

**Comments on Mr. Bill Hayton's paper/presentation
entitled "The modern origins of China's South
China Sea claims: maps, misunderstandings and
the maritime geobody"**

By Professor Dr. Yann-huei Song (宋燕輝教授)

Research Fellow, Institute of European and American Studies,
Academia Sinica, Taipei

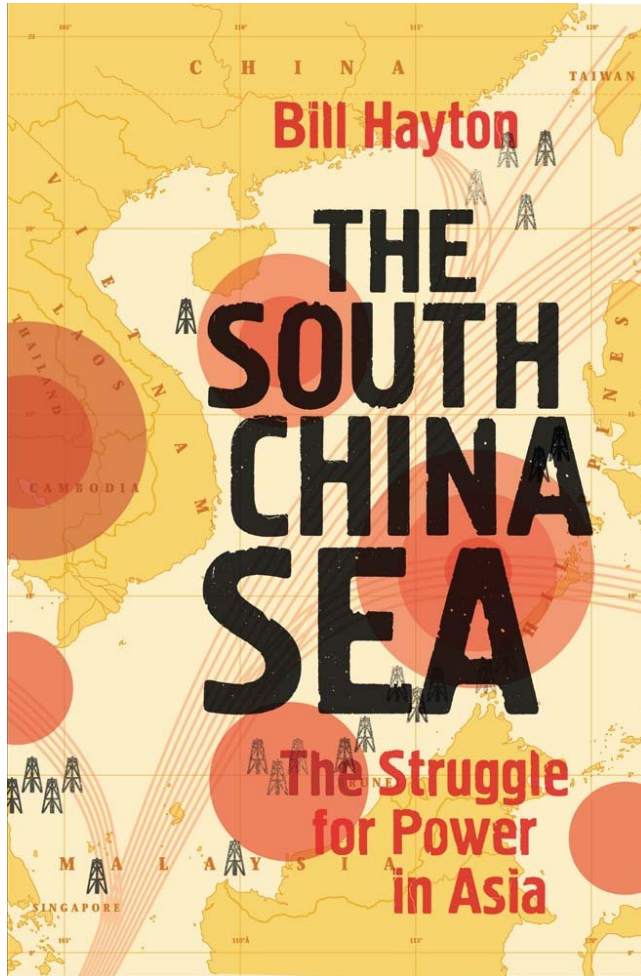
September 8, 2017

Opening Remarks

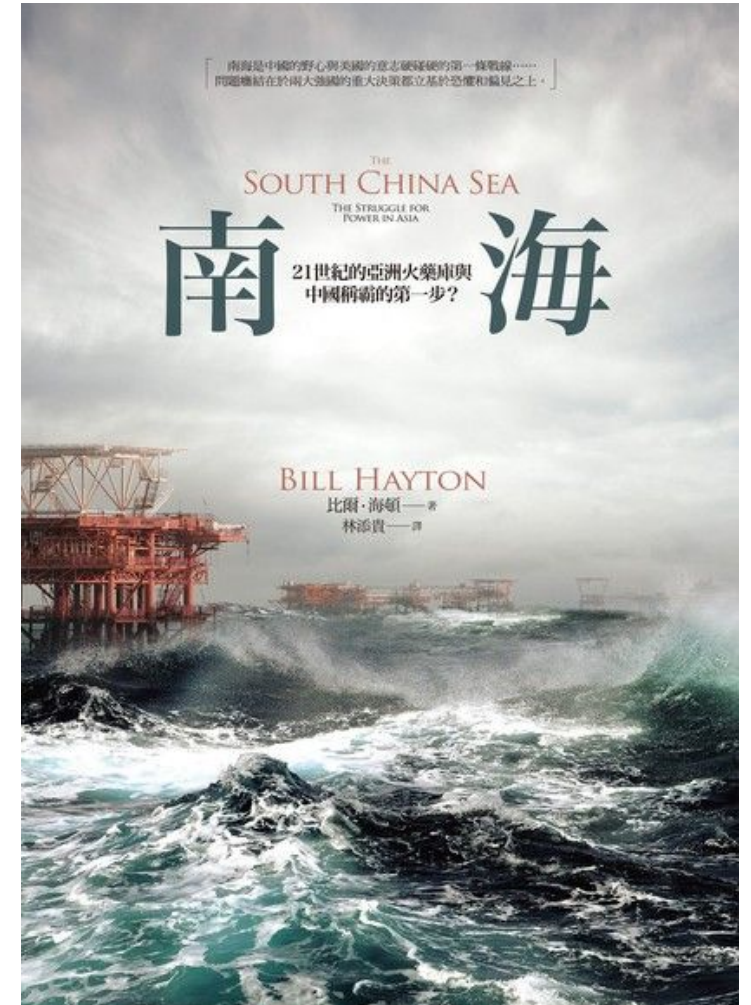
- A brief history between Mr. Hayton and me;
- One of the main arguments in Mr. Hayton's paper/presentation is related to nationalism and the role played by the ROC geographical elites in 1930s and 1940s;
- But what about the role of law and relevance of legal history in the interpretation of the SCS maritime history? (e.g., Grotius v. Selden, 1930s ILC's, 1945 Truman Declaration, and UNCLOS I, II, and III, the 1969 Emery report, and the 2008/2009 CLCS submissions?)
- Is it possible for “bad lawyers” to interpret and then accept the “biased” or “incorrect” historical evidences provided by “good historians” or “bad historians”?
- How about “bad judges” who paid more attention to their “legal ego” or “sacred mission” imposed themselves to interpret the relevant provisions of the UNCLOS on behalf of the sovereignty states that agreed to adopt the Constitution of the Ocean in 1982?

THE SOUTH CHINA SEA: The Struggle for Power in Asia

– By Bill Hayton



I wrote a book recommendation for the promotion of the sale of the Chinese version of Mr. Hayton's book in English in 2015.



There was an event hosted by Rye Field Publications yesterday. Unfortunately, I was not invited to the event. However, if I were invited, I won't be able to go due to the rise of an important family matter.

The 8th SCS Conference, 11/2016, Nha Trang, Vietnam

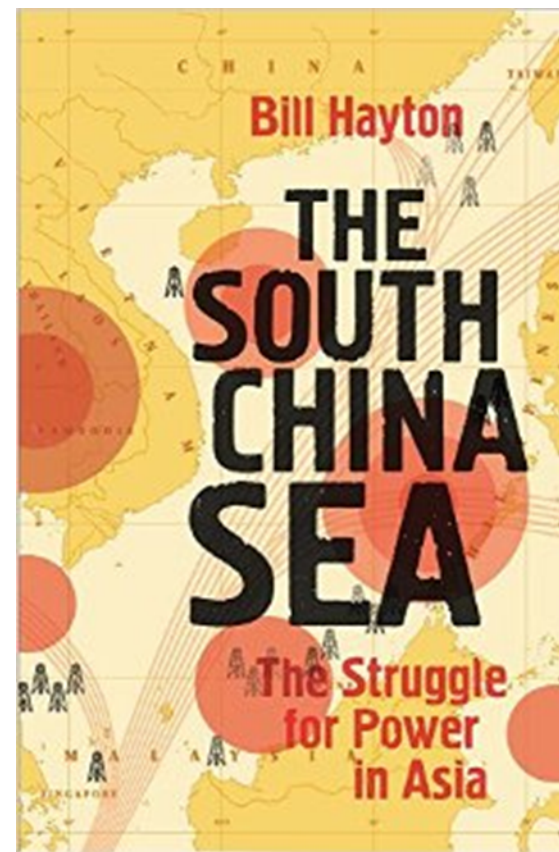


I agree fully with Bill Hayton's Conclusion

- There is much more work to be done in the archives of the Land and Water Maps Inspection Committee and its successors and on the relationship between their work, the private initiatives of patriotic cartographers, geographers and other educators and the journalistic and nationalistic writings of the period. Only by doing so can we fully tell the story of the emergence of China's 'historic claim' to the South China Sea.
- If this is Mr. Hayton's conclusion, I would suggest that there is a need to re-consider the use of such strong wording, such as "emotional claim" in Mr. Hayton's paper. The use of the notion or term such as "**Chinese maritime geobody**" by Hayton and "**地圖開疆**" (**Opening the maritime frontier by drawing maps**) by **黎蝸藤** (Li Gua Tern), an oversea Chinese historian who is now living in the United States, needs also be re-considered before more historical archives research are conducted.

I also agree with Mr. Hayton's answer given in his 2014 Book to the question: "Perhaps one answer lies in Taiwan"

- The Question is: **"How then could a Chinese population be persuaded to take a 'different view' of the history of the South China Sea?"**
- Mr. Hayton wrote: "Perhaps one answer lies in Taiwan. The chances of a freer debate on Chinese history are much greater in Taiwan than on the mainland. There are already a number of 'dissident' academics rethinking aspects of twenty-century history. Taiwan is also where the archives of the Republic of China, the government that first drew the 'U-shaped line', are stored."



What Should or Could Taiwan do?

- Perhaps a “different view” is not necessary needed, but a correct historical view from Taiwan, which is based on the concept or idea of “shared history”, “common destiny”, and “regional common heritage of mankind”, and then come out with a Win-Win solution so that all of the surrounding countries in the SCS can benefit from peace and cooperation.
- In order to shape this “correct historical view” in the SCS, however, there is a need for Taiwan to support and expand its own historical archival research.
- Only after that, a comparative international historical study could possibly be followed.

CHINA

KEY

- Chinese Militarization Sites
- U.S.-Philippines EDCA Sites

HAINAN ISLAND

東沙島

WOODY ISLAND

SCARBOROUGH SHOAL

Manila

民主礁/黃岩島

PHILIPPINES

SPRATLY ISLANDS

太平島



Five actions to be taken by Taiwan in response to the Ruling (7/29/2016 NSC meeting)

- 1. Taiwan will step up patrol missions to safeguard the rights and safety of Taiwan fishermen operating in the SCS.
- 2. The MOFA is instructed to enhance multilateral dialogue with other relevant parties on collaboration and consensus.
- 3. The Ministry of Science and Technology and related agencies are directed to invite international scholars to Taiping Island in the Nansha (Spratly) Islands to conduct scientific research on climate change, earthquakes, geology and meteorology.
- 4. The MOFA will collaborate with international organizations to develop Taiping Island into a base for providing humanitarian aid and supplies.
- 5. Taiwan will encourage more local talents to study maritime law so as to strengthen the nation's preparedness in response to international legal issues. (How about the SCS history?)

Drill on Humanitarian Assistance and Disaster Relief on Taiping Island and surrounding Waters on 11/29/2016



How about setting up an international research group to conduct an independent research on the history of the SCS?



科技部於9/06/2017率領由國內外24位學者專家所組成的國際科研團隊，登上南沙太平島進行科學研究勘查活動。

國際學者包括來自美國的Timothy Byrne教授與Anne L. Cohen博士、來自日本的Tetsuo Nakazawa博士與Kosuke Ito教授、及來自加拿大的James D. Reimer教授。

Before that, a number of questions can be raised, including:

Whom should we trust for the purpose of obtaining the “correct” history or true story? Bill Hayton, a British BBC reporter and researcher? Or Marwyn Samuel, a Jewish geographer, born in New York in 1942? Or, Professor Choon-ho Park, who is not a Chinese, but a well-known Korean law professor and later became the ITLOS judge?

Did the five arbitrators in *the SCS arbitration case* conduct independent investigations into archive sources? Are they familiar with Asian Maritime history? Are they “good lawyers” but “bad historians”? Did they rely solely on the opinions of the experts they appointed or relied on the European and Japanese archives to decide if Taiping Island (Itu Aba) can “maintain human habitation” or “have its own economic activities”? If new historic evidences are found, is it possible to revise the decisions made by the Arbitral Tribunal on 7/12/2016?

ICJ CASE CONCERNING SOVEREIGNTY OVER PULAU LIGITAN AND PULAU SIPADAN (INDONESIA v. MALAYSIA) (MERITS)

Judgment of 17 December 2002

- As regards its *effectivities* on the islands of Ligitan and Sipadan, Malaysia mentions control over *the taking of turtles and the collection of turtle eggs, allegedly the most important economic activity on Sipadan* for many years. Malaysia also relies on the establishment in 1933 of a bird sanctuary on Sipadan. Malaysia further points out that the British North Borneo colonial authorities constructed lighthouses on Ligitan and Sipadan Islands in the early 1960s and that these exist to this day and are maintained by the Malaysian authorities.
- (If fishing or taking of turtles and the collection of turtle eggs are considered “the most important economic activity in support of territorial and sovereignty claims, why did the Arbitrators in the SCS Arbitration case exclude fishing to support Taiping Island’s claim as a “fully entitled island” and therefore can have a 200-nm EEZ in accordance with Article 121 of UNCLOS?)

In the ICJ Case Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore) (Judgment of 23 May 2008)

- The Court concludes that sovereignty over Pedra Branca/Pulau Batu Puteh belongs to Singapore.

Is this judgement final and binding?

Can it be overturned?

What if new evidence is found?

On 2 February 2017, Malaysia filed an Application for revision of the Judgment delivered by the ICJ on 23 May 2008 in the case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore).

NEW FACTS Found by Malaysia

- Article 61, para. 1, of the Statute of the ICJ, provides that “[a]n application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence.”

NEW FACTS Found by Malaysia

- In its Application, Malaysia contends that “there exists a new fact of such a nature as to be a decisive factor within the meaning of Article 61”.
- In particular, it refers to 3 documents discovered in the National Archives of the UK during the period 4 August 2016 - 30 January 2017, namely:
 - (1) internal correspondence of the Singapore colonial authorities in 1958;*
 - (2) an incident report filed in 1958 by a British naval officer; and*
 - (3) an annotated map of naval operations from the 1960s.*
- These are new fact and new evidence, according to Malaysia.

NEW FACTS Found by Malaysia

- Malaysia asserts that the new fact was not known to Malaysia or to the Court when the Judgment was given because it was “only discovered on review of the archival files of the British colonial administration *after they were made available to the public by the UK National Archives after the Judgment was rendered in 2008*”.
- Malaysia also argues that its ignorance of the new fact *was not due to negligence* as *the documents in question were “confidential documents which were inaccessible to the public until their release by the UK National Archives”*.

Implications of the Malaysian Submission

- The right to access to the National Archives (limitation for foreigners, or requirement for special application procedure and approval?)
- The question of confidentiality
- Possible intended concealment
- Conflicting interpretation
- Mistakes made by the officials in charge of the matter in question
- Government commissioned research with set mission
- National sentiment/nationalism
- Language, funding, training, copying, recording. . .
- Others

Important Questions risen from Mr. Hayton's and other Oversea Chinese/Taiwanese historians' research

- The interpretation and application of Article 4 of the ROC constitution;
- The statement made by the ROC MOFA regarding sovereignty over the four large groups of islands in the SCS;
- The questions concerning ownership of Scarborough Shoal (民主礁/黃岩島), Taiping Island (太平島/Itu Aba);
- The need to cooperate between and among the countries that border the SCS for a comprehensive, independent research on the history of the SCS, including the Cross-the-Strait cooperation;
- The need to explore the possibilities for cooperation in the SCS in accordance with the concept of “common/regional heritage of mankind” and Articles 122/123 of the UNCLOS, many relevant Hard/soft law instruments, political statements, and unsolicited policy recommendations from academic community.

**Thank you very much for giving me
the opportunity to express my personal
views**

