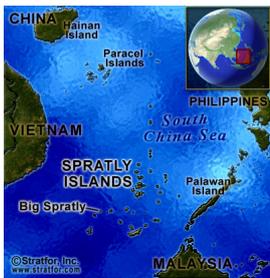


This paper argues that a better choice is to make active use of the Law of the Sea as a basis for delimiting territorial waters, Exclusive Economic Zones and continental shelves, and that this could be possible even without resolving the question of sovereignty to the Spratly Islands.



ABSTRACT

The dispute over maritime delimitation and sovereignty to islands in the South China Sea is so complex that it is unlikely to be resolved for a long time. This makes it tempting for the claimant states to shelve the disputes and jointly explore for oil in disputed areas. However, joint exploration may be dangerous, since a major oil or gas find would escalate the conflict. This paper argues that a better choice is to make active use of the Law of the Sea as a basis for delimiting territorial waters, Exclusive Economic Zones and continental shelves, and that this could be possible even without resolving the question of sovereignty to the Spratly Islands. To negotiate an agreement on maritime delimitation on the basis of international law could also be in China's best interest. China is no doubt the key player, and the way forward is for the PRC and the ROC to agree on a joint platform for negotiations with the Philippines, Vietnam, Malaysia and Brunei - on behalf of one China.

MOST LIKELY DEVELOPMENTS

There are several reasons why the disputes in the South China Sea are unlikely to lead to any

major armed conflict:

- 1.** Any military clash would reduce the chance of exploring successfully for oil for a very long time.
- 2.** All the main island features have already been occupied by one of the claimant states, and in the eyes of international law a military invasion of an already occupied islet would in no way strengthen the sovereignty claim of the new occupier.
- 3.** The strategic value of the islets in the South China Sea is limited since they are virtually impossible to defend successfully against a determined invader.
- 4.** More generally you cannot “occupy” the sea. You can just build naval forces that deter others from undesirable actions. What we see is therefore more of a naval build-up meant to impress others through various kind of demonstrations. No actor is likely to move towards an armed clash.

On the other hand, the dispute in the South China Sea is so complex that it is unlikely to be resolved for a long time. This also has a number of reasons:

- 1.** There are many states involved: China (PRC and ROC), the Philippines, Malaysia, Brunei and Vietnam.
- 2.** The dispute is closely related to the Taiwan issue, since Taiwan occupies the largest island in the Spratlys (Itu Aba) and since base points in Taiwan must be essential for the establishment of China’s EEZ claim.
- 3.** Both the ROC and the PRC have long been claiming virtually the whole of the South China Sea within the so-called u-shaped line, a line that is impossible to reconcile with international law, and this claim was reinforced when the PRC joined a map with the u-shaped

line to its recent protest against Malaysia and Vietnam's joint submission to the United Nations concerning the extension of their continental shelf.

- 4.** The South China Sea dispute involves several inter-related elements:
 - a.** Sovereignty to islands (Paracels, Scarborough Reef, the Spratlys),
 - b.** The question of whether or not these islands and reefs can themselves generate their own exclusive economic zones and continental shelves,
 - c.** The question of whether or not China can claim virtually the whole of the South China Sea as its own "historic waters" (the u-shaped line),
 - d.** The question of whether or not the Philippines can claim an archipelagic Kalaya'an ("Freedomland") ,
 - e.** The overlapping EEZ and continental shelf claims which need to be resolved through the drawing of median lines,
 - f.** The question of whether or not the establishment of national EEZs and continental shelves in the South China Sea would in any way infringe upon the freedom of civilian and military shipping.

For all of these reasons it seems the most likely future development is status quo, with tension and incidents erupting from time to time in relation to fishery disputes, the establishment of tourist sites, exploration for oil and gas, and notably the ongoing process of calculating the outer limits of the surrounding countries' continental shelves.

This is an unfortunate state of affairs for many reasons. It could once more sour relations between China and ASEAN. It makes it extremely difficult to decide which state has the responsibility for establish fishery regimes that can protect the fish stocks and maintain the natural habitat of the rich marine resources in the South China Sea. And it makes it difficult to explore for oil and gas in the disputes areas.

One way out is the attempt that China, the Philippines and Vietnam have made to conduct joint scientific exploration of the seabed in a disputed area. Apparently, not much exploration has happened under the agreement, and if it had, it could easily have become dangerous. It is already problematic when two states establish a joint development zone in an area disputed among the two of them, since this makes it necessary to agree on all kinds of responsibilities in that disputed zone, not only concerning how to divide eventual revenues, but also on who shall be responsible for monitoring the area and protecting its environment. If three countries open up for joint exploration in areas that are contested among all three and also additional states, and then oil or gas is found, it could lead to a very dangerous situation. The widespread enthusiasm for joint oil exploration in disputed areas is thoroughly misplaced. To explore for oil without first establishing a clear legal regime is irresponsible behaviour, and not laudable in any way. The general idea of shelving disputes and establishing practical regional cooperation is good of course, but a much better and less risky joint activity than oil exploration would be to set up joint regulatory, monitoring and enforcement regimes for the protection fish stocks and for protecting coral reefs against further destruction. Unfortunately this does not seem to be in the cards.

The most likely future development is, it seems, a continuation of a strongly unsatisfactory status quo, albeit with no serious risk of any major conflict. Perhaps the most likely positive development would be a strengthening of the agreement between ASEAN and China to avoid conflict and new contentious initiatives by giving a new version of the 2002 Declaration on a Code of Conduct a legally binding form.

COULD THE DISPUTES BE RESOLVED?

That a resolution of the disputes is unlikely does not mean that it is impossible. It shall be argued here that a resolution of the South China Sea disputes is:

- a. fully possible on the basis of international law,

- b.** with China holding the key,
 - c.** and that a resolution of the dispute based is in China's best interest.
- 1.** With regard to (a), let us return to the proposal presented by the present author a little over nine years ago [\[1\]](#) The suggestion was made then that the conflict may be resolved in six stages:
 - 2.** China and Vietnam agree on the delimitation of the Gulf of Tonkin, and a regime to regulate fishing on both sides of the border. (This has since been accomplished.)
 - 3.** The PRC and ROC governments decide on a co-ordinated negotiation strategy vis-à-vis the Philippines, Malaysia, Brunei and Vietnam.
 - 4.** The PRC and ROC's joint Chinese negotiation team make a 'small bargain' with the Philippines over Scarborough Reef, which includes a rock ("Hyungan" or "Yellow Rock") that satisfies the condition for being an island and therefore has a right to 12 nm territorial waters, but cannot have a continental shelf or EEZ of its own. They shelve the sovereignty dispute to the rock and its territorial waters, and set a ban on any kind of economic or military activity inside Yellow Rock's territorial waters.
 - 5.** The 'small bargain' is used as a model for a 'big bargain' concerning the Spratlys and the Paracels: It is agreed that none of the Spratlys satisfy the conditions for having more than 12 nm territorial waters. (This seems to have been assumed in Malaysia and Vietnam's recent UN submission of their calculation of the extension of their continental shelves.) They shelve the sovereignty dispute to the islands and their territorial waters. Vietnam recognises Chinese sovereignty in the Paracels, and all agree that base points in the Paracels can be used as a basis for measuring China's EEZ and continental shelf.
 - 6.** All states around the SCS publish their exact EEZ claims (200 nm), measured from their baselines, and submit to the UN their calculation of the extension of their continental shelves (beyond 200 nm). Where the EEZ and continental shelf claims overlap, median lines are drawn

up and agreed through a combination of bilateral and multilateral negotiations, or arbitration, or by referring decisions to the Law of the Sea Tribunal in Hamburg. Now only the sovereignty disputes concerning Yellow Rock and the Spratly islands, with their territorial waters, remain unresolved.

7. Regulatory regimes to protect fish stocks and the marine environment are set up, with each nation taking responsibility for monitoring its own EEZ. Exploration for oil can then be carried out under clear, national legal regimes and without any dispute over the revenue. A multilaterally managed nature park, with a ban on all economic and military activity, may be established for the Spratly Islands and their 12 nm territorial waters.

The big advantages of this solution are that it is based firmly in international law and that *it does not require any solution of the highly contested question of sovereignty to the Spratlys*

The main difficulties with the solution are that:

1. The PRC and ROC must develop sufficient mutual trust to carry out a major international negotiation together,

2. China and the Philippines must define the “u-shaped line” and the line drawn around “Kalayaan” as indicating a claim to sovereignty over all islands within that line as well as the 12 nm territorial waters of those islands, and not as a claim to “historic waters”, continental shelf or EEZ. This may be psychologically difficult in view of the dissemination these lines have got on maps in China and the Philippines.

3. Vietnam must give up its long-held claim to the Paracels.

4. Even if the Paracels are acknowledged as Chinese, and with a right to an EEZ and continental shelf of their own, the overall solution does not provide China with a share of the South China Sea that is in proportion to the country’s size. China is simply geographically disfavoured since its coasts are too far away from the parts of the South China Sea that are

most likely to hold exploitable reserves of oil and gas. This could tempt China to opt for status quo in the hope that the future will allow it to either disregard international law or obtain dramatic changes in the Law of the Sea, allowing a semi-enclosed sea with many countries around it to become the historic waters of the regional great power.

CHINA'S BEST INTEREST

Without China there can be no major resolution of the South China Sea dispute, only perhaps some piecemeal agreements between Malaysia, Brunei, Vietnam and the Philippines, in consultation with the UN, concerning how to measure continental shelves and EEZs. The question of what China is going to do in the South China Sea is a part of the larger question of how a rapidly rising China is going to define its role in East Asia and the world. The option to wait for a better chance to impose its "historic water" claim later, while seeking to persuade others to take part in joint exploration for oil, would make others suspect that China aims to re-establish a regional hegemony similar to the one the Middle Kingdom exerted in the pre-modern period. It would no doubt become a source of serious resentment if a part of the revenue from oil produced from areas that the Philippines, Malaysia and Vietnam considers their – with a strong basis in the Law of the Sea Convention – were to be collected by China. This could easily lead to tension that would make oil production in itself – and environmental protection – impossible.

A number of arguments can be made for saying that it is in China's best interest to avoid such resentment among its neighbours, and that it is in China's best interest to contribute to a multilateral solution of the South China Sea disputes, on the basis of international law. Here are some of those arguments:

1. As a global power depending on international trade and investments, and on provision of energy from far away, China depends on other states' respect for international law. Showing respect for international law in a case where this deprives China of some resources it had aimed to acquire for itself will make it much easier for China to demand respect for international law in all those cases where this works to China's benefit.

2. China seeks regional harmony and stability and has already benefitted much from having delimited and demarcated its land borders with all of its neighbours except India. A resolution of its sea borders based on international law would contribute further to a stable regional environment.

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3. In terms of energy security, China's main need is not the revenue from the production of oil and gas in the South China Sea, but the oil and the gas itself. China has much money, but there is a sense of vulnerability if a major proportion of the oil and gas needed for the country's further development must be imported from insecure places far away, such as the Gulf. If the continental shelves in the South China Sea are defined and divided among the nations on the basis of the Law of the Sea, then the oil and gas that might be found and produced would contribute to China's energy security even though the revenue went to the Philippines, Malaysia, Brunei or Vietnam.

4. The PRC could see South China Sea as a test case for the ROC's commitment to a one-China policy. Successful cooperation between Beijing, Taipei and Haikou (Hainan) in establishing and negotiating a multilaterally agreed legal regime in the South China Sea could be a major step towards a larger resolution of Taiwan's status. It could also be rewarding for Taipei to have its representatives take part in a major international negotiation, together with compatriots from the mainland.

5. China's extremely concerned for its environment, and also for the marine environment in the South China Sea and the future of the fish stocks that China's fishermen depend on for their living and China's urban population for their protein and culinary needs. Only by agreeing to a clear legal regime in the South China Sea will it be possible to establish a robust regime for protecting the natural habitat that is necessary for fish to breed.



CONCLUSION

It does not seem realistic to see any major progress soon towards a resolution of the South China Sea dispute. The most realistic positive development would be a legally binding agreement between China and ASEAN on a code-of-conduct. But the role of researchers should not just be to analyze what has already happened, or point out the most likely scenarios for the future. Our role is also to point out opportunities. Therefore the main message in this paper is that it is fully possible to arrive at a comprehensive solution to the disputes in the South China Sea on the basis of international law, and that this would not just be in the interest of Malaysia, Brunei, Vietnam and the Philippines, but in the best interest of Taiwan and mainland China as well.

Prof. Stein Tønnesson

Research Professor, International Peace Research Institute, Oslo (PRIO)

Visiting Research Fellow Nov.-Dec. 2009, Stockholm International Peace Research Institute (SIPRI)

[1] Stein Tønnesson, "China and the South China Sea: A Peace Proposal," *Security Dialogue* 31(3), September 2000: 307-326.