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Geopolitics of Scarborough Shoal

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Geopolitics of Scarborough Shoal

François-Xavier Bonnet¹

Abstract

Scarborough is the largest atoll in the South China Sea, located some 220 kilometers from the Philippines. The shoal is located inside the Exclusive Economic Zone of the Philippines but is claimed by China as its ancestral territory since the 13th century.

The paper considers the strategic importance of the shoal for the two countries. Then, using unpublished records and documents from China, the Philippines, and the United States, the author will show that the two countries claimed Scarborough Shoal in the 1930s, each without the knowledge of the other, and performed few actions that asserted their sovereignty up to the 1990s. Finally, the study raises up the lack of solidarity of the ASEAN countries, and the possibility of the United States and the Philippines invoking the Mutual Defense Treaty of 1951 in case of an escalation of violence in the area.

Introduction

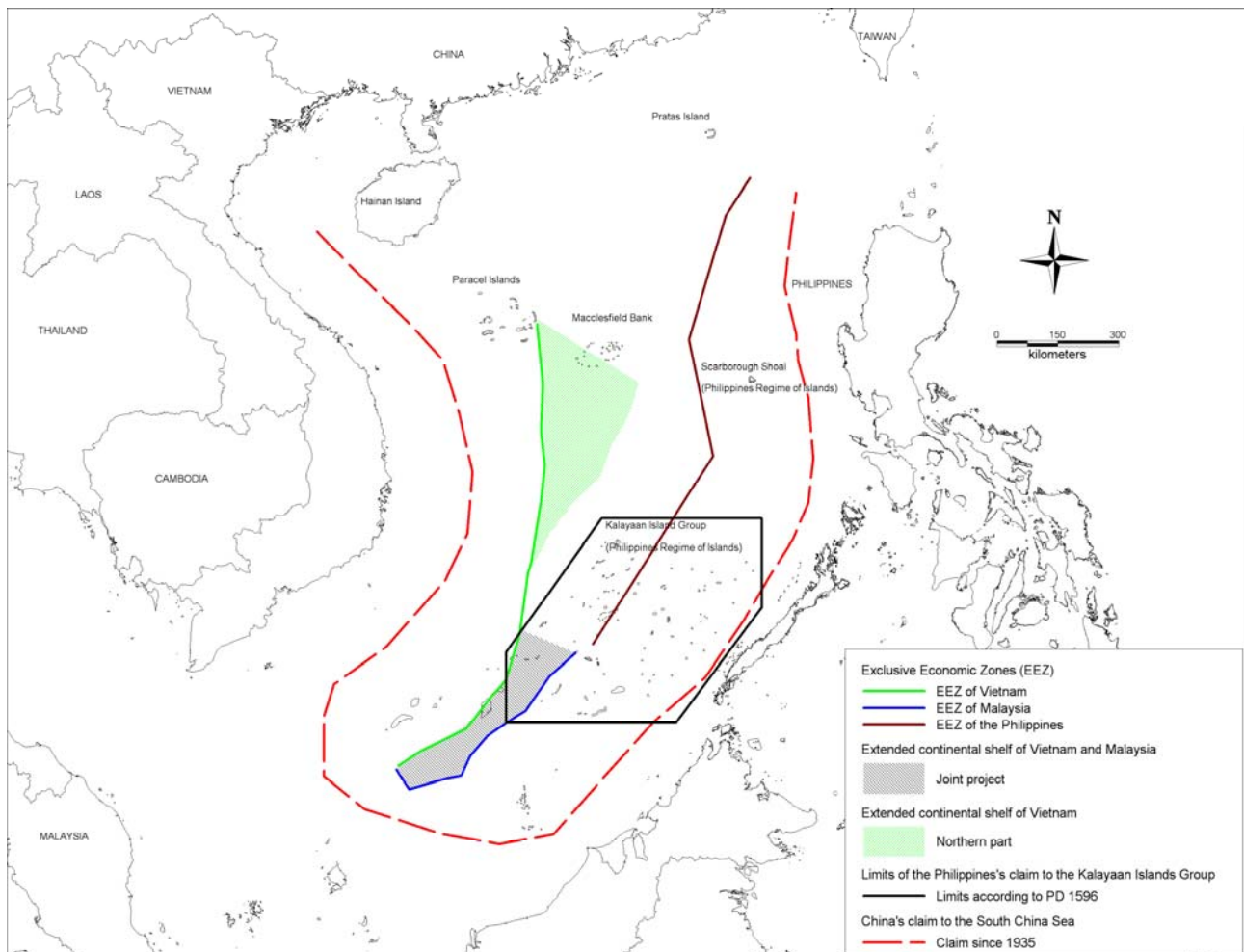
Scarborough Shoal (Bajo de Masingloc and Panatag for the Philippines or Huangyan Island for China), located some 220 kilometers from the province of Zambales (Luzon Island, Philippines), is, since 1997, a bone of contention between the Philippines and China. Scarborough is the largest atoll in the South China Sea,² submerged at high tide with few rocks above sea level, but was largely unheard-of before the implementation of the United Nations Convention on the Law of the Sea (UNCLOS) in 1994. The shoal is located inside the Exclusive Economic Zone (EEZ) of the Philippines but is claimed by China as its ancestral territory since the Yuan dynasty (1271-

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² Zou Keyuan, "Scarborough Reef: A New Flashpoint in Sino-Philippines Relations?", *IBRU Boundary and Security Bulletin*, Summer 1999: p. 71.

1368).³ For the Chinese authorities, Huangyan Island is part of a larger archipelago called Zhongsha Qundao comprising mostly underwater features (like Macclesfield Bank) located in the northern part of the South China Sea. The stakes are high. The few rocks of Scarborough Shoal are the only features of Zhongsha Qundao above sea level. If China loses these rocks, it would not only lose the natural resources around the shoal (fishing grounds and the potential deposits of polymetallic nodules⁴) but also the possibility of claiming Zhongsha Qundao and, by consequence, the whole of the South China Sea. This conflict, recurrent year after year during the fishing season, worsened from April to July 2012. To settle the issue once and for all, the Philippine government invokes the possibility of bringing the matter to the International Tribunal for the Law of the Sea (ITLOS).

In a first part of this paper, we consider the strategic importance of the shoal for the two countries, in the context of UNCLOS. Then, using unpublished records and documents from China, the Philippines, and the United States, we will show that the two countries claimed Scarborough Shoal in the 1930s, each without the knowledge of the other, and performed few actions that asserted their sovereignty up to the 1990s. Finally, we analyze, the lack of solidarity of the ASEAN countries and its impact on conflict resolution, and the possibility of the United States and the Philippines invoking the Mutual Defense Treaty of 1951 in case of an escalation of violence in Scarborough Shoal.



Map 1. The competing claims in the South China Sea

³ <http://ph.china-embassy.org/eng/sgdt/t922594.htm>

⁴ Interview by author, Manila, 2011. There are no exploration activities for oil and gas yet in this area.

1. What is at stake? Scarborough Shoal and UNCLOS

1.1. The 2012 standoff between China and the Philippines

On April 10, 2012, the Filipino warship *Gregorio Del Pilar* attempted to arrest eight Chinese boats that were poaching in Scarborough Shoal. The timely arrival of two Chinese marine surveillance vessels blocked the Filipino maneuvers and was followed by the tensest standoff since 1997. In the spirit of de-escalation of the dispute, the BRP *Gregorio Del Pilar* was replaced by two civilian ships (from the Coast Guard and the Bureau of Fisheries). At the height of the standoff, in May, no less than 80 Chinese fishing boats were present in and around the shoal. The arrival of a typhoon in July forced the Filipinos to depart, leaving the shoal, *de facto*, under the control of the Chinese. In August, the Chinese fishermen left Scarborough Shoal, but not before cordoning off the entrance of the shoal. As of October 2012, two Chinese civilian ships are still patrolling the area.⁵

During this standoff, the Chinese government used a large range of activities to intimidate and make the Filipino government bend to its will. One of them was the use of the national media, notably through Internet, to spread (or at least not stop) rumors of preparation for war against the Philippines. The Chinese government retaliated also on the economic side. The punitive measures ranged from a stricter control on bananas exported by the Philippines to stopping Chinese tourists from traveling to the Philippines. Moreover, Beijing used its diplomatic influence and power on Cambodia (which is presiding over ASEAN in 2012) to block the production of an official communiqué (which would have mentioned the dispute over Scarborough Shoal) at the end of the ASEAN Foreign Ministers Meeting in Phnom Penh on July 16, 2012. It was the first time in 45 years that ASEAN was unable to produce an official communiqué (see section 4).

Since the Chinese are, for now, alone on Scarborough Shoal and have focused their attention, during the month of September, on another dispute, this time with Japan (over the Senkaku/Diaoyutai Islands), calm has returned on the Scarborough front. But for how long? If, during the latest visit of Interior Secretary Manuel Roxas to China (at the end of September), the two parties recognized the importance of their bilateral ties (trade, investment, tourism, etc.), they also reiterated, without surprise, their respective claims to Scarborough Shoal.⁶ The interest for this previously mostly-ignored shoal is linked to the new possibilities offered by UNCLOS.

1.2. Scarborough Shoal an island? The Chinese perception

For China, Scarborough Shoal is of utmost importance for its claim over the Zhongsha Qundao (Zhongsha Islands or archipelago) and consequently to the features located inside the controversial "U-shape line". In effect, the Zhongsha Qundao is composed of Macclesfield Bank, Truro Shoal, Saint Esprit Shoal, Dreyer Shoal, and Scarborough Shoal. All these banks and shoals, except for Scarborough Shoal, are under several meters of water even during low tide.⁷ Chinese policy-makers know too well that without Huangyan Island, the chance of having their ownership over Zhongsha Qundao recognized is nil. If China loses Huangyan/Scarborough, it will lose Zhongsha Qundao, which could be divided by the EEZs of the neighboring countries or placed under the regime of the high seas. By consequence, China's entire claim to the South China Sea supported by the "U-shape line" would be moot and academic.

⁵ Forum on "West Philippine Sea beyond disputes, diplomacy and damage control: The need for strategic management", October 5, 2012, *Asian Center*, University of the Philippines.

⁶ <http://globalnation.inquirer.net/51276/roxas-says-no-change-in-ph-china-standoff>

⁷ For example, Saint Esprit Shoal is at least 10 meters below sea level; Macclesfield Bank is 20 meters below sea level with areas nine meters below sea level. See Admiralty Sailing Directions, *China Sea Pilot*, Vol. 1, Revised edition 1987, p. 79-80.



Picture 1. Satellite imagery of Scarborough Shoal, taken by Landsat 7 on February 23, 2000 (source: www.oceandots.com)

To support their claim to Zhongsha Qundao, the Chinese describe Scarborough Shoal as an island (Huangyan Island). Article 121 of UNCLOS defines an island as a “naturally formed area of land, surrounded by water which is above water at high tide”.⁸ In theory, island status would allow the drawing of, from Scarborough Shoal’s baselines, not only a territorial sea (12 nm) and a contiguous zone (24 nm), but also an EEZ (200 nm) and a continental shelf. In this case, Scarborough Shoal would give to China a huge and disproportionate maritime territory. It is, nevertheless, doubtful that UNCLOS could recognize Scarborough Shoal as an island. Pictures 2 and 3 show clearly that the shoal has few rocks above sea level at high tide. Rocks are defined in UNCLOS Article 121 (3) as elements that cannot sustain human habitation or economic life of their own. Scarborough Shoal satisfies these two criteria as both Filipino and Chinese fishermen live on their boats during the fishing season; none could live on these rocks, and all the logistics come from the two mainlands. The irony is that the representatives of China have affirmed in various international forums that:

“If a 200-mile limit of jurisdiction could be founded on the possession of uninhabited, remote or very small islands, the effectiveness of international administration of ocean space beyond national jurisdiction would be gravely impaired”.⁹

As the Permanent Mission of the Republic of Indonesia in the United Nations said, those statements above should also be “relevant to the situation in the South China Sea”.¹⁰ In this case, the rocks of the shoal could give to China, at most, only a territorial sea and a contiguous zone but not an EEZ or a continental shelf. This highly controversial perception of the shoal as an island is the main reason the Chinese refuse systematically to have the case adjudicated by an international body and prefer bilateral negotiations with the Philippines.

⁸ UNCLOS, Part 8, *Regime of Islands*, Article 121, *Regime of Islands*.

⁹ Statement of the Head of Delegation of the People’s Republic of China, H.E. Ambassador Chen Jinghua, at the 15th session of the International Seabed Authority in Kingston, Jamaica in June 2009, quoted in Indonesia’s communication to the Secretary of the United Nations, July 8, 2010, p. 2 at http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/idn_2010re_mys_vnm_e.pdf

¹⁰Indonesia’s communication, *op. cit.*, July 8, 2010, p. 2.

1.3. Remembering Mischief: the Philippines and Scarborough Shoal

For the Philippines, the stakes are also high. The rich fishing grounds of Scarborough Shoal attract most of the fishermen from the provinces of Zambales, Pangasinan, and Bataan. In 12 hours of travel by motorized outrigger, fishermen can reach the shoal and harvest tons of fish (jack, mackerel, etc.) and lobster. Since the coastal areas of these provinces are depleted, these hundreds of fishermen depend almost solely on the shoal for their livelihood. Moreover, some deposits of polymetallic nodules have been found around the shoal, at a depth of more than 3,000 meters (to date, no gas and oil exploration has been done around the shoal).¹¹ Beyond these local economic advantages, real and potential, virtually the whole EEZ of the western side of Luzon could be threatened by the Chinese claim. If we add the strong feelings of patriotism of the Filipinos¹² and the consciousness of the Filipino officials that they have a key in their hands to block or limit China's huge claim over the whole South China Sea,¹³ the rocks of Scarborough Shoal become disproportionately strategic at the national and regional levels. Finally, the trauma of Mischief Reef (the Spratlys) is still fresh in the minds of the militaries. In 1995, Chinese troops occupied this reef, claimed by the Philippines as part of its EEZ, and built in the succeeding years a strong naval base equipped with a sophisticated system of communications.¹⁴ The risk could be that Scarborough Shoal would be transformed into another communication and intelligence hub, this time closer to Luzon and potentially able to undertake surveillance activities in the northern part of the main Singapore-Hong Kong and Manila-Hong Kong sea lanes.¹⁵ Such an intelligence project could be easily disguised as a project to provide shelters for Chinese fishermen, like in the case of Mischief Reef.

After long debates over two decades, accelerated in 2009 by the submission of the limits of the extended continental shelf to UNCLOS, the Filipino policy-makers seem to have decided that the shoal is a *low-tide elevation* with some rocks (not islands) above sea level at high tide. According to Article 13 of UNCLOS, a low-tide elevation is a "naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide".¹⁶ The main argument of the Philippines is that Scarborough Shoal is located inside its EEZ. Therefore, if the shoal is recognized as a low-tide elevation and being outside the territorial sea of the two mainlands, it would not have a territorial sea of its own (Article 13 (2)).¹⁷ In this hypothesis, only a few rocks could possibly have a territorial sea (12 nm or 24 nm if a contiguous zone is added) and the waters beyond that territorial sea would definitely be under the jurisdiction of the Philippines.

By separating water and land, the Philippines set aside the issue of land titles on the rocks/islands to focus on its maritime rights, paving the way for a potential arbitration by the International Tribunal of the Law of the Sea (ITLOS).¹⁸ The ITLOS is not competent for the questions of land territories but can give an opinion on whether the Scarborough Shoal is a low-tide elevation with rocks or an island. If the ITLOS deems that the feature is made of few rocks above sea level, Scarborough Shoal would be totally surrounded by the EEZ of the Philippines,

¹¹Oil companies consider that there is no possibility of finding oil and gas in the area of the shoal. See Jay L. Batongcal, Conference in Ateneo de Manila, August 23, 2012.

¹² See, for example, ABS-CBN News, *Palace says nat'l pride at stake in Scarborough dispute*, 04/20/2012.

¹³ Interview by author. Manila, 2011.

¹⁴ Some of our sources think that a part of this system of communications is to guide and detect submarines.

¹⁵ Jay L. Batongcal, Conference in Ateneo de Manila, August 23, 2012.

¹⁶ UNCLOS, Part 2, *Territorial sea and contiguous zone*, Section 2, *Limits of the territorial sea*, Article 13, *Low-tide elevations*.

¹⁷ UNCLOS, *id.* The second paragraph of Article 13 stipulates that, "Where a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it has no territorial sea of its own".

¹⁸ The jurisdiction of the ITLOS comprises all disputes concerning the interpretation or application of UNCLOS. Nevertheless, Article 298 of UNCLOS allows a state to exclude, from the compulsory binding procedures, some specific kinds of disputes. These categories are sea boundary delimitations or those involving historic bays or titles (Art.298 (a)), disputes concerning military activities (Art. 298 (b)), and disputes involving the United Nations Security Council (Art. 298 (c)). Since 2006, China has excluded these three types of disputes from the compulsory binding procedures of the Tribunal. However, the Philippines can request an arbitration concerning its sovereign rights in its EEZ in the area of the Scarborough Shoal, questioning the activities of China and seeking a legal opinion on the nature of the shoal. The results of the arbitration would be binding on China.

which would neutralize all its strategic appeal; China would not be in a position to claim Zhongsha Qundao, which would be seen as a group of five rocks above the sea level at high tide, constantly submerged banks, and some reefs above sea level at low tide. It is therefore understandable that the Chinese authorities exert all their efforts to intimidate and test the resolve of the Philippine government to go to the ITLOS.



Picture 2. International team of radio amateurs sponsored by China on one of the biggest rocks of Scarborough Shoal (1995)
(source: southseaconversations.wordpress.com)

2. Who owns the shoal? A geohistorical perspective

2.1. A forgotten claim? The Philippines and Scarborough Shoal

2.1.1. Of wrecks, surveys, and rescue operations: Scarborough Shoal in the 19th century

The reefs, sand banks, shoals, and islets of the South China Sea have long been known to mariners as dangers to be avoided at all costs. The Paracel Islands (between Hainan Island and the coast of Vietnam), Macclesfield Bank (east of the Paracels), Scarborough Shoal (between Macclesfield Bank and the west coast of Luzon) and the Spratly Islands (between Palawan, Borneo, and South Vietnam), were surveyed and mapped by the colonial powers of the 19th century. These mapping activities had no other purpose but to “clean” the sea lanes crossing the South China Sea of all obstacles to navigation and trade (tea and opium).

On September 12, 1748, a British boat named *Scarborough*, carrying tea, was wrecked on a feature called Maroona by Spanish cartographers. Maroona Shoal became known internationally as Scarborough Shoal. Maroona Shoal was first surveyed in April 1800 by a Spanish frigate, *Santa Lucia*, sent by Admiral Malaspina in Manila.¹⁹ This expedition showed that the center of the atoll was

¹⁹ James Horsburgh, *Memoirs: Comprising the Navigation to and from China, by the China Sea, and through the various Straits and Channels in the Indian Archipelago*, London, 1805, p. 28. The Spanish Hydrographic Office was created in 1800. See David Hancox and Victor Prescott, *Secret Hydrographic Surveys in the Spratly Islands*, Maritime Institute of Malaysia, 1997, p. 24.

at longitude 117° 48' 5'' E.²⁰ These results were published in a chart in 1808, but Maroona Shoal was renamed Bajo de Masingloc, a term used up to the present by the Philippine government.²¹

A more precise survey of this feature was organized in May of 1866 by the British vessel H.M.S. *Swallow* under the command of E. Wilde. Scarborough, or Maroona Shoal as it was still named in the China Sea Directory of 1889, was described as an atoll of 40 kilometers in circumference with the shape of a triangle. The reef consisted of a narrow belt of corals and of several rocks with an elevation from 90 cm to three meters above sea level. The team of E. Wilde concluded that there was only a single entrance – on the southeastern side – to the lagoon where a boat could anchor. This anchorage was nevertheless precarious (the depth at the entrance was less than three meters, and the passage narrow) and should be used only in the calmest weather.²² With the exception of these two surveys, Scarborough Shoal did not attract the attention of the colonial powers. During this period up to the 20th century, it was unthinkable to claim a sandbank, a reef, rocks, or an atoll in the high seas. Thus, a territorial claim on Bajo de Masingloc by the Spanish authorities, if ever they had it in mind, could not have succeeded in the international arena of the time.

However, with the island of Luzon being the closest to Bajo de Masingloc (124 nm or 220 km), responsibility for rescuing vessels stranded at the shoal naturally fell to the Spanish navy. Thus, according to the Spanish Hydrographic Office, boats from the Philippines were sent to help crews in difficulty on this shoal.²³ This responsibility seems to have been transferred to the American colonial government in the archipelago. For example, when, on May 8, 1913, the Swedish steamship *Nippon* went aground on Scarborough Shoal, the Bureau of Navigation in Manila sent the Coast Guard cutter *Mindoro* to help the stranded crew.²⁴ Moreover, a conflict arose between the salvaging company and the insurance companies for the sharing of the proceeds of the salvaged cargo (copra). The Manila Court of First Instance and then the Supreme Court of the Philippines were seized by the litigants. The final judgment of the Supreme Court was recognized by the claimants.²⁵

If, from this very sparse information, we can not conclude that Scarborough Shoal belonged to the Philippines since at least the 19th century,²⁶ few remarks should be made.



Map 2. Details from Jose P. Algue, *Mapa general, Islas Filipinas*, Observatorio de Manila, United States Coast and Geodetic Survey, No 2, A. Hoen and Co, Baltimore, 1899; Bajo de Masingloc is west of Luzon.

²⁰ James Horsburgh, *op. cit.*, p. 244.

²¹ Aaron Arrowsmith, *Chart of the Philippine Islands, from the Spanish Chart 1808*. Bajo is an old Spanish hydrographic term that means shallows. Bajo de Masingloc can be translated as Shallows of Masingloc.

²² Hydrographic Office, The Admiralty, *The China Sea Directory*, Vol. 2, London, 1889, p. 352-353.

²³ Anuario de la Direccion de Hidrografia, ano 4, numero 56, Madrid, 1866, p. 18-19.

²⁴ Conference of Dr. Jay L. Batongbacal, Ateneo de Manila, August 23, 2012.

²⁵ See http://www.chanrobles.com/scdecisions/jurisprudence1916/mar1916/gr_1-10051_1916.php

²⁶ Spanish maps of the 18th century show some shoals off the coast of Zambales Province (Luzon) at the latitude of Scarborough Shoal but with widely different longitudes. Moreover, there is no evidence of any kind of “management” of this shoal, like conduct of rescue operations, before the 19th century.

First, the 19th century nautical books of the British Admiralty and the Spanish Hydrographic Office did not note the presence, on this shoal, of fishermen from China or elsewhere (unlike on the Spratly and Paracel Islands). Second, the geographical proximity spoke in favor of the Philippines (rescue operations). In a way, Bajo de Masingloc could be seen as integrated in the sphere of influence of the Philippines, but outside the main archipelago. Political and symbolic acts, like naming the shoal, surveying, mapmaking, and organizing rescue operations, were the only appropriate activities that the Spanish and American authorities could do on an isolated shoal, which was, for the most part, underwater during high tide.

2.1.2. Scarborough Shoal and the Commonwealth of the Philippines (1935-1941): a forgotten claim?

The main argument of the Chinese government and legal scholars is to consider the Philippine claim on Scarborough Shoal as extremely recent. According to their writings, the Philippine government claimed this shoal for the first time in 1997.²⁷ Subscribers to this view contend that the atoll is outside the Treaty of Paris signed between Spain and the United States in December 1898, the Treaty of Washington between the United States and Spain of November 7, 1900, and the Convention between Great Britain and the United States concluded on January 2, 1930, so the Philippines cannot reasonably claim it. On the Filipino side, legal scholars have avoided this subject, jumping from the Spanish time to some activities in the 1960s and then to UNCLOS. By doing this, these Filipino researchers have missed, in my opinion, a point: a claim on Scarborough Shoal by the Philippine Commonwealth government in 1937-1938.²⁸

As Hancox and Prescott have shown in their research, the reefs, sandbanks, islets, and islands of the South China Sea were the object of secret surveys and mapping in the 1920s to 1930s.²⁹ In the context of the southern expansion of the Japanese empire, the navies of the colonial powers, particularly Great Britain and later the United States and Japan, were exploring each reef and atoll to assess their potential as refueling stations, observation stations, naval and submarine bases, and navigation aids, and to find possible secret sea lanes crossing these dangerous areas. Conflicting claims for the Paracel Islands started in the 1920s between China and Japan, joined by France in the 1930s. In July 1933, the French government started the first claim on the Spratly Islands, opening the contest for the South China Sea islands.

In this context, the government of the Commonwealth was preparing the Philippines for its independence, particularly its defense. Thus, none of these conflicting claims in the South China Sea escaped the vigilance of high-level Filipino politicians and scholars. Elsewhere, we have shown that some of them pushed for a claim on the Spratly Islands but the American State Department considered the nine islets claimed by France not only outside the Treaty limits but too far from Palawan.³⁰

It is, thus, not surprising that the Commonwealth of the Philippines claimed Scarborough Shoal. The process started on December 6, 1937, when the director of the U.S. Coast and Geodetic Survey (USC&GS) in Manila, Captain Thomas Maher, received a request of information about

²⁷ See Zou Keyuan, *op. cit.*, 1999, p. 71-81.

²⁸ This silence is surprising as the documents we found, in the U.S. National Archives and Records Administration (NARA), in Maryland, have been declassified since 1994.

²⁹ David Hancox and Victor Prescott, *op. cit.*, 1997.

³⁰ François-Xavier Bonnet, "The Spratlys: A Past Revisited", *World Bulletin*, Volume 23, July-Dec. 2004, University of the Philippines Law Center, p. 18-19. The State Department considered that the islands claimed by France were separated from Palawan by a large maritime area called "Dangerous Ground" on the nautical charts. This "Dangerous Ground" could not be claimed by a colonial power as it was made of reefs and other underwater features. From that time, the U.S. government has always considered the need to separate the "Dangerous Ground" from the Spratly Islands proper. In their perception, they consider the Spratly Islands as a group of islands situated west of the "Dangerous Ground" even if they don't express it publicly.

Scarborough Shoal and its ownership, from the office of the U.S. High Commissioner.³¹ Maher's answer, albeit technical and not political, must be carefully reviewed. In effect, if Maher recognized that Scarborough Shoal is 9 miles (14 km) outside the limits set forth by the 1898 Treaty of Paris, these limits should be seen as flexible and not fixed boundaries.³² This flexibility can be shown by the fact that in 1900, the Philippines recuperated some islands (Sibutu and Cagayan de Sulu) but lost the Island of Palmas in 1928 and gained the Turtle Islands and Mangsee Reef in 1930. In his opinion, if the Spanish records, notably the maps and the survey of 1800, were enough evidence of Spanish ownership (he probably did not know about the rescue operations), the Philippines could lay a claim on Scarborough Shoal, "the transfer of which would be governed by the treaty of November 7, 1900".³³ With prudence, the director told the High Commissioner to ask the opinion of the State Department concerning potential foreign claims and proposed, after a survey of the shoal, building a small lighthouse. Interestingly, Maher mentioned a colleague noting that Philippine traders described Scarborough Shoal as a place with a considerable quantity of pearl shells, with pearls of excellent quality.³⁴

Maher's memorandum and the request of the High Commissioner were forwarded to the colonial administration.³⁵ The president of the Commonwealth himself, Manuel Quezon, through his secretary Jorge B. Vargas, asked the State Department to research all information available regarding the ownership of Scarborough Shoal. The objective of this request was to claim the shoal and develop a system of aid for air-ocean navigation on it.³⁶ After researching in the records of the State Department, Secretary Cordell Hull concluded that his Department had no information in regard to the ownership of the shoal. He went further by considering that:

"Because of the absence of other claims, the shoal should be regarded as included among the islands ceded to the United States by the American-Spanish Treaty of November 7, 1900. ... In the absence of evidence of a superior claim to Scarborough Shoal by any other government, the Department of State would interpose no objection to the proposal of the Commonwealth Government to study the possibilities of the shoal as an aid to air and ocean navigation".³⁷

Later, two other administrations directly interested by the project, the Navy Department and the Department of Commerce (Civil Aeronautics Authority), had "no objection to the course of action contemplated by the Commonwealth Government".³⁸ Despite all these developments, we have not been able to find a document or a draft showing an official claim on Scarborough Shoal. My hypothesis is that to avoid attracting the attention of the Japanese to this shoal, the American and Filipino authorities kept a low profile on this question. The bureaucratic process took nearly the whole year of 1938, and in 1939 the Japanese Navy took the control of Hainan Island, the Paracel Islands, and was pushing toward the Spratly Islands. For security reasons, Scarborough Shoal was unofficially claimed.

³¹ Memorandum of Captain Thomas Maher, USC&GS Manila, to Mr. Wayne Coy, Office of the U.S. High Commissioner, December 10, 1937. Bureau of Insular Affairs (BIA) 907.127 NARA (see Annex 2).

³² *Id.*, p. 2

³³ *Id.*, p. 3

³⁴ *Id.*, p. 3

³⁵ Memorandum from Antonio G. Perez, Chief Administrative Officer from the USC&GS Manila to Jesus Cuenco, Secretary of Public Works and Communications, January 18, 1938, Confidential. BIA 907.127 NARA.

³⁶ Letter of Jorge Vargas, Secretary to the President, to Wayne Coy, Office of the United States High Commissioner, March 31, 1938. BIA 907.127 NARA (see Annex 2).

³⁷ Memorandum of Cordell Hull, Secretary of State, to Harry Woodring, Secretary of War, July 27, 1938, BIA 907.127. NARA (see Annex 2).

³⁸ Letter from Rear Admiral Furlong, Acting Secretary of the Navy to the Secretary of War, August 27, 1938. BIA 907.127 NARA (see Annex 2). Letter of Paul Frizzel, Secretary of Commerce, to the Secretary of War, October 19, 1938. BIA 907.127 NARA.

From this period of the Commonwealth, two remarks can be drawn. First, the claim of the Philippines on Scarborough Shoal is obviously not recent. Second, the Treaty of Washington of 1900 is used by both the USC&GS and the State Department for the transfer of the shoal to the Philippines. Many analysts consider, in a restrictive manner, that this treaty concerned only the islands of Sibutu and Cagayan de Sulu. In fact, the unique article of this treaty is open to all islands that belonged to the Philippines during the Spanish time but would be found, in the future, outside the limits of the Treaty of Paris.³⁹ Among them were the two islands cited above.

The considerations above should be, of course, balanced with the arguments advanced by the Chinese government. Do they have a rich records of ownership and management of Scarborough Shoal, or, as they have called it since 1983, Huangyan Island?

2.2. Of ancient texts and maps: the Chinese claim

2.2.1. The myth of an old claim?

A quick look at the document "Some Basic Facts on China's sovereignty over Huangyan Island", published on the website of the Embassy of the People's Republic of China in Manila,⁴⁰ reveal a very limited amount of information about the so-called old history of China's sovereignty over Scarborough Shoal. In fact, the arguments jump from the Yuan dynasty (1271-1368 A.D.), with a map and some astronomical research by Guo Shoujing, directly to the 1935 work of the Map Verification Committee of China, which declared all the islands of the South China Sea as part of China's territory. Curiously, the Chinese government is using, for the first time, the scientific survey made by the famous astronomer Guo Shoujing in 1279 (with the results made into a very precise calendar) to claim Scarborough Shoal. This argument, in fact, has been used and re-used in all China's White Papers concerning the conflict with Vietnam over the Paracel Islands. Did Guo Shoujing go to the Paracel Islands or to Scarborough Shoal? In fact, many Chinese scholars disagree about Guo Shoujing's trip to the Paracel Islands. The astronomer measured the geographical coordinates of 27 places. The easternmost point was in Korea; the westernmost was in Yu Nan; the southeasternmost was in Zhu Ya (Hainan); and the northeasternmost was in Tie Le (north of Mongolia, in Siberia). The measures had an error of less than a degree.⁴¹ The fact that Zhu Ya was Hainan and not in the Paracel Islands or Scarborough Shoal reduces the so-called historical sovereignty of China to the year 1935, not so far from the 1937-38 claim of the Philippines.

This is consistent with the political maps of the Chinese empire, particularly with the political and administrative maps of Guangdong Province and the island of Hainan up to 1909. On these official maps (see Annex 1, Maps 1 to 4), both before and after the Opium Wars (1839-1842 and 1856-1860),⁴² the island of Hainan was consistently marked as the southern limit of the empire. Neither the Paracel Islands nor Scarborough Shoal, and even less the Spratly Islands, appeared on

³⁹ *Treaty between Spain and the United States for Cession of the Outlying Islands of the Philippines*, Concluded November 7, 1900. The sole article stipulates that, "Spain relinquishes to the United States all title and claim of title, which she may have had at the time of the conclusion of the Treaty of Peace of Paris, **to any and all islands belonging to the Philippine archipelago** [emphasis mine], lying outside the lines described in article 3 of that Treaty and **particularly** [emphasis mine] to the islands of Cagayan de Sulu and Sibutu and their dependencies, and agrees that all such islands shall be comprehended in the cession of the Archipelago as fully as if they had been expressly included within those lines".

⁴⁰ <http://ph.china-embassy.org/eng/sgdt/t922594.htm>

⁴¹ Han Zhen Hua, Lin Jin Zhi, Hu Feng Bin (eds), *Wo guo nan hai shi liao hui bian* [Compilations of Historical Documents on our Nanhai Islands], Dong fang chu ban she, 1988, p. 46.

⁴² Many foreign analysts have written that the claim over the whole South China Sea by China could be explained by the trauma of the Opium Wars and the war against France (1884-85). In short, China would reclaim her lost maritime territories which belonged to her before the European colonization. See, for example, Marwyn Samuels. *Contest for the South China Sea*, Methuen, London and New York, 1982, p. 46-47. This idea would be interesting if there were evidence of ownership before these colonial wars. Unfortunately for China, there is none concerning the Spratly Islands or Scarborough Shoal. This was even recognized by Chinese officials themselves in the 1930s (see below).

these maps as part of the Middle Kingdom. Moreover the old texts show, generally, a lack of knowledge concerning the maritime places now claimed by China as part of its territory. For example, Wang Wen Tai, who in 1843 described the maritime routes from Guangdong Province to Malaysia, used by foreign and Chinese ships, wrote:

“Today, the foreign boats leave Wan Shan [in Guangdong] and go directly to the south. After five days of navigation, they arrive at the Hong Mao Qian [Macclesfield Bank], pass it and navigate again five days towards the southwest. They arrive at Cao Xiu Shi [Sapato Island]. Cao Xiu Shi is the southern limit of the Wan Li Chang Sha [the Paracel Islands]. (The northern part of the Wan Li Chang Sha is off the county of Ling Shui in Hainan and is long of 1000 lis. In the southeast of Wan Li Chang Sha, there is Qi Zhou Da Yang [probably the Spratly Islands]. In the Qi Zhou Da Yang there are big rocks, but we do not know anything about it.) From Cao Xiu Shi, the boats go to the southwest, and after seven days they reach Di Pen Shan.

Concerning the Chinese navigators, they also leave Wan Shan toward the southwest, then pass Wan Lua Shan [Guangdong Island or Pulo Canton, off Vietnam], Xin Zhou [a port in Vietnam], Lu Nai, then to the south and after five days they reach Kun Lun Shan [Pulo Condor], which belongs to Vietnam. They continue five days to the south and reach Di Pen Shan. They take this longer route to avoid Cao Xie Shi”.⁴³

From the description by Wang Wen Tai, the Chinese navigators were not brave mariners who named and took control of the islands and reefs of the South China Sea, as depicted by the present Chinese scholars.⁴⁴ These mariners feared the high seas and simply followed the traditional route along the coast of Hainan and Vietnam (Annam) (or the Inner Passage, see Map 6). The foreigners, especially the British mariners, on the other hand, passed by the high seas, through Macclesfield Bank (or the Outer Passage).⁴⁵ This bank was called, by the Chinese, Hong Mao Qian, which literally meant “the bank of the barbarians with red hair”.⁴⁶ This name was simply the Chinese translation of “Banc des Anglais [English Bank]”, which appeared on French maps before it was renamed Macclesfield.⁴⁷ The fact that this bank did not have a Chinese name and was outside the traditional route of the Chinese navigators should be noted. Today, the Chinese government claims that the Zhongsha Islands, of which the Macclesfield Bank and the Scarborough Shoal are part, have been, since time immemorial, under the sovereignty of China. Obviously, up to the 20th century, the Zhongsha Islands were not part of China and the information about Hong Mao Qian was simply the result of interviews of Europeans mariners and consultation of foreign charts.

⁴³ Wang Wen Tai, *Hong mao fan ying ji li kao lue* [To Study the Foreigners], 1843, in Han Zhen Hua, *op. cit.*, 1988, p. 163.

⁴⁴ The seven expeditions of Admiral Zheng He (from 1405 to 1433), reaching the Indian Ocean (or Western Ocean for the Chinese), Eastern Africa, and the Middle East during the Ming Dynasty (1368-1644), were the exceptions in the whole history of the Empire.

⁴⁵ The British mariners called the sea lane between the coast of Annam and the long bank of the Paracels the Inner Passage; they called the high seas route through Macclesfield Bank, east of the Paracels, the Outer Passage. This differentiation would disappear when the European cartographers and surveyors discovered that the Paracel Islands were much smaller than initially perceived.

⁴⁶ “The barbarians with red hair” was the name given originally to the British people by the Chinese.

⁴⁷ This name comes from the British ship *Macclesfield*. Its captain, John Harle, made, in 1701, the first description of the bank. See *China Sea Directory, op. cit.*, p. 108.

2.2.2. China and Scarborough Shoal: a modern claim

With the exception of an isolated remark made in 1876 by the first Chinese Ambassador in Europe, Guo Song Tao (1818-1891), concerning the Paracel Islands,⁴⁸ there is little evidence that the Chinese authorities had an interest in the South China Sea islands and reefs up to the end of the 19th century. In fact, for three months each year between 1881 and 1884, the German Imperial Navy sent two boats (the ship *Freyja* and the warship *Illtis*) to study and map the Paracel Islands without either seeking the permission of or incurring protest by the Chinese government. This mission was finished without any problems and the German Admiralty published the results in 1885 in a document called "Die Paracel-Inseln" [The Paracel Islands].⁴⁹ This German hydrographic survey became an international reference for the description of the Paracel Islands.⁵⁰ Moreover, as we have seen, Spanish and British naval authorities were surveying and organizing rescue operations on Scarborough Shoal, without the Chinese government protesting or even knowing.

The trigger that started a strong Chinese interest in some groups of islands in the South China Sea was the discovery, in 1909, that Japanese traders had been exploiting the natural fertilizer (bird manure or guano) found on Pratas Island (Dongsha) since 1907, without the knowledge of the local Chinese authorities. Pratas Island and Reef, located off the coast of Guangdong Province, became the subject of negotiations between the governments of China and Japan. In November 1909 the Chinese Navy took back the islands officially after a ceremony and the payment of compensation to the Japanese businessmen. During the scandal of Pratas Island and Reef, the Governor of Guangdong, Zhang Yen Jun, sent, in April 1909,⁵¹ Admiral Li Zhun to explore, map, and give names to the Paracel Islands. The objectives of this first official Chinese mission were to check that no Japanese businessmen were established there and to integrate these islands into the national territory of China. A new map of Guangdong Province was published the same year, showing for the first time the Paracel Islands (or Xisha Qundao) as part of the province (see Map 3). Thus, from 1909 to 1935, the Paracel Islands became the southernmost part of China on all the maps and official documents.⁵² Neither Scarborough Shoal nor the Spratly Islands were considered as parts of the national territory of China at this time.⁵³

⁴⁸ He made the first unofficial claim over Bai La Su Dao, the phonetic translation of the Paracel Island. See Guo Song Tao, *Shi xi ji cheng* [Journey of a diplomat in western countries], Book 1, p. 7, in Han Zhen Hua, *op. cit.*, 1988, p. 126.

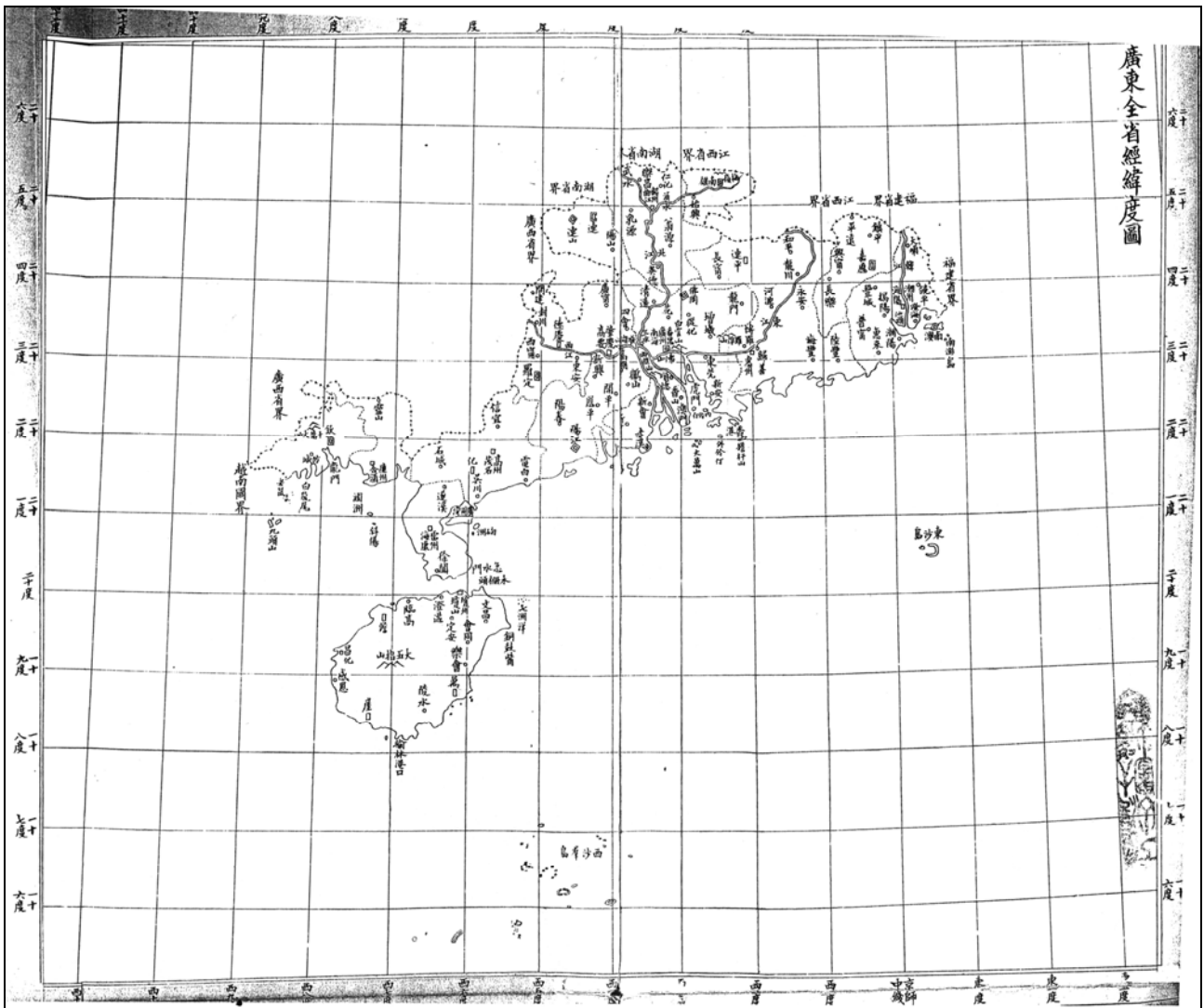
⁴⁹ Committee on Toponymy of Guangdong Province, *Compilation of the References on all the Names of the Islands of the Southern Sea*, Calligraphy by Ling Shi Tang, Guangdong Map Publishing Company, 1987, p. 367. Generally, Chinese scholars, writing for an international audience, consider that these German missions were in the Spratly Islands and that the Chinese government protested these activities to the point that the Germans left the area. In fact, Chinese scholars' own research shows otherwise, but such findings are not published in English.

⁵⁰ China Sea Directory, *op. cit.*, p. 103. In the note it is said, "The description of these islands and reefs [the Paracels] is principally from the German government surveys, executed between the years 1881 and 1884".

⁵¹ April 1909, according to the lunar calendar used by the Chinese. For the solar calendar (Gregorian calendar), it was in May 1909.

⁵² For example, in 1928, the Commission, sent to the Paracels to reaffirm Chinese sovereignty over the archipelago, confirmed that, "The Paracel archipelago is our nation's southernmost territory". See Marwyn Samuels, *op. cit.*, 1982, p. 57.

⁵³ See Han Zhen Hua, *op. cit.*, 1988, p. 319.

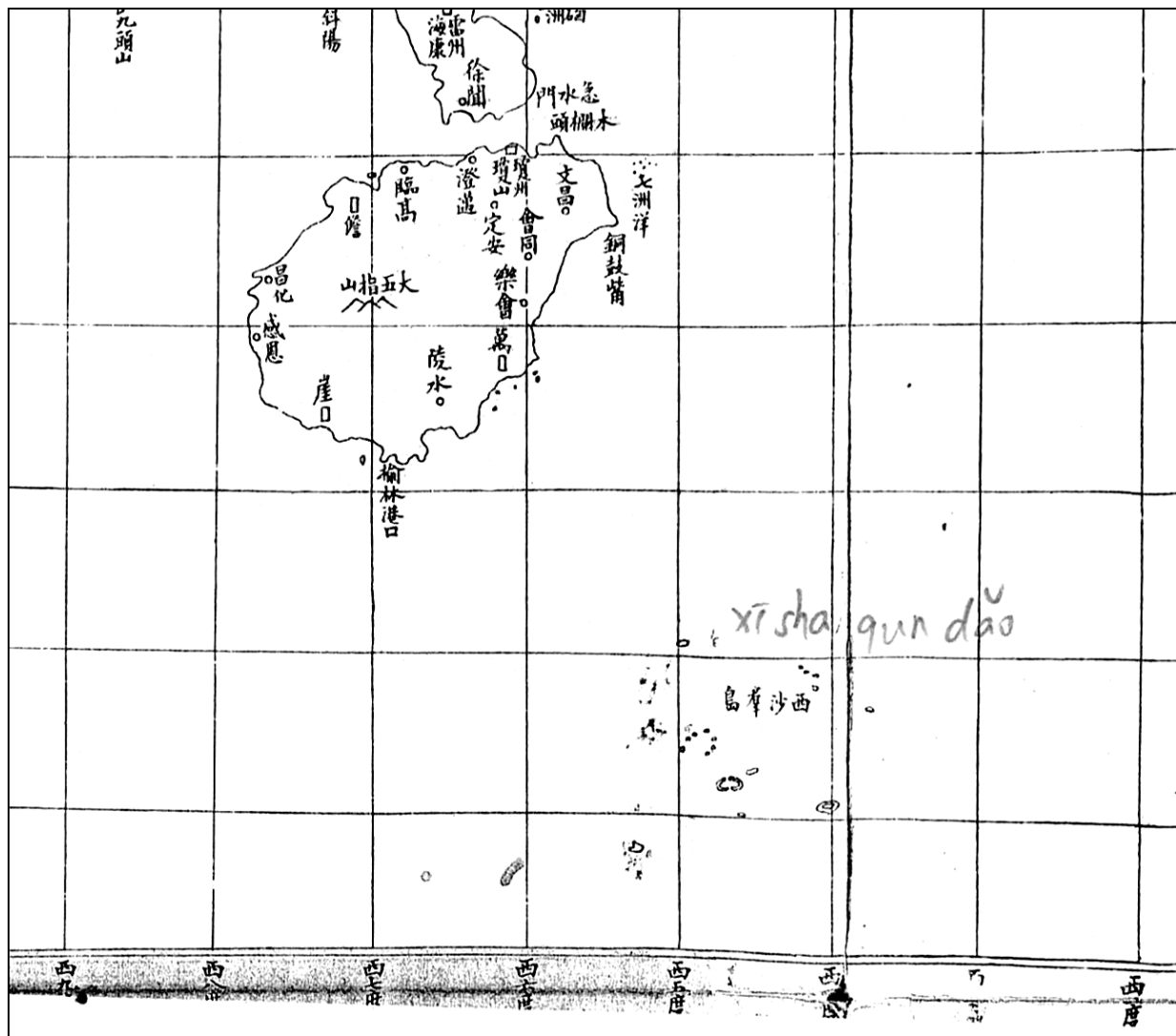


Map 3. *Guangdong yu di quan tu* [New map of Guangdong Province], Guangdong sheng [S.I]: Gaigu, Xuantong 1 [1909]; Xisha Qundao (the Paracels), southeast of Hainan, is incorporated in the territory of China for the first time (see details Map 4)

When, in November 1931, the committee in charge of checking the maps of China and standardizing all the names of places⁵⁴ started its work, the island of Triton in the Paracel Islands was still considered the southernmost place of China (Annex 1, Map 7). However, the war between China and Japan changed the priorities and the committee had to stop its work for financial reasons. These financial problems were so important that the committee had to wait until May 1933 to be operational again. Between May 1933 and December 1934, the committee organized 25 meetings and published for the first time, in April 1935, a map of all the South China Sea island groups (the Paracels, Macclesfield, Scarborough and the Spratly Islands) as part of the Chinese territory.⁵⁵

⁵⁴ In January 1930, a law was passed for the verification of all the maps of the national territory. The committee in charge of implementing this law was established in June 1931. It was composed of representatives from the Interior, Foreign Affairs, Navy, War, Education, and Mongolia Departments. See Committee on Toponymy, *op. cit.*, 1987, p. 38.

⁵⁵ Committee on Toponymy, *op. cit.*, 1987, p. 39-41.



Map 4. Details of the *Guangdong yu di quan tu*, 1909; Scarborough and the Spratly islands are not part of the Chinese territory

Why did the Chinese government change the scope of its territory so dramatically between 1933 and 1934? Since 1931, the territorial integrity of China had been threatened. In 1931, Manchuria was annexed by the Japanese. In 1932, the French government was claiming, for the first time, the Paracel Islands as part of Annam (Vietnam).⁵⁶ Moreover, as we have said above, the French government made a second claim, in July 1933, this time on the Spratly Islands. This last claim was made just two months after the Chinese committee on national territory began its work. These two claims of the French government confused the minds of not only of the Chinese public and the media, but also the official authorities like the military and the politicians in Guangdong Province and Beijing. In fact, the Chinese believed that the Spratly Islands and Paracel Islands or Xisha were exactly the same group, but that the French had just changed the name as a trick to confuse the Chinese government. To ascertain the position of the Spratly Islands, the Chinese Consul in Manila, Mr. Kwong, went, on July 26, 1933, to the U.S. Coast and Geodetic Survey and discovered, with surprise, that the Spratly Islands and the Paracel Islands were different and far apart.⁵⁷ This big blunder, showing a complete lack of knowledge about the Spratly Islands, was

⁵⁶ The French government did not react to the Chinese mission of 1909.

⁵⁷ Memorandum of Captain Maher, *op. cit.*, December 10, 1937, p. 2. The Consul submitted, on August 1, 1933, his report to the Chinese Foreign Affairs Department, which said, "The islands are collectively known as Tizard Bank and are situated at 530 miles from Hainan, 350 miles from the Paracels and 200 miles from Palawan The reports mentioning that the 9 islands were part of Xisha [the Paracels] are incorrect". See *The North China Herald* and *National News Weekly* of August 9, 1933.

recognized by the Chinese authorities in their internal documents. For example, the director of the influential newspaper, the *Peiping News*, Mr. Wang Gong Da, wrote to the Foreign Affairs Secretary, Mr Luo:

“The Spokesperson of the Foreign Affairs said that a protest was prepared if [emphasis mine] it was proven that the nine islands [Spratlys] were part of Xisha [the Paracels]. Don't make a diplomatic blunder; these islands are not part of Xisha. Triton Island [in Xisha] is the southernmost part of our territory. South of Triton Island, there is no connection with the Chinese territory. Our so-called experts, geographers, Navy representatives, etc., are a shame to our country”.⁵⁸

The militaries themselves recognized this blunder. In a secret report dated September 1, 1933, the Military Council defined the policy concerning the Spratly Islands:

“All our professional geographers say that Triton Island [in Xisha] is the southernmost island of our territory. But we could, maybe, find some evidence that the nine islands [Spratlys] were part of our territory in the past. After all, during the Han Dynasty, the North then the Center of Vietnam belonged to China. Under the Tang Dynasty, the military province of Annam was founded. Under the Ming Dynasty, the expeditions of Cheng Ho put Luzon, Malaysia, and Indonesia into the territory of the Empire. Moreover, at the beginning of the Qing Dynasty, Vietnam was included in our maps. Consequently, and naturally, these nine islands, being located at the center of our possessions, should belong to China. It seems confirmed by the 1923 book of the British Admiralty, *China Sea Pilot*, which mentions the presence of fishermen from Hainan on Tizard Bank [part of the Spratly Islands]. Unfortunately, this book does not say to whom these islands belong and does not give any evidence of any Chinese administration, the presence of an official representative of China, or Chinese equipment and infrastructure.

In conclusion, we have only one piece of evidence, our fishermen from Hainan, and we have never done anything on these islands [emphasis mine]. We need to cool down the game with the French, but let our fishermen continue their activities to protect our fishing rights. Our Navy is weak and these nine islands are not useful for us now

We must focus only on the Xisha Islands because the points of evidence of our sovereignty on them are so numerous that the whole world accepts it, with the exception of Japan”.⁵⁹

Following the discovery that the Spratly Islands and the Paracel Islands were two different groups, the Chinese government did not protest the French claim on the nine islands. But, like the military above, considering that in the future Chinese researchers could find evidence of sovereignty over these islands, the Department of Interior decided to integrate in the new map of China all the islands and reefs of the South China Sea. The process was simple: the committee in charge of checking the maps and names studied the foreign charts of the South China Sea and then simply translated the phonetics of the foreign names, without worrying about the meaning of these new names or whether these features had any historical links with China.⁶⁰ This blanket claim, not publicized to the whole world at this time, was following the colonial principle “Let's claim them all first, and only later we will try to justify our claim”. In a way, the integration of Scarborough Shoal on the new map of China was a collateral aspect of the main Chinese claim over the Paracel Islands.

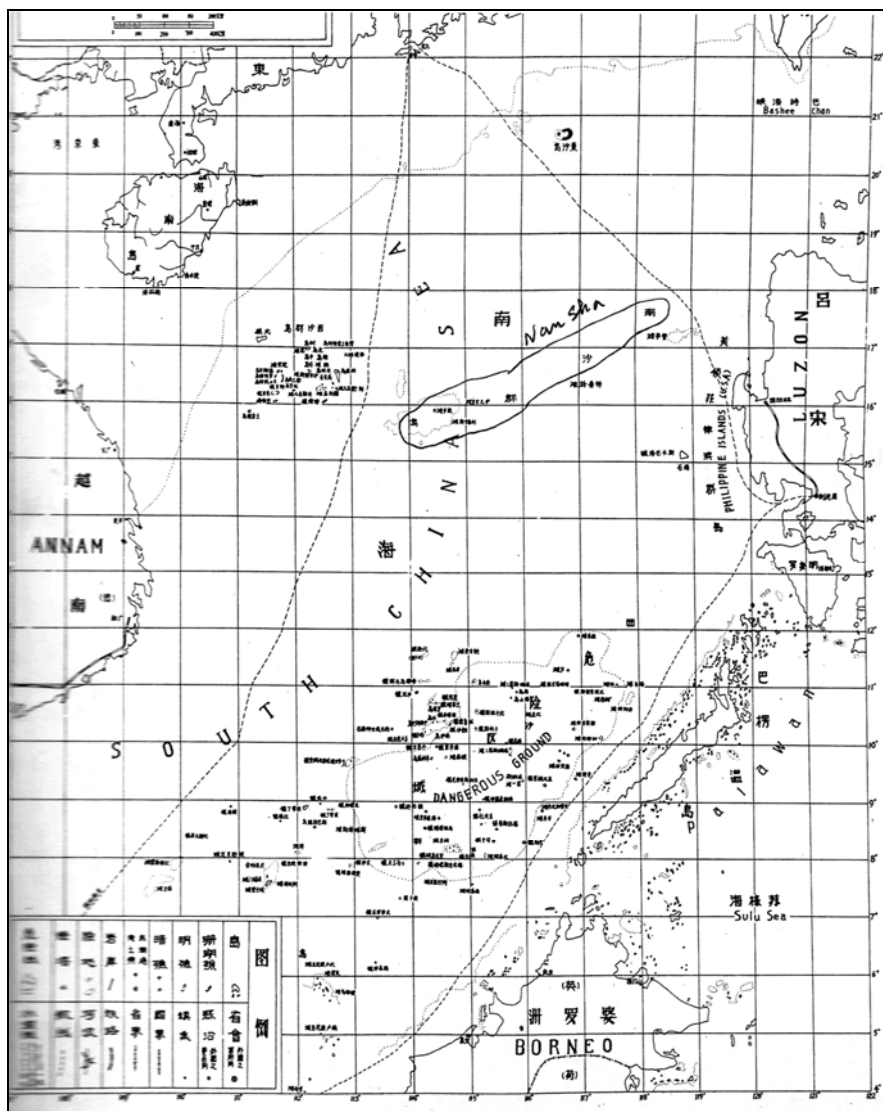
⁵⁸ *Wai Jiao bu nan hai zhu dao dang an hui bian* [Compilation by the Department of Foreign Affairs of all the records concerning the islands in the South Sea], Vol. 1, Taipei, 1995, p. 47-49.

⁵⁹ *Id.*, 1995, p. 99.

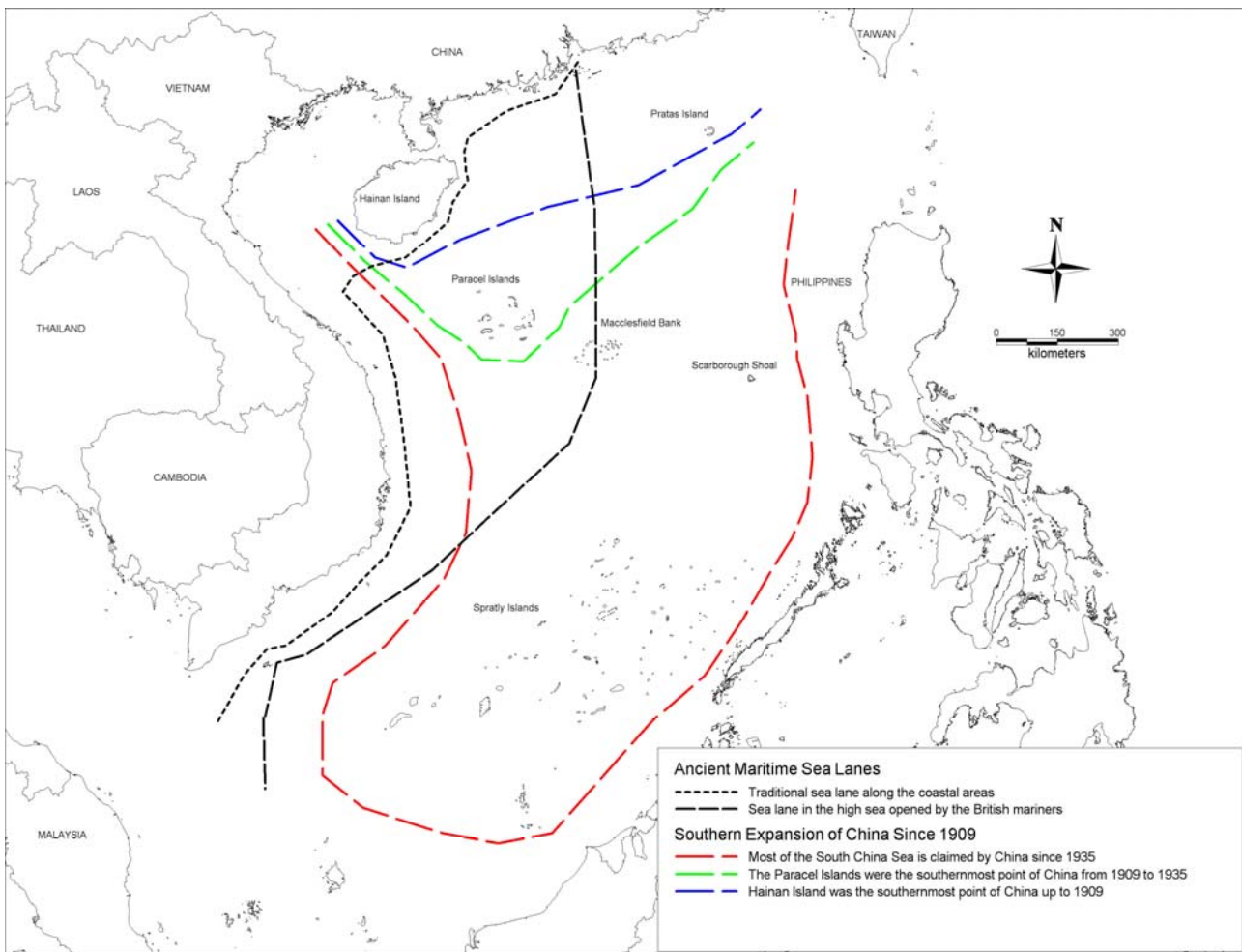
⁶⁰ See the critics of the Chinese geographers in Committee on Toponymy, *op. cit.*, 1987, p. 43.

In the new map of China published in 1935 (Map 5), Scarborough Shoal, called *Si ge ba luo jiao* (phonetic for Scarborough island), was part of a group called Nansha [southern sand] comprising also Macclesfield Bank, Druro Bank, and other submerged features. The Spratly Islands claimed by France were called Tuansha [chaotic sand]. It should be noted that some Chinese researchers discovered in 1977 some sketches, made by a fisherman from Hainan in 1935, showing the fishing grounds of the South China Sea. This sketch was made into a map. As can be seen on this map (Annex 1, Map 8), Scarborough Shoal does not appear; only the Paracels, Macclesfield Bank, and the Spratly Islands are marked. In 1947 the name Nansha was given to the Spratly Islands, and Macclesfield Bank, etc., were named *Zhongsha* [middle sands].

Thus, before the Second World War, in the context of Japanese expansion, the Philippines and China made parallel claims to Scarborough Shoal, each without knowing that the other was doing the same. Both claims were unofficial in the sense that there was no notice to the whole world, to avoid attracting the attention of the Japanese. Nevertheless, in the case of the Philippines, the State Department had more specific information about Scarborough Shoal than the Chinese had. For the Chinese government, Scarborough Shoal was simply one small feature among all the South China Sea islands and reefs. They had no information about this shoal but were expecting that in the future their researchers would find some evidence of Chinese ownership. In conclusion, the Chinese claim was as recent or as old as the one of the Philippines.



Map 5. Map of all our South Sea islands, published by the Committee on National Territory, April 1935 (source: Committee on Toponymy of Guangdong Province, *op. cit.*, 1987, p. 39)



Map 6. The virtual southern expansion of China in the South China Sea (1909-1935)

2.3. Scarborough Shoal: between smuggling and territorial claims

From the end of the Second World War up to the 1990s, Scarborough Shoal was largely ignored by the governments of China, Taiwan, and the Philippines. In some international conferences, the two Chinese governments would claim regularly that the Xisha, Zhongsha, and Nansha islands were part of their territories, but no specific actions were taken concerning Scarborough Shoal. This shoal was too close to Subic Bay, the main American naval base in Asia. In the context of the Cold War, the main ally of the United States, Taiwan, and the far away Mainland China would not risk trying to take control of a mostly-underwater reef.

In the Philippines, the name of Scarborough Shoal appeared in the newspapers mostly in relation to the smuggling activities of syndicates based in the province of Cavite and abroad. In October 1963, for example, the Philippine Navy discovered that the shoal was used as an entry point for smuggled goods (cigarettes, etc.) coming from Macao, carried by Taiwanese fishermen.⁶¹ According to news reports, the international syndicate built two bodegas and some pier facilities on the shoal. Fishermen from the Philippines working for the Filipino side of this syndicate loaded goods on their boats and unloaded them on various beaches of Luzon. These well-organized international private activities were simply using loopholes of maritime laws of the time. The status of a shoal in the high seas was still not clear. The Philippine Navy arrested the Filipino fishermen (a Taiwanese boat was pursued by a Filipino boat but was able to escape) and bombed, on orders of Defense Secretary Macario Peralta, the facilities built by the syndicate. This bombing followed an aerial mission by the Philippines Air Force over the shoal. It should be noted that

⁶¹ *Daily Mirror*, October 10-11 and 14, 1963 and *Manila Times*, October 11-12-14 and 29, 1963.

these state activities (fighting smuggling and bombing the structures on the shoal) undertaken by the Philippine Navy were not protested by Taiwan or China. Following the confiscation of around 680 crates of cigarettes and some weapons, Commodore Juan B. Magluyan, chief of the Philippine Navy, requested eight new boats to patrol more efficiently the maritime offshore areas of the Philippines, and destroy smugglers' relay stations not only in Scarborough Shoal but also in the area of the Spratly Islands. Already, the Navy authorities were complaining that the fleet was outdated, with only half of the boats in good condition for sea patrols. Of this half, only half were effectively used for sea patrols; the others were used for carrying rice or VIPs.

Scarborough Shoal was also perceived as a possible security risk by intelligence officers of the Armed Forces of the Philippines (AFP). For example, in March 1964, the Senate Blue Ribbon Committee started an investigation on smuggling activities by high level Filipino politicians. During the hearings, the AFP Chief of Staff, General A. Santos, indicated that since 1961, the AFP Intelligence Service uncovered some evidence linking smuggling activities in the Philippines with communist China. In August 1961, during a raid against Filipino communists in Dupax (Nueva Vizcaya Province), some documents including maps were seized. These maps, decoded by the Service, showed the smuggling routes from China, Macao, and Hong Kong to the Philippines, and Scarborough Shoal was one of the transshipment points for the smuggled goods entering the country.⁶² Were the smugglers simple businessmen or agents working for the subversion of the Philippines? Whatever the reality, our point is to show that, despite the difficulty to the Philippine Navy, this shoal was sometimes patrolled, arrests were made, and the area was monitored by the Philippine Air Force when it was necessary. Moreover, the Intelligence Service of the AFP was aware of a potential risk of subversive activities through this shoal. It is probably the reason that, following these investigations, a Filipino flag was raised on an 8.3-meter-high flag pole and that the government built and operated a small lighthouse.⁶³

Throughout this period, the two Chinas were inactive on the shoal. The Taiwanese had been focusing their activities on Itu Aba Island in the Spratlys since 1956.⁶⁴ The Mainland government contented itself to protest the "imperialistic invasion" of the Nansha Islands (the Spratly Islands) by the Philippines, which together with Xisha and Zhongsha were part of the traditional territory of China. These protests could not be followed by practical activities since, at this time, the Chinese Navy was non-existent. One thing is certain: the activities of the Filipinos on Scarborough Shoal in the 1960s went unchecked and were not protested by the two Chinas. As Zou Keyuan himself recognized, not only foreign scholars but also Chinese scholars "neglect to mention Scarborough reef (sic) in the four traditionally-acknowledged groups of islands in the South China Sea".⁶⁵ In short, up to the end of the 1970s and beginning of the 1980s, the shoal was largely ignored by intellectuals and policy-makers in China. The first official mission on this shoal by Chinese authorities was made in 1978. In effect, that year, the Earthquake Bureau and Oceanic Administration made a survey of Scarborough Shoal. In 1983, the shoal was renamed Huangyan Qundao (Huangyan Islands).⁶⁶

Thus, when, on May 1, 1997, Philippine Navy ships intercepted an international amateur radio team, sponsored by China, on Scarborough Shoal, and later arrested 21 Chinese fishermen, it started the first confrontation between the two countries over the shoal. On the Chinese side it was perceived as the first time the Philippines dared challenging China's sovereignty over the shoal. But, in light of what we have said before, the Philippines could easily turn the argument against China.

⁶² *Manila Times*, March 21, 1964.

⁶³ Department of Foreign Affairs, *Philippine Position on Bajo de Masinloc and the Waters Within its Vicinity*, April 18, 2012. The ruins of the small light are noted in the Admiralty Sailing Directions, *China Sea Pilot*, Vol. 2, 1998, p. 70. The light is located on the northeast side of the reef.

⁶⁴ Following the claim of the Filipino Thomas Cloma on Freedomland (the Spratlys) in 1956, the Taiwanese established themselves on the biggest island of the group, Itu Aba.

⁶⁵ Zou Keyuan, *op. cit.*, p. 71.

⁶⁶ Committee on Toponymy, *op. cit.*, 1987, p. 52.

3. The legal documents vs. the “U-shape line: strategic ambiguity

3.1. The legal documents of the Philippines and Scarborough Shoal

When, on March 10, 2009, President Gloria Macapagal Arroyo signed the new law on the baselines (R.A 9522) declaring Scarborough Shoal as outside the main archipelago but under the *regime of islands*, it was in conformity with UNCLOS and the historical links between the shoal and the Philippines. In fact, as we have seen, the shoal could be perceived as a special territory since the 19th century (under the sphere of influence of the Philippines) and confirmed as such by its exclusion from the different baseline laws of 1961, 1968, and 2009.⁶⁷ The various state activities on the shoal, like organizing rescue operations, fighting smuggling activities, building a lighthouse, or more recently arresting poachers, are consistent with the nature of a *low-tide elevation* and its isolation from the main archipelago, and with the sovereign rights of the state in its EEZ.⁶⁸



Picture 3. Congressmen Roque Ablan and Jose Yap planting a Filipino flag on one rock of Scarborough Shoal (1997) (source: southseaconversations.wordpress.com)

⁶⁷ Republic Act No. 3046 of June 17, 1961, *An Act to Define the Baselines of the Territorial Sea of the Philippines* ; Republic Act No. 5446 of September 18, 1968, *An Act to Amend Section One of the Republic Act Numbered 3046 "Entitled An Act to Define the Baselines of the Territorial Sea of the Philippines"*; Republic Act No. 9522, *An Act to Amend Certain Provisions of Republic Act No. 3046, As Amended by Republic Act No. 5446, to Define the Archipelagic Baselines of the Philippines and for Other Purposes*.

⁶⁸ UNCLOS, Part 5, *Exclusive Economic Zone*, Article 56, *Rights, jurisdiction, and duties of the coastal State in the Exclusive Economic Zone*.

The Chinese government has also criticized the Philippines's position as inconsistent with the constitutions of 1935, 1973, and 1987, as they refer to the Philippines's territory through the colonial Treaties, excluding *de facto* the shoal.⁶⁹ However, first, neither of the post-colonial constitutions refers to the different Treaties signed by the American from 1898 to 1930. In both constitutions, the national territory is described as comprising "the Philippine archipelago, with all the islands and waters embraced therein".⁷⁰ No details were given on the geographical coordinates of the archipelago. Second, as we have seen, the shoal was claimed in 1938, and the two constitutions (1973 and 1987) specify that the national territory of the Philippines comprises also "all other territories over which the Philippines has sovereignty or jurisdiction". Thus, it would be logical to consider that Scarborough Shoal belongs to this category, "other territories".

3.2. The "U-shape line" and Chinese ambiguity

The 2012 confrontation between China and the Philippines over Scarborough Shoal reactivated a long-drawn-out debate about the nature of the Chinese claim over the South China Sea and how to interpret the now-famous "U-shape line" or "nine-dotted line" drawn on all official maps of China since 1947. Many Chinese and foreign scholars have attempted to give an interpretation of this line, which encompasses most of the South China Sea. Is China claiming all the waters and land features located inside the line? Or is China claiming only the land features and their adjacent waters in accordance with UNCLOS? In other words, the line could be seen as an historical maritime boundary transforming the South China Sea into a "Chinese lake", or a simple line of delimitation of land features belonging to China, similar to the Treaty limits of the Philippines.

In fact, historically, this cartographic symbol encompassing the South China Sea first appeared in 1936, on privately-published atlases and maps of China. A systematic study by Han Zhen Hua showed that the "U-shape line" appeared on 26 maps published between 1936 and 1945.⁷¹ Moreover, some Chinese historical atlases showed two lines on the maps of Asia (Annex 1, Map 9). A thick black line showed the maximal expansion of the Chinese empire, considering all the tributary states as part of the empire (the Sulu Islands were included). A second thin line encompassed the whole of the South China Sea, in order to show to the viewer how small China had become in modern times. In all these maps, this "U-shape line" was not considered a fixed maritime boundary but a simple delimitation line showing what land features belong to China. In effect, the southern limit of the line, for example, varied greatly in latitude from 9° N (three maps) to 4° N (at the latitude of James Shoal, one map), with most of the maps marking the Southern limit at 7° N (19 maps) or 8° N (three maps)⁷².

In 1947, the Republic of China (ROC) published the first official map of the South China Sea with the "U-shape line" symbolized by 11 dashes. In the context of rivalry between the ROC and the Philippines over the Spratly Islands, a subtle strategy was developed by the officials of the Navy, Defense, and Interior during a meeting on June 12, 1947.⁷³ During this meeting, the Navy official explained that, between Palawan Island (Philippines) and the closest land feature of the Nansha Islands (Spratly Islands) there is a distance of 12 nautical miles. As each island is allowed to have a maritime belt of three nautical miles, there would be enough maritime space between the

⁶⁹ See <http://ph.china-embassy.org/eng/sgdt/t922594.htm>

⁷⁰ The 1973 Constitution of the Republic of the Philippines and the 1987 Constitution of the Republic of the Philippines, Article 1, *National Territory*.

⁷¹ Han Zhen Hua, *op. cit.*, 1988, p. 353. Between 1914 and July 1933, three maps showed also the "U-shape line" but it encompassed only the Paracel Islands and the Pratas Islands. These maps are: 1) Hu Jin Jie [Zhong hua min guo di li xin tu] (Map of the new geography of the Republic of China) 1914; 2), Tu Si Cong [Zhong hua zui xin xing shi tu] (Map of contemporary China) 1927; 3), Chen Duo [Zhong guo mo fan di tu] (Best map of China) July 1933.

⁷² Han Zhen Hua, *op. cit.*, 1988, p. 354-355.

⁷³ *Wai Jiao bu nan hai zhu dao dang an hui bian* [Compilation by the Department of Foreign Affairs of all the records concerning the islands in the South Sea], Vol. 2, Taipei, 1995, p. 784-788.

two countries (six nautical miles). However, for the official of the Interior, the standard to follow was the South China Sea as a whole. In short, the ROC government would claim officially and publicly everything inside the 11-dash line but, in case of negotiations with a third party, would follow the international rules of this time (i.e., a belt of three nautical miles around each island). With this flexible strategy, it was clear that the ROC government considered the "U-shape line" as a delimitation line and not an historical maritime boundary. The ambiguity was erected as a strategy to allow more flexibility during negotiations.

Following the defeat of the ROC government and its exile in Taiwan in 1949, the 1947 map was adopted by mainland China. However, two of the dashes were deleted in the area of the Tonkin Gulf in 1953. This new "Nine-dotted line" map has been the standard map in China and Taiwan since then. Since the implementation of UNCLOS in 1994, the "U-shape line" has been commented upon many times by various scholars but the Chinese government has always held to "strategic ambiguity" in its interpretation. In 2009, though, in the context of the Malaysian-Vietnamese joint submission and Vietnam's own submission of their extended continental shelves to the Commission on the Limits of the Continental Shelf (CLCS), the Beijing government gave an inkling of its possible interpretation of the line in the future. In effect, in protest to the actions of Malaysia and Vietnam, the Chinese not only reiterated their "indisputable historical rights and sovereignty" over all the land features enclosed by the "U-shape line" but also:

"[China] 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".⁷⁴

In protest to the Philippine position over the Malaysia-Vietnam project, the Chinese underlined also their "indisputable sovereignty" over the Nansha Islands (Spratlys), but also:

"In addition, under the relevant provisions of the 1982 United Nations Convention of the Law of the Sea, as well as the Law of the People's Republic of China on the Territorial Sea and Contiguous Zone (1992) and the Law on the Exclusive Economic Zone and Continental Shelf of the People's Republic of China (1998), China's Nansha Islands is fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ) and Continental Shelf".⁷⁵

From these two paragraphs, it could be inferred that, with extreme caution, the policy makers in China may interpret the "U-shape line" as a delimitation line of "their insular possessions", entitled to maritime zones in accordance with UNCLOS. This interpretation seems to have been confirmed, for example, on February 29, 2012 by Foreign Ministry spokesman Hong Lei who separated the disputes over the sovereignty on insular features in the Spratlys and the disputes over maritime delimitations.⁷⁶

However, the increasing assertiveness of the Chinese in the South China Sea since 2010 seems to contradict this interpretation. In effect, on May 25, 2011, for example, three Chinese surveillance ships cut the exploration cable of a survey ship belonging to PetroVietnam. This incident happened deep in Vietnam's EEZ and far from the Paracel Islands.⁷⁷ This kind of incident, combined with pressure on foreign oil companies not to participate in exploration projects of the Southeast Asians claimants (inside the U-shape line), and an imposition of a unilateral annual

⁷⁴ China's communication to the Secretary-General of the United Nations, May 7, 2009, p.1 at http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf

⁷⁵ China's communication to the Secretary-General of the United Nations, April 14, 2011, p.2 at http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2011_re_phi_e.pdf

⁷⁶ International Crisis Group (ICG), *Stirring up the South China Sea (1)*, Asia Report No 223, April 23 2012, p.3 at [http://www.crisisgroup.org/~media/Files/asia/north-east-asia/223-stirring-up-the-south-china-sea-i.pdf](http://www.crisisgroup.org/~/media/Files/asia/north-east-asia/223-stirring-up-the-south-china-sea-i.pdf)

⁷⁷ ICG, *op. cit.*, p. 6.

fishing ban, seem to suggest that, in practice, China wants to enforce its jurisdiction in the whole area encompassed by the “U-shape line”.⁷⁸ This divergence between some official statements and the practice of the Chinese government creates a strong uncertainty among the Southeast Asian claimants, who have all adopted UNCLOS for the definition of their maritime territories and jurisdiction.

Nevertheless, as Rodolfo Severino wrote, there is a risk in pushing China to clarify its claim in the South China Sea and define exactly the nature of the “U-shape line”.⁷⁹ This risk is to force the Chinese government to adopt the most radical interpretation of the “U-shape line”, under the pressure, notably, of hard-core nationalists at home. By sending their maritime claims unilaterally to the ITLOS, the Philippines takes the risk of pushing China into a corner. This risk is particularly high as the nationalists in Taiwan, in 1993, have already been successful in imposing this view on their government. The policy guidelines for the South China Sea, for example, published in 1993 in Taipei, noted that:

“The South China Sea area within the historic water limit is the maritime area under the jurisdiction of the Republic of China, where the Republic of China possesses all rights and interests”.⁸⁰

In short, departing from its original position (1947), the ROC now considers the “U-shape line” as a maritime boundary defining its historical maritime domain, or a “Chinese lake”.

Thus, the actual “strategic ambiguity” of Beijing could be a “blessing in disguise” for the Southeast Asian claimants and should be carefully managed by them. The Beijing government is trapped by these two representations of the “U-shape line”, notably for Zhongsha Qundao. If it chooses to apply UNCLOS on Zhongsha Qundao, it could use the few rocks of Scarborough Shoal and claim a small maritime jurisdiction. The government would have to justify this minimal jurisdiction at home, and could be considered as traitorous to the nation, with unpredictable political consequences. If it aligns on the hard-line position of Taiwan and considers the “U-shape line” as delimiting the maritime territory of China, the Chinese government would have to enforce its sovereignty and the risk of an escalation of violence would be high, with the possible involvement of the United States. As the “U-shape line” has never been recognized by the international community and has no meaning in international law (only historical bays are recognized), China risks isolating itself and being accused of having imperialistic designs over Southeast Asia. This move would be counterproductive, as Chinese officials have many times in the past attempted to reassure the Southeast Asian nations that the rise of China would be peaceful.

My hypothesis is that China is gaining time by using this “strategic ambiguity” developed by the ROC in 1947 but abandoned in 1993. In this balancing act, the resolves of ASEAN and the United States are being tested.

⁷⁸ Ian Storey, “China’s Bilateral and Multilateral Diplomacy in the South China Sea”, in Patrick M. Cronin (ed.), *Cooperation from Strength, the United States, China and the South China Sea*, Center for a New American Security, January 2012, p. 54 at http://www.cnas.org/files/documents/publications/CNAS_CooperationFromStrength_Cronin_1.pdf

⁷⁹ Rodolfo Severino, *op. cit.*, p. 1.

⁸⁰ Erik Franckx and Marco Benatar, “Dotted Lines in the South China Sea: Fishing for (legal) Clarity”, in Tran Truong Thuy (ed.), *The South China Sea, Towards a Region of Peace, Security and Cooperation*, Diplomatic Academy of Vietnam, Hanoi, The Gioi Publishers, 2011, p. 33, at <http://nghiencuubiendong.vn/en/>

4. ASEAN, China, and the United States: managing the disputes?

Up until now, each time a conflict arose over Scarborough Shoal, the governments involved have been able to deescalate the tensions, in the spirit of the South China Sea Declaration of 2002. But the measures taken have always been temporary in nature and the tensions have recurred every year during the fishing season (October to June). The latest row over the shoal (from April to July 2012), particularly tense, demonstrates the need for a united front among the ASEAN countries and “to manage the conflicts” in the South China Sea through a binding code of conduct.

4.1. Discord in the ASEAN family

On April 22, 2012, the Philippines's Secretary of Foreign Affairs, Albert del Rosario, frustrated by the silence of ASEAN, called on all the nations that have a stake in the South China Sea to take a stand on the perceived “new aggressiveness” of China over Scarborough Shoal. “All, not just the Philippines, will be ultimately negatively affected if we do not take a stand”.⁸¹ This call was not only targeting the naval and commercial powers, like the United States and Japan, but also the ASEAN countries as a block. In fact, the 2012 bilateral dispute over Scarborough Shoal revealed, once more, the deep divisions among the ASEAN countries. Only four countries of ASEAN (Brunei, Malaysia, Philippines, Vietnam) are claiming parts of the South China Sea. Other countries (Cambodia, Laos, Myanmar, Thailand) have deep economic and financial ties with China and hesitate to displease their big neighbor. These divergent national interests were exacerbated, in 2012, by the accession of Cambodia to the chairmanship of ASEAN. Cambodia took the opportunity to systematically block all attempts by ASEAN to release any statements concerning Scarborough Shoal and the South China Sea dispute in general. For the first time in 45 years, for example, ASEAN was unable to produce an official communiqué, at the end of the Foreign Ministers meeting in Phnom Penh on July 16, 2012. The Cambodian officials left the meeting when Vietnam and the Philippines insisted on having a paragraph on the Scarborough Shoal dispute in the communiqué.

The sacrosanct principles of decision-making by “consensus” and neutrality towards the territorial disputes of its members, which have been at the foundation of ASEAN since its inception, are probably reaching their limits. The only consensus among the ASEAN nations, stated in the 2002 Declaration on the Conduct of Parties in the South China Sea (DOC) and signed by China, is the necessity to peacefully resolve, in accordance with international law, and without the recourse to force, the disputes in the South China Sea. Moreover, ASEAN encourages the development of Confidence Building Measures (CBM) between China and the Southeast Asian claimants.⁸² But, beyond these very general statements, the lack of consensus among ASEAN nations weakens all proposals for conflict management and resolution. In 2011, for example, the Philippines proposed the establishment of a Zone of Peace, Freedom, Friendship, and Cooperation (ZoPFFC). This proposal, supported by Vietnam, was to delimit precisely the disputed areas in the South China Sea and transform them into areas of cooperation among the claimant states. The ZoPFFC would have been managed through a specific development agency. By separating the disputed areas from the non-disputed areas, the project would have forced ASEAN to quit its traditional position of neutrality and push for a multilateral solution to the dispute. As this displeased China, for whom the only acceptable solution is bilateral negotiation, ASEAN rejected this proposal.

⁸¹ <http://globalnation.inquirer.net/34333/other-nations-must-take-stand-on-china-%E2%80%93-philippines>

⁸² *Declaration on the Conduct of Parties in the South China Sea*, 8th ASEAN Summit, Phnom Penh, Cambodia, November 4, 2002, <http://www.aseansec.org/13163.htm>

Facing a more aggressive policy in the South China Sea by China since 2010, but also bolder moves by the Philippines and Vietnam, and an increasing involvement of the United States in the region, ASEAN and China are bound to develop a strong Code of Conduct (COC) to defuse the tensions. The actual guidelines of the 2002 DOC, adopted only in July 2011, are not binding on the claimants and cannot be enforced. The numerous incidents in the South China Sea since 2010 show the need for an enforcement mechanism binding upon the signatories of the code. For Mark Valencia, for example, the code should have a provision stipulating that dispute settlement should be compulsory and adjudicated through an *ad hoc* tribunal.⁸³

Nevertheless, even if on July 20, 2012 the Foreign Ministers of the ASEAN called for “the early conclusion of a Regional Code of Conduct in the South China Sea”,⁸⁴ it would probably not be binding but a mere political declaration. This pessimistic view, shared by many analysts, is based on previous experiences: the 2002 DOC, for example, was downgraded from a legally binding code to a simple declaration.⁸⁵ As in the case of the ZoPFFC, the negotiators clashed over the geographical scope of the DOC: should the DOC cover the whole of the South China Sea or only the disputed areas? What are the disputed areas? The Paracels and the Spratly Islands, as pushed by Vietnam? Or the Spratly Islands only, as advocated by some other countries, like the Philippines? The main stumbling block for the negotiators, however, is the nature of the Chinese claim over the South China Sea and the interpretation of the “U shape line”.

4.2. The South China Sea disputes: an American “conundrum”

The silence and indecision of ASEAN over the South China Sea disputes have deeply frustrated and angered some of the claimants, notably the Philippines and Vietnam. This frustration has contributed to the deepening of their relationships with the United States in order to counterbalance the perceived aggressiveness of China in the South China Sea. In the double context of a shift in foreign policy of the United States from Iraq and Afghanistan to the Asia-Pacific region, and of the dispute over Scarborough Shoal, many Philippine officials, the national media, and public opinion have debated over the possibility of invoking the 1951 Mutual Defense Treaty (MDT)⁸⁶ in case of an escalation of violence with China over the shoal. As rumors and statements of preparation of war circulated in the official Chinese media without censorship, this question became particularly sensitive, pushing Secretary of Foreign Affairs Alberto Rosario to clarify this point.⁸⁷

Can the United States be dragged into the Sino-Philippine dispute over Scarborough Shoal? Officially, the position of the United States over the South China Sea disputes is close to the position of ASEAN. The United States has repeatedly said that they do not take sides in these territorial disputes but enjoin the claimants to resolve their differences peacefully in accordance with international law and with respect of freedom of navigation. However, this principle of neutrality is counterbalanced by the Treaty obligations of the United States. The 1951 MDT can be invoked in three cases of attacks: 1) on the metropolitan territory of the Philippines (or the U.S.); 2) on the island territories under the jurisdiction of the Philippines (or the U.S.) in the Pacific

⁸³ Mark Valencia, *A Code of Conduct for the South China Sea: Politics, Principles and Possible Provisions*, Kuala Lumpur, Maritime Institute of Malaysia, 2012, p. 33, at http://www.mima.gov.my/images/stories/ResearchCentres/SOM/Research_Project/2012_RP/som%20-%20guiding%20principles%20for%20a%20code%20of%20conduct.pdf

⁸⁴ Rodolfo Severino, *A Code of Conduct for the South China Sea?*, Pacific Forum CSIS, Honolulu, Hawaii, August 17 2012, p. 1 at <http://csis.org/files/publication/Pac1245A.pdf>

⁸⁵ Rodolfo Severino, *op. cit.*, p. 1 at <http://csis.org/files/publication/Pac1245A.pdf>

⁸⁶ Mutual Defense Treaty between the Republic of the Philippines and the United States of America, August 30, 1951.

⁸⁷ Statement of Foreign Affairs Secretary, Alberto Rosario, regarding the Philippines-U.S. Mutual Defense Treaty, May 9, 2012 at <http://www.gov.ph/2012/05/09/statement-of-secretary-del-rosario-regarding-the-philippines-u-s-mutual-defense-treaty-may-9-2012/>

Ocean; 3) on the armed forces, public vessels, or aircraft of the Philippines (or the U.S.) in the Pacific Ocean.⁸⁸

If we apply the MDT to the case of Scarborough Shoal, several remarks can be made. Since the promulgation of the 2009 baseline law, the Philippine government clearly does not consider that the shoal is part of its metropolitan territory. However, as we have seen, the claim over Scarborough Shoal was made some 13 years before the signing of the 1951 MDT. No lesser persons than the President of the Commonwealth, the High Commissioner in the Philippines, the Secretaries of State of the Navy, of Commerce, and of War concurred with this claim. If the expression "Pacific Ocean" integrates also the South China Sea,⁸⁹ Scarborough Shoal could possibly be considered as part of the category "island territories". Moreover, an attack on any public boat of the Philippines patrolling around the shoal could prompt the decision to invoke the MDT.

Thus, the risk could be potentially high for the United States to be embroiled in the bilateral dispute. The Chinese government is conscious of this risk and has sent to Scarborough Shoal only civilian ships belonging to the Bureau of Fisheries and State Oceanographic Administration.⁹⁰ However, at the beginning of the standoff between the two countries, in April 2012, the Philippines used a warship, unsuccessfully, to enforce its fishery laws on the shoal. This act was considered a provocation by the Chinese, and could have easily escalated into violent acts if the Philippines did not recall its warship and replace it with civilian boats from the Coast Guard and the Bureau of Fisheries. Moreover, the Filipino Coast Guard has observed the dangerous behavior of the Chinese boats trying to intimidate the smaller Filipino boats, by maneuvering so close to them and the reef and at such high speed that an accident could have easily happened, potentially escalating into a more serious situation.⁹¹ These potentially dangerous behaviors at sea should probably be addressed in the future Regional Code of Conduct in order to reduce the risks of escalation and involvement of a third party.

However, the invocation of the MDT does not mean an automatic armed response. In fact, the two parties would meet and decide their next move. These actions could range from the status quo, to diplomatic sanctions, to an armed response.⁹² Few analysts consider that the United States would risk damaging their larger bilateral relationships with China for the sake of Scarborough Shoal. Moreover, the capacity of the United States to intervene quickly in the South China Sea for the defense of the Philippines would depend on their access to the facilities situated on the island of Luzon, and the possibility of prepositioning their forces.⁹³ This last point could become a bone of contention between Filipino nationalists across the whole political spectrum and the Aquino administration.⁹⁴ If the various nationalist groups have been highly supportive of the strong position of the Aquino administration during the standoff with China, they would probably withdraw their support from the government if the price to pay for the security of the Philippines were the return of an important and visible American presence to the country. Nevertheless, the

⁸⁸ Article 4 of the 1951 Treaty stipulates that, "Each Party recognizes that an armed attack in the Pacific area on either of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common dangers in accordance with its constitutional processes".

Article 5 defines the territory covered as, "an armed attack on either of the Parties is deemed to include an armed attack on the metropolitan territory of either of the Parties, or on the island territories under its jurisdiction in the Pacific Ocean, its armed forces, public vessels or aircraft in the Pacific".

⁸⁹ According to Foreign Secretary Alberto del Rosario, the U.S. Ambassador in the Philippines, Thomas C. Hubbard, confirmed, in a letter to Foreign Secretary Domingo L. Siazon, dated May 24, 1999, that the Pentagon considers the South China Sea as a part of the Pacific. See Statement of Foreign Affairs Secretary, Alberto Rosario, *op. cit.*, May 9, 2012.

⁹⁰ Carlyle A. Thayer, *Standoff at Scarborough Shoal: Implications for U.S.-China Relations*, May 9, 2012, at <http://www.chinausfocus.com/peace-security/standoff-at-scarborough-shoal-implications-for-us-china-relations/>

⁹¹ <http://globalnation.inquirer.net/35177/philippines-denounces-china-for-bullying-tactics>

⁹² Walter Lohman, *Scarborough Shoal and Safeguarding the American Interests*, Issue Brief, n°3603, May 14, 2012, The Heritage Foundation, p. 2, at <http://www.heritage.org/research/reports/2012/05/south-china-sea-dispute-between-china-and-the-philippines-safeguarding-americas-interests>

⁹³ Renato Cruz De Castro, "Future Challenges in the U.S.-Philippines Alliance", *Asia Pacific Bulletin*, n°168, June 26, 2012, East-West Center, p. 2, at <http://www.eastwestcenter.org/publications/future-challenges-in-the-us-philippines-alliance>

⁹⁴ Renato Cruz De Castro, *op. cit.*, p. 2.

United States can use the MDT as a “sword of Damocles” hanging over the head of China and develop their own “strategic ambiguity”.⁹⁵

Conclusion

1) The Philippines's claim on Scarborough Shoal can be, probably, based on several activities of the Spanish Navy during the 19th century. The Spanish authorities surveyed, mapped, and named the shoal, and organized rescue operations there. These actions, pursued during the American time, were limited due to the fact that the shoal was far from the coastal area of Luzon and mostly submerged at high tide. The shoal was nevertheless in the sphere of influence of the Philippines. During all this time, there is no evidence of a Chinese interest, no protest by the Emperors of the Qing Dynasty, and no description of fishing activities on this shoal. Even the Paracel Islands, closer to China, were not part of the imperial territory before 1909.

2) In 1937-38, the colonial authorities, either American or Filipino, claimed Scarborough Shoal. This claim was supported by the State Department and other important mainland administrations. The transfer of the shoal could be done by invoking the Treaty of Washington of 1900. Parallel to the Filipino claim, the Chinese government made a blanket claim in 1935 to all the features of the South China Sea, among them Scarborough Shoal. Nevertheless, with the exception of the Paracel Islands, the Chinese authorities recognized that they had only one piece of evidence to justify their huge claim: the presence of their fishermen from Hainan. This preventive claim could be justified later, in the future, by more thorough research. The Filipino and Chinese claims were not publicized to the whole world, probably to avoid attracting the attention of the Japanese.

3) Up to the 1990s, the Philippine government had some activities that went unchecked by Chinese administrations (both mainland China and Taiwan). These activities, like stopping smuggling activities, bombing the facilities of the smugglers, arresting some of them, building a small lighthouse with a Filipino flag, and possibly the U.S. and Filipino navies using the shoal for target practice were all state practices limited by the fact that the shoal is mostly underwater. Moreover, the constitutions of 1973 and 1987 defined the main territory of the Philippines archipelago but added, “and all other territories over which the Philippines has sovereignty or jurisdiction”. Having been claimed by the Philippines since 1937-38, Scarborough Shoal could logically enter the category “other territories”. This category would recognize the special position of this shoal as under the sphere of influence of the Philippines during the Spanish time but not part of the main archipelago. The three laws on the baselines (1961, 1968, and 2009), excluding the shoal from the main archipelago, tend to reinforce the idea of a special maritime territory.

4) The activities of the Chinese government on the shoal started at the end of the 1970s. The protests of the Chinese in the decades before were never targeted to the Filipino activities on Scarborough Shoal, but to activities in the Spratly and Paracel areas. It was the occasion to tell to the world that China was claiming all the features of the South China Sea, among them Zhongsha Qundao.

5) The four points above concern the possible land title of the Philippines over the shoal. These must be combined with the jurisdiction over the water surrounding the shoal. By showing to the ITLOS that Scarborough Shoal is a *low tide elevation* with few rocks above sea level, the Philippines could neutralize the EEZ around the shoal that the Chinese are eyeing. Nevertheless, this move could push China to choose to interpret radically the symbol of the “U-shape line” and

⁹⁵ Walter Lohman, *South China Sea: Make the Chinese Guess*, April 21, 2011, the Heritage Foundation, at <http://blog.heritage.org/2011/04/21/south-china-sea-make-the-chinese-guess/>

attempt to enforce its jurisdiction in all the waters encircled by the line, with significant consequences on the security and stability of the region.

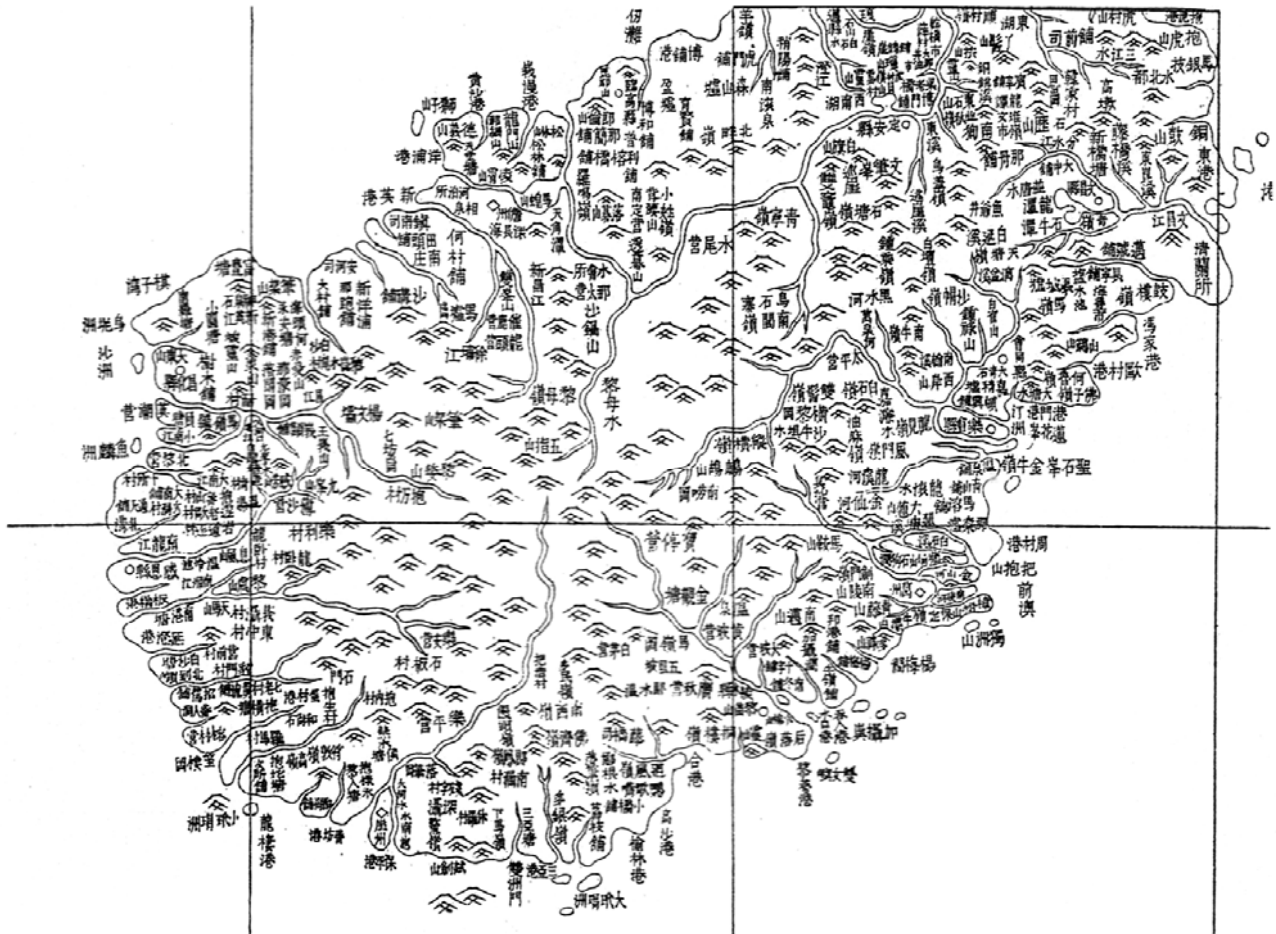
6) The neutralization of Scarborough Shoal is also in the interest of the other ASEAN countries, as it would reduce considerably the possibility for China to claim the whole South China Sea. However, the 2012 standoff on Scarborough Shoal has put the spotlight on the deep divisions among the ASEAN member states. A regional Code of Conduct for the South China Sea, binding all the claimants, would be necessary to reduce the tensions. However, the possibility is high that the COC would become a simple declaration under the influence of China.

7) Last but not the least, the Philippines's claim was made 13 years before the Mutual Defense Treaty was signed with the Americans in 1951. The claim was supported and encouraged by the highest personalities in the American administration of the time. Scarborough Shoal could possibly be considered as part of the MDT's category, "island territories". The United States and the Philippines can develop a "strategic ambiguity" on the possible use or not of the Treaty. This strategy could "help protect the Philippines and peace and stability in the South China Sea".⁹⁶

⁹⁶ Walter Lohman, *op. cit.*, April 21, 2011.

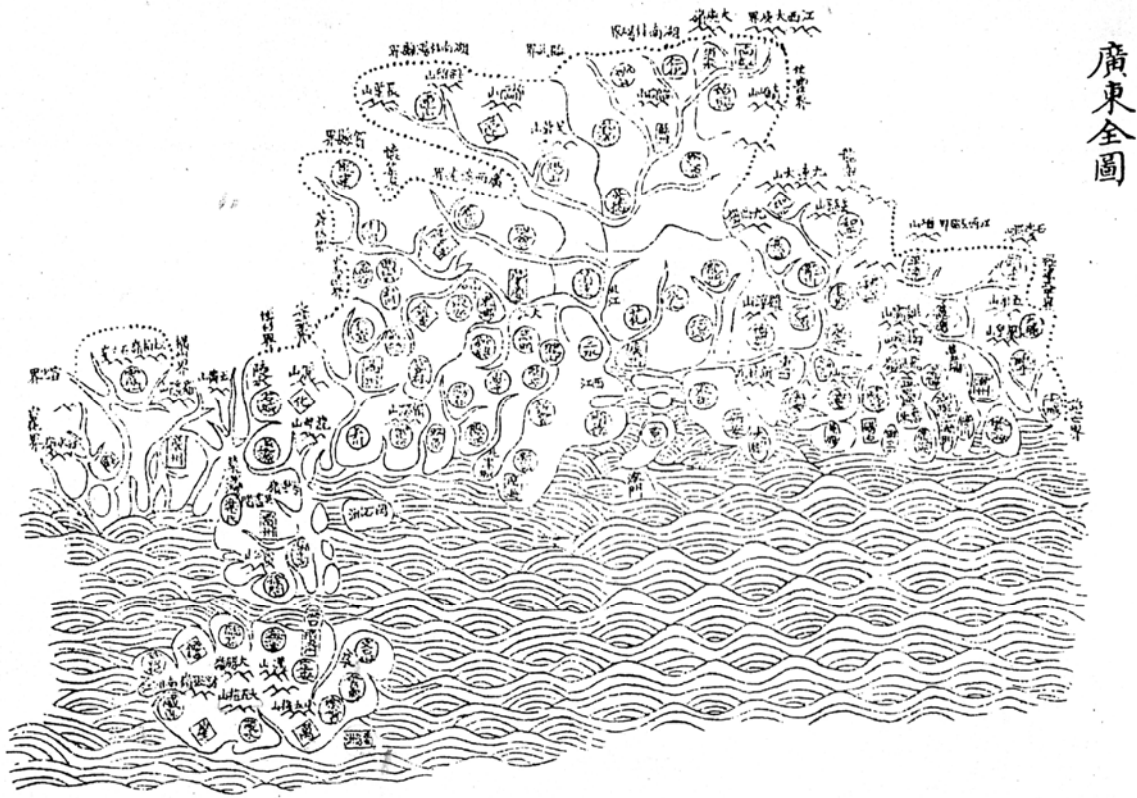
Annex 1

Ancient Administrative Maps of China

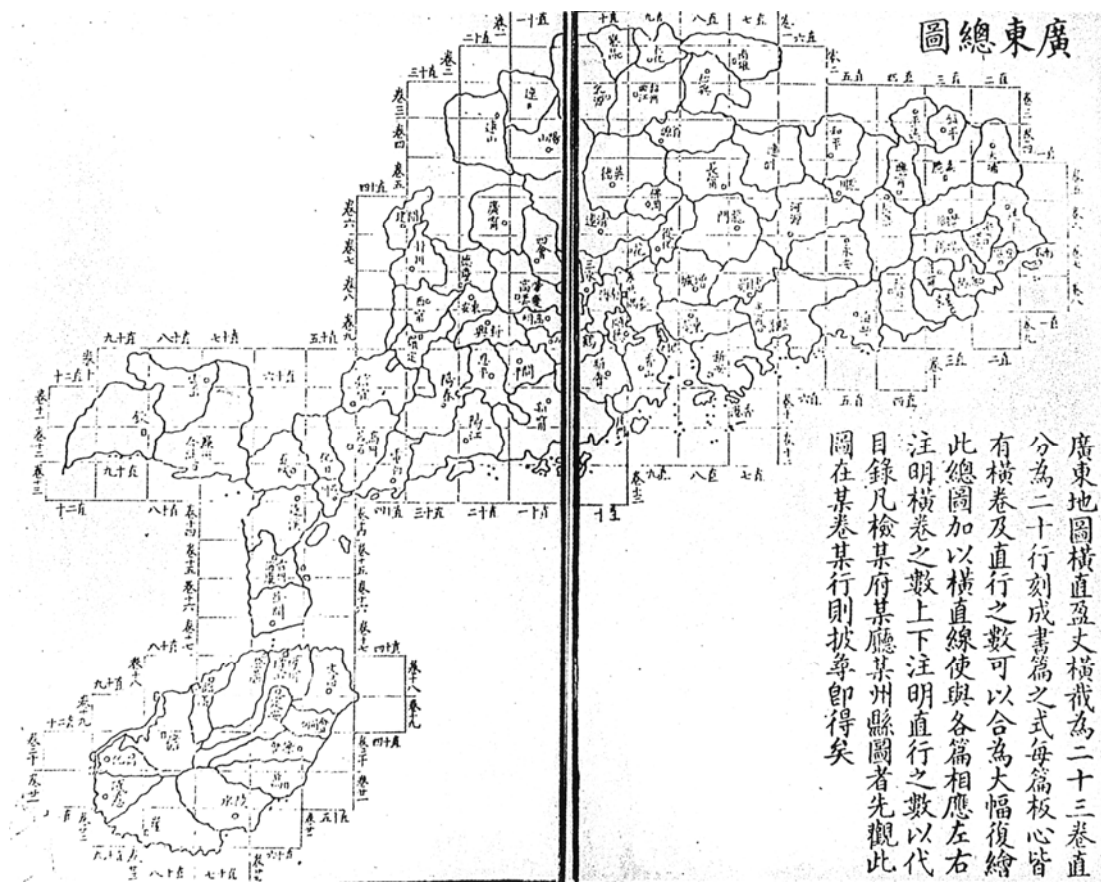


Map 1. *Qing dai yi tong di tu* [Administrative atlas of the Qing Dynasty], by Zhang Qiyun Jian Xiu, first edition 1760

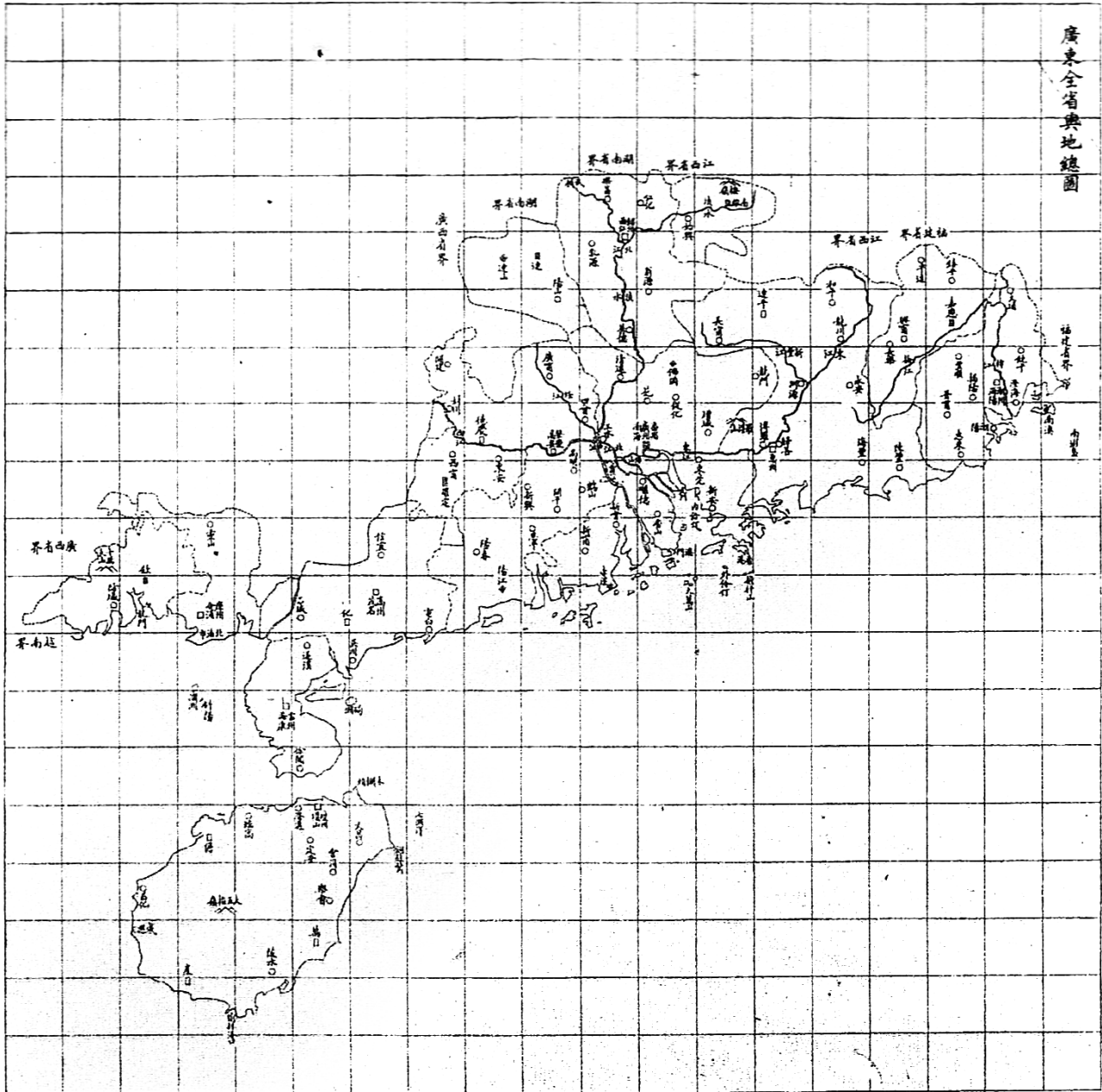
This very detailed map of Hainan Island shows precisely all the sand banks, islets, etc. around the main island. Xisha, Zhongsha, and Nansha were not part of the administrative map of the Qing Dynasty in 1760.



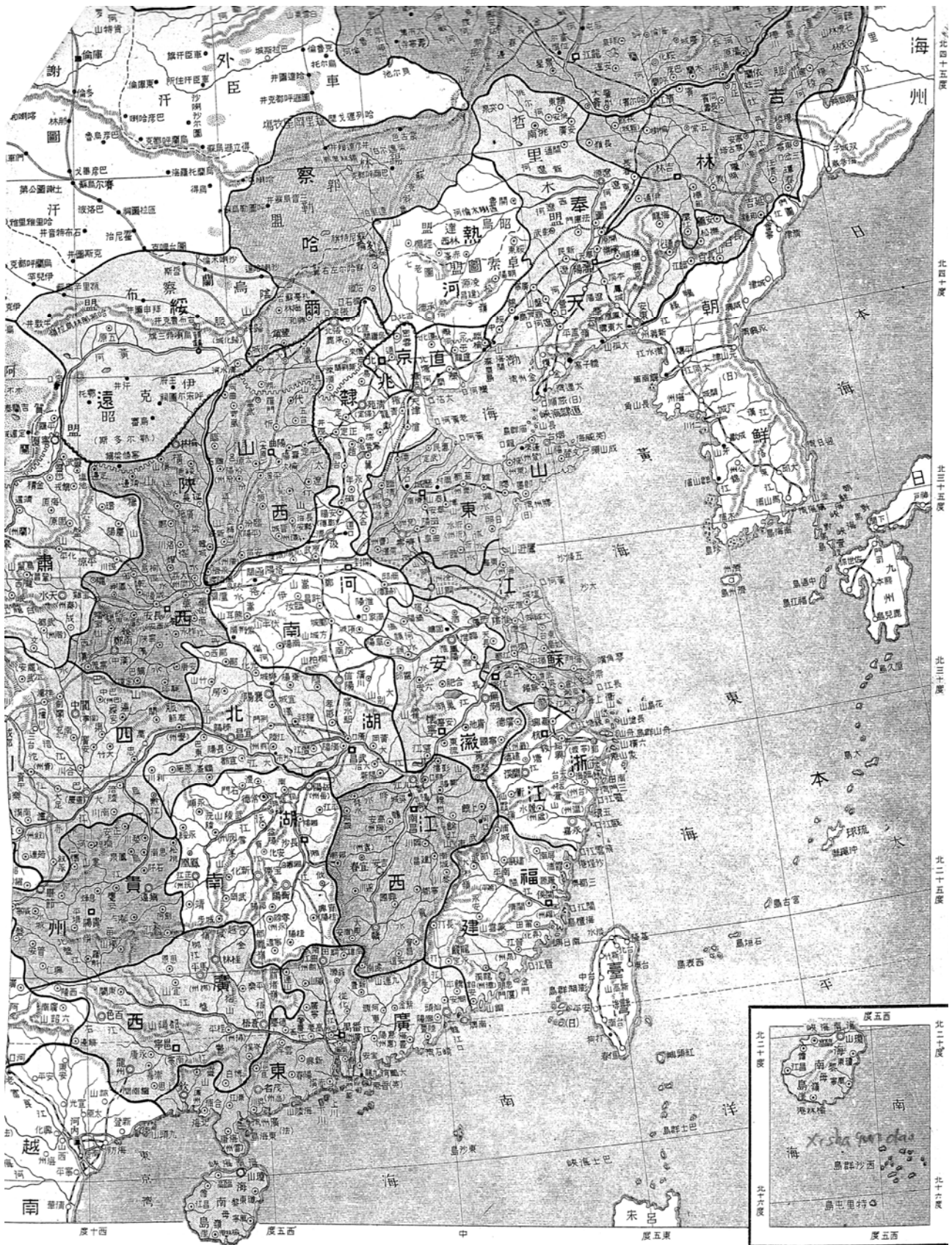
Map 2. *Da qing yi tong zhi* [Administrative book of the Qing Dynasty], 1784



Map 3. *Guangdong dong tu* [General map of Guangdong Province], 1866 (source: Zheng Xihuang (ed.), *An atlas of ancient maps in China*, Volume 3, 1997, No 196)

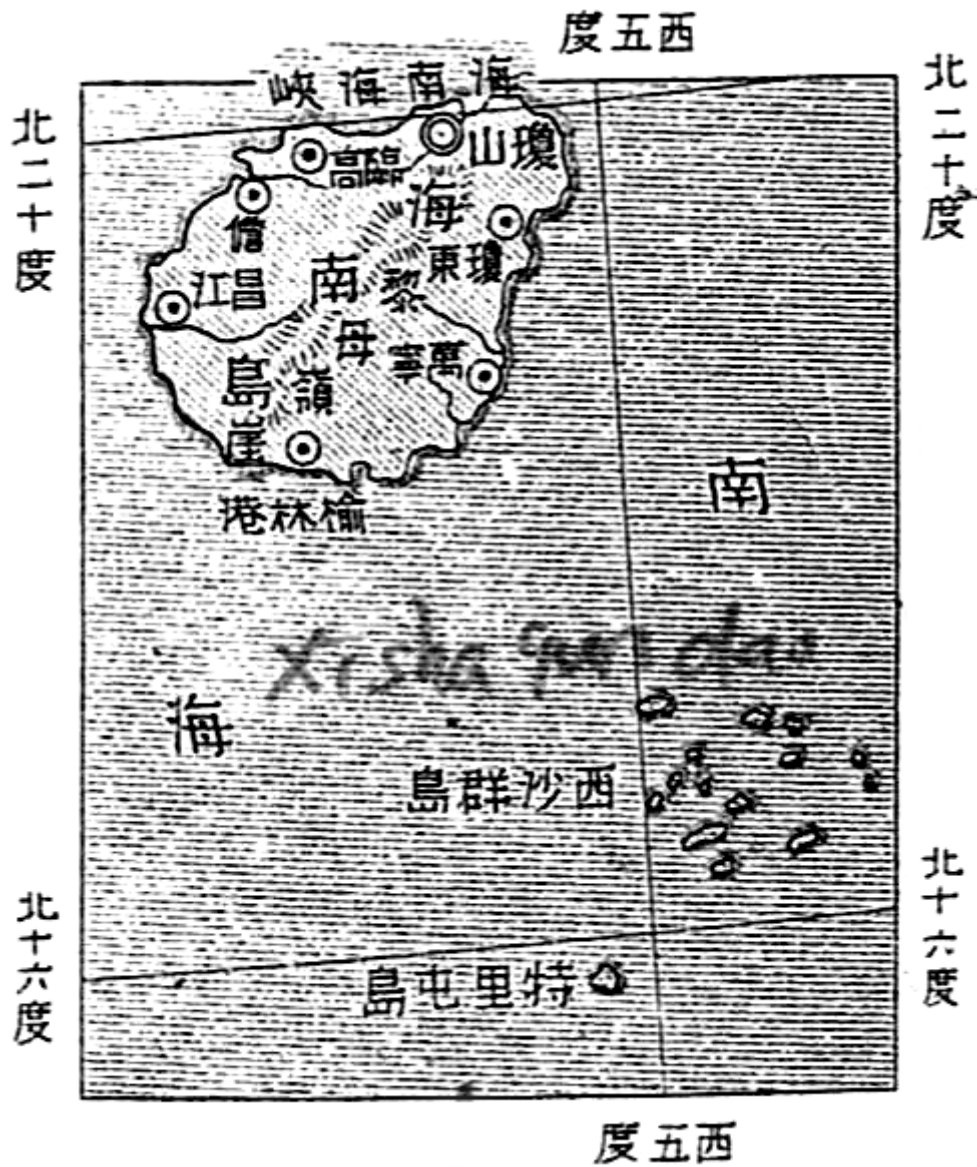


Map 4. Guangdong Yudi Quantu [Atlas of Guangdong Province], 1897 (source: *China in ancient and modern maps*, Sotheby's publications [multiple authors]: Philip Wilson Publishers Limited, 1998, p. 247)



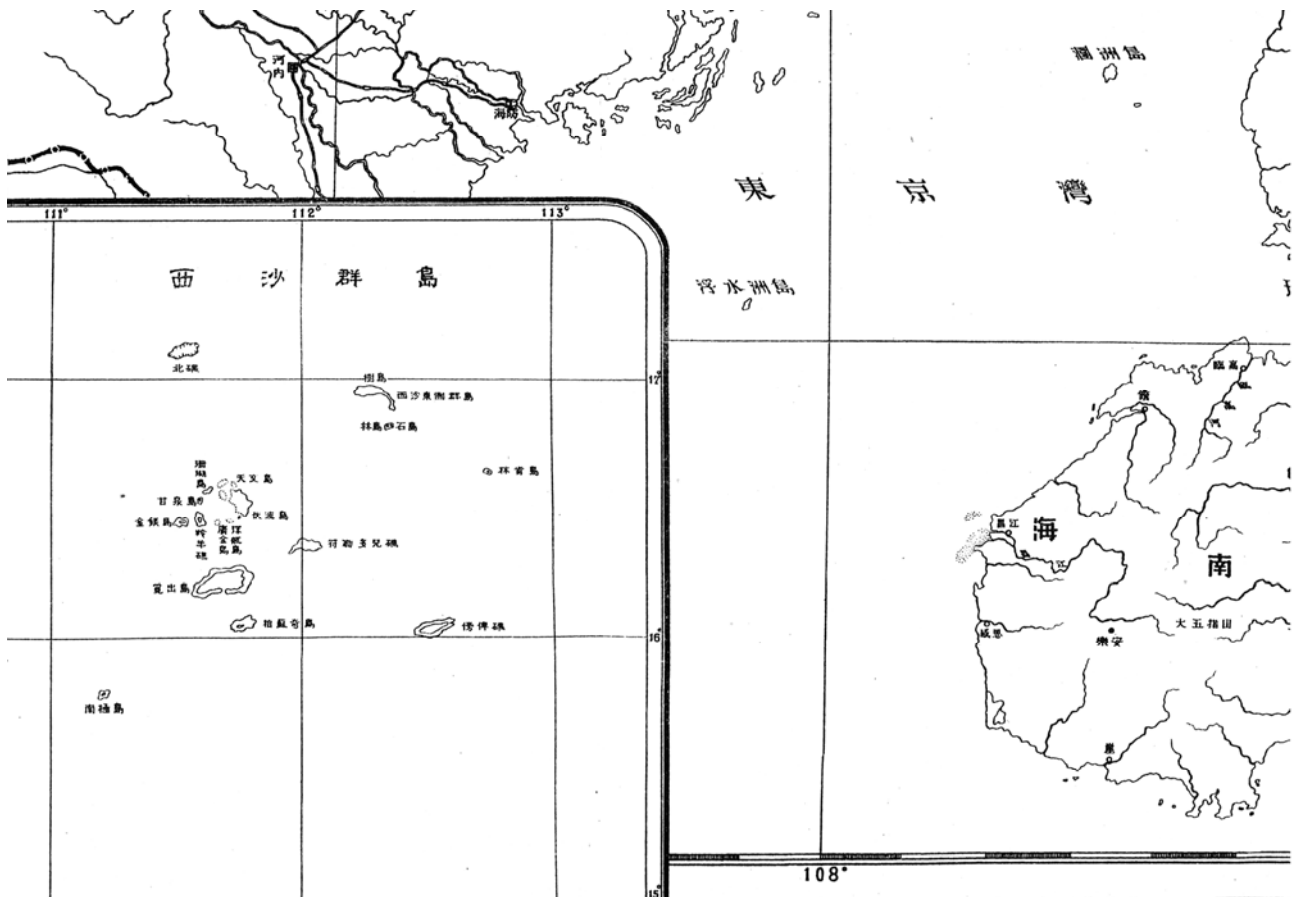
Map 5. *Zhonghua min guo xin qu yu tu* [Map of the new territory of the Republic of China], by Tong Shiheng, Shanghai: Zhong Wai yu tu ju, Minguo 6 [1917]

Since 1909, the Paracels are integrated in the maps of China. On this map of 1917, the Paracels are in the small frame, right corner (see details Map 6).



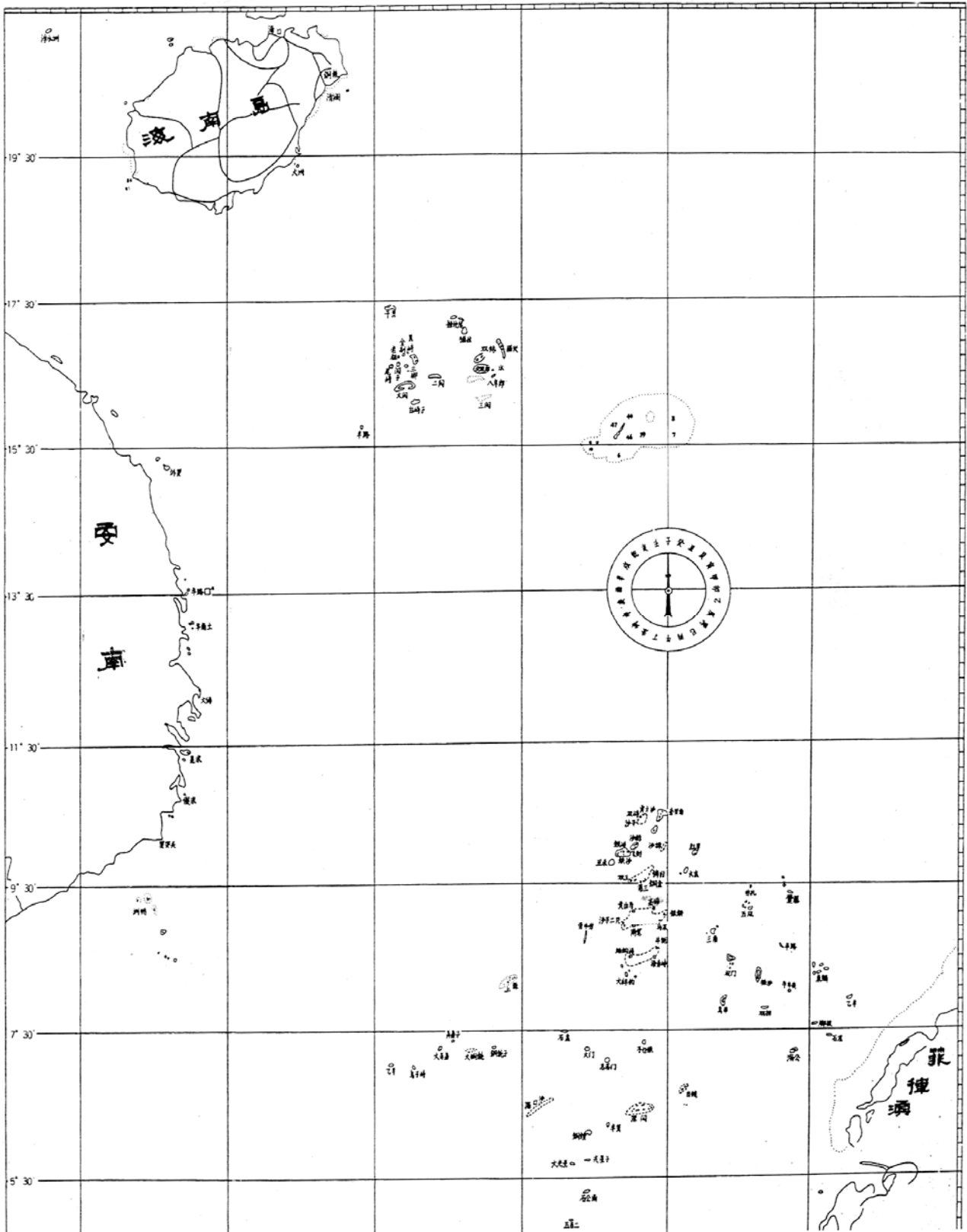
Map 6. Details of the *Zhonghua min guo xin qu yu tu*, 1917

The southernmost part of Xisha Qundao (Paracels) is *Te li tun dao*, the phonetics for Triton Island. Scarborough Shoal and the Spratly Islands are not part of the Chinese territory.



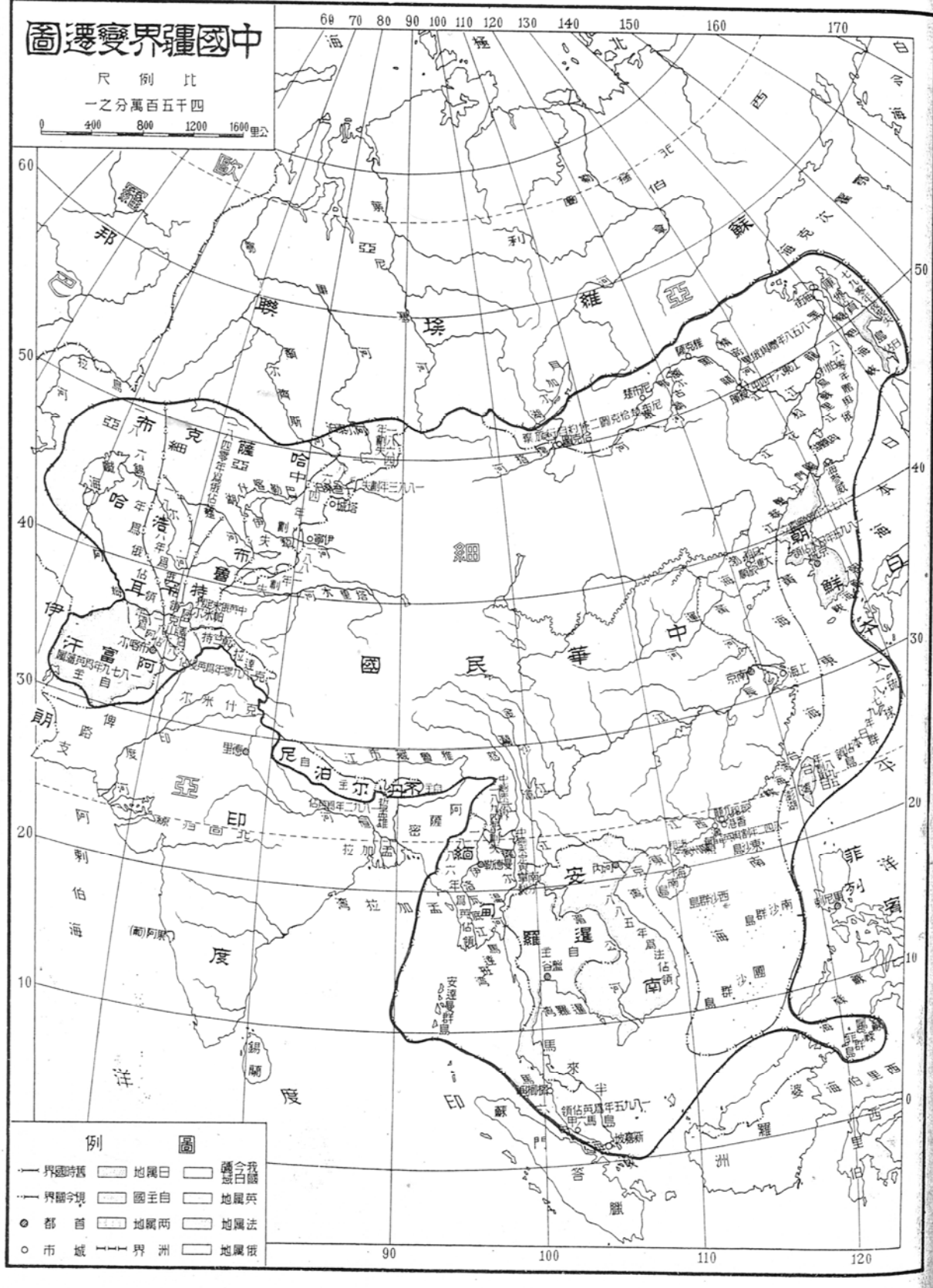
Map 7. Details of the *Liang guang di tu* (Map of Hainan and Guangdong Province), Guangdong, Minguo 20 [1931]

The year the Committee on National Territory started its work (1931), the province of Guangdong published this large map showing, in the frame (corner left), only Xisha Qundao as part of its territory.



Map 8. Map made in 1977 from sketches by a fisherman, Mr. Fu Hong Guang, in 1935 (source: Committee on Toponymy of Guangdong Province, *Compilation of the References on all the Names of the Islands of the Southern Sea*, Calligraphy by Ling Shi Tang, Guangdong Map Publishing Company, 1987, p. 86)

This map shows the fishing grounds of the Paracel Islands, Macclesfield Bank, and the Spratly Islands, but nothing about Scarborough Shoal.



Map 9. *Xin Zhongguo fen sheng tu* [New map of the provinces of China], by Tu Sicong and Wang Zhen Bian Zuan, [Chongqing]: Sheng huo shu dian, 1939, p. 45

The thick black line shows the tributary states of China in the past. The thin line in the South China Sea shows the actual limits of the territory of China, as perceived by the two authors.

Annex 2

Transcriptions of some records, concerning Scarborough Shoal, in the Bureau of Insular Affairs papers (BIA) in the U.S. National Archives Records Administration (NARA).

Letter from Wayne Coy, Office of the U.S. High Commissioner in Manila, to Thomas J. Maher, U.S. Coast and Geodetic Survey Manila, December 6, 1937 (Reference: BIA 907.127 NARA)

Dear Captain Maher,

Scarborough Reef (Shoal) lies some 200 miles north of Manila almost on the Manila-Hong Kong air line. Can you tell me whether or not it is outside of Philippine territorial waters, and if it is outside of Philippine territorial waters, is it unclaimed?

Cordially yours,
Wayne Coy

Letter of Thomas J. Maher, Director of Coast Surveys to Wayne Coy, Office of the U.S. High Commissioner in Manila, December 10, 1937 (Reference: BIA 907.127 NARA)

Dear Mr. Coy,

In reply to your letter dated December 6, 1937, I am forwarding you the following:

- a) Extract from India Directory 1836
- b) One extract from "Derrotero de Archipelago Filipino" dated 1879, with translation
- c) One extract from the China Sea Pilot, Vol II, British Admiralty
- d) One extract from the Coast Pilot, French Hydrographic Office
- e) One copy of Chart n° 4200 on which are outlined the treaty limits of the Philippine Islands

You will note that the eastern limit of Scarborough Shoal is about 9 miles west of the treaty limits outlined on chart 4200.

We have not carried our surveys, in this section, to the treaty limits as outlined. The location of Scarborough Shoal or Reef has not been determined by this organization.

The limits as shown are based on:

- The Treaty of Paris, December 10, 1898
- Supplemental treaty dated November 7, 1900
- Arbitral award, Permanent Court of Arbitration at the Hague, April 4, 1928
- Presidential proclamation, January 2, 1930 based on a convention between the United States and Great Britain.

The Treaty of Paris might be interpreted as setting the limits of jurisdiction within certain specified boundaries. The supplemental treaty removed any possible ambiguity as to jurisdiction extending to all Spanish territory in the Philippine Archipelago. The Arbitral award of April 4, 1928 recognized the jurisdiction of the Netherlands over Palmas Island which is situated approximately twenty five miles westward of the eastern limits as defined by the Treaty of Paris or twenty five miles within those limits. The Convention as set forth in the proclamation dated January 2, 1930 extended the original Treaty of Paris limits in the southwest area. The limits are determined by extent of territory instead of by fixed boundaries. These two changes show the flexibility of the limits: in one case, favorable in so far an extension was concerned; in the other unfavorable, in so far as the result was a loss of territory within boundaries described in the Treaty of Paris.

It may be of interest to note that modern charts show Scarborough Shoal or Reef as the closest to Luzon in that latitude. However, there are areas between Luzon and Scarborough Shoal or Reef which have not been surveyed.

Copies of charts on file in this office, the originals apparently dating back to 1727 indicate that there is a strong possibility of Scarborough Shoal or Reef having been known prior to the grounding on it of the Scarborough, as they show a shoal in the same latitude as Scarborough but differing in longitude, in the direction in which navigation in those days was most weak.

These old charts show several shoals off the west coast of Luzon. One is listed as Bco de Masingolo O' Panacot. Other charts show a similar shoal with the name somewhat modified. All are in practically the same latitude as Scarborough Reef or Shoal, but situated closer to Luzon, yet Scarborough Reef or Shoal, is today the closest known reef or shoal to Luzon in that latitude.

The technique of navigation a century and a half and more ago was such that, from shipboard, latitude could be determined with the necessary accuracy, but the determinations of longitudes were often accompanied by marked uncertainties if not inaccuracies. This great variation in longitude, even with respect to this one shoal, is shown on a chart of the China Sea believed to have been published or compiled about 1770 and contained in a volume believe to be solely the *Oriental Neptune*, though this map may have been compiled by Dalrymple. Three different locations of Scarborough Shoal apparently by different navigators are noted. All are practically in the same latitude but with an extreme difference in an east and west direction of about 140 miles. "B" location is about 80 miles west of the location most nearly agreeing with the accepted position. Location "A" is about 60 miles west of location "B" (Distances subject to correction as units of latitude were used as an approximate scale without investigation of chart distortion). Remarks intended as illustration of errors in location only.

While conversing with the Commanding officer of the British ship *Herald* regarding surveys of Asiatic waters, I asked him if he had been to Scarborough Shoal and if on account of the grounding of the Scarborough it were considered British. He did not answer my question, but said that it was no good. Acceptance of that statement, in its fullest meaning, would require some information as to the basis of his point of view. From necessity, not from choice, I have ridden out a typhoon within Apo Reef, a place which could not be called good, either.

Mr. Maynard, in charge of one of the Divisions of this office, informed me that a trader stated to him that he and some others organized a party which visited Scarborough Shoal; that excellent pearls could be obtained there and that there was a considerable quantity of pearls shells, but that rough weather was experienced and nothing was accomplished.

You probably have in your files news clippings (*Bulletin* July 27, 1933; *La Vanguardia* August 22, 1933) regarding the occupancy of certain islands in the vicinity of the Great Danger Reef. Under date of July 26, 1933 the Consul General of China requested information regarding the 9 islands west of the Philippines reported as having been taken over by the French government. I doubt that the possibility of laying claim to Scarborough Shoal or Reef had been overlooked by those scouring this section of the Pacific. Inquiry might therefore be made of the State Department as to whether they have information regarding definite ownership.

An expression of opinion as to ownership or what constitutes ownership will not be made by this office. Only the data, or references thereto on file in this office are submitted for consideration, viz:

- 1) Coast Pilot records of grounding of the Scarborough, 1748
- 2) Old charts indicating prior discovery or knowledge
- 3) Reference to survey in April 1800 by a Frigate sent by the Spanish Admiral from Manila.

If this survey would confer title on Spain or be a recognition of sovereignty, or a claim for same without protest, the Reef would apparently be considered as part of Spanish territory the transfer of which would be governed by the treaty of November 7, 1900.

A survey of the shoal is desirable for several reasons (see paragraph 3). If the survey shows an atoll or a rim enclosing deep water, it should be visited during both monsoons, for the purpose of observing the turbulence of the sea within.

Consideration might be given to the establishment of an unwatched skeleton steel frame light and to a determination of its feasibility.

I am also referring you to the Commandant, Navy Yard, Cavite, Bureau of Insular Affairs and the State Department.

Respectfully,
Thomas J. Maher

Letter of Jorge B. Vargas, Office of the President of the Philippines, to Wayne Coy, Office of the U.S High Commissioner in Manila, March 31, 1938 (Reference: BIA 907.127. NARA)

Sir,

I have the honor to enclose herewith for transmission to the Department of State, Washington, D.C, papers relative to the Scarborough Shoal.

The Commonwealth Government desires to study the possibilities of the reef, particularly as to its value as an aid to air navigation. It is requested, therefore, that inquiry be made of the State Department as to what information is available regarding its ownership. In case it should appear that the reef is of value to air or ocean navigation, the Commonwealth Government may desire to claim title thereto, should there be no objection on the part of the United States Government to such action.

Very respectfully,
Jorge B. Vargas

**Letter of State Secretary Cordell Hull to the Secretary of War, Harry H. Woodring, July 27, 1938
(Reference: BIA 907.127. NARA)**

My dear Mr. Secretary:

The receipt is acknowledged of the War Department's letter of May 24, 1938, transmitting correspondence received from the United States High Commissioner relative to Scarborough Shoal, and to a desire of the Government of the Commonwealth of the Philippines to study the possibilities of this shoal, particularly with respect to its value as an aid to air navigation. With the intention of possibly laying claim thereto if no objection be interposed on the part of the Government of the United States, the Commonwealth Government inquires as to what information the Department of State may have on the subject of the ownership of the shoal.

This Department has no information in regard to the ownership of the shoal other than that which appears in the file attached to the letter under reference. While the shoal appears outside the limits of the Philippine Archipelago as described in article III of the American-Spanish Treaty of December 10, 1898, it would seem that, in the absence of a valid claim by any other government, the shoal should be regarded as included among the islands ceded to the United States by the American-Spanish Treaty of November 7, 1900. This view would appear to be warranted by the following considerations:

1) The record of a survey of the shoal made in April 1900 by a ship sent out by the Spanish Admiral at Manila (see page 3 of letter of December 10, 1937 from the Director of Coast Surveys to the Office of the United States High Commissioner).

2) The fact that the shoal is in the general region of the Philippine Archipelago and that the nearest land is the island of Luzon, approximately 120 miles distant.

3) The absence of any evidence of any claim to the shoal by any other government.

Accordingly, in the absence of evidence of a superior claim to Scarborough Shoal by any other government, the Department of State would interpose no objection to the proposal of the Commonwealth Government to study the possibilities of the shoal as an aid to air and ocean navigation, provided that the Navy Department and the Department of Commerce, which are interested in air and ocean navigation in the Far East, are informed and have expressed no objection to the course of action contemplated by the Commonwealth Government.

The enclosures with your Department's letter of May 24 are returned herewith.

Sincerely yours,
Cordell Hull

**Letter from W. R. Furlong, Acting Secretary of the Navy to Louis Johnson,
Acting Secretary of War, August 27, 1938 (Reference: BIA 907.127. NARA)**

Sir,

Receipt is acknowledged of your letter of 1 August 1938 and the accompanying papers, with reference to the international status of Scarborough Shoal.

It is noted that the Commonwealth Government of the Philippine Islands desires to study the possibilities of this reef, particularly as to its value as an aid to air navigation and with the possibility of later claiming title thereto should there be no objection on the part of the United States Government to the such action.

The papers accompanying your letter, which are returned herewith, have been carefully considered and this Department has no objection to the course of action contemplated by the Commonwealth Government.

Respectfully,
W. R. Furlong