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The Senkaku/Diaoyu Islands Dispute Tiny Islets and Immense Legal Problems

Introduction

A fleeting glimpse of a political map of the world may bring about an impression of our planet being precisely and finally parceled between nearly two hundred sovereign states. However, the reality is less ideal with dozens of territorial disputes raging on. A conflict between China and Japan over a group of islands in the East China Sea is one of them. The islands are called Diaoyu or Diaoyutai by the Chinese and Senkaku in Japan. These names will be used simultaneously (or replaced by a reference to “the Islands”) to avoid the impression that the author supports or sympathizes with either one of the parties involved.

The tension over the Senkaku/Diaoyu Islands has attracted worldwide attention since, at least, 2010 and a famous boat collision incident. The conflict, as it stands now, is mostly analyzed through the lenses of political science. Nevertheless the perception of the problem will be shifted here and it is going to be tackled from the perspective of public international law: legal and only legal arguments are going to be examined to find out which set of legal reasoning (out of two presented by both states) seems to be more persuasive.

At the outset some basic geographical features of the Islands are going to be presented as of the utmost importance for legal reasoning in this case. The Senkaku/Diaoyu Islands are located approximately midway between the island of Taiwan and the southernmost Ryukyu Islands of Japan. Those three points: Taiwan, the Senkaku/Diaoyu Islands and southern Ryukyu form an almost equilateral triangle with the length of

all sides between 88–90 nautical miles (NM). Therefore the Senkaku/Diaoyu Islands are neither in the immediate vicinity of China nor Japan. The Senkaku/Diaoyu Islands consist of eight tiny uninhabited Islands with a permanently dry surface. Five of them are relatively large volcanic structures partly covered with some vegetation; the three remaining islets are mere rocky outcroppings. The total size of the whole group is approximately six square kilometers, comparable in size to the Warsaw Airport, which is not the largest one in Europe by the way.

The last observation provokes a question as to the reasons that have driven both states into the fierce conflict over such an inconspicuous piece of the land. The motives are abundant: ideological, economical or political, though those fields will not be explored here. However, one cannot omit a possible legal reason for the relevant dispute. Both states are parties to the United Nations Convention on the Law of the Sea of 1982 (UNCLOS) and hence article 121 UNCLOS is applicable to them.¹ Article 121 paragraph 2 states that an island may generate: the territorial sea of 12 NM, the Exclusive Economic Zone of 200 NM and the continental shelf zone (at least 200 NM). Consequently it is estimated that the ownership of the Senkaku/Diaoyu Islands might bring to a sovereign-state an additional maritime space of between 19,800NM² and 70,000 NM². It seems understandable then, why China and Japan cross swords over the setiny, volcanic islets.

Certainly not every formation protruding over the sea level has this effect. Pursuant to article 121 paragraph 3 UNCLOS, a rock “which cannot sustain human habitation or economic life of their own” may have 12 NM territorial sea only. However, according to some sources, the Senkaku/Diaoyu Islands hosted relatively extensive economic activity at the turn of XIX and XX century: allegedly more than a hundred persons worked there. Therefore, if this information is reliable, the Senkaku/Diaoyu Islands appear to be a group of *i s l a n d s* (and not rocks) within the meaning of article 121 UNCLOS, and may generate not only territorial sea but also an Exclusive Economic Zone and Continental Shelf Zone.

¹ “1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide. 2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory. 3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf”.

Moreover, the East China Sea is semi-enclosed and, what is of particular importance, the coast-to-coast distance between China and Japan is less than 400 NM. Hence if both states establish Exclusive Economic Zones of 200 NM each and Continental Shelf Zones of 200 NM each, these zones will overlap. This, in turn, may require delimitation of respective areas. And it cannot be excluded, at least theoretically, that the territorial sovereignty over the Senkaku/Diaoyu Islands might be advantageous in the delimitation process. On the other hand, that is in practice, one would be cautious not to over-estimate the Senkaku/Diaoyu Islands in the delimitation of maritime zones. According to article 74 and 83 UNCLOS, the delimitation of the Exclusive Economic Zones and Continental Shelf between opposite or adjacent states should be effected by agreement only, and must achieve an equitable solution. As a rule, an equitable solution is reached by drawing a median line between the territories of the two opposite states. Every point of this line must be equidistant from the nearest points of the territories of competing states. Does this mean that the Senkaku/Diaoyu Islands are to be regarded as "territory" of either China or Japan for the purpose of drawing such a median line? Not necessarily. In practice, to reach such an equitable result in separating maritime spaces, small and isolated islets such as the Senkaku/Diaoyu Islands are totally or partly ignored in drawing a maritime boundary: they are not regarded as "territory" for the purpose of drawing a median line. It would be against equity to grant a large part of maritime spaces to a state, only due to the fact this state is a sovereign over remote, isolated and small volcanic outcrops. Therefore it cannot be excluded that an impact the Islands may have in the delimitation of maritime zones is insignificant.

A starting point for a legal analysis of the dispute between China and Japan over the Senkaku/Diaoyu Islands is the history of the Islands and so called "critical dates". It is mandatory as time passes by and influences everything, year by year and century by century. Not only do people get older but also states rise or collapse and international law is in a constant transition. Even legal rights of states are affected by the passage of time: they form, they crystallize and they disappear in time, mainly as a result of activities conducted by states. Therefore, when one deals with the territorial dispute and tries to find out which party has a better legal right to the Islands, it is necessary to establish when those competing legal rights allegedly crystallized or disappeared in the past to the effect that

subsequent acts made by states could not alter the legal position no more. There are two critical dates in the history of the Islands: (a) 14 January 1895 – when the of Japan decided to formally incorporate the Islands as an alleged *terra nullius* (territory belonging to no state); and (b) 1972 – when the Okinawa Reversion Agreement entered into force between Japan and the United States of America. The latter reverted administration over the Senkaku/Diaoyu Islands to Japan. Paradoxically, the turbulent period that started thereafter has not significantly influenced Chinese and Japanese legal rights as to the Islands and, consequently, it will be skipped as legally irrelevant.

Incorporation of *terrae nullius*

The first date is crucial due to some substantial discrepancies between China and Japan over the legal effect of the decision made by the Government of Japan to incorporate the Islands as *terra nullius*. Japan asserts that the decision amounted to a permissible and valid incorporation of *terra nullius*. To the contrary, China strongly criticizes Japanese position and maintains that in January 1895 the Islands belonged to China and could not be incorporated as *terra nullius*. Here, we have words against words and arguments against arguments. However, in this respect the *onus* of proof, is on China. Therefore, if China claims that in January 1895 the Senkaku/Diaoyu Islands were not *terra nullius* as the Islands belonged to it then China is to produce appropriate evidence.

The Chinese position on the issue was roughly presented in a statement by the Ministry of Foreign Affairs of the People's Republic of China dated September 10, 2012. The document stresses that Japan in 1895 "illegally occupied the Diaoyu Island" as China allegedly had the original right to the Islands due to a so called "historic title": the Islands had been known to the Chinese and had been used by them from time immemorial. Public international law clearly accepts that a given territory may be acquired in that way if certain conditions are fulfilled. A state claiming the historic title (China in this case): (a) must have been exercising authority over area in a continuous way; (b) this exercise of authority was met with *acquiescence* (recognition, acceptance) by other states. The later condition certainly would be satisfied as no other state raised its claims over the Senkaku/Diaoyu Islands before January 1895. However, the former one is more challenging to demonstrate. At least four arguments

are put forward by China, trying to prove their exercise of authority over the Islands before that critical date.

The first one accentuates that the Islands and surrounding waters were used throughout centuries by Chinese fishermen who collected herbs on them and had their fishing grounds around the Senkaku/Diaoyu Islands. It appears, however, that sole activities by private persons cannot be perceived as effective occupation by a state, unless those activities took place under governmental authority, which apparently was not the case here. Therefore, the mere presence of Chinese fishermen in and around the Islands through many centuries has only one meaning: it shows that states other than China did not exercise territorial competences over disputed territory.

The second Chinese contention employs the fact that century for five hundred years since the 14th diplomatic missions were being sent by Chinese Emperors to the Ryukyu Islands, which had been brought into the Chinese tributary system by the Ming Dynasty. Chinese envoys and navigators used to present reports on their voyages to Chinese Emperors. Those reports contain clear indication that envoys treated the Senkaku/Diaoyu Islands as a kind of navigational beacon. There are also accounts that Chinese navigators clearly perceived the Islands as laying on waters belonging to China. There was a geographical reasoning that a shallow part of the East China Sea is separated from the Ryukyu Islands by the Okinawa Trough, a deep seabed feature. When Chinese ships travelled East: from the continent to the Ryukyu Islands, there was a place where the color of the seawater changed dramatically. The light blue of the shallow shelf-sea was suddenly replaced by navy blue of the deep open sea. The Chinese perceived this line as a boundary between "home" and "alien" waters and the Senkaku/Diaoyu Islands were on the "home side". Nevertheless, maps still cannot be treated as decisive evidence. The International Court of Justice noted in this respect in *Frontier Dispute* (Burkina Faso v. Mali), which states that whether in frontier delimitation or in international territorial conflicts, maps merely constitute information which varies in accuracy from case to case; of themselves, and by virtue solely of their existence, they cannot constitute a territorial title, that is, a document endowed by international law with intrinsic legal force for the purpose of establishing territorial rights.

The third and the fourth Chinese arguments refer to its jurisdiction exercised over the disputed territory before 1895. It is claimed in particular that the Islands were incorporated into the Chinese costal defense system

and formed a part of a naval patrolling area, an example of executive jurisdiction. Moreover, the Senkaku/Diaoyu Islands are a rare source of supply of a medicinal herb (*statice arbuscula*), used as a remedy against high blood pressure. As late as 1893, the Chinese Empress Dowager Ci Xi awarded three of the disputed Islands to a Chinese family for the purpose of collecting the herb, an example of legislative jurisdiction.

In fact, evidence of Chinese control over the Senkaku/Diaoyu Islands are scarce and dispersed in time. However, it is generally admitted in international law that even slight activity will suffice to establish a state control over inhabited, remote and tiny islands.² Thus I am inclined to conclude that the Senkaku/Diaoyu Islands did not constitute *terrae nullius* in January 1895 as they belonged to China. Therefore they could not be legally acquired by Japan by its unilateral act of incorporation of *terrae nullius*. However, this finding is not the one that ends the dispute definitely. There are still other ways to argue that Japan holds the legal right to the Senkaku/Diaoyu Islands. It may be claimed, in particular, that the Islands became a part of Japanese territory as a result of acquisitive prescription. It means that Japan could acquire the territory that had previously belonged to China as a result of the passage of time if during this time: (a) Japan, not China, possessed the territory as a sovereign; and (b) this possession was peaceful and uninterrupted. This peaceful and uninterrupted possession requires *inter alia* the expression or tacit consent by China on Japanese sovereignty over the Senkaku/Diaoyu Islands. These issues are to be discussed below.

Acquisitive prescription

As to the possession: in 1884 Tatsushiro Koga, a Japanese private entrepreneur from Fukuoka Prefecture, hit upon the idea to use the Islands for his business activities. A few years later, in 1894, he applied for

² "Manifestations of territorial sovereignty assume, it is true, different forms, according to conditions of time and place. Although continuous in principle, sovereignty cannot be exercised in fact at every moment on every point of a territory. The intermittence and discontinuity compatible with the maintenance of the right necessarily differ according as inhabited or uninhabited regions are involved, or regions enclosed within territories in which sovereignty is incontestably displayed or again regions accessible from, for instance, the high seas", Permanent Court of Arbitration, *Island of Palmas Case* (Netherlands v. USA), Award of 4 April 1928.

a required leasehold contract to the Okinawa Prefecture government and then to the Home Ministry and the Ministry of Agriculture and Commerce in Tokyo. Both applications were turned down as apparently it was not clear at that time whether the Islands belonged to Japan. There is an official correspondence preserved from the 21st of October 1885 between the Japanese Foreign Minister and the Minister of Interior. The former wrote: “the islands involved were very small, having Chinese names, and very close to the Chinese coast”, and that “recently some Chinese newspapers had reported rumors about a Japanese occupation of certain islands near Taiwan and urged the Qing government to be alert”. He advised to postpone the plan to start the development of the Islands and to place national markers there. This letter constitutes, by the way, another indirect evidence against a view that the Senkaku/Diaoyu Islands were *terra nullius* at the time.

Nonetheless, the “Japanese discovery” of the Islands by Tatsushiro Kogahad profound consequences as they were brought into Japanese attention. Consequently, on the 14th of January 1895, during the Sino-Japanese War, the Japanese government finally decided to incorporate them. What is of paramount importance here, the decision was not announced: China and the international society were not aware that the Islands had been incorporated. Yet the date marked the beginning of Japanese presence on the Senkaku/Diaoyu Islands. The evidence of Japanese control over the Islands is plentiful relating to a display of both executive and legislative jurisdiction. The Koga family, having finally leased the Islands in 1896 free of charge for thirty years, launched economic activities there. Japanese workers collected guano and albatross feathers and allegedly a small factory of bonito (dried and smoked tuna) was established. Scores of seasonal workers were brought to the Islands every year. After the expiration of the leasing contract, Mr. Koga bought the Islands from the Japanese government and became their owner according to Japanese law.³ Japan exercised control over the Senkaku/Diaoyu Islands at the time as evidenced by the setting up of a weather station in 1943 and traces of police control. This was all done without even slightest protest by China through out seven decades. Does this mean that China tacitly

³ Longstanding repercussions of this private-law transfer were dramatically revealed as late as 2012 when tensions flared following the April announcement of Tokyo Governor Shintaro Ishihara’s April that he intended to purchase three islets from their private owner.

recognized the Japanese possession of the territory? Does it mean that, as a result of *acquiescence* (equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent), the legal right to the Islands passed from China to Japan on the basis of *acquisitive prescription*? The answer is apparently affirmative: the Chinese protest against the Japanese possession of the Islands was rationally required to stop prescription. The absence of protest allegedly allowed prescription. However, there is another dramatic turn in our story: the Treaty of Shimonseki. The international agreement concluded between China and Japan to end warfare, contained article 2 (b). The provision stipulated that “China cedes to Japan in perpetuity and full sovereignty the following territories, together with all fortifications, arsenals, and public property thereon: [...] The island of Formosa, together with all islands appertaining or belonging to the said island of Formosa”. It should be emphasized in this respect that the Senkaku/Diaoyu Islands lie some 90 NM northeast of the island of Formosa, thus not in the immediate vicinity. Hence forth it was not obvious whether the Senkaku/Diaoyu Islands were a subject of article 2 (b), all the more the Treaty did not expressly mention them. A bizarre feature of this provision is that both parties differed as to its effect in respect of the disputed territory. China claimed that the Treaty had resulted in cession of the Islands while Japan maintained that they could have not been ceded as they already had been a part of Japanese territory since January 1895. *Nemodat qui non habet*: no one gives what he has not got! Who is right, then? An international treaty to be effective must express *m u t u a l c o n s e n t* in a given respect. No consent no agreement. Therefore, if both parties disagreed while entering into the treaty as to the effect of article 2 (b) in respect to the Senkaku/Diaoyu Islands, this provision did not result in the cession of those Islands. This conclusion, although in conformity with Japanese assertions, has had a highly disadvantageous impact upon its position in this case.

As previously explained, the legal basis for the Japanese claims to the Islands could be neither cession by treaty nor acquisition of *terrae nullius*. The only viable legal basis for a Japanese title remains acquisitive prescription. Japan has possessed the Islands since 1895 in the absence of Chinese protests. However, China did not oppose as it regarded the Japanese presence on the Senkaku/Diaoyu Islands as a direct result of the Shimonoseki Treaty of April 1895. At the same time China could not link Japanese activities thereon with the January 1895 decision by the Japa-

nese government since this decision had not been publicly proclaimed. All of this means that the silence of China and the lack of protest against the Japanese possession of the Senkaku/Diaoyu Islands did not amount to the acquiescence of prescription. It would be against the principles of international equity and good faith, it would also be irrational to demand Chinese protest against Japanese prescription when China could not be rationally required to know that Japan had just started prescription in January 1895.

Treaties after World War II

Finally, the last issue must be tackled: when did it become clear to China that Japanese claims in respect to the Senkaku/Diaoyu Island were not based on the Treaty of Shimonseki, rather either on prescription or on occupation of *terrae nullius*? And when was the Chinese protest against Japanese activities on the Islands rationally required? Japan's territory was occupied after World War II, from 1945 until 1952. The end of the occupation was marked by the Treaty of San Francisco. Pursuant to its article 3: Nansei Shoto (including the Ryukyu and Senkaku/Diaoyu Islands) were to be placed under the administration of the United States and during this period one of the Islands was used as a target for U.S. pilots practicing bombing runs.

As late as 1971 the U.S. and Japan concluded The Okinawa Reversion Agreement. The treaty resulted in a mere transfer of effective control over the Islands, and not in the transfer of legal title to them; hence forth the document has no significance for the Sino-Japanese dispute over the legal rights to the Senkaku/Diaoyu Islands.

The 1952 Treaty of Taipei was significantly more important. It contained article IV, which provided that "all treaties, conventions and agreements concluded before December 9, 1941, between Japan and China have become null and void as a consequence of the war". This stipulation clearly referred to the Treaty of Shimonoseki, which became thereby abrogated. Even if the People's Republic of China has casted doubts upon the legal consequences of the Treaty of Taipei, as it was concluded by a "separatist government", from their point of view this treaty is still important for the dispute discussed here. The Treaty of Taipei must have put both Chinese governments on notice that the Treaty of Shimonoseki

would no longer be a legal basis for the Japanese possession of the Senkaku/Diaoyu Islands. Accordingly, China had to protest to prevent acquisitive prescription of the Islands by Japan.

The protests were raised, however, they occurred quite late as they appeared in the 1970s and after rumors had spread out in regards to the gas and oil deposits under the seabed all around the Islands. Two decades is a significant delay, even from the perspective of public international law. Therefore, it may appear that the Islands became the territory of Japan as a result of acquisitive prescription between 1952 and 1970s. However, there is the "if"... Japan would have acquired the islands as a result of acquisitive prescription if it had possessed the Senkaku/Diaoyu Islands in this period. This was not the case, as between 1952 and the 1970s the Islands were placed under the administration of the United States. The lack of possession prevented acquisitive prescription by Japan.

All the havoc around the Islands that happened after 1972, the last critical date in this dispute, did not alter the legal situation in the case. The only relevant element appearing after this date was the clear and unequivocal protest by China against the Japanese presence on the Senkaku/Diaoyu Islands. This protest means that after 1972, Japan did not acquire the territory by either the occupation of *terrae nullius* nor by acquisitive prescription and nor by international agreement.

Conclusions

The present case forms only a selected part of an extensive legal and political mosaic depicting an intense and complex territorial controversy over islands and maritime areas in the East and South China Seas. China and Japan are not the only states involved in these disputes. Malaysia, the Philippines, Taiwan and Vietnam are also involved in articulating conflicting claims over, among others, the Paracel Islands, the Pratas Islands or the Spratly Islands, thus making the South and East China Seas the Gordian Knot of perplexities inherently canvassing territorial disputes. Indubitably these disputes provide a valuable opportunity for Beijing to demonstrate *Urbi et Orbi*, its self-perception of its own hegemonic position in the Asian region. Although the Chinese legal status in the Senkaku/Diaoyu Islands dispute seems to be more sound, as proved in the paper, Beijing consequently indicates its *désintéressement* in judicial

forms of dispute resolution. To the contrary it prefers unilateral acts that, while only multiplying (from the legal point of view) Chinese previous assertions and intensifying a stalemate situation, consolidates Beijing's position as a regional strong hand in a political perspective. A recent example of China displaying its robust political attitude in relation to relevant territorial disputes is the establishment of its air defense identification zone (ADIZ) over the Senkaku/Diaoyu Islands in the Autumn of 2013. As a consequence, noncommercial aircraft entering a broad zone over the East China Sea must first identify themselves to Beijing, at the risk of facing "defensive emergency measures" by the People's Liberation Army. Japan reacted with a predictable incantation by the Foreign Ministry, which stated that "the airspace the Chinese side established [...] is totally unacceptable and extremely regrettable as it includes the Japanese territorial airspace over the Senkaku Islands, an inherent territory of Japan".

Putting this ritual sabre-rattling aside, one still must not underestimate the international legal perception of legality or illegality as it still constitutes a general framework harnessing the political stance employed by sovereign states in international territorial disputes and are clearly present in their political statements.

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