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Do the Sino-Vietnamese Tonkin Gulf agreements show ways forward in the South China Sea?

Abstract

The Sino-Vietnamese maritime boundary agreement and fishery agreement for the Tonkin Gulf, which were both signed in 2000, point out several ways by which regional states may move forward towards resolving the maritime disputes in the South China Sea. First, by the way they were negotiated; second, by their use of international law; third, by their application of a median line adjusted for equity; fourth, by the weight attributed to small islands; fifth, by accommodating established fishing interests; sixth, by facilitating joint development of hydrocarbon and mineral resources; and seventh, by establishing a boundary between Hainan and the Vietnamese coast that may be prolonged into the central part of the South China Sea. This paper discusses how each of these points may be followed up, primarily but not only by China and Vietnam. This is part of a larger argument to the effect that the South China Sea disputes are not as impossible to resolve as often assumed. At present, it seems that the most promising venue for further constructive steps with regard to the South China Sea is the on-going bilateral negotiations between China and Vietnam.

Introduction

On 20 June 2013, when Vietnamese President Truong Tan Sang met Chinese President Xi Jinping in Beijing, the two countries reiterated an agreement reached several years before to set up a hotline between the two countries with the purpose of avoiding incidents at sea. More notably, an agreement was announced the same day between the two state-owned oil companies China National Offshore Oil Corporation (CNOOC) and PetroVietnam to extend through 2016 an agreement made in 2006 to jointly explore for oil and gas in the Tonkin Gulf, and expand the area of exploration from 1,541 to 4,076 square kilometers.¹ These agreements show that progress in

¹ 'Beijing, Hanoi set up hotline, sign oil deal,' *South China Morning Post* 21 June 2013: A6. 'Vietnam, China Expand Joint Exploration in Gulf of Tonkin,' *Rigzone* 20 June 2013: http://www.rigzone.com/news/oil_gas/a/127197/Vietnam_China_Expand_Joint_Exploration_in_Gulf_of_Tonkin (accessed 23 June 2013). Huy Duong (2013). 'Việt -Trung đạt thỏa thuận khai thác dầu khí trong vịnh Bắc Bộ,' VietNamNet 20 June: <http://m.vietnamnet.vn/vn/chinh->

bilateral relations may happen even in periods of significant tension; as recently as in June 2012 there were acrimonious mutual accusations between the two countries when Vietnam adopted a new maritime law confirming its claim to the Chinese-controlled Paracel Islands, and China responded by upgrading the status of ‘Sansha City’ in the Paracels, and by arranging for CNOOC to put out officially for tender a number of oil concession blocs in areas that are obvious parts of the Vietnamese continental shelf. In addition to showing how quickly crisis may be superseded by cooperation, the June 2013 CNOOC-PetroVietnam agreement also demonstrates that it is easier to cooperate in exploring for oil and gas when a maritime boundary has already been agreed upon than to establish a so-called Joint Development Zone in a still disputed area. The joint exploration area established by China, the Philippines and Vietnam in 2005 lapsed in 2008 without yielding any results.

What made it possible for the Chinese and Vietnamese leaders to reach agreements on the Tonkin Gulf in June 2013 was the prescience shown by their predecessors in the 1990s when they successfully negotiated three seminal agreements, first a land border treaty in 1999, then both a maritime boundary agreement and a fishery agreement for the Tonkin Gulf in 2000. This paper revisits the two latter agreements in order to see if they may serve as precedents and inspiration for further resolution of the maritime disputes in the South China Sea at large.

The Tonkin Gulf agreements of 2000

The two Tonkin Gulf agreements were signed by Vietnam and China on 25 December 2000. The maritime boundary agreement covers a 126,250 square kilometers water area stretching all the way from the Hainan Strait to the mouth of the strait between Hainan and Vietnam.² The fishery agreement established a Common Fisheries Zone and a Transitional Fishery Zone. In June 2004, both agreements were ratified by the Vietnamese National Assembly and the Chinese National People’s Congress. The

tri/127917/viet-trung-dat-thoa-thuan-khai-thac-dau-khi-tren-vinh-bac-bo.html (accessed 23 June 2013).

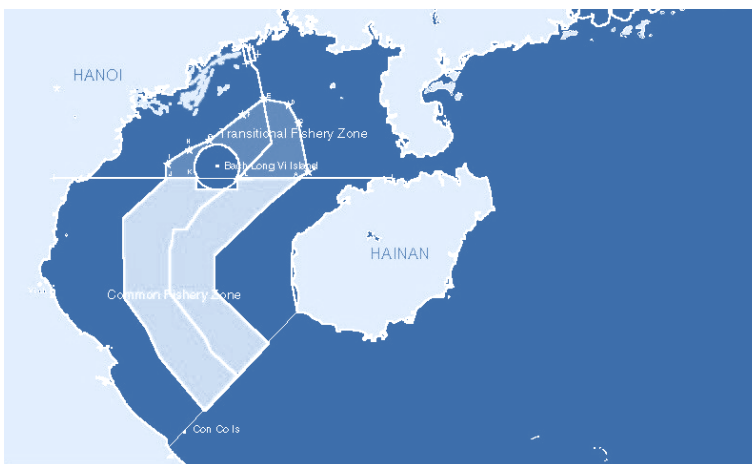
² ‘Agreement on Fishery Co-operation in the Tonkin Gulf between the Government of the People’s Republic of China and the Government of the Socialist Republic of Vietnam’ and ‘Agreement between the Socialist Republic of Viet Nam and the People’s Republic of China on the Delimitation of the Territorial Sea, Exclusive Economic Zone and Continental Shelf between the Two Countries in the Tonkin Gulf.’ Appendices A and B in Nguyen Hong Thao (2005). ‘Maritime Delimitation and Fishery Cooperation in the Tonkin Gulf,’ *Ocean Development and International Law* 36(1): 41–44. A slightly different English translation of the maritime delimitation agreement can be found as appendix to Zou Keyuan (2005). ‘The Sino-Vietnamese Agreement on Maritime Boundary Delimitation in the Gulf of Tonkin’, *Ocean Development and International Law* 36(1): 22–24.

Tonkin Gulf agreement was China's first maritime boundary agreement ever, and still today remains the only one. Vietnam had already signed a boundary agreement with Thailand in 1997 and reached another one with Indonesia in 2003, so for Vietnam the Tonkin Gulf agreement is one of three.

The Tonkin Gulf agreements were analyzed in 2005 by one Chinese and one Vietnamese legal scholar in separate articles in the same issue of *Ocean Development and International Law*.³ The present paper is based primarily on those two analyses while also being inspired by two later contributions situating the Tonkin Gulf agreements in a wider regional context.⁴ The only original contribution in this paper is its discussion of the possible implications of the Tonkin Gulf agreements for further resolution of disputes in the South China Sea. The agreements made in 2000 have drawn too little public attention from scholars, politicians and the media in the ten years that have passed since they were ratified. This lack of attention has contributed to an exaggerated pessimism as to the prospects of resolving the maritime disputes in the South China Sea.

Vietnam, because it had more islands and a longer relevant coast than China, received 53.23 per cent of the overall water area in the maritime boundary agreement while China had to do with 46.77 per cent. In accordance with normal state practice, the main determining factor was distance from the coasts of Vietnam and the Chinese Hainan Island.

Map 1: Delimitation line and joint fishing zones in the Tonkin Gulf. Source: Nguyen Hong Thao (2005). 'Maritime Delimitation and Fishery Cooperation in the Tonkin Gulf,' *Ocean Development & International Law* 36(1): 26.



³ Zou Keyuan (2005): 13–24; Nguyen Hong Thao (2005): 25–44.

⁴ Nguyen Hong Thao & Ramses Amer (2007). 'Managing Vietnam's Maritime Boundary Disputes, *Ocean Development & International Law* 38(3): 305–324; Nguyen Hong Thao & Ramses Amer (2009). 'A New Legal Arrangement for the South China Sea?,' *Ocean Development & International Law* 40(4): 333–349. See also Ramses Amer's contribution in Ramses Amer and Zou Keyuan, eds. (2011). *Conflict Management and Disputes Settlement in East Asia* (London: Ashgate).

Capable negotiators with a strong mandate

A key lesson from the Tonkin Gulf negotiations is that success depends both on teams of knowledgeable and capable negotiators who meet frequently to work closely together, and on a strong mandate from the top national leaders. No such top level commitment had been present when Vietnam and China first negotiated over the Tonkin Gulf in 1974 (when China seized the western Paracels from South Vietnam), and 1977–78 (when bilateral relations degenerated into crisis and war). In the 1980s the bilateral relationship was at a freezing point, but after the two countries had normalized their relations in 1991, the necessary political will was established on both sides. Between 1993 and 2000, the two sides held seven rounds of negotiations at the governmental level, three unofficial meetings between the heads of the governmental delegations, eighteen rounds of negotiations in mixed working groups, nine unofficial meetings between legal and technical experts, and ten rounds of meetings by groups of experts.⁵ In 1997, during a visit by the general secretary of the Vietnamese Communist Party to China, the top leaders of the two countries set as a goal to arrive at a land border treaty by 1999 and a Gulf of Tonkin agreement by 2000. These were tough deadlines to meet for the negotiators since they had many complex issues to resolve. Yet, when the general secretaries of the two communist parties met again in 1999, they stuck to their ‘determination to accelerate the process of negotiations and raise their working efficiency’ so as to conclude the land border treaty in 1999, complete settlement of the maritime delineation of the Tonkin Gulf in 2000, and make their common borderline one of ‘peace, friendship and stability.’⁶ Such was their determination to meet the deadline that the negotiators had to rush through the last outstanding issues and come up with treaty texts before their negotiations had been completed. Quite a few remaining issues had to be resolved after the agreements had been signed. It took until 2004 before the Vietnamese National Assembly and the National People’s Congress of China could ratify the two Tonkin Gulf agreements, and until 2011 before the land border had been fully demarcated with stone markers placed at regular intervals along the whole mountainous border.

One flaw in this process, however, was the absence of public debate in both China and Vietnam, and of a public relations effort undertaken by the two governments. This caused two problems. One was that there was little public awareness of the benefits to be drawn from the agreements in terms of enhanced security, protection of fish stocks, environmental protection, and economic opportunities. The other was that there was a public backlash against parts of the agreements from opposition

⁵ Zou Keyuan (2005): 13.

⁶ Nguyen Hong Thao (2005): 27–28.

movements accusing each government of having made excessive concessions. The backlash, however, was mainly directed against the land border agreement.

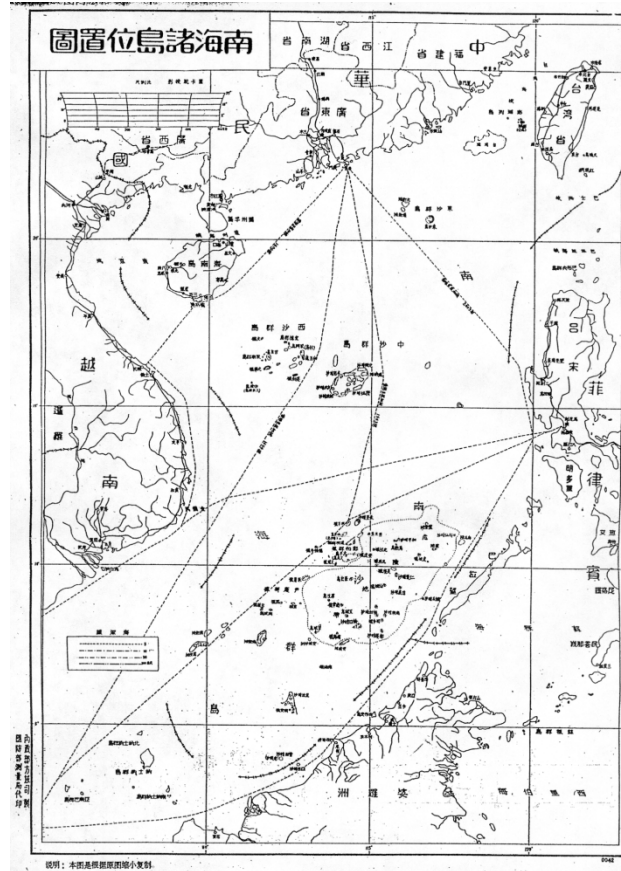
The utility of international law

When arguing publicly in favor of a territorial claim national governments have a tendency to emphasize history. Ancient historical evidence of presence, utilization and the placement of symbols of authority are evoked to convey the impression that a claimed territory has belonged to a nation since time immemorial. There is also a tendency to exaggerate the importance of old maps. Any line or sign on maps that can be used as evidence of sovereignty is widely displayed as a visual sign of ownership. This contributes to creating an intense public illusion that one's own national claims are evidently justified. Public claims of this kind endow sovereignty claims with a sacred allure and tend to make them non-negotiable. When governments sit down to negotiate, they need a different kind of language in order to seek for compromises. That language is found in international law.

In the Tonkin Gulf, the two sides were fortunate to have no rival claims to islands. The allocation of coastal islands had been made by France and China in the 1880s, and sovereignty over Bach Long Vi Island in the middle of the Gulf had been resolved in Vietnam's favor through a Chinese decision in 1957. It was inhabited by only Vietnamese citizens. Thus it was easier to negotiate about the Tonkin Gulf than about areas around disputed islands, such as Dokdo/Takeshima between Korea and Japan, Diaoyu/Senkaku between China, Taiwan and Japan, Scarborough Shoal (Huangyan) between China, Taiwan and the Philippines, and the Paracels (Xisha/Hoang Sa) and Spratlys (Nansha, Kalayaan, Truong Sa) in the South China Sea, where 6–7 states have rival claims.

Yet the Tonkin Gulf negotiations could easily have been derailed if the parties had insisted on claims based on maps with lines or on historic rights. For China this was no problem since the two Tonkin Gulf dashes originally included on the Republic of China's eleven-dash line map of the South China Sea had been omitted on maps published in the People's Republic of China (Map 2).

Map 2: Map published by the Republic of China in 1948 with sea-lanes and eleven dashes indicating a Chinese claim to all islands inside. The two dashes in the Tonkin Gulf, which would have made Bach Long Vi a Chinese island, have not been included in maps published in the People's Republic of China, whose maps have just nine dashes in the South China Sea.



Vietnam, however, had made strong arguments in the 1970s–80s, based on ‘historical rights’ and a line drawn on a historical map. Vietnam asserted that more than half of the Tonkin Gulf was Vietnamese ‘historic waters’ and thus should be considered the ‘internal waters’ of Vietnam, under its total sovereignty and hence without freedom of navigation for foreign vessels.⁷ Vietnam also claimed that a short line on a map attached to a Franco-Chinese border agreement of 1887, extending the land border into the sea, was meant as a maritime boundary, which should hence continue through the whole of the Tonkin Gulf, cutting off Hainan from all the most valuable fishing grounds. It was left unclear where the line should have its terminus. China had argued, more reasonably, that the line on the 1887 map just served the purpose of marking out which coastal islands belonged to China and which to

⁷ Zou Keyuan (2005): 15.

Vietnam (or the French protectorate Tonkin). It did not constitute a maritime boundary, China said. That boundary should be constituted by following the normal practice of establishing an equitable median line.

Once the Chinese and Vietnamese negotiators sat down with a strong mandate in 1993, it became clear that it would be impossible to negotiate on the basis of Vietnam's historical arguments. The Vietnamese were forced to put them aside and argue on the basis of the law of the sea. An agreement was reached on 19 October 1993, to base the negotiations entirely on the law of the sea. For the delimitation of their maritime boundary, the two sides agreed to apply international law and refer to international practice, following the principle of equity. After Vietnam had ratified the Law of the Sea Convention in 1994 and China in 1996 the Convention served as the obvious shared legal basis for the whole process of negotiation.⁸

The law of the sea did not of course dictate the terms. Although it includes some rather clear principles and guidelines, it is a flexible instrument of conflict resolution, open to practically oriented interpretation. Countries are also free of course to depart from normal practices when agreeing on their maritime boundaries. It is possible that an impartial tribunal would have arrived at a somewhat different solution in the Tonkin Gulf from the one agreed upon bilaterally, but probably not radically different.

When we now turn to discussing the implications of the Tonkin Gulf agreements for conflict resolution elsewhere, we should first emphasize that the bilateral agreement included the normal caveat that it does not affect or prejudice the position of either state concerning other ocean matters. The two countries are not legally bound to follow any precedent set in the Tonkin Gulf agreements. Yet they are of course free to refer to them as useful precedents in their talks with each other.

Common fishery zones

A key Chinese concern in the negotiations was that its fishermen, particularly those on Hainan, must be able to continue to fish on the Vietnamese side of the Gulf after a maritime boundary had been agreed upon. China had more fishermen than Vietnam, and they had invested far more in modern fishing vessels. Most of the best fishing grounds, however, were in the western half of the Gulf. There had been many incidents with Vietnamese patrol ships confiscating the gear of Hainanese fishing boats when they came near the Vietnamese coast. At the beginning of the negotiations China thus wanted fishing to be an integral part of the boundary negotiations.

⁸ Nguyen Hong Thao (2005): 27.

Vietnam, however, preferred to keep maritime delimitation and fisheries as two separate issues. The result was that the boundary and fishery negotiations were conducted in parallel, but independently of each other, resulting in two separate agreements. The fishery agreement signed on 25 December 2000 was highly preliminary. It was necessary afterwards to carry out lengthy negotiations before a more detailed additional protocol could be agreed upon in 2004, paving the way for the exchange of ratification instruments for both the maritime boundary and the fishery agreement on 30 June of that year.

The fishery agreement and additional protocol established a substantial common fishery zone between Hainan and Vietnam with a band of some thirty nautical miles on either side of the maritime boundary (see Map 1). This zone would be open to fishing by both countries' fishermen for a period of twelve years with an automatic extension of three years unless one side chose to annul the agreement. There would, however, be a quota system for the allowable catch and for the number of operating vessels allowed to take part in the fisheries, and compliance would be monitored by both sides. If a Chinese fishing boat were caught fishing without the necessary permission, the Vietnamese authorities were allowed to intervene – and vice versa. In that part of the Gulf which is north of the northern point of Hainan (the 20th parallel), a joint transitional fishing zone was established for a period of just four years. The 15 nautical mile EEZ of Bach Long Vi Island was reserved for just Vietnamese fishing.⁹

The fishery agreement shows that a maritime boundary agreement does not prevent the institution of arrangements to accommodate established fishing interests. It is fully possible to allow active fishermen some time to adjust to new circumstances. The fishery agreement also shows how a negotiated agreement may establish agreed institutional mechanisms for managing fish stocks and protecting the environment. This did not happen immediately. Even after the agreements had been ratified, a shooting incident occurred in the Tonkin Gulf related to a fishery dispute. The first joint Sino-Vietnamese naval patrol exercise was carried out only in 2006.¹⁰ A Joint Sino-Vietnamese Fishing Committee for the Tonkin Gulf was also established. If such an agreement could be established by the two sides in the Tonkin Gulf it should be possible to agree on similar fishing agreements multilaterally for the central parts of the South China Sea as well, including the waters around the Paracels and Spratlys, and set up a regional authority to establish and monitor quota arrangements. Multilateral fishing bans could then be declared during parts of the year. Such fishing

⁹ Zou Keyuan (2005): 16.

¹⁰ Nguyen Hong Thao & Ramses Amer (2007). 'Managing Vietnam's Maritime Boundary Disputes,' *Ocean Development & International Law* 38(3): 314.

bans would have far more legitimacy and be easier to enforce than the unilateral fishing bans instituted by China in recent years.

Oil and gas exploration

Perhaps the point that was left most unclear in 2000 was how to explore for oil and gas. The parties just agreed to reach an agreement later on the most effective manner to exploit those deposits of petroleum or mineral resources that cut across their maritime boundary, and to share equitably in the benefits from their exploitation.¹¹

It took until 2006 before China and Vietnam agreed to undertake joint exploration in an area cutting across their boundary, and the exploration did not lead to any discovery of commercially exploitable oil and gas. In 2013, as mentioned, it was agreed to conduct joint exploration in a larger area. Although it took long for the two countries to agree on such exploration, probably the main lesson to be learnt from their efforts is that a fully delimited maritime boundary facilitates the process towards exploring and exploiting hydrocarbons. It is easier to agree on revenue sharing and the setting up of joint ventures when there is an agreed boundary than to establish joint developing zones in disputed areas. The techniques for measuring how much oil or gas belongs to either side when a basin cuts across a boundary, and use this as a basis for revenue sharing, have been well established in areas such as the North Sea.

A median line adjusted for equity

The three main things to notice concerning the way the maritime boundary was drawn in the Tonkin Gulf is, first that it followed the single-line principle for both the EEZ and continental shelf, second that it was most probably arrived at by first drawing an equidistant line between base points on either country's coast and then modifying the line in order to ensure equity (the exact procedure followed during the negotiations has not been made public). This method is likely to be the most practical also in other parts of the South China Sea.

Vietnam and China agreed to use one single line to delimit both the continental shelf and the Exclusive Economic Zone (EEZ) of either country. This is common but not a universal principle. If the continental shelf extends beyond 200 nautical miles, then the EEZ and continental shelf boundaries will differ. This may also be the case if two countries with opposite coasts use the median line principle for their EEZ but

¹¹ Nguyen Hong Thao (2005): 29. Zou Keyuan (2005): 17–18.

take the natural prolongation of the continental shelf into consideration when delimiting their continental shelf. This could be relevant in the East China Sea, where China argues that its continental shelf extends all the way to the bottom of the slope of the Okinawa trough but cannot make a similarly extensive EEZ claim.

A maritime boundary between two opposite coasts is normally first drawn as an equidistant line between base points on either side, and then adjusted in order to ensure equity with reference to the length of the relevant coasts. Long relevant coasts shall carry more weight than short ones. In the Tonkin Gulf negotiations, Vietnam is likely to have pursued this standard principle. According to Nguyen Hong Thao, the ratio of the relevant coastlines of Vietnam and China was found to be 1.1:1, while the water areas of the two countries in the agreement are 1.135:1. He thus finds that the line of delimitation is 'equitable and acceptable.'¹²

Already at the United Nations Convention on the Law of the Sea (UNCLOS 3) 1973–82, China favored a wider concept of equity, and has stuck to its opinion since. China wants to introduce the equity principle at an early stage in a process of delimitation, not just as a way of modifying the equidistant line. China also wants to take other factors into consideration than just the length of relevant coasts. Thus China argued from the beginning of its negotiations with Vietnam that the Tonkin Gulf should be divided equally between the two sides. Vietnam, with its longer coast and more offshore islands, would stand to lose if a principle of strict equality were applied. The result was a compromise where Vietnam obtained 53.23 per cent and China 46.77 per cent of the area. As a strict use of equidistant lines between base points at the low water mark of the opposite coasts would have given Vietnam an even larger area it is likely that the equity principle did contribute to modifying the equidistant line in China's favor. One factor that contributed to reducing Vietnam's share was the limited weight attributed to certain islands.

Small islands count less than opposite coasts

Small islands may generate enormous continental shelves and EEZs if they are far away from any rival lands. They can then have an EEZ radiating out 200 nm in all directions. Sovereignty to small and scattered islands in the Pacific thus adds enormously to the maritime zones of countries such as France, the USA, Chile and Japan. Offshore islands may also radically extend the EEZ of a coastal state if belonging to that same state and facing no opposite coast.

¹² Nguyen Hong Thao (2005): 29.

In semi-enclosed seas, however, like the Tonkin Gulf, the South China Sea, and the East China Sea, the weight of small islands must be more limited since the length of their relevant coasts must be weighed against the length of any opposite coast. In the International Court of Justice's 19 November 2012 judgment in the Nicaragua versus Colombia case, the court applied some principles with clear relevance for the South China Sea.¹³ One of these principles is that a small island may be given little weight on one side but much on the other. On the side facing an opposite mainland coast it may have a very modest effect on delimitation while on the outward side, particularly if it faces the EEZ of the same country that has sovereignty to the island, it can generate a highly substantial zone. This is because the ICJ prefers to have continuous national EEZs rather than a patchwork of enclaves. In the Nicaragua versus Colombia case enclaves were allowed only when they could not be avoided, as when an island was so small or insignificant that it could not satisfy the criteria set in article 121.3 of the Law of the Sea Convention, which says: 'Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.'¹⁴

In the Sino-Vietnamese Gulf of Tonkin agreement of 2000, the Vietnamese Con Co (Tiger) and Bach Long Vi (Nightingale) islands, which both have a permanent population and are much bigger than any island in the Paracel and Spratly archipelagos, were deemed capable of generating extended maritime zones. Con Co has some 400 inhabitants. Bach Long Vi did not have any permanent habitation historically but some Vietnamese and Hainanese households settled down there in 1920 when a source of fresh water was found. If the Sino-Vietnamese agreement of 1957 agreement to let Vietnam have sovereignty over the island led to any change in the composition of the island's population is unknown to this author. However, as the Tonkin Gulf negotiations began for real in 1993, Vietnam persuaded a group of young volunteers and some fishing households to settle down permanently on the island.¹⁵ In

¹³ ICJ judgment of 19 November 2012 in the "Territorial and Maritime Dispute (Nicaragua v. Colombia)", see press release at: <http://www.icj-cij.org/docket/files/124/17162.pdf> and the full judgment at: <http://www.icj-cij.org/docket/files/124/17164.pdf>. See also the interesting separate declaration by Judge Xue Hanqin, who agreed with the judgment as such but would have preferred the delimitation to have taken equity into account from the very beginning rather than following the standard method of first drawing an equidistant line and then adjusting it, at: <http://www.icj-cij.org/docket/files/124/17172.pdf> (all accessed 25 June 2013).

¹⁴ LOS Convention, Article 121.3:

http://www.un.org/depts/los/convention_agreements/texts/unclos/part8.htm.

¹⁵ 'On March 26th 1993, Hai Phong People's Committee took the volunteer young people and some fishing households to the island to inhabit there.' 'Some features about Bach Long Vi island development history,' 26 July 2007: Communist Party of Vietnam Online Newspaper 26 July 2007. http://dangcongsan.vn/cpv/Modules/News_English/News_Detail_E.aspx?CN_ID=56858&CO_ID=30191 (accessed 23 June 2013).

the negotiations, Bach Long Vi was, as mentioned, deemed capable of generating an EEZ but was given just a 3 nautical mile EEZ and continental shelf beyond its 12 nautical mile territorial sea (15 nautical miles in total). Con Co is reported to have been given a 50 per cent effect.¹⁶

Although these agreements do not prejudice China's position with regard to other areas, Vietnam could make a valid argument that when so little weight was attributed to two populated islands of a quite substantial size, much smaller islands in other parts of the South China Sea should at least not count for more. If any of the Paracel and Spratly islands are considered capable of generating an EEZ and continental shelf, they should be given very limited weight, except perhaps on the side facing outwards to the part of the South China Sea that is more than 200 nautical miles from the main coasts of all the countries surrounding the South China Sea. If China realizes that the Paracel and Spratly islands cannot generate any EEZs covering the outer area within the nine-dashed line, then the time may be ripe for beginning serious boundary negotiations.

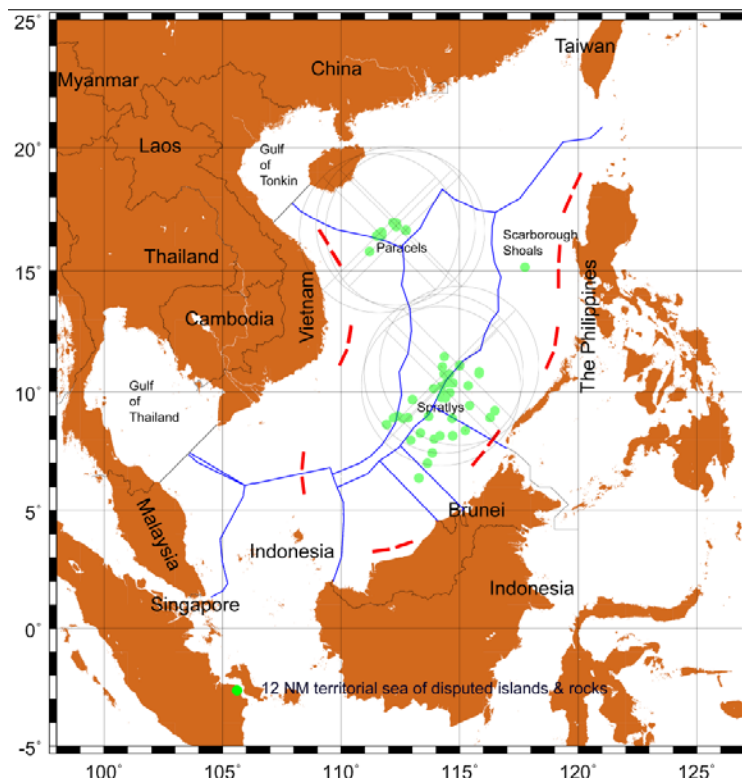
Map 3: Agreed boundaries (blue lines), the 200 nautical mile measured from the main surrounding coasts (red dots), and the Paracel and Spratly islands with 12 nautical mile territorial waters (green circles). The area in the middle of the South China Sea (between the red dotted lines) is commonly referred to as the 'doughnut.' It cannot be claimed as part of any country's EEZ unless some of the Paracels and Spratlys are deemed capable of generating an EEZ of their own. A continental shelf, however, may extend beyond 200 nautical miles if it is naturally prolonged.



¹⁶ Zou Keyuan (2005): 15.

The fact that small islands may generate vast zones on one side while having just a small zone on the other could in fact make it possible to delimit a maritime zone around the disputed Paracels without first resolving the sovereignty dispute as such. Vietnam and China could agree to establish a limited EEZ and continental shelf for the Paracels on their northern side (facing Hainan) and south-western side (facing Vietnam) and a much larger EEZ in the east and south-easterly direction, where it would include much of the northern part of the ‘doughnut’ (the part of the South China Sea that is more than 200 nautical miles from all mainland coasts). It would then also include the submerged Macclesfield Bank. Although Vietnam would continue to lay claim to the Paracels and their EEZ, it could tacitly realize that they would remain under Chinese control. Hanoi could simply from time to time remind the world of its claim. The advantage to be gained by Vietnam through this kind of pragmatism would be to win Chinese recognition of its own vast EEZ and continental shelf in the area south of the Paracels and between the Vietnamese mainland and the Spratlys.

Map 4: The 200 nautical mile circles on this map around some of the islands in the Paracels and Spratlys that might generate extended maritime zones, show that their EEZs could consume most of the ‘doughnut.’ Only in the northeast and extreme southern part of it are some areas to be found that cannot be part of any conceivable EEZ. Yet even they could be part of extended continental shelf claims by the Philippines, Malaysia and Vietnam. Thanks to Huy Duong, who has drawn this map, for allowing its reproduction here.



The boundary's prolongation

In January 2006, China and Vietnam began talks about a possible prolongation of their maritime boundary from the mouth of the Gulf of Tonkin.¹⁷ An agreement to expedite these talks was made in 2008, and no less than seven discussion sessions were held during 2010. In 2011, at a time of high tension in the South China Sea, several high level meetings were held between Vietnamese and Chinese representatives, discussing the South China Sea. On 11 October 2011, on the first day of General Secretary of the Vietnamese Communist Party Nguyen Phu Trong's first visit to China, the two governments reached an agreement to co-operate in several 'less sensitive' areas, including marine environmental protection, scientific research, search and rescue, disaster reduction and prevention, and to have further talks about the mouth of the Tonkin Gulf. Two rounds of expert level talks have since taken place between the two countries' specialists, the latest in May 2013. It was agreed then to have a third round in the second half of 2013, and to conduct joint surveys of the relevant sea area.¹⁸ But it appears to have been a big problem that the Vietnamese want to discuss the Paracels while the Chinese refuse any discussion of territories that are under 'undisputable' Chinese sovereignty.

A prolongation of the maritime boundary from the mouth of the Tonkin Gulf has more potential than one might think. The existing boundary is a median line between Hainan and the coast of central Vietnam (and Con Co Island). A prolongation of this line in a south-easterly direction is of great interest for two main reasons:

First, if the principle of equidistance is followed, the line will point directly towards the Crescent group of the Paracels (Maps 3 and 4). At some stage it should therefore bend eastward if the Paracels are Vietnamese, and southward if they are Chinese. The question is then how far the line can be drawn without prejudicing any of the two claims to the Paracels. Perhaps it does not need to prejudice the claims at all: Vietnam could allow the line to bend southward and still uphold its sovereignty claim. A creative solution might be found by allowing the two sides to jointly delineate a disputed zone around the Paracels, similar to the undisputed 15 nautical zone around Bach Long Vi, and just skirt the issue of who has sovereignty to the islands and resources inside the zone. In reality, China would continue to control the Paracels and their maritime zones, including the submerged Macclesfield Bank. Vietnam could continue to claim the Paracels and its maritime zones formally, and

¹⁷ Nguyen Hong Thao & Ramses Amer (2007). 'Managing Vietnam's Maritime Boundary Disputes,' *Ocean Development & International Law* 38(3): 305–324.

¹⁸ 'Vietnam, China negotiate sea area off Tonkin Gulf,' *Tuoi Tre News* 1 June 2013; <http://tuoitrenews.vn/politics/10236/vietnam-china-negotiate-sea-area-off-tonkin-gulf> (accessed 23 June 2013).

demonstrate its claim through regular diplomatic statements. It could not, however, have any realistic prospect of regaining control to the islands or enforce any sovereign rights to their resources.

What could Vietnam gain from this kind of creative flexibility? It could obtain a Chinese clarification of the meaning of its nine-dashed line. This is the second reason why the Sino-Vietnamese talks about boundary prolongation are so interesting. The boundary will approach the first of the nine dashes on China's controversial map. Since Vietnam can surely not allow the boundary to bend so much southward that it co-insides with the dash, no agreement is possible unless China accepts a line diverging from the nine-dashed line. This would then contribute to clarifying that the nine-dashed 'U-shaped' line is not a claim to 'maritime territory' or 'historic waters' but just an indication that China claims all islands inside it and their maritime zones. Such clarification is desirable from every point of view and carries immense importance for the South China Sea as a whole. It might even obviate the need for the Arbitration Tribunal that was established in March–April 2013 at the request of the Philippines, which has been asked to undertake this clarification on China's behalf.

The Sino-Vietnamese negotiations on the continuation of their boundary from the mouth of the Gulf of Tonkin could thus clarify a matter that has caused great anxiety in all the countries surrounding the South China Sea – even Indonesia. If China and Vietnam were to reach an agreement based on international law, with an agreed boundary ignoring the first Chinese dash while at the same time separating the (disputed) Paracels from the Vietnamese coast, then this could have some highly beneficial effects for long term conflict resolution in the South China Sea as a whole.

Conclusions

Zou Keyuan wrote in 2005 that 'the delimitation in the Gulf of Tonkin is indicative of China's positive attitude towards the resolution of other maritime issues with Vietnam and other neighboring countries.'¹⁹ Indeed this appeared to be the case in 2005. China had shown a similarly positive attitude in 2002 when agreeing with ASEAN on a Declaration on the Conduct of Parties in the South China Sea. However, a number of Chinese actions since 2009 have caused immense worry among its neighbors: a rapid build-up of naval and other maritime and aerial capabilities; construction works on reefs in the Spratlys; an assertive rhetoric in official and unofficial media; the imposition of unilateral fishing bans; the cutting of cables from seismic exploration ships operating on the Vietnamese continental shelf; the elevation of Sansha on

¹⁹ Zou Keyuan (2005): 13.

Woody Island in the Paracels to a ‘city’ serving as administrative centre for the whole South China Sea area; a standoff with the Philippines at Scarborough Shoal in Spring 2012 leading to de facto Chinese control of the shoal; active efforts in 2012 to work with Cambodia to prevent an ASEAN summit from stating any opinion on the recent Scarborough Shoal standoff; the announcement of oil concession blocs along the other perimeter of the nine-dashed line, close to the Vietnamese coast; unwillingness to negotiate seriously with ASEAN a legally binding code-of-conduct to replace the non-binding Declaration on the Conduct of Parties from 2002.

There have been assertive moves also by other claimant states. Indeed most Chinese commentators have seen China’s own actions as legitimate reactions to the assertiveness of others. China has been abhorred to see its neighbors call on the USA for protection, applaud its ‘pivot’ to Asia, and engage in military exercises or other forms of co-operation with the US Navy. The fact that the USA has enjoyed such increased diplomatic leverage both in Southeast and Northeast Asia in the last five years to the detriment of China could perhaps induce Beijing to think twice about the wisdom of its policies. Could it be in China’s interest to return to the positive approach it displayed during 1997–2007? Beijing could perhaps seek inspiration from the Tonkin Gulf agreements. As of 2013, with the sorry state of China’s relations with the Philippines, it seems that Beijing’s main opportunity is once again to negotiate with Hanoi. The two communist party states could agree on a prolongation of their maritime boundary in a south-easterly direction, in a way that would facilitate dispute resolution in the rest of the South China Sea as well.

China’s legal and maritime experts are likely to realize that no South China Sea agreement will ever be possible unless it is first made clear that the nine-dashed line means only a Chinese claim to the islands inside it and the maritime zones they can generate on the basis of the law of the sea. This is the main clarification that the Philippines seek from the Arbitral Tribunal that was established in March–April 2013 under the law of the sea. China now runs a risk that the meaning of its nine-dashed line will be clarified on its behalf by a Tribunal dominated by European judges, without any Chinese participation (since China has refused to participate). China’s national interests could well be better served if it undertook this clarification itself. As mentioned above, this may be done by agreeing with Vietnam on prolonging the maritime boundary established in 2000 from the mouth of the Tonkin Gulf in a direction that does not converge with the first dash in the nine-dashed line. This would in fact seal the matter.

The argument presented in this paper form a part of a larger argumentation that the South China Sea disputes are not as impossible to resolve as often assumed.²⁰ They can be resolved on the basis of international law although not probably in the form of a big bargain or negotiated package. Conflict resolution will happen incrementally over a long period of time. The way forward will go through a combination of bilateral and multilateral approaches. As a rising great power, China holds the main keys to success. Let me predict that as China grows stronger and more self-confident, it will become increasingly aware of its grand strategic interest in secure maritime borders. And then it will also be ready to accommodate its neighbors and base its boundary negotiations solidly on the law of the sea – just as it did in 2000 with regard to the Tonkin Gulf.

²⁰ Stein Tønnesson (2013). ‘Why and how China will resolve its maritime disputes,’ *Global Asia* (forthcoming). Song Yann-huei and Stein Tønnesson (2013). ‘The Impact of the Law of the Sea Convention on Conflict and Conflict Management in the South China Sea,’ *Ocean Development and International Law* (forthcoming). Stein Tønnesson (forthcoming). ‘Law trumps Realpolitik in the South China Sea,’ (accepted for publication by *Asian Survey*). Stein Tønnesson (forthcoming). ‘Vietnam and China in the South China Sea,’ ch. 11 in Zou Keyuan and Song Yann-huei, eds., (book to be published by Palgrave Macmillan). Stein Tønnesson (forthcoming). ‘China’s National Interests in the South China Sea,’ chapter in Nong Hong, ed., (book to be published by Routledge).