

# **Territorial issues in the East and South China Seas: A Comparative Assessment**

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## **Introduction**

The East China Sea and South China Sea capture much international attention recently due to the competing territorial claims and the high potential of conflict between claimant states. Despite geographical difference, one dispute on the East and the other on the South of China, but the disputes in both seas share some common features. Both have China as a key claimant, have some similarity in the historical background as well as on the current development. Using a comparative approach, this paper attempts to draw some common characteristics of the territorial issues in the two oceans and from that proposes some suggestions for enhancing cooperation among claimant states for the sake of peace and stability in East Asia.

### **1. Background of the issues**

First of all, the territorial issues in the East and South China Sea were both attached to the long and upheaval history of the region. The two share similar history and face some critical moments related to the validity of the use of force and the interpretation of the San Francisco treaties.

#### **a. The initiation of the issues**

In East Asia, it is no doubt that China is a big country with rich culture and history. In both issues in the East and South China Seas, the long history of China has been used to claim the sovereignty over the Senkaku/Diaoyu, Paracles and Spralys. In the East China Sea, the Senkaku/Diaoyu was claimed to be discovered by China and became part of Taiwan. In the South China Sea, the Paracels and Spratlys were also considered to be discovered by Chinese and later attached to Taiwan by territorial acquisition activities of Japan. Unfortunately, due to the remote and separate location of these

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islands from the vast territory of the mainland China and the Haijin (*Chinese: 海禁*), or “Sea Ban” policy of several past Chinese government,<sup>2</sup> the sovereignty evidences of China were scattered and lack of authenticity and accuracy. The historical documents of China only named the Senkaku/Diaoyu on provincial record of Fujian without specifying sovereignty activities of China.<sup>3</sup> There were only the observance of Zheng He’ in the seven sea journeys (1405-1433) under Ming Dynasty or the patrol of Vice-Admiral Wu Sheng (1710) during the Qing dynasty<sup>4</sup> to illustrate the sovereignty over the Paracels and the Spratlys. In the context of the lack of effective activities of China, the Senkaku/Diaoyu was annexed in 1895, before the conclusion of the Shimonoseki Treaty by Japan<sup>5</sup> and the Paracels and Spratlys were declared as belonging to the sovereignty of Vietnam by the Vietnamese King’s official visit to and the hoisting of the Vietnamese flag on the Paracels during the reign of the Nguyen Dynasty from the 17<sup>th</sup> to 18<sup>th</sup> centuries.<sup>6</sup> This situation was the root of disputes lasting to date in the East and South China Seas.

#### **b. Argument based on the Use of force**

Not only related to the complexity of the upheaval history of the region, but the legitimacy of the claims also related to the application of the principle of the use of force. In the East China Sea, China believed that the Senkaku/Diaoyu was a part of Taiwan which was forcibly ceded to Japan at the end of the China-Japan war in 1895 with the conclusion of the Shimonoseki Treaty. In other words, Japan illegally gained the sovereignty over the Senkaku/Diaoyu by the use of force in the war and the Shimonoseki Treaty was concluded by coercing China, thus was null and void.<sup>7</sup> However, it is note

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<sup>2</sup> Von Glahn, Richard. [1996] (1996). *Fountain of Fortune: money and monetary policy in China, 1000–1700*. University of California Press. ISBN 0-520-20408-5

<sup>3</sup> Han-yi Shaw, “The inconvenient truth behind Diaoyu/Senkaku islands”, 2012 from <http://kristof.blogs.nytimes.com/2012/09/19/the-inconvenient-truthbehind-the-diaoyusenkaku-islands/>

<sup>4</sup> Ministry of Foreign Affairs of the People’s Republic of China, *China’s Indisputable Sovereignty over Xisha and Nansha Island*, (Beijing: Foreign Languages Press, 1980)

<sup>5</sup> Fact sheet on Senkaku, Ministry of Foreign Affairs of Japan.

<sup>6</sup> Jean-Louis, “Notes on the Geography of Cochinchina” (1837) VI (Part II) *Journal of the Asiatic Society of Bengal*, 737-745.

<sup>7</sup> This principle was later codified in Article 52 of the 1969 Vienna Convention on the Law of Treaties.

worthy to recall that the conquest was one of the legal modes of territorial acquisition until 1945 when the United Nations Charter entered into force. Even if the sovereignty of Japan over the Senkaku/Diaoyu was gained by the use of force of Japan in the China-Japan war was in the 1890s, it was recognized as a legal mode of territorial acquisition at that time and thus created the valid title for Japan. Moreover, the annexation of the Senkaku/Diaoyu took place before the conclusion of the Shimonoseki Treaty and the content of the Shimonoseki Treaty did not mention the fate of the Senkaku/Diaoyu.<sup>8</sup>

Despite that China based on the principle of the use of force to invalidate the possession of Japan over the Senkaku/Diaoyu, China itself had used force to occupy the Paracels and several Spratlys features in 1974 and 1988 respectively. In the years of 1974 and 1988, the United Nations Charter had entered into force and the use of force by China, a UN member, clearly violated its treaty obligation and basic principles of international law.

This indicated that the principle of use of force was used in a “double standards” manner in order to maximize the interest of China in the East and South China Sea disputes.

### **c. Legal effect of San Francisco treaties**

Another turning point in the history of the East and South China Seas disputes was the interpretation of the San Francisco treaties.

After the end of the Second World War, Article 2 of the 1951 San Francisco Treaty stipulated that Japan renounced all right, title and claim to Formosa, the Pescadores, the Spratlys and Paracels. The Cairo Declaration of 27<sup>th</sup> November 1943 issued earlier by the UK, USA and Chiang Kai-Shek’s Nationalist China provided that “all the islands in the Pacific which Japan seized or occupied since the beginning of the First World War in 1914, and that all the territories that Japan had stolen from the Chinese, such as Manchuria, Formosa and the Pescadores, shall be restored to the Republic of China.” This provision was further clarified by Paragraph 8 of the Potsdam

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<sup>8</sup> Article II of the Shimonoseki Treaty only provided that Formosa and Pescadores were ceded to Japan without mentioning Senkaku/Diaoyu.

Declaration in 1945 that “the terms of the Cairo Declaration shall be carried out and Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku and such minor islands as we determine.” Later in 1972, at Point 3 of the Joint Communiqué between China and Japan, the two countries endorsed that “the Government of the People's Republic of China reiterates that Taiwan is an inalienable part of the territory of the People's Republic of China. The Government of Japan fully understands and respects this stand of the Government of the People's Republic of China, and it firmly maintains its stand under Article 8 of the Potsdam Proclamation.”

China argued that these provisions should be interpreted to mean that Japan were obliged to return the Senkaku/Diaoyu to China as the Senkaku/Diaoyu was a part of Formosa (Taiwan).

However, Article 3 of the 1951 San Francisco Treaty also provided that “the US will have the right to exercise all and any powers of administration, legislation and jurisdiction over the territory and inhabitants over the Nansei Shoto south of twenty-nine degrees north latitude, which included the Ryukyu and Daito Islands.” Accordingly, the Senkaku/Diaoyu was administrated by the US as part of the Okinawa Prefecture since 1945. In 1965, in a State Department memorandum on the Ryukyu, the United States declared that “we recognize that Japan maintains residual sovereignty over the [Ryukyu] islands, and have agreed to return them to full Japanese control as soon as Free World security interests permit.” As a result, the Senkaku/Diaoyu was returned to Japan in 1971. From 1895 to 1970, China expressed no opposition to the occupation of Japan and the administration of the United States, even though Taiwan, without Senkaku/Diaoyu, was returned to China since 1945.

In the South China Sea, China also argued that the San Francisco treaties could be interpreted to include the Paracels and Spratlys in the territories given to China under the Cairo Declaration. However, with 46 vote against among 52 participants, the San Francisco Conference had made a clear opposition to the suggestion of the formal USSR to give the Spratlys and Paracels to China.

Sharing the similar context after the end of the Second World War, the Senkaku/Diaoyu, Paracels and Spratlys were not part of the territories that had been returned to China. Therefore, it is submitted that their status must be restored as to the one before the Second World War. Cooperation in properly interpreting the San Francisco treaties will help to weight the legal effect of the sovereignty claims of the parties to the East and South China Seas disputes.

## **2. Current developments**

The current developments of the disputes in the East and South China Seas could have been generated from two big waves of tensions. The first was from the 1970s to 2000s and the second was from the 2010s to date.

### **a. From the 1970s to 2000s**

Disputes from the 1970s to 2000s were motivated mostly by economic interests. In the East China Sea, energy survey conducted by the Committee for the Coordination of Joint Prospecting for Mineral Resources in Asian Offshore Areas, under the authority of the United Nations Economic Commission for Asia and the Far East, revealed substantial energy deposits for the water near the Senkaku/Diaoyu. In addition, the adjustment in the regime of islands in the 1982 Convention on the law of the sea opened for a greater role of islands in generating maritime zones.<sup>9</sup> These events added another layer of maritime disputes to the territorial dispute over the Senkaku/Diaoyu, Paracels and Spratlys. China made its sovereignty claim over the Senkaku/Diaoyu in 1970 and threatened to use of force against hydrocarbon exploitation in the Vanguard Bank of Vietnam in 1992. China also fortified their presence in the Paracels and Spratlys by the use of force in 1974, 1988 and 1995.

### **b. From the 2010s to date**

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<sup>9</sup> Article 10 of the 1958 Convention on Territorial Sea only provided for a definition of an island and the possibility to generate territorial sea for islands. With the amendment in the 1982 Convention on the Law of the sea, the legal regime of islands is provided for under Article 121 with the possibility of generating full maritime zones of islands as to the mainland.

The second wave of tensions from the 2010s to date is characterized by the comprehensive assertive activities of China in a broad geographical scope and in various fields.

China's point of view is that other parties to the disputes in the East and South China Seas took the first steps to escalate their claims that forced China to react. In the East China Sea, Japan ignited the tension by changing the *status quo* through its nationalization of the Senkaku/Diaoyu. In the South China Sea, the other parties have exploited the natural resources of China.

One, however, may argue that the issue of sovereignty over Senkaku/Diaoyu has existed since 1970 without any nationalization move by Japan. The exploitation of natural resources was conducted within the exclusive economic zones and continental shelves that the littoral states are legally entitled under the 1982 Convention on the Law of the Sea. Therefore, these events only served as pretexts and excuses for China to pursue other strategies and ambitions, for example of becoming a maritime power after the successful rise of China as an economic power. In this regard, the Senkaku/Diaoyu, Paracels and Spratlys which have long been considered as parts of the first island chain have been chosen to be the first targets to secure China's exits to the Pacific, a prerequisite to expand China's maritime spaces and influence.

Accordingly, China has implemented comprehensive measures in both East and South China Seas to archive these new ambitions.

In the legal field, a series of new regulations and declarations have been enacted, starting with the declaration on note verbal attaching the nine dash line map in 2009, then the submission of baseline of the territorial sea of Senkaku/Diaoyu and its affiliated islands in 2012, the Hainan search and board regulation in 2012, the establishment of Sansha city in 2012, the ADIZ and the new fisheries regulation in 2013.

In international relations, on the one hand China re-iterated her good-neighbourliness policy to maintain good relationships with Southeast Asian countries. On the other hand, China used its economic leverage to charm its neighbour while still implement a policy of "divide and conquer" by exploiting

and deepening differences between ASEAN member states on the South China Sea issues and between Japan and Korea on the establishment of ADIZ. The failure of ASEAN to issue a joint statement for the first time after 45 year since its foundation at the ASEAN Ministerial Meeting in Cambodia was a consequence from such “divide and conquer” policy.

In economics, the territorial issues have caused negative impacts on bilateral economic cooperation. The cases of rare earth related to Japan and banana export related to the Philippines are only two among other examples of the disruption in economic cooperation due to territorial matters.

In “public relations”, territorial issues were well caught on the attention of public opinions. To some extents, such high public attention may help the leaders of one country to distract from some domestic issues, for example, the economic crisis, corruption or environmental problems. However, playing with nationality is like playing with a double edged sword that may prevent any compromised solution for dispute settlement in the future. This is particularly endangered when nationalism was pushed up to the highest levels by all means, from the use of social networks like facebook, twitters, or covering the whole page in the New York Times, or even advertising in commercial products.

In addition, to transfer all these measures to the field, law enforcement forces have been strengthened to fortify territorial and maritime claims. The intrusion into maritime zones, scramble on the airspace, arrest of fishing vessels, harassment of hydro carbon exploration and exploitation activities and so on are among the popular activities occurring in both the East and South China Seas. In some cases, these activities escalated to the “redline”. The “salami slicing” and “cabbage” strategies to gain new control and occupation, the radar lock on navy vessel and helicopter or the near collision between navy ships may lead to real conflicts at any time. In fact, arms conflict had been occurred in a similar context in the South China Sea in 1974, 1988 and 1995.

It can be said that sharing similar strategic location and being under similar influence sphere, the East and South China Seas are interconnected

and “mirror” each other. Development in one sea may serve as a test and predictions for developments in the other and vice versa. This is further illustrated by the following table which summaries the measures being implemented in both locations in the two waves of tension.

Types of activities	East China Sea	South China Sea
Legal measures	x	x
International relations	x	x
Economics	x	x
“Public Relations”	x	x
Law enforcement	x	x
Military		x

### 3. Prospects

Rooted in similar history, sharing similar development, the territorial issues in the East and South China Seas are likely to have common prospects.

At first, one may easily peak up the common and frequently used term “indisputable” in describing a party’s stance to both disputes. In the East China Sea, Japan holds the position that there exists no issue of territorial sovereignty to be resolved concerning the Senkaku/Diaoyu. In the South China Sea, China also views that China has indisputable sovereignty over the South China Sea’s islands. The “indisputable” concept in both Japan and China’s views is the refusal of the existence of dispute. However, in Japan’s point of view, despite the non-existence of the dispute, the door is always open for dialogue with China.<sup>10</sup> Meanwhile, from China’s perspective, “indisputable” means all doors for negotiation with Vietnam are closed for the

<sup>10</sup> Statement of Prime Minister Abe at a press conference in New York after attending the U.N. General Assembly, 2013



dispute over the Paracels.<sup>11</sup> In fact, a dispute is defined as a specific disagreement concerning a matter of fact, law or policy in which a claim or assertion of one party is met with refusal, counter-claim or denial by another.<sup>12</sup> The existence of a dispute, accordingly, will not depend on the admission of one party concerned.

In the situation of the East and South China Seas, accepting the existence of the dispute may bring greater benefit to the “refusal” countries. Holding a stronger legal basis on the Senkaku/Diaoyu, Japan may admit the existence of the dispute and challenge the claim of China by unilaterally submitting the case to the International Court of Justice. If China accepts the jurisdiction of the Court, the Court may have jurisdiction on the doctrine of *forum prorogatum*<sup>13</sup> and Japan will have a good chance to settle the case permanently by a court decision. If China will not respond, similar to the case with the Philippines, China may argue that “a state may choose not to appear before an arbitral tribunal in order to avoid anything that might upgrade or give credibility to a claim which it considers clearly inadmissible or manifestly unfounded, or where it considers the tribunal seized to be evidently without jurisdiction.”<sup>14</sup> If no response sends the signal that the claim of Japan is clearly inadmissible or manifestly unfounded, due to the lack of a counter claim, this means that no dispute exists. If no response sends the signal that the Court has no jurisdiction due to the lack of consent of China, this also means that China dares not to present their legal arguments before the Court due to their weaknesses. As all other states know that Japan has faithfully invited China to settle the dispute by a peaceful and judicial means, but received no response from China, this also means victory for Japan and thus in diplomatic aspect, no dispute exists. Similar approach may apply to China if

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<sup>11</sup> In the official visit of Le Duan, the communist party leader of Vietnam paid a visit to China and had the meeting with his counterpart, Deng Xiaoping in 1975, the two talked about the sovereignty over the Paracels and Spratlys and Deng Xiaoping admitted the dispute between China and Vietnam over the two groups of islands and agreed to bilateral talk. This position was later unfortunately turned down by China to the current position of indisputable and no dialogue.

<sup>12</sup> *Mavrommatis Palestine Concessions (Jurisdiction)*, PCIJ, Series A, No.2, 1924, p.11

<sup>13</sup> The jurisdiction of the Court over a case can be inferred by the consent of the responding State, expressed in an informal and implied manner, and after the case has been brought before it.

<sup>14</sup> Stefan Talmon and Bing bing Jia (ed.), *South China Sea Arbitration: A Chinese Perspective* (Oxford and Portland, Oregon: Hart Publishing, 2014), p.16

the country believes that they really have strong legal arguments on the sovereignty over the Paracels.

Pending for the change in Japan and China's views on dispute settlement, the current developments raise an imperative need for dispute management and conflict prevention. The East and South China Seas carry important sea lane of communications (SLOC) that China, Japan and many other countries share common interests. By emphasising on this common, there are many aspects well fit for cooperation between states along the SLOC, for example, on enhancing safety of navigation, environmental protection and search and rescue. Some of these areas have proved their success in bilateral cooperation and should be expanded at the mini-lateral or multilateral cooperation to attract better participation of China.

Given the fact that various law enforcement forces concurrently operate in the contested water, cooperation in building the rules of engagement and joint exercises for these forces are also other areas that are worth to explore. Having a capable and experienced coastguard, Japan may take the lead in proposing rules of engagement to prevent incidences at sea and create some cooperative forum for these forces of the littoral states in the East and South China Seas to engage in dialogue, build confidence and find possible areas of cooperation. Fishing arrangement like the one between Japan and Taiwan also stand as lesson for others in building up management mechanisms for fisheries.

### **Conclusion**

China is not only the common, but also the indispensable party in both East and South China Seas' territorial issues. The similarities in the history and current developments of the issues in both seas indicate that there are opportunities for claimant states to cooperate with each other in the proper use of historical evidences and interpretation of international law in order to arrive at valid and legal basis for sovereignty claims. Thanks to its strong legal argument, it is advisable that Japan may take the lead to have the Senkaku/Diaoyu settled at the world court for the sake of reaching a permanent, objective and fair solution. Pending for a novel approach on

dispute settlement from the parties concerned, cooperation between claimant states and others along the SLOC in the rule based approach at mini-lateral or multilateral levels will help to manage the dispute and prevent the current situation from escalating into conflict or even hot war.