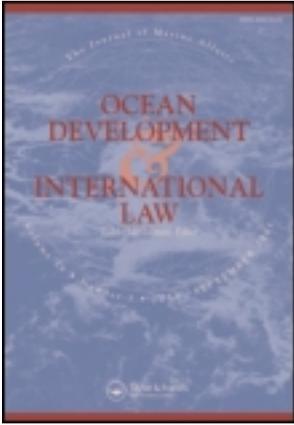


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Masahiro Miyoshi ^a

^a Aichi University Nagoya, Japan

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China's "U-Shaped Line" Claim in the South China Sea: Any Validity Under International Law?

MASAHIRO MIYOSHI

Aichi University
Nagoya, Japan

China's recent claims to a large "U-shaped" area in the South China Sea, involving the disputed Spratly and Paracel Islands, has given rise to a number of serious criticisms not only from neighboring states, but also some states beyond the region. The claim also raises a number of theoretical questions, including whether historic title claims without hard evidence have validity under international law. This article explores this and other issues raised by China's U-shaped claim.

Keywords China, historic title, South China Sea

Introduction

The recent claim of the People's Republic of China (hereinafter the PRC or China) to the "U-shaped line" in the South China Sea (see Figure 1), enclosing its claimed islands and their surrounding waters, has given rise to a number of objections and protests on the part of the neighboring states on the South China Sea. Strictly speaking it is not a line, but a series of nine broken or dotted lines enclosing vast sea areas involving large and small insular formations to which the PRC has a territorial claim. This extraordinary claim, allegedly based on historic title, has also raised concerns among international lawyers.

One wonders if it is possible or permissible at all to claim a sea area encircled by a series of dotted or broken lines instead of an unbroken line. Dotted or broken lines leave gaps between them, which create a serious question of how those sea areas in the gaps can validly be claimed to be delimited, provided those broken lines are clearly delimited at all. What the PRC seems to be saying is that the enclosed sea areas and insular formations have historically been its possessions without protest from foreign states over the years.

This brief article is an attempt to provide a critical international legal evaluation of the Chinese claim. In the following sections, the relevant claims will be reviewed: when the U-shaped line claim was first raised and how other states, especially neighboring states, reacted; if the claim is made as a claim of historical right, as indeed it is by the PRC, this will be tested as to whether it is a legitimate instance of state practice in international law; and if the claim is made in the interest of the claimant's national interest, what can be said of such national interest in the formation of international law.

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Address correspondence to Masahiro Miyoshi, Professor Emeritus of International Law, Aichi University, Nagoya, 461-8641, Japan. E-mail: miyoshim37.19mm@gmail.com

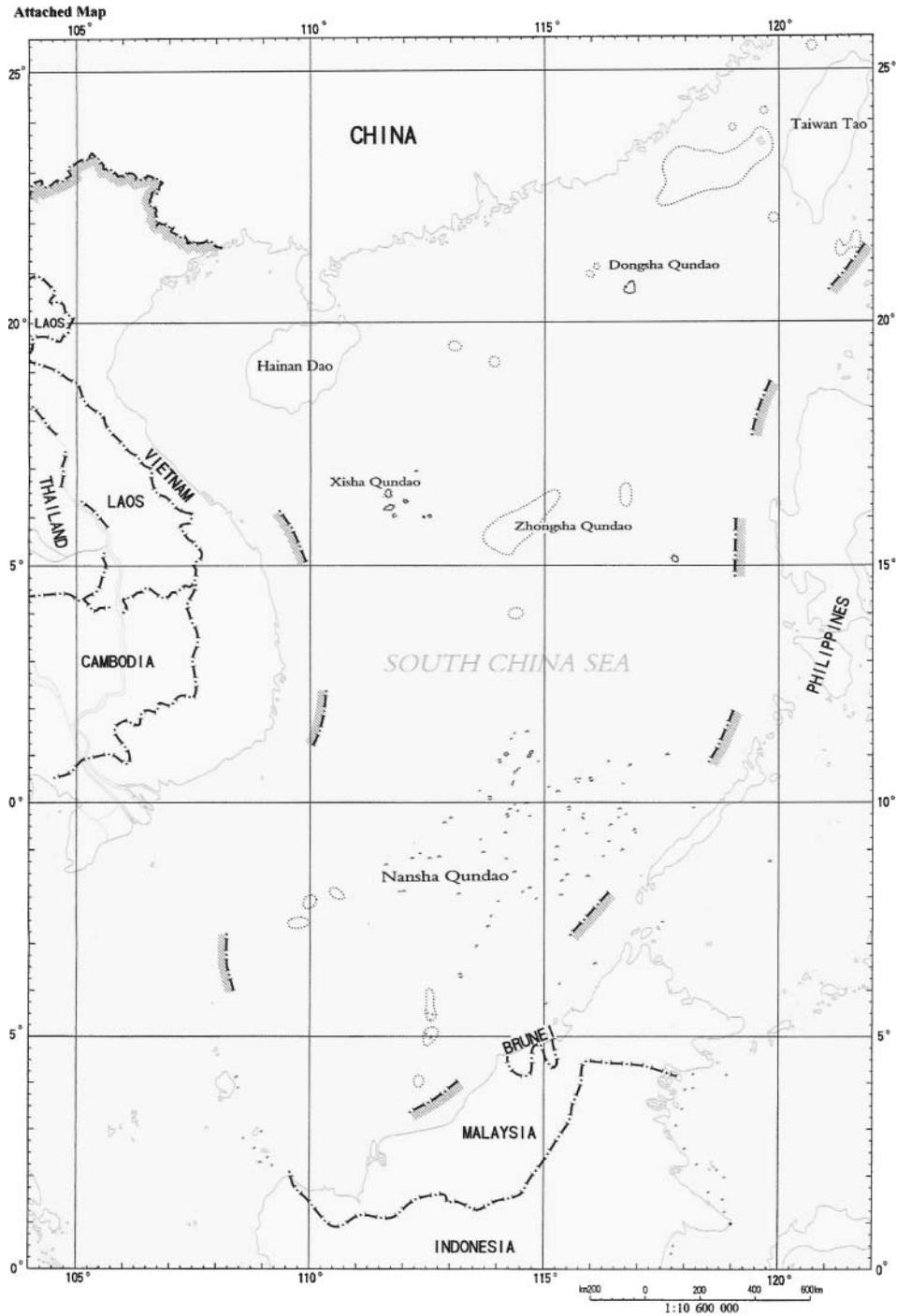


Figure 1. Map attached to the communication dated 7 May 2009 from the People's Republic of China to the UN Commission on the Limits of the Continental Shelf with regard to the joint submission by Malaysia and Vietnam to the Commission on 6 May 2009.

What Is China's U-Shaped Line Claim?

China's U-shaped line claim originated in the claim of the Republic of China (hereinafter the ROC or Taiwan) to the Pratas Islands, the Paracel Islands, the Macclesfield Bank, and the Spratly Islands as its territory in the South China Sea, as shown on the "Map of Chinese Islands in the South China Sea" published by the Land and Water Maps Inspection Committee in April 1935.¹ On the Map of China and its attached map—the "Location Map of the South China Sea Islands"—the above-mentioned islands were indicated as being part of the ROC's territory and an 11-dotted line was drawn around those insular features.² The map marked with the dotted line in the South China Sea was officially issued for the first time during the Kuomintang period.³

The PRC came to use this dotted line as its claimed maritime boundary in the South China Sea.⁴ Li and Li pointed to the acquiescence on the part of the adjacent states to this claimed Chinese boundary line⁵ and concluded that "[it] can be called the Chinese traditional maritime boundary line in the South China Sea."⁶ Acquiescence is an important point, as will be discussed more extensively below, but what seems to this author to be more important in this connection is whether the alleged dotted line can be characterized as a legitimate international maritime boundary line at all.

A boundary line, or any other line for that matter, must be a continuous one. Otherwise, it has gaps between its segments and cannot by definition be called a line. Needless to say, such gaps leave undelimited areas between the segments of boundaries, provided those segments are delimited. In the case of the PRC's (or the ROC's) claimed dotted line in the South China Sea, the question can be raised whether the alleged segments of boundaries are delimited at all. The claim with respect to the dotted line is based at most on historic title, allegedly tolerated or acquiesced in by the neighboring and other states.⁷ Is this lack of protest from other states enough to validate territorial sovereignty over the waters encircled by those segments of boundaries and the islands enclosed therein? If that were enough, then, whatever irrational or exorbitant territorial claim can be validated under international law unless there is a protest against it.

The PRC legislation of 1998, the Exclusive Economic Zone and the Continental Shelf Act, seems to assume that the PRC has succeeded to the ROC's claim to the dotted line in the South China Sea, for it provides in Article 14 that "the provisions of this Law shall not affect the historic rights enjoyed by the People's Republic of China."⁸ While the "historic rights of China" in this clause is not clear, it would be rightly assumed to refer to such rights in the South China Sea in view of the traditional maritime boundary line drawn on Chinese maps since 1947.⁹ This notwithstanding, the ROC has never given up its own claim to the dotted line. Indeed, in the Prologue of the Policy Guidelines for the South China Sea, approved by the ROC Executive Yuan in April 1993, it was claimed that:

[t]he South China Sea area within the historic water limit is the maritime area under the jurisdiction of the Republic of China, in which the Republic of China possesses all rights and interests.¹⁰

Song and Zou have traced the ROC position, which includes that in September 1993 both the interior minister and the premier reiterated that the waters of the South China Sea had long been the ROC's historic waters.¹¹ In March 1995, ROC forces fired on a Vietnamese freighter that had strayed into a restricted area around Itu Aba Island in the Spratlys.¹² Later in the same year, in response to the U.S. statement on the Spratlys and the South China Sea, the ROC Ministry of Foreign Affairs issued a five-point statement on the South China Sea

issue, in which Taipei reasserted its claim to the waters in the South China Sea encircled by the nine dotted lines as the historic waters of the ROC.¹³ Vietnam reacted by objecting that the ROC claim was ill-founded.¹⁴ In 1996, the ROC Ministry of Foreign Affairs reiterated that the historic waters claim in the South China Sea would be maintained unyieldingly.¹⁵ It is the case that the U-shaped dotted line and the waters and islands encircled thereby are claimed by both the PRC and the ROC governments.

Maps as Evidence of the Limits of State Sovereignty

The nine dotted lines, as shown in Figure 1, are presented as evidence of the PRC's or the ROC's claim to the historic waters enclosed by them. Maps have been relied on as evidence of claimed national territorial limits and, in some situations, maps have been accepted as having some evidentiary value. But in the numerous territorial and boundary dispute cases before international tribunals, the evidentiary value of maps has been reduced except for those maps that have intrinsic legal force as, for example, maps that are an integral part of the text of a treaty. As the International Court of Justice stated in the 1986 *Burkina Faso/Republic of Mali Frontier Dispute Case*:

Whether in frontier delimitations or in international territorial conflicts, maps merely constitute information which varies in accuracy from case to case; of themselves, and by virtue solely of their existence, they cannot constitute a territorial title, that is, a document endowed by international law with intrinsic legal force for the purpose of establishing territorial rights. Of course, in some cases maps may acquire such legal force, but where this is so the legal force does not arise solely from their intrinsic merits: it is because such maps fall into the category of physical expressions of the will of the State or States concerned. This is the case, for example, when maps are annexed to an official text of which they form an integral part. Except in this clearly defined case, maps are only extrinsic evidence of varying reliability or unreliability which may be used, along with other evidence of a circumstantial kind, to establish or reconstitute the real facts.¹⁶

This evaluation of maps has been cited with approval in subsequent territorial and boundary delimitation dispute cases, including: the 1999 *Botswana/Namibia Kasikili/Sedudu Island Case*,¹⁷ the 2002 *Indonesia/Malaysia Sovereignty over Pulau Ligitan and Pulau Sipadan Case*,¹⁸ the 2005 *Benin/Niger Frontier Dispute Case*,¹⁹ and the 2007 *Nicaragua/Honduras Territorial and Maritime Disputes in the Caribbean Sea Case*.²⁰ Note can also be made of an expert geographer's comment on the value of maps as evidence:

The text [of a treaty on boundary delimitation] is invariably accompanied by sketches and maps as supporting documentation, but these only have legal validity if incorporated into the treaty itself. Some agreements, surprisingly, have no accompanying maps, preferring to rely on a comprehensive legal description of the agreed boundary.²¹

These evaluations of maps as evidence of territorial or boundary claims suffice for the discussion of the subject matter since the maps presented by the ROC and the PRC are not

so clearly defined as to allow further analysis. It is more useful to discuss the intent of the states concerned and the legal effects in international law.

State Practice and Its Compatibility with International Law

The dotted line enclosure has resurfaced as an extraordinary territorial claim in the PRC reaction to the Malaysian-Vietnamese Joint Submission to the United Nations Commission on the Limits of the Continental Shelf (CLCS) in May 2009²² as well as the Vietnamese individual submission to the CLCS in April 2009.²³ The PRC's protest to those initiatives by Vietnam and Malaysia invoked its "indisputable sovereignty" over the islands in the South China Sea and the adjacent waters and claimed its "sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof."²⁴ The ROC also published its objection to the Vietnamese submissions to the CLCS on 12 May 2009.²⁵ The Philippines made a strong protest against the Chinese maritime claims in the South China Sea in its communication to the United Nations in April 2011.²⁶

If the claims by the PRC and the ROC governments to the dotted line in the South China Sea represent a case of state practice and have not met with any protest from the other states, especially the neighboring ones, over a long period of time, they may be a legitimate claim under international law. But as indicated above, this does not necessarily mean an end of the matter. As Hersch Lauterpacht rightly pointed out, a unilateral claim to title, whether territorial or otherwise, must not be patently at variance with international law:

... it is probably true to say that the absence of protest is irrelevant if the action of the state claiming to acquire title is ... so patently at variance with general international law as to render it wholly incapable of becoming the source of a legal right. ... In such a case a protest may be advisable; it is not essential. ... There are acts which are so tainted with nullity *ab initio* that no mere negligence of the interested state will cure it.²⁷

In the *Anglo-Norwegian Fisheries Case* of 1951, the International Court of Justice found that the delimitation of coastal sea areas by the coastal state concerned was not free from the restriction of international law. The relevant part of the judgment is:

The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law.²⁸

This is self-explanatory. If this is so with respect to narrow coastal sea areas, it would follow *a fortiori* that in mid-ocean areas that are broadly categorized as high seas, such as the South China Sea, the delimitation or enclosing of certain sea areas should have a stronger case for the restriction by international law. In this sense, the ROC's and the PRC's claim to the dotted line enclosing a large sea area of the South China Sea cannot be easily recognized as valid under international law.

States make claims on the basis of their considerations of national interest and they are instances of state practice. But in order for such a practice to be recognized under international law, it must be endorsed by international law (i.e., by fulfilling the requirements

for it to be a rule of international law). The UN Secretariat's study, "Juridical Regime of Historic Waters, Including Historic Bays,"²⁹ provides a basis for discussion of unilateral national claims to exclusive jurisdiction over a sea area on an alleged historical basis. This study points out, rightly, that there are three factors to be taken into consideration in determining the existence of a historic title to a maritime area: "(1) the exercise of authority over the area by the State claiming the historic title; (2) the continuity of this exercise of authority; and (3) the attitude of foreign States."³⁰ It is implied that a claim to historic title to a certain sea area cannot be a valid title under international law unless all of these three requirements are duly met.

Exercise of Authority

If the ROC or the PRC asserts that it exercised authority over the sea area enclosed by the dotted line in the South China Sea over a long period of time, it must prove that it actually did so. In the ancient times during which the ROC and the PRC claim to have exercised authority over the sea area in question, the degree or intensity of exercise of authority would be difficult to show unless there is written evidence to that effect. In those days it may be too much to expect of the claimer to prove that the rigorous requirement of effective authority set out in the 1928 *Island of Palmas Arbitration*³¹ was exercised over those sea areas. But if the ROC or the PRC is to claim its historic title today, or for that matter since 1947 when the map showing the dotted line was first published, they are required to demonstrate their effective exercise of authority (i.e., sovereignty).³² This must especially be so if there is a competing claim by even one neighboring state to sovereignty over those islands and islets encircled by the dotted line in the South China Sea. Needless to say, neither the PRC's nor the ROC's claim could prevail over other claims unless their case is presented with more strength than the others.

Continuity of Exercise of Authority

The exercise of authority must be continuous over a long period of time; sporadic exercise of authority does not suffice. The establishment of a historic title requires usage, which in turn requires passage of a certain uninterrupted length of time. Since historic title is of a prescriptive nature, it necessarily needs a long lapse of time for its establishment.

However, no precise criterion of the length of time exists in international law. Li and Li mentioned a period of "half a century" over which the dotted line has been allegedly recognized in the international community.³³ A half-century seems to be a reasonably long time for a title to be understood as established if no other state disputes the claimed title during the time. Indeed, a half-century criterion is mentioned in the *British-Guiana/Venezuela Arbitration Treaty of 2 February 1897*, Article 4, as one of the three "Rules to be taken as applicable to the case":

- (a) Adverse holding or prescription during a period of fifty years shall make a good title. The Arbitrators may deem exclusive political control of a district, as well as actual settlement thereof, sufficient to constitute adverse holding or to make title by prescription.³⁴

This appears to be the only conventional rule that exists and refers to 50 years as a required length of time to make adverse holding of a territory a good title to it. But this is not an absolute rule. If this time limit applied in one land territory situation between

litigating parties is considered as applicable *mutatis mutandis* to maritime areas in general, it is qualified by the words "exclusive political control" and "actual settlement." The implications are that the claimant state must have had exclusive political control over the sea area and actual control of it to the exclusion of foreign states. One may wonder if the ROC or the PRC has exercised such exclusive and undisputed control over the said sea area in the South China Sea over the past half-century. Should the ROC or the PRC fail to show its effective or exclusive control over the claimed sea area over the said period of time, it would be unsuccessful in its claim to historic title to the sea area enclosed by that dotted line.

Attitude of Foreign States

The third factor to be taken into consideration in determining a historic title is whether foreign states, particularly those in the same region, react adversely to the claim or remain silent. It is a truism to say that, if a state fails to make a protest against an act hostile or unfavorable to it, such failure amounts to acquiescence. If therefore the ROC's or the PRC's claim to historic title to the dotted line is to be denied, the neighboring states ought to have made due protest against the claim over the years. The neighboring states bear the burden of proof that they have protested while the claimant state for its part must, of course, prove that it has claimed its effective authority over the sea area uninterruptedly without protest from foreign states over a reasonably long period of time.³⁵

Lack of protest, however, can vary according to the interest of foreign states in the alleged claim: It can be acquiescence, tolerance, or even mere silence. Whichever form it may take, the failure of foreign states (especially those neighboring states closely interested in the matter) to protest can amount to tacit recognition of the state of affairs that the claimant state aims to attain. But opposing states cannot protest without knowledge of an alleged claim. It would, however, be going too far to demand that the claimant state must formally notify all of the foreign states that it has assumed sovereignty over a claimed sea area. The notoriety of the situation, the public exercise of sovereignty over the sea area in question, would in reality be sufficient.³⁶ With respect to the ROC's or the PRC's claim to historic title to the area encircled by the dotted line in the South China Sea, one could reasonably question whether it has exercised its sovereignty over the claimed sea area with sufficient notoriety.

The ROC has reportedly deemed "the entire area within the U-shaped line to be China's historical waters." Indeed, a scholar from Taiwan has explained:

Since the declaration of the 9-discontinued-and-dotted line, the international society at that time had not put forward any dissents. Neither had the adjacent States raised any diplomatic protests on the 9-dotted line. These amounted to acquiescence. After that, quite a lot of maps produced abroad were all delineated in this way and indicated as pertaining to China. China owns the historic right of islands, reefs, shoals, banks, and waters within the 9-dotted line. The South China Sea is regarded as the historic waters of China, which was universally acknowledged at that time. So far it has lasted for half a century.³⁷

But a Vietnamese scholar has questioned the effectiveness of such Chinese claims: "The obvious fact is that States within and without this region have navigated freely in the region's waters for a long time."³⁸ When noting this, the scholar was discussing the legal status of the waters within the historic waters, whether they were internal waters where

foreign vessels have no right of innocent passage or the territorial sea where foreign vessels have that right.³⁹ Another scholar has observed that “the exercise of authority in the area by either mainland China or Taiwan has been infrequent since the proclamation of the line.”⁴⁰ If these comments are correct, it would be difficult to say that the ROC’s or the PRC’s claim to historic title to the sea area within the dotted line is well founded, let alone established in international law.

National Interest and International Law

Claims are normally underlain by some interests of the claimant state. They may be economic or security interests. When states make claims, they tend to justify them in terms of legal principles or historical backgrounds. They are free to do so. But their freedom to do so is one thing and quite another whether the claim is justified in international law. China’s claims may not be an exception in this respect. China tends to justify its territorial claims on alleged historical grounds, rather than on a legal basis. A typical case in point is its claim to sovereignty over the Senkaku islets (Diaoyu islets in Chinese) in the East China Sea.

The PRC broke its silence with respect to the ownership of these islets in 1970 when Japan, South Korea, and Taiwan were negotiating the ways and means to explore for and exploit the potential oil and gas in the sea areas near the islets⁴¹ following a 1969 report by the Committee for Co-ordination of Joint Prospecting for Mineral Resources in Asian Offshore Areas (CCOP) of the UN Economic Commission for the Far East (ECAFE),⁴² which had conducted exploratory seismic activities in those sea areas in the autumn of 1968. Although the PRC asserts its ownership of the islets since ancient times,⁴³ it has failed to show convincing hard evidence for the assertion. When, for example, it made a declaration of an administrative nature on the breadth of its territorial sea in 1958, it failed to mention the Diaoyu islets as part of its territory while mentioning

... Taiwan and its surrounding islands, the Penghu Islands, the Tungsha Islands, the Hsisha Islands, the Chungsha Island, the Nansha Islands and all other islands belonging to China. ...⁴⁴

This contrasts with the 1992 Law of the People’s Republic of China on the Territorial Sea and the Contiguous Zone, Article 2 of which provides:

... Taiwan and all islands appertaining thereto including the *Diaoyu Islands*; the Penghu islands; the Dongsha Islands; the Xisha Islands; the Zhongsha Islands and the Nansha Islands; as well as all the other islands belonging to the People’s Republic of China. ...⁴⁵ (emphasis added)

In this official legislation of 1992, the Diaoyu Islands is expressly mentioned to show the PRC’s clear intention of claiming sovereignty over the Diaoyu Islands.⁴⁶

On top of the PRC’s Declaration of 1958, which lacks reference to the Diaoyu islets, an interesting newspaper article appeared in 1953 attesting to the PRC’s position that the Senkaku (or Diaoyu) islets belonged to Japan at that time. The article states:

The Ryukyu Islands are scattered to the north-east of our Taiwan and to the south-west of Kyushu, Japan, including the seven island groups of *Senkaku*

Islands, Sakishima Islands, Daito Islands, Okinawa Islands, Ohshima Islands, Tokara Island, and Ohsumi Islands. . . .⁴⁷ (emphasis added)

This is a part of the report that the people of the Ryukyu Islands were struggling to protest against the U.S. occupation, which has nothing to do with the ownership of the Senkaku islets. The item is noteworthy for two points: first, it uses the Japanese (instead of Chinese) names of the islands, and, second, it makes no reference whatsoever to the subsequent territorial sovereignty dispute with Japan. The PRC's official daily newspaper seems to have made a compromise in calling the disputed islands by the Japanese name of Senkaku Islands, a rare phenomenon for its normally nationalistic attitude. The news report reveals the truth of the PRC's position with respect to the ownership of those islands all the more because it does not mention a Chinese claim to sovereignty over the islands.

It can be inferred that the PRC made a declaration of its ownership of the islets in the 1992 legislation, if belatedly, on the basis of its awareness of the importance of potential oil and gas in the waters around the islets. Japan had incorporated them into Japanese territory by a cabinet decision in 1895 after a careful study to make sure that no other state had acquired sovereignty over those islets over the many years in the past. It did so as a matter of occupation of *res (or terra) nullius*. The decision met with no protest from foreign states thereafter until the late 1960s. In other words, foreign states, the PRC among them, are interpreted to have acquiesced in, or tolerated, Japan's sovereignty over the Senkaku islets at least since 1895.⁴⁸ A change of policy in favor of economic development is a matter for the state concerned, but its claim based on such a change of policy must be endorsed by international law if the claim is to be opposable to neighboring states.

Another striking example of the PRC's change of policy may be found in its complete shift from recognition to disapproval of the legal status of a mid-ocean island under Japanese sovereignty, Oki-no-Tori Shima. At one time the PRC used to recognize, and reportedly even praised, the Japanese claim to sovereignty over the island, presumably in defense of its claim to sovereignty over some of the South China Sea islands and islets that Vietnam and some other regional states disputed. Today the PRC vehemently objects not only to the Japanese claim of ownership of Oki-no-Tori Shima, but also that the feature is not an island but a mere rock that cannot have an EEZ or continental shelf of its own.⁴⁹ There is no way of knowing why or how the PRC has changed its attitude toward this mid-ocean island. The truth seems to be based on military policy considerations. A recent article by a high-placed official in the PRC's State Ocean Administration has disclosed the seemingly true reason why it now objects to Japan's claim to the island's EEZ and continental shelf. As this law of the sea authority stated, the influences and threats that Oki-no-Tori Shima will have to China are as follows:

- (1) Japan's claim to Oki-no-Tori Shima and its conduct damage the maritime interests of the coastal States near the Rock;
- (2) Oki-no-Tori on a "1.5th island chain" has minus impact on China's extension to the Pacific Ocean because China is a typical "geographically disadvantaged State" from the points of view of maritime boundary delimitation and geopolitics;
- (3) Oki-no-Tori crushes the desire and idea of the Chinese people to advance into the Pacific Ocean because its EEZ and continental shelf to the east of Taiwan constitutes a wall against Chinese extension; and

- (4) Because of its location in the strategically important position in the north-west Pacific, Oki-no-Tori can be the base for a watch over the Chinese military activities in time of peace and the advance base in time of war.⁵⁰

In a sense this is a candid disclosure of the government's policy shift, but it cannot be said to be a legal justification. It is true that the PRC's ostensible reason for objection is Article 121(3) of the UN Convention on the Law of the Sea (LOS Convention),⁵¹ but the stronger reason would seem to be military considerations as referred to above.

Thus, considerations of national interest can change a state's position on territorial matters. But such a change of policy does not necessarily entail the sanction of international law.

Any Dispute Settlement Procedure?

The obligation of states parties to the LOS Convention to settle any dispute concerning the interpretation or application of the Convention by peaceful means is set out in Article 279. However, the submission of any such dispute can be made only where optional exceptions have not been made to the applicability of compulsory procedures under Section 2 of Part XV, which provides for compulsory procedures entailing binding decisions. One of the optional exceptions is for "disputes concerning the interpretation or application of Articles 15, 74 and 83 relating to sea boundary delimitations or *those involving historic bays or titles*," which can be exercised in writing not only when a state signs, ratifies, or accedes to the Convention but also "at any time thereafter" under Article 298(1)(a)(i). In other words, a dispute concerning a historic title may at any time be exempted from the compulsory dispute settlement procedure. Thus, the PRC, a party to the LOS Convention, is under no legal obligation to submit, or respond to the submission of, any dispute concerning maritime boundary delimitation or historic title to a compulsory settlement procedure.

What can be done about the dispute over the dotted line in the South China Sea? Is there a dispute settlement mechanism available in the South China Sea region? As early as 1976, the five original members of the Association of Southeast Asian Nations (ASEAN)—Indonesia, Malaysia, the Philippines, Singapore, and Thailand—agreed on the settlement of disputes that

they shall refrain from the threat or use of force and shall at all times *settle such disputes* [disputes on matters directly affecting them, especially those likely to disturb regional peace and harmony] among themselves *through friendly negotiations*.⁵² (emphasis added)

In 1997, the PRC joined with the ASEAN states in making a joint statement on resolving disputes in the South China Sea, which states in part:

The parties concerned agreed to resolve their disputes in the South China Sea through *friendly consultations and negotiations* in accordance with universally recognized international law, including the 1982 UN Convention on the Law of the Sea.⁵³ (emphasis added)

This is an important development as it formally involves the PRC in the regional framework of settlement of disputes in the South China Sea. This joint statement was endorsed in the 2002 Declaration on the Conduct of Parties in the South China Sea.

The Governments of the Member States of ASEAN and the Government of the People's Republic of China,

...

COGNIZANT of the need to promote *a peaceful, friendly and harmonious environment in the South China Sea between ASEAN and China* for the enhancement of peace, stability, economic growth and prosperity in the region; COMMITTED to enhancing the principles and objectives of the 1997 Joint Statement of the Meeting of the Heads of State/Government of the Member States of ASEAN and President of the People's Republic of China;

...

4. The Parties concerned undertake to *resolve their territorial and jurisdictional disputes by peaceful means, without resorting to the threat or use of force, through friendly consultations and negotiations* by sovereign states directly concerned, in accordance with universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea;
5. The Parties undertake to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability including, among others, *refraining from action of inhabiting on the presently uninhabited islands, reefs, shoals, cays, and other features* and to handle their differences in a constructive manner.⁵⁴ (emphasis added)

The 2002 Declaration was signed by the PRC and ASEAN's ten members. The undertaking has since been confirmed time and again.⁵⁵ The question is whether this can be taken as a firm commitment of the PRC.

Insofar as dispute settlement is concerned, the PRC has been consistent in its policy of avoiding third party settlement procedures. It may possibly be a Communist Party policy.⁵⁶ The PRC has preferred direct bilateral, rather than multilateral, negotiations to any other mode of dispute settlement. As a seasoned Indonesian diplomat reflecting on South China Sea issues once said:

The issue of whether the prospect for solution would better be achieved bilaterally or through a regional approach still haunts the workshop until now. *China is particularly keen on seeking bilateral solutions with each claimant, while the Southeast Asian claimants are not so sure whether this is the right approach. . . . I feel that the Southeast Asian claimants seem to have come to a conclusion that while bilateral dialogues and consultations would be useful, the solution to the Spratly claims would have to be in a regional context involving all claimants.*⁵⁷ (emphasis added)

Admittedly states generally have a propensity for control over the settlement of disputes,⁵⁸ as indeed Southeast Asian states also prefer "friendly negotiations" as specifically provided for in the 1976 Treaty of Amity and Cooperation in Southeast Asia.⁵⁹ But the difference is that, while the PRC seems to prefer bilateral negotiations, the ASEAN states seem to like to negotiate with the PRC in a multilateral forum.

Some Concluding Remarks

As all the states involved in the dispute over the dotted line enclosure by the PRC or ROC would seem to prefer a nonbinding procedure of settlement to a binding judicial settlement,

they have no choice but to behave with self-restraint or patience and refrain from any unilateral action that may jeopardize a possible peaceful solution of the dispute.

While the 2002 Declaration on the Conduct of Parties in the South China Sea may be a good starting point for ASEAN-China cooperation,⁶⁰ there is bad news coming from various quarters in the South China Sea region. Indeed, unilateral assertions of sovereignty have not ceased to take place just because an agreement or, in fact, several instruments have been signed.⁶¹ According to the *Japan Times*, the China Marine Surveillance, China's ocean monitoring agency, said it will add 1,000 officers in 2011 to raise staffing to 10,000 and will purchase 36 new ships over the next 5 years.⁶² The official *China Daily* reported on 2 May 2011 that the agency presently has 300 vessels of all types, along with 10 aircraft.⁶³ The increased capacity is reportedly needed to deal with a rising number of disputes involving China and other countries that share overlapping claims to waters and island groups in the South China and East China Seas. For its part, the Philippines stated in March 2011 that it plans to acquire patrol ships, aircraft, and a radar system to assert its claims.⁶⁴ Thus, the culprits are not China alone. All the parties, having formally committed to efforts for confidence building, remain suspicious of each other's commitments and continue their assertions.⁶⁵

Only when the South China Sea players realize the urgent need to develop the natural resources of the area, can they possibly put aside the sovereignty issues and devise a method of sharing the resources in one way or another. Needless to say, all of this depends on the will of the states concerned: whether they can shelve, for the temporary purpose of exploiting the potential natural resources, the sensitive issue of sovereignty over the islands and islets enclosed by the dotted line in the South China Sea. Strategic and security considerations would also be an important matter over which it would be difficult for the states concerned to make concessions. But should there be no compromise, no way out is in sight at least for the foreseeable future.

Notes

1. Jinming Li and Dexia Li, "The Dotted Line on the Chinese Map of the South China Sea: A Note," *Ocean Development and International Law* 34 (2003): 289.

2. *Ibid.*, at 290.

3. *Ibid.*

4. *Ibid.*, at 290, the authors stated:

On the Map of China produced after the creation of the People's Republic of China in 1949, the eleven-dotted line in the South China Sea appears to follow the old maps. It was not until 1953, after Premier Zhou Enlai's approval, that the two-dotted line portion in the Gulf of Tonkin was deleted. Chinese maps published since 1953 have shown the nine-dotted line in the South China Sea.

5. *Ibid.*, at 290.

6. *Ibid.*, at 294.

7. *Ibid.*, at 290, the authors said:

Upon the declaration of the nine-dotted line, the international community at no time expressed dissent. None of the adjacent states presented a diplomatic protest. This silence in the face of a public declaration may be said to amount to acquiescence, and it can be asserted that the line has been recognized for half a century.

8. Exclusive Economic Zone and Continental Shelf Act, 1998, available at the Web site of the UN Division for Ocean Affairs and the Law of the Sea (DOALOS) at www.un.org/Depts/los/index.htm. Vietnam formally objected in its Note Verbal of 6 August 1998 to the Secretary-General

of the United Nations. See "Vietnam: Disputes Regarding the Law on the Exclusive Economic Zone and the Continental Shelf of the People's Republic of China Which Was Passed on 26 June 1998," para. 2, *Law of the Sea Bulletin* 38 (1998): 55.

9. See Yan-Huei Song and Keyuan Zou, "Maritime Legislation of Mainland China and Taiwan: Developments, Comparison, Implications, and Potential Challenges for the United States," *Ocean Development and International Law* 31 (2000): 318.

10. Republic of China, "The South China Sea Policy Guidelines," reproduced in Sun Kuan-Ming, "Policy of the Republic of China Towards the South China Sea," *Marine Policy* 19 (1995): 408, as quoted by Song and Zou, *supra* note 9, at 328.

11. Song and Zou, *supra* note 9, at 328.

12. *Ibid.*

13. Reported in *ibid.*, at 328.

14. *Ibid.*

15. *Ibid.*

16. *Frontier Dispute*, [1986] *I.C.J. Reports*, at 582, para. 54.

17. *Kasikili/Sedudu Island Case*, [1999] *I.C.J. Reports*, at 1098, para. 84.

18. *Sovereignty over Pulau Ligitan and Pulau Sipadan*, [2002] *I.C.J. Reports*, at 667, para. 88.

19. *Frontier Dispute*, [2005] *I.C.J. Reports*, at 119–120, para. 44.

20. *Territorial and Maritime Disputes in the Caribbean Sea*, [2007] *I.C.J. Reports*, at 58, para. 215.

21. Gerald Blake, "The Depiction of International Boundaries on Topographic Maps," *Boundary and Security Bulletin* 3, no. 1 (1995): 46.

22. Joint Submission of Malaysia and Vietnam to the Commission on the Limits of the Continental Shelf, Executive Summary, 6 May 2009, available at the Commission Web site at www.un.org/Depts/los/clcs_new/clcs_home.htm.

23. Submission of Vietnam to the Commission on the Limits of the Continental Shelf, (Partial Submission), Executive Summary, 7 May 2009, available at the Commission Web site, *supra* note 22.

24. People's Republic of China, Letter to the Secretary-General, New York, 7 May 2009, CML/17/2009, para. 2, where it said:

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

See also People's Republic of China, Letter, CML/18/2009, 7 May 2009, para. 2, for the identically worded objection to Vietnam's individual submission. These documents are available at the Web site of the Commission on the Limits of the Continental Shelf, *supra* note 22.

25. Republic of China (Taiwan) Ministry of Foreign Affairs, Declaration of the Republic of China on the Outer Limits of Its Continental Shelf, No. 003, 12 May 2009:

The Government of the Republic of China reiterates that the Diaoyutai Islands, Nansha Islands (Spratly Islands), Shisha Islands (Paracel Islands), Chungsha Islands (Macclesfield Islands), and Tungsha Islands (Pratas Islands) as well as their surrounding waters are the inherent territories and waters of the Republic of China based on the indisputable sovereignty titles justified by historic, geographic and international legal grounds. Under international law, the Republic of China enjoys all the rights and interests over the foregoing islands, as well as the surrounding waters and sea-bed and subsoil thereof.

Available at the ROC Ministry of Foreign Affairs Web site at www.mofa.gov.tw/webapp/content.asp?cultem=38077&ctNode=1036&mp=6. On 17 April 2011, the ROC reiterated its position on the South China Sea. "News and Events," No. 125, 18 April 2011, also available at the ROC Ministry of Foreign Affairs Web site, where it is stated:

The Ministry of Foreign Affairs (MOFA) of the Republic of China (Taiwan) has noted the disputes arising over the South China Sea islands and their surrounding waters among the countries concerned. The government's position, expressed by the MOFA spokesman to the press on April 17, is that the Republic of China (Taiwan) enjoys all rights over the Nansha Islands (Spratly Islands), as well as their surrounding waters, seabed and subsoil, which are an inherent part of the territory of the Republic of China (Taiwan).

26. Philippines, Letter, No. 11-0094, 000228, 5 April 2011, available at the Commission Web site, *supra* note 22.

27. Hersch Lauterpacht, "Sovereignty over Submarine Areas," *British Year Book of International Law* 27 (1950): 397–398. Immediately before the last sentence quoted above, he says:

Thus, for instance, if a state were to proclaim an exclusive right of navigation, jurisdiction or exploitation on what is regarded by the generality of states as part of the high seas, the absence of protest would hardly make any difference to the legal position—in the same way as the manifest illegality of any other action would preclude it from becoming a valid basis for precedent. *Ab injuria jus non oritur*.

28. *Fisheries Case*, [1951] *I.C.J. Reports*, at 132. The original French text reads:

La délimitation des espaces maritimes a toujours un aspect international; elle ne saurait dépendre de la seule volonté de l'État riverain telle qu'elle s'exprime dans son droit interne. S'il est vrai que l'acte de délimitation est nécessairement un acte unilatéral, parce que l'État riverain a seul qualité pour y procéder, en revanche la validité de la délimitation à l'égard des États tiers relève du droit international.

29. "Juridical Regime of Historic Waters," UN Doc. A/CN.4/143, in *Yearbook of the International Law Commission*, vol. II (1962), 1–26. This is a critical study of the subject, rather than a memorandum of facts.

30. *Ibid.*, at 13, para. 80. This is a careful, not an easy, enumeration of those factors, for the author of the memorandum stated at 13, para. 80: "[t]here seems to be fairly general agreement that at least three factors have to be taken into consideration in determining whether a State has acquired a historic title to a maritime area."

31. In the *Island of Palmas*, 1928, 2 *U.N. Reports of International Arbitral Awards*, 869, 870, the arbitrator found neither of the claimed titles of the parties to the Island of Palmas to be sufficiently established. He therefore compared the two "inchoate" titles and adopted the comparatively stronger one as prevailing over the other. The arbitrator stated:

In this case, no Party would have established its claims to sovereignty over the Island and the decision of the Arbitrator would have to be founded on the relative strength of the titles invoked by each Party.

Such inchoate title, based on display of State authority, would, in the opinion of the Arbitrator, prevail over an inchoate title derived from discovery, especially if this latter title has been left for a very long time without completion by occupation; . . .

32. "Juridical Regime of Historic Waters," *supra* note 29, at 15, para. 100, stated:

The first requirement to be fulfilled in order to establish a basis for a title to 'historic waters' can therefore be described as the *effective exercise of sovereignty* over the area by appropriate action on the part of the claiming State. (emphasis added)

It states this after a review of the opinions of some noted law of the sea experts, including Gilbert Gidel, Maurice Bourquin, and Antonio Sánchez de Bustamante. *Ibid.*, at 14–15, paras. 89–91, 98.

This requirement of effective exercise of authority was to be repeated, and consequently confirmed, in some subsequent international cases. See Masahiro Miyoshi, *Considerations of Equity in the Settlement of Territorial and Boundary Disputes* (Dordrecht: Martinus Nijhoff, 1993), 103–104.

33. Li and Li, *supra* note 1, at 290 stated: "Upon the declaration of the nine-dotted line, the international community at no time expressed dissent. None of the adjacent states presented a diplomatic protest. This silence in the face of a public declaration may be said to amount to acquiescence, and it can be asserted that the dotted line has been recognized for half a century."

34. British-Guiana/Venezuela Arbitration Treaty, 2 February 1897, 89 *British and Foreign State Papers* 89(1897): 60.

35. "Juridical Regime of Historic Waters," *supra* note 29, at 22, para. 155, stated:

There seems to be no doubt that the State claiming the area has to show that it has exercised the required sovereignty. To do that it would have to prove certain facts such as for instance that in certain instances it enforced its laws and regulations in or with respect to the area. These facts the State must prove to the satisfaction of the arbitrator (or Court or whoever has to decide whether the title exists or not). The opposing State (or States) might perhaps allege other facts intended to show that the required exercise of sovereignty did not take place, and the latter State must then show these facts to the satisfaction of the arbitrator. Each of the opponents therefore bears the burden of proof with respect to the facts on which they rely.

36. See *ibid.*, at 19, para. 128.

37. Guokai Zhao, "Analysis of the Sovereignty Dispute over the Spratlys Under the Present Law of the Sea" (in Chinese), *Asian Review* 9 (1999): 22, as cited in Li and Li, *supra* note 1, at 292–293.

38. Mei Zhi, "An Unreasonable Claim of the 'Historic Sovereignty,'" *Journal of China's South-east Asian Studies* 4 (1995), as quoted in Li and Li, *supra* note 1, at 292:4.

39. See, generally, "Juridical Regime of Historic Waters," *supra* note 29, at 23, paras. 166, 167.

40. Keyuan Zou, "Historic Rights in International Law and in China's Practice," *Ocean Development and International Law* 32 (2001): 161.

41. See *Renmin Ribao* (People's Daily), 4 December 1970, 5.

42. K. O. Emery, et al., "Geological Structure and Some Water Characteristics of the East China Sea and the Yellow Sea," *CCOP Technical Bulletin* 2 (1969): 41.

43. See, for example, "Sovereignty over the Diaoyu Islands" (in Chinese), *Renmin Ribao*, 18 October 1996, 8.

44. The Declaration of 4 September 1958, para. 1, *Peking Review*, 9 September 1958, 21. The original Chinese text of the Declaration is in *Renmin Ribao*, 5 September 1958, 1.

45. Law on the Territorial Sea and the Contiguous Zone of 25 February 1992, available at the DOALOS Web site, *supra* note 8.

46. It is interesting to note an attempted justification for the lack of reference to the Senkaku islets in the 1958 Declaration, *supra* note 44, by stating that it was necessary to specifically include Taiwan and its surrounding islands only under the prevailing circumstances. See Liyu Wang and Peter H. Pearse, "The New Legal Regime for China's Territorial Sea," *Ocean Development and International Law* 25 (1994): 435, where the authors maintained:

In the 1958 Declaration, which was driven by the crisis in the Taiwan Straits, it was deemed necessary to describe the territory claimed by China to specifically include Taiwan and its surrounding islands—the Penghu Islands and the four groups of islands in the South China Sea.

Later, in the 1960s and 1970s, when significant oil and gas resources were discovered around Diaoyu Islands and in the South China Sea, neighboring states made territorial claims in these areas. So, while the 1958 Declaration did not specifically mention the Diaoyu Islands (although they were included in the phrase "Taiwan and its surrounding islands") the drafters of the 1992 Law [on the Territorial Sea and the Contiguous Zone] considered it necessary to specify that these islands were Chinese territory.

As, however, it was pointed out in the text above, it is strange in the discussion of territorial claims to leave out the name of those controversial islets from the territory of the state when all the other island names were clearly mentioned. Besides, the 1953 newspaper article referred to below in the text (infra note 47) implied the state's official position at that time was that those islets belonged to Japan. The 1958 Declaration on the extension of the breadth of the territorial sea to 12 nautical miles should therefore have logically included the Senkaku islets as the basepoints from which the territorial sea was measured. Without those islets as the basepoints, the PRC's territorial sea would naturally have a smaller area than if it included them as the basepoints, which it would be simply inconceivable for the PRC to accept if it knew the islets were its own territory.

47. The author's translation from the original Chinese text that appears in *Renmin Ribao*, 8 January 1953, 4.

48. An authoritative analysis of the Senkaku islets sovereignty issue may be found in Shigeyoshi Ozaki, "Territorial Issues on the East China Sea: A Japanese Position," *Journal of East Asia and International Law* 3 (2010): 151–174. This is an abridged version in English of the author's more extensive study (in Japanese) of the problem of the legal status of the Senkaku islets based on his research over more than 25 years. The title of the paper was changed by the editor of the journal to make it comparable with the companion contributions by two Chinese authors.

49. See People's Republic of China, Letter, 6 February 2009, CML/17/2009, made to Japan's Submission to the Commission on the Limits of the Continental Shelf, Executive Summary, 12 November 2008, available at the Web site of the Commission, supra note 22.

50. Zhiguo Gao, "Consideration and Proposal on Socotra Rock and 'Oki-no-Tori' Rocks," in *A Study of the Trend and Development of the International Law of the Sea* (in Chinese), eds. Gao Zhiguo, Zhang Haiwen and Jia Yu (Beijing: Haiyang Publishing Co., 2007), 6–8.

51. UN Convention on the Law of the Sea, 1833 *U.N.T.S.* 397, Article 121(3) provides: "Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf."

52. Treaty of Amity and Cooperation in Southeast Asia, 24 February 1976, 1025 *U.N.T.S.* 316, art.13.

53. "ASEAN-China Cooperation Towards the 21st Century," the 1997 Joint Statement of the Meeting of Heads of State/Government of the Member States of ASEAN and the President of the People's Republic of China of 16 December 1997, para. 8.

54. Declaration on the Conduct of Parties in the South China Sea, 4 November 2002, preambular paras. 2 and 3, operative paras. 4 and 5, available at www.aseansec.org/13163.htm.

55. See, for example, Xinhua news from Beijing, 23 December 2010: "China, ASEAN Agree to Follow South China Sea Declaration," available at news.xinhuanet.com/english/2010/china/2010-12/23/c_13662098... (accessed 4 May 2011).

56. There seems to be good reason to suspect that the avoidance of a third party settlement of disputes in favor of direct negotiations with their opponents has been the traditional policy of Communist regimes, the former Soviet Union among them.

57. Observation made by Hasjim Djalal, then ambassador-at-large of Indonesia, at a speech on the first day of the SEAPOL Tri-Regional Conference on Current Issues in Ocean Law, Policy and Management: Southeast Asia, North Pacific, and Southwest Pacific, Bangkok, 13 December 1994. Hasjim Djalal, "The Spratly Islands Dispute: Prospects for Settlement," unpublished text of the speech (mimeo), 5.

58. For a discussion of the state's propensity for control over the settlement of disputes in international law in general, see Masahiro Miyoshi, "The State's Propensity for Control over Proceedings in the Settlement of Disputes," in *Summary and Selected Papers of the SEAPOL Tri-Regional Conference*, eds. Kathleen I. Matics and Ted L. McDorman (Bangkok: South-East Asian Programme in Ocean Law, Policy and Management, 1995), 106–112.

59. Treaty of Amity, supra note 52. This phrase has been repeated, with an occasional addition of "consultations," in the subsequent agreements or joint statements with the PRC. See the 1997 Joint Statement of the Meeting of Heads of State/Government of the Member States of ASEAN and the

President of the People's Republic of China of 16 December 1997, para. 8; and the Declaration on the Conduct of Parties in the South China Sea, *supra* note 54, operative para. 4.

60. This was the first time that China agreed to a formal multilateral agreement on the South China Sea. See Aileen S. P. Baviera, "The South China Sea Dispute After the 2002 Declaration: Beyond Confidence-Building," in *ASEAN-China Relations: Realities and Prospects*, eds. Saw Swee-Hock, Sheng Lijun, and Chin Kin Wah (Singapore: Institute of Southeast Asian Studies, 2005), 347. At 348–350, Baviera mentions three specific commitments of potential significance: an undertaking to refrain from action of inhabiting on the presently uninhabited islands, reefs, shoals, cays, and other features; a pledge to continue regular consultations on the observance of the declaration; and agreement to work for the eventual adoption of a genuine and binding code of conduct on the basis of consensus.

61. *Ibid.*, at 353.

62. *Japan Times*, 3 May 2011, 4.

63. *Ibid.*

64. *Ibid.*

65. While it ostensibly keeps a soft-toned attitude toward the South China Sea dispute, as a high-placed government official wrote in his contribution to the collection of essays on ASEAN-China relations, China seems never to give way to a multilateral endeavor for a possible solution. See Zhiguo Gao, "South China Sea: Turning Suspicion into Mutual Understanding and Cooperation," in *ASEAN-China Relations: Realities and Prospects*, eds. Saw et al., *supra* note 60, at 329–342.