeast Asia* (Sydney: Allen & Unwin, 2003), map by R. B. Cribb, "Territorial claims in the South China Sea," p. 217; and Heritage Foundation research.

