Steps Forward for China to Resolve its Disputes in the South China Sea

By Stein Tønnesson

Despite the escalation of tensions in recent years in the South China Sea, negotiated solutions are possible if China recognizes that it is better off pursuing negotiations rather than insisting on maritime claims that are not in line with international law, Stein Tønnesson argues. It will be a delicate task, but one that is in China’s strategic interest.

IF CHINA ACTS STRATEGICALLY on the basis of its national interests, then it will seek to resolve its maritime boundary disputes. China’s failure so far to move towards comprehensive negotiations with neighboring states, and a legally binding code of conduct (COC) with ASEAN, is an unstrategic behavior. My prediction is that the Chinese government will overcome its reluctance to correctly interpret the ill-conceived U-shaped line that appears on most of its maps of the South China Sea, adopt a more realistic and conciliatory policy that is based on its national interests, and seek resolution.

This will be difficult psychologically, since the U-shaped line has become an ingrained part of China’s identity politics. Small and insignificant islets have assumed a symbolic importance almost on par with territories such as Taiwan, Tibet or Xinjiang. Eventually, however, strategic sense will prevail, in my view. This expectation is based on an assessment of China’s need for territorial integrity, national security, energy security, environmental sustainability, regional stability and peaceful development in pursuance of the Chinese Dream.

THREE KINDS OF DISPUTE

China is engaged in three main kinds of legal disputes in the South China Sea: over territorial rights, sovereignty over islands and maritime boundaries. Although they are closely interlinked, they may be treated separately. By giving first priority to maritime delimitation, China could continue to shelve its complex sovereignty disputes over multiple islets, while building international support for its view on navigational rights. China and the United States disagreed on freedom of navigation previously at the United Nations Conference on the Law of the Sea, 1973–82, (UNCLOS III). China argued that military vessels need permission from the coastal state if they wish to conduct exercises, reconnaissance or intelligence operations inside another country’s Exclusive Economic Zone (EEZ). The US insisted that EEZs are “international waters” as far as navigation is concerned and that there can be no restrictions on the freedom of navigation for either civilian or military vessels. The coastal state has sovereign rights only to the resources, the US argued. Other countries can be prohibited from commercial activities, but not from any kind of navigation. Some of the other countries around the South China Sea (Malaysia, Thailand, Vietnam) share the Chinese view, although it runs contrary to the dominant interpretation of the Law of the Sea among international experts.

The disputes on sovereignty over islands concern the Paracels, Spratlys and Scarborough Shoal. (Pratas Island is not internationally disputed, but is occupied by Taiwan on behalf of China.) The Paracels are controlled by China and claimed by China, Taiwan and Vietnam. China, Taiwan and the Philippines all claim Scarborough Shoal (Huangyan), a group of rocks west of Luzon. The Spratlys consist of some 35–40 islets, reefs and shoals, grouped together in a number of atolls. China and Taiwan claim all of them. So does Vietnam. The Philippines claims most of them, Malaysia three of them. Brunei claims an EEZ that includes one islet.

The maritime boundary disputes concern the delimitation of each country’s 12-nautical-mile territorial sea and 200-nautical-mile EEZ and continental shelf. Whereas the coastal state holds sovereignty in its territorial sea (but must allow innocent passage), it does not hold full sovereignty in the EEZ, but has sovereign rights to its resources.

Before pointing out how the boundary disputes may be resolved, we shall look at the reasons why China needs to resolve them.

Territorial integrity

As M. Taylor Fravel and others have shown, the People’s Republic of China (PRC) has been ready on a number of historical occasions to make territorial concessions in order to secure its borders.1 It has signed land-border agreements with all of its neighbors except India. And it made concessions to win back its sovereignty over Hong Kong in 1997 and Macau in 1999. China signed a comprehensive land border agreement with Vietnam in 1999, which has since been fully demarcated, and agreed with Vietnam in 2000 on a maritime boundary in the Gulf of Tonkin.

China’s most important unresolved territorial issue is over Taiwan. This is intimately related to the South China Sea disputes since Taiwan borders on that sea, has the same claims as the PRC on its behalf, and controls both Pratas Island and Itu Aba (Taiping Dao), the largest island in the Spratlys. A Chinese strategy for the South China Sea must therefore be linked to its Taiwan strategy. By co-ordinating its South China Sea strategy with Taiwan, it could further improve cross-strait relations and get Taiwan to share responsibility for necessary concessions.

National security

Concern for China’s national security provides the first strong argument for a conciliatory approach in the South China Sea. National security may be enhanced through alliances, military capabilities or friendly relations. China has not entered into any military alliance since the breakdown of Sino-Soviet relations in the 1960s,
but it is doing its best to build both defensive and offensive military capabilities.

China has invested huge resources in modernizing its armed forces, with acquisitions and production of a range of precision-guided missiles, advanced aircraft, fast-going ships and silent-going submarines. Thousands of medium-range missiles have been deployed along the Taiwan Strait, and huge investments have been made in modern vessels for the Navy as well as China’s several non-military agencies.

The growth in the number of advanced Chinese submarines, some of which are nuclear, has led Vietnam to buy Russian-made Kilo-class submarines. Taiwan has plans to build its own. China probably aims to be able to deny the US and other foreign navies access to the “brown waters” of the South China Sea, East China Sea and Yellow Sea within the “first island chain” stretching from the Japanese main islands to Okinawa, the Philippines, the Spratlys and the Malacca Strait. While building such capacity, China has also started to build a “blue water” navy with a capacity to project power on the high seas. It launched its first aircraft carrier in 2012, and is building several more. While this does not enhance China’s national security in the short term, it may be a judicious long-term strategic investment provided that China can make use of other means to prevent any clash with the superior forces of the US and its allies.

In order to make sense, China’s investment in aircraft carriers presupposes peace with the US for at least three more decades. This must be a peace that Washington feels sufficiently confident about to refrain from actions aimed at obstructing the further expansion of the Chinese economy and military. This will require astute diplomacy, with substantial elements of confidence-building as part of a grand strategy.

How does this relate to China’s sovereignty disputes in the South China Sea? Does the ongoing rivalry over tiny rocks and islets offer valuable opportunities for China to gain experience with tactical operations? Are these islets important strategic assets? The answer is no.

While maritime clashes or standoffs may serve the particular interests of coast guards and maritime surveillance organizations, who acquire as a result new ships and domestic popularity, cold-headed naval strategists must see such incidents as a nuisance, drawing resources away from the navy’s main strategic tasks. The incidents instill fear among neighboring states and lead them to increase their military capabilities. In addition, they draw unwelcome attention from the US.

China’s top planners no doubt realize that the rocks and islets in the Spratlys are of limited strategic value. Any occupied islet is a sitting duck, does not provide a key to controlling the sea. Strong navies and air forces do. If China aims for access denial, it needs stable relations with Taiwan, the Philippines, Malaysia, Indonesia, Singapore and Vietnam. The less threatened these countries feel the more room there will be for China to quietly build its power projection capabilities. And if China opts to spend vast resources on constructing a blue-water navy, it will find it even more important to maintain good relations with its neighbors.

China will, of course, be more vulnerable in its home waters if it diverts substantial resources to the construction of expensive aircraft carriers. The US is then also more likely to adopt costly counter-measures. From the point of view of naval strategy, the best option for China would be not to just shelve its maritime disputes in the South China Sea, but actively resolve them.

My prediction is that the Chinese government will overcome its reluctance to correctly interpret the ill-conceived U-shaped line that appears on most of its maps of the South China Sea, adopt a more realistic and conciliatory policy that is based on its national interests, and seek resolution.

Energy security
Mainland China is in the enviable position of not being completely dependent on imported oil and gas. China has abundant coal deposits and substantial amounts of gas, including shale gas, and it produces about 40 percent of the oil it consumes. To be overly concerned with energy self-sufficiency in peacetime is not in any country’s national interest since this leads to costly over-investment. When energy is available on the global market, buying it at the lowest possible price is clearly preferable. China’s huge investments in African oil production and in pipelines through Central Asia and Myanmar have been motivated by energy security arguments and have probably already incurred excessive costs.

If substantial amounts of oil and gas could be found under the South China Sea, this could enhance China’s energy security at lower cost. It
Environmental protection
Care for the environment now counts highly in calculations of national interest, not least in China, where environmental problems could derail economic and social development. This is certainly the case at sea. There is an urgent need to protect dwindling fish stocks and effectively prevent the use of illegal fishing methods. This requires clarity as to who carries responsibility in the various parts of the sea. There is thus an urgent need for maritime delimitation.

Regional stability
A stable regional environment has long been the aim of China’s policy toward neighboring states. Were China to enjoy close, friendly relations with Vietnam, the Philippines or Malaysia as long as they could be securely shipped or piped to China. If maritime boundaries were agreed upon, the neighboring states would no doubt be ready to invite the China National Offshore Oil Company (CNOOC) to participate in joint ventures. The establishment of such ventures could even be part of a negotiated package. From the perspective of Chinese energy companies, as well as from the point of view of China’s energy security, it would be a clear advantage to get maritime boundaries in place sooner rather than later.

A PROACTIVE APPROACH
It seems that every core national interest points towards a need to resolve China’s maritime disputes. So far, China has pursued a policy of calculated ambiguity, keeping all options open while expanding its capabilities. With regard to the East China Sea, China took a step forward in December 2012, when making a submission to the United Nations Commission on the Continental Shelf (CCS) on the extension of its continental shelf. In the South China Sea, however, China has not yet made known its precise claims. China needs to clarify its claim, and preferably to do so before the Arbitral Tribunal, which is now being set up under the Law of the Sea Convention at the instigation of the Philippines. This could clarify substantial legal issues on China’s behalf and against its will.

THE U-SHAPED LINE
A priority for China is to clarify the meaning of the U-shaped line, which first appeared on an official Republic of China map in 1947 or 1948 — before the communist revolution triumphed. It can be interpreted in a number of different ways. The most extreme view is that all waters inside are Chinese sovereign maritime territory. Legally speaking, this is absurd, since there would then be no need for the baselines that China has drawn along its coasts. The function of such baselines is to separate fully sovereign territory from maritime zones, and to serve as a basis for calculating the extension of these zones. Another view is that the U-shaped line encloses China’s territorial sea. This is irreconcilable with international law, since the territorial sea is defined as a 12 nm zone measured from the baselines. In a third interpretation, the U-shaped line institutes a special “historical waters” regime since Chinese fishermen used the waters historically. The problem is that fishermen from other countries have long used the same waters too. A fourth interpretation is that the U-shaped line represents the Chinese EEZ boundary, measured from the Paracel and Spratly archipelages. However, the concept of an EEZ did not exist at the time the map was drawn, so this can hardly have been its original meaning. The Paracels and Spratlys are also not considered as groups or archipelagos in the eyes of the law, but rather as a collection of individual features. A fifth interpretation is that the U-shaped line indicates a claim to “historic rights.” These are not necessarily exclusive, but allow China’s fishermen to fish and its energy companies to explore for oil and gas. If China should wish to pursue the historic rights argument, then this will probably prolong the stalemate in the South China Sea, since other countries can claim similar rights. It is more likely that China could obtain temporary long-term rights in specific areas through voluntary agreements with other states, as it did with Vietnam in the Tonkin Gulf.

The last and only reasonable interpretation of the U-shaped line is the one stated in China’s official protest letter against Vietnam and Malaysia’s continental shelf submissions to the UN Secretary General on May 7, 2009, to which a map with the U-shaped line was attached. It said that the U-shaped line meant a claim to all islands inside it and their “adjacent waters.” If this can be understood as the maritime zones that can be derived from those islands on the basis of provisions in the 1982 Law of the Sea Convention, then this opens up a venue for resolving the disputes. However, the same letter to the UN also mentioned the term “relevant waters,” a concept probably meant to allow for “historic rights.”

A precondition for a constructive diplomatic effort towards conflict resolution is a clear confirmation that the U-shaped line means just a claim to the islands inside it and their maritime zones.

PRIORITIES IN CONFLICT RESOLUTION
If we optimistically imagine that China and Taiwan are able to collaborate and clarify the meaning of the U-shaped line, then there is the question of where to begin a process of conflict resolution. Many assume that the sovereignty dispute over the Spratly islands must be resolved before it is possible to define maritime boundaries. This is not necessarily so. It should be possible to begin by reducing the amount of disputed waters. The normal way to delimit maritime zones in waters where boundaries may be affected by the presence of small islets is to disregard the islets and draw preliminary boundaries on the basis of distance from base points on the main coasts. In those cases where the EEZs overlap, one will then draw a preliminary equidistant line. After the first rough delimitation, small islets...
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FIGURE 1 THE SOUTH CHINA SEA SHOWING SELECTED BOUNDARIES
Source: Stein Tønnesson

Key

- Agreed borders
- Estimated preliminary EEZ boundaries, before islands are taken into account.

Islets and surrounding 12-nautical-mile territorial waters

Gulf of Tonkin

Hainan

Pratas Reef

Paracel Islands

SOUTH CHINA SEA

Scarborough Shoal

Spratly Islands

Taiwan

China

Laos

Thailand

Vietnam

Brunei

Indonesia

Malaysia

PHILIPPINES

0 km 0 nm 200 400 600 km 100 200 300 nm

In Focus: Ending the South China Sea Impasse

May be given a modifying effect depending on their size and location. The most immediate modifying effect is that all islands are awarded a 12-nautical-mile territorial sea. The next issue to consider is if it satisfies the conditions set in the Law of the Sea Convention for having a right to extended maritime zones. Article 121.3 says that “rocks” that cannot sustain human habitation or an economic life of their own shall have only a 12-nautical-mile territorial sea. All of these matters may be decided without resolving the question of sovereignty to the islands as such. A huge area of disputed waters would then remain around and between them, but most of the surrounding South China Sea would be outside, so it could be divided in accordance with normal maritime delimitation methods (see Figure 1).

China will, of course, want to concede as little as possible. Hence, it may object to the normal procedure and suggest instead starting by defining EEZs around the disputed islets, on the assumption that either one or several of them can generate extended maritime zones. This would not be an unreasonable proposition. One could begin by drawing equidistant lines between the surrounding mainland coasts and the nearest Spratlys and Paracels, and Scarborough Shoal, and include full 200-nautical-mile EEZs measured from the Paracels and Spratlys in those areas where they would not overlap with EEZs measured from mainland coasts. This would absorb much of the deep-water central part of the South China Sea. These equidistant lines would mark the maximum extent of what could conceivably be part of EEZs measured from the Spratlys, Paracels and Scarborough Shoal.

The other claimant states would argue, with good basis in international law, that an equitable boundary between their coasts and the nearest disputed islet cannot be equidistant, given the discrepancy in the length of the relevant parts of their mainland coasts and the shorter coasts around the islands. Thus, the boundary between the disputed zones around the islands and these major countries’ undisputed coastal zones would have to be drawn much closer to the islands. They might point to the Sino-Vietnamese Gulf of Tonkin agreement from 2000 as a precedent. It accorded the Vietnamese Cat Long Vi Island an EEZ of 15 nautical miles (12 nautical miles of territorial sea plus three nautical miles of EEZ). Cat Long Vi is much larger than any of the Paracels or Spratlys and has several hundred inhabitants.

Through multilateral negotiations, it might in this way be possible for China and the other claimants to agree on a temporary maritime boundary for disputed maritime zones around the Spratlys and Paracels. The remainder of the South China Sea would belong to the EEZs of the country with the nearest coast — provided it is not more than 200 nautical miles away.

All of this may seem utopian, but it is not necessary to know the end result at the start of the process. One may do as Deng Xiaoping counseled: “Cross the river by feeling the stones with our feet.” There are two possible first stepping-stones, both of which set useful precedents for finding the next. The first is a southward prolongation of the already agreed Sino-Vietnamese boundary at the mouth of the Tonkin Gulf. This would be useful in two ways. It could be prolonged in a direction that separates the Paracels from the Vietnamese coast. This would please China, since it would somewhat undermine Vietnam’s claim to the Paracels. The prolonged line would also probably deviate from the first of the nine dashes in the U-shaped line. This would allow China to demonstrate to the relief of everyone that the line on its maps does not represent a claim to virtually the whole sea but just to the islands inside and their maritime zones.

The second possible first stepping stone is a
Sino-Philippine agreement on the status of Scarborough Shoal. It would not resolve the question of sovereignty but just decide the extension of Scarborough Shoal’s maritime zone. Since there is little doubt that the small rocks that rise above water from the shoal do not satisfy the legal conditions for generating more than a 12-nautical-mile territorial sea, it should be easy for the parties to delimit the territorial waters of the disputed shoal and reduce the salience of the sovereignty dispute. This would pave the way for defining the maritime boundary between the Philippines and China/Taiwan. The two countries would thus also set a precedent for how to handle the smallest, if not all, of the Spratlys. It seems preferable for China to resolve this issue bilaterally with the Philippines rather than wait for the recently established Arbitral Tribunal to do it on China’s behalf.

CONCLUSION
It is in China’s national interest to launch a proactive policy aimed at resolving its maritime boundary disputes in the South China Sea. As shown above, this may be done while continuing to shelve the sovereignty disputes over the Paracels, Spratlys and Scarborough Shoal as such. Priority will instead be given to delimiting maritime boundaries through bilateral negotiations. This will, however, require diplomatic stamina over many years or decades. The Chinese leaders must be courageous enough to make substantial concessions, notably by recognizing the sovereign rights of other claimant states in their EEZs and on their continental shelf. The way forward is unlikely to come through a comprehensive deal in one stroke, but instead by resolving the disputes step by step over a considerable period of time. Treaties agreed upon elsewhere in the world and boundary decisions by the International Court of Justice, the Law of the Sea Tribunal in Hamburg or special Arbitral Tribunals may set useful precedents along the way. The two main tasks for China to carry out at the initial stage are to:

a) Establish a co-ordinated all-Chinese maritime negotiation team including representatives of Taiwan; and

b) Clarify the meaning of the U-shaped line.

Admittedly, there are few signs that either Beijing or Taipei is ready to consider any radical initiative, although they have for some time been consulting each other informally. Strong leadership will be required both in Beijing and Taipei. While a common approach is worked out, the People’s Republic could set a useful precedent by agreeing with Vietnam on the southward prolongation of their boundary in the Tonkin Gulf. And China and the Philippines could agree to shelve their dispute over Scarborough Shoal, while agreeing that it can have just a 12-nautical-mile territorial sea. To agree on this, and say it emphatically, could set a precedent for similar agreements for all or most of the Spratlys. If the 12-nautical-mile territorial water issue could be settled, it would significantly reduce the amount of disputed waters, and pave the way for bilateral and multi-lateral boundary negotiations.

China has much to gain from taking diplomatic initiatives vis-à-vis its neighbors, instead of just waiting for decisions by an Arbitral Tribunal established against its will at the initiative of the Philippines. Perhaps paradoxically, if China opts for a legal solution, based squarely on established international norms, this would represent a triumph of realism over socially constructed ideas of national identity relying on sacred maps and other symbols.

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