

China's Claim of Sovereignty in the South China Sea - An Appraisal*

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Introduction

Recently some Chinese high-ranking officials, senior military officers and scholars have said that as early as the 2nd century BC, during Han dynasty period, Chinese ships had sailed into the South China Sea and discovered Xisha islands (the Paracel) and China has sovereignty over Nansha islands (Spratly) and that the Haiyang Shiyou-981 drilling rig is located within the Exclusive Economic Zone (EEZ) of the Paracel which belong to China. Furthermore, they maintain that Vietnam had acknowledged China's sovereignty over the Paracel and Spratly islands in the 1958 diplomatic note of Prime Minister Pham Van Dong of the Democratic Republic of Vietnam. This article examines the Chinese and Vietnam's positions with regard to the sovereignty over the Paracel and Spratly group of islands in relation to international laws and the 1982 UN Convention on the Law of the Sea (UNCLOS 1982) etc.

Principles Governing the Acquisition of Territorial Rights in International Law

China has adopted the principles of "historical sovereignty" and "historical title" to claim sovereignty over the Paracel, Spratly and Pratas islands, and Macclesfield Bank. In the long history of international law, legal principles and rules governing territorial sovereignty have been established on the basis of international realities such as 'actual occupation', 'historical sovereignty', 'geographical distance', etc. However, 'acquisition of national territory' is the only method to evaluate legal viewpoints given by disputed parties positively and scientifically, and becomes a principle widely recognised by international community. It is called the 'acquisition of territorial rights.' Development and growth in the 16th century made the Netherlands, the United Kingdom, France, etc., become major powers competing with Spain and Portugal for territories newly discovered outside Europe.¹ Under such circumstances, maritime powers devised legal principles applied to acquisition of territories they had newly discovered, including the principles of priority of occupation (or 'right of discovery') and 'actual occupation.'

According to 'priority of occupation,' international law reserves the priority of occupation for nations which are the first to discover those territories. However, in fact, the principle itself has never brought about national sovereignty for those which discovered those new territories. It is because of the fact that they could not specify the concept and legal value of discovery, the first discoverer, evidence of that discovery, and so on.

Thus, 'discovery' is supplemented by 'nominal occupation,' i.e., a nation which discovers a territory must leave traces on that territory. However, the principle of 'nominal occupation' not only failed to fundamentally resolve complex disputes among powers over 'promised land', especially territories in Africa and islands thousands of nautical miles from the main land, but also led to a number of serious confrontations between powers. The reason for this lies in the fact that they could not specifically agree upon what constituted 'nominal occupation.' Therefore, after the conference on Africa in 1885 of thirteen European powers and the United States, and especially after the session of the International Law Institute in Lausanne (Switzerland) in 1888, they agreed to apply a new principle. That is the principle of 'effective occupation.'

Articles III, XXXIV and XXXV of the Treaty of Berlin signed in 1885 determine the principles of 'effective occupation' and the essential conditions for the same as follows :-

- (a) There must be a notification of occupation to nations signatories to the aforementioned treaty, and
- (b) Maintaining a power on the occupied territory, sufficient to ensure that rights of occupants are respected.

The Declaration of the Lausanne Institute of International Law in 1888 emphasised: "...every occupation that wants to make nominal sovereignty... must be true, i.e., real, not nominal." This statement made the principle of 'effective occupation' of the Berlin Treaty a principle of common values in international law, enabling the settlement of sovereignty disputes between countries all over the world. Although the 1919 Saint Germain Convention declared the Treaty of Berlin 1885 void on the basis that the world no longer had derelict territories; lawyers and international tribunals have continued to apply its principles to resolve sovereignty disputes over islands.³

However, China is using the theory of historical sovereignty to prove its sovereignty over the Paracel and Spratly islands. This is an extremely outdated theory, which is contrary to international law and is no longer used to resolve disputes over territorial acquisition of islands.

Validity of Vietnam's and China's Sovereignty Claims Over the Paracel and Spratlys

Vietnam has sufficient historical and legal evidence to prove its sovereignty over the Paracel and Spratly islands. Official historical documents show that at least since the 17th Century, Vietnamese emperors claimed sovereignty and carried out activities to confirm Vietnam's sovereignty peacefully and continually over the Paracel and Spratly Islands when these territories were considered as 'derelict'. In particular, the Nguyen dynasty established Paracel Flotilla to conduct economic activities and exercise state administration over these two groups of islands. In 1835, King Ming Mang ordered the building of Paracel pagoda and placement of a stone monument on the Paracel, etc. Therefore, Vietnamese emperors' continual exercise of administration during the past centuries faced no opposition from any country, including China.

During this period, China did not have any sovereignty claim over the Paracel or Spratlys. Many maps, including the most recent maps published in the early 1930s, reveal that China's South pole actually stops at Hainan islands and China's territory does not include the Paracels and the Spratlys.

After Nguyen dynasty, the French and Vietnamese governments also continued to maintain their sovereignty and actual control of these islands. While establishing the protectorate in Vietnam in 1884, France, on Vietnam's behalf,

took over the Paracel and Spratly islands. They built a meteorological observation post on the Paracel Islands. In late 1973, soldiers of the Republic of Vietnam stationed on the islands even saved five Chinese fishermen when they were washed ashore on the islands. The soldiers shared their meagre rations to save this family.

The San Francisco Peace Conference, held in August 1951 with the participation of leaders from 51 countries to settle territorial disputes after World War II, recognised Vietnam's sovereignty over the Paracel and Spratlys. At this conference, Head of Vietnamese delegation confirmed Vietnam's sovereignty over the Paracel and Spratly Islands in the presence of representatives of 50 countries, including China. His assertion did not face any objections.⁴ Meanwhile, up to 48 out of 51 countries at the Conference rejected China's proposal for recognising its sovereignty over the Paracel and the Spratlys.

In July 1954, parties, including China, at the Geneva Peace Conference (1954), signed the Geneva Accords of 1954, recognising and respecting independence and territorial integrity of Vietnam. After France's withdrawal, the Republic of Vietnam resumed its exercise of sovereignty and administration of Paracel and the Spratlys, undertook a series of activities to assert its sovereignty over these islands. However, Chinese troops occupied by force some eastern islands in 1956 and seized entirely the Paracels from Vietnam in January 1974. Subsequently, China invaded Johnson South Reef which was under Vietnam's administration till March 1988. However, Vietnam has continued to assert and has never renounced its sovereignty over the Paracel and the Spratlys since 1974. China's aforementioned acts violate a fundamental principle of international law which requires the States to refrain in their international relations from threat or use of force [Article 2 (4) of the United Nations Charter].

About the Prime Minister Pham Van Dong's Diplomatic Note of 1958

China's interpretation of the Diplomatic Note dated September 14, 1958 signed by Prime Minister Pham Van Dong as an evidence that Vietnam recognised China's sovereignty over the Paracel and Spratly Islands is completely one-sided, and is a distortion of the contents and the meaning of that document. The correct position is explained in the succeeding paras.

According to China's explanation, on September 4, 1958 Chinese Premier Zhou Enlai declared to the world China's decision regarding the 12 nautical mile territorial waters from mainland China, which also included a map clearly depicting sea borders and sea territories (this also included the two archipelagos of the Paracel and the Spratlys). On September 14, 1958, Prime Minister Pham Van Dong representing the Democratic Republic of Vietnam sent a Diplomatic Note to his Chinese counterpart, as follows :-

"We would like to inform you that the Government of the Democratic Republic of Vietnam has noted and support the September 4, 1958 declaration by the People's Republic of China regarding territorial waters of China.

The Government of the Democratic Republic of Vietnam respects this decision and will direct the proper government agencies to respect absolutely the 12 nautical mile territorial waters of China in all dealings with the People's Republic of China on the sea. We would like to send our sincere regards."

The above statements of China and the Democratic Republic of Vietnam were made in a complicated situation prevailing in the region at that point of time, especially the confrontation between the Chinese and the Americans in the Taiwan Strait.⁵ In this situation, China made the declaration on territorial waters, including Taiwan, in order to confirm its maritime sovereignty in the Taiwan Strait. However, China did not forget its long-term plot in the South China Sea and added Vietnam's Paracel and Spratlys archipelagos to the declaration.

Prime Minister Pham Van Dong's Diplomatic Note of 1958 was released based on the special ties with China at that time. It was a diplomatic action showing the support of the Democratic Republic of Vietnam to China in respecting China's 12 nautical mile territorial waters in view of the complicated situation in the Taiwan Strait. The contents of the Diplomatic Note 1958 were very cautious, and especially it did not declare to give up Vietnam's sovereignty over the Paracel and the Spratly Islands. The Prime Minister of the Democratic Republic of Vietnam understood clearly that the right to make declaration of the national sovereignty belongs to the country's highest power institution - the National Assembly, and defending sovereignty and territorial integrity is always the top priority of the State and the Vietnamese people, especially in the circumstances that the Diplomatic Note was issued.

The Diplomatic Note of 1958 has two clear contents: (a) the Government of the Democratic Republic of Vietnam noted China's 12 nautical mile territorial waters and (b) the Government of the Democratic Republic of Vietnam instructed its state agencies to respect China's 12 nautical mile territorial waters. The Diplomatic Note 1958 did not have a single word about territory and sovereignty or name of any island. Therefore, the Chinese interpretation that Diplomatic Note of 1958 declared Vietnam's abandonment of its sovereignty over the Paracel and the Spratlys and that the diplomatic document was the evidence of Vietnam's recognition of China's sovereignty over the two archipelagos, is a distortion of history and has no legal basis.

The San Francisco conference in 1951 recognised Vietnam's historical and legal sovereignty over the Paracel and the Spratlys. The Geneva Accords 1954 and the Paris Treaty 1973, which had China as an official participant, also recognise Vietnam's sovereignty over the Paracel and the Spratlys. Those Accords and Treaty asked participating countries to respect independence, sovereignty and national unity, and territorial integrity of Vietnam. Hence, China's declaration of sovereignty over the two archipelagos dated September 4, 1958 is invalid under the international law.

In the Diplomatic Note of 1958, PM Pham Van Dong did not mention the Paracel and the Spratlys because under the Geneva Accords 1954, the two archipelagos, which are located to the south of the 17th Parallel North, were managed by the Government of the Republic of Vietnam (South Vietnam). At that time, the Government of the Democratic Republic of Vietnam (North Vietnam) did not have the duty or power to exercise sovereignty over the two archipelagoes under the international law. In its capacity as a nation that participated in and 'helped' Vietnam negotiate the Geneva Accords 1954, China knew better than any other country that Vietnam was divided into two by the 17th

Parallel. The Democratic Republic of Vietnam could not 'give' China what did not belong to them, in spite of the close relationship between the two countries.

Meanwhile, the Government of the Republic of Vietnam (South Vietnam), under the Geneva Accords 1954, continuously exercised Vietnam's long-standing sovereignty over the Paracel and the Spratly Islands through state administrative machinery and instruments of sovereignty. The highlight of that is the fierce battle of the Republic of Vietnam against China's invasion by ships and aircraft on the Paracel in 1974.

The Prime Minister Pham Van Dong's Diplomatic Note of 1958, in nature, expressed a political attitude and friendly behaviour to China's declaration of 12 nautical mile territorial waters. It is, therefore, illogical and naïve to imply (as China did) that Prime Minister Pham Van Dong signed this document to give up Vietnam's territory and sovereignty while he and the entire Vietnamese people struggled with all their hearts to win independence and freedom.

Before 1975, the countries and territories involved in the South China Sea disputes included China, Taiwan, South Vietnam, and the Philippines. Therefore, declarations made by North Vietnam may be seen as declarations of a third party, which had no effect on the conflict itself. Supposing that the Democratic Republic of Vietnam (North) and the Republic of Vietnam (South) were one country, then based on international law, this declaration is also invalid. However, some have quoted the doctrine of "estoppel" in order to argue that this declaration has validity and Vietnam cannot go back on its words.

According to international law, there is no other legal bar that creates obligation for those who make unilateral declaration other than 'estoppel'. The estoppel doctrine must meet the following

criteria :-

- (a) The declaration or action must be taken by a representative of a country in a clear and unequivocal manner.
- (b) The country that claims estoppel must prove that based on that declaration or action; there are actions or inactions being carried out by that country which constitute 'reliance', as is called in the English and the American law.
- (c) The country claiming estoppel also has to prove that based on the declaration of the other country, it has suffered damage, or that the other country has benefitted when making that declaration.
- (d) Some judgments aver that this declaration must be made in a sustained manner over time.

The estoppel doctrine has many precedents in international courts and countries who have made certain declarations but have found to not be obligated to follow them because not all the conditions had been met.

Applying these criteria of estoppel to the declaration of the Democratic Republic of Vietnam, we can see that conditions (a) and (c) above are missing. In the years 1956, 1958, and 1965, China did not have any position or make any changes in its position based on North Vietnam's declaration. China also cannot prove that it suffered damage for relying on that declaration. North Vietnam did not benefit in any way from making that declaration.

The wording of the declaration does not clearly and unequivocally affirm Chinese ownership of the Paracel and the Spratly Islands. The letter only states, "The Government of the Democratic Republic of Vietnam respects this decision (the decision to determine the 12 nautical mile territorial waters of China), and will direct the proper government agencies to respect absolutely the 12 nautical mile territorial waters of China..." In fact, this is a promise to respect the decision of China in its determination of sea territories, and a promise to order national agencies to respect Chinese territories.

Estoppel doctrine is only applied if we consider North Vietnam and The Socialist Republic of Vietnam as one; and even France during the colonial period, and the Republic of Vietnam (South Vietnam) as the same entity as the present Vietnam. If we consider the Democratic Republic of Vietnam (North Vietnam) as a separate country, then estoppel cannot be applied because, as stated above, the declaration will be seen as a declaration made by a country that does not have authority over territories being disputed. Therefore, if Vietnam is seen as one single entity from historical times until the present, then the declarations made by North Vietnam are only statements that carry political meaning during wartimes, compared to the position and viewpoint of Vietnam in general from the 17th Century until the present.

In view of the above, the declaration that we are analysing does not have many factors that allow for estoppel to be applied. The factors of reliance and intention are very significant. If the reliance factor does not exist in order to limit the application of estoppel, countries will not be able to formulate their foreign policies according to the changed circumstances.

Furthermore, China's statements that there is no dispute over the Paracel are contrary to what has been acknowledged by China's leaders. In September 1975, Deng Xiaoping, the then Deputy Prime Minister, told the then First General Secretary of the Vietnam Workers' Party Le Duan that the two sides (Vietnam and China) had different points of view about the Paracel and the Spratlys, which would be resolved through negotiations.

Claims in Relation to UNCLOS 1982

China has tried to justify their placement of Haiyang Shiyou-981 drilling rig since May 2014, stating that the oil rig was located within the EEZ and continental shelf of the so called Xisha islands (the Paracel) of China. This was completely illegal and is explained in the subsequent paras.

The Paracels consists of small rocks (the largest one is Woody island with the area of about 2 square kilometers). They do not satisfy the regime of islands in international law since they cannot sustain human habitation or economic life. Under the UNCLOS 1982, these rocks are not entitled to a 200 nautical mile EEZ and continental shelf. They can generate no more than a 12 nautical miles territorial sea. Therefore, the position of the Haiyang Shiyou-981 drilling rig (17 and later 25 nautical miles off Tri Ton island) is completely within Vietnam's EEZ and continental shelf of which there is no dispute with China. Under the 1982 UNCLOS, the oil rig is not located in the EEZ and continental shelf of the Paracels.

China deployed a large number of ships from its marine police, marine surveillance, fishery administration, and even naval ships and warplanes to illegally escort the Haiyang Shiyou-981 drilling rig deep into Vietnam's EEZ and continental shelf. China allows their vessels to remove canvas sheets covering their weapons, intimidating Vietnamese fishing vessels. The aforementioned acts reveal that China has threatened to use force. More alarmingly, Chinese ships have proactively and intentionally rammed and damaged many vessels of Vietnam's law enforcement forces. They even rammed and sank Vietnamese fishing boats and damaged ships of Vietnam's Fisheries Surveillance Force and Marine Police, injuring a number of men of Vietnam's law enforcement forces and fishermen working in the traditional fishing grounds in Vietnam's EEZ.

The Charter of the United Nations bans the threat or use of force in general and for territorial issues in particular. All disputes must be resolved through peaceful negotiations. The Security Council authorised on several occasions the use of force by member states, not only in cases of self-defence but also for the protection of the rights and lives of the people of other states.

Chinese declaration of establishing a safety zone with a radius of three nautical miles around the oil rig also violates international law. Under the 1982 UNCLOS, a state is allowed to establish a 500 m safety zone around its installations and structures at sea. In fact, Chinese vessels were obstructing ships of Vietnam's law enforcement forces from 30-40 nautical miles off the oil rig. This has threatened security, safety and freedom of navigation in the region. Furthermore, flights at low altitudes of Chinese reconnaissance aircraft and jet fighters to intimidate ships of Vietnam's law enforcement forces and fishing boats have become a real threat to safety and freedom of navigation in the Vietnam East Sea.

After more than two months' illegal operation in Vietnam's EEZ, Haiyang Shiyou-981 has been withdrawn. However, China's strategy of monopolising the East Sea remains unchanged. The withdrawal of the oil rig aims to : (a) avoid being criticised on the threshold of ASEAN Summit, ASEAN Regional Forum (ARF) and the East Asia Summit (EAS); (b) prevent Vietnam from submitting a case to the Permanent Court of Arbitration (PCA); (c) create the "atmosphere" for Vietnamese-Chinese government-level negotiations which would probably be followed by China's new actions to escalate the situation in the East Sea. In other words, the struggle to protect Vietnam's sovereignty over the sea and islands will become more strained, complex and difficult in the forthcoming time.

Conclusion

A decade ago, China disseminated the concepts of 'peaceful rise' and 'peaceful development' and pledged not to seek hegemony in order to reassure nations of the world. China proposed 'a maritime silk route' and an ASEAN - China Treaty on Good Neighbourliness in 2013. China hosted the Conference on Interaction and Confidence Building Measures in Asia (CICA) in May 2014. However, through its repeated provocations since 2009 in the South China Sea and East China Sea, countries in the region see a growing gap between words and actions of China.

China has been seen as a great power which is easily prone to use of force to upset the status quo in the region. It asserts sovereignty by creating 'new facts' in the South China Sea, becomes increasingly aggressive, violates international law, and threatens regional security, peace and stability. Thus, trust of regional countries in China has decreased. When trust in China's 'peaceful development' decreases, regional countries will resort to jurisdictional measures, establish new international cooperation and even strengthen self-defence capabilities. This will not benefit China in the long run because great powers need to create an environment of peace and cooperation on their peripheries. In today's interdependent world, an environment of peace and cooperation is necessary for prosperity in the region. Any actions that create confrontation and mistrust between neighbours ought to be avoided.

Endnotes

1. Decree signed by Pope Alexander VI on 4 May, 1493 for dividing spheres of influence of Spain and Portugal in newly discovered territories outside Europe.
2. Treaty of Berlin, <http://www.blackpast.org/treaty-berlin-1885#sthash.gpYEz6rA.dpuf> (Accessed on 25 Jun 2014).
3. In April 1928, La Haye (Permanent Court Arbitration) adopted this principle to resolve Island of Palmas Case between Netherlands and the United States of America. Judgment of the International Court of the UN in November 1953 for the sovereignty dispute between Britain and France over islands of Minquiers and Ecrehous, etc. In December 2012, the International Court of Justice concluded that sovereignty over islands of Pulau Ligitan and Pulau Sipadan belonged to Malaysia because they found that Malaysia had continually exercised authority over the islands.
4. At this Conference, Mr Tran Van Huu, prime Minister and Minister of Foreign Affairs of King Bao Dai Government, had declared: "Et comme il faut franchement profiter de toutes occasions pour étouffer les germes de discorde, nous affirmons nos droits sur les îles Spratley et Paracel qui de tout temps ont fait partie du Viet Nam".
5. On May 26, 1950, the Korean War broke out. The American President Harry S Truman ordered the 7th Fleet to enter the Taiwan Strait to prevent China's attack on the islands there. To show its determination to liberate Taiwan, on September 3, 1954, China shelled some islands like Quemoy and Matsu. This First Taiwan Strait Crisis lasted from August 11, 1954 to May 1, 1955. In 1958, the Second Taiwan Strait Crisis happened. On August 23, 1958, China

intensified artillery shelling of Quemoy and Matsu islands. The US President Eisenhower sent US warships to protect the logistic route from Taiwan to Quemoy and Matsu islands.

*This article represents the author's own opinion and not necessarily that of the Institution where the author holds an official position.

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