

# The Republic of China's Policy Toward the South China Sea: A Review

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*The sovereignty dispute over the Spratly (Nansha) Islands is an intricate problem which has long troubled the government of the Republic of China (ROC) on Taiwan. In the past, passive declaration of sovereignty was the main course of official policy. It was not until 1993 that, because of the escalation of tension among the claimant states, the ROC government adopted a new policy on the issue. The Policy Guidelines for the South China Sea is now the basic legal framework for the ROC's future actions. While welcoming the adoption of the new policy, the author highlights certain problems. First, the main components of the policy are outlined. Second, problematic areas are examined, including the introduction of the "historic waters" argument. Finally, suggestions are made for the improvement of the policy.*

**Keywords:** Republic of China, maritime policy, South China Sea, Spratly Islands, law of the sea

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## Conflict in the South China Sea: Recent Developments

After being dormant for quite some time, the sovereignty dispute over the Spratly (Nansha) Islands has regained momentum recently. This time, expectations of large offshore oil deposits in the region are spurring aggressive oil exploration efforts, supported by naval power, by the People's Republic of China (PRC) and Vietnam in the areas where their claims overlap.<sup>1</sup>

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<sup>1</sup>Edward D. Smith, Jr., "China's Aspirations in the Spratly Islands," *Contemporary Southeast Asia* 16, no. 3 (December 1994): 274.

This renewed tension can be traced back to 1991, when it was discovered that the PRC had built a 2,600-meter runway on Woody Island in the Paracel (Xisha) Islands which enabled it to rapidly project forces into the Spratlys, probably for the first time.<sup>2</sup> In February 1992, the PRC's National People's Congress promulgated the Law on Territorial Waters and Their Contiguous Areas, which expressly included the Spratlys in the PRC's land territory and authorized the use of military force to prevent other states from occupying the islands.<sup>3</sup> Moreover, in May that year, Beijing signed a contract with a U.S. company to prospect for oil and gas in an area close to the Spratly Islands and pledged the use of its navy to protect the company's activities.<sup>4</sup> In July 1993, the PRC awarded a second contract to an American company to cooperate in the development of South China Sea oil fields.<sup>5</sup> In July 1994, the PRC was even reported to have deployed two warships in the South China Sea to block the re-supply of a Vietnamese oil drilling rig in an area near the Spratlys where the PRC plans to prospect.<sup>6</sup>

Although the situation was already volatile, it was not until early 1995 that the dispute reached a crisis. On February 2, the Philippines sent a patrol ship and a reconnaissance aircraft to Mischief Reef (Meiji Jiao), one of the areas Manila claims, to verify a report by a Filipino fishing boat captain that he had been detained for a week in January by PRC forces who had set up a base on the reef.<sup>7</sup> Although the reconnaissance flight confirmed the report, President Fidel Ramos did not reveal the news until five days later when another local vessel carrying the mayor of nearby Pag-asa (Thitu) Island was allegedly turned away by PRC ships.<sup>8</sup> On February 8, Ramos said his government was protesting, through a "firm aide-memoire,"

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<sup>2</sup>*Free China Journal*, August 27, 1993, 3. See also Eric Hyer, "The South China Sea Disputes: Implications of China's Earlier Territorial Settlements," *Pacific Affairs* 68, no. 1 (Spring 1995): 34.

<sup>3</sup>Text of the law can be found in *The International Journal of Marine and Coastal Law* 18 (1993): 158-61.

<sup>4</sup>"In Developing South China Sea Oil, the PRC Claims That It Will Not Hesitate to Use Force," *Zhongyang ribao* (Central Daily News) (Taipei), June 21, 1992, 2.

<sup>5</sup>Hyer, "The South China Sea Disputes," 41.

<sup>6</sup>Philip Shenon, "China Sends Warships to Vietnam Oil Site," *The New York Times*, July 21, 1994. See also Smith, "China's Aspirations in the Spratly Islands," 275.

<sup>7</sup>"Territorial Imperative," *Far Eastern Economic Review*, February 23, 1995, 15.

<sup>8</sup>"Spratlys Test ASEAN: Reefs Strain Diplomatic Relations," *China News* (Taipei), April 3, 1995, 4.

the presence of PRC vessels, as the PRC's actions were "inconsistent with international law."<sup>9</sup> As a result, on March 25 the Philippines, after destroying concrete markers and small structures erected by the Chinese on these reefs, seized sixty-two Chinese fishermen and four boats for allegedly poaching in Philippine waters; they were charged with illegal fishing despite Beijing's demands that they be released.<sup>10</sup> Moreover, the Philippines began to send more troops to the Philippine-occupied parts of the Spratlys.<sup>11</sup> In view of this escalation of tensions, the present situation on the Spratlys may thus be said to be on the verge of armed conflict.<sup>12</sup>

### The ROC's Current Policy Toward the South China Sea: The New "Historic Waters"?

The sovereignty dispute over the Spratlys is an intricate problem which has long troubled the government of the Republic of China (ROC) on Taiwan.<sup>13</sup> In the past, a passive declaration of sovereignty was said to be the main course of official policy.<sup>14</sup> It was not until 1993 that, because of the escalating tension mentioned above, the ROC government adopted a new policy—not only in relation to the Spratlys but to the South China Sea in general.<sup>15</sup> The Policy Guide-

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<sup>9</sup>See note 7 above.

<sup>10</sup>"The PRC Demands That the Philippines Release Its Sixty-two Fishermen," *Lianhe bao* (United Daily News) (Taipei), March 29, 1995, 10. See also note 8 above.

<sup>11</sup>"Patrol Boats Off to Spratlys," *China News*, March 31, 1995, 4.

<sup>12</sup>"Canceling the Patrol Mission to the Spratlys, the Patrol Boats of the Seventh Peace Preservation Police Corps Land on the Pratas," *Lianhe bao*, April 2, 1995, 1. In a press conference, Lu Yu-chun, the then director-general of the National Police Administration of the Republic of China, stated that it is now very possible for Philippine and Chinese troops to clash in the South China Sea because of their sovereignty dispute over some islands in the Spratlys. The situation in the area is therefore "quite dangerous." See *ibid.* See also "Spratly Patrol Postponed to Avoid Conflict," *China News*, April 3, 1995, 1. Moreover, although the PRC and the Philippines subsequently agreed on a code of conduct in August 1995, it was reported that a Philippine naval vessel once again exchanged fire with, allegedly, a PRC vessel on January 22, 1996. Thus, the tense situation does not seem to have improved very much. For the latter incident, see *China News*, January 30, 1996, 1.

<sup>13</sup>Kuan-Ming Sun, "The Republic of China Tightens Its Grip on the Spratlys," *L.S.I. Professional Newsletter* #39 (Honolulu) 6, no. 7 (October 1995): 3.

<sup>14</sup>*Ibid.* See also "The South China Sea Task Group is Still Limited to Resource Evaluation; With Respect to Joint Development, the PRC Demonstrates No Good Intention," *Zhongyang ribao*, June 21, 1992, 2.

<sup>15</sup>"The Executive Yuan Passes the 'Policy Guidelines for the South China Sea' Draft, Reaffirming the ROC's Sovereignty over the Macclesfield Bank," *ibid.*, March 12, 1993, 2.

lines for the South China Sea is now the basic legal framework for the ROC's future actions.<sup>16</sup> The guidelines are more active and comprehensive, and their essential goals are to safeguard sovereignty over the islands in the South China Sea through an increased military presence and to actively seek peaceful settlement of the disputes relating to them (Guidelines Sec. 2.1, 3.3.c, and 2.4). More detailed goals include surveying and registering the land of the islands (Guidelines Sec. 3.4.a); protection of fisheries and navigation; security of maritime development operations (Sec. 3.3.b); establishment of satellite communications facilities and navigational aids (Sec. 3.4.a and c); construction of airport and dock facilities (Sec. 3.4.d); establishment of an environmental data bank; adoption of environmental protection measures (Sec. 3.6.a); collection of useful information on resources (Sec. 3.9.a); and drawing up development programs (Sec. 3.9.c). Moreover, the instrument also envisages the establishment of a police force for patrolling the area in question (Sec. 3.1.b). The most important part of this new policy is, however, its Prologue. The first paragraph of the Prologue reads:

On the bases of history, geography, international law, and fact, the Spratly Islands, the Paracel Islands, Macclesfield Bank, and the Pratas [Dongsha] Islands have always been a part of the inherent territory of the Republic of China. The sovereignty of the Republic of China over them is beyond doubt.

The second paragraph of the Prologue states:

The South China Sea area within the *historic water limit* is the maritime area under the jurisdiction of the Republic of China, in which the Republic of China possesses all rights and interests. The government of the Republic of China is willing to develop this area on the basis of peace and reason, and in accordance with the principle of safeguarding the sovereignty of the Republic of China. (Emphasis added)

The legal status of the waters of the South China Sea, it has been pointed out, had never been clarified by the ROC;<sup>17</sup> thus, the ROC was now actually claiming, through the 1993 instrument, "new" historic waters.

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<sup>16</sup>Adopted on March 10, 1993. For the original Chinese text of the guidelines, see *ibid.* For an unofficial English translation by the author, see *Marine Policy* 19 (1995): 408.

<sup>17</sup>Song Yann-huei and Peter Kien-hong Yu, "China's 'Historic Waters' in the South China Sea: An Analysis from Taiwan, ROC," *American Asian Review* 12, no. 4 (Winter 1994): 84.

## The Process of Decisionmaking: Clarification or Confusion?

During an August 1993 press conference, the chairman of the Research, Development, and Evaluation Commission of the Executive Yuan further explained the ROC's position in this regard.<sup>18</sup> The claim, he pointed out, is based on the "Map of the Location of the Islands in the South China Sea" published in 1948, on which a U-shaped line is drawn around the islands in the South China Sea claimed by the ROC.<sup>19</sup> The maritime area within the U-line, he explained, is the ROC's historic waters, which, although they do not have the status of internal waters, are analogous to archipelagic waters under the 1982 UN Convention on the Law of the Sea (LOS Convention).<sup>20</sup> In other words, within the U-line the ROC has, in addition to sovereignty over the islands, preferential rights in the maritime sphere.<sup>21</sup> Although this was meant to clarify the situation, there are problems with this stated position.<sup>22</sup>

### *The South China Sea as the ROC's Historic Waters: A Problematic Construction*

The main problem with this decision to claim the waters of the South China Sea as the ROC's historic waters in 1993 is that the ROC government never asserted such a claim prior to 1990.<sup>23</sup> The legal status of the waters had, indeed, never been clarified by the ROC.<sup>24</sup> As mentioned above, the 1948 map was mainly used (as indicated by its title) to show the location of the ROC-claimed islands in the South China Sea.<sup>25</sup> The purpose of the U-line, which was drawn arbitrarily and not delimited by precise coordinates, was actually

<sup>18</sup> "Academics Submit the Point of 'Historic Water' Opining That the South China Sea Belonging to ROC Territory Should Be Beyond Doubt," *Zhongyang ribao*, August 9, 1993, 1.

<sup>19</sup> *Ibid.* For the map, see Marwyn S. Samuels, *Contest for the South China Sea* (New York: Methuen, 1982), 195.

<sup>20</sup> See note 18 above.

<sup>21</sup> "Jargon Relevant to the South China Sea Issue Will Be Unified," *Zhongyang ribao*, July 1, 1994, 4.

<sup>22</sup> Kuan-Ming Sun, "Policy of the Republic of China Towards the South China Sea: Recent Developments," *Marine Policy* 19 (1995): 403.

<sup>23</sup> Song and Yu, "China's 'Historic Waters' in the South China Sea," 98.

<sup>24</sup> *Ibid.*, 84, and accompanying text.

<sup>25</sup> See note 19 above and accompanying text.

unknown.<sup>26</sup> Moreover, the ROC has never claimed a specific legal status for the waters in question—neither internal waters nor territorial sea or archipelagic waters.<sup>27</sup>

To be sure, it was not until 1990 that the nature of the U-line was first questioned.<sup>28</sup> In that year, the ROC's Ministry of the Interior (MOI) established an ad hoc committee to help determine the basepoints and baselines to be used for measuring the breadth of the ROC's territorial waters. At the same time, another ad hoc committee was set up to help draft the ROC's laws on its exclusive economic zone (EEZ) and territorial waters.<sup>29</sup> It was in these two ad hoc committees that the question of the legal nature of the U-shaped line was raised for the first time.<sup>30</sup> In a meeting, one group of committee members submitted the concept of "historic waters,"<sup>31</sup> holding that the waters encircled by the U-line should be claimed as the ROC's historic waters.<sup>32</sup> In an elaboration of this, two reasons were given: first, no protest or opposition was raised when the map became available to the public in 1948; and second, the claim to the enclosed waters as historic waters did not violate Article 47(1) of the LOS Convention, which provides that "an archipelagic State may draw archipelagic baselines joining the outmost points of the outmost islands and drying reefs of the archipelago."<sup>33</sup> Although another group opposed this position, pointing out that it was impossible to locate the U-line at sea because of the lack of coordinates, and that the concept of "historic waters," which was already outdated, could hardly be used to support Taipei's claim, the committees finally adopted the historic argument.<sup>34</sup> As a result, the ROC's official stance on this issue now is that the U-line is the ROC's boundary line<sup>35</sup> and the

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<sup>26</sup>Song and Yu, "China's 'Historic Waters' in the South China Sea," 96, and accompanying note 6 therein.

<sup>27</sup>*Ibid.*, 96, 97, 98.

<sup>28</sup>See Fu Kuen-chen's statement in *Wenti yu yanjiu* (Issues and Studies) (Taipei) 32, no. 8 (August 1993): 6.

<sup>29</sup>Nien-tsu Alfred Hu, "The 1982 UN Law of the Sea Convention: Current Problems and Issues to the Republic of China" (Paper presented at "The Law of the Sea Convention: Issues and Prospects," sponsored by the Southeast Asian Program on Law, Policy, and Management, Chiang Mai, Thailand, May 1991), 8.

<sup>30</sup>See note 28 above.

<sup>31</sup>*Ibid.*

<sup>32</sup>Song and Yu, "China's 'Historic Waters' in the South China Sea," 87.

<sup>33</sup>*Ibid.*

<sup>34</sup>*Ibid.*

<sup>35</sup>See the second paragraph of the Prologue of the Policy Guidelines for the South China Sea.

waters enclosed therein are ROC historic waters.<sup>36</sup> Ironically, however, it is also pointed out by scholars that the U-line is an unsettled international boundary.<sup>37</sup>

Moreover, it was further explained that the U-line, which was actually a medium line between the Spratlys and other littoral states,<sup>38</sup> could be traced back to the 1945 Truman Proclamation on the Continental Shelf.<sup>39</sup> By means of that proclamation, the United States aimed to establish jurisdiction over the natural resources of the subsoil and seabed of the continental shelf.<sup>40</sup> This quickly caused other states—particularly those in Latin America—to follow suit, and also prompted the ROC to consider the need to protect its historic interests in the waters of the South China Sea.<sup>41</sup> It was against this background that the U-line was adopted in 1947. The purpose of the line was obviously to demarcate the maritime area in which the ROC had historic rights and interests, since the Truman Proclamation was aimed at the subsoil and the seabed of the continental shelf. In any case, as a result, its use could not be confined to claiming sovereignty over islands in the area concerned.<sup>42</sup> Generally speaking, it was concluded that the ROC's approach was quite "moderate" in contrast to the radicalism of the Latin American countries: it only drew a medium line (the U-line) to delimit the ROC's historic waters.<sup>43</sup> In conformity with the 1958 Geneva Convention and the 1982 LOS Convention, the U-line could thus be said to be reasonable, self-constrained, and good-neighborly.<sup>44</sup>

Be that as it may, however, the most problematic part of the elaboration is the argument that because no protest or opposition was raised when the map became available to the public in 1948, the

<sup>36</sup>See also the introductory remarks by Chen Hurng-yu in *Wenti yu yanjiu* 32, no. 8 (August 1993): 2.

<sup>37</sup>Fu Kuen-chen's statement cited in note 28, p. 7. See also notes 18 and 22 above.

<sup>38</sup>Fu Kuen-chen's statement cited in note 28, p. 7.

<sup>39</sup>Fu Kuen-chen, "Legal Status of the Chinese Historic Waters and Islets in the South China Sea" (in Chinese with English summary), *Shehui kexue luncong* (Journal of Social Sciences) (Taipei) 42 (1994): 28.

<sup>40</sup>For the text of the proclamation, see David J. Harris, *Cases and Materials on International Law*, 4th edition (London: Sweet and Maxwell, 1991), 428-29.

<sup>41</sup>See note 39 above.

<sup>42</sup>See Fu Kuen-chen's statement cited in note 28, p. 7.

<sup>43</sup>See note 39 above. For a fuller exposition of the concept of historic waters, see Daniel P. O'Connell, *International Law of the Sea*, vol. 1 (Oxford: Clarendon, 1982), 417-34.

<sup>44</sup>See Fu Kuen-chen's statement cited in note 28, p. 7.



waters encircled by the U-line should officially be the ROC's historic waters. As mentioned above, the exact purpose of the U-line was actually unknown, and the ROC government had never asserted an official claim to historic waters prior to 1990.<sup>45</sup> Hence, it is certainly incorrect to argue that the lack of protests justifies the claim of historic waters. The lack of protests in this case could not be deemed to indicate acquiescence, since there was nothing to acquiesce to at all. After all, states could not protest against a claim which was not in existence at the time. In this specific respect, it is thus submitted that this is a wrongful application of the principle of acquiescence.<sup>46</sup> As a matter of fact, when the ROC government first introduced the claim of historic waters in 1991, Malaysia, together with Indonesia, immediately aired its opposition.<sup>47</sup> At the Workshop on Managing Potential Conflicts in the South China Sea hosted by Indonesia, Dr. B. A. Hamzah, director-general of the Malaysian Institute of Maritime Affairs, clearly registered his complaint:

There are parties which have claimed the entire South China Sea as their own on the basis of antiquity. Such claims cannot be serious nor treated with much respect. . . . By no stretch of imagination can the South China Sea be considered by any nation as its internal waters or historic lake as a basis to assert claim. Since such area claims are frivolous, unreasonable, and illogical, I urge the Parties concerned to drop area claims and focus instead on their claim to islands and non-islands.<sup>48</sup>

In short, the ROC's reliance on the lack of protests to construct the claim of historic waters is highly questionable since it has been correctly pointed out that the ROC government never asserted such a claim prior to 1990. Therefore, the states whose interests could be affected by the claim need not respond or take action to invalidate the ROC's claim.<sup>49</sup> Thus, it is submitted that this is a misuse of the rule of law and, as a result, causes a problematic situation.

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<sup>45</sup>Song and Yu, "China's 'Historic Waters' in the South China Sea," 96, 97, 98, and accompanying text.

<sup>46</sup>For a brief account of the rule, see Ian Brownlie, *Principles of Public International Law*, 4th edition (Oxford: Clarendon Press, 1991), 156, 157.

<sup>47</sup>Song and Yu, "China's 'Historic Waters' in the South China Sea," 88.

<sup>48</sup>B. A. Hamzah, "Conflicting Jurisdiction Problems in the Spratlys: Scope for Conflict Resolution" (Paper presented at the Second Workshop on Managing Potential Conflicts in the South China Sea, Bandung, Indonesia, July 15-18, 1991), 199-200. See also Song and Yu, "China's 'Historic Waters' in the South China Sea," 88, 89.

<sup>49</sup>See Song and Yu, "China's 'Historic Waters' in the South China Sea," 98.



*The Meaning of the ROC's Historic Waters:  
A Controversial Definition*

In addition to the problematic application of legal principles to construct the claim in the first place, the ROC also introduces a controversial definition of its "historic waters." As mentioned above, it was explained that the maritime area within the U-line does not have the status of internal waters, but instead is analogous to archipelagic waters under the 1982 LOS Convention.<sup>50</sup> Moreover, within the U-line the ROC has, in addition to sovereignty over islands, preferential rights in the maritime sphere.<sup>51</sup> Although this is intended to give a clear demarcation of the claim, it actually creates more confusion. Here, two observations can be made.

First, it is true that the legal regime of "historic waters" has never been spelled out in any international convention.<sup>52</sup> However, it is also true that the International Court of Justice (ICJ) did once hand down an authoritative interpretation, in the *Anglo-Norwegian Fisheries Case*, in which "historic waters" were defined as "waters which are treated as internal waters but which would not have that character were it not for the existence of a historic title."<sup>53</sup> Moreover, in a study prepared by the UN Secretariat in 1962, it was further added that the legal status of waters regarded as historic waters "would in principle depend on whether the sovereignty exercised in the particular case over the area by claiming state and forming a basis for the claim, was sovereignty over internal waters or sovereignty over the territorial sea."<sup>54</sup> In other words, depending on the sovereignty exercised over claimed waters by the claimant state, the waters could be considered either internal waters or territorial sea.<sup>55</sup> In view of these legal precedents, it is quite puzzling to argue that the ROC's "historic waters" are neither internal waters nor territorial sea.<sup>56</sup>

Second, it would of course be misleading to imply that the notion of historic waters has never been used to support an archipelagic

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<sup>50</sup>See note 18 above and accompanying text.

<sup>51</sup>See note 21 above and accompanying text.

<sup>52</sup>Song and Yu, "China's 'Historic Waters' in the South China Sea," 90, 92.

<sup>53</sup>*ICJ Reports*, 1951, 130.

<sup>54</sup>"Juridical Regime of Historic Waters, Including Historic Bays," *Yearbook of the International Law Commission* 2 (1962): 25.

<sup>55</sup>Song and Yu, "China's 'Historic Waters' in the South China Sea," 94.

<sup>56</sup>*Ibid.*, 96, 97. See also Fu, "Legal Status of the Chinese Historic Waters," 23.

claim. In claiming archipelagic status, Indonesia clearly stated that historically it has been an entity from time immemorial whose integrity was interrupted during the era of Western colonialism. The islands of Indonesia scattered over a vast area and the sea between them should therefore be regarded as one single unit of archipelago belonging to the Republic of Indonesia.<sup>57</sup> After nearly forty years of development, however, the introduction of an archipelagic argument in the claim of historic waters now only creates more controversies.<sup>58</sup> This is because since the formal institutionalization process carried out at the Third United Nations Conference on the Law of the Sea, these two concepts are currently governed by different sets of international legal rules.<sup>59</sup> Thus, when it is argued that the ROC has the right to "specialize" the waters of the South China Sea as Indonesia and the Philippines once did in the past,<sup>60</sup> there seems to be confusion between historic and archipelagic waters.<sup>61</sup>

In view of these anomalies, one cannot help but conclude that the ROC's "historic waters" have a controversial meaning. Generally speaking, the motive of the ROC in adopting the 1993 Policy Guidelines is quite clear. It wishes, in the main, to consolidate its claims over the islands in the South China Sea. However, the new approach (i.e., the introduction of a historic argument) may not be good enough to achieve that goal. This is because it not only fundamentally detracts from the original purpose but also creates more confusion. Therefore, it is suggested that the policy be reviewed so as to rectify these problems.<sup>62</sup>

### **Some Recommendations for the Improvement of the 1993 Policy Guidelines**

For the purpose of review, the following considerations are relevant.

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<sup>57</sup>Kriangsak Kittichaisaree, *The Law of the Sea and Maritime Boundary Delimitation in Southeast Asia* (Singapore: Oxford University Press, 1987), 157.

<sup>58</sup>Sun, "Policy of the Republic of China Towards the South China Sea," 406.

<sup>59</sup>*Ibid.* The concept of mid-oceanic archipelagos will not be discussed here, as it has already been dealt with at length elsewhere. For a good elaboration of the concept, see, for example, Phiphat Tangsubkul, *The Southeast Asian Archipelagic States: Concept, Evolution, and Current Practice*, Research Report no. 15, East-West Environment and Policy Institute (Honolulu: February 1984).

<sup>60</sup>Fu, "Legal Status of the Chinese Historic Waters," 27.

<sup>61</sup>Sun, "Policy of the Republic of China Towards the South China Sea," 406.

<sup>62</sup>*Ibid.*

*Searching for a Correct Interpretation  
of the Historic Argument*

As mentioned above, the introduction of the "historic waters" argument only complicates the effort to settle the dispute over the Spratlys.<sup>63</sup> It is generally agreed that the U-line is simply a boundary reference line, indicating that the islands of the South China Sea enclosed within the line belong to the ROC.<sup>64</sup> Thus, to argue that the line established a historic claim over the maritime sphere indicated by it is to interpret it too extensively.<sup>65</sup>

Although it is true that claims to historic title should be approached with circumspection,<sup>66</sup> this does not mean that the ROC should abandon the historic argument altogether.<sup>67</sup> This is because, in the first place, the historic argument could refer to the more limited concept of, for example, historic fishing rights. Indeed, in a study prepared by Professor Fu Kuen-chen of National Taiwan University, it was clearly stated that "[the Republic of] China is, with a self-constrained attitude, reasonably claiming preferential rights of a limited nature."<sup>68</sup> That is, "the sovereignty we claim over the islands and waters of the South China Sea is not equivalent to the sovereignty over internal waters; instead, the emphasis is placed on the control of resources."<sup>69</sup> Thus, it would seem that the drafters of the 1993 Policy Guidelines, while talking about "historic waters," actually had the historic rights over natural resources in mind. Moreover, there seems to be evidence pointing to the existence of historic fishing rights, in particular, on the part of the ROC. Thus, it would seem that the ROC is in effect pursuing only certain rights such as fisheries, rather than claiming historic waters as such. If this is the case (and in the opinion of this writer, it is), then, it is suggested that the "historic waters" argument be reinterpreted in this manner: the South China Sea is ROC historic waters in the sense that the ROC has tradi-

<sup>63</sup>Song and Yu, "China's 'Historic Waters' in the South China Sea," 101.

<sup>64</sup>*Ibid.*, 98. See also the remark by Yu Kuan-tsyh in *Wenti yu yanjiu* 32, no. 8 (August 1993): 5; and Hungdah Chiu, "The Legal Regime of Our Nanhai Historic Waters," *ibid.*, 23.

<sup>65</sup>Sun, "Policy of the Republic of China Towards the South China Sea," 405.

<sup>66</sup>Robin R. Churchill and Alan V. Lowe, *The Law of the Sea*, 2nd edition (Manchester: Manchester University Press, 1991), 36.

<sup>67</sup>Sun, "Policy of the Republic of China Towards the South China Sea," 407.

<sup>68</sup>See Fu, "Legal Status of the Chinese Historic Waters," 27.

<sup>69</sup>See Fu Kuen-chen's statement cited in note 28, p. 8.

tional rights over natural resources, such as fisheries, therein.<sup>70</sup> After all, it is recognized under international law that the long enjoyment of exclusive or particular benefits in an area can be a means of entitlement to the area in derogation of the standard rules.<sup>71</sup>

In short, this restricted (but correct) interpretation of the historic argument, which includes traditional rights over natural resources (such as fisheries) only, not only is more in accordance with international law but also will not detract from the original purpose of the policy.

*Archipelagic Waters for the Spratlys:  
To Claim or Not to Claim?*

In the aforementioned study by Professor Fu Kuen-chen, it is also suggested that the ROC should claim, in addition to the "historic waters," an archipelagic status for the Spratlys.<sup>72</sup> The reasons are said to be as follows:

First, the Chinese government has long dominated and played the leading role in the area. This special historical background should be sufficient to justify a different status for the waters. Second, the Chinese have, by means of occupation, sovereignty over the main islands in the area which are, as a result, a traditional part of Chinese territory. This, it is said, also justifies the differentiation of the waters in question from other maritime areas. Third, the waters within the South China Sea form a semienclosed sea. In accordance with Articles 122 and 123 of the LOS Convention, this particularity derogates from the rights of those states which do not border on the area. Fourth, the LOS Convention has already legalized the regime of archipelagic waters. As a result, there seems to be no reason to prevent the ROC from specializing the waters within the U-line. In conclusion, it is thus suggested that the ROC should be able to claim the waters surrounding the Spratlys as ROC archipelagic waters.<sup>73</sup> After all, this is "more acceptable to other neighboring states."<sup>74</sup>

Indeed, it is true that this is clearly permitted under the LOS Convention, Article 46, which states that "'archipelagic State' means

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<sup>70</sup>Sun, "Policy of the Republic of China Towards the South China Sea," 407.

<sup>71</sup>Daniel P. O'Connell *International Law of the Sea*, vol. 2 (Oxford: Clarendon, 1984), 713.

<sup>72</sup>Fu, "Legal Status of the Chinese Historic Waters," 2, 29.

<sup>73</sup>*Ibid.*, 26, 27.

<sup>74</sup>See Fu Kuen-chen's statement cited in note 28, p. 8.

a State constituted wholly by one or more archipelagos and may include other islands.” Moreover, enclosing the Spratlys by straight archipelagic baselines would greatly facilitate the determination of other seaward maritime zones.<sup>75</sup> Fundamentally speaking, however, this could not conform to the definition of “archipelago,” which means “a group of islands, including parts of islands, interconnecting waters and other natural features which are so *closely interrelated* that such islands, waters and other natural features form an intrinsic geographical, economic, and political entity, or which historically have been regarded as such.”<sup>76</sup> Because most of the claimed waters lie far off the insular formations in the area, the geographic configuration of the Spratlys can hardly be said to be closely interrelated.<sup>77</sup> In other words, it is not likely that the application of the archipelagic doctrine, as adopted in the LOS Convention, to the Spratlys would satisfy certain preconditions for its validity, such as the maintenance of a 1:1 to 1:9 land-to-water ratio in the area enclosed by the archipelagic baselines (Article 47, para. 1) or the use of baselines not exceeding 100 nautical miles, with 3 percent of the total number of baselines extending to as far as 125 nautical miles (Article 47, para. 2).<sup>78</sup> Thus, it has been pointed out that to claim the Spratlys as an archipelago would be too presumptuous to be justified under contemporary international law.<sup>79</sup> Hence, in the opinion of this author, any plan to claim archipelagic status for the Spratlys should be carefully reevaluated.

*The Beijing-Taipei United Front Approach:  
A Windfall or a Pitfall?*

At a government-sponsored seminar on the South China Sea held in Taipei in September 1993, a proposal to enhance the ROC’s military and civilian presence in the region was submitted. As a result, preparations were initiated to increase sea patrols in the Spratlys; this was characterized as a “symbolic move” to signal to Southeast Asian states that the ROC is “indispensable” in resolving disputes, but it

<sup>75</sup>See Sun, “Policy of the Republic of China Towards the South China Sea,” 407.

<sup>76</sup>Article 46(b) of the LOS Convention. Emphasis added.

<sup>77</sup>G. M. C. Valero, “Spratly Archipelago Dispute: Is the Question of Sovereignty Still Relevant?” *Marine Policy* 18 (1994): 335.

<sup>78</sup>*Ibid.*, 336 n. 132.

<sup>79</sup>Sun, “Policy of the Republic of China Towards the South China Sea,” 406.

did not challenge Beijing's position. Participants in the seminar agreed that Taipei and Beijing should exchange official documents jointly affirming Chinese sovereignty over the islands, and that Taipei should sponsor cross-Strait contacts on the issue.<sup>80</sup>

In practice, both the PRC and the ROC have unfailingly responded to statements and actions taken by any other party to the dispute, but they have not challenged each others' claims and have avoided military conflict over islands the other country occupies. The ROC also did not criticize Beijing's use of force in wresting control of the Paracels and the Spratlys from Vietnam. In fact, ROC troops passively observed the rout of Vietnamese troops by the People's Liberation Army in the March 1988 battle, and the ROC defense minister indicated that Taipei would, if necessary, help Beijing defend its position on the islands.<sup>81</sup>

Of course, the Beijing-Taipei united front approach could conform with the ROC's interests, since it would not allow Southeast Asian states to use the mainland-Taiwan conflict over other issues to breach their unity on Chinese sovereignty claims over the South China Sea.<sup>82</sup> In other words, this approach would give the ROC more leverage in the conflict. The advantage is indeed obvious. One cannot overlook the other side of the coin, however. Since all other claimant states recognize only the PRC, there is already a good chance that the ROC will be left out of the negotiation process. To totally "subordinate" its claim to that of the PRC only further enhances that possibility: if the claims of the two are identical, there will really be no reason for other claimants to contact the ROC, at the risk of provoking the PRC. Thus, there is definitely a need for the ROC to maintain a distinction, no matter how insubstantial, in the elaboration of its claim in order not to lose its foothold. In the present case, it is submitted that the historic rights over natural resources argument would be enough to serve the purpose; this is another reason why the writer does not advise the ROC to drop the historic argument altogether. The reason is simple and clear: one has to send out the message that without the ROC's participation, the Spratlys dispute cannot be thoroughly resolved.

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<sup>80</sup>*Free China Journal*, September 10, 1993, 2.

<sup>81</sup>"Five-handed Poker in the Spratlys," *The Economist*, May 21, 1988, 36.

<sup>82</sup>Hyer, "The South China Sea Disputes," 52, 53.

In short, the Beijing-Taipei united front approach could be a pitfall for the ROC, if no precautions are taken.

### Conclusion

In conclusion, the adoption of the 1993 Policy Guidelines is to be welcomed, because the issue has been long ignored by the ROC government. Moreover, this is the first active attempt by the ROC to coordinate its efforts (which in the past were sporadic and fragmented) by means of an overall policy. While the policy is now the basic legal framework for the ROC's future actions, however, there are still some fundamental drawbacks in details which may give rise to confusion in its practical application. Thus, in order to redress these shortcomings, the present writer proposes that the 1993 Policy Guidelines be revised in accordance with the following three principles:

First, the ROC's historic argument should be limited to the claim to historic rights over natural resources; that is, the South China Sea is the ROC's historic waters in the sense that the ROC has traditional rights over natural resources, such as fisheries, therein.

Second, the ROC should ignore the archipelagic proposal for the Spratlys; instead, it should concentrate on the effective occupation argument in the process of consolidating its title over the islands.

Third, the ROC should adopt a position, in practice, which is not totally identical with that of the PRC. Moreover, it should make it clear that without its participation, the Spratlys dispute cannot be thoroughly settled.

Finally, it may be added that all these proposed changes could be incorporated in an explanatory note without amending the document itself. This is because the text of the policy is sufficiently flexible to allow this approach.

