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BLUE SECURITY

A MARITIME AFFAIRS SERIES

MAKING HISTORY, MAKING ARCHIPELAGOS:

A parallel South China Sea dispute

Alex P. Dela Cruz

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INTRODUCTION

In July 2016, an Arbitral Tribunal formed under Annex VII of the United Nations Convention on the Law of the Sea (LOS Convention) published its Award in the South China Sea case between the Philippines and China. Among the several issues in dispute in the case was the legality of a series of nine dashes – the 'nine-dash line' – that China uses as a cartographical depiction of unspecified claims to historic rights in the South China Sea and its features.[1] On this issue, the Tribunal famously declared that the LOS Convention has 'superseded any historic rights or other sovereign rights or jurisdiction in excess of the limits imposed therein'.[2]

Nearly a decade after the Award, the making of historical narratives continues to play a critical role in the contest for dominance over the South China Sea. In July 2024, several historians and legal academics gathered in China's southern province of Hainan for a seminar on 'narrative construction and discourse building' in the South China Sea. Wu Shicun, the historian who leads China's National Institute for South China Sea Studies, reportedly warned attendees that China faces 'an increasingly arduous battle over public perception and opinion' as its neighbours cooperate 'with extraterritorial forces in the study of historical and legal issues'.[3] Alongside the recent escalation of confrontation at sea, the parallel battle for hearts and minds enlists history in an attempt to strengthen competing maritime claims. This renewed interest in history suggests that, in contrast to the *South China Sea* Tribunal's declaration, the LOS Convention has not completely suppressed appeals to history as a tool of legal argument. If the LOS Convention is said to have extinguished such claims, how are we to make sense of continued national efforts to mobilise historically grounded arguments in the law of the sea post-2016?

In this article, I critically describe the relationship between the LOS Convention and the construction of historical narratives to support maritime claims. The argument is that historical narratives have played a significant role in how states assert their rights and entitlements in the law of the sea before and after the adoption of the Convention. Such narratives belong to a repertoire of assertive and argumentative practices that purport to ground a maritime claim in international law, whether by treaty (LOS Convention) or by customary international law. Specifically, I develop the argument by examining how states have deployed historical narratives in asserting the legal status of archipelagos as defined in Article 46(b) of the LOS Convention. According to this provision, an archipelago refers to

> *a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such.*[4]

Little has been written regarding the reference to history in Article 46(b) and what it means, or its implications for the assertion of claims to 'offshore' or 'outlying' archipelagos, such as those made by China in relation to the Spratly Islands in the South China Sea. In the *South China Sea* Award, the Tribunal observed that states assert claims to offshore archipelagos by using straight baselines as defined in Article 7 of the LOS Convention to approximate the effect of archipelagic baselines in Article 47 in a way that is 'contrary to the Convention'.[5] Taking the archipelagic claims of the Philippines and China as illustrative examples, this article argues that the historical criterion for archipelagic formation in the law of the sea operates differently for the two states. For the Philippines, Article 46(b) constrains recourse to historical evidence that disputes the validity of boundary treaties concluded by former imperial sovereigns. However, Article 46(b) does not explicitly mention the subject whose regard is authoritative in the process of archipelagic formation. The silence leaves a gap in Part IV of the Convention, entitled 'Archipelagic States'. China seeks to fill this gap through state practice, including the making of historical narratives that assert a claim to an offshore archipelago in customary international law, a contested concept that does not appear in Part IV. The two cases of historical argumentation described here – through evidence and narrative-making – represent distinct kinds of legal work for the Philippines and China. The next section turns to a discussion of the role of history in the LOS Convention Part IV.

'HISTORY' IN THE LAW OF THE SEA CONVENTION'S ARCHIPELAGO REGIME

This section will describe how the reference to history in Article 46(b) of the LOS Convention limits recourse by archipelagic states to evidence of a past state of affairs relating to certain islands and waters – particularly colonial status – in asserting a maritime claim in the present. Excluding the LOS Convention's preamble, the word 'history' is referenced in the treaty six times through its variants, 'historic' and 'historical'. Further excluding provisions on archipelagos and archaeological and historical objects found at sea, three provisions of the Convention cite 'history' in relation to title to waters. These provisions are: Article 10(6) on 'historic bays'; Article 15 on the use of 'historic title' as an exception to the equidistance principle in the delimitation of the territorial seas of two states with opposite or adjacent coasts; and Article 298(1)(a)(i), which permits states to exclude disputes relating to historical bays or titles from the jurisdiction of the Convention's compulsory dispute settlement mechanisms. A few other provisions of the Convention imply an historical claim other than to title itself, such as Article 46(b) which deems islands and waters to be an archipelago where they 'historically have been regarded as such'.

Article 46(b) appears in Part IV of the Convention on 'Archipelagic States'. Part IV is the result of extended debates on the concept of archipelagos during the three UN conferences on the law of the sea from 1958 to 1982. A comprehensive history of these debates will not be attempted;[6] for my purposes here, it is sufficient to state that the Philippines entered these debates asserting sovereignty over waters within the archipelago that others (mostly large naval states and their allies) claimed to be international waters beyond the jurisdiction of any coastal state. The Philippine assertion of sovereignty over these waters was widely criticised, for example, at the 1974 session of the Third UN Conference on the Law of the Sea (UNCLOS III). There, the Bulgarian delegation accused the Philippines and other archipelagic states of abusing their geographical status in order to claim expansive areas of water.[7]

To those concerns, Mauritius, which allied with the Philippines, Indonesia, and Fiji to form an informal archipelagic negotiating bloc during UNCLOS III, responded that the legal concept of an archipelago should not stoke fears of expansive national jurisdiction over oceanic areas.[8] Its delegate, Anil Kumarsingh Gayan, argued that the term 'archipelago' should only refer to states that were truly archipelagic, and which consisted entirely of islands forming one or more archipelagos or a combination of those and other islands. He emphasised that states 'historically regarded' as archipelagic would retain that status.[9]

'Historically regarded' was language that Gayan lifted from the 1973 Archipelagic Principles, a draft proposal on archipelagos that the Philippines, Indonesia, Fiji, and Mauritius presented to the UN Seabed Committee, the forerunner to UNCLOS III.[10] The turn of phrase was inherently ambiguous and raised questions of what that 'regard' meant, when 'regard' was considered to have attached to a group of islands or waters, or how or when that 'regard' was considered to have been done with reference to history. More importantly, it was unclear whether the fact that certain islands and waters had been historically regarded as sufficiently closely interrelated to form an archipelago translated to a state's title to the waters separating the islands of that archipelago.

This uncertainty gave Filipino jurists a considerable measure of creativity in crafting legal arguments in favour of the fledgling Republic's territorial claims. Arturo Tolentino, head of the Philippine delegation to UNCLOS III, underscored the historical significance of the waters of the Philippine Archipelago and their role in unifying the Filipino people into a single sovereign state.[11] He maintained that the waters surrounding, between, and connecting the islands were juridically equivalent to land territory, designating them as the Philippines' 'historic waters'.[12] In his view, safeguarding what he regarded as Philippine historic waters from foreign interference was crucial to national security and warned that putting numerous qualifications on the legal concept of the archipelago would undermine its essence.[13]

Tolentino's notion of 'historic waters' applied the customary international law concept of 'historic title' to internal waters or territorial seas. At that point, however, both concepts eluded precise definition and implied a range of claims to maritime entitlements associated with islands. Tolentino used this ambiguity to make the argument that a recourse to history was necessary for the assertion of Philippine title or sovereignty over the waters around, between, and connecting the islands of the Philippine Archipelago. Indeed, the 2016 *South China Sea* Award acknowledges the role of the Philippines as the 'principal proponent' of the concept of historic title during UNCLOS III. During the debates, the Philippines used the term to assert a territorial claim to all waters enclosed by the lines drawn by Spain and the US in the 1898 Treaty of Paris as a means of designating and identifying the islands known as the 'Philippine Archipelago', which was the subject of the cession of territory between them.[14]

The US had previously rejected the Philippine position at UNCLOS II in 1960, when its chief delegate, Arthur Dean, commented that treating separate islands as an archipelago and granting it a unified area of water as territorial sea meant that high seas 'formerly used by ships of all countries would be unilaterally claimed... as internal waters'.[15] The US maintained this objection throughout UNCLOS III. In 1984, the Philippines ratified the Convention with a reservation that the new regime of archipelagic sea lanes passage '[does] not nullify or impair the sovereignty of the Philippines' and its 'authority to enact legislation to protect its sovereignty, independence, and security'.[16] The reservation provoked protests from the US, Russia, and Australia.

In 1962, the UN Office of Legal Affairs described a claim to historic waters as a claim that is

> *based on an historic title, to a maritime area as part of its national domain; it is a claim to sovereignty over the area. The activities carried on by the State in the area or, in other words, the authority continuously exercised by the State in the area must be commensurate with the claim. The authority exercised must consequently be sovereignty, the State must have acted and act as the sovereign of the area.*[17]

More recently, Murphy describes 'historic title' and 'historic waters' as similarly vague as the notion of 'historic rights'. At best, he writes, 'historic rights' refer to a wide array of state rights 'that are more limited than the plenary notion of sovereignty'.[18] Tanaka refers to 'historic rights' as those that a state acquires over certain land and sea areas 'through a continuous and public usage from time immemorial and acquiescence by other States, although those rights would not normally accrue to it under general international law'.[19] In the law of the sea, the notion of historic rights emerged at a time when the widely agreed – albeit uncodified – breadth of the territorial sea was three nautical miles, and states asserted such historic rights in order to exclude others from accessing and exploiting natural resources in the high seas adjacent to the coastal state.[20] In comparison, the *South China Sea* Tribunal uses the term 'historic rights' to refer to a broad array of state rights 'that would not normally arise under the general rules of international law, absent particular circumstances'. Such rights may include sovereignty, 'but may equally include more limited rights, such as fishing rights or rights of access, that fall well short of a claim of sovereignty'.[21]

What remains ambiguous, however, is whether the historical criterion in LOS Convention Article 46(b) refers to an assertion of historic rights, of historic title, or a claim to historic waters, or a combination of these. In the early days of UNCLOS III, prior to Article 46(b), the Philippines sought to deploy a previous state of affairs – its colonial status – to assert territorial claims to both sea and land areas encompassed within lines drawn up by Spain and the US in the context of a territorial cession. Since no one seriously contested legality of the 1898 Spanish cession of sea and land areas of the Philippine Archipelago to the US, the Philippines saw recourse to historical colonial status as a robust mode of asserting title to those areas after its independence. The apparent logic of the argument was that if the claims of past imperial sovereigns as to what constituted the Philippine Archipelago were valid at the moment of cession in 1898, then those claims should remain equally valid when asserted by an independent Philippines. Thus, the Philippines turned to historical evidence to shore up its claims to title over sea and land areas within the 1898 Treaty of Paris limits and – as we shall see in the following section – beyond them.

HISTORICAL EVIDENCE: THE PHILIPPINES IN *LIGITAN/SIPADAN*, 2001

This section discusses how the Philippines used history as evidence of a territorial claim to what is now the Malaysian state of Sabah on the island of Borneo in Southeast Asia. In an attempt to preserve and reassert this claim, the Philippines sought to introduce historical evidence of the close interrelation between the Philippine Archipelago and Sabah through a request to intervene[22] in the *Ligitan/Sipadan* case[23] between Malaysia and Indonesia at the International Court of Justice (ICJ).

In 1998, Indonesia and Malaysia reached an agreement to settle their sovereignty dispute over the islands of Ligitan and Sipadan through the ICJ. The sovereignty dispute could be traced from the nineteenth century from a series of attempts by the Netherlands and Britain, respectively the former imperial sovereigns of Indonesia and Malaysia, to settle their overlapping commercial and territorial interests on the island of Borneo.[24] Located east of Borneo, Ligitan and Sipadan and their surrounding waters have been the subject of oil prospecting licences from Indonesia and Malaysia since the independence of the two states.[25]

The Philippines saw *Ligitan/Sipadan* as an opportunity to assert its territorial claim to Sabah, which is located at close proximity to the disputed islands. Since 1962, the Philippines has maintained a dormant claim to Sabah, or North Borneo as it was known until 1963, through the ancient Sultanate of Sulu. The islands constituting the core of the Sultanate now correspond to the Philippine provinces of Sulu, Tawi-Tawi, and Basilan. In its intervention request, the Philippines acknowledged that its claim to Sabah was not the subject of the *Ligitan/Sipadan* case, and yet, 'we must explain enough of it so that the Court can appreciate the relation of the treaties, agreements and facts in the case before it to the claim of the Philippines and, as a result, our interest of a legal nature'.[26] An 'interest of a legal nature' that 'may be affected by the decision in the case' is central to any request for intervention, in accordance with Article 62(1) of the ICJ Statute. While it is for a state to consider itself possessed of an 'interest of a legal nature' in a pending case, it is for the Court to decide the request for intervention (Article 62[2], ICJ Statute).

Thus, in 2001, the Philippines submitted a request for permission to intervene in *Ligitan/Sipadan*. It sought to demonstrate an interest of a legal nature through a 'chain of title' over North Borneo. According to the Philippines, it entered this chain of title in 1962, when the Sultan of Sulu signed an instrument which 'ceded and transferred' the 'title and sovereignty and dominion' over the Territory of North Borneo to the Republic of the Philippines (1962 Sulu Cession).[27] The Sultanate of Sulu, in turn, traced its title to North Borneo from 1704, when the Sultan of Brunei ceded North Borneo to Sulu as a reward for Sulu's aid in a civil war for the Bruneian throne.[28] For the next century and a half, there were no serious contenders to the Sultan of Sulu's title to North Borneo.

The year 1878 was a critical point in the Philippine chain of title. During that year, an instrument entitled 'Grant by the Sultan of Sulu Covering his Lands and Territories on the Island of Borneo' (1878 Grant) was signed, on one hand, by Sultan Muhammad Jamalul Alam of Sulu, and on the other, by English merchant Alfred Dent and the Austrian consul at Hong Kong, Gustavus Baron von Overbeck.[29] A key provision of the 1878 Grant was that Dent and Overbeck would pay the Sultan of Sulu and his heirs the sum of 5,000 dollars annually. In 1881, after receiving a charter from the British government, Dent and his associates went on to form the British North Borneo Company. The charter vested broad prerogative powers to the Company, including 'the absolute power over life and death of the inhabitants of the country' and 'all the absolute rights of property' over its soil.[30] The BNBC administered North Borneo until economic losses from the Second World War forced it to abandon its charter in 1946. At that point, the British Crown assumed direct rule over North Borneo. In September 1963, Britain ceded the Crown Colony of North Borneo to the newly created Federation of Malaysia, an amalgamation of former British colonies in the Malay Peninsula, the island of Singapore, and the colony of Sarawak in northwestern Borneo.[31] At that point, North Borneo was renamed 'Sabah'.

The 2001 Philippine intervention request was not the first time the Philippines asserted a territorial claim to North Borneo. As mentioned earlier, prior to the British cession of North Borneo to newly formed Malaysia in 1963, the Sultan of Sulu ceded the same territory to the Philippines in April 1962. In January 1963, following a series of diplomatic protests, Filipino officials arrived in London to discuss the status of North Borneo with British counterparts. The two governments disputed the nature of the 1878 Grant during this dialogue. The British characterised the transaction recorded in the 1878 Grant as a cession of territory, while the Philippine position was that it was simply a lease. According to the British interpretation, the Sultan of Sulu had lost title to the areas covered by the 1878 Grant and so could not have been in a position to cede or transfer any rights to North Borneo in favour of the Philippines in April 1962. In line with its cession theory, Britain insisted that the annual payments required by the 1878 Grant were 'cession payments'. In contrast, the Philippines argued that the 1878 Grant was a lease and, therefore, the Sultanate of Sulu retained title to North Borneo. This title passed to the Philippines through the 1962 Sulu Cession. The required annual payments were, according to the Philippines, 'rental payments'. The debate over the nature of the 1878 Grant and the required annual payments featured in legal scholarship throughout the 1960s.[32] This debate came to be known in literature as the 1962 North Borneo Question.

The debate prompted an historical turn to events in Filipino international legal scholarship in an attempt to shore up the Philippines' claim to North Borneo against the British. Historical narrative afforded the Philippines a means of telling not only the story of how its territorial claim arose, but also the story of how some 7,600 disparate islands were drawn together as a single colonial entity of the Spanish Empire from 1565 to 1898, and a US territory from 1898 to 1946. By citing events from as early as the eighteenth century, the Philippines sought to establish the close interrelation between the Philippine Archipelago and North Borneo. During the 1963 London dialogue between the Philippine and British foreign ministries, the Philippine Society of International Law (PSIL) published a special North Borneo Supplement to the *Philippine International Law Journal*. The Supplement contained an assortment of historical records supporting the Philippine claim to North Borneo, including an English translation of the 1878 Grant, contemporaneous correspondence between British colonial administrators in Borneo and government officials in London, letters from the Sultan of Sulu to Spanish governors-general of the Philippines, and several other documents.

In more practical terms, historical evidence of an independent Sultanate of Sulu in 1878 enabled an independent Philippines to assert a territorial claim dating from the time it had the legal status of a colony. In international law, the colonial status of the Philippines until 1946 translated to an incapacity to conclude treaties and assert legal claims independently of erstwhile imperial sovereigns. Colonies could only be objects of such treaties and claims.[33] In insisting that it was the successor to a sovereign Sultanate of Sulu and its claim to North Borneo, the Philippines was seeking to claim, albeit provisionally, a capacity to assert a claim that it could not have asserted when it was a Spanish colony.

Aside from historical evidence, the North Borneo Supplement published a visual aid to the Philippine claim that North Borneo and the Philippines were closely interrelated. The Supplement prominently included a large map (see above) that featured all of East and Southeast Asia, parts of North and South Asia, Australia, New Zealand, and the western fringes of the Pacific Ocean. In one corner of the spread, the accompanying text described 'how essential North Borneo is to Philippine security'; 'North Borneo (Sabah)', according to the caption, 'is the gate to the open Philippine Sulu Sea like a cork to the open end of a bottle'.[34] The caption ended with a stern warning:

> *Should Malaya succumb to the communist threat on the mainland, with North Borneo under Malaya, there would be created a situation in which a communist territory would be immediately at the southern frontier of the Philippines. North Borneo is only 18 miles away from the nearest island of the Philippine archipelago. It is as vital to Philippine security as East Guinea is to Australia.*[35]

The London dialogue concluded in February 1963 in a British–Philippine statement that did not shift the parties' positions regarding North Borneo,[36] which became the State of Sabah in the new Federation of Malaysia later that year. For Britain, the Philippines was in no position in 1878 to assert or maintain its own legal claims separately from those of Spain (the imperial sovereign over the Philippines at that point). The colonial status of the Philippines continued through the 1898 Treaty of Paris, where a defeated Spanish Empire ceded the islands to an emerging global power, the United States. This colonial status – and the legal incapacity that came with it – would not end until Philippine independence in 1946. However, in 1963, it was unclear whether past colonial status would continue to have ongoing consequences for the legal claims of an independent Philippines.

The answer to this question would become apparent after the 2001 Philippine intervention request at the ICJ. On that occasion, the Philippines was confronted with the problem of establishing its links to the disputed islands

of Ligitan and Sipadan, and not Sabah. This task was complicated by the fact that neither island was mentioned in the 1878 Grant. As the ICJ observed, 'neither Indonesia nor Malaysia relies on the 1878 Grant as a source of title, each basing its title upon other instruments and events'.[37] The Court did not consider any of the instruments, treaties, and historical evidence presented by the Philippines 'as founding title to Pulau Ligitan and Pulau Sipadan'. Neither did the Court appreciate the case between Indonesia and Malaysia as a dispute over 'the precise status of rule in North Borneo' in the late nineteenth century.[38] During this period, on the island of Borneo, there were only two imperial sovereigns – the Netherlands and Britain – a condition that the ICJ did not consider to be in controversy in *Ligitan/Sipadan*.

Regardless of the Philippines' historical evidence, what the ICJ found to be central to its plea for an 'interest of a legal nature' for an Article 62 intervention were the determinations and agreements of Dutch and British sovereigns over what are now Indonesia and Malaysia, respectively. The implication of this conclusion was that in 2001, the Philippines could not link its claim to North Borneo to those of either the Dutch or the British in 1878. Thus, there was no way the Philippines could have deployed historical evidence to establish the close interrelation between the Philippine Archipelago and North Borneo, and much less to dispute the determinations of the British and Dutch empires as to where their boundaries lay in Borneo. By a majority vote, the ICJ rejected the Philippine request for intervention. The Court stated that it 'remains cognizant' of the Indonesian, Malaysian, and Philippine positions.[39] Such language, on its face, suggests that it might yet be possible for the Philippines in a future dispute to introduce historical evidence that the entity of the Philippine Archipelago extends beyond the boundaries demarcated by departed imperial sovereigns.

However, as I have argued in a longer project,[40] it is improbable that a claim to archipelagic status, whether grounded on geographical, economic, political, or historical evidence in accordance with Article 46(b) of the LOS Convention, would aid further Philippine territorial or maritime claims. In that project, I described the ICJ's judgment on the Philippine intervention request as a moment that fixes the position of Philippine independence in a particular historiography of events in international law. Moving forward, no amount of historical evidence could shift the position of Philippine independence as an event that came after the conclusion of imperial boundary treaties and the LOS Convention. In the midst of a deeply contested post-war law of the sea, the historical criterion in Article 46(b) in effect extends the material consequences of colonial status on the capacity of an independent Philippines to articulate and assert its own legal claims as to what an archipelago is.

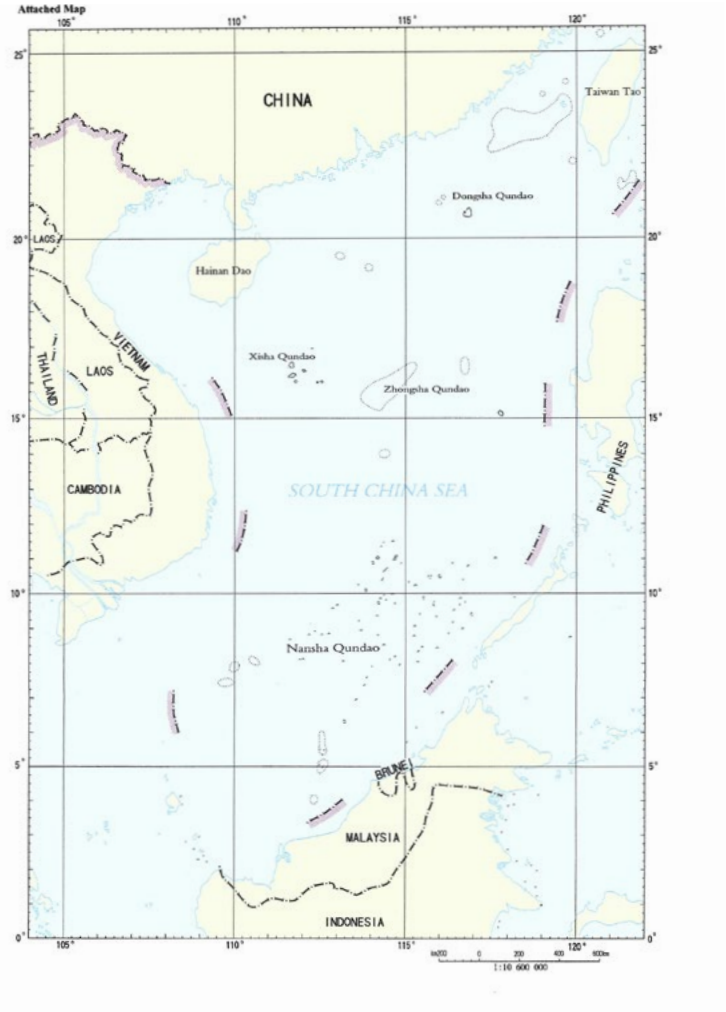
Indeed, when the Philippines initiated the *South China Sea* arbitration against China in 2013, it sought a declaration of the legal status and maritime entitlements of individual features in the South China Sea, rather than attempt to argue that the Spratly Islands constitute an archipelago within the meaning of Article 46(b). In the next section, I turn to how China has mobilised history in order to substantiate a claim to offshore or 'outlying' archipelagos in the South China Sea.

Map of British North Borneo, highlighting in yellow colour the area covered by the Philippine claim, presented to the Court by the Philippines during the Oral Hearings at the ICJ on 25 June 2001
Source: Verbatim Records of the Oral Hearings at the ICJ 25 June 2001 (CR 2001/1, page 46 and Annexure of Maps)

HISTORICAL NARRATIVE: CHINESE 'OUTLYING' ARCHIPELAGOS AFTER 2016

This section describes the role of historical narrative in enabling China to plug gaps in the regime of archipelagos as enshrined in Part IV of the LOS Convention. One such gap is the silence of Article 46(b) over the question of the subject whose regard is determinative of the formation of an archipelago based on historical grounds. The argument here is that after the 2016 *South China Sea* Award, China has taken advantage of the ambiguity in Article 46(b) to mobilise historical narrative in an attempt to substantiate what has long been an unspecified claim to historic rights in the South China Sea.

China has asserted claims to the South China Sea through a variety of practices, including confrontation, legislation, mapmaking, and historical narratives. In 1948, China – then under Republican control – gave visual form to these claims for the first time through the 'nine-dash line', a series of dashes drawn roughly in the shape of the letter U across the South China Sea.[41] In older Chinese atlases, a version of the U-shaped line was described as a line 'snaking around the South China Sea as far south as James Shoal',[42] located only 50 nautical miles north of the coast of the Malaysian state of Sarawak on Borneo island. Shortly before the 2016 *South China Sea* Award was delivered, a ranking Chinese official described the line as 'a confirmation of China's rights in the South China Sea formed throughout the history, instead of creation of new claims'.[43] The number of dashes comprising the line has changed at different times. Originally, it had eleven dashes until 1953, when two dashes were dropped following an agreement with Vietnam relating to the Gulf of Tonkin.[44]



In 2009, China annexed a map of the South China Sea, including a depiction of the nine-dash line, to a Note Verbale to the United Nations. In it, China claimed that it

> *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.*[45]

The 2009 Note Verbale marked the first occasion in which China officially used the nine-dash line in asserting its claims to the South China Sea in an international context.[46] The Note has been described as the 'most notorious representation' of China's claim to historic rights.[47] Then, in 2023, according to a map published by the Chinese Ministry of Natural Resources, the number of dashes has increased to ten, including a new dash to the east of Taiwan.[48] And yet, as Tanaka observes, China has not clarified what it means when it uses the nine-dash line in official statements.[49] The parsimonious text accompanying the nine-dash line map in the 2009 Note did not even indicate the geographic coordinates of the dashes.[50]

Due to the ambiguity of the scope and nature of the nine-dash line, the *South China Sea* Tribunal found it necessary to refer to repeated public statements of Chinese officials in order to ascertain it. The Tribunal appreciated the nine-dash line to be 'expressly linked' to a Chinese claim to rights 'formed over a long course of history', or a variant of such language.[51] For the Tribunal, such historic rights referred to a constellation of claims 'short of title'. This interpretation of historic rights enabled the Tribunal to exercise jurisdiction over the Philippine request for a declaration that the nine-dash line is contrary to the LOS Convention, since the Article 298 optional jurisdictional bar on disputes over title was not applicable to China's historic rights claim.[52] In July 2016, the *South China Sea* Tribunal concluded that China's claims to historic rights as embodied in the nine-dash line 'are contrary to the Convention and without lawful effect to the extent that they exceed the geographic and substantive limits of China's maritime entitlements under the Convention'.[53] Such historic rights, according to the Tribunal, have been 'superseded' by the LOS Convention.[54]

In response to the finding that the Convention has supplanted maritime entitlements based on historic rights, Chinese legal scholars such as Guo and Jia have argued that the nine-dash line is founded on the 'customary law of discovery, occupation, and historic title'.[55] In their view, the Convention, while a comprehensive legal instrument, 'was never intended... to exhaust international law'. It leaves scope for customary law 'to fill in the gaps that the Convention itself was unable to fill in 1982'.[56]

One of these gaps, according to the Chinese Society of International Law, concerns the rules of archipelagic formation in international law. In a 542-page analysis of the South China Sea Award in 2018, the Society argued that China has sovereignty over four groups of islands in the South China Sea, namely, Dongsha Qundao, Xisha Qundao, Zhongsha Qundao, and Nansha Qundao (the Four Shas; 'sha' being Mandarin for 'sand'). Collectively, China calls these groups the 'Nanhai Zhudao' (the South China Sea Islands).[57] The Society criticised the *South China Sea* Tribunal for its failure 'to give proper effect to China's position on the archipelago as a unit for sovereignty and maritime entitlement and delimitation purposes', in effect 'dismembering' Nansha Qundao and Zhongsha Qundao and 'fragmenting the territorial and maritime delimitation dispute' between the Philippines and China.[58]

China began using the terms 'Nanhai Zhudao' and 'Four Shas' interchangeably after the 2016 *South China Sea* Award.[59] In response to the Award, the 'Statement of the Government of the People's Republic of China on China's Territorial Sovereignty and Maritime Rights and Interests in the South China Sea' claimed that the activities of the Chinese people in Nanhai Zhudao 'date back to over 2,000 years ago', and that China was 'the first to have discovered, named, and explored and exploited Nanhai Zhudao and relevant waters'.[60] Since 2016, the establishment of factual bases for China's claims to the South China Sea has grown into what has been termed 'a cottage industry of research within the PRC law of the sea community'.[61]

Chinese boundary studies scholars Han and Hu confirm this extensive historical timeframe in their 2019 analysis of China's claim to territorial sovereignty over Nansha Qundao, the southernmost of the Four Shas. Using material from British sources, they write that 'claims over the islands could be traced back to the 15th century; the evidence includes maps of several centuries prepared by China'.[62] Citing a memorandum prepared by an official of the British Foreign and Commonwealth Office, Han and Hu insist that British records support historical facts that ground China's sovereign claims to Nansha Qundao.[63] In their view, these historical facts were, first, that British officials believed 'China's sovereignty over the Nansha Qundao is the most powerful'; second, according to British records, there were no objections to Chinese sovereignty over Nansha Qundao until the mid-1970s; and third, that British officials urged their government not to object to any Chinese declaration or act of sovereignty over Nansha Qundao.[64] These opinions of British Foreign and Commonwealth officials, according to Han and Hu, 'expose the seemingly unfair nature of the Philippines' appeal and the Arbitral Award', which are 'falsifying and ignoring the historical facts'.[65] In contrast to the 2001 Philippine intervention request in *Ligitan/Sipadan,* the Chinese approach to historical narratives uses statements and records from former imperial sovereigns in the South China Sea region, such as Britain, to support claims of sovereignty to outlying archipelagos.

In addition to British statements and records, Chinese official narratives often refer to traditional fishing activities as historical 'facts' that shore up the claim to Nansha Qundao and the outlying archipelagos. Chinese legal scholar Jia Yu argues that the LOS Convention's entry into force has significantly weakened and marginalised traditional fishing rights.[66] For Chinese academics, therefore, historical narrative-making is necessary in countering the impacts of the Convention on the claim to outlying archipelagos. While such fishing activities are often described as 'historical' in Chinese scholarship, Kardon argues that the provenance of the claims is fairly recent.[67] Kardon suggests that a turn to history was prompted by the Chinese ratification of the LOS Convention in 1996, during which Vice-Foreign Minister Li Zhaoxing addressed the national legislature on the challenges raised by the regime of the exclusive economic zone on China's traditional fishing activities in the Spratlys. In addition, Kardon notes that traditional fishing rights are not enshrined in any Chinese legal instrument, and yet ranking officials have publicly endorsed them.[68] For example, China Fisheries Bureau Director Wu Zhuang remarked that the waters of Nansha

> *have always been our country's traditional fishing grounds, and the homes of our fishermen's ancestors who have farmed the sea and fished for generations. However, since the 1970s, the Nansha waters have been restless because surrounding countries invaded and occupied our Nansha islands and reefs.*[69]

By insisting that Nansha Qundao is an 'offshore' or 'outlying' archipelago, China maintains a dual claim to land and water areas. The Chinese Society of International Law rejected the Philippine request to the *South China Sea* Tribunal for a declaration on the legal status of individual features of Nansha Qundao:

> *If a feature constitutes part of an outlying archipelago of a continental State, that State may claim maritime entitlements based on the archipelago as a unit rather than on individual features separately. The extent of the maritime areas generated by the archipelago as a unit would differ markedly from that generated by a single feature or some single features or the sum of those generated by the features separately.*[70]

Indeed, the core assumption underlying the Society's position is that the regime of continental states' outlying archipelagos 'is not dealt with in the Convention'.[71] It argues that the *South China Sea* Tribunal 'strangled' the regime of outlying archipelagos by asserting that there has been no state practice around the regime.[72] According to the Society, 'long-standing practice' confers historic rights on a state in relation to particular maritime areas in accordance with the 'contemporary law of the sea' principle that 'the land dominates the sea'.[73] Fitzmaurice writes that such long-standing practice may be established 'when fishing vessels of a given country have been accustomed from time immemorial… to fish in a certain area, on the basis of the area being high seas and common to all'.[74] Such repeated visits to a specific fishing ground were said to vest the flag state of the fishing vessel certain rights to those waters, although the Society does not explain the nature of those rights.

Governments across the South China Sea have resorted to fishing and seafaring narratives in response to what Roszko calls 'territorial anxieties'.[75] Such anxieties, in her account, are grounded in an 'historically recent understanding of territoriality as a constituent of state-spatial thinking represented and produced through cartographic technologies'. She argues that, as a result of these anxieties, the South China Sea has come to be seen as waters 'exclusive' to China, the Philippines, or other claimants, and that this exclusivity is secured by placing fishers' narratives, practices, and movements at the centre of national cartographic imaginations and territorial claims.[76] Thus, governments in the region enlist fishers as figures in historical narratives that authorise assertive conduct towards economic growth and national security goals.[77] In the present, the authorising power of China's historical narratives around fishing can be seen at play in the swarms of Chinese 'fishing' militias in the South China Sea. Purportedly built for fishing activities, the militias are, in essence, a 'shadowy armada' routinely deployed from China in order to counter Philippine naval operations to replace and resupply personnel stationed at disputed features such as Second Thomas Shoal.[78] Some of these militias' recent activities include the use of water cannons against Philippine Coast Guard vessels carrying out patrols in areas declared in the *South China Sea* Award to be within the exclusive economic zone of the Philippines.[79] The next section briefly discusses the how the *South China Sea* Tribunal appreciated China's claim that Nansha Qundao is an outlying archipelago.

OFFSHORE OR OUTLYING ARCHIPELAGOS

As mentioned earlier, Part IV of the LOS Convention regulates the entitlements, rights, and obligations of a new class of states designated as 'Archipelagic States'. By definition, archipelagic states are those that are 'constituted wholly by one or more archipelagos and may include other islands' (Article 46[a]). In 2016, shortly before the *South China Sea* Tribunal delivered the Award, the Chinese ambassador to the Netherlands sent letters to each member of the Tribunal. In this letter, the ambassador insisted that China has, based on the 'Nansha Islands as a whole', a claim to territorial sea, exclusive economic zone, and continental shelf.[80] The letter included copious quotes from an interview given by Chinese foreign ministry spokesperson Hua Chunying, who remarked that

> *China has indisputable sovereignty over the Nansha Islands and its adjacent waters, including Taiping Dao... Over the history, Chinese fishermen have resided on Taiping Dao for years, working and living there, carrying out fishing activities, digging wells for fresh water... all manifestly recorded in Geng Lu Bu (Manual of Sea Routes) which was passed down from generation to generation among Chinese fishermen, as well as in many western navigation logs before the 1930s.*[81]

Despite China's adamant refusal to appear in the arbitration proceedings, the *South China Sea* Tribunal decided to treat the ambassador's letter as an eleventh-hour plea that the Spratlys 'should be enclosed within a system of archipelagic and straight baselines, surrounding the high-tide features of the group, and accorded an entitlement to maritime zones as a single unit'.[82] This argument was significant for two reasons. First, Chinese officials and scholars have contended that the LOS Convention could not have supplanted all areas of international law as it related to oceans, including the question of archipelagos. And yet, the Chinese ambassador's letter employed language that the Convention uses – territorial sea, continental shelf, exclusive economic zone – in an attempt to describe and assert entitlements flowing from a conception of archipelagos that deviates significantly from the kind contemplated in Part IV of the Convention. Second, there was a sense of irony in the letter because, for the first time, an opponent mobilised the legal concept of the archipelago against the Philippines.

The letter, in effect, was a request for the Tribunal to consider Nansha Qundao as an offshore or outlying archipelago of China. Kopela, in her work on the notion of 'dependent archipelagos' in the law of the sea, has argued that the definition of archipelago in Article 46(b) 'does not distinguish between various types of geographical archipelagos' and how they might meet the 'unity' requirements prescribed in the provision. However, as she observes, the distinction is relevant 'for the drawing of archipelagic baselines' in accordance with Article 47(1).[83] This provision bars archipelagos with a water-to-land ratio of less than 1:1 or more than 9:1 from using archipelagic baselines. The bar was intended 'to preclude states composed of one large island surrounded by small island dependencies from applying the archipelagic regime'.[84] In the *South China Sea* Award, the Tribunal found that the water-to-land ratio in the Spratlys would 'greatly exceed 9:1 under any conceivable system of baselines'.[85] In other words, China's claim to water areas in the South China Sea is far too expansive for a configuration of land and water that would meet the requirements to be entitled to use archipelagic baselines. China's claim to Nansha Qundao, in effect, was a claim to an 'archipelago of a state', rather than to an 'archipelagic state'. This distinction was urged by the US, Britain, and their naval power allies during UNCLOS III in order to preserve navigational freedoms in waters that would be enclosed as sovereign waters of an archipelagic state. The term 'archipelagos of states' referred to examples like the Gálapagos Islands or the Faroe Islands, which are parts of the non-archipelagic coastal states of Ecuador and Denmark, respectively. On the other hand, the term

'archipelagic states' was to be confined to states such as the Philippines, Indonesia, Fiji, and Mauritius whose territories were exclusively constituted by islands.[86] Once the term 'archipelagic state' emerged during the UNCLOS III negotiations, the category of 'archipelagos of states' gradually disappeared from later drafts of the Convention. Moving forward, the only path for a group of islands and waters to be designated an archipelago in what would become the LOS Convention would be for such a group to also be a state in the first place.

Indeed, the *South China Sea* Tribunal rejected the Chinese ambassador's appeal and found that China is 'constituted principally by territory on the mainland of Asia' and does not meet the definition of an archipelago or the criteria for entitlement to use archipelagic baselines, matters which according to the Tribunal are 'strictly controlled by the Convention'.[87] Despite these provisions, Kopela argues that 'historic rights or special customary international law can provide a solution for the archipelagic principle' in respect of outlying archipelagos.[88] As Brownlie writes in relation to the emergence of a customary rule of international law, 'if the process is slow and neither the new rule [i.e., Part IV of the LOS Convention] and the old [outlying archipelagos] have a majority of adherents then the consequence is a network of special relations based on opposability, acquiescence, and historic title'.[89] Through the making of historical narratives, China can be seen as attempting to create opposability to LOS Convention Part IV in the hope that states might 'acquiesce' around or 'accept' some of those narratives.[90] However, given that the Convention has received 170 ratifications as of this writing, including from both the Philippines and China, the scope in which China might cultivate opposability through historical narrative appears to have narrowed in the years since the Convention entered into force. As its field of legal and historical argumentation within the framework of the Convention shrinks, China engages in increasingly coercive action and in direct defiance of the 2016 *South China Sea* Award.

CONCLUSION

In November 2024, the Philippines enacted new legislation on maritime zones[91] and archipelagic sea lanes[92] following decades of Congressional deadlock. At the ceremonial signing, Philippine President Ferdinand Marcos Jr vaunted how the new laws 'align' Philippine law with international law, particularly the LOS Convention. This development marks a dramatic shift from the position of the Philippines in 1984, when it ratified the Convention with a significant reservation on the application of the regime of archipelagos to the Philippines. Prior to the Convention, the Philippines for decades had argued that the waters of an archipelago are its internal waters, which could be closed unilaterally to foreign vessel traffic. The US, Russia, and Australia protested the Philippine ratification declaration.[93] In the decades following the adoption of the Convention in 1982, Philippine officials and scholars have continued to debate what constitutes the 'Philippine Archipelago' and whether its baselines should extend to features located at a significant distance in the South China Sea. These debates persisted beyond the Philippine ratification of the Convention, which is thought to have settled the question of what makes an 'archipelagic state', its baselines, entitlements, and obligations pertaining to the passage of foreign vessels. In an apparent departure from the Philippines' role as 'principal proponent' of the notion of historic title during UNCLOS III, the enactment of the 2024 legislation marks a significantly diminished role for the concept of the archipelago – including historical evidence – as a tool for asserting Philippine maritime entitlements in the South China Sea, particularly to the west of the 1898 Treaty of Paris limits.

In stark contrast to the trajectory of the Philippines' relationship with the archipelago concept, China has persisted in using historical narratives surrounding Nansha Qundao as a mode of maintaining, through the force of arms, a semblance of opposability against Part IV of a Convention that is widely regarded as the 'Constitution of the Oceans'. This is a jurisprudential battle that the Philippines – with far less naval capacity – had fought prior to the advent of the Convention. Its outcome: a narrow conception of archipelagos that created significant constraints on how Philippine sovereignty could be asserted in the aftermath of its independence from imperial rule. Despite the declaration that heralds the Convention's supposed displacement of historic rights, the persistence of a jurisprudential battle over history signifies history's enduring role in the assertion of maritime (and even territorial) claims. In the context of a newly powerful and confrontational China, it is a battle that attempts to settle the open question of authority underlying question of whose history matters in the formation of archipelagos; if not by legal-historical argumentation, then by force. Perhaps, if only for the spectacle of escalating violence across the South China Sea, it is time to reflect on the steep price of stabilising specific legal concepts and regimes, and to pay close attention instead to the practices by which states assert authority in the name of a contested law of the sea.

ENDNOTES

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Page 9 Credit: Map of British North Borneo, yellow area covered by the Philippine claim
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