

# China and the South China Sea: A Peace Proposal

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## Introduction

THE PEOPLE'S REPUBLIC of China (PRC) holds the key to resolving the complex disputes in the South China Sea. By engaging the Association of Southeast Asian Nations (ASEAN) – as well as Taiwan – in a process of conflict resolution, China can ensure peace and environmental security in its southern region and significantly enhance its international standing. For this to happen, however, the leaders in Beijing will have to change their present policy.

The South China Sea is a semi-enclosed sea that is surrounded by nine states with conflicting claims to islands and maritime zones. The Paracel Islands are disputed between China and Vietnam, and the following states claim islands and/or maritime zones in the huge Spratly area: the Philippines, Malaysia, Brunei, Vietnam, China (and Taiwan). With the exception of Brunei they all maintain a military presence in some of the islands. In addition, Scarborough Reef northeast of the Spratlys is disputed between the Philippines, China (and Taiwan). The PRC and Taiwan (which formally remains the 'Republic of China') make the same claims in the South China Sea, on behalf of China as a nation. For Taiwan it would be extremely difficult to reformulate its vast claims as purely Taiwanese, and such a move would be deeply resented in Beijing. The PRC appreciates the Taiwanese assistance in upholding the Chinese claim and sees the presence of a Taiwanese garrison in Itu Aba (the largest of the Spratly islands) as a manifestation of Chinese sovereignty. The dispute in the South China Sea and the dispute over Taiwan's status are in fact closely interrelated. The complex disputes in the South China Sea present a huge diplomatic challenge for the Chinese government, as well as the other governments in the region.



Map 1: The South China Sea

'Track two' workshops, with unofficial representatives of all the countries around the South China Sea, have been organized annually since 1990 by Indonesian ambassador Hasjim Djalal and Canadian law professor Ian Townsend-Gault. Since the end of the 1990s, the disputes have also been discussed in official regional forums. Talks between ASEAN and China began in 1999 with the aim of agreeing on a code of conduct to prevent further militarization of the disputes, and to foster cooperation. Talks continued in March 2000 and were seen as productive.

The risk of open warfare is not the only reason why a code of conduct is needed. Other reasons are the ongoing destruction of coral reefs and depletion of fish stocks, the urge to get on with drilling for oil and gas in disputed areas, the desire to remove the South China Sea conflict as an obstacle to regional co-operation and the need to suppress piracy.<sup>1</sup> Resolving the South China Sea conflict has to rank high on any human security agenda.

So far the PRC's policy has failed to instil confidence in the rest of the region. China's reactions to proposals for confidence building and environmental co-operation have been hesitant at best. China's present policy can be summed up in seven points:

1. A claim that China has irrefutable sovereignty over 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).
2. Wide-ranging but undefined continental shelf and maritime zone claims (probably encompassing most of the area within the nine-dotted line).
3. 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.
4. A longstanding, undefined proposal to shelve the sovereignty disputes while establishing joint development.<sup>2</sup>
5. 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.
6. Rejection of any involvement by extra-regional powers.
7. Repeated promises to follow the rules established in the 1982 United Nations Convention on the Law of the Sea (UNCLOS).<sup>3</sup>

This adds up to a number of contradictions and dilemmas, the result being that the Chinese Foreign Ministry has adopted an inert, reactive stance. While playing a passive diplomatic role, China has pushed its positions forward militarily and legally. The People's Liberation Army Navy (PLA-Navy) has modernized its South China Sea fleet, built an airbase on Woody Island in the Paracels group (which has been entirely occupied by China since 1974) and established a naval presence in the Spratly area, with exercises, patrols and the construction of permanently manned buildings on several underwater features, such as Mischief Reef.<sup>4</sup>

Legally, China has pushed its position forward by adopting new national laws that reassert its claims to most of the South China Sea.<sup>5</sup> In 1996 China also drew up a radical baseline system, as a point of departure for claiming a vast continental shelf and Exclusive Economic Zone (EEZ).



Map 2: Official Chinese map of the South China Sea with the nine-dotted line

Source: The Traffic and Tourist Map of Hainan, 1999.

The most contested part of the system is an 'archipelagic baseline' around the whole of the Paracels.<sup>6</sup> China has not, however, made known the precise extent of its maritime zone claims and, notably, has refrained from drawing an archipelagic baseline around the Spratly area. This 'non-action' was 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 rights to a continental shelf and EEZ around it, this would have blocked any prospect of resolving the South China Sea disputes.<sup>7</sup>

Many fear that China seeks a military solution. However, for Beijing it is neither a feasible nor desirable option to take the Spratly Islands by force. In 1988, when it first established its presence in the Spratlys, the PLA-Navy clashed with Vietnamese forces. Since then China has avoided violent incidents with other claimant states and has made no attempt to expel their occupation forces from the Spratly Islands. When deciding to refrain from such aggressive actions, China may have had regional stability in mind. It has also no doubt been motivated by strategic realism. Beijing knows that tiny islands, far away from the mainland, are difficult to defend. Thus China's best option is a negotiated solution. Negotiations about the South China Sea must be based on international law. China has ratified UNCLOS along with the other claimant states.<sup>8</sup> Thus they are committed to abiding by its rules.<sup>9</sup> Although the disputes in the South China Sea are complicated, they can certainly be resolved on the basis of international law. To reach this goal, China needs a clear diplomatic strategy, a basic understanding of international law and the necessary courage to reach out for a compromise.

This article will try to explain why China's diplomacy has been so passive until now and outline a possible Chinese strategy for assuming a constructive role in resolving the disputes.

### Beijing's Difficulties

China's combination of naval expansion and dilatory diplomacy is often seen as proof of a sinister long-term 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. Before Beijing can adopt a coherent proactive strategy, these difficulties will need to be addressed. Six such difficulties will be analysed here.

The first is military. It would not be hard for the PLA-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 these islands afterwards if a hostile force were to launch a counter-attack. 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.<sup>10</sup> It may be useful to have electronic listening posts in the Spratlys, but modern satellite technology may have made even these redundant. Beijing must weigh the importance of occupying reefs against the costs involved in building a capability to defend them. The other occupants (Vietnam, Malaysia, the Philippines and Taiwan) feel the same dilemma. Taiwan admitted in 1999 that it could not defend its island (Itu Aba), and announced that its troops 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 entered into force in 1994. As mentioned, China has both signed and ratified the convention, as have the other claimant states (Taiwan has unilaterally declared that it will abide by it). This means that the states around the South China Sea have committed themselves to abide by the Law of the Sea. Only a few Chinese analysts 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 drawn in the 1930s and published by Chiang Kai-shek's government in 1947, seems to treat the sea as if it were land, subsuming it under Chinese territory.<sup>11</sup> The map is based on an outdated concept of international law and is incompatible with UNCLOS. The Law of the Sea does not allow states to subsume waters beyond 200 nautical miles, except in the case of so-called 'historic bays'. The South China Sea is surrounded by many states and can be no one's 'historic bay'. China's legal scholars have realized this problem. Some hold that the nine dots should be understood as just a claim to the *islands* within the line. The problem with this proposition is not only that most of the Spratly islands are occupied by other countries, but also that they are probably too small to generate a continental shelf and EEZ. 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 must be above water at high tide (UNCLOS 121.1). To generate a right to a continental shelf and 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 Malaysian hotel).<sup>12</sup>

The third difficulty has to do with China's increasing need for energy. One of the motives for China's continental shelf claim is the expectation of finding oil. Chinese publications often state as 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 is less promising geologically than has often been assumed. To



establish the likelihood of finding hydrocarbons, it is necessary to conduct seismic surveys (preferably three-dimensional). To determine the question with certainty, test wells must be drilled. Serious oil companies are unlikely to drill for oil until they know on whose continental shelf they are operating. China's and Vietnam's attempts to induce US companies to drill for oil in the western part of the Spratly area have proved unsuccessful. A Joint Development Zone, where many states split taxes between them and laws and regulations are negotiated multilaterally, would also 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 will be extremely complicated to define the distribution of responsibilities and benefits within a multinational development zone, and if oil and gas are found, conflict over the terms are likely to arise no matter how much work legal experts put into the treaty before drilling starts. Thus the interested states, in order to realize their aims of exploring for oil and gas, will probably prefer to negotiate a classic treaty of delimitation.

Since 1993 China has been a net importer of oil. It is now among the world's ten largest oil importers.<sup>13</sup> While northern China still has surplus oil production, southeast China (Guangdong, Hong Kong, Fujian) depends heavily on imports. Since it will be 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 even authorized a project to import liquefied natural gas. Chinese oil companies have responded to the changing situation by investing in oil exploration in many parts of the world, including the Middle East. Although China will continue to depend much less on import of energy than countries such as Japan and South Korea, it is significant that China now shares the traditional concern of these countries for the safety of sea-lanes from the Middle East. China can respond to this in two ways. The first is to build a blue-water navy that can protect vital sea-lanes, escort convoys of tankers if need be and deter attacks on Chinese ships. The PLA-Navy advocates this course of action. Beijing is 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 of the freedom of navigation. This is certainly a more attractive solution, provided that Beijing can have confidence in its ability to maintain friendly relations with the USA, Russia, Japan and India. The military solution is risky, since other countries would see as a threat to their sea-lanes the same navy that from China's perspective was protecting its sea-lanes. 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.<sup>14</sup>

The fourth difficulty is environmental. The Chinese are becoming more environmentally conscious.<sup>15</sup> There is a growing realization that the country's coastal population depends on resource management and protection of the marine environment. In 1999 China for the first time instituted a temporary ban on fishing in the South China Sea. In 2000 it will hopefully go along with a multinational Strategic Action Plan for the South China Sea, developed by the United Nations Environment Programme (UNEP).<sup>16</sup> There is an acute need for international cooperation in the management of fish stocks. There is also a need to protect the remaining coral reefs (which are essential to the natural breeding of fish), to protect mangroves, to 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, the more acute the environmental problems will become. There is now a real risk that fish stocks could be depleted.

The fifth 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 occupied by Taiwan and also earlier was held by the Republic of China. Beijing now seems to value Taiwan's occupation of Itu Aba, since it confirms the identification of Taiwan with China. 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 Taiwanese participation. If Taiwan needs to participate in such negotiations, Beijing and Taipei may both think that they first have to resolve the question of Taiwan's status. As we shall see, there may be ways of getting around this problem, but if the deep suspicion that has characterized cross-strait relations since 1994 prevails, then Beijing may prefer to let the South China Sea disputes remain unresolved. This will, however, be resented in the Philippines and Vietnam, perhaps provoke US pressure and hamper China's desire to play a constructive role in regional diplomacy.

The sixth difficulty is internal. In order to carry out a determined effort to resolve its maritime disputes, China needs a clear strategy and a leadership with ability to impose its will on all branches of government. China's present decisionmaking system is difficult to comprehend. All branches of government seem to operate on the basis of a few publicized statements by the President, the Prime Minister or one of the party elders. Former 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 a new statement. All agencies concerned would then have to refer to this 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 interpretations and agendas. The Navy modernizes and builds bases. Fishermen fish in disputed waters and expect to be protected by the Navy. 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.<sup>17</sup> To the extent that such activities have international implications, they are meant to be coordinated by the Foreign Ministry. However, the role of the Foreign Ministry seems rather to consist in delaying or preventing initiatives than in pointing out a direction for coordinated efforts. 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 to give the Foreign Ministry sufficient authority to carry out new policies. The system of advice around Jiang Zemin 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 (when the top leaders remain silent), or happens very abruptly (when the top leaders reach consensus on a new initiative). In both cases it is difficult to develop a coherent strategy and coordinate its implementation.

Because of all these difficulties, it seems unlikely that China will radically change its approach to the South China Sea. However, most of China's difficulties could be overcome if it adopted a new policy, in line with the proposal below.

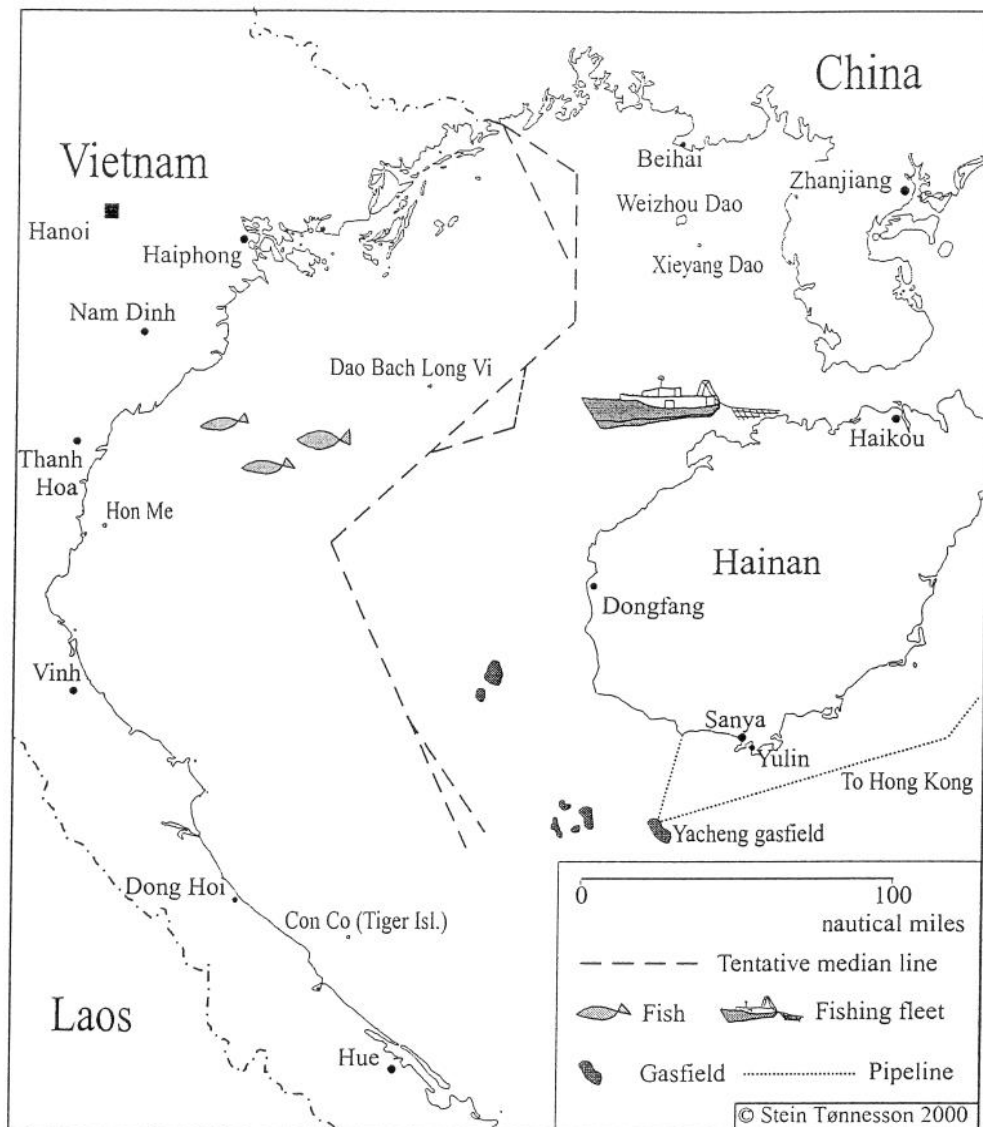
## A Six-Stage Peace Proposal

Although the chances of a shift in China's policy seem meagre, it may be useful to point out a strategy that China *could follow* if it wanted to get out of its impasse. A sustained diplomatic effort will need to be coordinated by a group of decisionmakers with authority to impose their policies on the Navy, the provinces, fishing authorities, oil companies and other agencies. The standard and quality of the Chinese diplomatic representatives in Southeast Asia have improved tremendously since the end of the Cold War. So have China's bilateral relationships with virtually all of the Southeast Asian countries. China could build on this. If it could resolve the disputes in the South China Sea in a way that improves instead of threatens the safety of international sea-lanes, China might also further improve its relations with the United States. The

White House and Pentagon do not wish to become enmeshed in the South China Sea imbroglio. Beijing and Washington indeed have a shared interest in seeing the disputes resolved without US involvement. In the present international situation, with Japan, Russia and India exerting only modest political influence in Southeast Asia, an enlightened leadership in Beijing could seize the initiative in resolving its maritime disputes on the basis of international law.<sup>18</sup>

What is the role of law in resolving international disputes? Some political scientists, drawing on realist theory, tend to disregard international law. International politics are decided by power, not norms, they claim, since there is no universal institution to enforce international law. Some legal scholars, by contrast, tend to reduce international disputes to a question of what the International Court of Justice would say if it were asked to decide. To understand the role of international law in resolving international disputes we must follow an analytical course between these two positions: When states want to resolve a conflict and are unable or unwilling to use force, they either have to refer their disputes to arbitration or negotiate. In either case, they have to define their claims in the language of international law. The law is open to interpretation, but not to any kind of interpretation. Thus the content of international treaties does have a genuine impact. Legal texts establish limits to what a state can legitimately claim, while also providing the language in which agreements must be phrased. If the states around the South China Sea want to disregard established international law and develop new legal practices, no one can stop them, but they may find that this makes it difficult to reach agreement among themselves. Moreover, if the states agree to apply solutions that violate established rules, their agreement will not infringe upon the legal rights of third parties (e.g. in respect of navigation). Thus their agreements will not be respected by the major shipping nations. If states 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. The countries which have ratified UNCLOS have accepted an *obligation* to abide by its rules. By fulfilling this obligation, they gain in trustworthiness. This is why the following proposal largely consists in a legal argument. A diplomatic solution, based on international law, could be accomplished through a six-stage strategy, with China in the initiating role.

At the first stage, China and Vietnam negotiate bilaterally a treaty on the Gulf of Tonkin (Beibu Gulf). In December 1999 the two states signed a treaty on their land border. They have promised to agree on how to delimit the Gulf of Tonkin before the end of 2000. This is the only part of the South China Sea where Beijing can negotiate without taking Taiwan, the Paracels or Spratlys into account. Only two parties are involved, and there are no islands to which more than one state claims sovereignty.



Map 3: *The Gulf of Tonkin*

The main problems are that Vietnam has more fish and more islands than China, while China has the largest fishing fleet. Chinese fishermen will therefore want quotas in Vietnamese waters. The two parties have more or less agreed to use a median line, but they disagree on the weight to attribute Vietnamese islands. It is also a problem that neither country has drawn baselines along their coasts in the Gulf, while elsewhere they have used a radical system of straight baselines with little prospect of being accepted internationally. It will be difficult for the two countries to use a similar straight baseline system

in the Gulf of Tonkin since this will favour Vietnam. However, in order to delineate their territorial waters, contiguous zones and EEZs, both countries need baselines. The easiest way to reach an agreement will no doubt be to comply with UNCLOS.<sup>19</sup> By applying a system of conservative baselines and delimiting the Gulf of Tonkin 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 international law.<sup>20</sup>

At the second stage, Beijing needs to enlist Taipei's cooperation in a coordinated negotiation strategy vis-à-vis the Philippines, Malaysia, Brunei and Vietnam. Beijing will probably want to form a mixed team, based on the 'One China' principle. Taiwan may be tempted to use the occasion to enhance its international status. A formula acceptable to both parties must be found.<sup>21</sup> It should not be impossible to define China's maritime claims without prejudicing Taiwan's future status. The parties could establish a shared Chinese continental shelf and EEZ which, if need be, could later be divided, either into separate subzones within the overall Chinese zone or into fully independent zones. These possibilities would not need to be mentioned.

At the third stage, China (with Taipei) can engage the Philippines in a *small bargain* over Scarborough Reef, a triangular-shaped reef with several rocks, situated 115 nautical miles west of Luzon and 170 nautical miles east of Macclesfield Bank.<sup>22</sup> The reef, which was the scene of some nasty incidents in 1999, represents a window of opportunity. The crucial paragraph 121 in UNCLOS (referred to above) reads almost as a description of Scarborough Reef. Its South Rock (*Nanyan*) rises 1.8 metres 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). Thus it is possible to claim sovereignty over it. (If it had been submerged, like Macclesfield Bank and Mischief Reef, it would have belonged to the country on whose continental shelf it is located.) China, Taiwan and the Philippines can all claim Scarborough Reef and try to base their claims on historical title, occupation or utilization. Although the reef is within an area that is most likely to be part of the Philippines' continental shelf, this does not automatically give the Philippines sovereignty over it. An island 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, it might or might not see it as significant that Scarborough 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 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.' Should there be doubt on this point, then the International Law of the Sea Tribunal in Hamburg could be asked to decide, but China (with Taiwan) and the Philippines could also simply concur, with reference to UNCLOS, that Scarborough Reef is an island with a right only to 12-nautical-mile territorial waters. Then they could delineate its territorial zone and agree to shelve the sovereignty dispute. They would thus have established an enclave under undetermined sovereignty. In view of its importance for the breeding of fish, 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 handling larger issues.

At the fourth stage, time has come for *the big bargain*. This has to be achieved in a combination of multilateral talks and bilateral negotiations between China (with Taiwan), the Philippines, Malaysia, Brunei and Vietnam. It could also be achieved through international arbitration, or Hamburg and/or The Hague could be asked to answer certain questions. As its part of the bargain, China has to make one concession that will greatly facilitate the delimitation of maritime zones. This is to concede that all of the 22–40 high tide elevations in the Spratly area belong to the same category as Scarborough Reef, and thus can only generate 12-nautical-mile territorial zones.<sup>23</sup> Three good reasons make the concession necessary: First, it seems to be in accordance with a textual reading of UNCLOS. As mentioned, 'rocks' (a term that probably denotes all kinds of small insular features) that cannot sustain human habitation or economic life of their own cannot have more than 12-nautical-mile territorial zones. None of the Spratly islands have maintained permanent human habitation historically. They have only given shelter to fishermen during a certain period of the year.<sup>24</sup> The second reason is pragmatic. If any of the islands in the Spratly area are granted a continental shelf and EEZ, then it becomes all-important to occupy them. The claimant states will then be tempted to seek a military solution. If, on the other hand, it is agreed that the Spratly islands can have only territorial waters, the value of occupying them is reduced and the conflict can be demilitarized. The third reason is that China can only expect to obtain concessions by making one itself.

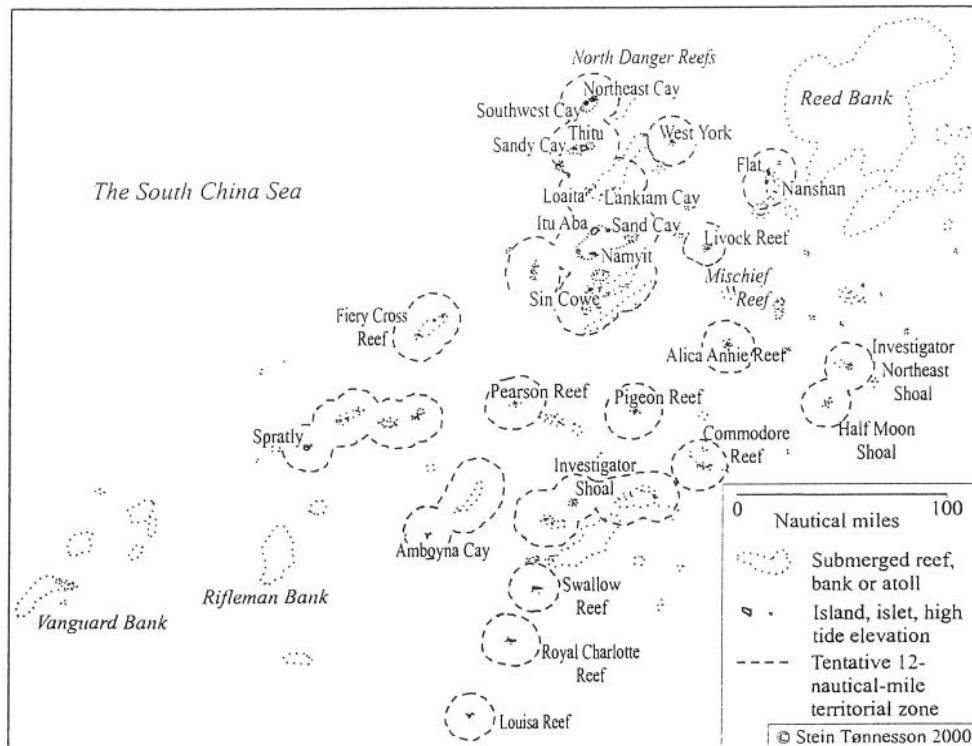
The Philippines, Brunei, Malaysia and Vietnam are all likely to accept that the Spratlys have only territorial waters. These states can claim vast maritime zones in the Spratly area on the basis of proximity to their coasts, and thus do not depend on 'their' islands being granted a continental shelf or EEZ. The coasts of Hainan and Taiwan, however, are too far away to generate maritime zones in this part of the South China Sea. Thus China will be deprived of access to resources in huge areas where Chinese fishermen have been fishing for centuries, and where Chinese companies are hoping to find oil. To give up the prospect of having a continental shelf and EEZ in this area will be a hard nut to swallow, but if China wants an equitable and legally defensible solution,



this cannot be avoided. China's claim to the Spratly Islands as such, however, may still be upheld.

What can Beijing expect in return for its concession? This, of course, is not a relevant question in the eyes of orthodox legalists who tend to see conflict resolution in terms of a verdict delivered by a court. In reality, however, conflict resolution involves bargaining, if not openly then behind the scenes. China will expect to get something in return for depriving the Spratlys of a continental shelf and EEZ. China may, firstly, expect Vietnam to abandon its claim to sovereignty in the Paracels. And, secondly, China may seek a commitment from all other claimants to give full effect to the Paracels in delineating China's EEZ and continental shelf. This means that the largest Paracel islands, in contrast to the Spratlys, must be recognized as islands with rights 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 have to be considered. If China's sovereignty to the Paracels is internationally recognized, and some of the Paracel islands are granted a capacity to generate a continental shelf and EEZ, this will greatly favour China since there is little overlap with rival maritime zone claims in the east and southeast direction from the Paracels. China will gain a huge zone which would otherwise be high seas. However, between the Paracels and the Vietnamese coast, the principle of proportionality (the relative lengths of opposite coasts) must be respected. The long Vietnamese coast will have much greater weight than the short coasts around the Paracels, so most of the waters and seabed in this area will fall under Vietnamese jurisdiction. To recognize Chinese sovereignty over the Paracels will be a tough concession for Vietnam. Vietnam has long claimed the Paracels on the basis of 'historic rights', and Chinese possession of the Paracels will create a huge overlap with the Vietnamese zone claims. As part of a big bargain, however, it seems possible that Vietnam could make such a concession. It is at any rate unrealistic for Vietnam to win back the Paracels, and the big bargain will give Vietnam an extensive 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 will the claimant states find it useful to define their precise continental shelf and EEZ claims.<sup>25</sup> UNCLOS obliges all states to define and publicize their claims, but as long as the question of the Spratly and Paracel islands' capacity for generating maritime zones remains undetermined, it will only complicate matters if the states publish their precise claims. After it has been clarified that the Spratlys have only territorial waters while some of the Paracels can have a continental shelf and EEZ, the states can precisely delimit their claims on the basis of distance from their coasts and coastal islands. Then the states can negotiate median lines where their claims are



Map 4: The Spratly Islands and Reefs

The tentative delimitation of territorial zones around high tide elevations is based on US Department of State Map 737328 (RO 1788) 12-95.

overlapping. At this stage decisions must be made about what to do with the remaining high seas in the centre of the sea, that is, waters beyond 200 nautical miles from all coastlines, and a decision must be taken as to whether the sea-bed here shall also belong to the global community.<sup>26</sup> At the end of the fifth stage it will be clear who has the right to exploit mineral and living resources, and who is responsible for resource management and environmental protection in all of the South China Sea except the 12-nautical-mile enclaves around the Spratly islands.

At the sixth stage, the tortuous question of sovereignty over the 22–40 Spratly features that are above water at high tide, their adjacent reefs and territorial waters must be dealt with.<sup>27</sup> By now this question will have lost some of its salience, and it seems likely that the claimant states will be prepared to reach out for a compromise or leave the issue to the International Court of Justice. UNCLOS will not now be of any help. It deals only with the sea and the sea-bed. The issue of sovereignty over land, including islands, is regulated by other parts of international law.

The claimants also have another option. Instead of resolving the sovereignty dispute they could transform the islands and their territorial waters into a system of marine nature parks. These would be administered by a regional authority, with power to enforce a moratorium on all economic exploitation, except environment-friendly tourism. This would give the island atolls back to their original inhabitants: the fish, birds and turtles. All claimants could announce that they were generously donating their sacred national soil to a regional nature park in a spirit of cooperation and concern for the natural environment.<sup>28</sup>

## Conclusion

Unfortunately, the South China Sea does not rank high on China's foreign policy agenda. The Beijing leaders concentrate on other issues and are therefore likely to continue to:

- block or delay ASEAN's attempts to launch multilateral talks,
- warn against foreign interference in the disputes, and
- from time to time wave the flag of 'joint development'.

Meanwhile the fishing fleets of many countries will catch as much as possible of the diminishing fish stocks, the navies will continue their modernization programmes and the press and television will tell the populations about their sacred territories being violated by foreign countries.<sup>29</sup>

China may thus lose a great opportunity to establish peace and environmental security in its southern region. By adopting the six-stage strategy above, China could enhance its international standing. It would require time: the first four stages alone would probably take 10–15 years. China would need to expand its competence in the Law of the Sea and prepare itself – and Taiwan – for the big bargain. It would be hard, but it could be done.

One major problem remains, which has not been properly addressed in this article: While the 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 to save the marine environment.<sup>30</sup> This is urgent. The risk that such an endeavour 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. And the more cooperation that is undertaken in the environmental sphere, the less utopian will the vision of a marine nature park become.

## NOTES AND REFERENCES

- \* Stein Tønnesson is Professor of Human Development Studies at the Centre for Development and the Environment, University of Oslo. A draft version of the present article was presented to the Third ECAN Conference, Copenhagen, 10–11 February 2000. A later version was presented at a seminar in Singapore on 7 March 2000 and published as *East Asian Institute Working Paper* No. 39. The author would like to thank the participants at the two seminars and also Song Yann-huei, Kriangsak Kittichaisaree, Robert Beckman, Alex G. Oude Elferink, Greg Austin, Johan Henrik Nossun, Marius Gjetnes and the three referees of *Security Dialogue* for their helpful comments.
- 1 See Zou Keyuan, 'Enforcing the Law of Piracy in the South China Sea', *Journal of Maritime Law and Commerce*, vol. 31, no. 1, January 2000, pp. 107–117.
  - 2 This proposal was put forward by Prime Minister Li Peng in 1990. Lee Lai To, *China and the South China Sea Dialogues* (Westport, CT: Praeger, 1999), 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. It has since become the most frequently used acronym for the convention as such. In this paper it is used for the convention.
  - 4 Virtually all the above-water islands in the Spratly area had been occupied by Taiwan, Vietnam, the Philippines and Malaysia before the PLA-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 incidents, but no outright military clashes.
  - 5 Law on the Territorial Sea and the Contiguous Zone (1992) and 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: International Law, Military Force and National Development* (St. Leonards: Allen & Unwin, 1998), pp. 180–184.
  - 7 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), p. 24, and 'China Versus South China Sea Security', *Security Dialogue*, vol. 29, no. 1, March 1998, pp. 101–112, on 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 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.
  - 9 To the extent that customary law equals the Convention, the states concerned were already bound by its rules before becoming a party to UNCLOS.

- 10 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.
- 11 For two recent attempts to clarify the status of the nine-dotted line, see Peter Kien-Hong Yu, 'The Chinese (Broken) U-shaped Line: Points, Lines, and Zones in the South China Sea', *IBRU Boundary and Security Bulletin* (forthcoming), 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', *International Journal of Marine and Coastal Law*, vol. 14, no. 1, 1999, pp. 27–55.
- 12 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, they may generate a right to an EEZ and continental shelf. However, the term 'rock' should probably be interpreted as synonymous with 'small island'. For UNCLOS see: <http://www.tufts.edu/departments/fletcher/multi/sea.html>.
- 13 IEA, oil market report, January 2000 (cited in *Aftenposten*, 25 January 2000). If the figure for Taiwan is included in China's, then China/Taiwan is the world's fifth largest oil importer after the USA, Japan, Germany and South Korea. For an analysis of the impact of China's energy needs on its South China Sea policy, see Knut Snildal, 'Petroleum in the South China Sea: A Chinese National Interest?', Cand. Polit. thesis in Political Science, University of Oslo, 2000.
- 14 See John H. Noer with David Gregory, *Chokepoints: Maritime Economic Concerns in Southeast Asia* (Washington, DC: National Defense University Press, 1996).
- 15 See Zou Keyuan, 'Implementing Marine Environmental Protection Law in China: Progress, Problems and Prospects', *Marine Policy*, vol. 23, no. 3, 1999, pp. 207–225.
- 16 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 at: <http://www.roap.unep.org/easrcu/index.htm>.
- 17 *Outline for Developing Hainan into an Ecological Province*, approved at the Eighth Session of the Hainan Provincial Second People's Congress, 30 July 1999 (Haikou: Department of Development Planning, Department of Land, Oceanography, Environment & Resources, 2000).
- 18 Liselotte Odgaard argues that a new order is emerging in the South China Sea, partly based on a balance of power between China and the United States, partly on regional consultations and cooperation; see Liselotte Odgaard, 'Deterrence and Cooperation in the South China Sea', PhD dissertation in Political Science, University of Aarhus, 1999. Tom Næss claims that a cross-national 'epistemic community' has been formed around the South China Sea, consisting of experts in maritime affairs who share a concern for resource management, environmental protection and respect for international law; see Tom Næss, 'Environment and Security in the South China Sea Region: The Role of Experts, Non-Governmental Actors and Governments in Regime-Building Processes', Cand. Polit. thesis in Political Science, University of Oslo, 1999.
- 19 Baselines have three main functions: (1) to distinguish internal from territorial waters; (2) to serve as a basis for measuring the precise extent of the territorial zone, contiguous zone, EEZ and continental shelf; and (3) to serve as a basis for negotiating a median



- line when the zones of opposite states overlap. Baselines that violate the rules established in UNCLOS are unlikely to be respected by other states and will thus fail to fulfil any of the functions. Under UNCLOS, however, 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. For two analyses of the Vietnamese baseline system (which like the Chinese does not conform with UNCLOS), see Nguyen Hong Thao, *Le Vietnam face aux problèmes de l'extension maritime dans la Mer de Chine méridionale* [Vietnam facing the problems of maritime extension into the South China Sea] (Villeneuve d'Ascq: Presses Universitaires Septentrion, 1998) and Johan Henrik Nossur, 'The Straight Baselines of Vietnam', MA thesis in Law, University of Oslo, 2000.
- 20 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.
  - 21 South China Sea experts from the PRC and Taiwan already know each other from the annual workshops organized in Indonesia during the 1990s and have had numerous occasions to discover the extent to which their South China Sea policies coincide. See Ian Townsend-Gault, 'Preventive Diplomacy and Pro-Activity in the South China Sea', *Contemporary Southeast Asia*, vol. 20, no. 2, August 1998, pp. 171–189; Lee Lai To, *China and the South China Sea Dialogues* (Westport, CT: Praeger, 1999); and Song Yann-Huei, *Managing Potential Conflicts in the South China Sea: Taiwan's Perspective*, East Asian Institute Occasional Paper no. 14 (Singapore: Singapore University Press, 1999).
  - 22 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. Zou Keyuan, 'Scarborough Reef: A New Flashpoint in Sino-Philippine Relations?', *IBRU Boundary and Security Bulletin*, Summer 1999, pp. 71–81.
  - 23 Since this is a legal question, legal scholars are likely to advise the claimants to refer it to the International Law of the Sea Tribunal. Its opinion could be sought on the capacity of the Spratly islands to generate a continental shelf and EEZ. However, if the court were to decide that one or a few of the islands can generate a continental shelf or EEZ, this would be to invite war over those islands. If, on the other hand, the court were to decide that none of the Spratlys can generate an EEZ or continental shelf, this would still have to be seen by the other claimant states as a Chinese concession. China cannot be expected to let the question be resolved in its disfavour without getting something in return. Thus it may be preferable to reach an agreement through negotiations.
  - 24 UNCLOS 121.3 does not necessarily require that an island has actually sustained human habitation or economic life of its own in order to generate an EEZ and continental shelf, only that it *can do so*. Thus the capacity of the Spratly islands to generate maritime zones is open to interpretation. However, it does not make sense to allow the use of modern technology to establish human habitation or economic life with the purpose of establishing a right to extensive maritime zones. If this were allowed, then any high tide elevation could qualify. Marius Gjetnes is writing an MA thesis in Law at the University of Oslo on the legal status of islands, with special regard to the Spratlys.
  - 25 Malaysia and the Philippines have already published their claims, but may prefer to reconsider before starting negotiations about delimitation.
  - 26 If certain conditions are satisfied, a national continental shelf can go beyond the EEZ 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 *sea-bed* remains outside national jurisdiction.
  - 27 Reefs located in the vicinity of an island (less than 12 nautical miles) can be considered part of that island, and a baseline may be drawn around such reefs. Hence the territorial

waters of some Spratly islands will extend more than 12 nautical miles from each island's coast.

- 28 See John W. McManus, 'The Spratly Islands: A Marine Park?', *Ambio*, vol. 23, no. 3, May 1994, pp. 181–186.
- 29 For an analysis of the South China Sea rhetoric in the Chinese press, see Leni Stenseth, 'Nationalism and Foreign Policy: The Case of China's Nansha Rhetoric', Cand. Polit. thesis in Political Science, University of Oslo, 1998.
- 30 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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