



RECENT DEVELOPMENTS IN THE SOUTH CHINA SEA – IMPLICATIONS TO PEACE, STABILITY AND COOPERATION IN THE REGION

Gen. (rtd.) Daniel Schaeffer

International Business Consultant

Former French Defense Attaché in Thailand, Vietnam and China

Ladies and gentlemen

Let me first thank the Academy of Diplomacy of Vietnam and the Lawyer Association of Vietnam for having invited me to speak on one question related to the South China Sea. That is: "Recent developments in the South China Sea – Implications to Peace, Stability and Cooperation in the Region". This noble assembly already knows a lot of things about this very sensitive question which more often than not is poisoning the relations in the region in spite of some small hopes of peaceful behaviors all around.

What I am going to say is based upon my own researches, upon my own feelings and thoughts, independently from governments, institutions, think tanks, officials, anybody else. This is why I feel absolutely free to say what I am going to say and, therefore, will be expressed strictly under MY OWN PERSONAL RESPONSIBILITY.

Roughly speaking, even if on certain aspects there are positive signs that may give us hope of achieving genuine peace in the future, stability and cooperation in the region, for the time being the negative signs are dominant. One of the main reasons is that countries around the basin are not equal in strength, not only militarily, but also strategically, politically, economically and that there is one dominating power who, despite reassuring speeches and behaviors, is trying, through a multi-pronged strategy, to compel the other countries to come to terms and accept what she has already decided. Here I mean the superpower China.

Before coming to the core of the question, it appears necessary to remind briefly some elements of the past. Because we cannot explain or understand what is happening today in this part of the World if we ignore the legacy of the past and its influence on the present. However, I am not going to develop a detailed chronology of all the events that affected, and are still



affecting, the situation in the area. I just want to set a few markers which are of importance in the present entanglement.

This constitutes my first departing point.

The second step is that I am not going to sum up all the works that have already been made by a lot of brilliant researchers. I would just like to emphasize one of the most remarkable contributions as far as international law is concerned. I am quoting here the rigorous study written in 1996 by Mrs Monique Chemillé-Gendreau and available today in English under the title: "Sovereignty over the Paracel and Spratly islands" at <http://hoangsa.org/tailieu>.

I. THE LEGACY FROM THE PAST

To fix a **1st marker**, I shall depart from the Cairo declaration dated 27 November 1943. After the meeting between Franklin Roosevelt, Winston Churchill and Chiang Kai-shek, it had been declared that "all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and the Pescadores, shall be restored to the Republic of China". No mention was made of the Paracel and the Spratly islands for the simple reason that, at the time, these islands were still under the French colonial administration exerting sovereignty over them on behalf of the Emperor of Annam.

As a matter of fact, as far as the Spratlys are concerned, we must remember that in 1930, on the 13th of April, the French Navy, on behalf of the French government and using all the procedures internationally recognized at that time, took official possession of the Spratlys and declared French sovereignty over them. The French Navy reiterated the gesture in 1933 with an expedition identical to the one of 1930¹. From that time on, which we must emphasize here, France never officially abandoned, nor renounced its sovereignty over the Spratly islands. This, in these conditions, introduces a specific legal case. As Monique Chemillé-Gendreau clearly explains it in her work, France has not lost her rights over the Spratly islands since France has not yet made act of dereliction². That means France never pronounced any abandonment of sovereignty. If actually, on the one hand, France discontinued, from 1954 on, administering the archipelago, on the other hand she has not officially renounced her *animus possidendi*. Thus, formally, France must be considered as not having lost its rights over the territory. This is a very important point to be stressed upon. The French unclear position over

¹ French Ministry of Foreign affairs, "Notices and Communications", *Journal officiel de la République française*, 26 juillet 1933: 7837

² Monique Chemillé-Gendreau, *Sovereignty over the Paracels and the Spratly islands*, <http://hoangsa.org/tailieu>, p.55



the Spratlys' status consequently and unfortunately opened the way to the present discord about the islands. **This is a second marker.**

As a third marker, I would like to start from the consequences of the Japanese defeat, in 1945, against the Allied forces which, in this part of the World were the Americans, the British and the Chinese nationalists of Chiang Kai-Shek.

At that time, not long before Japan was defeated and surrendered to the Allied, on August of the same year, the Japanese forces had, on March 1945, eliminated the whole French administration in Indochina, had destroyed its remaining military forces in Vietnam, and had settled a provisional Vietnamese government in Hanoi under emperor Bao Dai. So, for a very short while, Bao Dai's cabinet, under the supervision of the Japanese, resumed assuming the Vietnamese authority on the territory, including on the Paracels and the Spratlys, instead of the French, up to the moment the Japanese surrendered and were disarmed.

As far as the disarmament of the Japanese was concerned, it had been convened at the Potsdam conference, which took place in Summer 1945, that in the North of the 16th parallel, the Japanese would be disarmed by the Chinese, and in the South of the 16th parallel they would be by the British. It is the reason why the nationalist Chinese disarmed the Japanese on the Paracels and militarily occupied the Amphitrite group there, which is one part of the archipelago. **This is a 4th marker.**

If, as of the 5th of October, and thanks to the British's help, France did not encounter any difficulty reoccupying the South of Vietnam, the Chinese of Chiang Kai-Shek opposed a stiff resistance to this come back in the North. That led to conversations between France and China and, on the 28th of February 1946, to the signature of the two French – Chinese treaties of Tchoung King. By the second treaty, China agreed to withdraw its forces from North Vietnam. This was actually completed by June 1946, except from the Paracels, on which the nationalist Chinese maintained some troops, on the Amphitrite group. This is a **5th marker** and the first military occupation by China in the South China Sea archipelagos.

Moreover, even if, on the 24th of August 1945, Chiang Kai-Shek had declared that China had "no territorial ambition in Vietnam", the Chinese cheated a second time the Tchoung King treaty. They set foot in the Spratlys in December 1946 and occupied the most important island: Itu Aba. **This is the 6th marker.**

In spite of the protests from the French administration at that time, and even in spite of some French military actions, the Chinese did not evacuate the Paracels and the Itu Aba.



Since then Taiwan continues assuming this past and is still occupying Itu Aba. This situation leads us here to consider that Taiwan, as the Republic of China (ROC), is claiming exactly the same territories as the People's Republic of China in the South China Sea. And the ROC claims it all the more loudly that the nine dots line, which we are about to discuss, was originated from the nationalist party. Thus, we must consider that, in spite of separate expressions of claims from Beijing and Taipei on the South China Sea, both communist and nationalist entities are, on this present and specific situation, leading the same struggle on behalf of greater China. On this very occasion, Beijing considers the Taiwanese fight as a patriotic supportive struggle. It is the reason why the Taiwanese position will not be taken any more into account in the following presentation.

To come to the question of the nine dots line, we have to take notice that, simultaneously with the occupation of Itu Aba, the nationalist Chinese published, in 1947, in a private atlas, not an official one, the first map on which a plain line was surrounding almost all the South China Sea. It was not a dotted line as it should be pointed out. This line was merely leaving some narrow patches of territorial waters to the other bordering countries. But, since this line is not defined by any single coordinate it is absolutely inconsistent. Such an approximate marking make it fully invalid. This is one point among other ones.

Later the plain line evolved into an 11 dots line and, in the 1950s, into a nine dots line after the Chinese prime minister Zhou En Lai ordered to delete the two dots crossing the Gulf of Tonkin.

What is important to be stressed upon here is that, even if the nine dots line continues being printed on the Chinese maps, even if the Chinese always protest of what they claim to be their sovereign rights on the South China Sea inside this nine dots line, the Chinese governments, up to now, never produced any legal document formally stating the Chinese rights on the area determined by the 9 dots line. However sticking resolutely to this representation on the maps and in its discourses, China introduces a huge ambiguity and misleads the observers in their right interpretation of the very existence of such a line. As a matter of fact, all but a few observers of the conflicting situation in the South China Sea consider this demarcation as definitely indisputable. It makes everybody believe all over the World that this delineation is determining the Chinese genuine sovereign rights over the South China Sea. And the international press, by conveying such a belief without having checked that question carefully, shares its part of responsibility in disseminating such an ambiguity.



To justify the righteousness of keeping the nine dots line alive, the Chinese argue that this line is running at equal distances between the coasts of the other adjacent states and the archipelagos that China is claiming. Such an argument is drawn from the fact that China abusively confers the baselines status to these archipelagos, either explicitly for the Paracels islands as we will explain later, or virtually as in the case of the Spratlys and in the specific case of the Macclesfield bank considered as Zhongsha qundao if we follow the Chinese concept. We will come back to this concept a little bit later. By doing this, China is acting contrarily to the UNCLOS convention which stipulates that the baselines regime is applicable to the Archipelagic States only¹, not islands. We shall come back later on this question of baselines, real or fictive, around the South China Sea archipelagos.

To sum up, the persistence of this nine dots line is certainly a key element in the incessant poisoning of interregional relations around the basin. This is the **7th marker** and probably one of the most important ones.

As the 8th marker, I chose the Treaty of peace with Japan, better known as the San Francisco treaty, which concluded the hostilities in the Far East, dated on the 8th of September 1951, and which, in its chapter II, Territory, article 2, paragraph f, stipulates that "Japan renounces all right, title and claim to the Spratly Islands and to the Paracel Islands". But nowhere it is specified to whom these territories should be handed over for the simple evidence that they belonged to France and subsequently to Vietnam.

In 1954, the Geneva agreements concluded the 1st Indochina war. They do not specifically mention the islands but it was clear that, since France was handing over all its Vietnamese possessions to the two Vietnamese governments, North and South, due to the partition at the 17th parallel, the French possessions in the South China Sea should have normally fallen back into the hands of the Vietnamese side. It is effectively what happened when the South Vietnamese regularly settled troops in the Spratlys and, in the Paracels, on the Crescent group, unoccupied by the Chinese. This is our **9th marker**.

In 1956, on the 15th of May, the situation in the South China Sea started to become even more complicated with the arrival of the Philippines on the scene. At that time a Filipino retired admiral and businessman, Tomas Cloma, considering the Spratlys as "terra nullius" or "non regnis", took possession, on his own behalf, of more than the four fifths of the archipelago. The area thus determined had been christened Kalayaan. The Philippines militarily occupied some of the islands in the North and are still there.

¹ UNCLOS, Part IV, Archipelagic states



We must take notice here that, at that time, France did not react to that occupation of a territory which, at the end of the colonial era, could have appeared as being under a peculiar status, either still French or newly Vietnamese. Let us remind here that during the colonial era, France had administratively attached the Spratly islands to the governorate of Cochinchina. Therefore they were officially attached to a Vietnamese administrative entity. So when France left Vietnam she handed over all her powers to Vietnam who, even separated into two parts, assumed the continuity of the administration on the whole territory. Therefore the administration authority of the Spratleys fell directly under Vietnam's sovereignty.

Should we deny this reality consequent to the application of the international rule concerning the continuity of the administration of a territory, in this case the Spratleys are still French. As a matter of fact and according to the international law, to lose her sovereignty over the Spratlys, France should have, in this case of figure, officially pronounced her abandonment through an official act of derelictio. What she, up to now, has not done and cannot do. Doing otherwise would contradict what happened at the end of the colonial era and would be an intrusion in the Vietnamese affairs. So when Thomas Cloma, and later, in 1971, the Philippines government took possession of the Kalayaan territory, the silence France observed on these occasions cannot be, as far as the international law is concerned, considered as an act of derelictio. Referring to the hand-over of power from France to Vietnam at the end of the colonial era, France simply could not and cannot do it. This is the **10th marker**.

In 1974, China took advantage from the partition of Vietnam and from the situation of strategic dependency under which North Vietnam was placed because Beijing was providing a strong military support to the Vietcong for its fight against the Southern regime. That situation created for China the opportunity to send troops on the Crescent group of the Paracels islands. Since the Chinese were performing a conquest against the Saïgon administration, North Vietnamese were thus torn between three dilemmas: their antagonism with the South, their support from China, and their will to assert their sovereignty over the Paracels. Hanoi chose the third solution but because of the military support it was receiving from Peking, it could not do it otherwise than *mezzo voce*.

By completing the final conquest of the Paracels by force in 1974 the Chinese operated for the first time in obvious violation of the international principle of *Uti possidetis juris* against Vietnam. May I remind here that the *uti possidetis juris* principle is a principle that has been commonly agreed by the nations at the end of the colonisation era so as the borders of the former colonies must not be modified by newly independent states through the use of force. If



the nations want to modify these borders they must do it only through negotiations¹. If, in 2000, China showed the respect due to the *uti possidetis juris* principle when negotiating the final delineation of her land border with Vietnam and the partition of the waters in the Gulf of Tonkin, that was not obviously the case when conquering the Paracels. This is the **11th marker**. The situation inherited from that action is not conducive to peace and stability in the region.

After the 70s, the dispute on the South China Sea became more sensitive and festered because of the presumed existence of rich hydrocarbon deposits in this tertiary basin. These presumptions became reality, at least partly, when the first discoveries were made by Mobil oil Co, on February 1975, on the Vietnamese continental shelf, and when, later on, the developed exploration – exploitation activities indisputably confirmed the first assumption. So the claims tied to the economical interests came in addition to the pure disputes for sovereignties over the area. This one is the **12th marker**.

After 1982, when the UNCLOS was adopted, part V opened the possibilities for coastal States to extend their maritime responsibility beyond their national waters and claim a 200 miles economic exclusive zone. In the South China Sea, such a disposition introduced the opportunity for Malaysia and Brunei to cover maritime areas overlapping some of the Southernmost islands of the Spratlys : 7 for Malaysia, three of which are militarily occupied and one, Louisa reef, for Brunei. But here, as far as the international law is concerned, Malaysia and Brunei wrongly interpreted the situation because, based on strict juridical considerations, the possibility of claiming a 200 miles EEZ does not provide any sovereignty right over the islands that can be reached under the new UNCLOS extension. As a matter of fact, whilst the UNCLOS stipulates that territorial waters are attached to territories lying under the sovereignty of a State, it cannot further transfer automatically any sovereignty to a State over the territories that the extension of its maritime area puts a its reach. It is indisputably the case of those Spratlys islands claimed by Malaysia and Brunei. The paradox here is that the UNCLOS indirectly induced a new ferment of discord between the adjacent States of the South China Sea. That's the **13th marker**.

On March 1988, China operated a second violation of the *uti possidetis juris* principles by leading a violent amphibious military assault against 11 islands of the Spratly archipelago, once more challenging by force the Vietnamese sovereignty. And the Chinese settled troops and military means on the newly conquered islands. Consequently, Chinese and Vietnamese forces are today intertwined one in the other in the Spratlys, depending on the positions of the

¹ Vienna Convention on the Law of Treaties, adopted on 22 May 1969, entered into force on 27 January 1980, ratified by 110 States of October 2009



islands each one is respectively occupying. This is the **14th marker**. That cannot generate any seed of peace and stability in the area.

By the way let us pay attention to one fact. Contrarily to the claims that Hanoi consistently and clearly repeated over the Spratlys (Truong Sa in Vietnamese) and the Paracels (Hoang Sa in Vietnamese), the Macclesfield bank is never included in Vietnam official assertions of its sovereign rights in the South China sea. Thus when the sketches or maps which draw the Vietnamese claims in the area encompass the Macclesfield bank, they are incorrect. Nonetheless, this unsolicited Vietnamese claim on Macclesfield bank, depicted and indefinitely repeated by erroneous documents in such a way, without any reference to any accurate and reliable source, is adding to the confusion.

On the 25th of February 1992, China published her “Law on the territorial Sea and the contiguous area of the People’s Republic of China”. This law lays down the principle of the straight baselines bordering the Chinese sea territory. Besides the mainland and the coastal and nearing islands, the text defines the national Chinese territory in article 2 as “Taiwan and the various affiliated islands including Diaoyu Island (or Senkaku), Penghu Islands (Pescadores), Dongsha Islands (Pratas), Xisha Islands (Paracels), Nansha Islands (Spratly) and other islands that belong to the People's Republic of China”. This very last point is lacking of accuracy and opens the door to a lot of possible interpretations. If we rely upon what is written here and there about spots subject to claims from China we may determine that, among the “other islands” still to be listed, we may find: 1 - James Shoal and Luconia reefs, both being situated off the Malaysian State of Sarawak and consequently being source of dispute with Malaysia ; 2 - Scarborough reef, laying off the Philippine island of Luzon, subject to dispute between China and the Philippines, 3 - Truro shoal, in a median position between Macclesfield and Scarborough.

We must narrowly keep in sight here that China considers Scarborough reef and Truro shoal as integral parts of the Macclesfield bank even though these two atoll type reefs or islands groups are rather far away from the geographical Macclesfield bank. The Chinese gather all these scattered places under the globalizing concept of Zhongsha Qundao which, in these conditions, covers a very large surface. This concept is obviously conflicting with the accepted geographical definition of the Macclesfield bank¹. Should China one day succeed in having such a claim internationally agreed or even discussed in the appropriate forum, the acceptance

¹ See also Zou Keyuan, "Scarborough reef: a new flashpoint in sino- philippine relations", *Boundary and Security Bulletin*, International Boundaries Research Unit, Department. of Geography, University of Durham, Summer 1999, p.71



of the Zhongsha Qundao would bear very important consequences for the other users of the South China Sea.

In the unlikely event that China would convince the largest part of the international community to let her attain the objectives she wants in the South China Sea i.e. keep the baselines already defined around the Paracels; enjoy sovereignty rights all over the Spratlys islands and Macclesfield bank according to its all-inclusive toponym as Zhongsha Qundao; drawing the baselines around this cluster, what could be the risks? They would be that China would have gained the capability to deliberately check all the maritime movements between the Northern and Southern parts of this South China Sea, to restrain these movements according to its own will, and even to deny the innocent passage to the foreign military navies, what, in this case, would be contrary the dispositions of the UNCLOS. Already today, China does not recognize the right of innocent passage. She demands that, before crossing her territorial sea, foreign warships first request an authorization from the Chinese authorities. An extension of power for China in the South China could result in that navies crossing the South China Sea from South to North should be constrained to sail only through a narrow corridor between the Paracels and the geographic Macclesfield bank and be denied any passage through the Zhongsha Qundao. Although such an hypothesis may appear extreme, it deserves to be studied before the international community takes the risk of facing a burgeoning fait accompli.

By the way, it would also be interesting to study, under the same extreme hypothesis, how the future scientific and hydrographic researches could be pursued in the basin, considering the fact that World States tend to interpret differently the UNCLOS dispositions in this field of activities.

To conclude this part, which will be the **15th marker**, it clearly appears that the way China defines its territory outside the mainland, in the ocean, is not conducive to peace and stability.

To continue this chronology, we must remind that, on May 1992, China conferred to the American company Crestone the right to explore and exploit a polygon shaped area striding on the far South West of the Spratly islands, on Vanguard bank (Wan An Bei in Chinese, Tu Chinh in Vietnamese). But what must be noticed is that the Vietnamese did not protest against the fact that the Chinese had walked on the Spratlys but against the fact that the Chinese did so on the Vietnamese continental shelf. To support their claim they demonstrated that Tu Chinh is separated from the main part of the Spratly islands by a trough which is marking the continental margin at this place. At that time the dispute threatened to flare up because the Chinese side resorted to a strong demonstration of naval military force. But it must be outlined



however that, afterwards, China has finally behaved so as not to worsen the situation since the Crestone contract has, up to now, remained without any concrete follow up. This must be noticed as a sign of appeasement from China. This is a **16th marker**.

Later, on March 1994, the Chinese once more aggravated the situation in the Spratlys, in their Northern part. At that time they came there to mark what they consider as falling under their sovereignty by settling troops on one of the islets, Mischief reef, which is situated in the exclusive economic zone (EEZ) declared by the Philippines, then on some other ones, right in the heart of the territory claimed by the Filipinos as well as by the Vietnamese. This is the **17th marker** which cannot be considered as a harbinger of peace and stability in the region.

Finally, starting from the middle of the 90s, some small gleams of light came appearing and could be interpreted as messengers of hope for a betterment of the conflicting situation in this maritime region, even if the causes of the disputes remain deeply rooted in the minds. That was because China, while sticking to her assertion, made nonetheless little positive steps in the direction of an apparent appeasement. On the side of the other claimants, even they are sincerely wishing an improvement of the situation, continued however remaining firm on their respective positions to defend what they consider as their sovereignty rights. That explains why recent developments in the South China Sea are most often a mixture of counterproductive events and at the same time, possible occasions conducive to peace, stability and cooperation. Some other events are frankly counterproductive while some others genuinely bear witness of a kind of will to reach some harmony in the region.

II. LATEST DEVELOPMENTS IN THE SOUTH CHINA SEA – IMPLICATIONS TO PEACE, STABILITY AND COOPERATION IN THE REGION

1. Recent developments as a mixture of counterproductive events and at the same time possible occasions conducive to peace, stability and cooperation

When, on the 15th of May 1996, China officially introduced a declaration on the "baselines of part of its territorial sea adjacent to the mainland and those of the territorial sea adjacent to its Xisha Islands" (Paracels), registered in due form at the United Nations, China appeared to be ready to comply with the international rules of the UNCLOS. But by defining baselines around the Paracels, China has been introducing a new element of dispute with Vietnam about the archipelago. It is expression of the Chinese will to pile up useful deeds necessary to help her assert more and more deeply her rights for a sovereignty that is not genuinely established over the Paracels territory.



Moreover let us say also that by defining baselines around the Paracels, China is unduly interpreting the UNCLOS part IV, Archipelagic States, at its own advantage. As a matter of fact, by drawing baselines around the Paracels, China applies the status of the archipelago States to the islands concerned. This assumption is wrong since the Paracels do not constitute an Archipelagic State. Thus the Chinese procedure obviously appears as an abusive interpretation of the UNCLOS article 46. Consequently this offers China the possibility to arbitrarily extend the maritime surfaces under her jurisdiction. This introduces a new seed of aggravation of the situation in the area. More generally, whosoever is the genuine owner of the Paracels, the statutes that should be applied to the archipelago should be the regime of other land territories, i.e. islands, taken one by one, as stated in the UNCLOS, part VIII, article 121, regime of the islands, and not the regime of the Archipelagic states. So even if the 15 May 1996 declaration on China's baselines pretends to conform with the international rules, it also feeds the dispute between China and Vietnam. It is more a counterproductive act towards peace and stability in the region rather than the contrary. This is an **18th marker**.

Before proceeding further we must stress here that China published her declaration on the baselines before she ratified her adhesion to the UNCLOS on the 7th of June 1996. This is an **19th marker**.

Later, on the 26th of June 1998, and this is the **20th marker**, Peking published the "Exclusive economic zone and continental shelf act of the People's Republic of China". The terms used are generally reassuring as are those used in article 2. They state that "Conflicting claims regarding the exclusive economic zone and the continental shelf by the People's Republic of China and States with opposite or adjacent coasts shall be settled, on the basis of international law and in accordance with the principle of equity, by an agreement delimiting the areas so claimed". If everything sounds clear in almost all the articles in the text, at least apparently, an ambiguity suddenly appears in item 14, which stipulates: "The provisions of this Act shall not affect the historical rights of the People's Republic of China". What does that mean?

My conclusion as drawn from the 30 interviews I conducted in Vietnam and China in Spring last year, is that Chinese historical rights is interpreted in China according to three following lines of thoughts¹.

The first school asserts that the South China Sea is a territorial sea. It is based on the fact that the nine dots line had been drawn before the UNCLOS was even thought for. It is a

¹ Li Jinming and Li Dexia, "the dotted Line on the Chinese Map on the South China Sea: a Note", *Ocean Development and International Law*, Taylor and Francis, London, 3rd of January 2003, p. 287-295



historical heirloom. This rejoins the second line of reasoning of those who argue that the South China Sea is a Chinese historical sea. In both cases the arguments are not acceptable because, as far as the law of the sea is concerned, there is no such thing as historical seas. Historical bays exist, not seas. Considering the South China Sea as a territorial sea is also a nonsense because the distances claimed and covered in such case are several times longer than the distances admitted by the UNCLOS to cover territorial seas, contiguous zones, EEZs and even continental shelves. Furthermore, this point of view is somewhat contradictory with the fact that on one hand the Chinese government considers all archipelagos are Chinese territories and, on the other hand, regards the baselines it has defined or imagined around the archipelagos to be those of an Archipelagic state. That cannot be the case as I already demonstrated when I introduced marker N° 18.

The third line of reasoning appears to keep the usual Chinese claims on the archipelagos but considers that the nine dots line does not match with any clause of the UNCLOS and therefore cannot be opposed to the law of the sea. This is the first point. The second point is that, by claiming her sovereignty on almost the whole South China Sea, China does not deliver a picture of seriousness to the rest of the World. It would be exactly the same sort of abuse as if the Greeks were telling that the Mediterranean Sea is theirs since they were the first ones to navigate on it. So, if China wants to keep some credibility and be listened to by the international community, the better for her is to drop the nine dots line. This opinion has been launched as of late by Professor Zhao Lihai¹. After having been himself a harsh defender of the nine dots line, he realized that deploying such a kind of argument to defend the Chinese claims in the South China Sea would have an opposite effect to what China is looking for: being be listened to in earnest.

After a series of serious incidents which regularly poisoned the situation in the South China Sea, Beijing, one day proposed to the ASEAN countries to stand on the existing status quo through the building of a “code of conduct to abide by”. The arguments the Chinese used to promote their idea was that the countries around the South China Sea put aside their different claims of sovereignty and refrain from acting in a way that could consequently disrupt the balances and worsen the situations. Worried about the rise of the Chinese military power, the ASEAN countries welcomed the Chinese proposal and agreed to negotiate. That led to the final common signatures of the “Declaration on the conduct of parties in the South China Sea”, on the 4th of November 2002, in Phnom Penh.

Let us underline here, for it is of the utmost importance, that the text is labelled as a “declaration” and not a “code of conduct”, and even less as a “code of good conduct” as

¹ Zhao Lihai, *Studies on the Law and of the sea issues*, Beijing, Peking University Press, 1998



sometimes abusively quoted. Moreover, the wish of the different parties to reach a settlement of a genuine code of conduct is explicitly expressed as such at the end of the Declaration on the conduct, paragraph 10.

As this Declaration sounds like, it lists a series of intentions to be abode by each country concerned. In some way, it is no more than a simple declaration of intent and does little more than laying some moral principles that, in fact, each party may interpret at its own will and feelings. Since in such a framework it was never envisaged to refer to any court of arbitration in the case of an abuse denounced by any of the parties concerned, such a Declaration finally appears as a text deprived of law enforcement power. Thus, this is from these somewhat casual basis that, on the 10th of April 2007, the Chinese government seems to have drawn its arguments to protest violently the authorisation given by the Vietnamese to the BP - Conoco Phillips – Petrovietnam consortium to exploit the Moc Tinh and Hai Thach gas fields, those gas fields being situated at the Far West side of the Spratlys islands, on the Vietnamese continental shelf. And this is probably what, in spring 2008, led Beijing to protest against the projects of agreement between Petrovietnam and Exxon Mobil Oil for exploration-exploitation activities on one block located off the Vietnamese coast.

These are two illustrations of the ambiguities left in the “Declaration on the conduct of the States in the South China Sea”. They indicate to which extent the Parties have the possibility to interpret the declaration according to their own standards and to their own interests. But, whatever the weakness of such a declaration, it still appears as an encouraging genuine positive development possibly conducive to peace and stability. But that depends very much on the goodwill and the interpretation given by the different parties.

However, when the “Declaration on the conduct of the States in the South China Sea” was adopted, the event raised a lot of hope for improvement of the situation around the basin and offered bright prospects for solving the regional problems. Moreover that hope was reinforced when, 3 years later, on the 22nd of December 2005 China published her white paper entitled “China’s peaceful development road”. Shouldn't this be reassuring? The following events in the area proved that, in reality, China is pursuing a two pronged policy there: a pacific one which makes believe that from now on everything will go on well; a coercive one, through different means of pressure, in order to compel the different parties to the disputes to come up to China's view.

This finding leads us to study first the developments counter productive for Peace, Stability and Cooperation in the Region



2. Counterproductive developments for Peace, Stability and Cooperation in the Region

Before coming back to China, who is indisputably the dominant power in the area, let us examine quickly the situation between the different ASEAN bordering countries. What we must start by saying is that they are all confronting one another especially because of their claims over the Spratly islands on which each one considers have either full rights, as Vietnam, or partial rights as the Philippines as main contend, as Malaysia and Brunei as minor candidates. This factor of division between ASEAN countries is a cause of collective weakness whilst facing the Chinese greed.

But these countries have recently started to become aware that it would be more profitable to avoid tearing each other instead of trying to find solutions to the existing problems. That has started in the 1990s with, for example, the “Agreement between the Government of the Kingdom of Thailand and the Socialist Republic of Vietnam on the delimitation of the maritime boundaries between the two countries”. That was signed on the 9th of August 1997. More recently Vietnam and Malaysia reached a “broad understanding” on how to fix the limits of their respective continental shelves. After that, between the 6th and the 7th of May 2009, the two countries proceeded to a joint submission on the limits of the continental shelf beyond 200 nautical from the baselines to the Commission on the Limits of the Continental Shelf of information, and Vietnam submitted its own one. Later, between the 27th and the 28th of August 2009, Vietnam presented it at the 24th plenary session of the UN Commission, in New York. But such an agreement, which could be reached without China meddling during the negotiations, does not please Peking which loudly denounces it as illegal.

This Chinese reaction leads us to speak about the ways and means of soft or hard coercion that Beijing uses to establish what it considers to be its rights over the South China Sea.

A first series of actions leans on harassment though the threat of using military or paramilitary means. That has been the case in April 2007 when China succeeded in compelling the international oil consortium BP-Conoco-Petrovietnam to stop its exploitation activities on the gas fields of Moc Tinh and Hai Thach, arguing that these activities were violating the Chinese sovereignty. There are other significant incidents similar to this one. This was the case, to quote only one, when in July 2007 the Chinese Navy dispatched one warship in the South of the South China Sea to compel Vietnam to stop its hydrographic campaign for gathering the data needed to determine the extension of her Continental shelf as convened under the UNCLOS.



However, what is noticeable is that, since the time when the Declaration on conduct was signed, whilst China usually resorted to the threat of using force by occasionally dispatching warships over the whole area to compel the other countries to break their activities, she has no more used the military force to strike as she had done in March 1988 against Vietnam in the Spratlys.

In the field of the paramilitary pressures or identical ones, we must take into account some fishing incidents artificially created by the Chinese side, a pretty good number of them in the Gulf of Tonkin. The problem is to distinguish these fabricated incidents from day to day ordinary quarrels between fishermen, especially in the Tonkin Gulf. It is possible to provide a non exhaustive list of these incidents. But we must also admit that China is not the only nation which intervenes against the fishermen of the other countries in the South China Sea. These countries, at their turn, can also resort to strong actions against the Chinese fishermen coming in their national waters or considered as such. It happens that the Philippines or Indonesia proceed sometimes to the arrest of Chinese fishermen.

However, to counterbalance all these incidents that are deteriorating the atmosphere between the countries bordering the South China Sea, we must observe in another way that Chinese fishermen or Chinese maritime search and rescue services do not hesitate to come to the rescue of their neighbors' endangered fishermen, especially during the typhoon season. Such behaviors must be accounted for as possibly inductive to peace, stability and cooperation in the region. But assuming voluntarily such a responsibility for life saving in the South China Sea may reversely represents some way for China to assert a kind of domination over the area.

With reference to the lesser degree of pressure, we must take into account all the Chinese lobbying strategies, direct and indirect, towards the various local governments, sometimes with the support of local pro-Chinese lobbies.

An example of the softer method used by China to convince the different countries to act according to her wishes is the proposal of conciliatory solutions as enclosed in the declaration on conduct.

In this field of soft policy I would say, we can also find some arrangements engineered between China and local governments. We may count in here the development that has been denounced by the Filipino opposition parties to President Macapagal Arroyo. For that we must come to the Joint Marine Seismic Undertaking (JMSU) that had been signed between the Philippines National Oil Company (PNOC) and China National Offshore Oil Company



(CNOOC) on the 1st of September 2004, joined the following year by Vietnam. The purpose of the agreement was to commonly proceed with a 2D seismic campaign in order to detect oil in an area lying in the Philippines exclusive economical zone, North of the Spratly islands, partly astride with the Kalayaan territory as defined by the Filipinos, and 88 nautical off Palawan island. This JMSU should have lasted three years and be eventually renewed, depending on a decision to be taken before the 30th of June 2008. Two campaigns were conducted but the 3rd one did not take place because of the harsh attacks of the Filipino opposition to president Arroyo accused of selling out the national territory to the Chinese. And in support of its assertion, the Filipino opposition pointed out that, if the JMSU agreement had been passed between PNOC and CNOOC, this was in exchange of preferential tariffs that ZTE, one of the two leaders in the Chinese telecommunications, granted to the Philippines for installing a telecommunication network in the country.

At an upper level we may find more determined Chinese lobbying strategies on the regional governments. I'll take again here the example of the Philippines and the pressure exerted by China. This one concerns the disagreement that China is marking to oppose the internal Filipino political debate about whether or not the present limits of the Philippines territory should be changed. To better understand the roots of the debate we must come back to history.

After the Spanish-American war of 1898 when the Philippines fell under the United States of America's rule by virtue of the treaty of Paris (10th of December 1898), the limits of the territory ceded by Spain to the USA had been clearly defined in article III of the treaty. These limits, which encompassed a large maritime area around the archipelago, are still valid today. And the present internal Filipino debate is turning around the choice to be made between keeping the present delineation or shifting to a delineation determined according to baselines defined by the UNCLOS, part IV, articles 5, 7 and 47 i.e. baselines around an Archipelagic state. The latter final choice should forcibly have important incidences on the definition of all the surrounding waters of the Philippines archipelago, and consequently on the extension of its continental shelf. Such a prospect does not suit the Chinese at all, all the more so because some Filipino politicians with senator Antonio F Trillanes IV at their head are wanting the straight baselines to encompass the Kalayaan territory and Scarborough reef.

It is the reason why, at least twice, the Chinese discreetly intervened on the Filipino side to the effect that the project of law, including the two latter disputed areas, be withdrawn from the vote by the Philippines assembly. However, if the Filipino government finally decided to temporarily withdraw such a project in order to review it, it is not only because of the Chinese objections but also because some genuine Filipino specialists of the Law of the Sea



succeeded in demonstrating that the inclusion of the two controversial territories within the Filipino baselines would contravene the UNCLOS dispositions.

Along the political pressures that China exerts on other countries bordering the South China Sea in order to bring them to what she wants, China applies economical and administrative pressures. In the economical sector, this was the case when, in spring 2008, Peking protested against the project of agreement between Petrovietnam – Exxon Mobil Oil for the exploration-exploitation on oil and gas fields located off the Vietnamese coasts and presumed to be laying in a disputed area. Since no agreement has yet been signed between the Vietnamese and American companies, we must consider that China’s strategy of blocking the project has succeeded and China is therefore the winner.

Regarding administrative pressures, we can observe that China tries it utmost to create irreversible situations. This was the case when, on the 26th of October 2007, she decided, though unofficially, to re-create on a different scheme than previously, the Sansha District, as a district level administrative region encompassing Paracels, Spratlys, and Zhongsha Qundao. This new administrative district would be placed under the authority of the city of Wenchang in Hainan island. We must remind here that the scheme is not new. It is only a continuation of what has been left by history since the moment when, on the 5th of May 1949, the nationalists already tried a similar organisation and later Peking tried it again regularly under different names, the last one having been created on the 19th of September 1988 as the “Hainan Province Paracels, Spratlys and Zhongsha islands Authority”.

Moreover, we must also take notice that, as it has been announced on the occasion of a press conference on the 10th of December 2008, China is encouraging people to settle on the uninhabited islands of the Paracels and the Spratlys. The scheme is to help China building the proof that she has continuously ruled these areas, since continuously ruling a territory is one of the compulsory legal elements that a country must produce for her to be recognized as legally sovereign over this territory. But to be fair, we must also recognise that all the bordering countries, except Brunei, do their utmost as well, by settling people on some of the Spratly islands, with the view to create a de facto administrative presence on these territories.

However, when one looks at the unstable situation in the South China Sea, it is not black on both sides. There are also positive aspects that could lay the bases for Peace, Stability and Cooperation.

3. Developments possibly conducive to Peace, Stability and Cooperation in the Region



Through the brief flashes that appeared in the first part of this presentation and in spite of the prevailing dark side of these conflicts of interests, we can perceive however developments that could be conducive to peace, stability and cooperation. These small burgeons of hope may be classified into the following categories: i/the preservation of navigation safety at sea and in the air above; ii/first attempts to develop scientific and economic cooperation projects; iii/ sustainable development; iv/ preliminary and cautious political steps towards negotiations of respective maritime territories; v/ possibilities referring to supra national instances to find at least limited solutions to the existing problems; vi/ and possibilities of request for assistance of think tanks independent enough to provide suggestions without being influenced by the pressures of the States involved in the regional debate.

Safety of sea and air navigation is certainly the motive for which, at least in the main lines, the States forget their territorial disputes in the South China Sea for the prior sake of safety.

As far as the safety of life at sea is concerned and, in the limits of the means they are able to deploy, all countries participate to the search and rescue of endangered lives. Among them however, China has the capacity to deploy the largest and most efficient search and rescue capabilities. By taking so much care in the safety of life, the different parties to the South China Sea dispute are genuinely behaving in accordance with the directions of the UNCLOS as they are stipulated in article 98, Duty to render assistance, and to the SOLAS convention.

As far as the question of air safety is concerned, because of the necessity to comply strictly with the international rules of air traffic safety, all the countries have decided that the territorial disputes at sea should be set aside so as not to disturb the specific air traffic safety schemes. Starting from this basic principle, they chose to share in earnest the airspace above the sea and define Flight Information Regions (FIR) duly recognized by the International civil aviation organization (ICAO).

Attached to those concerns of safety at sea and in the air above take place the meteorological forecasts. In that sector, a series of different agreements have been passed for cooperation between the countries so as to establish a communications network in order to exchange meteorological information and bad weather.

Scientific and economic projects exemplify positive aspects inductive to peace, stability and cooperation.



Amongst these kinds of projects we find the Joint Marine Seismic Undertaking (JMSU) that, we mentioned earlier. Although it has been terminated, it can be quoted as one of the first attempt to internationally cooperate in the economical and hydrocarbon detection sector between competing companies and moreover between competing countries.

Another example of cooperation that can be quoted, in the scientific field this time, is the Joint Oceanographic Maritime Scientific Research Program (JOMSRE). This program has been settled through a cooperation agreement signed in 1994 between Philippines and Vietnam with a view to study the living stocks and the environmental situation in the South China Sea. Since then 4 campaigns of oceanographic researches have been executed in 1996, 2000, 2005 and 2007 along a broad East West axis from the Philippine island of Palawan to Nhatrang city in Vietnam. China has expressed the wish to participate to further expeditions should they occur.

Whatever the difficulties or successes of these two programs, they provide two examples of what can be done in the spirit of article 123 of the UNCLOS, Cooperation of States bordering enclosed or semi-enclosed seas, applied to the South China Sea.

Among the economical agreements established with a view to operate in the best conditions of equity we must take into account all the fishing agreements signed between the South China Sea coastal States. Most of these agreements are bilateral ones signed between the different users of the South China Sea. It happens that some of them are denounced by third parties, not involved in the agreement, as fringing on what they consider their sovereign rights. China remains however the country which protests most often of the time.

In the field of economic cooperation, it is obviously in the sector of exploration – exploitation of hydrocarbons that the agreements will be the most difficult to reach, not because of the territorial disputes, not because China denies the other countries the rights to determine fair limits for their maritime spaces either, but because all the countries bordering the South China Sea are squeezed under a stressing need for oil and gas, to sustain their national economies and respond to their strategic needs.

One might quote as a model the China – Japan agreement signed in June 2008 in order to exploit the Chunxiao / Shirakaba gas field which is lying right astride on the median line of the East China Sea, the question of the median line being also a subject of dispute between Japan and China due to their divergent interpretations of the Law of the Sea on the continental shelf. The reverse side of such a model however is that in order to get access to the gas field



the Japanese have been forced to agree that they are merely invited, as written in the text of the agreement, by the Chinese to operate along with them on Chunxiao.

In the South China Sea some tentative partnership agreements have already been signed between CNOOC and some national oil companies such as Petronas for Malaysia and as Petrovietnam for Vietnam, this last one having been signed in Hanoi in November 2005.

For her part, Vietnam, which insists that a distinction should be made between her claims on the archipelagos and her continental shelf, is ready to invite foreign companies, among them some Chinese ones, to search and exploit hydrocarbons on its continental shelf, the problem for the Vietnamese is having their continental shelf recognized as such by the other countries.

In the field of their proposals to ease the tensions in the South China Sea between the adjacent countries and to promote an economic cooperation, the Chinese put forward the idea of a Pan – Tonkin Regional Economic Cooperation scheme. Such a project sounds pleasing at first but is raising concerns among the regional countries because under the intention of reinforcing cooperation between the Far Eastern partners appears a scheme by China to firmly tie them to Beijing in a way similar to the vassal states of the Chinese empire. Moreover the scheme amounts to tying the ASEAN countries not to China, but to the Southern provinces of China. Such a configuration would reduce the different ASEAN countries to the level of Chinese provinces, not full States.

Sustainable development

Outside the economic field, countries in the region are involved in programs dedicated to the protection of the environment at sea and in the coastal zones. These programs would concern areas which cover areas larger than the South China Sea *stricto sensu* but would include the environmental questions concerning the region.

The first of these programs is the "Partnerships in Environment Management for the Seas of East Asia" (PEMSEA) which involves all the Far East countries, among them China and the ASEAN countries. This program has been launched in 1994 with international support but is encountering difficulties while moving on the implementation phase. This program mainly concerns the environmental protection in the South China and settles a scheme of cooperation between all the countries around. The efforts will be oriented towards the biological protection, the fight against oil pollution and the protection of the coastal environment.



The second program is the Coordinating Body for the Sea of East Asia (COBSEA). It involves the ASEAN countries and Australia and, when operational, which is not yet, is intended to preserve the coastal environment.

Political activities

In the field of political activities there exist tiny indicators that may appear as possibly encouraging for the improvement of the situation around the basin, though we must remain exceedingly prudent before trying to draw optimistic conclusions.

The first observable steps in that trend are those either accomplished, or on the way, by China and Vietnam to start solving their border problems through negotiations. If, on land the question has been rather quietly solved, at sea it is gradually addressed. This has started by the discussions to delineate the partition of the Gulf of Tonkin by the median line instead of the former delimitation defined after the Paris meridian $105^{\circ} 43'E$, or the Greenwich meridian $108^{\circ}03'13''$. This was a situation inherited from the colonial era and the Convention passed on the 26th of June 1887 between the French and the Chinese governments at that time. As a matter of fact, thanks to the partition along the 108th meridian, Vietnamese was allocated at least the two thirds of the waters of the Gulf while China had the rest.

After lengthy discussions, the two parties reached an agreement signed on the 25th of December 2000 and 4 years later, on the 30th of June 2004, they exchanged their instruments of ratification. Alongside the signature of the agreement on the new maritime border in the Gulf of Tonkin, the two countries passed some fishing agreements. The purpose is for their respective fishermen to be able to continue their activities, on each side of the new line, without being bothered by their neighbors. In order to avoid abuses, the two countries have convened to conduct common naval patrols which in turn give rise to a certain number of problems such as coordination, means to be used, frequency of the patrols, and so on. The same agreement establishes also the conditions of cooperation for the exploitation of the hydrocarbons lying in the depths of the Gulf. The application of this part of the agreement is sometimes problematic.

What is remarkable in such a termination of a situation inherited from the colonial past is that China, in order to reach her goal, agreed to negotiate with Vietnam instead of using the military force as she did previously when she occupied the Paracels and some islands in the Spratlys. By behaving like that China demonstrated that it has the full capacity to respect the



uti posenditi principles. This deserves to attract a special attention because a similar approach could be applied to the archipelagos of the South China Sea.

Presently, China continues showing the same respect of the uti posenditi principles by continuing the negotiations with Vietnam in order to try fixing a new part of the delineation of the maritime border at the Southern entrance of the Tonkin Gulf from Quang Binh, Quang Tri to Hue, Da Nang.

Elsewhere we can take note that Vietnam also signed an agreement on the delimitation of the continental shelf with Indonesia, another one on the sea delimitation with Thailand in 1997, and an agreement on historical waters with Cambodia on the 7th of July 1982, plus the “broad understanding” recently reached between Vietnam and Malaysia on how to fix the limits of their respective continental shelves and condemned by China.

In the light of these encouraging developments we may be led to wonder whether China will finally agree to definitely delete the line from their maps and from their speeches. It is not forbidden to dream!

III. CONCLUSION¹

My conclusion will be brief. Recent developments in the South China Sea region comprise encouraging signs that could indicate some progress towards peace, stability and cooperation. But numerous other developments are counterproductive towards a better future because the remnants of the past are weighing too heavily on a situation which, I am afraid, cannot be completely and satisfactorily solved. There may be solutions but each country in the area must abandon parts of its claims, especially China whose greed cannot be accepted by the other countries or by the United Nations Convention on the Law of the Sea.

¹ Complementary short bibliography and websites:

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