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Reconsidering the Senkaku Islands Issue from an International Legal Perspective

Motoyasu Nozawa*

Abstract

According to Japan's position, it is clear that the Senkaku Islands are an inherent part of Japan, as evidenced by both historical facts and international law, and therefore there is no "disputes" about the sovereign title of the islands. However, in *Mavro Mmatis En Palestine*, a dispute is a disagreement on a point of law or fact, a conflict of legal view or interests between two parties, and it is not sufficient for one party to a contentious case to assent that a dispute exists with the other party.

Keywords: Title to Territory, Occupation, Inherent Territory, Territorial Sovereignty

I Location of the Problem

The Senkaku Islands¹ are Japan's inherent territory and there is no territorial dispute to be resolved. This has been the consistent view of the Japanese government. However, since the Japanese government nationalized the Senkaku Islands in December 2012, the activities of Chinese vessels around the Senkaku Islands have become the norm. The following year, China not only established its own air defense identification zone in the airspace over the Senkaku Islands, but also enacted the "Maritime Police Law" in 2021, allowing the units of the China Coast Guard Bureau to use weapons in the "sea area under their jurisdiction." In addition, in August of this year (2022), after a visit to Taiwan by U.S. Speaker of the House Pelosi, China conducted a live ammunition military exercise in the form of a mock siege of Taiwan, with part of the ammunition landing in the EEZ of Japan. In response to Japanese protests, China asserted that the Senkaku Islands are China's inherent territory. If a contingency involving Taiwan were to occur, it could become a contingency involving Japan, including the Senkaku Islands. The situation in the East China Sea, including the Senkaku Islands, is unpredictable. How would such actions and claims by China be evaluated under international law, and what are the legal grounds for China to engage in such actions?

There have been a number of excellent historical and legal studies on the Senkaku Islands and other territorial disputes. In this paper, I will first clarify the issues that have been discussed so far (especially

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¹ The Senkaku Islands (Diaoyutai or Tiaoyutai Islands in China, Pinnacle Islands in Western countries) are located west of Okinawa Island and north of the Yaeyama Islands, between 123°30' and 123°41' east longitude and 25°44' and 25°55' north latitude. They are now scattered between 25°44' and 25°55' N latitude. They are currently part of Ishigaki City (Tonoshiro, Ishigaki City), Okinawa Prefecture, and consist of four uninhabited islands (Uozurijima (3.8km²), Kubajima (0.87km²), Kita Kojima (0.31km²), Minami Kojima (0.35km²), and three reefs, plus Taishojima (0.05km²) 110 km to the east. (4) Historically, the island is located 110 km to the east of the island.

Ministry of Foreign Affairs of Japan Website <http://www.mofa.go.jp/mofaj/area/senkaku>

those related to the title to the territory) from the perspective of international law, and then reexamine the claims of the Japanese and Chinese governments that the islands are “inherent territories” and the Japanese government’s view that “there is no territorial issue to be resolved” from the viewpoint of international law. I would like to examine this from the perspective of international law.

II Issues concerning the title to territory

1 Legal doctrine of prior occupation and historical title

“Title” is defined as a fact recognized by law as giving rise to a right. The title of acquisition of territory is, in other words, the fact recognized by international law as the right to acquire a certain territory. Acquisition of national territory is realized by the creation of a valid territorial title. In other words, a territorial dispute takes the form of one state asserting the validity of its title and another state contesting it.

As is well known, the Senkaku Islands were formally incorporated into Japan’s territory by a Cabinet decision on January 14, 1895. It was not until the early 1970s that a dispute over the Senkaku Islands (the existence of the dispute will be discussed below) became apparent (Taiwan claimed the islands in June 1971 and China in December of the same year). This was the result of a marine survey conducted in the fall of 1968 by the United Nations Economic Commission for Far East Asia (ECAFE, now the Economic and Social Commission for Asia and the Pacific, SCAP), led by Japanese, Korean, and Taiwanese scientists, which indicated the possibility of abundant oil reserves in an area of approximately 200,000 square kilometers of seabed northeast of Taiwan. Since then, China (Taiwan) has been implementing a series of state actions, such as enacting domestic laws to declare the Senkaku Islands as its territory.

When considering the Senkaku Islands issue, one of the most important issues under international law is the question of title to acquire the territory. Japan claims the legal doctrine of “prior occupation,²” while China claims the issue of so-called “historical title.” In the Basic Opinion of the Ministry of Foreign Affairs of March 8, 1972, “The Territorial Issue of the Senkaku Islands,” and in the Ministry of Foreign Affairs document of January 1978, “Regarding the Senkaku Islands,” etc., Japan stated that it “made several on-site surveys of the Senkaku Islands over a period of ten years since 1885 through the authorities of Okinawa Prefecture,” and “carefully confirmed that there was no evidence of the islands having belonged to the Qing Dynasty.” After “carefully confirming that there was no evidence of their belonging to the Qing Dynasty,” the Senkaku Islands were acquired through a careful annexation procedure in which “a marker was erected under the jurisdiction of Okinawa Prefecture.” In traditional international law, “prior occupation,” which is established as the title to acquire territory, must satisfy the following four requirements in order to be valid under international law. First, the subject of the first occupation must be a state. Second, the territory in question must have been “unclaimed” prior to the prior occupation. Third, the state making the first occupation must express its territorial intention toward the territory in question (subjective requirement). Fourth, there must be effective control over the territory by the state that is the first occupying party.

² Historically, it is undeniable that the doctrine of prior occupation was used by Western nations as a means of acquiring colonies. Takane Sugihara, “Lectures on International Law,” p. 280.

2 Requirements for Prior Occupation and Japan's State Execution

It is therefore necessary to examine whether Japan's prior occupation of the Senkaku Islands satisfies these three requirements.

Regarding the first requirement, no problem arises because it is an act performed by the Japanese state. The second requirement is whether the Senkaku Islands are unclaimed land or not. As mentioned above, it seems almost certain that the Senkaku Islands were unclaimed land according to Japan's claim. However, China opposes Japan by "historical title." In other words, China claims that the Senkaku Islands were China's territory long before Japan incorporated them into its territory through prior occupation. This should be considered in light of two other requirements.

What about the third requirement, the subjective requirement of an expression of intent to possess the territory? According to the Basic Opinion of the Ministry of Foreign Affairs and the Ministry of Foreign Affairs data, this was expressed by the Cabinet decision on January 14, 1895, to the effect of constructing a marker on the territory. China, on the other hand, argues that this formal declaration of intent to claim the territory is invalid because the relevant countries, including China, were not notified of the declaration. However, international court precedents such as the Palmas Island³ and Clipperton Island cases,⁴ as well as major academic theories, deny that notification is a requirement under international law regarding the validity of prior occupation.

As for the fourth requirement, effective control (objective requirement), it does not only mean physical occupation in the form of actual use or settlement of land, but also establishment of social control in the area concerned (social occupation theory), as in the decisions in the Palmas Island, Eastern Greenland⁵, and Mankiye-Ekureo cases⁶. The mere act of erecting a marker in the area in question does not constitute completion of possession. With regard to the Senkaku Islands, after the incorporation of the Senkaku Islands in 1895, Japan established land titles on four islands except Taisho Island (then called Kume-aka Island) in 1902 through the land readjustment project of Okinawa Prefecture, and then in 1921, the Ministry of Home Affairs also established land titles on Taisho Island, thus completing the incorporation procedure of the Senkaku Islands under domestic law. Thereafter, the government leased and disposed of state-owned land to the islanders, collected land rent and property taxes, and granted permission for phosphate mining. At its peak in the 1890s, the Senkaku Islands were home to 247 people living in 99 households. Given these circumstances, it is not difficult to imagine that social control in effective rule was well established. What is even more remarkable is that the lack of competing state claims made effective control more certain, as the Eastern Greenland case decision demonstrates. The fact that China did not raise any claims until 1971 means that the Japanese did not have the right to claim the land until 1971, when they were forced to abandon their claims in favor of China. This suggests that Japan's effective control was sufficient to satisfy the requirement of prior occupation in view of international court precedent. The cohesion of title and lack of protest will be discussed below.⁷

³ Permanent Court of Arbitration, *The Island of Palmas Case, United States of America v Netherlands*, 4.April 1928.

⁴ *Affaire de l'île de Clipperton*. Sentence arbitrale. RIAA.II.p.1105

⁵ PCIJ Series A/B, No.53, pp.45-46

⁶ ICL Reports 1953, p.59

⁷ The fact that the time of the territorial incorporation was close to the end of the Sino-Japanese War is thought to be the reason why the Chinese side said that Japan had "grabbed" the territory. Yoshiro Matsui, *Horitsu Jiho*, Vol. 85, No. 3, p. 56

3 Historical Title and China's State Practice

The Chinese side's argument can be summarized as follows. As is clear from the *Sakuhoushi*, the boundary between China and Ryukyu was between Sekibi Island (Taisho Island) and Kume Island, where the "Kokusui-kou" (Okinawa Trough) was located, and it was customary for sailors to hold the "Kakou Festival" when they passed through there. In other words, this is the "border between China and the outside world." In the Ming Dynasty, the Senkaku Islands were already included in the "Chinese maritime defense zone" and were attached to Taiwan, which was part of China, and were "seized" by Japan in 1895 when the defeat of the Qing government became certain in the Sino-Japanese War. The Japanese government then forced the Qing government to conclude the Treaty of Maskan, which ceded Taiwan, all attached islands, and the Penghu archipelago to Japan.

As to the historical title, they claim to have discovered and effectively controlled the Senkaku Islands before Japan. As examples of the effective control they claim, they cite the use of the Senkaku Islands as a navigational marker, their incorporation into China's maritime defense zone, and their use as a fishing ground by fishermen. The first question is what "discovery" itself means under international law. As to whether it constitutes prior occupation, it is common to consider "discovery" as "immature title"⁸ even in the 15th and 16th centuries, and it must be supplemented by effective prior occupation during a reasonable period of time thereafter. With respect to China's claim of effective control, it is reasonable to assume that the route markings and incorporation into the maritime defense zone merely indicated the Senkaku Islands as a sea area to be watched for the defense of the mainland, since the islands were in the path of Japanese pirates when they attacked and the vicinity was a sea area they frequented. It is not likely that the Chinese had effective control over the area as they claim. With regard to the use of the area as a fishing ground by fishermen, the ICJ Fisheries Decision stated, "As far as the fishing activities of coastal residents are concerned, occupational activities carried out by individuals on their own initiative and for their own benefit, without any authority or delegation by the government, cannot confer sovereignty on the State," (individual opinion of Judge Hsu Mo), and the activities of private individuals cannot be considered as an element of effective control of the state.⁹

4 Postwar Disposition and the Senkaku Islands

China claims that the Senkaku Islands were ceded to Japan under Article 2 of the Sino-Japanese Peace Treaty. However, the article does not clearly state this, and there is no evidence that this was mentioned in the negotiation process of the treaty. In particular, the scope of Taiwan to be handed over is not discussed.

What about postwar handling of the issue? Immediately after the signing of the Okinawa Reversion Agreement (December 23, 1971), China condemned both the U.S. and Japan with regard to the Senkaku Islands, claiming that the Diaoyu Islands and other islands attached to Taiwan had been under the administration of the U.S. government after World War II, and that any attempt to hand them over again to Japan was an act of aggression against Chinese territory and sovereignty. The U.S. and Japan were condemned for their violation of China's territory and sovereignty. In essence, the Senkaku Islands were

⁸ Even in the 15th and 16th centuries, it is doubtful that the mere fact of discovery alone confers more than immature title. *Ibid.* Vol.85, No.2, p56

⁹ CIJ Recueil 1951, p.116

included in Taiwan and other areas that were finally separated from Japanese territory under Article 2 of the San Francisco Peace Treaty, and were not included in the areas that would remain Japanese territory but would be under U.S. administration for the time being, as stated in Article 3 of the treaty. Japan's claim is that the area is not included in the area that will remain as Japan's territory under U.S. administration for the time being.

Japan accepted the Potsdam Declaration on August 14, 1945, and immediately thereafter China began the process of incorporating "Taiwan and the Penghu Islands" into China. On September 2 of the same year, the Allied Supreme Commander's General Order No. 1 was issued at the same time as the Japanese surrender document was signed, authorizing Chiang Kai-shek to distribute the occupied territories. In accordance with this order, the Ordinance on the Organization of the Taiwan Provincial Administrator was promulgated on September 20, and the seizure of Taiwan was specifically initiated in October. On October 25, the formal confiscation procedure was completed with the "Ceremony of Acceptance and Surrender," and the ROC legally completed the incorporation of Taiwan into its own country. Taiwan thus became the Province of Taiwan.

So, how did China view the Senkaku Islands at that time? In other words, were the Senkaku Islands included in the area that Chiang Kai-shek decided to seize? It should be noted that the U.S. military occupation of the Yaeyama Islands in Okinawa Prefecture, including the Senkaku Islands, began two years after China's annexation of Taiwan was completed. In other words, China did not seize the Senkaku Islands, and the Senkaku Islands were not included in the Cairo Declaration's definition of "Manchuria, Taiwan, Penghu, etc., all of which were stolen by the Japanese from the Qing". The fact that China, which immediately after Japan's acceptance of the Potsdam Declaration began the annexation of Taiwan and the Penghu Islands, did not confiscate the Senkaku Islands, not only means that it did not recognize the Senkaku Islands as its own territory, but also that it acknowledged that the Senkaku Islands were part of Japan (of course, Chiang Kai-shek, who was authorized to do so, did not recognize them as his own territory).¹⁰

5 Coagulation of Title and Lack of Protest

So far, the Chinese side has developed various theories (sophistry) to prove the illegality of Japan's prior occupation of the Senkaku Islands based on historical title and that the Senkaku Islands are part of Taiwan. However, all of these opinions were officially expressed after December 1971 (June 1971 for Taiwan). In other words, no protests or counter claims were made until 1971. These facts allow Japan to claim "solidity of title": in the ICJ Fisheries Case (1951), without protest from foreign countries, "the permanent and sufficiently long-standing practice, and the attitude of the Governments towards it, is evidence of the fact that they did not consider it to be in violation of international law. This is evidence of the fact".

Applying this to the Senkaku Islands, even if the Senkaku Islands were not unclaimed territory as claimed by China at the time of Japan's prior occupation, but were China's territory, the continuous and peaceful exercise of sovereignty over the territory by Japan over a long period of time (over 70 years) (without any protest) is evidence of a violation of international law. This is considered to be evidence of

¹⁰ "Japanese Territory" by Kentaro Serita, p. 113 (2002), Chuko Soshō

the fact that the islands were legal under international law.¹¹

III Existence of International Dispute and Critical Date

1 Problems concerning “No Territorial Dispute”

As seen above, the incorporation of the Senkaku Islands into Japan's territory under the doctrine of prior occupation was carried out in an extremely peaceful manner, and there is no doubt whatsoever about Japan's sovereignty over the islands.

By the way, since the Japanese government stated in a letter to the Secretary-General of the United Nations in February 1997 that “there can be no dispute of territorial title” to the Senkaku Islands, it has consistently maintained as in the General Debate of the UN General Assembly on September 27, 2012 that “there is no dispute to be solved over the Senkaku Islands in the first place.” In international cases, as in the *Mavromatis case*¹², a “dispute” is a “disagreement on law or facts,” or as in the *Southwest Africa case*,¹³ “merely denying the existence of a dispute is not sufficient to prove its non-existence,” and “for a dispute to exist, one party's claim must be opposed by the other party.” In order for a dispute to exist, one party must “actively oppose the claims of the other party.” Looking at the exchange between Japan and China at the UN regarding the Senkaku Islands issue, it would be difficult to deny the existence of a dispute between the two countries.

2 Critical Date and Future Issues

If a territorial dispute (international dispute) exists between the two countries, it must be resolved by peaceful means in accordance with the UN Charter so as not to endanger international peace, security, and justice. This is an obligation under general international law. Furthermore, according to the Declaration of Friendly Relations, “each State is obliged to refrain from the threat or use of force that would violate the existing borders of another State or as a means of settling border disputes, including territorial disputes and questions concerning national borders.” They are also obligated to “refrain from any action which might aggravate the situation and jeopardize the maintenance of international peace and security, and to act in accordance with the purposes and principles of the United Nations”.

In settling territorial disputes, the date on which the basis of territorial title is to be established is the critical date, and facts up to that date are admissible as evidence in international tribunals, while those after that date are not subject to review. This allows the court to determine the rules of law to be applied, with the aim that the court automatically precludes any subsequent action by either party with the aim of changing the situation that existed at the time the dispute arose (*Isle of Palmas case*). Usually, the date on which the dispute “materialized”¹⁴ is considered the criterion for the conclusive date.

When, then, is it appropriate to consider the critical date in the Senkaku Islands dispute? As already mentioned, Japan incorporated the Senkaku Islands into its territory on January 14, 1895 under the doctrine of prior occupation. In response, China stated that the Senkaku Islands were not already unclaimed land in 1895 due to historical title. However, was there any dispute between Japan and Qing China at that time? Under international law, an official and substantial protest by the other party would

¹¹ ICJ Reports 1992,p.577, ICJ Reports 2002,p.415-416

¹² PCIJ Series A,No2 p11

¹³ ICJ Reports, 1962,p.32

¹⁴ ICJ Reports, 1953,p.53, ICJ Reports, 2002,p.682,Para135

materialize the dispute. If so, then February 26, 1971, when Taiwan officially and substantially protested against Japan, and December 30 of the same year for China, would be the decisive date, and subsequent actions (joining international treaties, enactment of domestic laws, etc.) would not strengthen the position of either country in the dispute at all.

In the above, we have examined some of the issues and problems inherent in the Senkaku Islands issue in the event that it is considered an international dispute. However, the Senkaku Islands issue will only come to light when a territorial dispute (international dispute) between the two countries exists and concrete measures are taken to resolve the dispute peacefully.¹⁵

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