

The Disputes in the South China Sea
-From the Perspective of International Law

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1. The essence of the disputes in the South China Sea

There exist some disputes in the South China Sea. However, in essence, the disputes in the South China Sea are those disputes between China and other neighboring countries in the region concerning islands sovereignty and maritime delimitation. Furthermore, between these two kinds of disputes, the fundamental issue is the sovereignty dispute over the islands and rocks in the South China Sea. In light of the principle that the land dominates the sea, without the settlement of the sovereignty dispute, it may be impossible to resolve the dispute of maritime delimitation. The arbitration between Yemen and Eritrea in 1998 and 1999, the Qatar v. Bahrein case of 2001, and the Nicaragua v. Honduras case of 2007 provide examples for this. And such a relationship between sovereignty dispute and maritime dispute is also reflected in the 1982 Convention on the Law of the Sea. According to article 298, under some conditions, the maritime delimitation dispute may be submitted to the compulsory conciliation under Annex V, section 2; however, “any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission”. So we should pay much more attention to the island disputes.

2. The sovereignty of the islands in the South China Sea

1) Introduction

The applicable law in this regard is the relevant rules of customary law, instead of the UNCLOS. Under traditional international law, there are five modes of acquisition of territory: occupation of *terra nullius*, prescription, cession, accretion and

conquest. So adjacency is not a valid ground to argue for sovereignty over territory. There are lots of examples where the islands of one state are located in the vicinity of another state, such as the French islands of St. Pierre and Miquelon, which are located immediately south of the Newfoundland of Canada. Besides, a state cannot validly argue for the territorial sovereignty of islands on the ground that these maritime features are located on its continental shelf or within its EEZ, for such arguments are totally conflicting with the fundamental rule that the land dominates the sea.

As far as the islands dispute in the region is concerned, occupation is of much relevance. Occupation is often preceded by discovery, therefore it is appropriate to begin with the question who discovered and named these islets. Then whether the discovering state has exercised effective control to establish its title. In this respect, one famous scholar pointed out that, “control, although needing to be effective, does not necessarily have to amount to possession and settlement of all of the territory claimed. Precisely what acts of sovereignty are necessary to found title will depend in each instance upon all the relevant circumstances of the case, including the nature of the territory involved, the amount of opposition (if any) that such acts on the part of the claimant state have aroused, and international reaction.”¹

2) Chinese sovereignty over the islands in the South China Sea

Lots of historical evidence demonstrates that China was the first to discover and name the islands in the South China Sea.

The earliest discovery by the Chinese people of the Nansha Islands can be traced back to as early as the Han Dynasty. For example, in the East Han Dynasty (23-220 A.D.), Yang Fu made reference to the Nansha Islands in his book entitled *Yiwu Zhi* (Records of Rarities). During the Three Kingdoms Period (220-280AD), General Kang Tai, one of the famous ancient Chinese navigators, mentioned the Nansha Islands in his book entitled *Funan Zhuan* (Journeys to and from Phnom) (the name of an ancient state in today's Cambodia). In the Yuan Dynasty (1271-1368), there were more detailed descriptions the various islands of the Nansha Islands. The Road Map of the Qing Dynasty (1644-1912) marks the specific locations of the islands, reefs,

¹ Malcolm N. Shaw, *International Law*, p. 511.

shoals and isles of the Nansha Islands, including 73 named places. The Road Map served as a navigational guide to the Chinese fishermen for their trips to the Xisha and Nansha Islands for productive activities there.

Regarding the requirement of effective control, the Nansha Islands came under the jurisdiction of China at least from the Yuan Dynasty. The Map of the Territory of the Yuan Dynasty included the Nansha Islands within the domain of the Yuan Dynasty. The History of the Yuan Dynasty has accounts of the patrol and inspection activities by the navy on the Nansha Islands. In the Qing Dynasty, the Chinese Government marked the Nansha Islands on the official maps and exercised sovereign jurisdiction over these islands.

After the establishment of the Republic of China in 1912, the Chinese Government took a series of measures with respect to the islands in the South China Sea. For example, in 1932, the Chinese Government set up a Committee for the Review of Maps of Lands and Waters of China. This Committee examined and approved 132 names of the islands in the South China Sea, all of which belonged to the Xisha, Zhongsha and Nansha Islands.

In 1933, France invaded and occupied 9 of the Nansha Islands, including Taiping and Zhongye Islands. The Chinese Government lodged a strong protest with the French Government.

In 1935, the Map of the Islands in the South China Sea was compiled and printed by the Committee for the Review of Maps of Lands and Waters of China.

In 1939, Japan invaded and occupied the islands in the South China Sea. After WWII, in 1946, the Chinese government appointed Special Commissioners to the Xisha and Nansha Islands respectively for their recovery. A take-over ceremony was held on the islands, marks of sovereignty were erected on the islands, and the troops were sent over on garrison duty.

In 1947, the Ministry of Internal Affairs of China renamed 159 islands, reefs, islets and shoals in the South China Sea, including the Nansha Islands, and subsequently published a map with the U- type Line.

In 1958, in the Declaration of the Chinese Government on China's territorial Sea,

the People's Republic of China declared that the breadth of its territorial sea shall be 12 nm, and this provision applies to all territories of China, including, inter alia, “the Dongsha Islands, the Xisha Islands, the Zhongsha Islands, the Nansha Islands and all other islands belonging to China”.

In 1959, the Office for Xisha, Nansha and Zhongsha Islands' Affairs was established by the Chinese government.

By the way, it is worth noting that although the 1951 San Francisco Peace Treaty just provides that the Japanese Government shall renounce all its "right, title and claim" to Taiwan, Penghu Islands as well as Nansha and Xisha islands, and failed to unambiguously ask Japan to restore the Xisha and Nansha Islands to China. However, in 1952, the second year after the peace conference, in the Map of Southeast Asia of the Standard World Atlas published by Japan and was recommended by the then Japanese Foreign Minister, the Xisha, Nansha, Dongsha and Zhongsha Islands were all clearly marked as Chinese territory. Besides, in the peace treaty concluded between Japan and the Taiwan authority of China the same year, article 2 specifically provides that Japan has already renounced all its "right, title and claim" to Taiwan, Penghu Islands as well as Nansha and Xisha islands. Noted that the similar provision did not appear in the peace treaty between Japan and the other states in the region. So in the view of Japan, the Xisha and Nansha Islands that Japan was asked to renounce by the San Francisco Peace Treaty shall be returned to China, in the same way as Taiwan and Penghu Islands. Thus, the argument that the Xisha and Nansha Islands became terra nullius because of the provision in the San Francisco Peace Treaty can not be established.

According to the international judicial decisions in the similar cases, particularly the observations of the PCIJ in the Eastern Greenland case that “It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other state could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries,” in light of the continuous

“manifestations of the display of territorial sovereignty” by China historically, it is justified to conclude that China had the original title to the Islands in the South China Sea.

Besides, the international reactions may also be considered as evidence. In this regard, the Islands in the South China Sea have been recognized as China's territory by governments of quite a few countries. For example, the British High Commissioner to Singapore said in 1971: "Spratly Island (Nanwei Island in Chinese) was a Chinese dependency, part of Kwangtung Province and was returned to China after the war. We can not find any indication of its having been acquired by any other country and so can only conclude it is still held by communist China."² And in maps published in many countries, the Nansha Islands are marked as China's territory too. For example, Atlas International Larousse published in 1965 in France marks the Xisha, Nansha and Dongsha Islands by their Chinese names and gives clear indication of their ownership as China in brackets.

What is more important is the reaction of the neighbouring states in this region. As far as Vietnam is concerned, prior to 1975, Vietnam had, in explicit terms, recognized China's territorial sovereignty over the Nansha Islands. In this context, it is worth recalling the observations of the PCIJ in the Eastern Greenland case, where the foreign minister of Norway replied to the representative of Denmark that “the Norwegian Government would not make any difficulty in the settlement of this question” concerning the legal status of the Greenland. Although Norway did not recognize the Danish sovereignty in Greenland in this statement, however, “The Court considers it beyond all dispute that a reply of this nature given by the Minister for Foreign Affairs on behalf of his Government in response to a request by the diplomatic representative of a foreign Power, in regard to a question falling within his province, is binding upon the country to which the Minister belongs.”³ So in the view of the Court, as a result of the declaration, “Norway is under an obligation to refrain from contesting Danish sovereignty over Greenland as a whole, and a fortiori to

² The Far Eastern Economic Review (Hong Kong), Dec. 31 of 1973

³ Eastern Greenland case, para. 192.

refrain from occupying a part of Greenland”.⁴ These findings are applicable to the statements of Vietnam. Besides these official recognition of Chinese sovereignty over these islands, Vietnam acknowledged the Nansha Islands as being China's territory in its world maps published in 1960 and 1972.

As far as the Philippines is concerned, before the 1970s, the Philippines had never referred to its territory as including the Nansha Islands in any of its legal instruments. As for Malaysia, it was only in December 1978 that it first marked part of the Nansha Islands into the territory of Malaysia in its published continental shelf maps.

So, when the other states launched their claims to the Nansha Islands, China had already established its title to these islets and the Nansha Islands were not terra nullius any more. Thus, their arguments based on occupation are fairly weak.

3. The maritime delimitation disputes in the South China Sea

As regards the maritime aspect of the South China Sea dispute, the fundamental issue is the maritime delimitation. The maritime delimitation issue derives from the fact that due to the narrowness of the geographical space, the entitlements of the neighbouring states overlap and the states concerned therefore cannot obtain the full maritime zone which they could have legally gotten if the neighbouring states had not existed. The maritime zoning regime in the LOS Convention is the major basis of entitlement to the maritime area. But it may not be the exclusive one. For though the Convention has been appraised as the Constitution for the ocean, as the Preamble of the Convention affirms, “matters not regulated by this Convention continue to be governed by the rules and principles of general international law”.

For example, the LOS Convention does not mention the term historic waters, but it does not follow that the Convention forbids historic waters, because the Convention refers to “historic bays” and “historic title”. As we all know, historic waters refer to those waters covered by “historic title”, and “historic bays” is one type of historic waters. So the mention of historic title in the Convention can be interpreted so that it implicitly recognizes the existence of historic waters. The same logic may apply to the

⁴ Eastern Greenland case, para. 202.

historic rights. It can be argued that the fact the Convention does not refer to the terms “historic rights” or historic waters only means that the Convention does not touch on these matters and leave them to the customary law. The state practice and the judicial decisions, such as Fisheries case and El Salvador/Honduras case, have proved that historic waters exist in and regulated by the customary law. In this connection, it is worth recalling the *Tunisia/Libya* case, where the historic fishing rights were put forward by Tunisia. The ICJ said that “The historic rights remain however to be considered in themselves. Historic titles must enjoy respect and be preserved as they have always been by long usage.” In the view of the ICJ, the references to 'historic bays' or 'historic titles' or historic reasons in the Convention “in a way [amount] to a reservation to the rules set forth therein. It seems clear that the matter continues to be governed by general international law”. The findings of the ICJ show that the Court did not consider that to put forward claims to historic rights or historic waters per se should be taken as a breach of Convention.

Here it should be pointed that Chinese people started to develop the Nansha Islands and engage in fishing on the islands as early as in the beginning of the Ming Dynasty. They were later on organized with the approval and support of the Chinese Government. For ages, Chinese fishermen would come and go between Hainan Island and Guangdong Province on the one hand and the Nansha Islands on the other, and they never failed to pay their taxes and fees to the Chinese Government. In its Law on the EEZ and Continental Shelf, the Chinese government declares that “The provisions in this law shall not affect the historic right that the PRC enjoys”.

In light of the LOS Convention, maritime delimitation “between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution”. And according to China, the overlapping claims should be determined “by agreement with the states with opposite or adjacent coasts in accordance with the equitable principle on the basis of international law”. The jurisprudence of the international court and tribunal shows that maritime delimitation shall not be effected by automatic application of somewhat delimitation

method, and the agreement delimitation is the supreme rule for maritime delimitation.

According to Articles 74(3) and 83(3) of the LOS Convention, “pending delimitation, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement”. In the view of the Tribunal in the Guyana/Suriname case, this provision imposes two obligations in the context of a boundary dispute concerning the continental shelf and EEZ: “The first obligation is that, pending a final delimitation, States Parties are required to make ‘every effort to enter into provisional arrangements of a practical nature.’ The second is that the States Parties must, during that period, make ‘every effort ... not to jeopardize or hamper the reaching of the final agreement.’”⁵ In the view of the Tribunal, the first obligation imposes the parties a duty to negotiate in good faith,⁶ and joint exploitation of resources has been particularly encouraged by international courts and tribunals. As regard the non-hamper obligation, the tribunal pointed out that in the absence of a provisional arrangement, activities that lead to a permanent physical change of the marine environment, such as exploitation of oil and gas reserves, could be undertaken only jointly or by agreement between the parties, because such activities could be perceived to, or may genuinely, prejudice the position of the other party in the delimitation dispute, thereby both hampering and jeopardising the reaching of a final agreement. Violation of these obligations will give rise to state responsibility.

In that case, Suriname was found to violate the first obligation because it did not send a representative to conclude discussions on modalities for joint utilization of the disputed area; and refused to accept the last minute invitation of Guyana and negotiate in good faith. These findings seem to show that to participate into the negotiation on joint development itself constitutes part of the obligation under paragraph 3 of article 74/83. During the talks, the parties have to resolve lots of complicated issues, such as the location of the JDZ and the mode of JD. While the

⁵ Guyana v. Suriname, Award, n.2 above, para. 459.

⁶ Ibid., para. 461.

determination of these questions is the prerequisite for the realization of JD, it shall not be the precondition for the starting of JD negotiations.