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SOUTH CHINA SEA DISPUTE?**

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1. Introduction

China faces in the South China Sea what is probably the world's most complex international legal dispute. The South China Sea is a semi-enclosed sea that is surrounded by no less than nine independent states, all with conflicting claims to islands and maritime zones in the area. The Chinese claims are being pursued not only by the People's Republic of China (PRC), but also by the government in Taipei (Taiwan). Sovereignty to the Paracel Islands is disputed between China and Vietnam, and the following states claim islands or maritime zones in the huge Spratly area: the Philippines, Malaysia, Brunei, Vietnam, China (and Taiwan). In addition, Scarborough Reef, in the northeastern part of the South China Sea, is disputed between the Philippines, China (and Taiwan). The disputes in the South China Sea will be difficult to resolve and thus will present an enormous diplomatic challenge for the Chinese government, as well as for the other governments in the region. (see Figure 1 for location of places mentioned)

"Track 2" workshops, with unofficial representatives of all the countries around the South China Sea (including Taiwan), have been organised annually throughout the 1990s by Indonesian ambassador Hasjim Djalal and Canadian law professor Ian Townsend-Gault. Towards the end of the decade, the dispute was also raised in official forums where China and the ASEAN countries took up matters of mutual concern. Talks between ASEAN and China began in 1999 with the aim of agreeing on a regional code-of-conduct to prevent further militarisation of the disputes, and to enter into a process of conflict resolution. The talks continued in March 2000, and were seen as productive although they did not lead to an agreement. The risk of open warfare is not the only reason why a code-of-conduct is needed. Other compelling reasons are the ongoing destruction of coral reefs and the depletion of fish stocks, the need to suppress piracy,¹ the urge to get on with drilling for oil and gas in disputed areas, and the desire to remove the South China Sea conflict as an obstacle to regional cooperation. Resolving the South China Sea conflict is bound to rank high on any human security agenda.

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¹ See Zou Keyuan. "Enforcing the Law of Piracy in the South China Sea". *Journal of Maritime Law and Commerce*, volume 31, number 1 (January 2000), pp. 107–117.



Figure 1. Countries and disputed areas in the South China Sea

So far the People's Republic of China has pursued a policy that has failed to instil confidence in the rest of the region. China's reactions to proposals for environmental cooperation or conflict management have been characterised by hesitation, while the Chinese navy has steadily increased its presence in the contested areas. China's present policy can be summed up in seven points:

- (i) A claim that China has irrefutable sovereignty to the Paracels (Xisha), the Macclesfield Bank (Zhongsha), Scarborough Reef (Huangyan) and all the islets and reefs in the huge Spratly (Nansha) area (i.e., all isles within the so-called nine-dotted line).
- (ii) Wide-ranging, but undefined continental shelf and maritime zone claims (probably encompassing most of the area within the nine-dotted line).
- (iii) Occupation and construction of facilities on formerly unoccupied reefs in the Spratly area, but no attacks against islets or reefs that are already under occupation by other states.
- (iv) A long-standing, undefined proposal to shelve the sovereignty disputes while establishing joint development.²
- (v) Rejection of proposals for multilateral negotiations, and a preference for resolving the disputes bilaterally with each of the other claimant states; yet reluctant acceptance of multilateral talks within the region about specific issues, such as a code-of-conduct.
- (vi) Rejection of any involvement by extra-regional powers.
- (vii) Repeated promises to follow the rules established in the 1982 United Nations Convention on the Law of the Sea (UNCLOS).³

This adds up to a policy with a number of internal contradictions and dilemmas, the result being that China has adopted a passive, reactive stance. While playing a passive diplomatic role, China has pushed its positions forward both militarily and legally. It has modernised its South China Sea fleet, built an airbase on Woody Island in the Paracels group (which has been entirely occupied by China since 1974), encouraged the fishermen of Hainan and Guangdong to fish in the Spratly area, while at the same time establishing a naval presence there, with exercises, patrols and the construction of permanently manned buildings on several underwater reefs, such as Mischief Reef.⁴

² This proposal was put forward by then Prime Minister Li Peng as early as 1990. Lee Lai To: *China and the South China Sea Dialogues*, p. 18.

³ The acronym UNCLOS may be confusing in that it was previously used to refer to the three conferences of the United Nations on the Law of the Sea, but has now also become the most frequently used acronym for the Convention that resulted from the conferences. In this paper the acronym is used in its new meaning.

⁴ Virtually all of the above-water islands in the Spratly area had been occupied by Taiwan, Vietnam, the Philippines and Malaysia before the PRC Navy entered the area in 1987-88. In March 1988, more than 70 Vietnamese sailors died in an unsuccessful attempt to prevent China from occupying a reef that was close to an island occupied by Vietnam. Since then there have been many episodes, but no real military clashes.

Legally, China has pushed its position forward by adopting new national laws (1992, 1998) that reassert former claims to most of the South China Sea,⁵ and by drawing a radical baseline system in 1996, as point of departure for claiming a vast continental shelf and EEZ (Exclusive Economic Zone). The most contested part of the baseline system is an "archipelagic baseline" around the whole of the Paracels.⁶ China has not, however, made known the precise extent of its continental shelf and economic zone claim and, notably, has refrained from drawing an archipelagic baseline around the Spratly area. This "non-action" is perhaps the most praiseworthy aspect of China's South China Sea policy in the 1990s. If China had claimed the whole Spratly area as a Chinese archipelago with a right to a continental shelf and EEZ around it, this would have blocked any prospect of resolving the disputes in the South China Sea, whether now or in the foreseeable future.⁷

When asked by a journalist in November 1999 if Chinese expansionism is a threat to Southeast Asia, Singapore's Senior Minister Lee Kuan Yew replied:

What do you mean by Chinese expansionism? I don't envisage their coming down to Southeast Asia to capture us. I see them wanting to reunify Taiwan, and later start drilling for oil and gas in the Spratlys. But they will not go into the Philippines, Thailand or Vietnam. They've said they would abide by the Law of the Sea, so these problems should not be insurmountable.⁸

Hopefully, Lee Kuan Yew is right. To take the South China Sea area by force is neither a feasible nor desirable option for Beijing. China has ratified the United Nations Convention on the Law of the Sea (UNCLOS) along with the other states around the South China Sea.⁹ Thus China is committed to abiding by its rules.¹⁰ Although the disputes in the South China Sea are complicated, the claimant states

⁵ Law on the Territorial Sea and the Contiguous Zone (1992). Law of the People's Republic of China on the Exclusive Economic Zone and the Continental Shelf (1998).

⁶ Greg Austin: *China's Ocean Frontier*, pp. 181ff.

⁷ Professor Ji Guoxing (Director of the Institute of International Strategy Studies, Modern Management Centre, Shanghai) has put forward the reckless proposal that China should "define its baselines of territorial seas in the Spratlys by taking as base points such small islands as Itu Abu Island, Thitu Island, Amboyna Cay, Flat Island, Nanshan Island, Commodore Reef, Swallow Reef and Spratly Island, then draw straight lines connecting them in a rectangular form, and define the 200 nautical mile continental shelf instead of the nine-dashed intermittent line". Ji Guoxing, *The Spratlys Disputes and Prospects for Settlement*, Kuala Lumpur: ISIS Issue Paper, 1992: 24, and Ji Guoxing, "China Versus South China Sea Security", *Security Dialogue*, vol. 29, no. 1, March 1998, pp. 101-112 (at p. 103). Fortunately, the Chinese government has not heeded Ji Guoxing's advice. It may be added that Malaysia, which has not yet published any baselines north of Sarawak and Sabah, could possibly be harbouring a similarly dangerous idea of drawing a baseline connecting its claimed islets and reefs in the southern part of the Spratly area.

⁸ *Far Eastern Economic Review*, 11 Nov 1999, p. 28.

⁹ The PRC's "Standing Committee of the National People's Congress" ratified UNCLOS on 15 May 1996 and the ratification was announced in *China Ocean News*, No. 507, 17 May 1996, p. 1. Under international law the date of China's ratification is 7 June 1996, when the instrument of ratification was deposited with the Secretary General of the United Nations.

¹⁰ To the extent that customary law equals the Convention, the states concerned were already bound by its rules before becoming a party to UNCLOS.

can no doubt resolve it diplomatically. It will require a long, sustained effort, but the dispute is far from insoluble. For China to contribute towards resolving the dispute, its government will need a clear diplomatic strategy, a basic understanding of international law, and the necessary courage to reach out for a compromise.

In this paper I will first try to explain why China's diplomacy in the South China Sea has been so passive until now. I will then outline a possible Chinese strategy for assuming a constructive role and resolving the disputes over the next ten-fifteen years.

2. Beijing's Difficulties

On the one hand China has gradually pushed its positions forward by modernising its navy and fishing fleet, awarding oil concessions in disputed areas, adopting new national laws for its maritime zones and trying to enforce them, occupying reefs, and setting up military installations on some of them. On the other hand, it has maintained a passive approach to regional diplomacy, resisting attempts to establish a new regional order. This combination of gradual expansion and diplomatic hesitation is seen by some as the result of a sinister plan to establish regional hegemony. The term "creeping assertiveness" has been used. China's policy, in the view of this author, should rather be seen as reflecting a number of unresolved difficulties, inconsistencies or dilemmas. Before Beijing can adopt a more coherent and active political strategy towards the disputes in the South China Sea these difficulties will need to be addressed. Seven such difficulties will be analysed here.

The first is military. Occupation of islets in the Spratly area has taken on enormous symbolic value. It would not be hard for the Chinese Navy to evict the troops of the Philippines, Malaysia and Vietnam from the reefs and islets they occupy, but it would be extremely difficult to hold such positions afterwards if a hostile force were to launch a counter-attack. The small and exposed islets in the Spratly area are difficult to defend. Only a country enjoying naval supremacy as well as command of the air could defend the Spratly islets; such a country would however have little need for them. The strongest naval power in the region, the United States, has always shown scant interest in the Spratlys, simply because they are of questionable military value.¹¹ It may be useful to have electronic listening posts in the Spratly area, but modern satellite technology can make even these redundant. The islets are primarily of symbolic value. Beijing must therefore weigh the symbolic importance of occupying reefs in the Spratly area against the costs involved in building a capability to defend them. The other occupants (Vietnam, Malaysia, the Philippines and Taiwan) feel this same dilemma. Taiwan admitted in 1999 that it could not defend its island (Itu Aba or Taiping), and announced that its troops there would be replaced by coast guards.

The second difficulty is legal. Chinese legal experts cannot find support for China's (and Taiwan's) vast claims in UNCLOS, which was signed in 1982-84 and

¹¹ Also historically China tended to show little interest in the island atolls of the South China Sea in the periods when China was the strongest maritime power in the region. Marwyn Samuels has noted the irony of the fact that "China's concern for these relatively obscure islets, reefs and rocks grew proportionately to the weaknesses of its own position in the region". Marwyn Samuels, *Contest for the South China Sea*. New York: Methuen, 1982, p. 24.

entered into force in 1994. China has, as mentioned, both signed and ratified the convention, as have the other claimant states (except Taiwan, which has unilaterally declared to abide by it). This means that the states around the South China Sea have committed themselves to abide by the Law of the Sea. There are few, however, who know what this means, but everyone knows the Chinese national map with the famous nine dots encompassing all of the South China Sea. This map, which was first published by Chiang Kai-shek's government in 1947 or 1948, seems to treat the sea as if it were land, subsuming virtually all of it as Chinese territory.¹² The Law of the Sea, however, does not allow any state to subsume huge sea areas in the same way as land, i.e., internal waters. For this to be possible, the sea must be defined as a nation's "historic bay". The South China Sea does not satisfy the conditions for being anyone's "historic bay". China's legal scholars have realised this problem. Some of them now claim that the nine dots should be understood as just indicating a claim to sovereignty to all *islands* within the line. The problem with this position is not only that most of the islands in the Spratly area are occupied by other countries, but also that these islands are probably too small to generate a right to a continental shelf or economic zone. Not only is their military value limited, their economic value may also be minimal since none of them, if UNCLOS is to be followed, is likely to have a right to more than a 12-nautical-mile territorial zone. To be an island at all, an insular feature needs to be above water at high tide (UNCLOS 121.1). To generate a right to a continental shelf and a 200-nautical-mile EEZ, small islands must in addition be able to sustain human habitation or economic life of their own (UNCLOS 121.3); none of the islets in the Spratly area have ever sustained permanent human habitation, except by troops (and the staff of a recently established Malaysian hotel).¹³

The third difficulty has to do with China's need to produce more oil and gas. One of the motives for China's vast continental shelf claims is the expectation of finding hydrocarbons under the seabed. Chinese publications, notably the military ones, have often stated as if it were a fact that there *are* huge quantities of oil and gas in the Spratly area. The truth is that no one knows. Seismic exploration has revealed geologic structures that *may* contain oil and gas, but the Spratly area seems less promising geologically than some other parts of the South China Sea, such as the continental shelf of northern Borneo and southern Vietnam. In addition, to

¹² For two recent attempts to clarify the status of the nine-dotted line, see Peter Kien-hong Yu, "The Chinese 'U-shaped Line' and its Importance in Viewing the South China Sea Strategic Zone", *Defence & Foreign Affairs: Strategic Policy*, (April 1999): 16; and Zou Keyuan, "The Chinese Traditional Maritime Boundary Line in the South China Sea and Its Legal Consequences for the Resolution of the Dispute over the Spratly Islands", *The International Journal of Marine and Coastal Law*, 14, no. 1 (1999), pp. 27–55. Zou Keyuan concludes (p. 52): "On the one hand, it seems that China does not claim everything within the line as can be seen from its diplomatic notes, relevant laws and public statements. What China claims are the islands and their adjacent waters within the line (...). On the other hand, a number of factors may give people the impression that China regards the line as its maritime boundary line."

¹³ UNCLOS 121 (3) reads: "Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf." It has been argued that since some of the Spratly islands are not "rocks", but reefs or atolls, and a few of them have some vegetation, they may generate a right to an EEZ and continental shelf. However, the term "rock" should probably be interpreted as synonymous with "small island". It might also be argued that although these islands have not been able to sustain human habitation or economic life in the past, they may be able to do so in the future, i.e., through tourism or the use of new technology. If this argument is accepted, then any rock or island will in principle be able to sustain human habitation or economic life. UNCLOS 121 (3) will then lose any meaning. The full text of UNCLOS can be found at: <http://www.tufts.edu/departments/fletcher/multi/sea.html>.

determine the likelihood of finding hydrocarbons, it will be necessary to conduct intensive seismic surveys (preferably three-dimensional); and to determine the question with certainty, the oil companies need to drill test wells. Serious oil companies are unlikely to drill for oil until they know on whose continental shelf they are drilling. China's and Vietnam's attempts to induce US companies to drill for oil in the western part of the Spratly area have so far proved unsuccessful. A Joint Development Zone, where many states split taxes between them, and laws and regulations are negotiated multilaterally, would also probably be less attractive to the oil companies than a classic solution where the seabed is divided between the countries concerned, following the principles of delimitation established in UNCLOS. It would be extremely complicated to define the distribution of responsibilities and benefits within a multi-national Joint Development Zone, and if huge quantities of oil and gas are found, conflict over the terms are likely to arise no matter how much work legal experts are putting into the treaty before drilling starts. Thus China, in order to realise its aims of exploring for oil and gas, will probably first have to negotiate a classic treaty of delimitation on the basis of UNCLOS.¹⁴

The fourth difficulty results from China's increased consumption of energy and need to import oil and gas. China can no longer satisfy its energy needs through domestic production, neither onshore nor offshore. Since 1993, China has been a net importer of oil. (In the 3rd quarter of 1999 it was the world's ninth largest importer of oil with more than one million barrels per day.)¹⁵ While northern China still has a surplus production of oil, southeast China (Guangdong, Hong Kong, Fujian) is now heavily dependent on imports. Since it will remain costly to transport oil, coal and electricity from the north to the south, it seems likely that southeast China will continue to import much of its energy. In the beginning of 2000 Beijing also authorised a project to import liquefied natural gas (LPG) to Guangdong. Chinese oil companies have responded to the changing situation by investing in oil exploration in many parts of the world, including the Middle East. China will continue to be much less dependent on import of energy than countries such as Japan and South Korea, but it is significant that China has now started to share the traditional concern of these countries, and of the USA, for the safety of the world's sea lanes.

China can respond to its new problem in two ways. The first is to build a strong blue-water navy that can protect vital sea lanes, escort convoys of tankers if need be, and deter attacks on Chinese ships. Throughout the 1990s the People's Liberation Army Navy (PLA-Navy) has told the country's leaders that this is what they should do. The Beijing leaders are acutely aware, however, that to build a large, modern navy is an extremely costly and long-term project. The other solution is to join up with the world's maritime nations in a principled multilateral defence for the freedom of navigation. This is a solution based on international cooperation and integration. It is certainly more attractive, provided that Beijing can have confidence in its ability to maintain friendly relations with the USA, Japan and India. The military solution is risky, since other countries would see the same blue-water navy that from China's perspective was protecting its sea lanes as a threat to their freedom

¹⁴ However, as will be argued below, it might not be necessary to first resolve the sovereignty dispute over the Spratly Islands.

¹⁵ IEA, oil market report, January 2000 (cited from *Aftenposten*, 25 January 2000). If the figure for Taiwan is included in China's, then China/Taiwan would be the world's fifth largest oil importer after the USA, Japan, Germany and South Korea.

of navigation. The USA is unlikely to accept a development where China gains naval supremacy in the South China Sea, because of the heavily used sea lanes that run from the Strait of Malacca, and the Sunda and Lombok straits in the south to the Taiwan and Luzon straits in the north.¹⁶

The fifth difficulty is environmental. China is becoming more environmentally conscious.¹⁷ There is a growing realisation that the country's coastal population depends on scientifically-based resource management and protection of the marine environment. In 1999 China was for the first time obliged to institute a temporary ban on fishing in the South China Sea. In 2000 it will hopefully go along with a multi-national Strategic Action Plan developed by the United Nations Environment Programme (UNEP) for saving the South China Sea's environment.¹⁸ There is an acute need for international cooperation in the management of fish stocks. There is also a strong need to protect the remaining coral reefs (which are essential to the natural breeding of fish), to protect mangroves, reduce pollution from agriculture and industries, and to establish a capacity for rapid intervention in case of a blow-out or oil-spill from a tanker. The longer China sticks to its passive approach to international cooperation around the South China Sea, the more acute the environmental problems will become. There is also a real risk that fish stocks could be depleted.

The sixth difficulty is Taiwan. Beijing and Taipei have the same claim in the South China Sea, both in the name of China. The first island in the Spratly area that came under permanent occupation by one of today's claimants was Itu Aba, which since 1956 has been under the occupation of Taiwan and also, in the years 1946–50, was occupied by the Republic of China. During the 1990s, Beijing seems to have appreciated the Taiwanese occupation of Itu Aba, since it confirms the identification of Taiwan with China. It would be difficult for Taipei to legitimate its occupation of Itu Aba on purely Taiwanese grounds, and China would deeply resent it if Taipei were to unilaterally withdraw from Itu Aba. At any rate, if China were to negotiate with the Philippines over maritime delimitation in the area between the two countries, or with Vietnam, Malaysia, Brunei and the Philippines over the Spratly area, it would be awkward to do this without some kind of Taiwanese participation. However, if Taiwan were to participate in such negotiations, Beijing and Taipei might both think that they first need to resolve the difficult question of Taiwan's status. As we shall soon see, there may be ways of getting around this problem, but only if the government in Beijing and the new government in Taipei are able to build a minimum of trust between themselves. If the deep suspicion that has characterised the relationship between Beijing and Taipei since 1994 prevails, then Beijing will probably prefer to postpone the resolution of the disputes in the South China Sea. However, if the leaders in Beijing decide to let resolution of the South China Sea dispute wait till after Taiwan has been reunified with the mainland, they will lose a chance to play a constructive role in regional diplomacy, provoke deep

¹⁶ See John H. Noer with David Gregory. *Chokepoints. Maritime Economic Concerns in Southeast Asia*. Washington DC: National Defense University Press, 1996.

¹⁷ See Zou Keyuan. "Implementing marine environmental protection law in China: progress, problems and prospects", *Marine Policy*, vol. 23, no. 3 (1999), pp. 207–225.

¹⁸ United Nations Environment Programme (UNEP). *Transboundary Diagnostic Analysis for the South China Sea* (version 3, 3 February 1999) and *Vision and plan - a systematic approach. Leading the EAS Action Plan to the 21st Century* (UNEP(WATER)/EAS IG.9/4 Annex I), 10 February 2000, both available on: <http://www.roap.unep.org/easrcu/index.htm>

suspicion in the Philippines and Vietnam, and perhaps provoke the countries of ASEAN to invite an expansion of the US role in the region. From an environmental-security perspective, China will furthermore be guilty of contributing to the ongoing destruction of coral reefs and the depletion of fish stocks.

The seventh and last difficulty is internal. In order to carry out a determined effort to resolve its maritime disputes, China will need a conscious medium-term strategy, and also a political leadership which is able to impose its strategy on all branches of government. This may be difficult to achieve with China's present decision-making system. The way the system works is difficult to comprehend. All branches of government operate on the basis of a few well-publicised statements by the President, the Prime Minister or one of the party elders. Then Prime Minister Li Peng laid down the principles for China's present South China Sea policy in 1990 when he proposed to shelve the disputes, and jointly develop resources. No similarly authoritative statement has been made since. Jiang Zemin, Zhu Rongji and a few others could revise China's policy by making another statement. All agencies concerned would then have to refer to the new statement, interpret it and in some way follow it up. As long as there are no clear guidelines, the various agencies tend to have their own separate interpretations and agendas. The Navy modernises and makes its presence felt in the Spratly area. Fishermen from Guangdong, Guangxi and Hainan go after fish where there is most to be found. When their own coastal waters are depleted, they go to the Spratly area or to Vietnamese waters, and expect protection from the Navy. The oil companies try to attract foreign participation in exploring for oil, while the State Oceanic Administration and the National Environmental Protection Administration make scientific surveys and launch initiatives to protect the environment. Some of the coastal provinces also have their own agendas. Hainan has adopted a programme for becoming China's ecological province.¹⁹ To the extent that the activities of the various agencies and provinces have international implications, they are expected to be co-ordinated by the Foreign Ministry. However, in the case of the South China Sea, there does not seem to be any active co-ordination. The role of the Foreign Ministry seems to consist in delaying or vetoing all kinds of initiatives rather than pointing out a direction for co-ordinated efforts. Foreign Ministry officials have no doubt been anxious to avoid international complications. In the absence of clear signals from the top leaders, they have tended to put brakes on any kind of action. Only in one sense has the Foreign Ministry been a force for change: It has done its best to improve diplomatic relations with the Southeast Asian states. This may have prepared the terrain for conflict resolution.

In order to carry out new policies, the top leaders will need good advisers who also have the authority to carry out new policies once a decision has been made. The system of advice around Jiang Zemin is not well known. It appears to be almost as convoluted as it was under Mao and Deng. No one seems to really know whose authority they can safely rely on when the leaders at the top fail to issue clear directives. To change policy in such a system is either an extremely slow process

¹⁹ "In the near future, we will prohibit the acts of damage of coral reef, gradually restore coral reef and marine biological resources and facilitate the virtuous cycle of the maritime ecological system We must prohibit mining or digging of coral reef, protect and restore the offshore coral reef near Hainan Island and strengthen the protection and management of coral reef core areas in the Xisha Islands and the Yongshu [Fiery Cross] Reef of the Nansha Islands." *Outline for developing Hainan into an ecological province* (approved at the Eighth Session of the Hainan Provincial Second People's Congress on July 30, 1999). Haikou: Department of Development Planning, Department of Land, Oceanography, Environment & Resources, 2000.

(when the top leaders remain silent), or happens very abruptly (when the top leaders have reached consensus on a new initiative). In both cases it is difficult to develop a consistent strategy and co-ordinate its implementation.

Because of all these difficulties, it seems unlikely that China will radically change its approach to the South China Sea. Jiang Zemin may have decided to concentrate on the Taiwan issue, and leave the problem in the South China Sea to his successor. China is therefore likely to continue its reactive policy and is likely to:

- block or delay attempts from ASEAN and other quarters to launch multilateral talks;
- warn against foreign interference in the disputes (internationalisation); and
- from time to time wave the flag of "joint development".

Meanwhile the fishermen from the countries around the South China Sea will catch as much as possible of the rapidly diminishing fish stocks, the navies will continue their modernisation programmes, and the press and television will continue to tell the populations about their sacred territories being violated by foreign countries.²⁰

3. Is There a Way Out?

Could Beijing find a way out of its difficulties? Here we are not asking how likely this is to happen. We have already established that the chances are meagre. Still it may be useful to point out a strategy that China *could follow* if it wanted to find an equitable solution to the South China Sea disputes. By adopting a more constructive approach, China could enhance its influence and prestige in the region. The way out is not military, but diplomatic. A sustained effort over many years would need to be co-ordinated by a group of decision-makers with authority to impose their policies not only on the diplomatic branch of China's government, but also on the Navy, the provinces, fishing authorities, oil companies, and other agencies. The standard and quality of the Chinese diplomatic representatives in Southeast Asia has improved tremendously during the 1990s. So has China's bilateral relationship with virtually all of the other countries surrounding the South China Sea, perhaps except the Philippines. China could build on this. As Lee Kuan Yew said, the problems are not insurmountable, and China has pledged to abide by UNCLOS. It would be possible for Beijing to play a leading role in resolving the maritime disputes on the basis of international law.

What is the role of law in resolving international disputes? Is UNCLOS a means or an end in itself? Some political scientists, basing themselves on realist political theory, tend to disregard international law. International politics are decided by power, not norms, they claim, and there is no universal institution that can enforce international law. On the other hand, there are also some experts who, influenced by liberal or legalistic thinking, tend to exaggerate the role of international law and assume that the rule of law can be implemented internationally. They are in the habit of reducing international disputes to a question

²⁰ For an analysis of the South China Sea rhetoric in the Chinese press, see Leni Stenseth: *Nationalism and Foreign Policy*.

of what the International Court of Justice would have been likely to say if it had been asked to decide. To understand the role of international law in resolving international disputes we must follow an analytical course somewhere between the two positions: when being used as a means to resolve disputes, the content of international treaties and legal interpretations of customary international law do have a genuine impact. If the states around the South China Sea want to disregard international law, no one can prevent them from doing so, and no one can force them to refer their disputes to the International Court of Justice in the Hague or the International Law of the Sea Tribunal in Hamburg. But if they choose to disregard international law, they are unlikely to reach an agreement among themselves, or to institute a maritime regime that is respected by other states. Also, if the states agree to apply a solution that is in conflict with the clauses of UNCLOS, such a solution could not infringe upon the rights of third states (e.g. in respect of navigation). If the states in the region want to institute a regime with international legitimacy, they have to base it on a reasonable interpretation of existing international conventions and customary international law. To abide by international law is not perhaps an end in itself, but states which do so somehow gain in trustworthiness. In addition, the countries which have ratified UNCLOS have accepted an *obligation* to abide by its rules. It is difficult to see how the claimant states around the South China Sea could reach any kind of agreement without basing it on UNCLOS and other relevant parts of international law simply because these legal texts provide the only language in which an agreement can be expressed.

This is why the following peace proposal will consist to a great extent in a legal argument. A diplomatic solution, based on international law, could be accomplished through a six-stage strategy, with China in the central role. If Beijing chooses to adopt an active role, it could gain enormously in terms of regional and international respect.

At the first stage, China negotiates bilaterally with Vietnam a treaty on the delimitation of the Gulf of Tonkin (Beibu Gulf). On 31 December 1999, the leaders of the two countries fulfilled their promise to resolve their disputes over the land border by signing a treaty. They have also promised to finalise negotiations about the Gulf of Tonkin before the end of 2000. This is the only part of the South China Sea where Beijing can negotiate a treaty on delimitation without being obliged to take Taiwan or the contested Paracels or Spratlys into account. The negotiations are difficult, but the problems are much less complicated in the Gulf of Tonkin than in other parts of the South China Sea. In the Gulf of Tonkin there are only two parties involved, and no islands to which more than one state claims sovereignty. The main problems are that Vietnam has more fish and more islands in the Gulf than China, while China has the largest fishing fleet. There may therefore be a need for an arrangement where Chinese fishermen obtain certain quotas in the Vietnamese EEZ. The two parties disagree on how much weight should be given to the Vietnamese islands when drawing a median line, but these disagreements do not seem insurmountable. Another problem is that, in the Gulf of Tonkin, both countries have so far refrained from drawing baselines along their coasts, while elsewhere they have applied a radical system of straight baselines with little prospect of being accepted internationally. It would be difficult for the two countries to mutually accept a radical system of straight baselines in the Gulf of Tonkin. However, in order to accurately delineate 12-nautical-mile territorial zones and contiguous zones, and the two nation's EEZs in the middle of the Gulf, both countries need to publish baselines. The easiest way for them to reach an agreement would probably be to use

more conservative baselines, in accordance with the rules established in UNCLOS.²¹ This would break with the principle followed in the rest of the two countries' baseline system, but would demonstrate their dedication to abide by UNCLOS. By resolving the Gulf of Tonkin dispute in a way that builds clearly on UNCLOS, China and Vietnam could set a precedent for resolving other disputes in the South China Sea on the basis of the Law of the Sea.²²

At the second stage, Beijing needs to enlist Taipei's cooperation, in order to be able to follow a co-ordinated negotiation strategy vis-à-vis the Philippines, Malaysia, Brunei and Vietnam. Beijing will probably want to form a mixed team, with Taipei's representatives getting some kind of auxiliary role, and accepting the "one China" principle. The new Taiwanese government will reject this, and may be tempted to use such an occasion to instead enhance its international status. A formula acceptable to both parties will need to be found.²³ An agreement on how to co-operate in the South China Sea may contribute to building confidence across the Taiwan Strait, and eventually become a step on the way to resolving the Taiwan issue. It should not be impossible for Beijing and Taipei to define the Chinese claim to a continental shelf and EEZ in the South China Sea without prejudicing Taiwan's future status. The parties could simply establish a shared Chinese continental shelf and EEZ which, if need be, could later be divided, either in separate specially administered zones within the overall Chinese zone, or in fully independent, internationally recognised zones. These possibilities would of course never need to be mentioned.

At the third stage, when the mixed team has been formed, China (with Taipei) can engage the Philippines in what might be called *the small bargain*. This concerns Scarborough Reef, a triangular-shaped reef with several rocks, situated 115 nautical miles west of Luzon, 170 nautical miles east of the submerged Macclesfield bank, and far to the north of the Spratly area.²⁴ Scarborough Reef, which was the

²¹ For two analyses of the Vietnamese baseline system, see Nguyen Hong Thao, *Le Vietnam face aux problèmes de l'extension maritime dans la Mer de Chine méridionale*. Villeneuve d'Ascq: Presses Universitaires Septentrion, 1998 (2 vols); and Johan Henrik Nossu, *The Straight Baselines of Vietnam*. Oslo: MA thesis in law, 2000.

²² For an excellent analysis of the delimitation issue in the Gulf of Tonkin, see Zou Keyuan, "Maritime Boundary Delimitation in the Gulf of Tonkin", *Ocean Development and International Law*, no. 3 (1999), pp. 235-254. Under UNCLOS, states may opt to use one baseline for defining the outer limits of their zones and other baselines for the purpose of delimitation with neighbouring states. I would like to thank Dr. Elferink for clarifying this point.

²³ South China Sea experts from the PRC and Taiwan already know each other from the annual workshops organised by Indonesian ambassador Hasjim Djalal and Canadian law professor Ian Townsend-Gault during the 1990s, and PRC and Taiwan experts have met at Chinese conferences. Numerous difficulties have to be resolved for PRC and Taiwanese experts to sit down together, and Taiwan has not been allowed to host any meetings of technical working groups in connection with the regional workshop process, but the Chinese experts from the PRC and Taiwan have had numerous occasions to discover to what extent their South China Sea policies coincide. See Ian Townsend-Gault, "Preventive Diplomacy and Pro-Activity in the South China Sea", *Contemporary Southeast Asia*, 20, no. 2 (August 1998), pp. 171-189; Lee Lai To, *China and the South China Sea Dialogues*, Westport CO: Praeger, 1999; and Song Yann-Huei, "Managing Potential Conflicts in the South China Sea. Taiwan's Perspective", Singapore University Press: *East Asian Institute Occasional Paper* No. 14, 1999.

²⁴ Shee Poon Kim & Zou Keyuan, "The Scarborough Reef: Political, Strategic, Security and Legal Implications for Sino-Philippine Relations", *East Asian Institute Background Brief* No. 22, 29 September 1998.

scene of some nasty incidents in 1999, actually represents a window of opportunity for the countries which dispute it. The crucial paragraph 121 in UNCLOS (referred to above) reads almost as a description of Scarborough Reef. Its South Rock (*Nanyan*) rises 1.8 meters high at high tide and is said to have room for 12 people if they stand closely together. This means it satisfies the conditions for being an island: "An island is a naturally formed area of land, surrounded by water, which is above water at high tide" (UNCLOS 121.1). Since it qualifies as an island, it is possible to claim sovereignty to it. (If it had been submerged at high tide, it would not have been an island and would therefore belong to the country on whose continental shelf it is located.) China, Taiwan and the Philippines can therefore with some degree of legitimacy claim sovereignty to Scarborough Reef, and try to base their claims on historical title, occupation or utilisation. It seems clear that Scarborough Reef is within an area that will be part of the EEZ and continental shelf of the Philippines, but this does not automatically give the Philippines sovereignty to the reef as such. An island that is within one country's EEZ can be under the sovereignty of another. Its territorial waters will then form an enclave. If the International Court of Justice were asked to decide the question of sovereignty to Scarborough Reef, it might or might not see it as significant that the reef is outside the line fixed in the Spanish-American treaty of 1898 which delineates the area of the Philippine islands.

While Scarborough Reef satisfies the conditions for being an island, it is clear that it does not satisfy the conditions established in UNCLOS 121.3 for generating a continental shelf or EEZ: "Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf." If they are in doubt on this point, then China, Taiwan and the Philippines could jointly ask the International Law of the Sea Tribunal to resolve the question of Scarborough Reef's capacity for generating maritime zones, but they could also simply agree between themselves, with reference to UNCLOS, that Scarborough Reef is an island with a right to 12-nautical-mile territorial waters, but no more than that. Then they could delineate its territorial waters, and agree to shelve the sovereignty dispute. The reef and its territorial zone would then form an enclave under undetermined sovereignty. In view of the high importance of Scarborough reef for the breeding of fish and other living resources, the parties could further agree to prohibit all economic exploitation of the reef and its territorial waters. This would be *the small bargain*. It would reduce tension, display environmental responsibility, and make China, Taiwan and the Philippines ready for a further process of conflict resolution, based on the Law of the Sea.

At the fourth stage, Beijing and Taipei will be ready for *the big bargain*. This has to be achieved in a combination of multilateral talks within the region and bilateral talks between the representatives of China (including Taipei), the Philippines, Malaysia, Brunei and Vietnam. It could also be achieved through international arbitration, or by asking the International Tribunal for the Law of the Sea or the International Court of Justice to decide certain questions. China will no doubt prefer to resolve most matters diplomatically. As part of the big bargain, China has to make one huge concession, one that will greatly facilitate the delimitation of maritime zones in the South China Sea at large. This concession has nothing to do with the tortuous sovereignty issue, which can be shelved for the time being. What China needs to do is to recognise that all of the 22–40 high tide

elevations in the Spratly area belong to the same category as Scarborough Reef, and thus cannot generate more than a 12-nautical-mile territorial zone.²⁵

Three good reasons make it necessary for China to make this concession: The first is that it seems to be in accordance with a textual reading of UNCLOS. As mentioned, "rocks" (a geographic term that here probably denotes all kinds of small insular features) that cannot sustain human habitation or economic life of their own do not have the right to more than 12-nautical-mile territorial zones. None of the "Spratly islands" has maintained permanent human habitation historically. They have only given shelter to fishermen during a certain period of the year. The second reason is pragmatic. If some of the islands in the Spratly area are granted a right to generate a continental shelf and EEZ, then it becomes all-important to occupy those islands. This will no doubt escalate the conflict. The governments involved will then be tempted to resolve the dispute militarily. If, on the other hand, it is agreed that none of the Spratly islands have a right to more than 12 nautical mile territorial zones, then the value of occupying these islands will be reduced, and the conflict can be demilitarised. The third reason is that China can only obtain important concessions from its counterparts by making a concession itself.

Why then will it be so hard for China to recognise that none of the Spratlys can generate a continental shelf or EEZ? Because this will deprive China of the right to resources in the waters and under the seabed in most of the Spratly area, where Chinese fishermen have been fishing and catching turtles for centuries, and where Chinese oil companies harbour great hopes of finding oil and gas. To give up the claim to a continental shelf and economic zone in this area will be a hard nut to swallow, but if China wants an equitable solution, there is no way of avoiding this concession. The Chinese coastline is much too far away to generate a right to an economic zone in this part of the South China Sea, and it is hard to imagine that any of the other claimant states will recognise Chinese sovereignty to any of the Spratly Islands if these islands are given a right to generate a continental shelf and EEZ. If one applies a strict interpretation of paragraph 121 in UNCLOS, then those parts of the continental shelf and waters in the Spratly area that are within a distance of 200 nautical miles from the coasts and coastal islands of the Philippines, Malaysia, Brunei and Vietnam will be divided between these four nations (the continental shelf may go beyond 200 nautical miles). The question of sovereignty to islands (the 22-40 features that are above water at high tide), their adjacent reefs, and the 12-nautical-mile territorial waters around them, can still be left undecided.²⁶ The Chinese will then have to forget the legally unsustainable idea that the whole of the seabed and all the waters within the nine-dotted line belong to China. This, however, does not mean that China has to give up its claim to sovereignty over *the islands*

²⁵ Since this is a geographical and legal question, the claimants may want to refer it to the International Law of the Sea Tribunal. Its opinion could be sought on the capacity, or lack of such, of the Spratly Islands to generate a continental shelf and EEZ. This would perhaps be the proper way of resolving the question, but if the court were to decide that the islands cannot generate any continental shelf or EEZ (as seems likely), this would still have to be seen by the other claimant states as a Chinese concession, and thus a part of a bargain. China cannot be expected to let this question be resolved to its disfavour in Hamburg without getting something in return.

²⁶ Reefs located in the vicinity of an island (less than 12 nautical miles) can be considered part of that island, and a baseline drawn around those reefs. For this reason the territorial waters of many islands in the Spratly area (notably Tizard Bank and Reefs around Itu Aba) will extend more than 12 nautical miles from each island's coast.

within the nine-dotted line, and their 12-nautical-mile territorial waters. The dispute over sovereignty to the Spratly islands can continue to be shelved.

What can Beijing try to achieve in return for its concession? This, of course, is not a relevant question in the eyes of legal scholars. They tend to see conflict resolution in terms of a verdict delivered by a court, which interprets international law. In reality, however, the interpretation of the law is mixed with bargaining, if not openly, then behind the scene. China will expect to get something in return for depriving the Spratlys of a continental shelf and EEZ. China may, firstly, ask Vietnam to either abandon its claim to sovereignty in the Paracels, or let the dispute over the Paracels be decided through arbitration or the International Court of Justice. China may, secondly, seek a commitment from the other claimant states to attribute the Paracels full effect in delineating China's EEZ and continental shelf in the east and southeast direction from this island group. This means that the largest Paracel islands, by contrast to those in the Spratlys, would have to be recognised as islands with a right to a continental shelf and EEZ. This could find support in UNCLOS, since some of the Paracels are larger than the Spratlys, and have sustained human habitation if not permanently, then at least for the better part of the year. The question of whether the Paracel Islands are able to sustain economic life of their own would then have to be considered. If China's sovereignty to the Paracels is internationally recognised, and some of the Paracel islands are granted a capacity to generate a continental shelf and EEZ, this will be of great importance since there will be little overlap with rival continental shelf and EEZ claims in the central part of the South China Sea. In this area, China will therefore gain control of a huge zone. However, between the Paracels and the Vietnamese coast, the principle of proportionality (the relative lengths of the opposite coasts) will have to be respected. The long Vietnamese coast will thus be given much greater effect than the short coasts around the Paracels, so most of the waters and seabed in this area will fall under Vietnamese jurisdiction. In order to further boost its claims, China may, thirdly, try to gain acceptance for the straight baselines it has drawn around all of the Paracel "island group", although these baselines find no support in UNCLOS. Only archipelagic states, such as Indonesia and the Philippines, have a right to use archipelagic baselines, and even if the Paracels had been an archipelagic state, the ratio between land and water would not be enough to warrant the drawing of the kind of baseline China has drawn. If, however, a textual interpretation of the law forms an obstacle to a reasonable and equitable solution, then new law can be developed or existing law be reinterpreted. China could try to claim that "island groups" are not sufficiently provided for in UNCLOS, and that a new regime for "island groups" must be developed. Such an endeavour could perhaps get support from other states with interests similar to China's, like Ecuador (which claims an extensive EEZ around the Galapagos Islands). If the states around the South China Sea should decide to see the Paracels as an "island group" with some kind of special status, there would be little that the rest of the world could do to prevent it. China would then be able to define the waters inside the baseline of the Paracels as internal, or archipelagic, waters, and have an even more solid basis for its continental shelf and EEZ claim to the south and east of the Paracels. There would, however, not be much extra to gain from these straight baselines.

To recognise Chinese sovereignty to the Paracels, or allowing this question to be decided through arbitration or the International Court of Justice, will be a tough concession to make for Vietnam. This is not only because it claims the Paracels itself on the basis of "historic rights", but also because Chinese possession

of the Paracels will create a huge overlap between the Chinese and Vietnamese maritime zone claims. As part of a big bargain, however, it seems possible that Vietnam may be willing to make such a concession. This is partly because it is unrealistic for Vietnam to win back the Paracels from China, and partly because Vietnam, through such a concession, will obtain China's and the other states' recognition of an extensive Vietnamese continental shelf and EEZ in the western part of the Spratlys (the Vanguard Bank area), where there is some prospect of finding oil and gas.

Only at the fifth stage, when the big bargain has been made, will the countries around the South China Sea find it useful to unilaterally define their precise continental shelf and 200-nautical-mile EEZ claims. UNCLOS obliges all states to define and publicise their claims, but as long as it has not been agreed to deprive the Spratly islands of a right to a continental shelf and EEZ of their own, it will only complicate matters if the states define their respective zone claims. After it has been clarified that the Spratlys can be disregarded, all zone claims will be calculated from baselines along the coasts and coastal islands of Vietnam, East Malaysia and Brunei, from the Indonesian Natuna Island, from the archipelagic baselines of the Philippines, and from baselines around Taiwan, along the coast of Guangdong, around Hainan—and around the Paracels (preferably separate lines around each of the Paracel islands). After having published their precise claims, the states will negotiate bilaterally and multilaterally to delineate maritime borders where their claims are overlapping. Now they will also have to decide what to do with the area of High Seas which remains in the centre of the South China Sea, (i.e., waters that are beyond 200-nautical-miles of all coastlines and therefore belonging to the global community), and if any part of the seabed is outside the continental shelf of all the claimant states.²⁷ For the High Seas, and for the remaining seabed area, if there is any, some kind of management regime must be established. The region will then approach a situation where the whole of the South China Sea is divided into national and international zones, except the small islands in the Spratly area and their 12-nautical-mile territorial waters. This will be a great achievement. It will clarify who has the right to exploit both mineral and living resources, and attribute responsibilities for resource management and environmental protection.

Only at the sixth and last stage in the strategy will the tortuous question of sovereignty to the Spratly islands need to be tackled, and by this time this question will have lost much of its salience since the disputed sea and seabed area has been radically reduced. It may not be a tragedy if the process takes some time, although it will be regrettable if military troops and fishermen are allowed to further destroy the coral reefs while the dispute is going on. However, after the maritime zones have been delineated, it seems likely that the states around the South China Sea will have lost some of their enthusiasm for keeping military troops on the islands and reefs, and be more ready than previously to make concessions. One option will be to transform all the islands, and their adjacent reefs, into a system of marine nature parks, and institute a moratorium on all kinds of economic exploitation, with a

²⁷ If certain conditions are satisfied, a national continental shelf can go beyond 200 nautical miles to a maximum of 350 nautical miles. It is therefore possible that there will be an international area of *high seas* in the middle of the South China Sea, while no part of the *seabed* remains outside of national jurisdiction.

possible exception for environment-friendly tourism.²⁸ This would mean to give the island-atolls back to their original inhabitants: the fish, birds and turtles. All of the claimant states can then announce that they have generously donated their sacred national soil to a regional nature park, in a spirit of cooperation and concern for the natural environment. If the nations are less generous, the sovereignty issue can instead be resolved through negotiation or arbitration. From the outset it will then be clear that all reefs and other features that are not above water at high tide, and are not closer than 12 nautical miles to an island, will belong to the country on whose continental shelf they are located; Article 60 in UNCLOS makes it absolutely clear that no state has the right to unilaterally construct artificial islands within the economic zone of another country without that country's permission. For those islands that are above water at high tide, and their adjacent reefs, it will need to be decided if they shall belong to the state within whose EEZ they are located, or if historical rights and long-term occupation and utilisation should give another country sovereignty to them. If this question has to be resolved, then UNCLOS will not be of any help. UNCLOS deals only with the sea and the seabed. The issue of sovereignty to land, including islands, is regulated by other parts of international law.

4. Conclusion

The six-stage process outlined above will no doubt be a drawn-out affair. Only the first four stages will probably take some ten–fifteen years. And this is an optimistic scenario, based on the assumption that China's leaders decide to engage themselves in a process of conflict resolution. Unfortunately this does not seem to be in the cards. Because of all the difficulties and dilemmas mentioned in the first half of the paper, a considerable period of time is likely to elapse before Beijing is ready to abandon its less than constructive current stance, and adopt a proactive line of action.

The purpose of the second half of this paper has not been to make predictions. The aim has been to point out the main difficulties that China needs to resolve before it can play a constructive role, and to suggest a possible way of establishing an equitable solution in the South China Sea. China has the main keys to resolving the dispute, but it is reluctant to use them. If it decides to open the door to conflict resolution, Beijing needs to further expand its competence in the Law of the Sea. It also needs to prepare itself for the big bargain: tone down its rhetoric about the inviolable Chinese sovereignty to the *Nansha* (Spratlys), gain Vietnam's recognition for its sovereignty to the *Xisha* (Paracels), and claim a vast economic zone in the northern half of the South China Sea.

One major problem remains, which has not been properly tackled in this paper: While the drawn-out process of conflict resolution goes on, fish stocks may already be depleted and the marine environment further destroyed. In addition to resolving the legal disputes, it will therefore be essential to launch joint efforts in the

²⁸ See John W. McManus, John W. "The Spratly Islands: A Marine Park?", *Ambio*. vol. 23, no. 3, May 1994, pp. 181–186.

environmental sphere.²⁹ This needs to be done as soon as possible. The risk that this could distract the negotiation process is minimal. Environmental cooperation will not only be important in its own right, but may also contribute to building the trust needed for establishing a zone of peace around the South China Sea. And the more cooperation that is undertaken in the environmental sphere, the less utopian will the vision of a marine nature park become.

²⁹ Here too states have legal obligations. Under the 1992 Convention on biological diversity they are responsible for the conservation and sustainable use of their own biological diversity. Parties also have a responsibility to manage their own processes and activities which may threaten biological diversity, regardless of where these effects occur. And the parties are to cooperate in the implementation of the Convention, particularly on matters of mutual interest, for example, shared ecosystems and areas beyond national jurisdiction, such as maritime areas that have not yet been divided into exclusive economic zones.

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