

The Problem and Improvement for Territorial Sea Legal System in China

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Keywords: Territorial Sea Legal System; Straight Baselines; Hot Pursuit

Abstract: The establishment and improvement of China's territorial sea system is of great significance for safeguarding national sovereignty and developing the economy. Still, there are some problems in the territorial sea legal system in China, such as insufficient legitimacy argumentation for the selection of straight baselines, not yet fully promulgated baselines of the territorial sea, and unclear provisions on the enforcement of the law of the territorial sea. As a major maritime country, China should be guided by the standards of the United Nations Convention on the Law of the Sea and actively justify the baselines of the territorial sea in the application of straight baselines. At the same time, China should properly consider the baseline plan for the Nansha Islands, and clarify the conditions for using force in maritime law enforcement.

1. Introduction

China has a long coastline of more than 32,000 kilometers, of which 18,000 kilometers are on the mainland^[1]. China first published the Statement of the Government of the People's Republic of China on the Territorial Sea, which stipulates in principle China's territorial sea system. The Third United Nations Conference on the Law of the Sea adopted the United Nations Convention on the Law of the Sea (hereinafter the UNCLOS) in 1982, which provides for a comprehensive international regime for the oceans. China is a party to the Convention. In order to further improve China's territorial sea regime, exercise its rights, and fulfill its obligations under the UNCLOS, China adopted the Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone on 25 September, 1992. It is a basic law on China's maritime affairs, which comprehensively stipulates the system of China's territorial sea and contiguous zone.

The territorial sea is a complex legal system of the sea, which includes the baseline system, the rights of coastal States in the territorial sea, the rights and obligations of third states in the territorial sea, and so on, many of which are controversial. The second part of this article will provide an overview of China's territorial sea legal system, the third part will analyze the problems existing in the implementation of China's territorial sea legal system, and the fourth part will give suggestions for improving the problems mentioned in the third part.

2. Overview of China's Legal System for the Territorial Sea

2.1. China's rights in territorial sea

Territorial sea is an integral part of China's territory, and China has sovereignty over its territorial sea. This sovereignty extends to the airspace above the territorial sea, the seabed, and the subsoil. At the same time, China also has jurisdiction over territorial sea. In terms of legislative jurisdiction, regulations may be made on the safety of navigation and the management of maritime traffic, provided that they are made public, and the content of the regulations must not substantially derogate from the right of innocent passage of foreign ships. In terms of the jurisdiction of the coastal State, criminal jurisdiction is exercised by the flag state generally, but in special circumstances, the coastal States have jurisdiction, specifically including the situation where the crime on board the ship affects the interests of the state to which the territorial sea belongs, and the state to which the territorial sea belongs is requested to exercise criminal jurisdiction, etc., but whether the crime affects the state to which the territorial sea belongs needs to be carefully judged on a case-by-case basis. As far as civil jurisdiction is concerned, there is no strict restriction on the kind of civil jurisdiction by a coastal State in the territorial sea, except that there are some requirements to be observed. In terms of law enforcement jurisdiction, the relevant authorities of China have the right to take measures in accordance with the law against foreign ships that violate Chinese laws and regulations, such as arresting, trialing, and imposing penalties. Hot pursuit is also one of the ways in which law enforcement jurisdiction is exercised. The right of hot pursuit is the right of a coastal State to pursue and arrest foreign ships (merchant ships) that violate its laws and regulations to ensure the realization of its jurisdiction over its territory or territorial sea and other maritime areas and to protect its legitimate rights and interests. The law of China also strictly restricts the exercise of the right of hot pursuit.

2.2. The rights and obligations of foreign ships passing through China's territorial sea

Under international law, foreign non-military vessels have the right of innocent passage through the territorial sea. However, innocent passage must be carried out in accordance with the law, which requires a balance between the sovereignty of the coastal State and the right of innocent passage of foreign ships, and in doing so, the ships must comply with the relevant provisions of international maritime law, that is, the relevant provisions on the prevention of ship collisions.

In view of the regime of navigation of foreign military vessels in the territorial sea of coastal States, combined with the legislation of various countries and relevant international treaties, it can be considered that the right of foreign warships to pass through the territorial sea without hindrance has not been generally recognized. Therefore, each coastal State, except those who have undertaken treaty obligations, may, in accordance with the principle of sovereignty over the territorial sea, make provisions on the regime for the passage of foreign military vessels through the territorial sea that are in line with their national interests and foreign policies. That is, foreign military vessels may be granted the right of innocent passage through the territorial sea in domestic legislation, or foreign military vessels may be required to obtain prior authorization or notification before passing through the territorial sea. Paragraph 2 of article 6 of the Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone stipulates that "the entry of foreign military vessels into the territorial sea of the People's Republic of China shall be subject to the approval of the Government of the People's Republic of China." That is, foreign military vessels do not enjoy the right of innocent passage in China's territorial sea.

When foreign ships pass through China's territorial sea, they must abide by China's laws and regulations, and at the same time accept China's management, which is the inevitable conclusion of

the principle of sovereignty in territorial sea. In terms of the specific form of implementing China's laws, due to the different types of foreign ships, if a foreign military ship or a foreign government ship used for non-commercial purposes violates China's laws and regulations when passing through China's territorial sea, the relevant agencies of China have the right to order it to leave the territorial sea immediately, and the flag state shall bear international responsibility for the loss or damage caused. However, since these ships enjoy certain immunity under international law, the relevant agencies in China cannot directly deal with them in accordance with the law. For other foreign vessels, if China's laws and regulations are violated in China's territorial sea, the relevant authorities may deal with them in accordance with the law.

3. Problems existing in the implementation of China's legal system for territorial sea

China enjoys sovereignty over the territorial sea, under which China, as a coastal State, can administer its territorial sea by legislative, administrative, and judicial means. The scope of China's exercise of sovereignty is determined by the selection of base points and baselines, but the justification of straight baselines in China is insufficient, the baselines of territorial sea in some sea areas have not yet been promulgated, and the boundaries of China's law enforcement conducts in the territorial sea also need to be further clarified.

3.1. The legitimacy of the straight baseline is insufficient

In accordance with Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone and the Statement of the Government of the People's Republic of China on Baselines in the Territorial Sea of the People's Republic of China, China adopts straight baselines in the Yellow Sea and the northern waters of the East China Sea. Some scholars have questioned these baselines.

First, the United States Department of Defense pointed out that point 9 and 10 were low-tide elevations.^[2] Korea considered the two points to be located from the coast 70 nautical miles, which negates the legitimacy of these two points in deciding the straight baseline^[3]. Paragraph 4 of article 7 of the UNCLOS allows for the use of low tide elevations as the base point of a straight baseline, and distance does not constitute a condition for negating the validity of the base point. It is necessary to meet the requirements of "lighthouses or similar installations permanently above sea level on low-tide elevations" or "internationally generally recognized as the starting and ending points for the delineation of baselines on such elevations". Since the construction information of the base point has not been made public, it is unknown whether the selection of the point of China meets the requirements of the UNCLOS^[4]. It can be seen that China's selection of low-tide elevations that exceed the width of its territorial sea as the base point of the straight baseline needs more clarification, otherwise it may cause disputes between neighboring countries.

Secondly, China's point 12 is also questioned as not meeting the selection requirements of the straight baseline, and it is considered to be far away from the coast and deviate from the general direction of the coastline. This is based primarily on paragraph 3 of article 7 of the UNCLOS, which constitutes an overarching limitation on the direction and location of straight baselines. The purpose of this provision is to limit the unrestricted expansion of the territorial sea by the coastal States and to achieve equitable exploitation and utilization of the oceans. Some scholars have pointed out that the point is located on the outer edge of a series of islands in China's Zhoushan Islands, so it meets the conditions for the application of straight baselines, and at the same time, China also has the practice of fishing activities in this area, which is specifically stipulated in paragraph 5 of article 7 of the UNCLOS. The main consideration here is the priority of paragraphs 3 and 5 in their application. This paper argues that the general limitation on the direction and location of the straight baseline

cannot be used against the practice set out in paragraph 5. If the general limitation of paragraph 3 is considered to have priority, paragraph 5 has no room to apply in the case of conflict, and the UNCLOS shouldn't provide for paragraph 5. At the same time, for the purposes of paragraph 5, which is intended to safeguard the long-standing and "real and significant" economic interests of the coastal State, it is the protection of the special interests of the coastal State by the States parties to the Convention and should not be easily denied. However, at present, China has not proved that this fishery activity has a long-term existence and has special economic interests for the region.

3.2. The baselines of some islands in China have not yet been promulgated

At present, China does not promulgate the baselines of the territorial sea of the Zhongsha and Nansha Islands, because China hopes to maintain good-neighborly and friendly relations with neighboring countries and not to exacerbate conflicts in the South China Sea ^[5]. Although it is not yet the right time to promulgate the baselines of the territorial sea of Nansha and Zhongsha Islands from the perspective of maintaining peace and stability in the South China Sea, the baseline system is closely related to maritime rights and interests. Conflicts in the South China Sea are also constantly staged, and foreign countries continue to interfere with the legitimate operations of Chinese fishermen, conducting illegal acts such as seizure and punishment ^[6]. The 2016 South China Sea Arbitration also added to the complexity of the issue. The arbitral tribunal denied the legality of the application of straight baselines in the outlying archipelagos, and the above-mentioned views of the arbitral tribunal also created an obstacle to China's delineation of straight baselines in the Nansha Islands in the future ^[7]. Although there are objective reasons and obstacles for China's failure to publish the baselines of the territorial sea of the Nansha Islands, it does make it difficult for China to exercise jurisdiction in the relevant waters.

3.3. Lack of clarity in the provisions of the right of hot pursuit

The right of hot pursuit is an indispensable part of China's maritime law enforcement and is of great significance to safeguarding China's maritime rights and interests. Article 14 of the Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone and Article 12 of the Law of the People's Republic of China on the Exclusive Economic Zone and the Continental Shelf regulates the right of hot pursuit and its exercise. However, these provisions are relatively general and avoid controversial issues, such as whether China's maritime law enforcement agencies can use "necessary and reasonable force" to achieve law enforcement purposes when exercising the right of hot pursuit, which is not mentioned in the above two laws ^[8]. The Coast Guard Law of the People's Republic of China promulgated in 2021 authorizes coast guard agencies to carry out maritime rights protection and law enforcement activities in waters under the jurisdiction of the People's Republic of China and the airspace above them, which makes more detailed provisions on China's enforcement of the right of hot pursuit in territorial sea. Where it is necessary to force the ship to stop sailing when a ship is in hot pursuit in accordance with the law, the staff of the coast guard agency may use police equipment or other equipment and tools on the spot. This is akin to a kind of warning. Coast guard personnel may use weapons when the violation is ongoing and serious. At the same time, the law imposes certain restrictions on the use of weapons, and the staff of the coast guard shall reasonably judge the necessary limits for the use of weapons in light of the nature, degree and urgency of the danger of the illegal and criminal acts and the perpetrators of the crimes. The use of force is a sensitive and controversial subject in international law, and the prohibition of the use of force is a fundamental principle of international law that is permissible only in very exceptional circumstances and faces strict restrictions. Therefore, when exercising the right of hot pursuit, China's coast guard needs to clarify the boundaries of the use of force and further clarify the reasonable scope of the use of force.

4. The path to improving the territorial sea legal system in China

In view of the problems existing in practice, from the perspective of improving the legal system of territorial sea and safeguarding China's national sovereignty, China should further study the provisions on straight baselines in the UNCLOS, so as to provide a sufficient legal basis for the determination of China's straight baselines. China should also clarify the limitations of the use of force in the exercise of the right of hot pursuit in combination with the international practice of maritime law enforcement.

4.1. Strengthen the justification of straight baselines in territorial seas

The UNCLOS has made preliminary provisions on the selection of appropriate points for straight baselines. Although there isn't generally accepted understanding of the interpretation of its content, China should justify its determination of straight baselines of territorial sea in accordance with the ordinary meaning of the provisions. Specifically, the following methods can be adopted. Firstly, China should take measures to promote the construction of low-tide elevations. As the base point of a straight baseline, a low-tide elevation needs to have a lighthouse or other installations permanently above sea level. The UNCLOS puts higher requirements for the construction and maintenance of installations on low-tide elevation. In addition to strengthening the routine maintenance of existing facilities, China should also strategically take on construction projects on low-tide elevation to provide more options for the selection of the base point of the straight baseline in the future. Secondly, China should prove the marine economic activities in relevant sea areas. Since economic activities as a customary practice are of great significance in the process of determining a straight baseline, China should improve the collection of historical materials to provide evidence to support this customary practice in China. At the same time, China should also actively develop the marine economy in the sea area to prove the continuity of this economic activity.

4.2. Determine the baseline plan for the Nansha Islands in a timely manner

China's statutory baseline determination method is the straight baseline, so the analysis of the straight baseline scheme of Nansha Islands is of great practical significance. Some scholars have pointed out that there are three straight baseline schemes for the Nansha Islands. The first one is the "integrated" scheme, that is, the entire Nansha Islands are delineated as a straight baseline. The second is the "dot" scheme, in which each dry reef (low tide elevation) is taken as an independent unit, and the territorial sea baselines are delineated separately. The third option, the "block" approach, is to divide the Nansha Islands into several areas and delineate straight baselines respectively^[9]. However, this analysis does not preclude the possibility of applying other types of baseline. It should be pointed out that China continues to promote the construction of islands and reefs in the South China Sea, which provides more choices for China to select the appropriate point of the straight baseline of the Nansha Islands. The baseline plan for the Nansha Islands should not be rushed, not only from the perspective of maintaining stability in the South China Sea, but also from the perspective of generating more appropriate points to choose in the future.

4.3. Clarify the limitations for the use of force against the right of hot pursuit

The use of force is permitted by international law under special circumstances. The Coast Guard Law of the People's Republic of China also clearly mentions the use of force in maritime law enforcement. Although its article 50 puts forward some considerations on the reasonable judgment of the necessary limits for the use of weapons, it is relatively general and not operable, and needs to be

clarified in conjunction with the practice of the use of the right of hot pursuit at home and abroad. Combined with international conventions and relevant precedents, some scholars have pointed out that “necessary and reasonable force” should have the following factors: (1) the warning is invalid; (2) there is no means other than the use of force; (3) there are situations of violent resistance to arrest; (4) deliberately sink the ship is forbidden; (5) humanitarian principles needs to be considered; (6) be reasonably proportionate to the circumstances at the time^[10]. Therefore, when faced with a situation that requires the use of force, China’s coast guard should follow the principle of due process, and properly negotiate with other vessels on the premise of indicating the identity of China’s law enforcement personnel. In circumstances that may cause loss of important interests in the waters under the jurisdiction of China, the use of force shall be carried out in accordance with the principles of humanity and proportionality.

5. Conclusion

With the development of economy and society, the ocean has become more and more strategically significant. Neighboring countries are constantly challenging China’s legitimate maritime rights and interests, and China needs to respond with facts and laws. China should continue to assess the global marine development situation and make timely adjustments to its own laws and policies related to territorial sea, so as to effectively safeguard China’s maritime rights and interests and achieve the goal of becoming a maritime power.

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