

Legislative Analysis on the Ownership of Uninhabited Islands

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Abstract: With abundant natural resources, uninhabited islands are the important basis for our national economy and social sustainable development. The unique geographic location of the uninhabited islands makes them irreplaceable in maintaining the territorial integrity of the State and safeguarding the maritime rights and interests. However, a lack of definite legal regulations on their ownership resulted in the disordered development and exploitation such as low level development and damage to the environment and resources which negatively influenced the interests of the State and society and threatened the national defense security. To this end, it is of great theoretical and practical significance to strengthen legislation on islands, define the legal status and ownership of the uninhabited island so that we can safeguard the sovereignty, territorial integrity and national security of the State.

Key Words: Uninhabited Island; Island sovereignty; Island ownership; Island legislation

In geographical sense, territory, a special realm governed under the sovereignty of a State on the earth and an essential element of a State, is the space and scope for a State to exercise its sovereignty on. Territory and sovereignty are two concepts highly interlinked with and indispensable from each other as a State exercises its sovereignty on its territory and safeguards the independence and integrity of its territory with its State sovereignty. Territorial sovereignty integrates the concepts of

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territory and sovereignty. The territory consists of territorial land, territorial sea, airspace and subsoil. The uninhabited island in territorial seas should be considered as a part of the territory. Since there are rich resources on the uninhabited island, it would be helpful to realize its value with a clearly defined ownership. Under the premise that the uninhabited island belongs to the State, the paper here puts forward certain recommendations on how to deal with the ownership of the uninhabited island.

I. There Are No Regulations on the Ownership of the Uninhabited Island in the Promulgated China Law

The island has the feature of property in the civil law and hence the ownership of it is within the scope of property rights system. Property rights refer to the rights to directly control certain property.¹ It is an exclusive right that the civil subjects own, manage, control and enjoy the benefits of the property.² The Draft Property Law of the People's Republic of China has defined the property rights in Article 2(3): "The property right mentioned in this Law means the exclusive right enjoyed by the obligee to directly dominate a given thing according to law, which consists of the right of ownership, the usufruct and the security interest on property." The property right of a State refers to "as a special form of ownership, the State has the right to occupy, utilize, benefit from and deal with the State property. In essence, it is a reflection of the State ownership."³ Since the State is a political but not an economic organization, it cannot directly operate and utilize the island. Therefore, to fully realize the economic value of the island, the State has to entrust a particular unit, individual or economic entity to develop, operate and utilize the island. The study on the ownership of the island needs to answer the questions: Whom does the island belong to; who is the owner of the island; what rights are the obligee entitled to; what obligations should other people shoulder; how should the ownership of the island be protected and what are the civil responsibilities of the infringing party. In short, the core issue about the island ownership is to define its ownership,

1 Yin Tian, On the Definition and Essence of Property Rights – From the Perspective of Methodology, at http://article.chinalawinfo.com/article/user/article_display.asp?ArticleID=24504, 13 March 2006.

2 Li Kaiguo, *The Basic Problems of Civil Law*, Beijing: Law Press China, 1997, p. 269. (in Chinese)

3 Tong Rou ed., *China Civil Law*, Beijing: Law Press China, 1994, p. 249. (in Chinese)

utilization and protection. The island ownership is the prerequisite for its utilization and protection. However, there is no clear definition concerning the ownership of an island in the Constitution of the People's Republic of China or the promulgated laws concerning the administration of the ocean, land, mineral resources, forestry, environment protection and etc.

The Constitution of the People's Republic of China (passed on December 4 NPC and promulgated afterwards, amended on the 8th NPC on March 29, 1993) defines the principle that natural resources are owned by the State in Articles 9 and 10, yet there are no clear statements that the ocean and island are included in the natural resources. Most people consider the island to be a part of an ocean. But there is no such inclusion of ocean into the list in Article 9. (It should be admitted that there are obvious defects in the Constitution). There is no explanation on whether river, lake and ocean are included in the scope of waters. Though the ocean water is flowing, most people think waters refer to rivers and at home or abroad there is no classification of the ocean into the waters. As to "tidal flats", it is by no means an island.

If we manage to incorporate the island into the Article 9 "and other natural resources", the island ownership is still not clear. There are different types of ownership in China. Will that be State-owned or collectively owned? It can't be decided. Some uninhabited islands might be State-owned, including islands used as base points while some might be collectively owned. The authors believe that the long time failure to incorporate the ocean (islands included) into the Constitution is an important reason resulting in the disorderly, excessive and gratuitous development of the ocean and the island.

There are no definition of the island ownership in the series of laws such as the Constitution, Land Administration Law of the PRC (1998), Forestry Law of the PRC (1998), Law of the PRC on the Protection of Wildlife (1989), Mineral Resources Law of the PRC (1996), Fisheries Law of PRC (amended in 2000) and Environmental Protection Law of the PRC (1989).

The Draft Property Law of the People's Republic of China (Seeking public

comments in July 2005)⁴ adjusts the tangible property relations and answers to whom the property belong, what rights are obligee entitled to and how should property rights be protected. As to the ownership of the important resources, there are clear regulations in the Property Law.⁵ The Draft Property Law clearly regulates that sea areas belong to the State and the State Council exercise the ownership on behalf of the State. But just like the Law of the People's Republic of China on the Administration of the Use of Sea Areas, it fails to provide clear definition on the island ownership. Uninhabited islands are important resources of the State. As a unique ecosystem, the island is considered to be an important part of the sea area whose ownership belongs to the State. Therefore, it should be clearly defined in the Property Law that the island belongs to the State and the on the basis of this regulation, there should be further regulations on the utilization of the island.

II. The Current Situation of Uninhabited Islands in China

The ownership of uninhabited islands, in other words, who is the owner of the island, is the essential issue here. According to law, the one who owns the island has the basic rights to utilize, handle and benefit from the uninhabited island. Since China is a socialist country, its means of production are mainly public owned. There are various economic sectors in existence and a complex structure of rights is in shape which features State, collective and individual ownership. In addition, the socialist market economic system has been established but we are yet to have a unified regulation on the ownership of the relevant resources, so there are no clearly defined regulations on the ownership of the uninhabited island. Therefore, the ownership of our coastal uninhabited islands is a complicated question with a

4 General Office of the NPC Standing Committee points out in the notice of Comments Seeking on the Draft Property Law of PRC, this Law is "the draft civil law that has a close bearing to the immediate benefits of the people by defining the ownership of the property, protecting property rights and fully playing the efficiency of property in order to safeguard the order of the socialist market economy and maintain the basic economic system of the State.

5 Article 51: "All mineral resources, waters, sea areas and land in the cities belong to the State". Article 52: "Such natural resources as forests, mountains, grasslands, wasteland and tidal flats belong to the State, except where they belong to the collectives as is provided for by law." Article 53: "Land in the rural and suburban areas and all resources of the wildlife which belong to the State as are provided for by law are owned by the State." Article 54: "On behalf of the State, the State Council shall exercise ownership of natural resources like mineral resources, waters, sea areas, the State-owned land and grasslands."

lot of historical and current problems waiting for in depth discussion.

Judging from our national conditions, if we decide on the ownership according to who can make the decisions, there are three types of ownership on uninhabited islands in China: State-owned (owned by the nation or by the army), collective (village) owned and individual (in the name of an individual or a company) owned.

A. State Owned

Article 3 of the Law of the People's Republic of China on the Administration of the Use of Sea Areas regulates "the sea areas are owned by the State, and the State Council exercises the right of ownership in the sea areas on behalf of the State." The uninhabited island is located in the sea and should be under the ownership of the State. Currently, the majority of the uninhabited islands are under the administration of the local government. For northern offshore uninhabited islands, individuals or units have been issued with aquaculture licenses to utilize the offshore barriers and their surrounding sea areas in accordance with the Law of the People's Republic of China on the Administration of the Use of Sea Areas. Majority of the people living in the coastal areas think that the oceanic islands and the islands under the unique protection and utilization of the State belong to the State and should be administered by the State.

Some garrison islands are uninhabited islands. The objective of the garrison island is for national defense and should be guaranteed. The ownership of such islands belongs to the State. The problems arise after the withdrawal of the military groups. The handling of these islands might be complicated. Some islands are under the management of local government or have been entrusted to the local government for their management, such as Qianliyan Island (also called Qianli Island or Qianli Mountain, which is located in south of the Yellow Sea at north latitude 36°15'57", east longitude 121°23'09"). It covers an area of 0.2 square kilometers with the altitude 90.9 meter and distance 24.8 nautical miles to the nearest land point: Haiyang Pier). Before the garrison withdrew from the island, it signed an agreement with Haiyang government and entrust the latter to manage its over 40 mu camp production and over 100 barracks. However, when it comes to Zhoushan city of Zhejiang Province, things are quite different. Some are under the management of the government with the entrustment of the garrison and some have been rented by the garrison to the company or individual for development and utilization. We can take Fenghuangshan Island in Dinghai District of Zhoushan

City as one example. It covers a small area of 0.09 square kilometers and whose nearest point is only 1 kilometer away from the Zhoushan Island. It embraces pretty scenery with mountainous and ocean view. After the withdrawal of the garrison, Zhejiang Xinhui Industrial & Trade Co., Ltd. and Ningbo Huamao Real Estate Co., Ltd. have jointly developed the Phoenix Island Holiday Inn with construction investment for Phase I about RMB 40 million (including pier, seawall, hotel, which are under operation now). The Phase II construction is under construction and expected to be concluded by 2006. The manager is not clear about the transfer procedures, transfer commission and has been applying for the land certification. Since the island used to be a garrison island, the two forts on the island are maintained because of the principle that military installations can't be destroyed.

B. Collective Ownership

Up till now, there are still some villagers living along the seaside one-sided believe that the island close to the village belongs to the village. Therefore, the development and utilization of some offshore uninhabited island have received approval or oral agreement from the local village committee. Most of the development is for the aquaculture or culture and proliferation around this area. For instance, several villagers from Gangdong Village of Laoshan District, Qingdao City got consent from the local village committee engaged in sea farming of abalone and sea cucumber in offshore barrier or subtidal zone in Tuzi Island (which located at north latitude $36^{\circ}16'27.3''$, east longitude $120^{\circ}42'49.6''$. It covers an area of 0.505 square kilometers with the distance 1.62 nautical miles to the coast). Haier Group has already built small wharf and planted trees to develop a base for recreation and holiday as its international training center. However, since the offshore barrier has been occupied by the villagers who do not allow others to pass by, Haier Group had to ask the oceanic administration department of Laoshan District government to lead the negotiation with Gangdong Village and hire Shandong Maritime Judicial Expert Testimony Center to evaluate the value of the facilities and species raised by the sea farmers so as to provide economic compensations and acquire the whole right to develop and utilize Tuzi Island.

For another instance, Zhoushan City is the only prefecture-level one set on the basis of islands. It is situated on the northeast of Zhejiang Province, south of Yangtze River Estuary and in the East China Sea area outside the Hangzhou Bay. There are two districts and two counties in the city: Dinghai District, Putuo

District, Daishan County and Shengsi County which cover a total area of 22,216 square kilometers with 20,599.06 square kilometers of sea area and 1,256.94 square kilometers of land area. There are 1390 islands under jurisdiction of the city, each of which area is greater than or equal to 500 square meters above the mean high tide line. In total, there are 1,311 uninhabited islands in the city, taking about 94.32% of the number of total islands. The uninhabited islands cover an area of 52.79 square kilometers, account for 4.2% of the total land area of the city. Among which, there are four islands which cover more than 1 square kilometers (100 hectares): Xugong Island of Shengsi County, Da Xi'an Island of Daishan County, Xifeng Island and Lianghengshan Island from Putuo District. As the biggest one among uninhabited islands, Da Xi'an Island covers an area of 2.52 square kilometers. There are 422 islands that cover the area between 1~100 hectares and 865 islands cover an area smaller than 1 hectare. Since Zhoushan City has been considered a city with 1000 islands, all the land and forestry counterpoising truly of islands here, no matter inhabited or not, have been entrusted by the State to the collective in accordance with the relevant law of forestry and land. Certificates of ownership have been issued already. For example, the ownership certificate of mountain and forest issued by Daishan County government in 1982 has the public sealing of the county government and signature of the county head. It clearly regulates that "in line with the national policy, we confirm the mountain and forestry of ... belong to the commune. The certificate is issued and under the protection of national laws. No infringement from other units or individuals are allowed". After the land and forestry counterpoising truly had been entrusted to the commune, most of them have been further subcontracted to the individual farmers.

C. Individual or Company Ownership

Because of unclear ownership, some uninhabited islands which are close to the land and small in size are almost in a state of neglect. Neighboring villagers call these islands "deserted islands", and some engage in small scale agricultural production or aquaculture activities and consider themselves owners of the "deserted island".

Due to unclear ownership, some uninhabited islands were developed by certain well-funded companies who believe that those first take the island will be the landowner. For example, the Wu Island (also called Xiekou Island, at north altitude 37°06'24", east longitude 122°28'42") is an uninhabited island with a limited area

of 0.0005 kilometers and the elevation of highest point 3.4 meter. However, since it is close to the shore (just 0.63 nautical miles), a company landed on the island and started to construct. Its bulldozer and excavator are on the island now. Another example is Datu Yu of Xiamen, Fujian Province. Three villas had been established on the island and were abandoned before the conclusion of the construction since they were illegal.

The above analysis demonstrates that since there are no clearly defined ownership of the uninhabited island, no effective policies and measures to deal with the relevant issues, certain problems arise. The ownership of the uninhabited island is not clear and some local governments, units or individuals in the coastal areas believe that the island near their administrative region belongs to them and take the land or transfer and rent the island, resulting in a disorderly development of the uninhabited island.

III. Recommendations on the Ownership of Uninhabited Islands

A. Improve the Legal Regime of Ocean Property Right

Ocean, including the islands and sea areas, is an important natural resource supporting the economic and social development of China. Law of the People's Republic of China on the Administration of the Use of Sea Areas has established a management system of ocean property. Inhabited islands are incorporated in the current city and village system and are subject to the jurisdiction of the relevant laws and regulations on property rights. While, as a unique natural resource, it is not until recently that the importance of uninhabited islands has been recognized, and therefore, there are no definite laws regulating their ownership. On one hand, the uninhabited island has high comprehensive resource value because of its significance on the State sovereignty, security, transportation and energy. While on the other hand, the uninhabited island usually just covers a small area with limited soil, no fresh water and frequent natural disasters. Furthermore, they have substantial ocean attributes and basically do not have land worthy of development and can't be used as agricultural land for farming, plowing, or animal husbandry. In addition, the high fragility and irretrievability of its ecosystem make it improper to include uninhabited island into the collective ownership of the farmers. Article 9 of Constitution stipulates that "[m]ineral resources, waters, forests,

mountains, grassland, unreclaimed land, beaches and other natural resources are owned by the State, that is, by the whole people, with the exception of the forests, mountains, grassland, unreclaimed land and beaches that are owned by collectives in accordance with the law.” Like mountains, beaches and unreclaimed land, the uninhabited islands should be administered as a special and independent resource in the administration of legal regulations and systems. However, what makes the difference is the single ownership of uninhabited islands; therefore, they should be regarded as one of the “other natural resources” regulated by the *Constitution*. Their ownership should belong to the State⁶ and a complete property system should be established. Due to a lack of legal regulations on the ownership of uninhabited islands, there are frequent random occupation, utilization and damaging of uninhabited islands. The recent “island owner” fashion, in particular, has attracted certain enterprises and individuals to develop and utilize uninhabited islands through various channels which has worsened the waste of island resources, damaged local ecosystem and disrupted development order of the island and even threatened China’s State sovereignty and security. Therefore, it is really urgent for us to establish the property system of the uninhabited island via legislation and perfect our marine property system.

In addition, since there are large varieties of islands in different areas which might have certain historical issues, it might be advisable to make detailed rules by the local government. The benefits of the public must be properly handled to safeguard the social stability.

Uninhabited islands belong to the State. But for the island that has been occupied (utilized) in the real life, the State might adopt different methods in accordance with different situations if it wants to reclaim it: first, is it unjustifiable occupation or justifiable one and are there any legitimate formalities? If there are no legitimate formalities and it is simply an occupation without permission, it should be reclaimed; while if it is rational utilization, for instance, the user has already done the application process from the village committee, then relevant compensation should be made according to law if the State is to reclaim the island; if several farmers form a partnership and jointly cooperate and develop the island, they could continue to use upon paying using fees in accordance with relevant provisions; if the island belongs to the collective ownership of the village before

6 Jiang Chengsong and Zhai Yong, *Constitution Principles on Legal Regulations of Natural Resources*, at http://www.chinalawedu.com/news/2004_7/2/1340484979.htm, 20 July 2006.

the issuance of relevant law, and its development or utilization has been conducted under the prerequisite of protecting the uninhabited island, then it should be classified as justifiable operation (utilization).

*B. Give Full Play to the Role of State Oceanic Administration
Department in the Comprehensive Administration of
Uninhabited Islands*

Uninhabited islands are national asset, should be owned by all the people and whose ownership exercised by the State Council on behalf of the State. But it is impossible for the State Council to exercise its ownership and right to use around the whole State. Therefore, it is necessary to define a specific department to take the charge from the State Council and mobilize the enthusiasm of the coastal provincial governments. The Sixteenth National Congress of the China's Communist Party points out: "Continuing to adjust the layout and structure of the State sector and reform the State property management system is a major task for deepening economic restructuring. We should give full play to the initiative of both the central and local authorities on the precondition of upholding State ownership. The State should make laws and regulations and establish a State property management system under which the Central Government and local governments perform the responsibilities of investor on behalf of the State respectively, enjoying owner's equity, combining rights with obligations and duties and administering assets, personnel and other affairs."

Because of the multiple values that the uninhabited island possesses, there are several departments in the State Council involved in its management, such as ocean, land, forestry, mineral resources, fishery, transportation, tourism, environmental protection and etc. The oceanic administration department should be the best choice to offer relatively concentrated comprehensive management. The reasons are as follows:

First, the island is an integral part of the ocean, but the administration mode of the ocean in 1960s to 1970s by most States is based on the principle of maximizing the efficiency of resource utilization. For instance, the transportation department was responsible for port, the fish section was responsible for fishery, tourism sector for entertainment and chemical engineering department for salt industry and etc.

Since each department was concerned about the maximum benefits that its resource can create, there was limited coordination among the different departments. In addition, there is only singular discipline base for each department which resulted even in the extension of management model of the land into the ocean. Experience and data have shown that this management model is an important reason for the conflicts in the utilization of the marine resources and deterioration of the environment. Since 1990s, with people have more understanding about of the importance of the ocean and marine ecosystem, they put forward the comprehensive management model for marine resources on the basis of their past experience. There are proposals to have integration among departments, at various levels (like State level, provincial level or local level), between science and management and among different spaces (sea areas). Ecosystem Approached Management, which was introduced by the academia and administrative departments in the end of the 20th century, takes into all relations of living and non-living resources into consideration, rather than solve a single problem in isolation.

Islands are important components of the marine ecosystem and they themselves can form a clearly bordered and comparatively complete unique ecosystem which can also be called as island ecosystem. The basic cell structure of it consists of three geological ones: sea area, land-sea transition zone, and land area; or it can be divided into four parts (sub-system): island land, island beach, reefs and the surrounding seas. The main features of the island ecosystem and its physical flow and energy flow are mainly controlled and restrained by the ocean. Therefore, the management of the island should base on the scientific study and technological method of the marine and is inseparable from the management of the ocean. State Oceanic Administration is not a simple resource management department; rather, it provides comprehensive marine administration. It is advisable to have the State Oceanic Administration to take charge of uninhabited islands around the country on behalf of the State Council, which could avoid the conflicts arisen from the singular resource management and provide a comprehensive and ecological administration for the uninhabited island.

In addition, the “three determination” (determination of the department in charge, and its functions and personnel allocation) plan of the State Council points out that the State Oceanic Administration is responsible for the relevant work of islands. The Administration has already formed a mature management system and regulations of islands over the past 20 years. With the cooperation with relevant department, it has conducted a comprehensive investigation of all national island

resources from 1988 to 1996 and established three island pilot programs like island development experimental zone, island management demonstration zone and etc. In 1996, in line with the spirit of the United Nations Conference on Environment and Development and the future development strategy of the China's Agenda 21 – White Paper on China's Population, Environment and Development in the 21st Century, the Administration made China Ocean Agenda 21. Chapter IV “sustainable development of the island” outlines the strategic development framework for the economic development of the island, protection of island resources and environment, management and protection of uninhabited islands and the infrastructure construction of the island and its social development. It points out “to achieve a sustainable development, we must strengthen the comprehensive management of the island, develop and use the island in a rational and proper manner to avoid blind and damaging productive activities, pay attention to the protection of ecosystem in the development process and give particular attention to the islands that play important roles in protecting the biodiversity.” On the basis of this principle, the State Oceanic Administration, together with Ministry of Civil Affairs and the Headquarters of the General Staff jointly promulgated the Provisions on the Management of the Protection and Utilization of Uninhabited Islands, which started the system construction for our island protection and management, directed and guided the island management of the local People's Congress and government in the coastal areas. Currently, a set of mature island management system and regulations have taken into shape between the oceanic administrations from the State level to the local level.

Furthermore, the management of the uninhabited island needs to be equipped with special marine facilities, such as vessels, navigation communication, devices for offshore survey, detection, monitoring and surveillance together with professional personnel who are familiar with the offshore working technology and management; or it would be impossible to conduct the management. At present, the oceanic administrative departments have had all these personnel and equipment. If various departments are there to take the charge, a large amount of equipments and personnel would be required, which would not only lead to an economic waste but also prevent us from having a concentrated and comprehensive management.

*C. Give Full Play to the Enthusiasm of Local Government
in the Administration of Uninhabited Islands*

Currently, a new system with a hierarchical management of the central government and local government under the unified leadership of the State is in power for our marine management. As Article 7 of the Law of the People's Republic of China on the Administration of the Use of Sea Areas regulates that "[t]he department in charge of marine administration under the State Council shall be responsible for supervision over the use of the sea areas nationwide. The departments in charge of marine administration under the local people's governments at or above the county level shall, as authorized, be responsible for supervision over the use of the sea areas adjacent to their administrative regions respectively. The department in charge of marine administration shall, in accordance with the Fisheries Law of the People's Republic of China, conduct supervision over marine fishery. The maritime administration authority shall exercise supervision over maritime traffic safety in accordance with the Maritime Traffic Safety Law of the People's Republic of China." Article 10 regulates that "[t]he department in charge of marine administration under the State Council shall, in conjunction with the departments concerned and the people's governments of coastal provinces, autonomous regions, and municipalities directly under the Central Government work out marine function zoning plans. The departments in charge of marine administration under the coastal local people's governments at or above the county level shall, in conjunction with the departments concerned of the people's governments at the same level, work out the local marine function zoning plans on the basis of such plans worked out at the next higher level." Articles 12, 17 and 18 regulate the examination and approval of marine function zones by different levels.

The administration of the uninhabited island should abide by the basic spirit of the Law of the People's Republic of China on the Administration of the Use of Sea Areas to have hierarchical administration between the central government and local government under the united leadership of the State. The island has become the new forefront for China's marine economic development and the property system has been developing from the ownership oriented model to use oriented model. The extension from ownership to right of use covers a serious of policies, measures and large amounts of detailed work. The task that the local government is capable of can be handed to them. For the administration of the uninhabited island that involves the sovereignty, national interests, national plan, legislation, policies, development strategies, standards, organization of national islands investigation, monitoring, surveillance, science plan, deciding on the list of uninhabited islands

that need special protection and base points as well as the guidance for the local administration should be conducted by the central level government. (Some functions can also be fulfilled by some agencies, such as the three institutes of the State Oceanic Administration); while for the local governments, they are mainly responsible for making plans of the local island on the basis of the national plan, accepting applications for the approval of non-national key islands development and protection, supervising and inspecting uninhabited islands in its administrative region, collecting island using fees in accordance with the regulations and imposing punishment on the activities that violate the law. Therefore, the role of the local administration should be regulated in the legislation so as to fully mobilize their enthusiasm.

Translator: GE Weihong