

South China Sea Disputes Are Heading Towards Dangerous "Uncharted Waters"

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2015, the South China Sea dispute was at a time of change and turbulence. The disputes of the South China Sea related claimant countries over the scramble for marine resources, island sovereignty, maritime demarcation and channel security are further aggravated; the intervention of “Great Maritime Powers” in the South China Sea Situation is intensified gradually; under the background to build a “Maritime Power”, the Chinese government increased the South China Sea rights protection. With the South China Sea Confrontation upgraded and the conflict risk increased, the related countries are heading towards dangerous “Uncharted Waters”. To exit the “Uncharted Waters”, all the parties should exercise restraint and seek a compromise point.

The author reviewed the development of the South China Sea Disputes, analyzed the hidden reasons and provided five suggestions.

The Deadlock Resolved By the International Arbitration

On the issue of whether to resolve the South China Sea Dispute through International Arbitration, some South China Sea claimant countries support while China oppose, which set both parties in a stalemate. Philippines is the judicialization “vanguard” of the South China Sea Dispute. On January 2013, Philippines submitted “Philippines v. china arbitration case” to The Permanent Court of Arbitration at The Hague. Philippines believed it had submitted a written document of “notice and rights claim about West Philippine Sea” to China and stated the disputes, requests and the reasons. Obviously, Philippines filed the arbitration well prepared.

China will always stand its ground of “not accept and not participate in the arbitration filed by Philippines”. On Dec. 7th 2014, China published its “position paper of Chinese Government on the jurisdiction issue in the South China Sea Arbitration case filed by the Republic of Philippines”. In the “position paper”, China clarified that the arbitration court had no jurisdiction in arbitration cases, which opposed Philippines’ claim in law and urged it to return to the effective way of direct negotiation.

Oct.29th 2015, Philippines unilaterally called for the established “South China Sea Arbitral Tribunal”(The Hague) to give a ruling on the jurisdiction and admissible issues. The tribunal made a ruling that Philippine could have jurisdiction in 7 out of 15 requests it had raised. From the result, in the battle between China and Philippines, China seemed to lose the first game. Although China clarified that the Arbitral

Tribunal had no jurisdiction, the result had showed the court thought it had part of the jurisdiction.

The Game of “Intervention” and “Anti-intervention” between great powers is intensified

Since 2015, the US has been increasing its intervention in the South China Sea disputes by “freedom of navigation” and “aviation liberty”. May 8th, the United States Department of Defense released the China Military and Security Development Report (2015) and pointed out that in the South China Sea area, China was pushing forward large-scale land reclamation that could be used for “base of operations”. It also said the land reclamation area was enlarged to about 8 square km, which was contrary to the “regional wish to realize peace and stability”. May 13th, the Assistant Secretary of the US State Department for Asian and Pacific Affairs Russell warned China on a US senate hearing that its effort to build island in South China Sea would be in vain. Russell said that, “No matter how much sand you have piled up on the islands and reefs of the South China Sea, you are unable to achieve sovereignty.” May 20th, the US Department of Defense allowed a CNN journalist board its Boeing P-8 Poseidon for interview and flied over the waters around the Fiery Cross Reef of the Nansha Islands. Sept. 24th and 25th, the US President Obama required China to immediately terminate the instruction of islands in South China Sea during a talk with Chinese President Xi Jinping.

The latest conflict happened on Oct. 27th 2015. The US sent USS Lassen to sail within 12 sea miles around South China Sea Islands and Reefs (Subi Reef and Mischief Reef). By this, the US showed it refused to recognize China’s sovereignty over the Nansha Islands Waters. China strongly objected the action of USS Lassen that time, condemned that its actions was illegal and urged it to stop further “dangerous and aggressive” move. It is challenging for China this time to respond to the US and also vital for the US to avoid further aggressive actions under the tough attitude of China. For the US government, it is sailing toward dangerous “Uncharted Waters”.

The possibility of conflict between the US and China around South China Sea Disputes is increasing, and the two countries’ confrontational behavior is sailing towards dangerous “Uncharted Waters” in South China Sea. From China’s perspective, it respects every country’s Freedom of Navigation and Aviation Liberty under the International Law. America’s provocative behavior would pose a threat to China’s sovereignty and safety. America neglects the island building behavior of Malaysia, Philippines, Vietnam and other countries while selectively interfere with China’s behavior. From its perspective, the US believed it was just sailing

freely on the high seas (rather than China's territorial waters). The calls for tougher actions are increasing in both countries, they have to manage to ease the tension.

Apart from the US, other South China Sea "Extraterritorial Powers" such as India and Japan also intervene in the South China Sea Disputes. Oct. 14th 2015, India's Foreign Minister Swaraj and Philippine Foreign Minister Albert del Rosario called South China Sea by "West Philippine Sea" and "South China Sea" at the same time in a joint announcement after the Third India and Philippines Bilateral Joint Commission, which indirectly stated India's diplomatic support for Philippine in the dispute. Japanese Prime Minister Shinzo Abe repeatedly supported America's sail around South China Sea islands and reefs. Japan's ministry of defense planed to dock the warships of Japan Maritime Self Defense Force in Vietnam's Cam Ranh Bay which faces the South China Sea in 2016 for the first time with the intention to contain China in the South China Sea.

New Considerations on the South China Sea Strategies

South China Sea is the key part in the China "Maritime Great Power" strategic layout, the sea that must be passed for China to find footholds in Pacific area, explore the India Ocean and push forward the "21st century Maritime Silk Road" plan. Under the background that China is establishing a "Maritime Great Power" and the South China Sea Dispute is highlighted, the Chinese Government must give it a second thought.

Consideration One: to seize control in the law nature of U-shaped line of the South China Sea. The major basis is the "historic rights". The hard situation for the Chinese Government is that the state of the "historic rights" is very vague and the detailed rights are not mentioned. The bigger challenge is that the Chinese law doesn't give the U-shaped line a clear legal identity and legal position. The writer thinks that, of the four legal explanation, the South China Sea U-shaped line "state line saying", "belonging line saying", "historical water line saying" and "historic rights saying", the supporting facts and legal reason of "belonging line saying" is the most sufficient. "Belonging line saying" proposes that under the premise that the sovereignty of South China Sea belongs to China, China designates its territorial sea, EEZ and continental shelf in accordance with the "United Nations Convention on the law of the sea". It not only suits the appearance, development and historical process of the U-shaped line, but also benefits China's right and interests in South China Sea area. The writer advises that if the EEZ doesn't reach the U-shaped line, U-shaped line's "historic right" can assist. Within the "historic right" line, China enjoys marine fisheries resources, seabed oil and gas resources, the development and utilization of mineral resources priority. The writer

also thinks, it can make other claimant countries more rational about China's claim by adding "historic right" explanation to the legal nature of "belonging line". It also can help China take the lead in international law explanation of the U-shaped line.

Consideration Two: to promote the establishment of South China Sea Claimant Country Mechanism. Rather than putting the disputes in the "International Judicial System" (The Hague's Permanent Court of Arbitration), it is better left within its territorial waters. The mechanism promoted by China includes five claimant countries, that is China, Vietnam, Philippines, Malaysia and Brunei. In this mechanism, there are four vital problems. Firstly, the "bilateral and multilateral negotiation" is practical. The island sovereignty disputes should be solved under the "Five Countries and two sides"(including China, Vietnam, Philippines, Malaysia and Brunei) framework; after Indonesia was included, the delimitation of sea area should be decided under the "Six Countries and Two sides" (including China, Vietnam, Philippines, Malaysia, Brunei and Indonesia) framework. Secondly, the claimant in maritime resources should be declared more clearly. Under the South China Sea Claimant Countries Mechanism, China should turn the "historic right" into practical use of maritime resources. China should show other four claimant countries what its right is. Thirdly, the navigation liberty issue and the freedom of the sailing of military ships on and under water should be negotiated as soon as possible. The military use of South China Sea lacks recognized rules, which is the reason why conflict exists between China and America. This issue is also a matter of principle between coastal countries (whether they are claimant countries or not) and user states. Now each claimant countries' claimed exclusive economic zones overlapped with each other, it is necessary for all parties to achieve common rules for military use and military navigation. It is possible to set short-term, mid-term and long-term goals. The short-term one is to control the crisis; the mid-term one is to build mutual trust; the long-term one is to solve the dispute.

Consideration Three: to examine the differences in the positions of the claimant countries and take action accordingly. The other four claimant countries apart from China can be divided into two groups: Philippines and Vietnam are in a group, their attitude toward China is tough; Malaysia and Brunei are in a group. China should adopt a firm bottom line policy to Philippines. China and Vietnam should properly resolve the South China Sea Disputes from the overall strategic level to maintain a friendly bilateral relationship. China and Vietnam should borrow experience from the successful resolution and cooperation of land boundary demarcation and Beibu Gulf demarcation. South China Sea Disputes is the final historical issue between China and Vietnam, if this issue can be resolved

properly, the two countries' relationship could develop to a better stage. Malaysia and Brunei keep a low profile, they choose to make “muffled fortune” by keeping the gas and oil exploration and fishing going. China's resolution is extra oil and real benefits. When China is making open protest, it should avoid putting those two countries in an “opposite” position. Since Indonesia is the biggest country in the ASEAN and it doesn't make a claim of sovereignty in South China Sea, in the dispute, it is rather detached and neutral. So China should maintain Indonesia through careful diplomacy to make sure Indonesia could keep neutral.

Consideration Four: to strengthen the sovereignty in South China Sea Islands and Reefs by law. October 2014, the fourth Plenary Session of the Eighteenth Central Committee passed the Decision of the Central Committee of the Communist Party of China on a number of major issues concerning the overall promotion of the rule of law. It says that “to use legal means to safeguard China's sovereignty, security and development interests”. South China Sea Islands and Reefs and the surrounding waters concern China's sovereignty, security and development interests, so China should take the lead to influence the law making. In addition to strengthen their presence in the South China Sea through the construction of facilities, military construction, administrative jurisdiction, resource exploitation and other aspects, China should be good at taking legal means and thoughts. In dealing with Philippines' unilateral request, China should take advantage of the legal means to fight back Philippines' provocation and discredit.

Consideration Five: cultivate the national's rational and legal territorial view of land and ocean. Marine territory and mainland territory is different in legal status. Mountains or plains, they are equal in law. Marine territory has features of “liquid validity” and “fuzzy attribution”. In the legal status, the marine territory can be roughly divided into two types: one that the nation has exclusive sovereignty and the other that has limited sovereignty decided by the international law or international conventions. For a country, the ownership and jurisdiction of different parts of the ocean can be significantly different. In the 1998 June “The exclusive economic zone and continental shelf law of the people's Republic of China”, “If China's marine territory overlaps with its neighbor's EEZ or continental shelf, the border should be made in accordance with the international law on the basis of fairness. It can be interpreted in this way: in the overlapped area, both parties should consider from the overall benefit of the state to seek a fair and reasonable solution. The maritime border negotiation is a process of “give and take”. Chinese scholars should think rationally and spread real voice about the China border affair. Chinese nationals should understand the differences of different

parts of oceans in law from a legal perspective. Chinese nationals should also have a reasonable and legal expectation for the future South China Sea negotiation. The Chinese government should consider before and in the negotiation how to gain support from Chinese nationals and public opinions while not hurt the national pride.

After all, we have to study the South China Sea strategy deeply from the joint view of international law, international mechanism, international relations and domestic sovereignty.

From the international law angle, China is advised to clarify the legal nature of South China Sea U-shaped line to convince the international society, so as to effectively influence the decision making of “the South China Sea Permanent Court of Arbitration” (the Hague). From the international mechanism level, China is advised to promote the establishment of claimant country mechanism actively, take the practical “bilateral and multilateral combined” negotiation strategy and turn the “historic rights” into practical maritime resource right. From the international relation angle, China is advised to walk out of the conventional broad outline pattern, consider deeply the position differences of the South China Sea claimant countries and take action accordingly. From the domestic sovereignty angle, China is advised to strengthen its presences by legal means and cultivate its national’s reasonable and legal view of maritime territory.

Translator/ Ji Yingyun