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How to Solve the South China Sea Disputes

*Bill Hayton**



A helicopter prepares to land on the Philippine navy's strategic sealift vessel BRP Davao del Sur during an amphibious landing exercise at the lighthouse beach facing the South China Sea in Subic Freeport in Subic town, north of Manila on 21 September 2019, as part of a combined exercise between army, navy, air force and marines. Photo: Ted Aljibe, AFP.

** Bill Hayton is Associate Fellow in the Asia-Pacific Programme at Chatham House, United Kingdom.*

EXECUTIVE SUMMARY

- Researchers now know enough about the history of the South China Sea to resolve the competing territorial claims to the various rocks and reefs.
- Disaggregating claims, i.e. breaking down expansive claims to entire island groups into specific claims to named features, opens a route to compromise and the resolution of the disputes.
- With some states unwilling to make use of international law, there is a role for non-governmental organisations to create a ‘Track Two Tribunal’. They could collect rival pieces of evidence, test the claimants’ legal arguments, and present the likely outcomes of any future international court hearing to the claimants and their publics.
- The historical evidence of physical acts of administration on the disputed rocks and reefs suggests that – with some important exceptions – the current occupiers of each feature have the best claim to sovereignty over it.
- Southeast Asian states have an interest in recognising each other’s *de facto* occupation of specific features and then presenting a united position to China.

INTRODUCTION

The disputes over the islets in the South China Sea are generally thought to be intractable. Six claimants, namely the People's Republic of China (PRC or China), the Republic of China (ROC or Taiwan), Brunei, Malaysia, the Philippines and Vietnam, claim at least one of them, and a few islets are claimed by at least five states. These rival territorial claims are commonly thought to be the result of centuries of history, and most observers assume that unpicking, assessing and weighing the evidence for each claim would be impossible. None of this is true. We now know enough about the history of the South China Sea to resolve the competing claims.

THE PROBLEM

There are two main groups of disputed islets in the South China Sea: the Paracels (*Hoang Sa* in Vietnamese, *Xisha* in Chinese) in the north and the Spratlys (*Truong Sa* in Vietnamese, *Nansha* in Chinese) in the south. Scarborough Shoal, to the east, is disputed only between the Philippines, China and Taiwan while the fate of Pratas (*Dongsha* in Chinese), in the northeast, is an intra-Chinese question.¹ If these islands did not exist it would be a relatively simple matter to divide up the waters and resources of the South China Sea in the way that European countries have done in the North Sea, for example.² If the islands were larger, like those in the Mediterranean, they would have settled populations able to decide their own sovereignty on the basis of self-determination. We know that the Natuna Islands belong to Indonesia, for example, because the people who live on it say so. The tragedy of the South China Sea is that the disputed islets are just the right size to cause trouble.

The other problem is that China, Taiwan, Vietnam and the Philippines claim groups of islands in their entirety rather than specific features. China asserts a claim to the entire *Nanhai Zhudao*: every feature within the 'U-shaped line' drawn on Chinese maps of the South China Sea since 1948.³ Taiwan claims each of the four 'island groups' separately as the *Xisha*, *Nansha*, *Dongsha* and *Zhongsha* (*Zhongsha* is actually a group of underwater features plus the Scarborough Shoal). Vietnam claims the *Hoang Sa* and the *Truong Sa* while the Philippines claims Scarborough Shoal and the 'Kalayaan Island Group' which contains all of the Spratlys except for Spratly Island itself.⁴ As a result, these claimants are playing a zero-sum game. No compromise is possible: they either win sovereignty over every feature in the island group or nothing.

The result is *Sturm und Drang* (*Storm and Stress*) in the corridors of power and on the streets outside, massive spending on military hardware and a refusal to address the most pressing issues in the South China Sea, particularly the collapse of its fish stocks.

THE SOLUTION

Thankfully, there is a potential solution to this zero-sum game, and it is one that has already proved successful in Southeast Asia: the patient presentation of verifiable evidence to a neutral tribunal. Indonesia and Malaysia resolved their dispute over the islands of Ligitan and Sipadan through the International Court of Justice (ICJ) in 2002. More relevant to the South China Sea dispute was the ICJ's resolution of the dispute between Malaysia and Singapore over three sets of uninhabited rocks in the Singapore Straits in 2008.⁵ The ICJ was able to rule that Pedra Branca belonged to Singapore while Middle Rocks belonged to Malaysia even though the two are just a kilometre apart. It ruled in favour of Singapore over Pedra Branca mainly because Singapore had carried out acts of physical administration there, notably by building a lighthouse on the rock. The judges also specified a different fate for a third feature, South Ledge, because it is underwater at high tide and therefore not 'territory' as such. It ruled that sovereignty could only be settled later, once the two countries had agreed on a boundary between their territorial seas.

The ICJ rejected Malaysia's vague claims that Pedra Branca had belonged to the Sultanate of Johor "from time immemorial" and instead examined the documented evidence of occupation and administration. It then reached a conclusion based on the international legal principle of *à titre de souverain* – asking which state could better demonstrate that it had exercised actual authority over the feature. While legal principles such as this have their origins in Medieval Europe, they can now be considered global. They have been used to adjudge disputes in contexts as diverse as the Red Sea and the Caribbean as well as in Southeast Asia. It would be quite possible to apply them to all the disputed islets in the South China Sea.

By ruling out vague claims to sovereignty "from time immemorial" and demanding specific evidence of physical acts of administration, the ICJ also gave the South China Sea claimants a route out of their impasse. Governments and their advisers do not need a comprehensive knowledge of every period of South China Sea history to reach conclusions about sovereignty. They simply need to examine the evidence for physical acts of occupation and administration by the different state authorities.

THE HISTORICAL EVIDENCE

The digitisation and opening of many national archives over the past two decades have allowed researchers to examine the history of claim-making in the South China Sea in much greater detail than was feasible during the twentieth century. It is now possible to make some authoritative statements about who did what and when.

The task has been made much easier by the rival claimants putting evidence to support their claims in the public domain. We can now assess whether certain documents are meaningful in the various sovereignty disputes.

Based on all this evidence, we can now say that no state made any physical act of sovereignty on any of the currently disputed islands before the nineteenth century. The archival evidence that is currently available suggests that the earliest acts of occupation in the Paracels were conducted by Dai Viet (Vietnam) in 1816, by the Qing Great State (China) in 1909 and by Japan in 1938. In the Spratlys, the first formal acts of administration were made by the UK in 1877, by France in 1933, by Japan in 1939, by the ROC in 1946, by the Republic of Vietnam (RVN or South Vietnam) in 1956, by the Republic of the Philippines in 1970 and by Malaysia in 1978. The first occupation by the PRC took place in 1988. Japanese claims were renounced in the 1951 Treaty of San Francisco and the claims by the UK and France have been allowed to lapse.⁶

The documentary evidence makes clear two important points. Firstly, it tells us that states occupied different features at different times in a haphazard manner. States installed people or structures on certain islets in competition with one another, but these were often transient affairs. Just because officials landed on a particular feature did not mean that they subsequently maintained effective occupation over it. Governments did not achieve complete control of the various features until the 1970s (in the Paracels) or the 1980s (in the Spratlys).

Secondly, it tells us that the various claimants never administered entire archipelagos or island groups, let alone the entire South China Sea. Just because an action was taken on one island did not mean that effective occupation was asserted over other features. Claimants often made rhetorical claims by publishing maps or issuing declarations, but this was quite different to establishing a real occupation.

Understanding this history in the light of the ICJ ruling on Pedra Branca opens a way forward to resolve the disputes. Rather than examining rival claims to entire archipelagos, the ICJ, or some other body agreed upon by the claimants, only needs to reach conclusions about physical acts of administration on each feature. Our knowledge of the archives tells us that these will only have taken place in the modern era.

DISAGGREGATION OF CLAIMS

The key is to disaggregate the claims. Just as in the Pedra Branca case, it is theoretically possible to examine claims to the sovereignty of each feature in the South China Sea separately. This will, admittedly, be easier in some cases than in others. Some features are completely isolated but at Tizard Bank, Union Reef and North Danger Reef, rival claimants occupy different islets atop the same large coral reef. Even here though, it should be possible to disentangle their histories.

Take the giant reef at Tizard Bank. France placed a sovereignty marker on its largest above-water feature, the islet of Itu Aba, in 1933. Japanese and French forces both occupied Itu Aba during the Second World War. France placed another sovereignty marker on Itu Aba

in October 1946 and a ROC expedition did the same in December 1946. The ROC maintained a physical presence on Itu Aba until May 1950. In May 1956, a Philippine businessman, Tomas Cloma, attempted to claim a group of islands for himself, prompting the ROC to reoccupy Itu Aba. France, which had just departed from its Indochina colonies, re-stated its earlier claim to the islet and then both the PRC and the newly independent RVN made rhetorical claims to sovereignty over all the Spratlys. In August 1956, the RVN landed on Spratly Island, 300 kilometres to the southwest. In 1962, RVN warships visited Namyit, another islet on Tizard Bank, across the lagoon from Itu Aba, and in 1972, RVN troops physically occupied it. In 1974 the RVN occupied Sand Cay on the same reef. In 1975, RVN troops were evicted from both these islets by forces from the Democratic Republic of Vietnam (DRV or North Vietnam). Days later, the RVN was extinguished as a state by the Revolutionary Government of Southern Vietnam, which merged with the DRV the following year. In 1988, the final claimant arrived when the PRC occupied Gaven Reefs at the western end of Tizard Bank.

Reaching a judgement on the sovereignty of these features will require detailed consideration of both the history of occupations and the inheritance of claims from one state to the next. Can the court accept that the histories of Namyit Island, Sand Cay and Gaven Reefs are separate from the history of Itu Aba? Does the ROC's long occupation trump the shorter occupation by France? Did the RVN inherit the French claim? Did the DRV inherit it too? Does the PRC inherit the ROC claim or does that issue remain moot? These will be tricky questions to answer, but that is the purpose of international tribunals and the ICJ has tackled equally tricky questions in the past.

Thankfully, most of the disputed reefs currently have only one physical occupier, which should make assessing sovereignty claims simpler. That said, some have had other occupiers in the past and a tribunal would have to rule on the relative merits of rival claims. Each feature has a different history, but that history can be known and assessed.

A ROLE FOR OUTSIDERS

None of the claimant states has yet been willing to take its territorial claims to an independent tribunal. There are two main reasons for this. Firstly, all are uncertain about the strength of their claims and that of their rivals. Secondly, they fear the domestic political consequences of losing such a public argument. For instance, Malaysian politicians continue to argue about Pedra Branca more than a decade after the ICJ ruling.

There is a role here for outside bodies. Think-tanks, researchers, lawyers and foundations could act as a 'virtual ICJ' to rehearse the arguments that governments might present in a real hearing. Experts, whether independent or partisan, could assemble the evidence already placed in the public domain by governments and others and seek supplementary materials. This 'Track Two Tribunal' could invite governments to submit their evidence but could proceed whether they cooperated or not.

The result would be a matrix of evidence: a detailed history of the various acts of sovereignty made on each named feature. Expert jurists could be invited to debate the merits of the claims and offer advisory opinions about which is stronger. These would then be circulated to all the claimant states and publicised. The world would be able to understand what an evidenced and fair settlement of the South China Sea disputes might look like.

A LIKELY SOLUTION

Based on the historical evidence already in the public domain, it is likely that such a ‘Virtual ICJ’ would find that, with some significant exceptions, the current pattern of occupations in the South China Sea is the legitimate one, since that it is the only one that has ever existed. The two major exceptions to this are:

- The western half of the Paracel Islands (the ‘Crescent Group’): controlled by Vietnam until its forces were expelled by the PRC in 1974
- Southwest Cay in the Spratlys: occupied by the Philippines until its forces were expelled by the RVN in 1975

This then suggests the basis for a compromise solution to the South China Sea disputes: each claimant keeps what it currently occupies and drops its claims to the other features. There is a legal name for this principle: *uti possidetis, ita possideatis* – what you have is what you keep.

No state would have to suffer the indignity or strategic disadvantage of withdrawing from any feature that they currently occupy. Each state would simply have to acknowledge reality – that they are never going to acquire all the rocks and reefs they rhetorically claim. This is already implicit in the Declaration on the Conduct of Parties in the South China Sea (the DoC) adopted by ASEAN and the PRC in 2002. Under Article 5, all the signatories are committed to “self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability including, among others, refraining from action of inhabiting on the presently uninhabited islands, reefs, shoals, cays, and other features and to handle their differences in a constructive manner.”

The current commitments not to escalate the disputes and not to occupy any uninhabited features are, in effect, *de facto* recognitions of the other states’ occupations. States would not suffer any practical consequences by turning these implicit commitments into more formal declarations. Armed with the historical evidence to justify their decisions, the rival claimants could move ahead – either bilaterally or collectively. Brunei, Malaysia, the Philippines and Vietnam could recognise each other’s *de facto* positions and thereby resolve the Southeast Asian part of the puzzle. They would then seek the same *de facto* recognition from China and/or Taiwan.

Such recognition would end whatever dreams that Vietnam and the Philippines may have about one day recovering the Paracels and Southwest Cay respectively. But this would be a price worth paying if the *quid pro quo* is regional stability. For Vietnam, recognition of Chinese possession of the Paracels would be painful but it could unlock an agreement between Vietnam and China over the maritime boundary at the mouth of the Gulf of Tonkin and areas further south. This would, in effect, end China's U-shaped line claim and open areas of the sea for Vietnamese energy exploration and fisheries.

OBSTACLES TO CONSIDER

There are, of course, many political and legal difficulties to consider. A knotty problem will be the fate of 'low tide elevations'. The ICJ's 2008 ruling on South Ledge will not be much help here. Malaysia, Vietnam and China have all constructed outposts on features that are below water at high tide and therefore not considered territory. The most egregious example is Mischief Reef, occupied by China since 1994. The 2016 ruling by the South China Sea arbitral tribunal concluded that the huge Chinese structures on Mischief Reef were constructed unlawfully inside the Philippines' Exclusive Economic Zone (EEZ).⁷ The implication of the ruling is that the structures should either be demolished or handed to the Philippines. In the meantime, no state should be expected to explicitly recognise other states' sovereignty over low tide elevations, but they might recognise a *de facto* presence in the same spirit as the other commitments in the DoC.

More fundamentally, all the governments involved – whether authoritarian or democratic – will need to persuade their publics of the merits of compromise. Their strongest arguments will be that compromise is a necessary step in the pursuit of regional peace and prosperity. The contribution of a 'Virtual ICJ' or 'Track Two Tribunal' would reinforce these arguments with evidence for their historical legitimacy, leaving less room for diehard nationalists to huff and puff. Governments could then focus on the fate of fisheries and other offshore resources.

CONCLUSION

There can no longer be any pretense that the South China Sea disputes are too complex to resolve. The necessary evidence is publicly available, and the general legal principles are widely accepted. In the current geopolitical situation, there is a clear incentive for Southeast Asian governments to begin a process of formally recognising each other's occupations in the Spratly Islands. Such mutual recognition would help solidify their own claims and facilitate the creation of a clearer negotiating position with China.

Some cases will be more difficult to resolve than others, and the sequencing of recognition will need to take this into account. Non-governmental organisations could play a key role

in helping governments scope out likely obstacles and pitfalls and in generating support for the necessary political compromises.

ENDNOTES

¹ Pratas/*Dongsha* is claimed by both China and Taiwan but is currently occupied by Taiwan. It is an isolated feature mid-way between Hong Kong and Taiwan and no other state claims it.

² Interstate negotiations lead to bilateral treaties in the 1960s with the International Court of Justice ruling on a case involving the Netherlands, Germany and Denmark. See Yiallourides, Constantinos, “Continental Shelf Boundaries in the North Sea and the North Atlantic” in Greg Gordon, John Paterson and Emre Usenmez (eds) *Oil and Gas Law - Current Practice and Emerging Trends: Vol I - Resource Management and Regulatory Issues* (3rd Edn, EUP 2018), Available at SSRN: <https://ssrn.com/abstract=2985968> or <http://dx.doi.org/10.2139/ssrn.2985968>.

³ People’s Republic of China, White Paper: *China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea*, July 2016,

https://www.fmprc.gov.cn/mfa_eng/wjdt_665385/2649_665393/201607/t20160713_679474.html.

⁴ When the Philippines defined and claimed the Kalaayan Island Group (KIG) in the 1970s, it asserted that it was different from the Spratlys and deliberately omitted Spratly Island from its KIG claim. Spratly is currently occupied by Vietnam but also claimed by China and Taiwan.

⁵ International Court of Justice, *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore) Summary of the Judgment of 23 May 2008* <https://www.icj-cij.org/en/case/130/summaries>.

⁶ For evidence regarding occupations, see the following. Hãn Nguyễn Nguyễn Nhã (trans. Vinh-The Lam), *Vietnam, Territoriality and the South China Sea, Parcel and Spratly Islands* (Abingdon, UK: Routledge 2018); Ulises Granados, “As China Meets the Southern Sea Frontier: Ocean Identity in the Making, 1902-1937”, *Pacific Affairs* 78, No. 3(Fall 2005); Stein Tønnesson, “The South China Sea in the Age of European Decline”, *Modern Asian Studies* 40, 1 (2006):1–57; Gregory B. Poling, *On Dangerous Ground: America in the South China Sea* (Oxford, UK: Oxford University Press, forthcoming 2022); Geoffrey Marston, “Abandonment Of Territorial Claims: The Cases Of Bouvet And Spratly Islands”, *British Yearbook of International Law* 57, Issue 1 (1986): 337–356.

⁷ Permanent Court of Arbitration, *Award In The Matter Of The South China Sea Arbitration (Case No 2013-19)*, 12 July 2016 pp. 474-6, <https://pca-cpa.org/en/cases/7/>.

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