

# CHINA'S CHANGING ROLE IN THE SOUTH CHINA SEA:

## REFLECTIONS ON A SCHOLARS WORKSHOP



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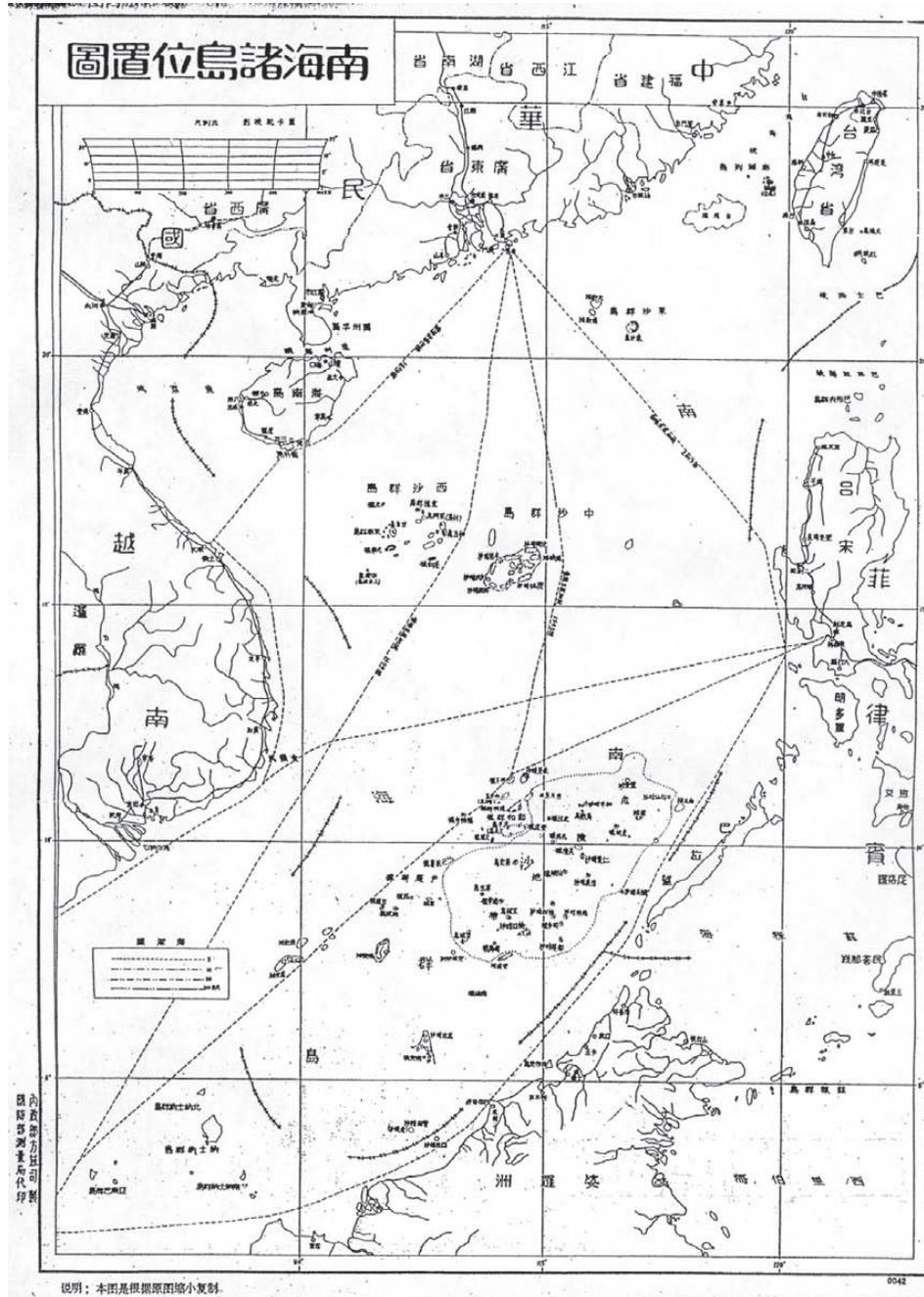
### INTRODUCTION

Events during 2010 demonstrate how China's policy in the South China Sea fails to serve its national interests. Actions in pursuance of that policy have undermined a decade of diplomatic effort to build trust in Southeast Asia, and have brought the United States back as a counter-balancer. Vietnam is drawing Russia back as well, as a naval partner and provider of hardware. Vietnam seeks to internationalize debates about regional security and has used its presidency in ASEAN to this effect. At the East Asian Summit (EAS) in Hanoi in October 2010, foreign ministers from the United States and Russia were received as special guests. They will be EAS members from now on. Vietnam's new assertive diplomacy also manifested itself in two scholarly workshops on the South China Sea held in Hanoi (November 25 - 27, 2009) and Ho Chi Minh City (November 10 - 12, 2010). The present article reports from these workshops, where Chinese, Taiwanese, and Southeast Asian scholars met with colleagues from other

countries to engage in some frank discussions.

### MUTUAL MISPERCEPTIONS

Many analysts, including some among the workshop participants, claim that China has adopted a new, aggressive strategy in the South China Sea. They argue that this reflects its newly acquired naval strength. Evidence cited includes a series of recent events. In March 2009, Chinese vessels harassed the USNS *Impeccable*, a marine hydrographic survey ship deployed seventy-five miles south of Hainan Island, where China has built a modern naval base. *Impeccable* was forced to pull out but returned the next day with a military escort. Shortly thereafter, in May 2009, China attached a copy of a controversial map with a nine-dashed line to an official diplomatic letter when protesting to the United Nations Commission on the Limits of the Continental Shelf (CLCS) a joint Malaysian-Vietnamese calculation of how far the Chinese continental shelf extends into the South China Sea beyond 200 nautical miles. The



In 1948, the Republic of China (ROC) issued this map of the South China Sea, with eleven dashes forming a u-shaped line. Soon after its establishment in 1949, the People's Republic of China (PRC) started using the same map. While the ROC has continued to use this map, the PRC dropped the two dashes in the Gulf of Tonkin after 1953. Hence, the resulting PRC map with the "nine-dashed" or "nine-dotted" line. The meaning of the line has yet to be clarified, but it appears to represent a Chinese intention to claim all islands within it, and the maritime zones, that can be derived from those islands based on discovery and effective control following the Law of the Sea.

SOURCE: Guangdong Toponym Committee (ed.), *Collected Materials on the Toponymy of South China Sea Islands* (Guangzhou: Guangdong Atlas Publisher, 1987) (in Chinese), 45-46. Reprinted in the latest issue of *Ocean Development and International Law* (ODIL) 2010, 41(3): 208.

map conveys the impression that China claims almost the whole South China Sea as its own.<sup>1</sup> Meanwhile, China pressured international oil companies to desist from exploiting oil and gas on Vietnam's continental shelf. Both in 2009 and 2010 China boarded a number of Vietnamese fishing boats in disputed areas, confiscating the catch and arresting the fishermen. In a meeting with two US representatives in March 2010, Chinese State Councilor Dai Bingguo<sup>2</sup> stated that the South China Sea is one of China's "core interests" (*hexin liyi*) - along with Taiwan, Tibet, and Xinjiang. From April to October 2010 the People's Liberation Army Navy (PLAN) carried out three exercises in the South China Sea with the participation of ships from the East China and North China fleets. The impression that China was applying a new, aggressive strategy was reinforced by developments elsewhere, most notably by China's rapid escalation of a conflict with Japan in September 2010 over Japan's arrest of a Chinese fishing captain near the disputed Diaoyutai/Senkaku islet east of Taiwan.

Some of the participants at the November 2010 workshop in Ho Chi Minh City, which took place at the same time as the G20 summit in Seoul, provided more nuanced interpretations of the events cited above. The Chinese scholars viewed China's actions as responses to provocations made by others and do not think that these reactions were coordinated. Rather, they believe various decision-makers simply applied established policies. The USNS *Impeccable* was engaged in a kind of activity inside China's Exclusive Economic Zone (EEZ) that China for a long time has considered a violation of the provisions of the United Nations Convention on the Law of the Sea (LOS Convention). Scientific surveys are in conflict with the Law of the Sea if they are undertaken for a commercial purpose inside another country's EEZ without prior authorization. China has long argued that the same rule applies for naval hydrographic surveys and aerial reconnaissance. This is why it took drastic action as early as 2001 to prevent US intelligence operations both in the sea and the air near Hainan.

So, in the Chinese view, the action against the

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<sup>1</sup> The Republic of China (Taiwan) issued a declaration of its own. Smith, R. W., "Maritime Delimitation in the South China Sea: Potentiality and Challenges," *Ocean Development and International Law* 41 (2010): 232-233.

<sup>2</sup> For State Councilor Dai Bingguo's position in the Chinese Communist Party's Leading Small Group on foreign affairs, see Linda Jakobson and Dean Knox, "Foreign Policy Actors in Chinese Decision-Making," *SIPRI Policy Paper* 26 (September 2010): 5.

USNS *Impeccable* did not reflect a change of policy. When China submitted its protest to the CLCS in May 2009, it actually made two moves in the direction of conforming its sovereignty claims to international law. By attaching the map with the nine-dashed line, it made this map into an official document, hence leaving it open to scrutiny by legal experts. In its protest letter, China also said that it claimed the islands within the line, along with their "adjacent" or "relevant waters." Although these are not terms used in the LOS Convention, their meaning does indicate that China will have to derive its claims to maritime zones from distance to Chinese islands. This is in fact a change towards a less expansionist policy. The ill-advised "core interest" remark was made in a closed door meeting between Chinese and US representatives and was later leaked to the Japanese and American press. It had its background in a joint statement in November 2009, during president Obama's visit to Beijing, in which the two sides agreed to "respect each others' core interests."<sup>3</sup> China has taken the initiative to define each side's "core interests and major concerns" in bilateral talks with several countries. The United States has been reluctant to define its own "core interests," and has been more eager to define mutual or shared interests. Although we must assume that the South China Sea "core interest" remark in March 2010 had been cleared in advance on the highest level, it is unlikely that it was meant to be a public announcement. It is also unclear what the statement really meant, since there are parts of the South China Sea that are not even encompassed in the nine-dashed line on the map attached to the May 2009 protest letter to the CLCS. There is no official Chinese statement on record to the effect that the South China Sea has been elevated to a "core interest."<sup>4</sup>

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<sup>3</sup> "The two countries reiterated that the fundamental principle of respect for each other's sovereignty and territorial integrity is at the core of the three U.S.-China joint communiqués which guide U.S.-China relations. Neither side supports any attempts by any force to undermine this principle. The two sides agreed that respecting each other's core interests is extremely important to ensure steady progress in U.S.-China relations." U.S.-China Joint Statement, November 17, 2009. Accessed October 26, 2010: <http://www.whitehouse.gov/the-press-office/us-china-joint-statement>.

<sup>4</sup> Hence Niall Ferguson misleads his readers when claiming that "The South China Sea has already been declared a 'core national interest'," *The Wall Street Journal*, Nov. 18, 2010. Christian Karyl does the same when saying that "China startled the rest of the world by announcing that it would henceforth regard the territories in the resource-rich South China Sea as being an area of 'vital national interest'," *The New York Review of Books* 52-9 (November 2010): 32.

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In the face of many negative reactions provoked by the remark, China has since backtracked.<sup>5</sup> More recently, China has softened its approach to Vietnam. A researcher from the Diplomatic Academy of Vietnam informed the November 2010 workshop that, in recent months, there had been no new reports of Chinese harassment of Vietnamese fishermen and no new indications of pressure on oil companies. What remains then of China's new "assertive strategy" are the naval exercises. The Chinese explain them either as "normal" or as reactions to exercises undertaken by the United States and its allies. In conclusion, there does not seem to be a new Chinese strategy; rather, there have been a number of ill-advised, uncoordinated, sometimes arrogant moves that have damaged China's position in the region.

Chinese analysts tend to think the United States has changed its strategy. Until recently, Washington always emphasized that sovereignty disputes in the South China Sea were none of its concern; yet at the July 2010 ASEAN Regional Forum (ARF) summit in Hanoi, US Secretary of State Hillary Clinton suddenly offered to facilitate a process of conflict resolution. This move had clearly been coordinated in advance with some of the Southeast Asian governments, but certainly not with China. Secretary of Defense Robert Gates also made a series of statements in 2010 that seemed to indicate a new and more assertive US strategy in the South China Sea. This went in tandem with an increased US naval presence - port calls and naval exercises were conducted, although mainly further east. China saw this in connection with a US statement to the effect that the US-Japanese security treaty would henceforth cover disputed territories such as the Diaoyutai/Senkaku islets.

Again, this is a misperception. The US strategy in the region has been consistent. Referring to statements made by the United States in 1995, when the Philippines had discovered that China was occupying Mischief Reef

<sup>5</sup> Carlyle Thayer, "Recent developments in the South China Sea and Implications for Regional Security and Prosperity." Paper presented to The Second International Workshop, *The South China Sea: Cooperation for Regional Security and Development*, Ho Chi Minh City, Vietnam, November 11-12, 2010. Part of compendium with papers presented to The Second International Workshop, *The South China Sea: Cooperation for Regional Security and Development*, Ho Chi Minh City, Vietnam. See also Carlyle Thayer, *Southeast Asia: Patterns of Security Cooperation*. Australian Strategic Policy Institute (September 2010): 34-35.

on the Philippines continental shelf, the same was said then as in 2010.<sup>6</sup> The United States has one overriding national interest, upon which it always insists: the unimpeded freedom of navigation. The United States does not accept any differentiation between commercial and military navigation, and does not accept or respect national legislation that requires naval ships to obtain advance permission if they wish to use their right to innocent passage through a country's territorial waters (inside 12 nm). Moreover, in the "maritime commons" outside the territorial waters the United States insists on the right to conduct naval maneuvers, exercises, intelligence surveys, and other operations.

It must be emphasized that the concept of "maritime commons" in US parlance includes the Exclusive Economic Zones (EEZs) of other countries. For any other purpose than economic exploitation of resources, the coastal state has no prerogatives in its EEZ. This is why the United States insisted on its rights

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in connection with the spy plane incident in 2001 and the survey ship USNS *Bowditch's* marine hydrographic surveys near Hainan that same year. For the United States, these surveys have become more important because of China's naval modernization. The US Navy wants to follow every move of Chinese submarines - (some of which are nuclear) - operating from the Yulin base in Hainan. *Impeccable's* 2009 mission was no different than *Bowditch's* mission in 2001 and it did not signal a new US strategy.

The United States has also consistently declared its interest in the peaceful management of South China Sea disputes. It has offered in the past as well to serve as a facilitator if called upon to do so. However, there seems to be one new element in recent US statements. US Secretary of State Hillary Clinton stated in July 2010:

"Consistent with customary international law, legitimate claims to maritime space in the South China Sea should be derived solely from legitimate claims to land features."<sup>7</sup>

<sup>6</sup> Bronson Percival, "The South China Sea: An American Perspective." Paper presented to The Second International Workshop, *The South China Sea: Cooperation for Regional Security and Development*, Ho Chi Minh City, Vietnam, November 11-12, 2010.

<sup>7</sup> Secretary of State Hillary R. Clinton, Remarks at Press Availability, National Convention Center, Hanoi, July 23, 2010. Accessed November 18, 2010: <http://www.state.gov/secretary/rm/2010/07/145095.htm>

While this is correct, the Chinese are not the only ones to think it is paradoxical that a country that is not a party to the LOS Convention is lecturing countries who are party to it about customary international law in this field. Of the countries around the South China Sea, only Cambodia and Thailand have not yet ratified the Convention. Its signing in 1982 did not represent a victory for the naval powers. Although it confirmed the principle of freedom of navigation, it above all reflected the interests of coastal and archipelagic states who obtained a dramatic increase in their sovereign rights in vast maritime zones. China, Indonesia, and the Philippines were enthusiastic supporters of the Convention. The United States played a significant part in the negotiations and declared that it was satisfied with the outcome (although it did object to the international seabed chapter that aimed to set up an International Seabed Authority). However, the United States has not yet ratified the Convention.

What we have seen recently is not the application of new Chinese or US strategies, but a clash between longstanding positions. It is noteworthy that the Southeast Asian countries, with the exception of Cambodia, Thailand, Laos, and Myanmar, have broken a trend of moving closer to the Chinese economic juggernaut and have sided with the United States in the domain of security.

Several participants at the Ho Chi Minh City workshop expressed concerns that great power geopolitics could override efforts of local conflict management and regional efforts to fight against the most important threats in the South China Sea, namely the destruction of the marine environment and the depletion of fish stocks. Most participants were disappointed that the Chinese-ASEAN Declaration on the Conduct of Parties in the South China Sea (DOC) from 2002 had not been more respected. They saw a strong need to negotiate a new legally binding Code of Conduct (COC) with more specific provisions, such as a prohibition against further reinforcement of the fortifications that Vietnam, China, Taiwan, Malaysia, and the Philippines have continued to build on the reefs and islets they occupy in the Spratlys.<sup>8</sup> The real tragedy of these structures, it should be emphasized, is not that they represent a military threat. The tiny Spratly islets are impossible to defend against a determined attacker

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<sup>8</sup> Aerial photographs of these structures may be seen in Rommel C. Banlaoi, “Renewed Tensions and Continuing Maritime Security Dilemma in the South China Sea: A Philippine Perspective,” *The South China Sea: Cooperation for Regional Security and Development. Proceedings of the International Workshop, co-organized by the Diplomatic Academy of Vietnam and the Vietnam Lawyers’ Association, 26-27 November 2009, Hanoi, Vietnam*, ed. Tran Truong Thuy (Hanoi: Nha Xuat Ban The Gioi, 2010), 149-157.

and have always been of negligible strategic value. The real tragedy is that the buildings, runways, and military and tourist traffic in the area are destroying the coral reef habitats. In the past they provided breeding grounds for turtles; at present, they still support the breeding of innumerable species of fish and birds.

In spite of sharing in the disappointment, I belonged to a cautiously optimistic minority at the workshops. This minority argued that the present crisis might cause China to conclude that its inherited policy works against its own interests. If China changes its policy to better conform to international law, it could conceivably garner support from other countries in its attempts to curtail certain US naval and aerial operations. As of today, sovereignty disputes to isles, islets, and maritime zones are conflated with the question of US naval access to China’s coastal waters. China wants to separate these issues so as to prevent US interference in the sovereignty disputes. In order to separate them, however, Beijing must understand that growing naval power does not automatically translate into increased political leverage in its region; it may just as well lead to counter-balancing behavior. If the neighboring states are to accept the growth of China’s naval capabilities without resorting to counter-balancing, they must be convinced that China will operate in accordance with international law. And if Beijing looks at the South China Sea through a legal lens, it will discover that there is not

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one South China Sea dispute, but at least three different ones. Each of these may be approached separately.

#### THE FREEDOM OF NAVIGATION (AL SPYING)

The first dispute concerns the freedom of military operations at sea and in the air within the territorial zone (12 nm) and the Exclusive Economic Zone (200 nm) of coastal states. When US representatives speak about this, they often say “freedom of navigation”, but the United States is thinking about more than just “navigation.” It is keen to prevent any legal development that would prevent it from conducting military maneuvers and intelligence gathering in the maritime economic zones of other countries.

On the question of whether or not the United States has the right to conduct marine hydrographic survey activities within China’s EEZ without prior authorization, the US interpretation of the law of the sea

is far from evident. China could thus get considerable regional support for its position. But that support is not given because China's neighbors fear that it would use its navy to enforce its territorial claims.

China, Vietnam, and the Philippines all require prior authorization for the passage of warships through their territorial waters.<sup>9</sup> In the EEZ (12 to 200 m), warships enjoy full freedom of navigation since the jurisdiction of the coastal country concerns only its resources. Still there are countries, such as Brazil and Malaysia, who maintain that military exercises or maneuvers cannot be conducted within their EEZs.<sup>10</sup> In the section of the LOS Convention regulating commercial activities undertaken within another country's EEZ, Article 246(2) states:

“Marine scientific research in the exclusive economic zone and on the continental shelf shall be conducted with the consent of the coastal State.”

On the other hand, Article 204(a) states:

“Marine scientific research shall be conducted exclusively for peaceful purposes.”

Hence the paradox that the marine hydrographic surveys undertaken by *Bowditch* in 2001 and *Impeccable* in 2010 would have violated the law if they were made for a scientific or commercial purpose, but do not violate customary international law (as defined by state practice) when undertaken for a purely military purpose. There is a clear risk that China will move away from its current interpretation of international law and adhere to the United States' view that, when a navy grows large and sufficiently powerful it can move further away from its shores.

#### MARITIME DELIMITATION

The second dispute concerns the delimitation of maritime borders. China has not yet fulfilled its obligation in the LOS Convention to make known the precise extent of its EEZ and continental shelf claim. Its claims are so vague and wide-ranging that they must provoke resentment in the other claimant states. Perhaps the clearest message from virtually every participant at

<sup>9</sup> Donald R. Rothwell and Tim Stephens, *The International Law of the Sea* (Oxford and Portland: Hart Publishing, 2010), 270.

<sup>10</sup> *Ibid.*, 275.

the two workshops in Vietnam (except the Chinese and Taiwanese) was the need for the People's Republic of China (PRC) and the Republic of China (ROC) to clarify their claim(s).

Many Chinese and Taiwanese believe that they can claim virtually all of the South China Sea within the so-called “nine-dashed,” “nine-dotted” or “u-shaped” line, either as Chinese “historical waters” or as the EEZ and continental shelf of the Spratlys and other groups of islets. However, there is no way that either the “historical waters” principle or the measurement of EEZs or continental shelves from these islets can produce such a result. If China were to gain sovereign rights in the whole area covered by the nine-dashed line, it would need to break with or completely revise international law, and this would require the consent of other states.

Since May 2009, when China attached the map with the nine-dashed line to its protest against the Vietnamese and the joint Malaysian-Vietnamese submissions of their continental shelf measurements to the CLSS, the legal status of the map has been scrupulously examined by a leading European authority on the law of the sea, Professor Erik Franckx, of the Vrije Universiteit Brussel, Belgium. He serves as Member of the Permanent

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Court of Arbitration and as President of the Department of International and European Law. He presented his findings to the workshop in Ho Chi Minh City, together with his research assistant, Mr. Marco Benatar. The anticipated legal journal article, developed from their presentation, will most likely conclude that the map with the nine-dashed line lacks a solid basis. It thus poses problems if maintained as part of the PRC and the ROC's official policy.<sup>11</sup>

The map with the nine-dashed line was inherited by the PRC from Chiang Kai-shek's ROC and it appears on a number of maps published in China. It is part of the national psyche and can therefore not be easily abandoned. However, it can be reinterpreted or silently shelved while China makes known its precise EEZ and continental shelf claims. This is likely to happen, albeit slowly, if the governments in Beijing and Taipei have sufficient will to legislate new necessary policies in spite of nationalist propaganda.

Recent statements from the government in

<sup>11</sup> Erik Franckx and Marco Benatar, “Dotted Lines in the South China Sea: Fishing for (Legal) Clarity.” Paper presented to The Second International Workshop, *The South China Sea: Cooperation for Regional Security and Development*, Ho Chi Minh City, Vietnam, November 11-12, 2010.

Taipei, which occupies the largest of the Spratlys, Itu Aba, have downplayed the “historical waters” argument. This argument dominated Taipei’s thinking in the past. Instead, Taiwan’s law experts now tend to see the waters within the u-shaped line as constituting the “surrounding waters” of a number of land features to which the ROC holds sovereignty.

As mentioned, the PRC’s protest to the CLCS also spoke of islands and their “adjacent waters.” The correct way to claim sovereignty over land features is to name and precisely locate each one and explain how it was discovered, as well as how it has been administered and used. This is not simply done by drawing a line around an area on a map. For China, deriving ownership to maritime resources from sovereignty to land is certainly a move in the right direction. However, the problem for China is not just that its sovereignty claims to the Spratlys, Paracels, and Scarborough Shoal are disputed; some of these islets are too small to generate an EEZ or continental shelf at all; others in turn, are too small to carry much weight in the delimitation of national EEZs (except beyond 200 nautical miles from all coasts, the so-called “doughnut” in the middle of the South China Sea).

No EEZ can go longer than 200 nm from a coast, but a continental shelf can extend beyond that limit. The joint Malaysian-Vietnamese calculation from May 2009 of how far the continental shelf goes beyond 200 nm represents a significant step forward in the application of the Law of the Sea since it disregards the tiny Spratly islets entirely, many of which are occupied by Malaysia and Vietnam. It measures distance uniquely from the Malaysian, Vietnamese, Brunei, and Philippine coasts and coastal islands.

At any rate, it is clear from delimitations elsewhere - such as the recent one in the Black Sea between Romania and Ukraine - that the proper method to make delimitations is as follows: first, to delineate continental shelf and EEZ claims on the basis of distance from the main coasts; second, to identify the median line between opposite coasts (or equidistant line between adjacent coasts); and only then to consider whether small islets should have a modifying effect.

Vietnamese legal experts have grasped this fully. This was evident in a detailed presentation to the workshop in Ho Chi Minh City by Nguyen Thi Lan Anh of the Diplomatic Academy of Vietnam. He showed how extremely difficult it will be to delimitate maritime borders in the South China Sea if any of the Spratly features are allowed to have any effect on the delimitation of EEZs and the continental shelf.<sup>12</sup>

<sup>12</sup> Nguyen Thi Lan Anh, “Maritime Delimitation in International Law and the Impacts on the South China Sea Disputes.” Paper presented to The Second International Workshop, *The South China Sea: Cooperation for Regional Security and Development*, Ho Chi Minh City, Vietnam, November 11-12, 2010.

### *Sovereignty to Islets*

In light of the above, it is clear that the question of sovereignty to tiny rocks, reefs and islets may be dissociated from the dispute over maritime delimitation. This can be done if the parties simply agree that they can have only 12 nm of territorial waters. If this is done, it will significantly simplify conflict resolution.

We must, however, distinguish between the different groups of insular features. The easiest is Scarborough Shoal, a rock located west of Luzon, which is disputed between the Philippines, the ROC, and the PRC. It is clearly above water at high tide, so it does satisfy the criterion for constituting an island in the LOS Convention 121(1). Hence it can have 12 nm territorial waters. However, it cannot sustain human habitation or an economic life of its own, so it does not qualify the criteria set in the LOS Convention 121(3) for being able to generate an EEZ or continental shelf of its own. Hence it will not affect maritime delimitation in any other way than to create either a circular Chinese enclave in the Philippines EEZ, or a rock within the Philippines EEZ.

It might also be possible to leave Scarborough Shoal as an enclave under disputed sovereignty. As such it would not hinder negotiations to delimitate the maritime border between the Philippines and China/Taiwan. We may add here that a similar solution has been proposed for the Diaoyutai/Senkaku rocks in the East China Sea.<sup>13</sup> Here it is China that would “win” from such a solution and Japan that would need to accept that Senkaku does not provide a basis for extending Japan’s continental shelf and EEZ.

China has moreover protested against Japan’s attempt to use the tiny Okinotorishima as a basis for making a vast EEZ and continental shelf claim. It made a seemingly convincing legal argument, that this feature, a seamount barely breaking the ocean’s surface, cannot generate more than 12 nm of territorial waters. China tried, before the meeting of all parties to the LOS Convention in 2009, to get the issue of article 121(3) on the agenda. Unfortunately it failed.<sup>14</sup> China’s position vis-à-vis Japan would no doubt be strengthened if China applied the same logic in the South China as in the East China Sea.

However, the Sino-Vietnamese dispute over sovereignty to the Paracels would probably have to be resolved in China’s favor. Moreover, the Paracels might have to be given at least partial effect on the delimitation of China’s continental shelf and EEZ in the middle of the

<sup>13</sup> Jerome A. Cohen and Jon M. Van Dyke, “Lines of latitude,” *South China Morning Post*, November 10, 2010, A15.

<sup>14</sup> Yukie Yoshikawa, “Okinotorishima: Just the Tip of the Iceberg,” *Harvard Asia Review* 10, 4 (2005); and R. W. Smith, “Maritime Delimitation in the South China Sea: Potentiality and Challenges,” *Ocean Development and International Law* 41 (2010): 222-223.

South China Sea. Some of the Paracels are notably larger than the Spratlys, so it might be possible to argue that they can generate either permanent human habitation or an economic life of their own. China's claim to sovereignty over the eastern part of the Paracels (the Amphitrite group), including Woody Island, can build on almost continuous occupation since 1946 (except 1950-56), and on a claim to the whole Paracels archipelago made by the Chinese Empire in 1909.<sup>15</sup>

China's claim to the western part of the Paracels (the Crescent group) is weaker. Key islands in this group (notably Pattle) were occupied first by France and then South Vietnam from 1947 to 1974, and then taken by Chinese force of arms. However, realistically speaking, Vietnam will probably sooner or later have to give up its claim to the Paracels as a whole, as part of a general bargain. It may also have to allow Woody Island (2.1 km<sup>2</sup>) to be given some effect on the calculation of China's EEZ and continental shelf.<sup>16</sup>

The Spratlys, where Taiwan occupies the largest islet, Itu Aba (0.43 km<sup>2</sup>), is the most difficult case. The other islets in the Spratlys are occupied by Vietnam, the Philippines, and Malaysia; China occupies a certain number of low tide elevations (reefs). At the first November 2009 workshop, the Taiwanese scholar Song Yann-huei discussed the capacity of four specific Spratly features (and Woody Island in the Paracels) to generate permanent human habitation or an economic life of their own. These are: the Taiwanese-occupied Itu Aba, the Vietnamese-occupied Spratly, the Philippines-occupied Thitu, and the Malaysian-occupied Swallow Reef. He concluded that all four features could generate an economic life of their own and therefore could likely have their own EEZ and continental shelf.<sup>17</sup>

However, Song did not argue that they had generated permanent human habitation or an economic life of their own in the past. Instead he based his argument on the fact that in recent years, Taiwan, China, Vietnam, and Malaysia have invested heavily in income-generating activities such as tourism, and have built runways for airplanes. To this we may object that if states are allowed to prove a capacity for economic life by subsidizing the construction of tourist facilities, then it is difficult to imagine any rock or feature that could not have the capacity to generate an economic life of its own.

If all the claimants could agree that none of

<sup>15</sup> Stein Tønnesson, "The Paracels: The 'Other' South China Sea Dispute," *Asian Perspective* 26-4 (2001): 145-169; Stein Tønnesson, "The South China Sea in the Age of European Decline," *Modern Asian Studies* 40-1 (2006): 1-57.

<sup>16</sup> Nguyen Thi Lan Anh argues that they, like the Spratlys, cannot have any such effect.

<sup>17</sup> Yann-huei Song, "The Application of Article 121(3) of the Law of the Sea Convention to Five Selected Disputed Islands in the South China Sea," in ed. Tran Truong Thuy (2010), 44-68.

the Spratly islets can have more than 12 nm territorial waters, it would be so much easier to move ahead with maritime delimitation. One would just leave a circular enclave around each islet, without resolving who holds sovereignty to it. When submitting their continental shelf measurement to the CLCS, Vietnam and Malaysia implicitly assumed that the Spratlys would not have any EEZ or continental shelf of their own. If China were to accept this, it could be seen as a Chinese concession to Vietnam in return for Vietnamese recognition of Chinese sovereignty in the Paracels.

In addition to the above-mentioned islets and reefs there is also the issue of Macclesfield Bank. It is located in the central part of the South China Sea, between the Paracels and Luzon. Although it covers a fairly large area, Macclesfield Bank does not stick above water at high tide. Thus it does not qualify as an island under the LOS Convention 121(1), and is therefore considered a part of the seabed. If the Paracels end up under Chinese sovereignty, but are not given any right to generate an EEZ or continental shelf of their own, then the waters on and around Macclesfield Bank will end up in the "doughnut" of High Seas. If one or more of the Paracels are given a right to serve as base points for measuring China's maritime zones, then Macclesfield Bank could presumably become part of China's 200 nautical mile EEZ and continental shelf.

Some may consider the above exposition as naïve, given its emphasis on international law and its belief that three interrelated disputes may be treated separately. In the real world of international politics, related conflicts complicate and influence one another. Moreover, it is often assumed that great powers can bend the law at will. While it is true that China may continue to disregard the law of the sea and maintain its vague claim to virtually the whole South China Sea within the nine-dashed line, it is highly unlikely that China can convince the other states in the region to accept its sovereignty claims. Armed with sophisticated knowledge of their rights, the other countries will continue to seek outside support for their security if China does not operate in accordance with international law. Ignoring the law comes with a cost and the nine-dashed line is becoming increasingly costly for China.

There are several reasons why the Chinese government may consider revising its policy and clarify its claims to maritime territory. One reason is that this would strengthen its position in its legal disputes with Japan. Another is that it would reduce the need felt by the Southeast Asian countries for a US naval presence; hence China might be given room to continue its naval buildup. China could then also continue to capitalize diplomatically on its growing economic clout and develop it further within the recently established China-ASEAN Free Trade Area.

Why should China not see the need for maritime

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## What is most important for China is not whether oil or gas is produced on its own continental shelf, but whether it is produced at all.

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borders as clearly as it has done on land? Professor M. Taylor Fravel of the Massachusetts Institute of Technology has analyzed how China has negotiated no less than 17 border agreements since its establishment in 1949. It has delineated and demarcated its land borders with its neighboring countries, except India and Bhutan. China has made substantial concessions in its negotiations and, according to Fravel, has been most generous when it has negotiated from a position of strength.<sup>18</sup> The Shanghai Cooperation Organization builds on a strict principle of respect for existing borders. After China agreed with Vietnam on their land border in 1999, the two countries also negotiated the delimitation of their continental shelves and EEZs in the Gulf of Tonkin, in an agreement that was ratified by both countries in 2004.<sup>19</sup> This was China's first maritime border agreement. It is unlikely to be the last. According to the Swedish scholar Ramses Amer, who participated in the Hanoi and Ho Chi Minh workshops, these agreements are part of a long-term regional trend towards legally based maritime delimitation.<sup>20</sup>

There is yet another reason why China may realize its interest in moving towards maritime delimitation - energy security. From China's point of view, it would be advantageous to see as much oil and gas as possible being produced in its vicinity. However, as long as the disputes over maritime delimitation have not been resolved, it is difficult to get companies to invest in exploration. Serious oil companies are reluctant to operate in disputed territory. China's pressure against international companies to desist from activities on the continental shelves of Vietnam and the Philippines has further strengthened this reluctance and thus had a counter-productive effect on China's energy security.

What is most important for China is not

whether oil or gas is produced on its own continental shelf, but whether it is produced at all. China does not need the revenue as much as it needs the oil and gas itself. Moreover, the China National Offshore Oil Company (CNOOC) would probably be a welcome bidder for concessions on the continental shelves of the Philippines, Vietnam, and Malaysia once the maritime borders have been fixed.

### JOINT OIL DEVELOPMENT A DEAD END

China has long suggested to its neighbors that it would be best to "shelve the disputes and jointly develop resources." Chinese participants repeated this mantra at the workshops in Vietnam, without generating much enthusiasm as far as oil and gas is concerned. What really needs to be shelved is Chiang Kai-shek's map with the u-shaped line. The disputes over the Spratly islets as such might also be shelved, once it is agreed that they can only have 12 nm territorial waters. Joint development of oil and gas is no good substitute for the delimitation of maritime borders, and may be just as difficult to realize.

In 2005, China managed to obtain a "tripartite agreement for joint marine seismic exploration" with the Philippines and Vietnam in areas that will most likely end up as part of the Philippines' continental shelf. However, to China's disappointment, the agreement lapsed in 2008 amidst a political scandal in Manila. The obvious reason is that no state wants to develop oil jointly with other states in a territory they consider (with basis in international law) to belong to themselves. The existence of the map with the nine-dashed line cannot make the Philippines or Vietnam accept that areas close to their shores are under a legitimate dispute.

Joint development is likely to be a dead end in the South China Sea as far as oil and gas are concerned. For one, there is the risk that oil will actually be found through drilling under a joint exploration agreement. This would immediately up the ante, and could make the disputes even more contentious, particularly if one did not agree emphatically from the outset that the zone was under a "legitimate" dispute. If oil is going to be produced, a sophisticated legal regime with clear rules for how to divide costs, obligations, and revenues must be established.

This may be as difficult to agree upon as to delimitate maritime borders, particularly when there are more than two parties involved. Professor Gao Jianjun of China University of Political Sciences and Law in Beijing has examined how states establish joint development zones. In particular, he has looked at the failed attempts to agree on a Sino-Japanese joint development zone in the East China Sea. He finds that: "...joint development is by no means an easier challenge

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<sup>18</sup> Fravel, Taylor. *Strong Borders, Secure Nation: Cooperation and Conflict in China's Territorial Disputes*. Cambridge, MA: Princeton UP, 2008.

<sup>19</sup> Ramses Amer, "The Sino-Vietnamese Approach to Managing Border Disputes - Lessons, Relevance and Implications for the South China Sea Situation," in ed. Tran Truong Thuy (2010), 251-271.

<sup>20</sup> Ramses Amer, "Dispute Settlement and Conflict Management in the South China Sea - Assessing Progress and Challenges." Paper presented to The Second International Workshop, *The South China Sea: Cooperation for Regional Security and Development*, Ho Chi Minh City, Vietnam, November 11-12, 2010.

to tackle than delimitation.”<sup>21</sup>

The even greater complexity of establishing joint development in the context of the South China Sea, with its many overlapping claims, came out clearly in a paper presented to the first of the two workshops in Vietnam by the Shanghai-based scholar Ji Guoxing. Ji states:

“I suggest that we might first agree to have an overall framework for joint development in the whole South China Sea; indicating the willingness of all parties concerned and the basic principles to be pursued . . . Then we might have various forms of joint development, including bilateral, trilateral, quadrilateral, or quinquelateral levels depending on the different overlapping areas.”<sup>22</sup>

The complexity of Ji’s suggestion shows that joint development can be more difficult to agree upon than delimitation. In fact, it is very difficult to agree on which areas are disputed among whom bilaterally, trilaterally, or multilaterally, and how revenue should be divided up in each case. Why should this be easier than to simply draw up the borders?

#### JOINT FISHERY MANAGEMENT

A stronger case can be made for joint management of fisheries, joint protection of the environment, and joint marine research and monitoring. One of the achievements of the Managing Potential Conflicts in the South China Sea workshops, organized by Indonesia since 1990, has been to establish several functional working groups. China has been active in this area, out of genuine concern for the future of regional fisheries, and has acted in a truly cooperative spirit. This is demonstrated by the various presentations on this topic by Chinese scholars at the workshops. At the Ho Chi Minh City workshop, Li Jianwei of the China National Institute for South China Sea Studies in Hainan spoke about Sino-Vietnamese fishing management cooperation in the Gulf of Tonkin. Dr Song Yann-huei from Taipei made a presentation on joint research of marine biodiversity. Moreover, Wang Hanling from Beijing

<sup>21</sup> Professor Gao rightly points out that joint development requires more sincerity or trust among the parties than delimitation. Gao Jianjun, “Joint Development in the East China Sea: Not an Easier Challenge than Delimitation,” *International Journal of Marine and Coastal Law* 23 (2008): 39, 41, 75.

<sup>22</sup> Ji Guoxing, “Maritime Jurisdiction and Maritime Security Cooperation in the South China Sea,” in ed. Tran Truong Thuy (2010), 31-36 (ref. p. 35).

presented a paper on the need for joint management of fisheries in the whole area, and several other proposals for future cooperation were put forward.<sup>23</sup>

We are likely to see more cooperation in these essential fields, although budgetary allocations to environmental protection are extremely modest. In the “doughnut” area in the middle of the South China Sea the regulation of fisheries will continue to be a shared responsibility. There are thus many reasons to develop joint management of fisheries and joint protection of the marine environment.

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### **In general, China does not want the Southeast Asian countries to pull in external powers such as the United States, Japan, India, or Russia.**

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#### FROM GEOPOLITICAL GLOOM TO LEGAL PROGRESS

At the second workshop in Ho Chi Minh City, assessments of the future changed quite a bit from the initial to the final sessions. The first sessions, which dealt with recent international developments, were characterized by doom and gloom. Either China was flexing its muscles or the United States was interfering with regional peace. At any rate the window of opportunity for regional conflict resolution was closing. The next sessions took a more long-term view, considering legal developments and various constructive options, mostly building on the expectation that China will clarify its claims and aims. The last sessions, dealing with what has been achieved, both through formal agreements and informal consultations, provided grounds for cautious optimism.

However, any optimism must rely on the hope that China will change its policy. It has an interest in protecting fish stocks together with other countries, strengthening its legal position vis-à-vis Japan, and stabilizing relations with the Southeast Asian countries. It also wants to prevent US interference so that it can gradually build up its navy. In general, China does not want the Southeast Asian countries to pull in external powers such as the United States, Japan, India, or Russia. Moreover, it has an interest in enhancing its energy security by making sure that oil and gas can be produced in its vicinity.

All of these national interests point in the direction of regional cooperation and resolution of

<sup>23</sup> Li Jianwei, “Cooperation in the Gulf of Tonkin: the China-Vietnam Fishery Agreement Revisited”; Song Yann-huei, “Joint Marine Biodiversity Projects in the South China Sea: Efforts Made in the SCS Workshop Process”; and Wang Hanling, “International Joint Development of Fisheries Resources.” Papers presented to The Second International Workshop, *The South China Sea: Cooperation for Regional Security and Development*, Ho Chi Minh City, Vietnam, November 11-12, 2010.

disputes based on international law. The pursuit of China's national interests is impeded by Chiang Kai-shek's vague, provocative and legally dubious map. There was general agreement at the Vietnam workshops that a final solution to the disputes in the South China Sea will be long in coming. But on a more optimistic note, Ambassador Rodolfo Severino, the former Secretary-General of ASEAN (1998-2002), concluded:

“The one thing that can be done is to bring the claims as close as possible to alignment with international law, above all the UN Convention on the Law of the Sea.”<sup>24</sup>

10 + 1 + 1 = ?

When will China change its policy? The ill-conceived statement that the South China Sea belongs to China's “core interests” has caused renewed debate inside China.<sup>25</sup> Perhaps we will see the first signs of official change after the Communist Party Congress in 2012. However, the role of Taiwan is a stumbling block that needs to be overcome before an effective change can be made. Just as in the informal workshops in Indonesia, scholars both from Taiwan and Mainland China have participated in the two workshops in Vietnam. This is of vital importance. The respective governments of

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<sup>24</sup> Rodolfo C. Severino, “Cooperation for Regional Security and Development in the South China Sea.” Paper presented to The Second International Workshop, *The South China Sea: Cooperation for Regional Security and Development*, Ho Chi Minh City, Vietnam, November 11-12, 2010.

<sup>25</sup> Professor Shen Dingli, Fudan University, Shanghai, argues in an article in the December 2010 issue of *Shehui Guancha* [Social Observation] that China should not let its South China Sea policy be trapped by the map with the nine-dashed line, but base its policy clearly on the law of the sea.

the Republic of China (ROC) and People's Republic of China (PRC) make the same claims in the South China Sea on behalf of “China”. Taiwan occupies both Pratas Island west of Taiwan and Itu Aba in the Spratlys. It is therefore necessary for the PRC and ROC to coordinate their policies. This, of course, is difficult.

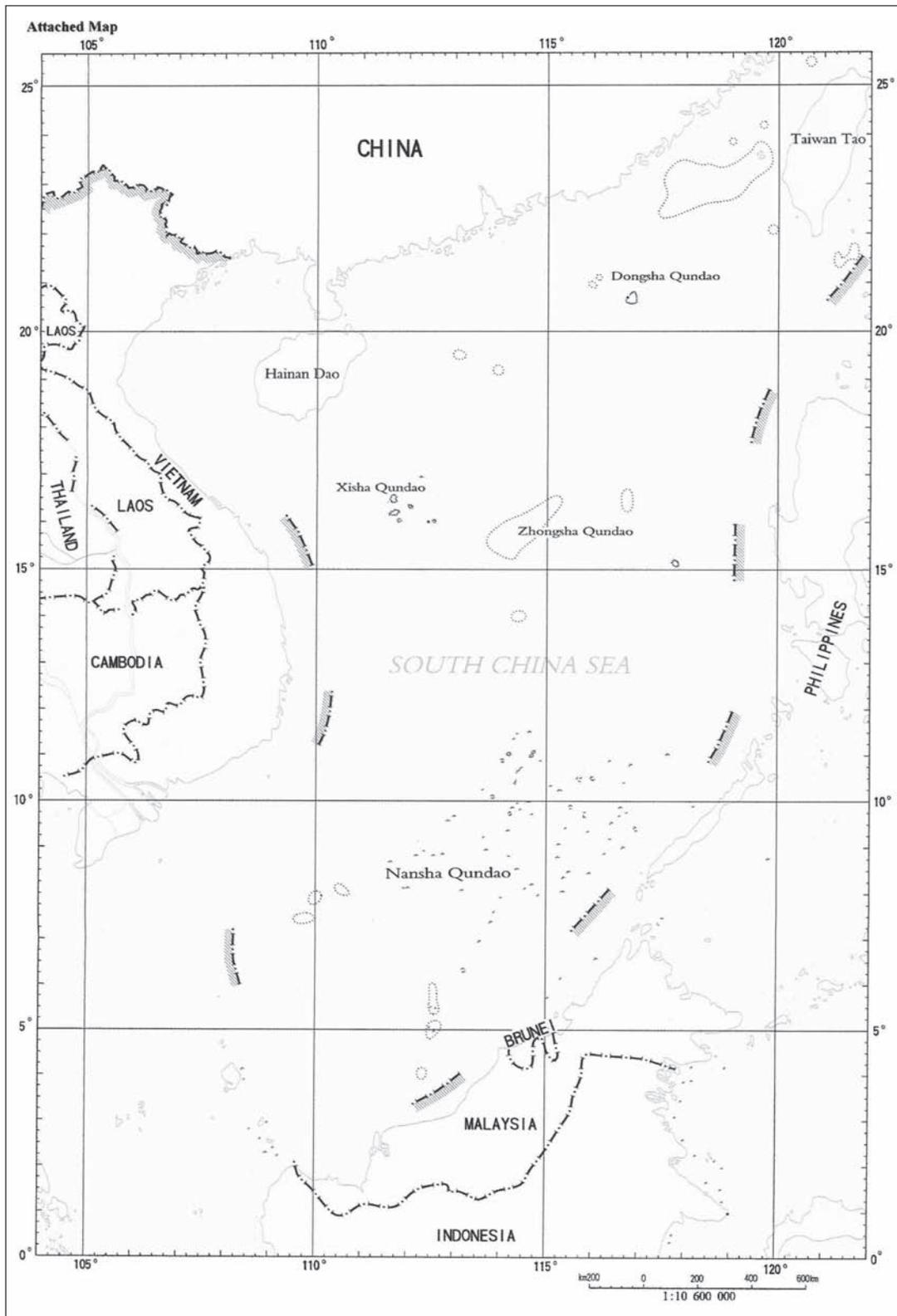
To believe that the ROC and PRC can revise their policies in tandem and base their new approach on a joint understanding of the law of the sea may seem naïve, but it should be noted that cross-Strait relations have not been affected by the recent geopolitical squabbles. These relations have shown improvement over time, with a number of new cooperative agreements.

There should be capacity for even more cooperation in the South China Sea, perhaps even talks with other claimants, based on the 10 + 1 + 1 formula: ASEAN + China + “Chinese Taipei”. This formula was developed in the annual informal workshops that Indonesia has organized since 1990, and carries great potential significance. China cannot move towards conflict resolution in the South China Sea without Taiwanese cooperation. Base points on the coast of Taiwan must be used to calculate the extension of (the One-) China EEZ and continental shelf claims. As mentioned, Taiwan occupies Itu Aba, the largest of the Spratlys. If Beijing quietly shelves the nine-dashed map and moves in the direction of a legally sustainable solution without support from Taiwan, then the decision makers in the PRC might come under fire from nationalist opinion makers in Taiwan, Hong Kong, and its own universities and websites. The governments in Taipei and Beijing need to reinforce each other in the process of conflict resolution in the South China Sea. This is in China's long-term national interest.



Map of the South China Sea, with place names only in English so as not to choose sides in any sovereignty dispute (virtually every reef and islet in the South China Sea have been given different names by each claimant state).

SOURCE: Stein Tønnesson (copyrighted)



This map, with a nine-dashed line, was attached to a May 7, 2009 letter from the People’s Republic of China to the United Nations Commission on the Limits of the Continental Shelf, protesting a Vietnamese and a joint Malaysian-Vietnamese submission with calculations of the continental shelf beyond 200 nautical miles from their coasts. By attaching the map to its letter, China made it into an official United Nations document, thus lending it to scrutiny by experts of international law.