INTERNATIONAL LAW AND THE DISPUTE OVER SOVEREIGNTY IN THE SOUTH CHINA SEA: MALAYSIA’S POLICY

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INTRODUCTION

The end of colonization and the surrender of the Japanese in World War II created a complicated situation to the question of sovereignty and ownership of the islands in the South China Sea, particularly the Spratlys and Paracels. In addition to that, the introduction of UNCLOS (United Nations Law of Sea Convention) in early 80s complicated the matter further by allowing a legal basis for what is known as the exclusive economic zone (EEZ). The International Court of Justice and the United Nations can make the matter worse if the issue is brought to these institutions for debate on sovereignty. While the international organisations can act as an arbiter, one or two of the claimants refuse to support any effort to internationalise the issue. The progress thus far had been mainly through informal dialogues or deliberation at bilateral forum. The subject of discussions were mainly revolving around the “art of diplomacy”. On the other hand, the act on the ground among the conflicting states is completely different and on occasions run opposite to the diplomacy of reconciliation.

This article is an attempt to look at the legality of the assertions of sovereignty among the claimants. It will briefly deal with the way in which the disputing parties stake their claims to the Spratlys while providing an analysis in terms of the strength of the claim. Secondly, it is in the interest of this work to state Malaysia’s policy on the issue, both from the perspectives of international law and a strategic point of view.

Journal of Diplomacy and Foreign Relations Volume 4, Number 1 June 2002
International Law and the Viability of the Claimant’s Assertion of Sovereignty

The idea of sovereignty as a legal basis concomitant to international law towards territorial claims has been only recognized since the post-colonial era in Southeast Asia. Indeed the pre-colonial era noticed the freedom of movement among people without taking into account of national frontiers. Although history has clearly interpreted the existence of various kingdoms, such entities have never remained unchallenged to carve permanently a legal base over territorial claim like in the west. In reality, it was an era where technological developments and strong political will toward boundary demarcation had not been taken seriously. Expansionism and the existence of empires were mainly drawn along vague and non-precise boundaries such as rivers, mountains, people and others indicators.

However, in the present situation, particularly since the United Nations Conference on the Law of the Sea (UNCLOS), the issue of territorial claim in the maritime environment has entered a new era. There are various ways states could claim disputed territories or waters with a strong legal procedure. Indeed, in most cases the room for legal debates is still ample which in turn tend to frustrate the process of settlement over the maritime disputes.

It is in this manner, the process for a settlement over maritime disputes in the South China Sea will be prolonged in the future. Most of the conflicting claims over the disputed areas are based on the principles of overlapping territorial and maritime claims. These areas do not cause much debate in terms of conflicting claims. In contrast, the question of sovereignty over Paracels and Spratlys is unique and, to date, subject to much dispute. All parties have their own versions to enhance their claims while interpreting them under the perspective of international law.

However, “the idea of sovereignty as an internationally recognized principle, defining the wall of legitimate authority around political space, has no exact parallel in East Asian legal and political history and the area of state and its various compartments was not a function of legal limit but of social organisation, history and loyalty of subjects”.1 Hence, the rise of an Asian concept of a “nation state” during the period of decolonisation predominantly after the Pacific War and with the introduction of international law, in the early days of the United Nations Conference on the Law of the Sea became the basis for declaring sovereignty rights over maritime space. The sudden realization that the whole South China Sea was “up for grabs” induced some nations to declare sovereignty based on their own history as evidence.

To date, China, Taiwan and Vietnam are the only states to present comprehensive historical argumentations (pre-20th century) and there cannot be any doubt that in this respect, China is in a more favourable position than Taiwan or Vietnam.2 Certainly, China does not want any other power to dominate the strategic waters that had once enjoyed as a historical legacy.
China's settlement of the Paracels in the South China Sea seems to go back to the Han dynasty in which a chronicle appeared in the eastern Han period (25 to 220 A.D.) mentioning the existence of those islands, whilst Chinese coins, the oldest dating back to the rule of Emperor Wang (3 B.C. to 23 A.D.), are said to have been found in Paracels.\(^5\) In 1947, further historical artifact, the Chinese temple, was discovered on Wood Island in the Paracels. It was estimated to be more than a hundred years old\(^4\) and clearly asserts China's sovereignty based on historical background.

However, in the case of the Spratlys, no such ancient sources have been identified. The only evidence that seems to clearly notify the Chinese presence on the Spratlys was in 1867, when the crew of a British survey ship met some fishermen from Hainan on Itu Aba of the Spratlys and secondly, in 1883, when the Chinese government successfully stopped a German expedition to the Spratlys through diplomatic pressure.\(^5\) Though China seems to claim undisputed sovereignty in the South China Sea, no proper historical documents or ancient discoveries appear to support the effective occupation of the Chinese in the Spratlys. Hence, the Chinese claim of sovereignty based on historical background in the Spratlys seems unclear. Moreover, according to Professor Steven Kuan-tsyrh Yu of the National Taiwan University, the historical grounds advanced by both China and Taiwan, with respect to their claims to the Paracels, "are, in principle, the same as those advanced by both governments to justify these claims".\(^6\)

In addition, the presence of Taiwanese "sovereignty" in the Spratlys also seems to complicate the question of China's sovereignty in the South China Sea. In the quest for sovereignty, both states seem to use similar historical accounts. Until recently, the leadership in Taipei considered Taiwan as part of China as a whole and the 1991 election revealed the rejections of being an independent state.\(^7\) Leaders in Taipei also announced before the election that Taiwan stood for one state and two systems. But in the case of South China Sea, the Taiwanese government considered the Japanese renunciation in the bilateral treaty of 1951 as a clear indication of its sovereignty over the islands in that region,\(^8\) thus, making the issue more complex. Historically, Taiwan has also regarded itself as the successor to China.

The Taiwanese authority sent its first naval expedition to the South China Sea after the Pacific War and today it continues to occupy the Pratas archipelago and Itu Aba in the Spratlys. In 1946 and 1947, Taiwan sent a naval task force of four ships to the area; two of which occupied Itu Aba and two of the Paracels. However, the Chinese takeover of Hainan immediately forced Taipei to withdraw all its garrisons from the Paracels. Their absence in the Spratlys between 1950 and 1956 was also due to the Communist takeover of the mainland. The rise of the Filipino claims with the invention of Kalayaan territory in 1956 was subject to Taiwanese protest and Taipei decided to re-occupy Itu Aba by stationing a naval unit permanently to enhance its sovereignty.\(^9\)
Amazingly, both China and Taiwan claim a similar area involving almost the entire South China Sea, including the four major archipelagoes of Spratlys, Paracels, Macclesfield Bank and Pratas, which certainly reflects a "one Chinese" claim. In addition, in several events, Beijing seems to portray a mutuality of interest between itself and Taiwan over the claims in the South China Sea. For example, a document of the Chinese claims on Paracels and Spratlys has mentioned Beijing Foreign Ministry as stating that "For years, the Taiwan authorities of China have maintained a military garrison on Taiping Island (Itu Aba), the biggest among the islands". In addition a Beijing administrative decision excluded the Pratas group, under the control of Taiwanese forces. At the same time it reported to Taipei on the developments in the Paracels and the establishment of a new administrative province to take responsibility for jurisdiction over the South China Sea Islands.

The presence of Taiwan in the South China Sea, although an advantage for China as a whole, also has the potential to confuse the issue of Chinese sovereignty. Taipei's territorial claims in the South China Sea have been reasserted on several occasions since 1952 and most recently with the 1988 incident (Sino-Vietnam clash), but China's offers to assist Taiwan in defending that claim have been rebuffed by Taipei, hence, bringing in the "two China" conflict to complicate further the crisis of the Spratlys. It seems that both China and Taiwan are again becoming rivals and they have yet to solve their own problems on the issue of sovereignty in the South China Sea. Indeed, this was pointed out in the 1991 Bandung Conference by Pangiran Osman of the Brunei Ministry of Foreign Affairs, when he said:

The presence of Taiwanese 'sovereignty' in the Spratlys Islands complicates the issues, extending the disputes of 'Two China' in the Far East, to the arena of Southeast Asia political questions. It will be most difficult to contemplate requesting both China and Taiwan to sit down on a territorial and jurisdictional settlement in the South China Sea whilst they maintain the status quo across the Formosa Strait.

On the same issue, Professor Steven Kuan-tsyu Yu Taiwan also acknowledged this complexity: both Beijing and Taipei are rivals in the internal politics of China and in the case of the South China Sea, each claims to represent China as a whole, as he affirms, "thus there is nothing like territorial disputes between them as understood internationally".

The Vietnamese claims of sovereignty to the Paracels and Spratlys are not based on a long historical period as the Chinese. Moreover, they have difficulty in proving the continuity of their own state and territory from its status as a Chinese province (between 221 B.C. and 939 A.D.) until the period of French colonisation and the final formation of the present Vietnamese state. Historically, the earliest event that serves as a basis for Vietnamese sovereignty claims in the South China Sea seems to date back
to 1700 with the foundation of “Do Houng Sa” society which used the Paracels for commercial purposes. The following Nguyen dynasty emperors reactivated the society in 1802, hoisted the Vietnamese flag in the Paracels in 1816 and additionally constructed a pagoda in 1834.\textsuperscript{16}

Vietnamese claims over sovereignty in the post Pacific War era were asserted in 1951 San Francisco peace conference. None of the states at that time protested the Vietnamese claim over the Paracels and Spratlys. In contrast the conference voted for the rejection (with 46 votes, 3 against and 1 abstention) when an amendment was about to be made on the peace treaty to return the archipelago to China.\textsuperscript{17} Thus, it is a clear fact that the San Francisco treaty only noted the Japanese renunciation of rights over these territories.

Provided the historical information given by Vietnam is true, “as a state” it apparently showed a definite interest in the Paracels somewhat earlier than did China.\textsuperscript{18} In this respect, Vietnam was the only state to fulfill the criteria of “effective occupation” in international law before the Pacific War. Vietnam had consolidated its occupation and established sovereignty by organising the Paracels brigades for the purpose of exploitation in a state capacity. There are numerous written works on those brigades being operated in the Paracels and Spratlys during the reigns of the Nguyen lords (1558-1786) and Nguyen dynasties (1902-1945), which have been described by Vietnamese Government documents.\textsuperscript{19} In contrast, until recently, China’s “undisputable sovereignty” has not been proven in terms of effective occupation.

Unlike China and Vietnam, the Philippines, Malaysia and Brunei do not base their claim for sovereignty in the Spratlys on a long historical account, but more in terms of proximity. For the Philippines, its basis for claiming the Spratlys areas was initiated by Tomas Cloma, a Filipino private businessmen who discovered those islands. Cloma claimed that he discovered the islands in 1947, established several colonies in that area, and named the archipelago Kalayaan (freedom land) while sending a note to the Filipino government at that time.\textsuperscript{20} However, Cloma’s claims through his letter were addressed not on behalf of the government of the Philippines, but as the claims of the “citizens of the Philippines”.\textsuperscript{21} Nevertheless, the Philippines claims on Spratlys was strongly established in 1978 through the signing of the Presidential Decree (No. 1596). The 1978 Presidential Decree claims Kalayaan for the Philippines because “these areas do not legally belong to any state or nation, but, by reason of history, indispensable need, and effective occupation and control “which are” vital for the security and economic survival of the Philippines”.\textsuperscript{22} The decree also asserted that in accordance with international law, the claims of offers “have lapsed by abandonment and cannot prevail over that of the Philippines”.\textsuperscript{23} The Philippines, since 1972, has managed the “Kalayaan” area through a separate municipality within the province of Palawan.
Malaysian claims do not comprise the entire archipelago of the Spratlys. It claims the islands located to the extreme south of Spratlys because they lie within its continental shelf. The first Malaysian claim was established after the immediate release of its map of the continental shelf in 1979, which shows some of the islets under its national jurisdiction.\textsuperscript{24} Malaysia does not base its claim for sovereignty on historical grounds. All other parties disapprove its claim in the Spratlys whilst Malaysia considers some of the islets as not part of the Spratlys. Malaysia's claim to the Spratly islands based on the rights of the continental shelf is seen as unconvincing "because it is not the waters which give title to the islands, but islands which confer rights to waters".\textsuperscript{25}

Brunei's claim to the Spratlys is not clearly defined. It is argued that Brunei's drawing of maritime boundaries (continental shelf) is extended naturally without taking international legal consideration of its neighbours,\textsuperscript{26} hence, lessening the strength of its claims into the Spratlys area. To date, Brunei has not occupied any islets. Brunei only claims Louisa Reef, the southern most reef of the Spratlys. In addition, unlike other claimants, Brunei maintains a low profile over its claim.

In summary, the issue of sovereignty in the South China Sea, particularly in the Spratlys, is sensitive and confusing. Each of the conflicting states has their own version for their legal basis for claiming sovereignty. Although it is not in the interests of this research to justify the legality of their claims, it is important to note that the legal evidence provided by each of the claiming parties is disputable. In the case of Chinese claim to Spratlys, maritime expeditions and the use of some islands as shelter for fishing do not reflect state activities for effective occupation. In the case of Vietnam, its historical existence as a nation state is questionable in order to accept its effective state occupation of the islets. The discovery and occupation, in a private capacity (the Cloma incident), also does not enhance the Philippine’s claim to ownership of the islands. Finally, the Malaysian claim for islands, based on its view of the continental shelf, can also be disputed in international law. In addition, there are parties who claim almost the entire South China Sea as internal waters on the basis of historical precedent. The view cannot "be regarded as serious, nor should it be treated with respect" based on perspective of international law.\textsuperscript{27}

Moreover, international understanding on the implications of the Law of Sea is still developing and it is questionable as to whether it can provide an absolute settlement for a unique case like the Spratlys. In such circumstances, it seems there is no alternative, but that the conflicting states may depend on force, as a policy instrument to defend their claim to sovereignty. No state is willing to accept the present status quo.

There is also a fear of China, regarded as the emerging superpower and a major power in the South China Sea, that whilst Beijing, has in the past, expressed the desire for co-operation, it continues to maintain its stand of "undisputable sovereignty". This reflects the tactic of Chinese diplomacy
which poses a question mark on the entire issue. Unlike the conflicting states which are willing to sacrifice their national interest to justify the common benefit, there are possibilities that there might be no alternative to the use of force to defend their strategic interests.

Indeed, although all delegates to the Bandung Workshop in July 1991 were receptive to the idea of forming joint authority in Spratlys, some seemed to advocate that the sovereignty issue should be first resolved. However, governments believe that most of the territorial disputes in the South China Sea can be resolved peacefully. Such an assumption is made based not only on the improved relationship among littoral states but because of the increasing potential for joint exploration of natural resources and also as there are good prospects for settlements. To date the littoral states have not, so far, engaged in war over the overlapping territorial and maritime claims. Each country has agreed not to exploit the resources, in these areas, unless an agreement is reached.

Although disputed archipelagoes such as the Paracels and Pratas are controlled by the military forces of China and Taiwan, to date, their status quo remains unchallenged. Obviously, Vietnam has been deterred from making any military attempt to recapture the Paracels since 1974. It is also unlikely that China and Taiwan would go to war over the Pratas islands or the Macclesfield Bank. Disputes in such areas can be resolved through bilateral negotiation or joint development. However, these reasons may not be absolute, but are discussed to increase our perception of whether the entire South China Sea is a potential flashpoint. The only area, at the moment, seen as a potential flashpoint is the Spratlys.

In sum, evidence that are historical in nature, particularly related to archaeological artifacts or even ancient maps do not necessarily tend to receive strong support for territorial claims under the international law. With regards to two of the major claimants over the territorial disputes in the South China Sea, who often refer historical evidence for sovereignty claims, however, have to succumb to the fact that the history of the colonial powers in Southeast Asia’s also rich in similar means. If such historical means are used as evidence, it will in turn invite other external powers like France, Britain and so on to pursue their interest on the basis of occupation or even for drawing some of the ancient maps. Hence, it does not bring much rationale for a constructive settlement, but further delaying the process.

Therefore, despite being in an unclear state, the various claimants in the South China Sea continue to pursue their evidence in an antagonistic manner. Each of the claimants including Vietnam, China, Taiwan, Malaysia, Philippines and Brunei has, to some extents find an alternative avenue for the debate over sovereignty. However, it is also more evident over the years that the United Nations Convention on the Law of Sea does not have the means to resolve the issue with equal justice. The settlement can only be reached by abandoning sovereignty. If sovereignty is one issue that must
be resolved before any efforts for joint-exploration could be seen, then the conflicting parties have no alternative but to shelve the so-called "sovereignty status".

**Malaysia’s Strategic Policy on Territorial Disputes in the South China Sea**

Malaysia’s claim to the South China Sea is solely based on the UNCLOS procedure. Its publication of a map in 1979 asserting its maritime boundaries which includes some of the islets and atolls within the 200 nautical mile of EEZ made Malaysia as an important player or stake holder in the scramble for territories in the South China Sea. However there are two crucial points that must be accounted on Malaysia’s claim in the so called disputed areas of the South China Sea. Firstly, Malaysia is not claiming the entire Spratlys. Therefore its dispute with the other claimant are partial on the basis of the overlapping maritime zone.

Secondly, it is also interesting to note that Malaysia’s map on territorial waters was not subjected to formal protest from the United States. The US is often known for keeping alert on maritime claims of regional countries. More so, the American maritime strategy straddles through all the strategic waters around the globe. And the South China Sea has been an important area in terms of sea lanes.

In line with Malaysia’s EEZ map, it now occupies Terumbu Layang-layang, Ubi and Mantanani. Where national security is concern, the decision of occupying these islets was strategic. If Malaysia would have failed in that endeavour, it will be facing a scenario which confronted the Philippine in 1995. China occupied Mischeef Reef and has built large structures that can accommodate the stationing of its naval vessels and soldiers. Intelligence reports indicate that the PRC’s naval vessels regularly visit the area.

Malaysia’s occupation of some of the islets have expanded in terms of activities. While there are facilities for stationing the military, the government has allowed tourism to grow. It had offered private companies to bring tourist to Terumbu Layang-layang for diving and bird watching. The islands occupied by Malaysia are fully protected by the Royal Malaysian Navy. Naval vessels, anti aircraft guns and other military facilities are visible in ensuring the defence and ownership of the islands.

Malaysia’s policy of stationing military facilities and developing tourism in that area are generally subjected to protests from other claimants including China, Vietnam, Philippines and Taiwan. However, Malaysia can expect the ASEAN claimants renouncing the use of force in this area. The only worry that could affect Malaysia’s control can be seen from the emerging China’s military activities in the Spratlys region. It is doubtful that other claimants would want to use force to overthrow the military from the occupied islands. China too, on occasions maintains a stand of not using force. However its actions are not clear since the 1995 Mischeef Reef development.
In 1999, Malaysia’s development of structures for scientific research at Terumbu Peninjau and Siput was protested by both China and the Philippines. Prime Minister Mahathir responded to the protest by the Philippines by saying that Malaysia never questioned the occupation of Terumbu Laksamana by the Philippines. Similarly, Amboyna Cay is also occupied by Vietnam. Malaysia considers the development of structures in the areas as within its EEZ. These activities are seen as vital for scientific research. In fact, most of the other claimants also conduct a variety of research in the disputed territories. Malaysia stood firm on defending its sovereignty. Defending national sovereignty in the South China Sea is a difficult task. It requires sizeable maritime assets both in terms of naval patrol boats as well as air power capabilities. Given the Sipadan and Pandanan hostage crisis, it is predictable that Malaysia’s maritime surveillance and power projection capabilities will grow steadily in the years ahead.

Malaysia’s Policy on Territorial Disputes: From the International Law Perspective

Territorial dispute in Spratlys is a unique case where Malaysia has no choice but to use its military to defend its claim and its EEZ as well. If Malaysia neglects the occupied islands, it will be grabbed by others. But this does not mean that Malaysia believes in the use of force as a way for settling disputes in the South China Sea. Malaysia’s defence policy clearly states that the use of force is the last means in settling dispute. Being a member of ASEAN, it also subscribes to the principle of no use of force. In this regard, Malaysia demonstrates its strong support to international organisations and legal regimes that are in place for resolving conflict.

The adoption of UNCLOS witnessed Malaysia adhering to all cardinal rules of continental shelf, territorial waters, marine and environmental laws of maritime affairs. It is also working closely with regional countries on efforts towards a regional code of conduct in the maritime environment. Similarly, Malaysia also adheres to standards set by the International Maritime Organisation (IMO) and other UN conventions on maritime affairs. On the whole, Malaysia’s practise has been in line with the international law.

Where territorial disputes are concern, Malaysia’s positive approach towards resolving them amicably can also be seen in several other cases. Malaysia’s maritime dispute on the ownership of Ligitan and Sipadan has been referred to the International Court of Justice. This has significantly improved its bilateral relations with Indonesia. In the case of Pulau Batu Puteh, Malaysia and Singapore have agreed to deliberate the case at ICJ as well. This on the whole indicates Malaysia’s respect for international law.

The problems with international law and UNCLOS are manifold. The attempt to exercise sovereignty by most of the claimant are disputable under international law. UNCLOS can offer some solution, but the case of Spratlys
is entirely unique to be resolved using UNCLOS parameters. Claimants are now generally using history, discovery, effective occupation, effective administration and so on as evidence. However, most of claimants confront evidentiary problems. Old maps are not clear to show evidence. Black dots are not clear signs to show ownership of island using ancient maps. Colonialism and traditional tributary relationship between claimants and later the arrival of France into the scene complicates the entire assertion of sovereignty based on what has been regarded by China and Vietnam as historic waters. The above are difficult issues that can provide solutions through internal law. Using UNCLOS can only solve problems of a few of the claimants. And this will surely be contested by others who reject an UNCLOS approach using the maritime boundaries demarcation principles.

Where Malaysia is concerned, it has been quite successful in resolving other overlapping maritime boundary problems using the law of sea convention. In most instances, Malaysia and disputed parties have adhered to the principle of equidistance as a way to demarcate overlapping maritime boundaries. The remaining disputed areas will be resolved by joint exploration and development approach. The Gulf of Thailand will be a successful case to demonstrate Malaysia’s friendly approach using the available international law and maritime regime for settling disputes. Similar approach has been adopted in dealing with Vietnam and Indonesia in other overlapping maritime zone. Boundary demarcation in the Straits of Malacca is also another case that indicates Malaysia’s policy in line with international law.

In the case of the Spratlys, policies of most claimants are ambiguous. Actions and statements of policies do contradict one another where real practices on the ground are concern. Like some of the other claimants, Malaysia supports ideas and suggestions that signify cooperation.

CONCLUSION

Malaysia’s policy over the Spratlys and the rest of disputed areas in the South China Sea are consistent with the practice of the international law, particularly in line with the UNCLOS regime. However the question of sovereignty will remain as the contentious issue among the claimants. Most of the claims can be disputed through international law. Like other claimants, the stationing of the military and other administrative practice to ensure the status of occupation in international law is something understandable within the context of realpolitik. However, this has not hampered Malaysia from resolving its maritime disputes using the international legal regimes and via cooperative means. Where the national policy on overlapping claims is concern, it has sufficient record and successful cases of resolving conflict through peaceful means. Its policies are primarily in line with international law. The problem now remains whether international law can resolve the question of sovereignty in the South China Sea.
NOTES

1 Cited by Marwyn Sameuls, Contest for The South China Sea, Methuen and Company, New York, 1982, p. 51


3 Ibid., p. 22.


5 Ibid., pp. 10-11.

6 Ibid., p.10.


9 For more details on Taiwan’s activity in the South China Sea after the Pacific War, see Steven Kuan tsyh Yu, pp. 14-16.


11 Ibid., p. 117.


16 Ibid.

17 See Foreign Broadcasting Information Service, East Asia, 28 April, 1988, p. 60.

18 Heinzig, Disputed islands.................., p. 25.

19 See Foreign broadcasting Information Service, 28 April 1988, pp. 54-56.

20 For more details on Cloma’s expedition, See Marywn Sameuls, “Contest For South China Sea”, pp. 81-86.

21 Chi-Kin Lo, China’s Policy Towards Territorial Disputes”, p. 140.

22 Quoted from Presidential Decree No. 1596, “Declaring Certain Area part of the Philippine Territory and providing for the Government and Administration”, 1978, p. 2; also cited by Bradford Thomas, The Spratlys Islands .................. P. 4.

23 Ibid.

Steven Kuan-tsyh Yu, “Who Owns The Paracels and Spratlys?”, p. 27.


