Making International Law Truly ‘International’?
Reflecting on Colonial Approaches to the China-Vietnam Dispute in the South China Sea and the Tribute System

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Abstract

Before non-European regions adopted international law, a different set of law of territory governed the non-European regions. Notwithstanding their differences, international courts and tribunals have approached non-European territorial disputes through a single lens of Eurocentric international law. The general claim of this article is that international courts and tribunals should approach non-European territorial disputes with special consideration to account for the region’s historical system. This article case studies the China-Vietnam dispute in the South China Sea to advance this claim. Through the case study, I argue that East Asian concepts of sovereignty do not equate with those employed by Eurocentric international law. I then suggest guidelines for considering regional systems when ruling on non-European territorial disputes. If international courts and tribunals do not change their legal approach, this not only distorts the historical realities of the non-European regions but also results in unfair dispute settlements.

Keywords

Tribute System – Territorial Disputes – Law of Territory – Paracel Islands Dispute – South China Sea
1 Introduction

In 2016, the Arbitral Tribunal (hereinafter ‘the Tribunal’) ruled on one of the most contentious territorial and maritime disputes: the *South China Sea* case (*The Philippines v. China*). The Award ruled on the legality of the nine-dash line, which is a sovereignty claim over the maritime features and the waters in the South China Sea.\(^1\) In defending the nine-dash line, China argued for the necessity of considering a regional system in the South China Sea dispute.\(^2\) In one of its briefings, the Ministry of Foreign Affairs of China demanded this regional system to be considered, as the United Nations Convention on the Law of the Sea (UNCLOS) does not cover all aspects of the law of the sea fairly.\(^3\) However, the Tribunal rejected this argument by highlighting that UNCLOS supersedes earlier rights and agreements. In other words, China’s claims to historical rights were invalidated once China acceded to UNCLOS.\(^4\)

This article will conduct an in-depth analysis of China’s argument that regional systems need to be considered. However, this does not mean that this article advocates China’s claims of historical rights based on the nine-dash line. The regional system in East Asia does not support the nine-dash line claim. China was also not able to provide any regional evidence of the nine-dash line in any of its statements.

However, besides the nine-dash line claim, the regional system may have affected the regional law of territory and the concept of sovereignty in East Asia. The law of territory is the international law on the acquisition of title to

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2. This article refers to the People’s Republic of China as ‘China’ and the Republic of China as ‘Taiwan’. Also, I acknowledge the controversies concerning Taiwan’s statehood and do not show any opinions on the issue. Nevertheless, as Taiwan is an important entity in the South China Sea dispute, this article assumes Taiwan as an equal entity as other disputing parties.
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Territorial sovereignty. In developing the law of territory, the colonisers used the law to legally justify the acquisitions of the territorial title in non-European regions. This was done through the notion of Westphalian sovereignty, a concept of state sovereignty stemming from the Treaty of Westphalia in 1648 which marked the demise of Christendom and the rise of the European state system. From Westphalian sovereignty, the international lawyers in the nineteenth and twentieth centuries generated standards of statehood and civilisation, which excluded non-European entities and allowed the territorial acquisition of the colonisers. Unfortunately, the ‘inappropriateness of judging on pre-colonial matters on postcolonial standards’ persists today in international jurisprudence on non-European territorial disputes.

Had the Tribunal considered the regional system in place at the time of the territorial and maritime disputes, the Tribunal’s legal reasoning might have been different, despite the outcome being the same. Unlike the South China Sea case, which ruled in light of the contemporary law of the sea, the South China Sea sovereignty disputes require the examination of the past law of territory which governed the disputed area as per intertemporal law, because the disputes originated in historical times when the regional framework governed the region. This intertemporal law binds international courts and tribunals to consider the rules governing at a disputed time, not by the law governing them

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6 Ibid., 711.
8 Chapter 1 of Kayaoğlu, Turan. Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China (Cambridge: Cambridge University Press, 2013); and chapter 2 of Anghie, Antony. Imperialism, Sovereignty and the Making of International Law (Cambridge: Cambridge University Press, 2005) state how the international law in the nineteenth and twentieth centuries excluded non-European states from the realm of international law and international relations for colonialism.
What the Tribunal overlooked was that the spatial aspect should also be considered in applying the intertemporal law.

In this vein, the following research question becomes apparent: if non-European territorial disputes originate from an era when Eurocentric international law was not adopted by the region concerned, is it fair to neglect the relevant regional system that did govern at that time? This article advances the claim that the colonial nature of international law is strengthened by solely relying on the notion of Westphalian sovereignty when evaluating non-European territorial disputes. In doing so, this approach overlooks the complexities and significance of the regional systems. To support this claim, I study the case of the China-Vietnam sovereignty dispute over the Paracel Islands in the South China Sea.

In terms of the structure, I first briefly explore the South China Sea dispute and examine the tribute system, which dealt with treaty and diplomatic relations between China and other states. The system also affected the regional concept of sovereignty and statehood as well as the law of territory. As such, the tribute system dictated the delimitation of land and sea borders in East Asia. Based on the principles of the tribute system and the historical examples, I argue that East Asian concepts of sovereignty and statehood do not equate with those employed by Eurocentric international law. If international courts and tribunals do not consider this system when adjudicating the non-European territorial disputes, this not only distorts the territorial sovereignty in the area but also fails to appreciate the relevant regional differences.

Next, I briefly explore the legal approach to non-European territorial disputes, focusing on how international courts and tribunals downplayed non-European territorial sovereignty. Based on these underpinnings, I suggest the two possible scenarios if this default legal approach continues to be adopted in the South China Sea dispute. Arguing that both scenarios inappropriately capture East Asian sovereignty, I recommend a set of normative guidelines for the reconstruction of regional systems to international courts and tribunals, based on indications provided by the past international cases. With English, Korean, Chinese, and Japanese sources considered, this article aims for a more balanced view of the dispute and the tribute system.

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The South China Sea Dispute

The South China Sea dispute is a territorial and maritime dispute, with colonialism deeply rooted in the history of territorial acquisition. The South China Sea borders the Malacca Strait to the southeast and the Taiwan Strait to the northeast, having China, Taiwan, Vietnam, Malaysia, Brunei, Indonesia, and Singapore as the coastal states. The six disputing parties to the South China Sea sovereignty dispute are China, Taiwan, Vietnam, the Philippines, Malaysia, and Brunei. The maritime features of the South China Sea are commonly recognised as the Spratly Islands, Paracel Islands, Macclesfield Bank, and Scarborough Shoal. Of these, the Spratly Islands, Paracel Islands, and Scarborough Shoal are at the centre of intense sovereignty disputes. Whilst China and Taiwan claim all three of these features, Vietnam claims the Spratly Islands and the Paracel Islands. The Philippines claims ten maritime features within the Spratly Islands and Scarborough Shoal, while Malaysia claims twelve maritime features within the Spratly Islands. Lastly, Brunei has an indirect claim on the Louisa Reef.11

The case study of this article, the Paracel Islands are located in the northwest of the South China Sea, 185 nautical miles east of the Vietnamese coast and 165 nautical miles south of the Hainan Island, China.12 The Paracel Islands comprise 130 reefs and banks, largely divided into two sub-groups: the Crescent group located in the west and the Amphitrite group in the north.13 The Paracel Islands are called ‘Xisha Qundao (西沙群岛)’ in Chinese and ‘Quần đảo Hoàng Sa’ in Vietnamese. Apart from a legal perspective, the sovereignty dispute over the Paracel Islands is motivated by economic and fishing interests in the area. Although there are no significant fossil fuel reserves within the Paracel Islands, oil and gas reserves have been reported nearby.14 The South China Sea is also one of the four most productive fishing zones in the world, representing around ten per cent of the world’s annual maritime catch.15 Furthermore, once the military outposts stationed by the claimant states are removed, there is a

13 Ibid.
**FIGURE 1** Map of the South China Sea

*Note:* The *South China Sea Case*, page 9.

tourism potential around the Paracel Islands given the beautiful coral reefs.\textsuperscript{16} However, land reclamation projects conducted by China have been largely criticised due to the militarisation of the area and the significant harm inflicted on the marine environment.

The rationale for selecting the Paracel Islands dispute as the case study is, firstly, that the South China Sea dispute involves competing sovereignty claims intertwined with the history of colonisation and decolonisation. The claimants of the South China Sea are all non-European states (i.e. states that international lawyers in the early twentieth century denied having statehood).\textsuperscript{17} Secondly, their sovereignty claims involve territorial acquisitions in the nineteenth and twentieth centuries. This includes the timeline when a regional framework influenced East Asia and when East Asian states did not fully adopt European international law. Thirdly, the South China Sea sovereignty dispute is yet to be resolved because the Tribunal in the \textit{South China Sea} case did not rule which maritime features belonged to which disputing parties, due to the absence of jurisdiction under UNCLOS.\textsuperscript{18}

What is ignored in this dispute is the existence of a regional framework, the tribute system. The tribute system entailed different concepts of sovereignty and statehood. Despite these differences, legal scholarship has seldom delved into the tribute system. In the next section, I investigate the tribute system and its implication for the East Asian concept of sovereignty. I also explore how East Asian concepts of sovereignty and statehood were different from their European counterparts.\textsuperscript{19}

\begin{itemize}
\item \textsuperscript{17} Oppenheim, Lassa. \textit{International Law: A Treatise} (London: Longmans, Green and Co., 1905), 32–33.
\item \textsuperscript{18} The \textit{South China Sea} Case, para. 5.
\item \textsuperscript{19} To be more precise, the concepts of ‘sovereignty’ and ‘statehood’ are derived from Westphalian sovereignty and European international law. These concepts were also conceived differently in East Asia. For example, Tieya points out that China deemed itself more as a ‘cultural entity’ than a state or a nation state. Tieya, Wang. ‘International Law in China: Historical and Contemporary Perspectives’, in \textit{Recueil des cours de l’academie de droit international de La Haye} 221 (1990), 195–369. For more, see Carrai, Maria Adele. ‘Translating Authority: In Search of Commensurability between Tianxia World Order and Western Sovereignty’, in \textit{Translation and Modernization in East Asia in the Nineteenth and Early Twentieth Centuries}, ed. Lawrence Wangchi Wong (Hong Kong: Chinese University Press, 2018), 131–164. However, for the purpose of critique, this article will adopt the language which is used by international courts and tribunals under discussion.
\end{itemize}
3 East Asia’s Tribute System and East Asian Sovereignty

William A. P. Martin first introduced international law to China by translating Henry Wheaton’s *Elements of International Law* into *Law of All Nations* (萬國公法) in 1864. After the introduction of European international law, different laws governed East Asia depending on the relationships. Within the tribute system, the actors complied with the tribute system whereas any relationships with non-tributary actors were conducted with the newly introduced European international law in the late nineteenth century. This is best exemplified by Li Hongzhang’s (Viceroy of Zhili and Beiyang Trade Minister of China) recommendation to a Joseon official to ‘use European international law (萬國公法) in relations with Japan as European international law explicitly invalidates seizing lands without legitimate reasons.’ Despite this, China deemed itself as the most civilised state above all and as the most authoritative amongst neighbouring states. Westphalian sovereignty, shifting the centre of the world to Europe, was unacceptable to China.

This section examines the principles of the tribute system and compares how the system entailed different concepts of sovereignty and statehood as compared to its European counterparts. This section will serve as a stepping-stone when I later analyse the legal implications of invoking European sovereignty in non-European territorial disputes.

3.1 Principles of the Tribute System

The tribute system is commonly referred to as a Sinocentric system, founded upon the hierarchical order between China and tributary states. The Chinese emperor held the title of the Son of Heaven (天子, Tianzi), which no other entities participating in the tribute system could have. When encountering

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20 Regardless of the specific dynasties, I will refer to states’ names throughout the article – China, Korea, and Vietnam. The name of the dynasties will be referred only to indicate a specific time.
23 ‘Communication between Lee Yuwon and Li Hongzhang (書「答肅毅伯書(1) 附:再書」, translated by the author)’ (16 September 1876), available at: http://contents.nahf.or.kr/item/item.do?levelId=gkd_0005_2050 (last accessed on 29 November 2020).
foreign entities, the entities had to offer tribute and in return, the Chinese emperor showed benevolence by acknowledging the foreign entity. This system peaked during the Ming dynasty (1368–1644) and Qing dynasty (1644–1912), having Annam (today’s Vietnam) and Joseon (1392–1897, today’s Korea), Siam (today’s Thailand), and Laos as tributary states. The two pillars of the tribute system were the military power of China as well as normative and cultural superiority in Confucianism. There was a correlation between the military power of China and the solidity of the tribute system. The Confucian superiority also was the foundation of Chinese authority in the tribute system: in the seventeenth century, during the demise of the Ming dynasty and the rise of the Jurchen (later the Jin dynasty), Korea and Japan rejected the Jurchen’s legitimacy as the hegemon due to the Jurchen’s lack of Confucian superiority.

Despite this Sinocentric premise on the tribute system, the system governed under the principle of reciprocity. From the perspective of non-Chinese entities, being incorporated into the tribute system was not entirely a bad deal. The rulers of the tributary states gained legitimacy through the investiture of the Chinese emperor. In paying the tributes, commercial relations between China and non-Chinese entities were inseparable. Merchants of non-Chinese entities accompanied the tribute envoys to the Chinese border or the Chinese capital. In receiving the tributes, Beijing mutually sent ‘imperial regards’ as counter-gifts. European states deemed paying the tributes as a


29 Tieya, ‘International Law in China’ 1990 (n. 19), 221; Yu, ‘Vietnam-China Relations’ 2009 (n. 27), 95.


32 Oh, ‘Tributary Order’ 2019 (n. 28), 345.
mere formality in opening up the trade routes with China.\textsuperscript{33} Kang argues that China was committed to not exploiting the tributary states for economic benefits.\textsuperscript{34} For militarily feeble states, their incorporation into the tribute system meant explicit Chinese protection. They hoped to deter external threats and receive military assistance in the form of alliance. Hence, being incorporated into the tribute system meant systemic stability for the non-Chinese entities.\textsuperscript{35}

The tribute system had both similarities and differences compared to Westphalian sovereignty. Analogous to the Westphalian sovereignty, the tribute system was also based on sovereign equality, reciprocity, mutual respect, fairness, good faith, and treaty-based international relations.\textsuperscript{36} As per sovereign equality, China regarded the tributary state to be ‘self-governing (自治)’. In terms of border relations, the Chinese emperor deferred to the King of Korea in dealing with Chinese nationals illegally entering Korea.\textsuperscript{37} Many scholars posit that China did not comprehend the basic assumption of Westphalian sovereignty, the principle of sovereign equality.\textsuperscript{38} This is not entirely true though, as China had repeatedly claimed that the tributary states were independent of China.\textsuperscript{39} China would send out military or diplomatic assistance

\textsuperscript{33} Fairbank/Têng, ‘Ch’ing Tributary System’ 1941 (n. 31), 140. See also Hamashita, Takeshi. China, East Asia and Regional Economy: Regional and Historical Perspectives, eds. Linda Grove and Mark Selden (Abingdon: Routledge, 2008), 19.

\textsuperscript{34} Kang, David C. East Asia before the West: Five Centuries of Trade and Tribute (New York: Columbia University Press, 2010), 62.

\textsuperscript{35} Ibid., 68.

\textsuperscript{36} Evans, ‘The Primary Sources’ 1907/1911 (n. 24), 270–271; Denny, Owen Nickerson. China and Korea (Shanghai: Kelly and Walsh, Ltd. Printers, 1888), 8.


\textsuperscript{39} However, the concept of ‘independence’ was differently construed by China and the tributary states compared to the European states. Both Korea and Vietnam regarded the treaties explicitly stating their independence to be compatible with their status as tributary
if the tributary states asked for help, but this was in good faith. The tributary states could decline the Chinese request for military assistance, showing their high degree of autonomy. In sum, Kang describes the tribute system as being formally hierarchical, but informally equal.

3.2 The Tribute System’s Differences to the European Order

The tribute system entailed a different concept of territory compared to European practice. There was no notion of ‘territory’ in the tribute system. Territory (lingtu, 領土) was a notion that was imported and adopted from Eurocentric international law. Instead of ‘territory’, the Qing dynasty divided the land into four categories: trading countries (hushi, 互市), tributary states (shuguo, 屬國), dependencies (fanbu, 藩部), and provinces (zhisheng, 直省). Before the adoption of international law, levels of sovereignty exercised regarding the acquisition of territory and effective control all scaled differently in these four classifications. China considered dependencies and provinces as their territories, whilst the trading countries and tributary states were not.

states to the Qing dynasty. For example, the King of Korea sent a letter to Commodore Shufeldt, the US Representative of the Korea-United States Treaty stating that ‘Chosen has been from ancient times a state tributary to China, but that the United States had no concern with this relation, and that he entered into the treaty as an independent sovereign, and on terms of equality.’ Foster, John W. American Diplomacy in the Orient (Boston: Houghton, Mifflin, 1904), 328; Baka/Fei, ‘From Western International Law to Confucian Semantics’ 2018 (n. 38), 390. Furthermore, China exerted influence on the manner in which tributary states dealt with their national politics or foreign relations, depending on the shifts in international relations. This is well pointed out in Foster, 328, that Chinese attitude to the independency of Joseon has been inconsistent in the late nineteenth century. Foster summarises that ‘while denying responsibility for the acts of that government towards foreign powers, China was constantly seeking to control its intercourse with them.’

41 Kang, East Asia before the West 2010 (n. 34), 54.
43 In translating 屬國, this article mainly uses ‘tributary state’. This is to prevent the assumption that the tribute system is similar to vassalage system. However, depending on the primary source, 屬國 is sometimes translated as ‘vassal state’.
44 Tributary states during the Qing dynasty were Korea (Joseon), Ryūkyū, Vietnam, Siam, and Laos whilst dependencies were Mongolia, Tibet, and Xinjiang (Chinese Turkestan). Takashi, ‘Concept of “Territory”’ 2017 (n. 42).
This classification meant that China had a different sense in exercising sovereignty over territories under dependencies or tributary states, compared to colonies or colonial protectorates. Compared to this East Asian classification, international law had a different concept of statehood in the nineteenth century. British practice classified statehood into civilised states, colonies, colonial protectorates, and uncivilised entities.\footnote{Although this article presents British practice as an example of the state practice during the colonisation era, Koskenniemi shows that state practice of colonial law was in disarray when Spanish, French, and British practices are compared. Koskenniemi, Martti. ‘Colonial Laws: Sources, Strategies and Lessons?’. \textit{Journal of the History of International Law} \textbf{18(2–3)} (2016), 248–277.} Civilised states, as discussed above, had sufficient civilisation and institution to be recognised as members of the international community. Colonies were territories with their external relations and territorial sovereignty designated to alien powers (or a mother country). Internal affairs on defence and public order may also have been governed under the alien powers, dependent on the legal characteristics of each colony.\footnote{Sullo, Pietro. ‘Decolonization: British Territories’. \textit{Max Planck Encyclopedia of Public International Law} (Oxford University Press, 2013), available at: https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e924?rskey=xSq5Bl&result=1&prd=OPIL (last accessed on 1 March 2021), para. 2.} As per the British Interpretation Act of 1889, colonies were all British territories outside the United Kingdom (except the Channel Islands, Isle of Man and British India) and were governed under local or British legislation.\footnote{Interpretation Act (1889), Art. 18(3).} Colonies were governed under national law, not international law, in the nineteenth century.\footnote{Grewe, Wilhelm G. \textit{The Epochs of International Law} (Berlin: de Gruyter, 2000), 472.}

Protectorates were independent, but weak states which depended on the protecting state for protection by ceding certain rights.\footnote{Ibid.} These rights included engaging in diplomatic relations independently, so the protecting state mediated diplomatic relations between the protectorate and a third state. Despite their dependence on the protecting power, protectorates were regarded as sovereign states under international law.\footnote{Ibid.; Trilsch, Mirja, ‘Protectorates and Protected States’. \textit{Max Planck Encyclopedia of Public International Law} (Oxford University Press, 2011), available at: https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1082?rskey=gYjZp4&result=1&prd=OPIL (last accessed on 1 March 2021), para. 6.} This differentiated protectorates from colonies, as the former were under the governance of international law whereas the latter were not. ‘Colonial protectorate’ was given an additional historical context in the nineteenth century. In addition to the definition given
above, colonial protectorates served as stepping-stones for the colonial powers to control the territory and formally annex it. Since the objective of the colonial powers was to annex the colonial protectorates into their national territory, the colonial protectorates were deemed less as sovereign states than protectorates. Lastly, uncivilised entities were entities denied of their sovereignty and statehood but were not colonised by the civilised states.

This comparison between East Asian and European concepts of sovereignty and statehood in the nineteenth century has the following implications. Firstly, it is hard to equate one concept from one region with the other. The tributary states exercised more political autonomy than the colonies or colonial protectorates. Although there is a correlation between the military power of China and the influence of the tribute system, China did not have territorial dominium over the tributary states. Whilst many colonies and colonial protectorates were colonised against their will, most of the tributary states participated in the tributes without military conflict with China. The concept of vassalage, originating from medieval feudalism in Europe, cannot be equated to the tributary states either. Whilst feudalism is based upon the economic exploitation of land, the tribute system was not premised upon the suzerain exploiting the tributary system. Amongst many philosophical foundations of the tributary states, Li (禮) forbade exploiting or invading the inferiors. Li (禮) was the law of nations in East Asia, a social norm which regulated relations between lords and states. This is historically explicable: when the Song dynasty (960–1279) was on its deathbed due to military conflicts with Liao (遼), later Jin, 大金, the Song did not militarily or economically exploit the tributary states. Even when the tributary states voluntarily offered economic assistance, the Song declined.

Secondly, the concept of statehood, linked to sovereignty, was very different between the two regions. Westphalian sovereignty operated with the standard

51  Grewe, Epochs 2000 (n. 48), 472.
54  Svarverud, Rune. International Law as World Order in Late Imperial China: Translation, Reception, and Discourse, 1847–1911 (Leiden: Brill, 2007), 9.
56  Oh, ‘Tributary Order’ 2019 (n. 28), 348–349.
of civilisation, dividing foreign states into either a future member of the international community or an entity soon to be colonised. East Asia, on the other hand, did not impose such civilisation standards on foreign states. As China deemed itself to be the most civilised state, such imposition was unnecessary.\(^5^7\)

The membership of the tribute system was not an important matter, as non-state entities like the Dutch East India Company could send tributary missions to China as well. The system focused on the relations of the units, not the units themselves.\(^5^8\)

Historical cases in the late nineteenth century also show that the East Asian and European concept of sovereignty and statehood could not be equated. Historical actors had multiple legal disputes on whether the tributary states could be equated with colonial protectorates in international law. Notable disputes are the Kanghwa-do Incident (운요호사건, 雲揚號事件), the negotiation of the Korea–United States Treaty of 1882, the negotiation of the Treaty of Saigon (1874) between China and France, and the exchange between Li Hongzhang and Robert Hart (the inspector-general of the Imperial Maritime Customs in Beijing). All of these cases involved China with the tribute system-based ideas and states with European legal ideas. In all cases, they failed to conclude equating the two different concepts – one from the tribute system and one from Eurocentric international law.

Firstly, the Kanghwa-do Incident was the dispute between Japan and China in 1876. After the incident, Japan questioned China on the legal status of Joseon (Korea). In the Kanghwa-do incident, Japan sought to increase its political and military presence in Korea, dispatching a vessel under the disguise of surveying the coastal waters of Korea. In response to Japanese enquiry, China answered that Korea was a tributary state to China but is also independent.\(^5^9\) Japan replied that such a concept was invalid under international law – that Korea should be either colonial or independent. Eventually, the Korea–Japan Treaty of 1876 (조일수호조규, 朝日修好條規) was concluded without the presence of China, with Article 1 stipulating ‘Korea being a country of autonomy [自主之邦, “jajujibang” in Korean, “jishu no kuni” in Japanese] enjoys equal rights with Japan.’ In interpreting this provision, Japan equated ‘autonomy’ with an

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\(^{57}\) Zhang/Buzan, ‘Tributary System’ 2012 (n. 53), 14.

\(^{58}\) Ringmar, ‘Performing International Systems’ 2012 (n. 52), 13, 15.

\(^{59}\) For relevant documents, Japanese communication to China, see 森有禮, ‘清光緒中日交涉史料 1 ’ (14 February 1876), available at: http://contents.nahf.or.kr/item/item.do?levelId=gk_d_0005_1250 (last accessed on 29 November 2020). For Chinese document on this, see Li Hongzhang’s communication to Joseon: Hongzhang, Li. ‘淸季中日韓關係史料’ (19 January 1876), available at: http://contents.nahf.or.kr/item/item.do?levelId=gk_d_0005_1150 (last accessed on 29 November 2020).
independency whereas Korea highlighted Korea’s status as a tributary state. Despite the mismatch in the two parties’ conception of autonomy, since Korea concluded a treaty without China, the foreign relations of the tributary states in the 1870s were quite independent when compared to the colonial protectorate.\(^{60}\)

Secondly, the negotiation of the Korea–United States Treaty of 1882 involved miscommunication between the United States representative (R. W. Shufedlt) and Li Hongzhang, on behalf of Korea. During the negotiation, Li Hongzhang wanted to explicitly stipulate that ‘Joseon is a tributary state (屬國) but is independent in terms of domestic politics and diplomacy.’ However, the United States disagreed over including this provision as ‘such concept is non-existent in international relations.’ What Shufeldt feared was that the proposed provision by Li Hongzhang might hinder the equal relations between Korea and the United States. In the end, the provision containing a tributary state was not included in the final text of the treaty.\(^{61}\)

Thirdly, the negotiation of the Treaty of Saigon (1874) between China and France also involved a debate on equating East Asian terms to those of European. China and France had conflicting interpretations over Article 2 of the Treaty of Saigon.\(^{62}\) Article 2 stipulated that France recognises ‘la souveraineté du roi d’Annam et son entière indépendance vis-à-vis de toute puissance étrangère (the sovereignty of the king of Annam and his complete independence from any foreign power)’, with French intention to end Vietnam’s status as a tributary state. However, this provision’s assumption was perceived differently by each party – unlike the French intention, China and Vietnam did not think that this provision exempted Vietnam from the tribute system. And for China, its


\(^{62}\) Treaty of Commerce between France and Annam (signed at Saigon, 31 August 1874) 148 CTS 137.
position was more of a benevolent protector, who rarely intervened in domestic politics of the tributary states without a request for assistance from them. The miscommunication between France and China continued to 1879, when Vietnam asked for military assistance from Beijing, not France, against Chinese bandits along the Sino-Vietnamese borders. For China and Vietnam, the Treaty of Saigon did not invalidate the tribute system in the area. The two sides, East Asia versus France, had mismatched understandings on the concept of sovereign equality and the tribute system, eventually leading to the Sino-French War in 1884.\(^\text{63}\)

Lastly, the exchange between Li Hongzhang and Robert Hart involved customs tax issues between China and a tributary state. As regards the customs tax issue, Hart enquired whether Korea, a tributary state, should be dealt with as one of the Chinese provinces or a foreign state in the treatment of customs liability. In response, Li Hongzhang confirmed that for customs tax purposes Korea should be dealt with the same manner as the foreign nations. Hart later enquired once again on the exact status of Korea as a ‘tributary state (屬國)’, on whether it should be regarded as a ‘colony’, and Li Hongzhang clarified that Korea was a foreign nation, independent in internal and foreign affairs.\(^\text{64}\)

These historical cases reveal that the actors in the tribute system, both China and tributary states, rejected invoking Eurocentric international law to the system. The concepts of statehood and territorial sovereignty have been contingent upon the regional framework. What if international dispute settlement ignores this regional framework? This question is answered in the next section, studying the China-Vietnam sovereignty dispute over the Paracel Islands.

4 Application of the Current Legal Approach to the China-Vietnam Dispute

International courts and tribunals have hitherto never explored East Asian sovereignty and the tribute system. There are many reasons why the tribute system and East Asian sovereignty have been overlooked. The first reason is due to the lack of chance given to international courts and tribunals to consider the tribute system and relevant regional framework. Territorial disputes persist

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\(^{63}\) See also Baka/Fei, ‘From Western International Law to Confucian Semantics ’ 2018 (n. 38), 388–390.

in East Asia, notably the Senkaku-Diaoyudao Islands dispute and the South China Sea dispute. Nonetheless, the disputing parties have been reluctant to resolve the disputes through multilateral means. More importantly, there has not been any territorial dispute between states which were historically in the tribute system. This applies not only to disputes between China and tributary states but also to inter-tributary states. In other words, none of the international courts and tribunals have settled any territorial disputes between China, Korea, Japan, Vietnam, Myanmar, and Thailand.

The second reason is that, even if the territorial disputes between pre-tributary states and China were initiated in international courts and tribunals, it is highly unlikely that the regional framework or different concepts of territorial sovereignty would be considered in the dispute settlement. This is observed from the legal approach taken by international courts and tribunals to other non-European territorial disputes. The legal reasoning taken in non-European territorial disputes shows that international courts and tribunals have frequently overlooked the regional framework in deciding issues relating to statehood and have instead mostly relied on the European framework based on Westphalian sovereignty for non-European regions. The cases reveal a general tendency to downplay the statehood of local authorities, albeit with improvements being shown over time. Overall, local authorities were either regarded (1) not to have any legal personality and sovereignty; (2) to have a territorial title and limited legal personality to conclude treaties with


66 Island of Palmas Case (Netherlands/U.S.A.), Reports of International Arbitral Awards, vol. 11. The Award briefly mentioned that the natives inhabited the island as they had witnessed the absence of Spanish landing or contact with them. The Award also used various terms in indicating the authorities of the natives – native princes, chiefs of people, native authorities, and native states were all used to suggest a single entity. Some of these terms, particularly native authorities and native states, infer the natives’ authority over the territory. Yet, these terms and recognition of the natives’ authority were used to justify the acquisition of territorial title via suzerainty. The natives’ authorities were only recognised in the process of colonisation and territorial acquisition but were ignored in determining their statehood. The Award in effect considered the island to be terra nullius.
states but without statehood;67 or (3) to be sovereign states based on a single European source.68

International courts and tribunals, however, failed to formulate the core differences between the local authorities which resulted in such disparities in the first place. In most of the international cases deciding the local authorities’ legal personality and statehood, international courts and tribunals ignored regional systems and applied the lens of Westphalian sovereignty. These factors fed into the downplaying of non-European states’ authority, and an overvaluing of the European states’ arguments. International law in the era of colonisation was not ‘universal’, but Eurocentric and colonial.69 Without recognising this regional difference, past international cases have indiscriminately applied the Eurocentric international law to disputes. International courts and tribunals have also not attempted to reconstruct regional framework.

When applying this current legal approach to the China-Vietnam dispute in the South China Sea, the tribute system complicates the issue. Considering the tribute system, the dispute can be seen from another perspective. Hence, this article will focus on the sovereignty claims and issues of China-Vietnam dispute around the time when the tribute system was influencing these two parties.

Today, Vietnam’s sovereignty claims over the Paracel Islands starts with a mixture of historical claims or discovery and occupation, effective occupation

67 This is observed in Western Sahara, Advisory Opinion, ICJ Reports 1975 and Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, ICJ Reports 2002. In the Western Sahara case, the ICJ ruled that Western Sahara was not terra nullius at the time of Spanish discovery, because the local tribes were under the sovereignty of the Sultan of Morocco. The ICJ also acknowledged the derivative territorial title from a contract with the local tribes and considered pre-colonial historical allegiances between local tribes and the Moroccan Sultan, which was a great improvement on the Island of Palmas Case. In Cameroon v. Nigeria, the ICJ denied the statehood of the locals (the Chiefs of Old Calabar) but recognised the legal consequences of the treaty they concluded with Great Britain (the Treaty of Protection between Great Britain and Chiefs of Old Calabar in 1884).

68 Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, ICJ Reports 2008. In this case, the ICJ recognised a non-European entity, the Sultanate of Johor, as a sovereign state. However, the ICJ did not elaborate on why the Sultanate of Johor’s statehood was undisputed. Rather, the only explanation provided was that Grotius regarded the Sultanate as a sovereign principality (supremi principatus) in the early seventeenth century. However, this analysis was in the context of whether the Sultanate had the authority to conduct a public war, not on the statehood. See also Huh, ‘Title to Territory’ 2015 (n. 5), 721.

under French administration acts, and state succession. Vietnamese claims on the Paracel Islands are based on Emperor Gia Long’s (1802–1820) establishment of a company called the Hoàng Sa Company to exploit the Paracel Islands. In 1816, Emperor Gia Long annexed the Paracel Islands into Vietnamese sovereignty. In 1835, Emperor Minh Mang (1820–1841) ordered the construction of a pagoda and stone monument on one of the rocks in the Paracel Islands.

In contrast to these Vietnamese claims, Chinese sovereignty claims on the Paracel Islands stem from their first administrative act in 1909. Many publications point to earlier dates to show Chinese sovereignty claims over the Paracel Islands. However, Hayton discovered that claims before 1909 were misunderstood or cannot be supported with any historical evidence. The news article reporting the Chinese expedition in 1909 demonstrates that the expedition was motivated to reject any other states’ claims over Paracel Islands: ‘the Paracel Islands have been proclaimed to the world as Chinese territory and renamed to avoid any question that might arise as to their ownership.’ Therefore, the year 1909 should be the critical date of the China-Vietnam dispute in the Paracel Islands, when the parties formally opposed the other’s sovereignty claims.

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71 The records of Emperor Gia Long and Minh Mang are based on the Prequel Records of the Veritable Records of the Great South (大南實錄 前編 Đại Nam Thực Lục Tiền Biên) and Principal Records of the Veritable Records of the Great South (大南實錄 正編, Đại Nam Thực Lục Chính Biên) which was the royal record published by the Nguyen dynasty. Chiu/Park, ‘Legal Status’ 1975 (n. 70), 7; Lee, ‘Bối cảnh và quá trình diễn biến’ 2019 (n. 70), 201; Ahn, Kyong-Wan. ‘Historical Evidences of Vietnam’s Sovereignty on the Hoang Sa Islands and Truong Sa Islands’. *Vietnamese Studies* 14 (2016), 3–22.


When Vietnamese claims were made over the Paracel Islands, these dates were when Vietnam was under the tribute system. In China, the tribute system lasted until 1911, which marked the demise of the Qing dynasty. From the perspective of Vietnam, it left the tribute system influence in 1884, when France and China concluded the Tientsin Accord on 11 May 1884 and when France and Vietnam concluded the Treaty of Hué (or the Protectorate Treaty) on 6 June 1884. This is because first, the Tientsin Accord recognised that China should withdraw its troops from Tonkin, settling the war between France and China. Although the Accord does not explicitly say that the tribute system was void, it meant that China could no longer influence Vietnam through the tribute system. The exit of Vietnam from the tribute system was confirmed with the Treaty of Hué (or the Protectorate Treaty) which recognised French protectorate over Annam and Tonkin. France and China later concluded the Treaty of Tientsin in 1885, forcing China to confirm French protectorate over Vietnam.

This sequence of events shows that 1884 was the turning point in the tribute system over Vietnam. Amongst the Vietnamese sovereignty claims, the effective occupation under France or state succession claims by Vietnam are the least controversial claims; the historical claims or discovery and occupation, conducted in the early and mid-1800s, are the linchpins of the Vietnamese sovereignty claims. The disputed timeline is therefore prior to the French protectorate over Vietnam, between 1816 and 1884.

76 Preliminary Convention of Amity and Good Neighbourship between China and France (signed at Tientsin, 11 May 1884), 163 CTS 497; Treaty of Protectorate between France and Annam (signed at Hué, 6 June 1884), 164 CTS 85.

77 For example, Article 1 of the Tientsin Accord states that China has no say in the upcoming Treaty between France and Vietnam: ‘Le Céleste Empire, rassuré par les garanties formelles de bon voisinage qui lui sont données par la France, quant à l'intégrité et à la sécurité des frontières méridionales de la Chine, s'engage: 1° à retirer immédiatement, sur ses frontières les garnisons chinoises du Tonkin; 2° à respecter dans le présent et dans l'avenir, les traités directement intervenus ou à intervenir entre la France et la Cour de Hué.’

78 Article 1 of the Treaty of Hué recognises French protectorate over Vietnam: ‘L'Annam reconnaît et accepte le Protectorat de la France. La France représentera Annam dans toutes ses relations extérieures. Les Annamites à l'étranger seront placés sous la protection de la France. This treaty replaced the 1883 Treaty of Hué (or Harmand Treaty) as the 1883 Treaty was criticised within France for imposing overwhelming territorial concession to Vietnam. Preliminaries of Peace between France and Annam (signed at Hué, 25 August 1883) 162 CTS 325. As the French Ministry preferred indirect control over Vietnam via protectorate rather than direct territorial control, France did not ratify the 1883 Treaty and instead, concluded a new treaty (the 1884 Treaty of Hué).

79 Treaty of Peace, Friendship and Commerce between China and France (signed at Tientsin, 9 June 1885), 166 CTS 195.
The Paracel Islands dispute was crystallised when both China and Vietnam were operating under the regional framework, the tribute system. However, what if international courts and tribunals were to disregard this information? If international courts and tribunals follow their default legal approach to the China-Vietnam dispute, they would equate the tributary states to colonial protectorates. This is because tributary states exercised political autonomy from China, thus it is closer to the concept of colonial protectorates in the nineteenth century. Whilst colonies were directly governed by the home country, colonial protectorates were given partial political autonomy. Separate government bodies controlled the colonial protectorate with their regional legislations.

If we agree that the closest form of tributary states to the European concept are the colonial protectorates, there are two possible scenarios when we apply Westphalian sovereignty to the China-Vietnam dispute in the South China Sea: whether Vietnam is considered as a colonial protectorate or not. If international courts and tribunals regard the tributary state as a colonial protectorate, a protecting state holds the territorial title over a territory of a colonial protectorate according to *Cameroon v. Nigeria*. In this line of reasoning, the effectiveness of Vietnam's sovereign acts of discovery and prior occupation would be open to criticism.

However, historical evidence shows that tributary states exercised more autonomy than colonial protectorates. In the 1860s, China was unaware that Vietnam was suffering French attacks from 1858 and European states' demands for open-door policies. Although Vietnam did not send tribute envoys from the early 1850s to 1867 due to the French attacks and the Taiping rebellion in China, China did not actively investigate the suspension of Vietnamese tributes nor seek to help Vietnam. Vietnam also did not ask for military assistance from China during its war with France, due to the strong public sense of autonomy and independence. It was not until 1870 that China was informed about the war between Vietnam and France. Considering that China had to deal with the Taiping rebellion from 1850 to 1864, it is highly unlikely that China could have intervened in the war between Vietnam and France even if China knew of

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84 Yu, ‘Vietnam-China Relations’ 2009 (n. 27), 90.
the war beforehand. This is also supported by the fact that China did not consider Vietnam to be strategically significant during the Qing dynasty, prioritising Korea and Ryūkyū over Vietnam. In summary, the tributary relationship between China and Vietnam was closer to a diplomatic formality in the late nineteenth century when compared to the colonial protectorates.

The second scenario is whether international courts and tribunals do not regard Vietnam as a colonial protectorate. They would then have to reconstruct East Asian sovereignty around the disputed era. However, this reconstruction of an obsolete concept of sovereignty is extremely difficult. If disputed, the claimants’ arguments are bound to differ as to the gravity of the tribute system to the different modes of territorial acquisition. Even amongst scholars, the degree of dependency of the tributary states on China differs greatly. Whilst some focus on the wording of ‘vassal’ state (屬國), others emphasise that China did not actively interfere in the internal or foreign affairs of the tributary states.

In reconstructing East Asian sovereignty, international courts and tribunals should not regard the tribute system as the sole criterion in approaching East Asian rules and framework. This is because the gravity of the tribute system to the concept of sovereignty perceived by China and tributary states is controversial. The tribute system is highly contested and politicised in international relations, dividing scholarly opinions on this matter into four strands. Firstly, Fairbank and Têng argue that China imposed submission on non-Chinese entities based on the Sinocentric hierarchy. As ‘the medium for Chinese international relations and diplomacy’, the tribute system was explicable in procedural matters and numbers of tributes made by the non-Chinese entities. Another strand of Chinese historians regard the tribute system as simply ‘bureaucratic management on foreign relations’. Thirdly, the English School of International Relations views the tribute system not only as a system embodying strategic and economic interaction but also as an international society, embodying social relations and sets of norms on acceptable and legitimate
behaviour. Lastly, Zhang argues that to understand the tribute system properly, it has to be supplemented by other diplomatic and strategic approaches employed by China and non-Chinese entities. In sum, there is no scholarly consensus on the exact indicators to evaluate the hierarchy of the tribute system and the system's ramifications for East Asian sovereignty.

Rather than relying solely on the tribute system, this article emphasises that the outcome of non-European sovereignty disputes can be very different without the consideration of regional rules. If the regional framework is not considered, non-European territorial disputes are settled not by the sovereignty norms and legal rules which governed the area, but rather by spatially different rules – Eurocentric international law. As regards states that have adopted international law later than other disputing parties, they may have not satisfied the European conditions of effective control, failing to have the upper hand in the territorial disputes. This approach may also settle the dispute in favour of the colonising states when disputed with colonised states. The cases above all involve disputes either between colonial powers or colonised states. If a territorial dispute arises between colonising states and colonised states, the current legal approaches will overvalue the sovereignty claims of the colonising states, resulting in apparent injustice to the colonised states. In this sense, recognising the regional systems may rectify this unfair outcome.

5 Suggestions in Approaching Non-European Territorial Disputes

Up to now, this article has examined the tribute system and the regional differences in the concept of statehood and sovereignty. This reveals that international courts and tribunals should approach non-European territorial disputes not by invoking Westphalian sovereignty but by considering the regional systems. Legal scholarship has agreed that the law of territory in public international law developed with the need for colonisation. However, legal scholarship rarely touched upon how such legal implications should be applied to the approach of international courts and tribunals to non-European territorial disputes.

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93 Zhang, ‘Rethinking the Tribute System’ 2009 (n. 30), 548–549; Zhang, Feng. ‘How Hierarchic was the Historical East Asian System?’ International Politics 51(1) (2014), 1–22, 5.
In this situation, international courts and tribunals face the challenge of recreating the regional systems which are now obsolete. How should international courts and tribunals then approach non-European territorial disputes once governed by regional framework and rules? The International Court of Justice (ICJ) has already given doctrinal cues on this. This section answers this question by suggesting that international courts and tribunals consider the following three normative guidelines: (1) to bring regional systems into the legal dispute as regional customary law; (2) to consider the individual treaty practice of protecting states and protectorates rather than regarding all forms of protectorates identical; and (3) to recall that the influence of regional systems over the state actors are variable.

The first recommendation is to invoke regional systems as regional customary law. In *Colombian-Peru Asylum Case* and *Right of Passage over Indian Territory*, the ICJ recognised the existence of local or regional custom.95 In these cases, the disputing parties had a common understanding of regional customs, which were different from customary international law. Although the tribute system is more than a mere regional custom which includes a set of ideological beliefs and social norms, international courts and tribunals can use the regional custom as a stepping-stone to bring the tribute system to their rulings. The similarities between regional custom and the tribute system stem from the common understanding of territorial sovereignty which is shared by the disputing parties. In this sense, the ICJ’s reasoning of regional custom can extend to the recognition of the different concept of sovereignty in non-European regions. The regional rules on territorial sovereignty as well as the tribute system can be considered as regional customs. Following the doctrinal cues, international courts and tribunals thus have the mechanism to endorse the regional concept of territorial sovereignty.

The second guide is not to regard all forms and cases of protectorates as identical. This guide is set out by the *Nationality Decrees in Tunis and Morocco* case by the Permanent Court of International Justice (PCIJ).96 To evaluate the protecting states’ power over the protectorates, the PCIJ referred to (1) the treaties between protecting states and protectorates, and (2) the extent of the third states recognising the protectorates as per the conditions prescribed by the

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96 *Nationality Decrees in Tunis and Morocco* (1923) (Permanent Court of International Justice), 27.
Developing from these two factors, I also suggest that international courts and tribunals should consider (3) the practice between the protecting state and protectorates.

Unlike the first two, legal scholarship has seldom addressed the third factor. A treaty may merely prescribe that the protecting state exercises the foreign relations of the protectorate – but the protecting state may have various levels of such exercise from complete indifference to an active representation of the protectorate. Crawford also points out that the extent of sovereignty the protecting power exercises varies depending on the protectorates. Some may exercise external sovereignty to enter into foreign relations and also internally enforce this in the protectorates. Another protecting power may exercise the external sovereignty on behalf of the protectorates but leave internal enforcement to the protectorates. Others may only hold the responsibility of protection without intervening in the protectorates’ exercise of external or internal sovereignty.

Likewise, the power to enter into foreign relations not only relates to treaty-making with third states but also involves the range of autonomy in enforcing it on the protectorates. The protecting state’s control over the external sovereignty may also differ, from a low level of simply attending the negotiation between the protectorate and third states to a high level of representing the protectorate. For example, China regarded Korea to be independent in terms of internal and foreign affairs. This position was stated repeatedly throughout the late nineteenth century when the United States attempted to initiate trade relations with Korea.

This practice should involve the protectorates’ interactions with the protected state as well as the protecting state’s governance over the protectorates. Protectorates’ interactions with the protecting state indicate the procedural and substantive matters of reports, trade, and tributes made from the protectorates. Legal approaches have been focusing on protecting powers when deciding the legal characteristics of the protectorates. However, how the protectorates have interacted with the protecting power is also legally important, along with the perception of the protectorates on the protecting power. It would be difficult to say that China had the highest level of control over Vietnam when Vietnam was engaged in the war between Vietnam and France from the 1850s to the 1860s. One should not neglect the fact that this lack of

97 Ibid.
Chinese control over Vietnam was also due to the Vietnamese perception that they were independent of and autonomous from China.\(^\text{100}\)

The third recommendation is drawn from history; international courts and tribunals should bear in mind that the influence of the regional framework on states within that framework is itself variable. When reconstructing the tribute system, international courts and tribunals would also have to assess the significance of the system over a specific timeline. The tribute system was a variable framework and dependent on international relations and domestic politics. If China had variable control over the non-Chinese entities, international courts and tribunals cannot simply rely on the general information on the tribute system. Rather, they should inspect the intensity of Chinese control over a disputing state over a specific timeline.

When China was challenged with internal and external threats, its interests and information over non-Chinese entities were limited. For example, Zhang highlights that the tribute system was very weak during the Song dynasty because it had to maintain territorial integrity against the threat from Liao.\(^\text{101}\) The tribute system was also weak during the Han dynasty (BCE 206 – AD 220) and the Tang dynasty (AD 618–907) when China was divided.\(^\text{102}\) Furthermore, the intensity of Chinese control over Korea varied over time – whilst China was indifferent to the Korea–Japan Treaty of 1876, China shifted its position by actively engaging in Korean diplomacy from the 1880s. Negotiation of the Korea–United States Treaty of 1882 was conducted between Robert Wilson Shufeldt, a representative of the United States, and Li Hongzhang, without Korean representatives.\(^\text{103}\)

6 Concluding Remarks

The history of non-European territories is the history of denial. As ‘to claim territory is to deny it to others’,\(^\text{104}\) the colonisers had denied non-European states’
sovereignty over their territories. In this process, non-European states were forced to adopt Westphalian sovereignty, without any consideration of the regional systems. Alarming, international courts and tribunals have echoed this negligence. To raise this concern, this article applied the legal approaches taken by international courts and tribunals to the South China Sea dispute, particularly the China-Vietnam dispute over the Paracel Islands. After analysing the tribute system, I suggested that the East Asian concepts of sovereignty and statehood were different from the Westphalian sovereignty. Comparison between the two regions showed that the concepts of sovereignty and statehood in the two regions are not analogous and cannot be equated.

Coming back the South China Sea case, the Tribunal’s reasoning might have been different if they considered the regional systems. The Tribunal may have entertained Chinese arguments on the existence of regional rules and delved into whether the nine-dash line was truly based on the regional system. After discovering that the line was not based on such regional system, the Tribunal may have concluded that the nine-dash line is based on neither UNCLOS nor regional rules. However, this is not how the Tribunal approached the matter. The Tribunal took note of Chinese arguments on regional rules not covered by UNCLOS but regarded Chinese historical rights to be superseded by Chinese accession to UNCLOS. Through this reasoning, the Tribunal circumvented the need to consider the regional system in deciding the legality of the nine-dash line.

The analysis on the legal approaches to non-European territorial sovereignty, the tribute system, and the South China Sea dispute boils down to one conclusion: if the current legal approaches are imposed on the South China Sea dispute, it may result in distorted outcomes. Considering that decolonisation took place in the 1960s, it has been around 60 years that European international law has become lingua franca. By introducing the tribute system and applying it to the South China Sea dispute, I suggested a set of guidelines to change the course of international courts and tribunals into another direction: recognising the existence of regional systems and making international law truly international.

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105 The South China Sea case, para. 246.
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