

Resolving Japan's Territorial and Maritime Disputes with its Neighbors —Problems and Opportunities—

Thomas J. Schoenbaum *

I. Introduction

Japan currently has important territorial and maritime boundary disputes over various islands with all of its neighbors, China (including Taiwan), Korea (both South and North), and Russia. To a great extent, these are problems left over from the tragic series of Asian wars beginning with the Sino-Japan War of 1894-95 and ending with Japan's defeat in World War II. These disputes are relatively unknown to the international community, and even among those in the know, they are generally considered bilateral problems, not worth significant attention outside the countries concerned. This idea is false, however. Japan's disputes with its neighbors are serious, and military confrontation is not out of the question. At a minimum, they are irritants that have retarded the development of normal international relations between Japan and the three countries concerned, and the establishment of peace and security in East Asia. Now that Japan aspires to be a permanent member of the United Nations Security Council, the existence of these disputes is a major obstacle to attaining that status. Thus, they merit the attention of all members of the international community.

Although these disputes are political in nature, issues of international law dominate and point the way to a solution in each case. Each of the disputes therefore should be settled according to the applicable legal principles either by diplomatic means or through submitting them to international tribunals.

The purpose of this article is to define the disputes, to delineate the legal and factual issues involved, and to discuss options and opportunities for their

* Professor at the Division of International Studies. The assistance of Yoshiko Yamanaka, BA, is gratefully acknowledged.

resolution. My thesis is that the tools of international law analysis and dispute settlement may be helpful in solving these difficult problems. Legal issues, in fact, dominate all of the disputes. Of course, the disputes are political as well, but the legal framework provides the key to political and diplomatic discourse and to dispute settlement. Japan as well as its neighboring states have accepted and ratified the UN Convention on the Law of the Sea (1982), which is therefore authoritative for all four (or six?) states. The expansion of national maritime zones as permitted under this treaty greatly exacerbates and magnifies the importance of these island disputes. Not only small, relatively insignificant islands are at stake, but also over one million square kilometers of ocean space. The peaceful and equitable resolution of these disputes will do much to establish peace and security and to enhance regional cooperation in East Asia.

Map 1: Areas affected by island disputes in East Asia⁽¹⁾



II. The Disputes

1. The Disputes with China

Japan and China have three distinct disputes: (1) a dispute over the maritime zones surrounding Okinotorishima; (2) a territorial dispute over the Senkaku Islands; and (3) a dispute over their lateral maritime boundary in the East China Sea.

(1) Okinotorishima

Since 2004 China has claimed the right to conduct marine research and other activities in what Japan claims is the exclusive economic zone (EEZ) surrounding Okinotori Island (Okinotorishima), is the southernmost point of Japan. Japan claims an EEZ and an extended continental shelf on the basis that Okinotorishima is an island under the international law of the sea entitled to four maritime zones: a 12 mile territorial sea measured from the baseline, normally the low-tide line; an additional 12 mile contiguous zone; a 200 mile EEZ measured from the baseline; and a continental shelf that may extend as far as 350 miles from the baseline. China contests the claims to an EEZ and continental shelf on the basis of Article 121 (3) of the UN Convention on the Law of the Sea, which provides that a “rock” that is above high tide but is unable to support human habitation or economic life cannot claim an EEZ or a continental shelf.

This dispute is therefore over the factual and legal character of Okinotorishima.

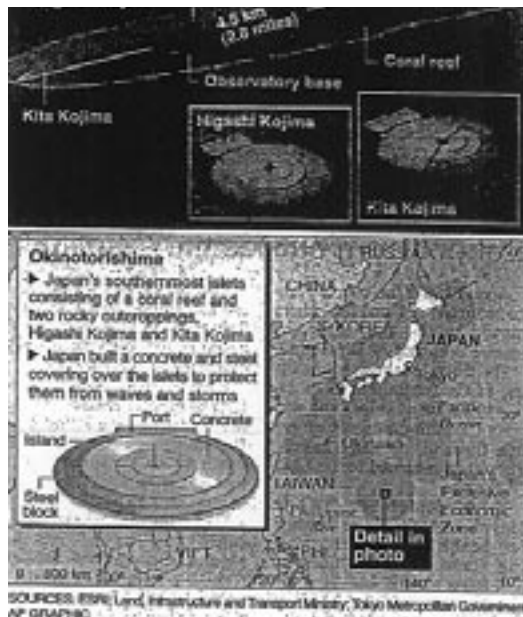
Okinotorishima is the southernmost point of Japanese territory and Japan's only tropical island. It is located at 20.25 degrees north latitude and 136.5 degrees east longitude, 1200 km. northwest of Guam and 1700 km. south of Tokyo. Its Spanish name is “Parece Vela” and in English it is known as “Douglas Reef”. The Tokyo Municipal Government administers the island. Most of the island is a submerged coral (table) reef 4.5 km. long and 1.7 km. wide; it is shaped like a pear or eggplant with a circumference of 11 km. In addition, five islands above high tide existed until 1987, when three of these disappeared under

the sea. At present two small, rocky islets exist: Higashi Kojima (6 cm above high tide) and Kita Kojima (16 cm above high tide). At one time construction was started to make one island a lighthouse and the other an observatory, but this work was abandoned. The Japanese Government has constructed some works to prevent erosion. Several time in recent years ships have landed or stranded on the island causing some damage.

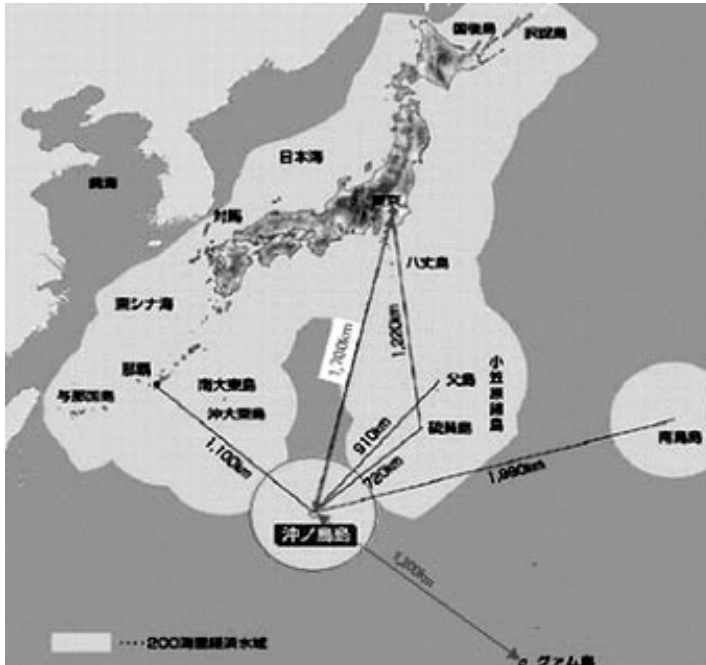
Before April of 2004, China not only admitted but also supported Japan's claims. This changed apparently because China realizes that in the event of a conflict over Taiwan, she must have open sea-lanes between the East China Sea and the Pacific Ocean. China's interest is primarily over security concerns.

There are various proposals to develop Okinotorishima. One idea is to construct an ocean thermal electric generating plant on the island; another is to establish fishing and tourism; a third is to raise the coral by constructing polders. None of these projects have been finalized.

Map 2: Okinotorishima



Map 3: The Location of Okinotorishima and the EEZ around Japan⁽²⁾



(2) The Senkaku (Chinese Name: Diaoyu; English Name: Pinnacle) Islands.

Japan and China have a territorial dispute concerning the Senkaku (Diaoyu) Islands, small, uninhabited islands located in the East China Sea. They are 170 km. north of the Ishigaki Islands (Japan); 170 km. northeast of Keelung, Taiwan; and 410 km. west of the Okinawa mainland. The group is 7 sq. km. of small, volcanic islands as follows:

Uotsuri-jima (Diaoyu Dao): 4.319 sq. km.

Kuba-jima (Huangwei Yu); 1.08 sq. km.

Taisho-jima (Chiwei Yu)

Kita Kojima (Beixiao Dao)

Minami Kojima (Nanxiao Dao)

And three rocks: Okino Kitaiwa, Okino Minamiwa, and Tobise (no Chinese names).

These islands are administered by Japan as part of Ishigaki City, Okinawa Prefecture, but are claimed by China as part of Toucheng Township, Yilan County, Taiwan Province. Of course these islands are also claimed by Taiwan in its separate dispute with China.

China claims these islands through records of discovery in 1372 and various contacts after that date, ranging from fishing expeditions to gathering herbs on the islands. The records of these contacts have not been made public.

Japan claims the islands were “*terra nullius*” (vacant territory) until the late 19th century when, from 1885 on they were thoroughly surveyed by the Government of Japan. Japan’s claim rests on its effective administration of the islands, which is well documented to begin in 1895 and was uncontested until 1970/71. The USA administered the islands after World War II until they were returned to Japan in 1971 at the same time as Okinawa.

Map 4: The Location of Senkaku Islands⁽³⁾



Figure 1. The Geographical Location of the Study Island

(3) The Maritime Boundary between China and Japan in the East China Sea.

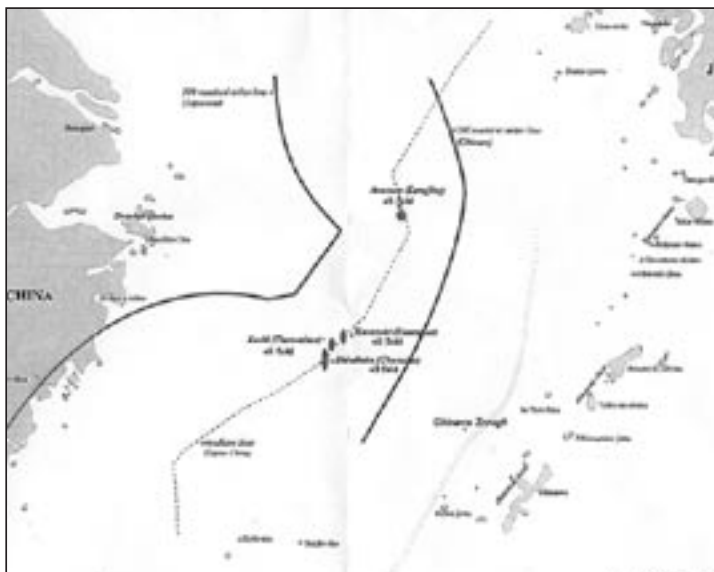
The East China Sea is bounded by the Chinese mainland on the west, Japan's Ryukyu Islands (Okinawa Prefecture) on the east, South Korea to the north and the island of Taiwan to the south. There is a Japan/South Korea Joint Development Zone in the northern part of the East China Sea.

The maritime boundary between China and Japan in the East China Sea is contested. The Asian continental shelf (the underwater prolongation of the continent) stretches hundreds of kilometers under the East China Sea, terminating at the Okinawa Trough, a deep-sea trench west of the Ryukyu Islands. Japan claims an Exclusive Economic Zone to a point equidistant between the Asian mainland and the Ryukyu Islands. China, however, claims its rights to the continental shelf, relying primarily on a natural prolongation idea that the physical shelf extends to the Okinawa Shelf. Thus, there is a large overlap between the claim of Japan to an EEZ and China's claimed continental shelf rights.

Since the Senkaku Islands are located in the middle of the East China Sea and are features of the continental shelf, they are entangled in the maritime boundary dispute. Obviously, if these islands belong to one side or another the maritime boundaries are radically affected. Thus, the resolution of the two disputes — the territorial dispute and the maritime boundary disputes — must be handled together.

The question of dispute resolution has become urgent in recent months because there is every indication that valuable oil and gas deposits are present in the East China Sea. The state-owned China National Offshore Oil Corporation has announced plans to begin exploratory drilling for oil near the Senkaku Islands near the equidistance line in August 2005. In its turn, Japan has announced plans to grant Japanese companies concessions to drill for oil on its side of the contested equidistance line.

Map 5: Senkaku Islands and median line and Chinese drilling sites.⁽⁴⁾



2. The Dispute with Korea

Japan's dispute with Korea (South and North) involves Takeshima (Korean name: Dok) Island, which is located in the Japan Sea 92 km. southwest of the South Korean Island of Ururundo, and 157 km. northwest of Japan's Oki Island. Takeshima has a total area of 0.23 sq. km., about the size of Hibiya Park in Tokyo, and no valuable resources are known to be present in the surrounding waters other than fishing rights. Takeshima consists of two large rocks (the east and west islands) and several smaller rocks. It has no permanent inhabitants, although since 1954 South Korean police personnel have occupied it. Takeshima was known as Matsushima before 1905, and older maps and documents often confused Takeshima with two nearby islands, Ururundo and Takesho, both of which are South Korean. Takeshima also has an English name: Liancourt Rocks, adding to the confusion.

This dispute over Takeshima (Dok Island) intensified in 2004 when South Korea issued a Takeshima postage stamp and proclaimed a Takeshima memorial

day. This drew a protest from Japan, and Shimane Prefecture also proclaimed a Takeshima memorial day. In April 2005 the South Korean Ambassador to Japan rejected the idea of submitting the Takeshima issue to the International Court of Justice. This is consistent with long-standing Korean policy. South Korea is in *de facto* control and the area is off-limits to Japan.

Map 6: The location of Takeshima/Dok Island (and Yi Syngman (李承晩) Line)⁽⁵⁾



3. Dispute with Russia

Japan's dispute with Russia involves the four so-called "northern territories": Habomai, Shikotan, Etorofu, and Kunashiri Islands at the southern end of the Kuril archipelago north of Hokkaido. These four islands (or island groups) were occupied by Soviet troops in August 1945 at the end of World War II, and many Japanese inhabitants fled. In 1946 Russia annexed these islands and forcibly deported the remaining Japanese inhabitants. Russia still administers the islands as part of its own territory, although it has offered to return the two

III. The International Law of Territorial Sovereignty

1. Introduction

Territorial sovereignty is one of the essential characteristics of the modern state and a requirement for statehood. The disputes between Japan and its neighbors involve differences of opinion concerning sovereignty over territory. Rather than boundary questions —the usual type of territorial dispute between neighbors, these disputes involve issues of the acquisition and loss of territorial sovereignty. Accordingly, we will briefly review the international law on these matters.

2. The Acquisition of Territorial Sovereignty

There are several recognized modes of acquiring territorial sovereignty under international law. First, a state may acquire territory by **cession**, which is the transfer of territory, usually by treaty, from one state to another. Second, territory may be acquired by what is termed **occupation**. Occupation as a method of acquisition presumes, however, that the territory in question was “*terra nullius*” immediately before acquisition—that the territory belonged to no state. Furthermore, occupation giving rise to sovereignty has a technical meaning: **effective control with the intention and will to act as sovereign**. Therefore, the state relying on this method must show a requisite number of what are termed “*effectivités*”, —specific factual instances of effective control— to prove its case. Third, territory may be acquired by **prescription**, which also depends on showing effective control. But the distinction between occupation and prescription is that in the latter case the territory in question was not *terra nullius*, but admittedly belonged to another state. Consequently, the effective control in the case of prescription must be longer and more apparent than for occupation, because loss of territory by a former sovereign is not readily presumed. Fourth, **conquest** was a recognized method of acquiring territory in the past, and though it is not so today, the issue of conquest must still be considered. Fifth, an **operation of nature** may change territory, such

as accretion, erosion, or the appearance or disappearance of a volcanic island. Sixth, territory may be acquired by **international adjudication** of some sort. In the context of a court or arbitration decision, adjudication is not really a method of acquisition, but a method of determining existing rights; but an international boundary commission or the UN Security Council may be empowered to decide territorial questions that involve awarding as well as settling territorial rights.⁽⁷⁾

Five further observations are necessary. First, these acquisition methods do not exhaust all possibilities; they are simply the main methods that offer useful analysis when territory is in dispute. Second, the above methods are interrelated in various ways in any particular case. Third, a state does not have to be prepared to prove its title to every square meter of its territory in terms of one of these methods; they are relevant only when title to territory is uncertain or disputed. Fourth, **acquiescence and recognition** of territory play a very important role in the acquisition of territory, although they are not strictly speaking modes of acquisition. Fifth, territorial sovereignty may also be lost through **renunciation**.

Obviously, in the case of Japan's disputes with its neighbors, several of these points and methods are not relevant. Accordingly, we will discuss only the relevant methods, which are: (1) occupation; (2) prescription; (3) conquest; (4) acquiescence/recognition; and (5) renunciation. We will also discuss several concepts closely related to territorial sovereignty: the concept of condominium or joint sovereignty; and "intertemporal law", the question of what is the effect when the rules of acquisition change over time. We will also consider the impact of political arguments related to the question of territorial sovereignty.

(1) Occupation

"Occupation" is the method of acquiring sovereignty over territory that is *terra nullius*—claimed by no state. In the *Eastern Greenland Case (1933)*, the Permanent Court of Justice said that a claim to sovereignty based on occupation requires a showing of two elements: "the intention and will to act as Sovereign; and some actual exercise or display of such authority."⁽⁸⁾ The question of the will to act as sovereign is a subjective element that can only be shown by objective

acts, so in reality what counts is the second element, which is the requirement of effective control. Acts of effective control can also demonstrate the first element if (1) the activity is not just by an individual, but is that of the state or its agents; (2) the activity is consistent with a governmental purpose.

Thus, the cases resolving disputes over effective control over territory turn on which party to the dispute can show concrete activities consistent with sovereign control. In the *Island of Palmas Case (1928)*,⁽⁹⁾ the US claimed a disputed island on the basis of cession from Spain, whose claim was founded upon discovery. But the arbitrator held that the discovery claim was trumped by the effective control exercised by the Netherlands beginning in the 17th century and continuing to the outbreak of the dispute in 1906; relevant acts of sovereignty were exercised intermittently by the Dutch East India Company.

The acts necessary to establish sovereign control are held to vary with the conditions of time and place, and the nature of the area involved. In the *Clipperton Island Arbitration: France v. Mexico (1931)*,⁽¹⁰⁾ the inaccessibility and uninhabited nature of the island were taken into account so that an offshore geographical survey, a landing by a small party and a declaration of sovereignty published in a Honolulu newspaper were held sufficient to uphold the claim of sovereignty by France.

In the *Eastern Greenland Case* the court awarded sovereignty to Denmark on the basis that Denmark had passed legislation relating to the uninhabited Eastern section of the island and had granted concessions there. This was considered superior to the Norwegian actions, which involved the wintering of expeditions and the erection of a wireless station, against which Denmark protested. In addition, Norway had not claimed sovereignty until 1931.

Acts of effective control (also known by the French term “*effectivités*”) will be considered more important if they are diverse in number and include legislative, regulatory or judicial acts. This was determinative in the *Minquiers and Ecrehos Case (1953)*,⁽¹¹⁾ a dispute over Channel Islands between France and the UK. The court appraised the relative strength of the opposing claims by considering the nature of the activities of each party. The court stated that

it “attaches in particular probative value to ...acts which relate to the exercise of jurisdiction and local administration and to legislation.” The UK was held to have the best claim because it had exercised criminal jurisdiction, held inquests, collected taxes, and placed the administration of the “Ecrehos Rocks” within the Port of Jersey, an uncontested UK territory. Similarly, in the *Case Concerning Sovereignty over Pulau Ligatan and Pulau Sipadan (Indonesia/Malaysia)* (2002),⁽¹²⁾ the International Court of Justice ruled in favor of Malaysia because “the activities relied upon by Malaysia... are modest in number but... are diverse in character and include legislative, administrative and quasi-judicial acts. Moreover, the Court cannot disregard the fact that at the time when these activities were carried out, neither Indonesia nor its predecessor, the Netherlands, ever expressed its disagreement or protest.”

In the *Eritrea-Yemen Arbitration (1998/99)*,⁽¹³⁾ which concerned disputed Red Sea islands, islets and rocks, the tribunal classified the respective acts (*effectivités*) of government authority of the contending parties as follows:

- Evidence of intention to claim the islands, as shown by public claims to sovereignty and by legislative acts seeking to regulate activity on the islands;
- Evidence of activities relating to the surrounding waters, including such matters as licensing various acts, fishing vessel arrests, search and rescue operations, acts of patrol, and environmental protection;
- Evidence of activities on the islands themselves, including landing parties, construction and maintenance of facilities, overflight, and administrative acts.

The tribunal found, after weighing all the evidence, in favor of Yemen.

In addition to weighing the quality and quantity of governmental activities, a court or tribunal will consider when these took place in relation to certain “critical dates”, which will, of course, vary in each case. Three such critical dates may be relevant. First, a tribunal may decide if possible the date before which the territory in question was *terra nullius*. This occurred in the *Clipperton Island Case*, where the court determined that before 1858, when France first

proclaimed her sovereignty over the island, it was *terra nullius*. A second critical date that may be possible to establish is the moment the rights of the parties have crystallized so that activities after that date will not be taken into consideration. This was determined in the *Indonesia/Malaysia Case*. A third critical date that may be relevant in a given case is when the dispute arose. In the *Eastern Greenland Case* the fact that the dispute arose only in 1931 was relevant in that this was the date on which sovereignty must be found to have existed in one or another of the parties. By implication, activities after this date (which will inevitably be carried out under protest) cannot affect the outcome.

In summary, three factual points are especially important in order to assert sovereignty: (1) evidence of effective occupation; (2) the exercise of governmental authority; and (3) recognition or acquiescence by other states.

(2) Prescription

The doctrine of acquisition of territory by prescription is very ill defined. It operates when territory belongs or may belong originally to another state, and a different state exercises continuous and undisturbed acts of sovereignty over it for a long period of time. The difficulty of application of this concept is obvious. Perhaps the greatest problem is there is no accepted period of time in international law for the application of the doctrine; it is held to vary in each case. The essence of the doctrine is the passage of time plus the implied acquiescence of the dispossessed sovereign.⁽¹⁴⁾ But there seems to be no case where territorial acquisition was squarely based on this method. Rather, cases such as the *Chamizal Arbitration (US/Mexico) (1911)*⁽¹⁵⁾ commonly hold that if a state protests sovereign acts over disputed territory, the doctrine of prescription cannot apply. Thus one effect of the doctrine is the fact that protests can prevent acts of control from having an effect on territorial rights.

The chief utility of the doctrine it seems is that a tribunal faced with competing claims can decide the case without first making a definite finding that the area in question was *terra nullius* at some point. Thus the arbitrator in the *Island of Palmas Case*, for example, did not make clear whether the island

was under Spanish sovereignty before the Dutch began to exercise control. So the doctrine of prescription means that, when facing with competing claims, a tribunal may find in favor of the party that can prove the greater degree of effective control without basing its judgment on any specific mode of acquisition.

(3) Conquest

Under traditional international legal norms, conquest was a valid method of acquiring territory even without a treaty of cession as long as hostilities had ended and the conquering state declared its intention by annexation. But this rule was changed when restrictions were placed on the right to wage war. Therefore, at least since the date of the Covenant of the League of Nations (1919) conquest is no longer a valid method. This change in the law brings up the issue of what is called “intertemporal law”: the continuing validity of rights gained through acts which were once legal but now are illegal or invalid. The general rule is that acts are judged by international legal norms as they existed at the time, not as they exist at some subsequent time or today.⁽¹⁶⁾ But this is qualified by the famous distinction drawn by Judge Huber, the arbitrator in the *Island of Palmas Case*:

“As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case...a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, its continued manifestation, shall follow the conditions required by the evolution of the law.”

The application of this distinction is unclear, but logically Judge Huber’s distinction must be applied judiciously in order not to lead to instability. If carried to the extreme every state would have to keep under constant review the title to each portion of its territory. And Judge Huber himself did not apply the principle to invalidate Spain’s title based on discovery.

(4) Acquiescence/Recognition

Where territory is in dispute between two states, it will be relevant if one or the other can show that its title was recognized at some point by the other state. Recognition can be either in the form of a treaty or a unilateral declaration. Such recognition may be express, but it also may be implied from acquiescence—failure to object or protest.⁽¹⁷⁾ Also relevant is recognition by or from third states.⁽¹⁸⁾

(5) Renunciation

Territory can be lost in a variety of ways such as abandonment, cession and renunciation. Renunciation of territory must be express; abandonment may be inferred from conduct, such as the long-term absence of the exercise of sovereignty.

Where renunciation of territory occurs by treaty, there may be questions as to the meaning of treaty language. Such questions must be answered with respect to the relevant principles of interpretation of the Vienna Convention. Article 31 of the Convention sets out the general rule that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Article 32 of the Convention sets out criteria for recourse to “supplementary” means of interpretation such as preparatory work and the circumstances of its conclusion. These can be used only when the interpretation according to Article 31 leaves the meaning ambiguous or obscure; or leads to a manifestly absurd or unreasonable result.

Another issue that may arise is the question of whether a treaty may confer rights on third (non-party) states. As a general rule a treaty only applies between the parties to it. This precludes either an obligation or a benefit for third states. However, Article 75 of the Vienna Convention states that this rule is “without prejudice to any obligation in relation to a treaty which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State’s aggression.”

(6) Condominia

International law recognizes the possibility of condominium, which exists when two or more states exercise sovereignty conjointly over a territory.⁽¹⁹⁾ For example, the UK and Egypt had condominium over the Sudan between 1898 and 1956. The UK and France exercised condominium over the New Hebrides until this area gained independence as Vanuatu in 1980. Condominium, however, will not be imposed, and as a practical matter can only come into being by international agreement. In that case the particular regime of condominium will depend wholly on the agreement negotiated to establish it.

(7) Political Arguments

The concept of territorial sovereignty involves extraordinary emotional fervor in certain cases. Political as well as legal arguments may be brought to bear in any particular case. Three main arguments are usually raised: First, one or more of the claimants may argue the principle of geographical contiguity is in its favor. Second, historical continuity may be argued as a basis of title. Third, where an area is inhabited, the principle of self-determination may become involved.

Although none of these arguments are considered to have determinative legal effect,⁽²⁰⁾ they can sway a decision in close cases. From a legal viewpoint, these arguments operate as presumptions —they can be taken into account, but are rebuttable by contrary legal evidence of sovereignty.⁽²¹⁾

IV. Islands and International Law

The UN Convention on the Law of the Sea, Article 121, paragraph 1, adopts the following definition of an island:

“An island is a naturally formed area of land, surrounded by water, which is above water at high tide.”

This distinguishes “islands” from what are called “low-tide elevations”. Under Article 13 of the LOS Convention a naturally formed area of land that is

above water at low tide, but submerged at high tide is not an “island” properly defined. A low-tide elevation has no entitlement to any maritime zone, not even a territorial sea. However, as an exception to this rule, “where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial seas from the mainland or an island, the low-water line on that elevation may be used as the *baseline for measuring* the territorial sea.” (emphasis supplied).

Article 121, paragraph 2 of the LOS Convention states that an island meeting the definition above is entitled to all four maritime zones specified for other land territory: (1) a territorial sea; (2) a contiguous zone; (3) an exclusive economic zone; and (4) a continental shelf.

Article 121, paragraph 3 qualifies this by the statement that a certain category of “island”, namely a “rock” that “cannot sustain human habitation or economic life of [its] own shall have no exclusive economic zone or continental shelf.” By implication, then, a rock does possess the other two maritime zones, a territorial sea and a contiguous zone.

The definition of when an island is a “rock” is somewhat problematic. The terms “economic life” and “human habitation” are directly linked to human activities. Since these terms are phrased in the alternative, one or the other is enough to posit an island not a rock. A rock must lack both. Furthermore, since human activities can and do change over time, the determination will depend on the status of the island at the time the claim is made.

The *travaux préparatoires* for the LOS Convention show that it is relatively easy to claim island status. Human habitation needs not be all year round; it can be temporary such as a shelter for seasonal fishing. In addition, economic life may include exploitation of the living or non-living resources found in the territorial sea. There is no requirement of arable land or potable water to be an island and not a rock. Thus, the status of “island” when it comes to small features may vary over time and will depend on the human activities carried on in the area.⁽²²⁾

The process of delineating maritime zones is complicated by the fact that all zones begin at what is termed the “baseline”. The baseline is normally the

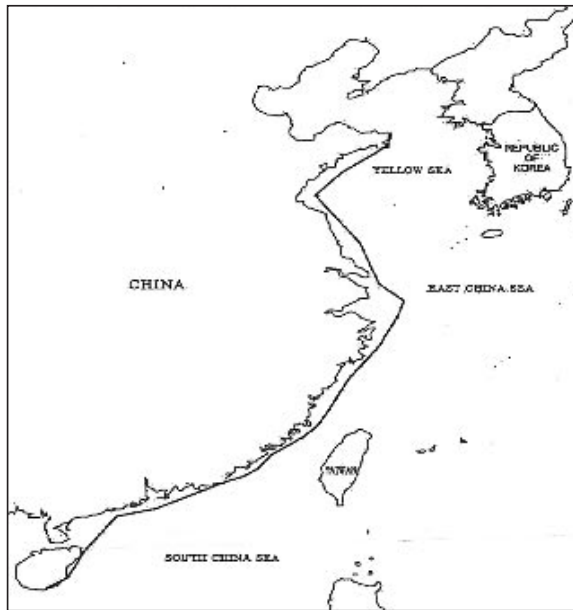
“low-water line along the coast” (LOS Convention Article 5) and the closing lines of bays and river mouths (Articles 9-10). In the case of islands with fringing reefs, the baseline is the seaward low water line of the reef, as shown by the appropriate symbol on charts officially recognized by the coastal state (Article 6).

Under customary law and the LOS Convention, archipelagic states are permitted to draw straight baselines around the outermost points of islands and drying reefs of an archipelago. Japan, North and South Korea, China, and Russia all have unilaterally claimed this option. The system of straight baselines increases, sometimes dramatically, the areas enclosed by maritime zones. Since these straight baselines are drawn unilaterally, the problem arises that different nations use varying methods and standards. There is need for agreement both on whether straight baselines are permissible and how they should be drawn.⁽²³⁾

Map 8: Straight baselines claimed by Japan⁽²⁴⁾



Map 9: Straight baselines claimed by China⁽²⁵⁾



Map 10: Straight baselines claimed by South Korea⁽²⁶⁾



V. The International Law of Maritime Boundary Delimitation

1. Introduction

The problem of drawing maritime boundaries between states located opposite or adjacent to each other was greatly complicated by the UN Convention on the Law of the Sea (1982), which grants coastal states the rights to four separate maritime zones: a territorial sea of 12 nautical miles; a contiguous zone of 12 nautical miles; an exclusive economic zone (EEZ) of 200 nautical miles; and a continental shelf of up to 350 nautical miles. This tremendous extension in coastal state jurisdiction gave rise to many disputes, and there are now many agreements settling maritime boundaries as well as decisions of the International Court of Justice and various arbitral tribunals on the issues involved. As a result, the applicable legal principles, if not crystal clear, may be stated with reasonable certainty.

Particularly relevant to the disputes between Japan and its neighbors are the legal principles relation to the maritime boundaries between two of the zones: the continental shelf and the EEZ. We concentrate on these delimitations in this paper. It is particularly important to note that, while in theory each of these two maritime zones could have a separate delimitation settled under different applicable principles, in practice —both in decisions of international tribunals and bilateral agreements— both delimitations are treated together by laying down a single maritime boundary without distinguishing between the different zones.

2. Delimitation by Agreement

The preferred option under the LOS Convention is for the states concerned to agree on their maritime boundaries. Both Article 74, which concerns delimitation of EEZ boundaries, and Article 83, which concerns delimitation of continental shelf boundaries, are worded the same: “The delimitation...shall be effected by agreement on the basis of international law...in order to achieve an equitable solution.” Both articles also provide that, in default of an agreement,

“the States concerned shall resort to the procedures provided for in Part XV of the Treaty”—the procedures on the Settlement of Disputes.

The rule of law that applies with respect to forging an agreement is “an equitable solution”. This is very general and imprecise; it is derived from the judgment of the International Court of Justice in the *North Sea Continental Shelf Cases*, where the Court found that there was no governing rule of customary law, and, therefore, “delimitation is to be effected by agreement in accordance with equitable principles, and taking account of all the relevant circumstances”⁽²⁷⁾ To this end there is an obligation to negotiate in good faith.

3. The Law of Delimitation in Dispute Settlement

If states cannot agree on their maritime boundaries, they are obligated to resort to dispute settlement. This means they must submit to the jurisdiction of an international court or tribunal according to the provisions of the LOS Convention, Part XV. These provisions and dispute settlement in general are analyzed in the next section of this paper. But first we turn to the applicable law in such a case.

The only rule of treaty law that governs dispute settlement is Article 6 of the 1958 Convention on the Continental Shelf, which posits that, in the absence of agreement, the maritime boundary is to be, in the case of opposite states (two states facing each other), the line of equidistance or median line equidistant from the nearest points of the opposing states' shores, adjusted for “special circumstances”. What are “special circumstances” is limited. The principal drafters of Article 6, the International Law Commission, considered “special circumstances” to be only exceptional configurations of the coast and navigable channels.⁽²⁸⁾ But this is a moot point, because none of the states involved in the maritime boundary disputes considered in this paper are parties to the Convention on the Continental Shelf, so the rule of Article 6 does not apply.

Thus, we must look to sources other than treaty law for the applicable rules of delimitation in contested cases. First, no rule of customary international law would seem to beat hand. The International Court of Justice in the *North Sea*

Continental Shelf Cases, after extensive analysis, found no applicable customary law rule, and none seems to have developed since this case was decided. What has developed, however, is extensive judge-made law, which can be considered as binding since decisions of international tribunals are one of the recognized sources of international law.⁽²⁹⁾

There is now an extensive body of international decisional law.⁽³⁰⁾ In addition, we have the example of numerous agreements between states during the last 25 years.⁽³¹⁾ With this data it is possible to state the applicable legal rules in the absence of agreement between states. From a combination of state practice and decisional law, the applicable rule is, as stated in the *Anglo-French Continental Shelf Case*, “the [maritime] boundary is to be determined on equitable principles.”⁽³²⁾

Distilled from the cases a number of such “equitable principles” can be stated:

- Even if both the EEZ and continental shelf maritime boundaries are in dispute, a *single maritime boundary* will be delimited. The reason for this is the practical one of avoiding complexities and overlap that can cause future difficulties.⁽³³⁾
- The starting point for determining the maritime boundary between opposite states will be the equidistance line.
- The equidistance line is subject to adjustment taking into account “all relevant circumstances”.
- “Equitable principles” does not mean that delimitation is an exercise in distributive justice whereby the existing resources are to be equally divided.

What “relevant circumstances” must be taken into account is very broad; it is wider in scope than “special circumstances” under the 1958 Treaty on the Continental Shelf. Relevant circumstances can include virtually any fact considered important in the particular situation involved. Some examples of “relevant circumstances” that have been used are the following:

- Geographical circumstances such as concavity or a sudden change of direction in the coast.

- The presences of islands. If an island is very close to a foreign coast it may be enclaved or otherwise not given full value.
- The presence of navigable channels.
- There should be a reasonable degree of proportionality between the length of each party's coastline and the area of continental shelf attached to it.
- Relative population densities of coastal areas may be taken into account.
- Security interests may be considered.
- The prior conduct of the parties.

Some factors that have not been considered relevant circumstances in recent cases include:

- Socio-economic factors.
- The natural prolongation of the continental shelf. Geomorphology was ignored, for example, in the *Tunisia/Libya Case*.

The court or arbitral tribunal will have wide discretion on how to weigh all of these factors in any particular case. This means it is difficult to predict the outcome of any particular case.

V. International Dispute Settlement and the Role of International Adjudication

The LOS Convention, Part XV, obligates parties to resolve disputes by peaceful means and to negotiate in good faith and to exchange views “expeditiously”. If agreement cannot be reached, the Convention allows the disputants to choose any procedure, judicial or non-judicial, to resolve the matter.⁽³⁴⁾

Where settlement is not possible by means freely chosen by the parties, compulsory methods of dispute settlement come into play. Section 2 of Part XV details “compulsory procedures entailing binding decisions” that must be used. Where no means of dispute settlement has been designated or when parties to a dispute have designated different methods, *arbitration* is the default compulsory dispute settlement procedure.⁽³⁵⁾

These compulsory methods of dispute settlement are subject to significant exceptions, however. Article 298 of the LOS Convention allows a party to declare in writing at any time that it does not accept binding procedures with respect to certain categories of disputes, most importantly disputes relating to sea boundary delimitations. But if a delimitation dispute is not settled within a “reasonable time”, either state party may insist that the matter be referred to “compulsory conciliation”.⁽³⁶⁾ This procedure, which is detailed in Annex V of the LOS Convention, involves the appointment of outside conciliators who consider the arguments of the parties and render a written report. The parties to the dispute are then obligated to settle the matter on the basis of the conciliators’ report or some other procedure.⁽³⁷⁾

The disputes between Japan and its neighbors China, South and North Korea, and Russia, involve both territorial and marine boundary issues. With respect to territorial claims, the only legal obligation is to resolve the disputes in a peaceful manner through good faith negotiations. Only with respect to marine boundary and law of the sea issues do the dispute settlement provisions of the LOS Convention apply.

1. The Territorial Disputes

The three territorial disputes are fundamental and are separate and distinct both from each other and from their associated marine boundary disputes. The first step in resolving each is to proceed to either agreement or international adjudication with respect to each separate territorial dispute. Japan should place a high priority on bilateral negotiations with respect to each of the three territorial disputes. Alternatively, each of the three territorial disputes should be submitted either to international adjudication or *ad hoc* arbitration.⁽³⁸⁾

2. The Maritime Disputes

If the territorial disputes are resolved, it will be much easier to resolve the maritime boundary disputes between the parties. In fact, the maritime boundary disputes cannot be resolved prior to the territorial disputes except in the case

of Okinotorishima, which involves only the law of the seas independent of any territorial dispute.

3. Options for Dispute Settlement

There appear to be several choices to be made in order to settle these disputes. One choice would be to separate the territorial and the maritime disputes, and to take a step-by-step approach, deferring the maritime boundary matters until after resolution of the territorial disputes; the other choice is to go for a comprehensive settlement between Japan and each of the three countries involved. The preference here would be to come to a comprehensive settlement with each country as a partial agreement would no doubt be impractical since it would solve very little. A further complication is the *de facto* existence of Taiwan and the fact that there are two Koreas, North as well as South. But agreed settlements among Japan, China, and South Korea would, as a practical matter, hold up and receive the backing of the international community.

Another key decision is whether to go for negotiated, diplomatic solutions, on the one hand, or to submit the disputes to international arbitration or litigation. While such a decision can be made individually regarding each of the disputes, there does not appear to be any realistic possibility that any of the disputes will be submitted to an international court or arbitral tribunal. Thus, negotiated, diplomatic solutions between Japan and each of the neighboring countries seem to be the only practical method available at the present time. Although no international court will rule on the disputes, international law remains a key tool in conducting the necessary negotiations, since all parties will wish to start negotiations by asserting their international legal rights. After this appropriate compromises can be struck if necessary. Diplomatic negotiations can be held between Japan and each party on a bilateral basis. But in one or more of the negotiations it may be helpful to employ a third party, such as an experienced expert of unquestioned standing and impartiality to serve as a mediator or conciliator. Of course, this person would have no power to bind the parties or to compel any settlement, which would be up to the parties themselves

to fashion and accept.

VII. Evaluation of the Disputes and Suggested Solutions

1. Okinotorishima

China disputes Japan's legal right to claim an EEZ and Continental Shelf of 200 nautical miles surrounding Okinotorishima on the basis that this island is a "rock" under LOS Article 121 (3), which limits its maritime zones to a 12-mile territorial sea and a 12-mile contiguous zone. China's position is dictated by military and political concerns. China has designated as its "First Security Line" a line drawn between the Japanese archipelago and Nansei-shoto to Taiwan,⁽³⁹⁾ and its "Second Security Line", a line drawn between Ogasawara-shoto to the Mariana Islands. China considers it important to keep open sea-lanes for military use between the East and South China Seas and the Pacific Ocean. This is directed not so much against Japan as against the United States, especially in a confrontation over Taiwan.

China first claimed these rights in April 2004 in reply to a Japanese protest over China's unauthorized survey of the Okinotorishima EEZ. China rejected this protest and has repeatedly violated Japan's EEZ claim by conducting research and survey activities from 2004 to the present. China's current stance is a 180-degree change from the past. In 1988, for example, in the Chinese military publication, '解放軍報', the writer profusely praised Japanese efforts to protect Okinotorishima from erosion.⁽⁴⁰⁾ Until 2004, China carefully respected Japan's EEZ claim and applied for advance permission to conduct research activities.⁽⁴¹⁾

Japan has responded to China's change of policy by monitoring and protesting all Chinese violation of the Okinotorishima EEZ. Japan has also taken steps to protect against further erosion including the installation of titanium bars surrounded by concrete around each of the protruding islets. To guard against ship-standings and other navigational accidents, Japan has built a radar station and plans to construct a lighthouse. In addition, Japan and the Tokyo

governmental administration plan to create several possible types of economic uses of Okinotorishima:

- Regeneration and possible exploitation of the coral resources since Okinotorishima includes not only the islets of Kita Kojima and Higashi Kojima, but also the surrounding coral reefs.⁽⁴²⁾
- Construction of an electric generating facility capable of using the differences in water temperature on and under the island to generate electricity.⁽⁴³⁾
- Fishing activity.⁽⁴⁴⁾
- Weather observation and material testing facilities.⁽⁴⁵⁾

The legal basis of Japan's claim to the maritime zones surrounding Okinotorishima depends on maintaining or creating two distinct factual characteristics of this place.

First, Okinotorishima must continue to protrude above the surface of the sea at high tide. There is no question that this is the case today, but whether this fact can be maintained in the future is problematic. The present elevation of the two islets at high tide is only 16 cm. for Kita Kojima and 6 cm. for Higashi Kojima. Sea level has risen substantially in the past century and this is expected to continue with no end in sight. It appears Japan may be fighting a losing battle against the sea to maintain the islets. Even if no further erosion takes place, sea level rise may doom the islets to become only low-tide elevations or to become completely submerged. In this case Okinotorishima would lose its island status and all its maritime zones. Of course Japan could construct an artificial structure over the islets, but this would not satisfy the legal conditions of LOS Article 121 (1), which defines an island as a "*naturally* formed area of land". An artificial structure would flunk the test of being "natural". Thus, the idea of regenerating the coral surrounding Okinotorishima may be the key to maintaining island status. The coral beds are a natural and integral part of the area, and growing coral to build the height of the land above the sea at high tide appears to be the best idea.

The second legal issue facing Japan is to satisfy the condition of LOS

Article 121 (3) that Okinotorishima is not a “rock” because it is capable of sustaining human habitation or an economic life of its own. These are two separate matters, and both need not be satisfied. Thus, permanent human habitation is not necessary, but some self-sufficient economic use is required. Furthermore, the economic use must be centered *on* and not merely *around* the island. Fishing alone therefore would not be sufficient unless a fish processing plant or some other economic facility were located *on* the island.

Of the alternative proposals to create an economic use on Okinotorishima, the best suggestion appears to be the construction of an electrical generating facility. This plant, although it would utilize temperature differentials in the waters under and around the island, would still require a building and machinery on the island itself. This would appear to satisfy the requirement that the island has “an economic life of its own”.

In summary, Japan should (1) continue to assert the full island status of Okinotorishima; (2) vigorously protest and publicize all unauthorized Chinese incursions into the Okinotorishima EEZ; (3) continue steps to halt erosion; (4) take further steps to build up the island through regeneration of the coral reef; and (5) create economic value on the island through establishment of an electric generating facility.

2. Senkaku/Diaoyu Islands

(1) The Territorial Claims

An objective application of the law of territorial acquisition and sovereignty over the Senkaku/Diaoyu Islands favors Japan. Under all of the relevant modes of territorial acquisition, Japan’s claim is by far stronger than China’s.

Most relevant is the law of occupation, which presumes that the territory in question was “*terra nullius*”, land belonging to no state and therefore capable of acquisition. Under the doctrine of occupation discovery of lands is not enough; the claimant to sovereignty must show (1) an intention to act as sovereign and (2) actual exercise of administration and authority. The acts of control necessary to

prove these two elements are often termed by the French word, “*effectivités*”.

Japan's “*effectivités*” over the islands began in 1879 after the Japanese government established Okinawa Prefecture upon the abolition of the Ryukyu Domain. Over a ten-year period, Japan surveyed the islands and came to view them as “*terra nullius*”. In 1895 a Cabinet Decision was taken to incorporate the islands into Okinawa Prefecture.⁽⁴⁶⁾

From at least 1884 Japanese nationals were using the islands as fishing bases, and in 1895 the Okinawa Government to Koga Shinshiro, a Japanese citizen, formally leased certain lands on the islands. Shinshiro and his descendents maintained their fishing activities and purchased 4 Islands from Okinawa Prefecture in 1932. In the 1930s several buildings and docks were built on Uotsuri Island. In 1940, however, the Shinshiro family abandoned their enterprise because of financial difficulties. Since 1940 the islands have not been inhabited.⁽⁴⁷⁾

At the end of World War II, in 1945, the islands came under the administration of the United States as a result of the US occupation of Japan. By the treaty of administration on Japanese islands (群島組織法) between Japan and the US, the Senkaku Islands were noted to be part of the Ryukyu (Nansei) Islands belonging to Japan.⁽⁴⁸⁾ The 1951 San Francisco Peace Treaty between Japan and the US continued American administration under the terms of the Peace Treaty.⁽⁴⁹⁾ In 1971 the islands were returned to Japan by the Agreement between Japan and the United States Concerning the Ryukyu and Daito Islands. (沖縄返還協定).⁽⁵⁰⁾

These “*effectivités*” are specific and governmental in character, and qualify under the standards set in the *Eastern Greenland*⁽⁵¹⁾ and *Isle of Palmas Cases*⁽⁵²⁾ to show both Japan's intention and will to act as sovereign and actual exercise of sovereignty. Furthermore, even if the islands were not “*terra nullius*” in the 19th century, Japan's claim is validated by the doctrine of *prescription*. During the period from 1895 to 1971, China (including Taiwan) made no objection or protest over Japan's exercise of sovereignty, and no complaint or claim was registered by China when the islands were the subject of two

international agreements between Japan and the US. Although no specific time period is accepted in international law for the running of prescription, the open administration of the islands by Japan and the US over 76 years without objection seems more than sufficient to qualify under the prescription doctrine.

Japan's claim to the islands is also supported by the doctrine of *acquiescence/recognition*. It is significant that the US as a third state has continuously recognized, in fact has taken for granted, Japanese sovereignty. China also recognized the legitimacy of Japanese sovereignty until 1971. In 1871, when Taiwanese people killed several Japanese nationals who accidentally landed on Taiwan, China rejected the resulting Japanese protest on the grounds that it had no administrative power over the area, including Taiwan. In 1920, after Japan rescued several Chinese nationals who were accidentally stranded on the islands, China sent Japan a certificate of appreciation stipulating that the islands belonged to Japan. In addition, official Chinese maps published as late as 1970 designate the Senkaku Islands as Japanese territory.

China's modern claim to the Senkaku Islands dates only from 1971, and was made only after a United Nations survey team⁽⁵³⁾ found potentially rich deposits of oil and gas lay under the seabed around the islands. The basis of China's claim to the islands is twofold: First, China relies upon evidence of their discovery in 1372, as well as subsequent visits by Chinese fishing parties and expeditions to gather herbs and other plants. China therefore denies the islands were "*terra nullius*" in the nineteenth century. Second, China argues that Japan acquired the islands through cession under the 1895 Treaty of Shimonoseki, which ended the Sino Japanese War. If this is the case, Japan lost the islands in Article 2 of the San Francisco Peace Treaty, which renounced all claims to "Formosa and the Pescadores".

However, there appear to be fatal weaknesses to the Chinese claim of sovereignty over the islands. First, the basis of the Chinese claim seems to be only *discovery*; there is no record of any "*effectivités*" —the exercise of administration or government control. Under the customary law standards set out in cases such as *Isle of Palmas*, *Indonesia/Malaysia*, and the *Minquiers*

and *Ecrehos*, discovery alone is not a sufficient basis for a claim of sovereign acquisition. A showing of government control and administration is also required. This appears to be lacking on the part of China.

Second, there is no evidence the islands were acquired by cession to Japan in 1895. The Treaty of Shimonoseki does not mention the Senkaku Islands. Moreover, they were not specifically renounced or mentioned in the San Francisco Treaty. In fact, the subsequent practice of their administration by the US is a definitive indication that the islands were considered by all concerned to belong to the Ryukyu (Nansei) Islands group.

Third, China acquiesced and even on occasion recognized Japan's sovereignty from at least 1895 until 1971, which is the critical date the dispute arose. Under the authority of the *Eastern Greenland Case*, the respective rights of the parties had already crystallized so that protests and claims after that date cannot be taken into account.

Therefore, under international law the Senkaku Islands should be recognized as part of the territory of Japan.

(2) Maritime Boundary Delimitation

In the light of the putative resolution of the territorial dispute over the Senkaku Islands in favor of Japan, the full extent of the Sino-Japanese dispute over their maritime boundary delimitation in the East China Sea can be fully illuminated. Three maritime boundary lines may be considered as relevant.

(1) Assuming Japanese sovereignty over the Senkaku Islands, Japan could claim an EEZ of 200 nautical miles with the islands as the baseline. This would give maximum value to Japan's sovereign claims and extend her maritime zone far into the East China Sea. This option was in fact considered and rejected by the Japan Foreign Ministry when Japan ratified the UNCLOS in 1995, reportedly "to avoid upsetting China."

(2) The line Japan did submit as its EEZ claim is the Median Line equidistant between the Chinese coast (with allowance for Taiwan) and the Ryukyu Islands. This Median Line encompasses the Senkaku Islands within

Japan's claim, but they are not given any value as far as extending Japan's EEZ is concerned. This line thus represents a generous political decision by Japan to forego what it would arguably be entitled to claim under international law. The maritime boundary delimitation jurisprudence would dictate that the Senkaku Islands should be given some, if not full, value in an extension of Japan's EEZ. But Japan has chosen to draw its EEZ boundary with no value at all to the Senkaku Islands.

(3) China's claim to an EEZ in the East China Sea delimits a line based on the natural prolongation of the continental shelf to the edge of the Okinawa Trough. This line maximizes the possible Chinese claim and extends China's EEZ to close proximity to the Ryukyu Island chain.

It is evident that the rival claimants in the East China Sea have taken different initial approaches. While Japan has claimed much less than the law allows, China has done the opposite and claimed the absolute maximum. On the one hand, according to the jurisprudence of the law of the sea, the Chinese claim, which is based on the natural prolongation theory, is not valid; recent cases such as the *Tunisia/Libya Case* ignore natural prolongation as a factor when delimiting a contested EEZ. On the other hand, the law of the sea jurisprudence would allow Japan to claim a larger EEZ in the East China Sea than it presently does. While small, uninhabited islands such as the Senkakus cannot be the basis for a 200-mile zone, they clearly can be given some value, as was done by the tribunals in the *Jan Mayan* and *St. Pierre and Miquelon Cases*. Alternatively, the Senkaku Islands may be enclaved in a future delimitation and given their own EEZ separate from that recognized for the Ryukyus.

China's claim to an extensive EEZ/Continental Shelf beyond the equidistance line that is the limit recognized by Japan rests on two basic arguments: (1) the natural prolongation idea that a coastal state may claim the entire continental shelf as a physical structure; and (2) the idea that China's greater population and size entitle it to a larger share than Japan. However, neither of these arguments support in the recent jurisprudence. Although the natural prolongation theory was emphasized in the *North Sea Continental*

Shelf Cases (1969),⁽⁵⁴⁾ later cases have uniformly rejected natural prolongation as an important and special circumstance. Similarly, socio-economic factors such as the population, wealth or land territory belonging to each party are also disregarded as important in the cases.⁽⁵⁵⁾ Therefore, China's claim to a maritime zone beyond the equidistance line cannot be valid.

(3) Resolving the Disputes

While the possible solution to the dispute under strict international law is important, the parties must settle the matter through negotiations and compromise. As a starting point it is important to note that Japan has already made substantial concessions by not claiming as much as it could under international law; while China has maximized its claim. China has also proceeded in aggressive fashion to develop the maritime resources of the East China Sea. In 2004 China conducted extensive exploration of the area, and according to the Japanese Foreign Ministry 22 “illegal” surveys were conducted on the Japanese side of the equidistant line. China has also established several producing gas wells in close proximity to the putative equidistance line. In response, Japan has authorized exploratory energy development projects on its side of the line. Thus both nations are developing what is essentially the same resource, creating a potentially explosive situation that cries out for a peaceful solution.

What is needed is a comprehensive settlement that respects the legal and political rights of both nations. The elements of such a settlement appear to be as follows:

- A definitive determination of sovereignty over the Senkaku/Diaoyu Islands. The best solution would be for the parties to agree to submit this matter to an international tribunal for an objective determination.
- Agreement in principal that the maritime boundary between them is the Median (equidistance) Line between Okinawa and the Chinese mainland. This line is already the working line accepted by both sides. It can be adjusted as needed after the determination of sovereignty over the

Senkakus. A separate maritime zone can be added, but with agreement in advance that full value of 200 miles will not be recognized.

- A Joint Development Agreement should be concluded between Japan and China in order to develop fairly energy resources.
- The 1997 Fisheries Agreement between Japan and China establishing a Joint Management Zone in the East China Sea for fisheries should be confirmed and extended.

In dealing with these disputes, Japan must keep in mind the political reality that China's expansive claims in the East China Sea are part of a larger whole: China's aspiration to a "great China"—a country with a world class military and economy and a corresponding political reach. China is also concerned with its development and assuring adequate energy supplies. Thus, the Chinese leadership is induced to make extravagant and unsupported maritime claims as part of this grand strategy.⁽⁵⁶⁾ China is building up its navy and expanding its maritime reach not only in the East China Sea but also in the South China Sea and even the Indian Ocean. China's exaggerated claims are also driven by domestic policy considerations—to cater to anti-Japanese feelings. Japan has been much too timid in muting its rightful territorial claim to the Senkaku Islands and in foregoing its rightful maritime rights in an effort to be "reasonable" to China. This has not contributed to settling the dispute but has rather encouraged China's ambitions. Thus, in the future Japan should firmly assert its rights under international law by: (1) renewing and restating its territorial claim to the Senkaku Islands while calling for reference of this dispute to an international tribunal; (2) vigorously protesting and publicizing Chinese incursions beyond the Median (equidistant) Line; (3) proceeding with oil and gas exploration and development in the East China Sea; and (4) continuing to negotiate with China to avoid military confrontation and ultimately to settle the disputes on a fair and comprehensive basis.

Japan should also undertake a major initiative to solve these problems if at all possible. Japan's policy in the past has been to downplay their significance and to "sweep them under the rug." This is no longer possible. Solving these

disputes with China is now imperative, not only to improve bilateral relations, but also to begin overdue initiatives to establish regional cooperation and an East Asian Community.

3. Takeshima/Dok Island

(1) The Territorial Dispute

The territorial dispute over Takeshima (Dok Island) dates from 1952, shortly after the 1951 San Francisco Peace Treaty between US and Japan. South Korea asserted its claim after it became aware that, at Japan's insistence, Takeshima was excluded from territory renounced by Japan. By acceding to this request, the US, which had included Takeshima in the draft treaty, admitted the possibility that Takeshima was part of Japan. In response, South Korea on January 18, 1952, declared the so-called Yi Syngman (李承晩) Line, which formally claimed Takeshima as part of South Korea. In response, Japan took a Cabinet Decision on January 28, 1952, formally protesting the Yi Declaration and reaffirming that Takeshima was under the jurisdiction of Shimane Prefecture.⁽⁵⁷⁾

South Korea's claim to Takeshima has a long history. South Korea argues that historical documents recognize the Takeshima as part of Korea as early as 512. At an early age the island was known as Usando (干山国) and was considered to be a part of a territory known as Ullungdo. Both were also referred to by the name Usan-koku. According to Korean scholars, Usan-koku was acquired by the Korean kingdom of Shilla (新羅) in 512.⁽⁵⁸⁾

Japan's claim to Takeshima dates from 1618 when the Tokugawa shogunate permitted the Murakawa and Ohya families to use Ullungdo including Takeshima as ports of anchorage for fishing activities. By at least 1661 the Tokugawa shogunate authorized these families to possess feudal tenure over the island.⁽⁵⁹⁾ Their use of the area continued until 1696 when, as a result of disputes between Japanese fishermen and the islands' inhabitants caused the Japanese Government to declare the area off-limits except for Takeshima proper.⁽⁶⁰⁾

Japan took formal action to incorporate Takeshima into Japan in 1905. On February 22, 1905, Public Notice No. 40 was published (in one local newspaper and only in Japanese) by Shimane Prefecture formally annexing Takeshima. This action had been quietly authorized in January 1905⁽⁶¹⁾ at a secret Cabinet meeting by the central government. Apparently this was done quietly to avoid adverse reactions by other countries. There was no official reaction from Korea, and there is no evidence Korea even was aware of Japan's action. At this time Japan was involved in war with Russia (the Russo-Japanese War of 1904-05). In January 1905, Japan captured the Russian stronghold of Port Arthur after a seven-month siege, and went on to win a victory at Mukden in central Manchuria. In May 1905 the Japanese navy won an historic victory when a Russian relief fleet was destroyed near the island of Tsushima. Thus, the annexation of Takeshima was a relatively unimportant part of the policy of territorial expansion to the north and on the Asian mainland. In the Treaty of Portsmouth (1905) Russia ceded southern Sakhalin and Port Arthur together with its surrounding territory to Japan. As a result of its victory and the defeat of China ten years before, Korea became a Japanese protectorate and was formally annexed by Japan in 1910.

The first "critical date" in the Takeshima dispute is accordingly 1905, the date of its formal annexation by Japan. A key legal issue is what is the status of Takeshima immediately prior to Japan's action at this time. Was the island the territory of Korea or Japan? The answer to these questions depends on an analysis of the "*effectivités*" of each country with respect to Takeshima. As stated above, neither Korea nor Japan paid much attention to the Takeshima before 1905. Japan's administrative acts at the beginning in the 17th century appear to be more vigorous than Korea's administration; but Korea's was much earlier in time. Comparing these two claims, it appears that Korea's actions incorporating Takeshima into Shilla in the 6th century meet the standard set in the *Clipperton Island Arbitration*. In that case the arbitrator took into account the inaccessibility and the uninhabited nature of the island to uphold the French claim despite its minimal character. This is similar to Korea's actions concerning

Takeshima. Another important factor is that two Japanese government maps published respectively in 1875 (army) and 1876 (navy) clearly show Takeshima to belong to Korea. In 1877 the government of Japan, in reply to a query from Shimane Prefecture whether Ullungdo and “one other island” (presumably Takeshima) should be included on the official prefectural map, declared that “Ullungdo and the other island are Korean territory, and Japan has nothing to do with these islands.”⁽⁶²⁾ In addition, when the Korean Government in 1900 approved Imperial Ordinance 41 designating Ullungdo as an independent county of Kangwon Province, Tokdo was mentioned apparently as “Sokdo”, and considered part of Korean territory.⁽⁶³⁾

This evidence clearly favors a finding that Takeshima was Korean territory until Japan's annexation in 1905. The next question is the effect of Japan's 1905 annexation— was this action illegal?

At first glance the annexation of Takeshima by Japan appears clearly illegal; after all, a nation cannot annex the territory of another state in secret and without permission. Takeshima was clearly not “*terra nullius*”. But Japan has always maintained up to the present that the annexation of Korea was not contrary to international law.⁽⁶⁴⁾ In fact, the Korean Government accepted the Protectorate Treaty offered by Japan in 1905 as well as the Treaty of Annexation in 1910. According to this line of reasoning, Takeshima was an integral part of the territory of Japan as confirmed by the Annexation Treaty of 1910, and while after World War II Japan renounced “all right, title and claim” to Korea in the San Francisco Peace Treaty, Takeshima was specifically excluded from the territory returned to Korea. Thus, Takeshima is today part of Japan.

However, this line of reasoning cannot withstand scrutiny. First, the annexation of Takeshima in January/February 1905 was separate from the process of annexation of Korea by means of the Protectorate Treaty first and then the Annexation Treaty. The annexation of Takeshima was purely unilateral and done in secret; the Korean Government certainly did not consent and was probably unaware of this action. Second, the annexation of Korea was illegal under international law norms. The treaties of protection and annexation

were clearly forced on Korea. Japanese officials arranged the assassination of the Korean Queen in 1895, and through military pressure installed a puppet government that was induced to dissolve the Korean Army and accepting annexation. Coercion of a state or its representatives is one of the grounds for invalidity of a treaty,⁽⁶⁵⁾ and Japan's actions at this time meet this test. A further ground for considering Japan's annexation illegal is the international law rule that conquest is not a valid method of territorial acquisition. Although this rule was not fully in force in 1905, and Japan's annexation was not accomplished by military means, subsequent events must inevitably be taken into account under the principle of intertemporal law as expressed by Judge Huber in the *Isle of Palmas Case*.

The exclusion of Takeshima in the 1951 San Francisco Peace Treaty from territories renounced by Japan does not affirm that this island belongs to Japan. The history of US post war policy toward Japan shows that the Americans regarded Takeshima as Korean territory. Shortly after the Japanese surrender, on January 29, 1946, the American occupational government issued a decree, SCAPIN No. 677,⁽⁶⁶⁾ which defined the territory of Japan to exclude Takeshima as well as Ullungdo from Japanese territory. This was the operational policy of the US throughout the occupation.⁽⁶⁷⁾ The draft San Francisco Peace Treaty of 1951 also listed Takeshima as territory excluded from Japan. This provision was removed only after the Japanese government lodged a protest. But there is no indication the Americans intended to incorporate Takeshima into Japan; the provision was removed only because the situation was unsettled. Moreover, Korea immediately reacted to the exclusion of Takeshima from the 1951 Peace Treaty, as stated above, by issuing the Yi Syngman Declaration of January 18, 1952, claiming Dok Island as part of the territory of South Korea.

In summary, an objective analysis of the legal issues concerning the Takeshima territorial dispute yields the conclusion that this island belongs to Korea, not Japan.

Although the Korean claim is relatively slight, while Japan's claim rests on more substantial administration, Korea's claim to Takeshima is valid based

on the analogy with the *Clipperton Island Case*, where the more substantial but later Maxican claim did not take precedence over the earlier, very slight actions taken by France.

(2) Maritime Boundary Delimitation

Under the assumption that Takeshima is South Korean territory, what are the maritime boundary implications? In 1999 Japan and South Korea established a Joint Fishing Zone in the Japan Sea including the area around Takeshima.⁽⁶⁸⁾ However, despite this agreement, Korean army vessels now patrol the seas around Takeshima, and Japanese vessels are off limits. Settlement of the territorial dispute should be accompanied by a new Joint Fishing Agreement that would clearly recognize Japanese fishing and management rights in this area. In addition, with the settlement of the dispute over sovereignty, the maritime boundary between South Korea and Japan could be definitively established. Takeshima, as territory of South Korea would have its own maritime zones, but since Takeshima is unquestionably only a “rock” under Article 121 (3) of the UNCLOS, its maritime area would be limited to a 12-mile territorial sea and a 12-mile contiguous zone; Takeshima lacks eligibility for an EEZ. Moreover, because of Takeshima’s distance from both Japan and Korea, it would be an enclaved maritime area in the Japan Sea. If the Joint Fishing Zone were continued, recognition of Takeshima as Korean territory would have little practical effect, and Japan would gain new economic rights in the disputed area.

(3) Resolving the Dispute

Since South Korea has long refused to submit the Takeshima (Dok Island) dispute to the International Court of Justice or some other international tribunal, this matter can be settled only through bilateral negotiations. Several factors dictate that Japan may consent to a negotiation where the end result is renunciation of a claim to the island. First, Japan’s legal case is quite weak. If the dispute were to be submitted to a court, Japan would in all likelihood lose. Second, the stakes in play are quite minor. Takeshima has no resources

other than fishing, and access to fishing and other economic or navigational advantages can likely be secured by Japan in the negotiation. Thus, Japan will lose little by renouncing its territorial claim; only abstract considerations of “sovereignty” and nationalism are really at issue. But these can properly be sacrificed in order to end a dispute that has festered for over a century and continues to poison Korean-Japanese relations. Japan may in fact reap great good will from Korea and countries around the world by handling this matter in a statesman-like manner. Ending this dispute may inaugurate a much-needed era of friendly relations between Japan and its closest neighbor.

4. The Northern Territories

(1) The Territorial Dispute

Japan’s dispute with Russia over the so-called Northern Territories has a tangled but interesting history. Russia and Japan both laid claim to the Kuril Island chain and parts of Sakhalin in the eighteenth century. These conflicting claims were resolved in the 19th century by the conclusion of two agreements. First, the 1855 Treaty of Commerce, Navigation and Delimitation (known as the Shimoda Treaty) provided in Article 2 that “henceforth the boundary between the two nations shall lie between the islands of Etorofu and Uruppu. The whole of Etorofu shall belong to Japan, and the Kuril Islands lying to the north of and including Uruppu shall belong to Russia. With regard to Sakhalin Island, rather than establishing a boundary, historical precedent shall be observed.” The Shimoda Treaty therefore divides the Kurils into a northern group of 18 islands and a southern group (Minami Chishima in Japanese) of two islands, Etorofu and Kunashiri. Two of the presently disputed islands, Habomai and Shikotan, were not considered part of the Kuril Islands and were considered Japanese territory.

The second agreement was the 1875 St. Petersburg Treaty for the Exchange of Sakhalin for the Kuril Islands. Article 2 of this agreement effects an exchange: Japan ceded its rights in Sakhalin to Russia in exchange for title in

the 18 northern Kuril Islands. Under this agreement the frontier between Japan and Russia was the middle of the strait between the peninsula of Kamchatka and the northernmost of the Kurils, the island of Shumushu.

This boundary settlement held until the Russo-Japanese War of 1904-05. As a result of this war, which was won by Japan, the Portsmouth (New Hampshire) Peace Treaty of 1905, Article 9, provided that Russia “cede(s) to the Imperial Government of Japan, in perpetuity and full sovereignty, the southern portion of the island of Sakhalin, and all the islands adjacent thereto.... The fiftieth degree of north latitude shall be...the northern boundary of the ceded territory.”

So things stood until 1943, toward the end of World War II, when the Cairo Conference first raised the question of the postwar fate of wartime territorial acquisitions. The three allies —the UK, China, and US— issued a declaration that “Japan will...be expelled from all...territories which she has taken by violence and greed.” This declaration set postwar policy on this issue. The question of the Kuril Islands was first specifically raised at the subsequent Teheran Conference, which was attended by Joseph Stalin on behalf of the Soviet Union. US President Roosevelt was reportedly⁽⁶⁹⁾ told incorrectly by Undersecretary of State Sumner Welles that the Kuril Islands had been awarded to Japan in the Treaty of Portsmouth; thus he was receptive to Stalin’s proposition that both Sakhalin and the Kurils should be awarded to the Soviet Union after the war.

Next came the Yalta Conference in February 1945, only two months before Roosevelt’s death, at which the allies agreed that “the Soviet Union shall enter the war against Japan.... on condition that...the Kuril Islands shall be handed over to the Soviet Union.” It should be pointed out that this promise by the allies to the Soviet Union is without legal effect under the rules of international law. As provided in the Vienna Convention on the Law of Treaties, 1969 (customary law in 1945), Article 34:

“A treaty does not create either obligations or rights for a third state without its consent.”

The next relevant action was President Truman’s General Order No. 1,

which came after the Japanese surrender. The first version of this order on August 15, 1945 ordered Senior Japanese Commanders to surrender to Soviet Forces in the Far East “within Manchuria, Korea north of 38 degrees north latitude and Karafuto [Sakhalin].” On August 16 Stalin sent Truman an urgent message reminding him of the Yalta Declaration and stating that “all the Kuril Islands” must be inserted onto General Order No. 1. Stalin also asked Truman to include in the “region of surrender...to Soviet troops” the northern portion of the island of Hokkaido. As a compromise, the final version of General Order No. 1 issued on August 23, 1945 ordered: “all of the Kurile Islands” (but not Hokkaido) “shall surrender to the Commander in Chief of the Soviet Forces in the Far East.”

Soviet troops immediately took over Etorofu and Kunashiri; during September 1-4, 1945, they also occupied the Habomai Islands and Shikotan. Moscow justified the latter move on the basis that the Habomais and Shikotan were part of the Kurils. On September 20, 1945, the Soviet Union unilaterally declared that all four islands were now Soviet territory. On February 25, 1947 language was inserted into the Soviet Constitution that the Kurils were an “integral component of the Russian Federated Socialist Republic.”

The Soviet Government’s annexation of the four Northern Territories was clearly illegal. First, as we have seen, the Yalta Agreement was totally incapable of affecting Japan’s territorial rights. Second, General Order No. 1, even as revised to include “all of the Kurile Islands” was not and could not have been an authorization of annexation. This order merely determined the areas where Japanese forces would surrender to the Soviets as opposed to American forces. It was not intended nor could it have any impact on territory. This is obvious when one considers that if this order did have territorial impact, the Soviets could have annexed Manchuria and North Korea as well. Third, Soviet annexation of occupied Japanese territory was contrary to international law. The Hague Convention No. IV (1907), Article 47, which specifies the duties of an army occupation and an occupying power, prohibits “annexation...of the whole or part of the occupied territory.” Moreover, by expelling the Japanese inhabitants

of the islands, the Soviets committed grave violations of the humanitarian laws of war.

The most difficult issue concerning the Northern Territories current status grows out of Article 2(c) of the 1951 San Francisco Peace Treaty signed by Japan, the US and 47 other nations. This Article provides that:

“Japan renounces all right, title, and claim to the Kurile Islands, and to that portion of Sakhalin and the islands adjacent to it over which Japan acquired sovereignty as a consequence of the Treaty of Portsmouth of September 5, 1905.”

Although Japan's Prime Minister Shigeru Yoshida protested, the language was not altered. Russia argues that this provision confirmed its title to at least two of the Northern Territories, Etorofu and Kunashiri.

But Russia cannot claim any right to the Northern Territories flowing from Article 2(c). The Soviet Union did not sign the 1951 Peace Treaty; in fact, the Soviet negotiators walked out in protest. Article 25 of the Treaty specifies that “the present Treaty shall not confer any rights, titles or benefits” on any allied power that does not sign and ratify it. This accords with the general international law rule that a treaty cannot create either rights or obligations for non-parties. The US government also issued an interpretation that the Japanese renunciation in Article 2 was not intended to include any of the four Northern Territories. A final point concerns the equity of the matter; it would be a gross injustice if the Soviet Union and its successor, Russia, were permitted to use the San Francisco Treaty as a justification of its obvious violations of the laws of war following World War II.

Japan and the Soviet Union began bilateral talks in 1955 to normalize relations and to negotiate a treaty of peace. Of course, the question of the four Northern Territories loomed large in the discussions. The Soviets softened their position and were fully prepared to return Habomai and Shikotan to Japan. The Japanese Foreign Ministry for its part began to prepare to accept the return of only two of the islands in return for a peace treaty. Then in August 1956 occurred the now-famous “Dulles Threat Incident”. John Foster Dulles, the

US Secretary of State, at a meeting with Japanese Foreign Minister Mamoru Shigemitsu, brought up the subject of Article 26 of the San Francisco Peace Treaty, which states: “Should Japan make a peace settlement with any state granting that state greater advantages than those provided by the present Treaty, those same advantages shall be extended to the parties to the present Treaty.” Dulles suggested, “The Japanese might tell the Soviets that if they were forced to give up the Kuriles they would have to give up the Ryukyus as well.”⁽⁷⁰⁾ What Dulles was saying was that if Japan gave up the Kuriles the “United States might remain forever in Okinawa.”⁽⁷¹⁾

Scholars still debate Dulles’ intent in making this statement. Some believe it was a threat to annex the Ryukyus;⁽⁷²⁾ others, particularly Russian scholars, believe that Dulles’ intent was to derail the peace negotiations.⁽⁷³⁾ Newly declassified US government documents, however, show that Dulles’ intent was to strengthen Japan’s hand in dealing with the Soviets. This was the age of the Cold War, and US policy toward the Soviet Union was “containment”. Dulles wanted to discourage Japan from giving up on the return of Etorofu and Kunashiri Islands.⁽⁷⁴⁾

Dulles’ ploy worked to perfection. Tokyo went back to its insistence on return of all four islands. On October 19, 1956 Japan and the Soviet Union issued a Joint Declaration, which ended the state of war and resumed diplomatic relations, but was not a treaty of peace. The Joint Declaration stated: “The Union of Soviet Socialist Republics and Japan agree to continue...negotiations for the conclusion of a Peace TreatyIn this connection, the Union of Soviet Socialist Republics, desiring to wishes of Japan...agrees to transfer to Japan the Habomai Islands and the Island of Shikotan (sic), the actual transfer to take place after the conclusion of a Peace Treaty.” Some have argued that in signing this Joint Declaration Japan again renounced its claim to Etorofu and Kunashiri;⁽⁷⁵⁾ but it is readily apparent this was not done. Rather, Japan simply acknowledged Russian willingness to hand over two of the islands, but insisted on the return of all four. The fact that the dispute involves all four islands –Etorofu and Kunashiri included– was admitted by Russia in 1993 when President Boris Yeltsin signed

the Tokyo Declaration, which called for the resolution of the territorial issues involving all four islands. The Tokyo Declaration was followed by a bilateral summit meeting in Krasnoyarsk in 1997 at which both nations pledged to make “utmost efforts” to conclude a treaty of peace by the year 2000. Of course the situation remains deadlocked to the present time.

In summary, Japan's claim to the Northern Territories is unequivocal and clear under international law. Japan should continue to insist on the return of all four islands in talks with Russia. Japan should also enlist the international community to exert pressure on Russia to end this dispute and to sign a formal treaty of peace with Japan.

(2) Maritime Boundary Delimitation

If the territorial dispute over the Northern Territories is resolved, the maritime boundary question can be relatively easily resolved. The principle of equidistance appears to be quite adequate for the purpose of drawing new maritime boundaries in the area between Russia and Japan.

(3) Resolving the Dispute

On the surface, it would seem quite easy to resolve this dispute considering the vast amount of territory enjoyed by Russia. However, Russian reluctance to give in stems from the fact that giving the islands back to Japan might induce China to ask for the return of areas along the Russian-Chinese border that the Soviets took over before and during World War II. In addition, the rich fishing grounds of the Kurils provide a great proportion of the fish consumed in Russia as well as a source of revenue. Moreover, the Northern Territories may have substantial mineral wealth.

Japan should pressure Russia to submit this dispute to an international tribunal. Failing this, bilateral negotiations are the only option, and Japan will undoubtedly have to offer substantial economic inducement to gain the islands' return.

VIII. Conclusions

In conclusion, Japan should place a high priority on the settlement of territorial and maritime boundary disputes with neighboring countries. The existence of these disputes casts a negative spell on international relations in East Asia. All of these disputes date from the bleak period of war and unrest prior to 1945. Japan should seek to put these disputes in the past in order to concentrate on a new future in the twenty-first century.

The disputes with China, Korea and Russia have very different origins and involve different political considerations. All, however, involve small islands and their surrounding maritime areas. Analysis of the legal aspects of these disputes offers an opportunity for Japan and the Japanese people to evaluate their negotiating position and the chances of ultimate success. This paper offers not only an evaluation of the legal aspects of the disputes, but also suggestions on how to resolve them.

The disputes between Japan and China involve islands in the East China Sea and their maritime zones. The legal position of Japan is relatively strong in these disputes. China as a rising great power is seeking to maximize its maritime position in the East China Sea. The presence of oil and gas resources in this area also leads China to assert broad claims to the area. Japan's legal title to the Senkaku Islands is stronger than China's claim. Japan can also control its destiny with regard to future development of Okinotorishima, the southernmost island of Japan. It is important for Japan to establish an economic use on Okinotorishima in order to assure Japan's maritime area on its southern border.

The dispute between Japan and Korea involves Takeshima, a small, uninhabited island in the Japan Sea. Takeshima has little value or resources other than fishing. Japan's claim to Takeshima is based on feudal rights granted to Japanese nationals and other uses primarily for fishing dating from the seventeenth century. Korea, however, appears to have an even older claim dating from the sixth century and the Shilla Government. Japan may wish to negotiate with South Korea in order to secure economic and fishing concessions in return for renouncing Japan's claim as a gesture of peace and good will.

The dispute between Japan and Russia over the Northern Territories has its roots in the eighteenth and nineteenth centuries when both nations explored and utilized the Kuril Islands and Sakhalin. Although various treaties established the nineteenth century border between Japan and Russia, these were changed by the wars of the late nineteenth and early twentieth centuries. At the end of World War II, the Soviet Union as an occupying power acted contrary to international law by expelling Japanese inhabitants and annexing the four northern islands into Soviet territory. Japan has a strong and unequivocal claim for the return of these islands under international law.

Hopefully, the resolution of these disputes will remove irritants that, while minor, impede friendly relations between Japan and its neighboring countries. The disputes should be resolved peacefully and in accord with accepted principles of international law. This may open the way to closer regional cooperation among East Asian nations and the establishment of an East Asian Community.

Notes

- (1) See Morgan.
- (2) Adapted from booklet of the Land, Infrastructure and Transportation Ministry of Japan.
- (3) See Unryu Suganuma.
- (4) Map courtesy of Embassy of Japan, Washington DC.
- (5) See Ohnishi.
- (6) <http://www.askasia.org/image/maps/kuril1.html> (Oct.10, 2005)
- (7) For example, the UN Security Council in the exercise of its powers under Chapter VII of the UN Charter determined the border between Kuwait and Iraq in 1991 after the Gulf War. See Report of the International Boundary Demarcation Commission, 32 ILM 1425 (1993).
- (8) PCIJ Ser. A/B, No. 53, 3 Hudson, World Ct. Rep. 148. (1933).
- (9) Permanent Court of Arbitration, 2 UN Rep. Int'l Arb. Awards 829 (1928).
- (10) 26 *AJIL* 390 (1932).
- (11) ICJ Rep. 1953, p.47.
- (12) ICJ Rep. 2002, p.90.
- (13) Permanent Court of Arbitration, <http://www.pca-cpa.org>.

- (14) See Brownlie, pp.152-153.
- (15) 5 *AJIL* 782 (1911). See also the Case Concerning Kaskili/Sedudu Island (Botswana/Namibia), IJC Rep. 1999, 39, 39 ILM 310 (2000), which applied the same principle.
- (16) See Brownlie, p.127.
- (17) Preah Vihear Temple Case (Cambodia/Thailand), ICJ Rep. 1962, p.6.
- (18) Legal Status of Eastern Greenland (Norway v. Denmark) Permanent Court of International Justice, 1933, [1933] PCIJ Ser. A/B, No. 53, 71. Norway was also held to have recognized Denmark's title by its actions.
- (19) Brownlie, p.114.
- (20) United States v. The Netherlands (Island of Palmas), Permanent Court of Arbitration, 1928, 2 U.N. Rep. Int'l Arb. Awards 829.
- (21) See Jennings.
- (22) See Charney.
- (23) See Roach.
- (24) *Ibid.*
- (25) *Ibid.*
- (26) *Ibid.*
- (27) ICJ Reports 1969, p. 3, 87.
- (28) ILC Yearbook, 1956, Vol. II. p. 300.
- (29) Article 38, Statute of the International Court of Justice.
- (30) In addition to the North Sea Continental Shelf Cases, the ICJ was called upon to decide the Continental Shelf Case (Tunisia/Libya), 1982 ICJ Rep. 18; Continental Shelf Case (Libya/Malta), 1985 ICJ 12; Case Concerning Maritime Delimitation in the Area between Greenland and Jan Mayan (Denmark v. Norway), 1993 ICJ Rep. 38; Land, Island and Maritime Frontier Dispute (El Salvador/Honduras with Nicaragua intervening), 1992 ICJ Rep. 351; Gulf of Maine Case (US/Canada), 1984 ICJ 246. In the Aegean Sea Continental Shelf Case the ICJ found that it lacked jurisdiction. A number of cases have also been decided by arbitral tribunals: Anglo-French Continental Shelf Case (1977); Dubai/Sharjah Border Arbitration (1981); Guinea/Guinea Bissau Maritime Boundary Case (1985), 25 ILM 252 (1986); and the Case Concerning the Delimitation of maritime Areas between Canada and the French Republic (St. Pierre and Miquelon) (1992), 31 ILM 1149 (1992).
- (31) For a review see Colson.
- (32) 18 ILM 421 (1979).
- (33) See Erik.
- (34) LOS Convention, Article 283.
- (35) *Ibid.* Articles 286-287.
- (36) *Ibid.* Article 298.
- (37) This procedure has not yet been employed, perhaps because of the ambiguity of the "reasonable time" standard.

- (38) For the differences and the advantages and disadvantages of each see Richard.
- (39) See Hiramatsu, pp.44-57.
- (40) *Ibid.*
- (41) *Sankei Shimbun* Aug 5, 2001
- (42) The Ministry of Agriculture and Fisheries is budgeting 400 million yen in 2005-2006 for this purpose. The idea to use the coral was put forth by associate professor Kayane Hajime of Tokyo University. See <http://nippon.zaidan.info/seikabutsu/2004/00004/contents/0005.htm> (Nov.10 2005).
- (43) This idea was put forth by Professor Ikegami Yasuyuki, of Saga University. See <http://nippon.zaidan.info/seikabutsu/2004/00004/contents/0017.htm> (Nov.10 2005)
- (44) In January 31 2005, Ishihara Shintaro, the Governor of Tokyo-to, announced Tokyo-to will start fishing activity around Okinotorishima. (*Nikkei Shimbun* Jan.31 2005).
- (45) This is already underway.
- (46) See Urano, pp.14-15.
- (47) *Ibid.*, p.136.
- (48) Article 1.
- (49) Article 3.
- (50) Urano, p.14.
- (51) *Supra* note 8.
- (52) *Supra* note 8.
- (53) UNECAFE (UN Economic Commission for Asia and the Far East) Report of 1970.
- (54) The Libya/Malta Continental Shelf Case[1985] ICJ Rep.13; Tunisia/Libya Continental Shelf Case [1982] ICJ Rep.18.
- (55) See the Tunisia/Libya Case, *op. cit.*, pp.77-78; the Libya/Malta Case, *op. cit.*, pp. 40-41; the Greenland/Jan Mayen Case, *op. cit.*, pp. 73-74.
- (56) See Lee, p.549.
- (57) See Onishi, pp.93-110.
- (58) See Shin, p.25. For an extensive analysis see also Choung, Il Chee. "Legal Status of Dok Island in International Law" *Korean Journal of International Law* 25 (1997), 1-48.
- (59) See Kawakami, pp.70-82.
- (60) See *Ibid.*, pp.92-93.
- (61) The cabinet decision notes Takeshima is 'an uninhabited island that had no traces of ownership by any country.' See Shin, p.147.
- (62) *Ibid.*, pp.101-105.
- (63) *Ibid.*, pp.132-142.
- (64) See the statement of Prime Minister Tomiichi Murayama to the Diet October 11, 1995 as reported in the International Herald Tribune, October 12, 1995, p. 4.
- (65) Vienna Convention on the Law of Treaties, Article 51-52.
- (66) SCAPIN No. 677 provides islands' names which will exclude from Japanese territory, as

- follows: (a) Utsuryo (Ullung) Island, Liancourt Rocks (Take Island) and Quelpart (Saishu or Cheju) Island.
- (67) For example, SCAPIN No. 1033 reads as follows: 1(b) Japanese vessels or personnel thereof will not approach closer than twelve (12) miles to Takeshima (37°15' North Latitude, 131°53' East Longitude) nor have an contact with said island.
 - (68) See Sun, pp.253-267. For an extensive analysis, see Young, Koo Kim. "Maritime Boundary and Island Disputes in Northeast Asia" *Korean Journal of International Law* 25 (1997), 49-91.
 - (69) See David, pp.61-62.
 - (70) Foreign Relations of the United States 1955-57, vol. 23, part 1, pp. 202-203.
 - (71) *Ibid.*
 - (72) See Savigtri, pp.79-80.
 - (73) See Markov.
 - (74) See Bruce, p.489.
 - (75) See Clarke, 23.

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日本とその近隣諸国との領土及び海洋を巡る紛争の解決に向けて —問題と機会—

< 要 約 >

トーマス・J・ショーエンバウム

日本政府は隣国との領土紛争の解決と境界画定により励むべきである。なぜなら、これらの紛争は東アジアの平和と友好を大きく妨げるものだからだ。紛争の解決には、国際法の原則に則り行われるのが望ましい。この論文は、東アジアの領土紛争と海洋の境界画定について分析すると共に、国際法の観点から、いくつかの解決策を提示したものである。

各紛争の概要と法的評価

I. 沖ノ鳥島

1. 概要

沖ノ鳥島は、日本最南端の島で、幅 4.5km、長さ 1.7km の洋ナシのような形をした卓礁で、満潮時には卓礁自体は沈んでしまい、北小島（海上 16cm）と東小島（同 6cm）の二つの島のみが海上に残る。これら二つの島は海水や風雨による浸食を防ぐため周りが補強されている。その他沖ノ鳥島上には、昔建設された灯台基台と観測所が存在する。

沖ノ鳥島に関しては、その経済水域の範囲をめぐる中国との間で問題となっている。中国は 2004 年に、沖ノ鳥島は国際海洋法条約第 121 条 3 項が規定する「岩」であるため、日本の周囲の経済水域の権利は認められないと主張した。そしてそれ以後、沖ノ鳥島の経済水域での無許可操業を重ねている。中国のこの主張は、台湾有事の際のシーレーンの確保と、沖ノ鳥島周辺の海洋調査を行うためであると考えられている。

2. 評価

日本が法的に沖ノ鳥島の島としての地位を主張するためには二つの条件を維持しなければならない。それは、1) 高潮時も海面上に存在すること、2) 海洋法 121 条 3 項の条件のいずれかを満たすことである。1 番目の条件としては、珊瑚礁の育成が鍵となってくるだろう。なぜならこのままでは海面上昇に伴いいずれ島は沈んでしまうからである。そして、人工島では 121 条 1 項の「自然に形成された」という条件を満たさないため、意味を成さないのである。2 番目の条件としては、121 条 3 項の条件、つまり人が居住するか、何らかの経済的活動を島の上で行わなければならない。最もよい方法は発電所の建設であろう。

したがって、日本が今すべきことは、1) 沖ノ鳥島全体の島としての地位を主張し続けること、2) 中国の沖ノ鳥島の EEZ 内への侵入に注意深く監視し、抗議を続けること、3) 浸食を防ぐこと、4) 珊瑚礁による島の再生を目指すこと、5) 発電所の建設による島の経済的価値を高めること、の 5 つである。

II. 尖閣諸島

1. 概要

尖閣諸島は東シナ海上に存在する魚釣島をはじめとする 5 つの無人島と 3 つの岩を指す。この諸島の領有権に関しては、中国との間で紛争となっている。これらの諸島は 1895 年の閣議決定で日本領にされた後、第二次戦争後にアメリカの施政下におかれ、1971 年に沖縄と共に日本に返還された。尖閣諸島をめぐる紛争は、中国が 1971 年 12 月 30 日にそれまで日本領であった同諸島に、公式に主権を主張する声明を発表したことにより始まった。それは、1969 年の国連 ECAFE(アジア極東経済委員会)による調査で、周辺海域に石油が埋蔵されているという事実が分かり、この諸島の帰属先を明らかにすることが重要になったためである。

尖閣諸島についてはその周辺海域の領海画定も問題となっている。島の周辺の海底に天然ガスが埋蔵しているため、尖閣諸島の領有権に基づく経済水域、大陸棚の権利が重要となっているのである。現在、日中中間線の中国側で中国のガス田が操業を開始し、日本政府も日本側でのガスの試掘を民間会社に認めており、早期の領海画定が必要とされている。

2. 評価

法的主張は日本のほうが中国のものより正当性がある。もっとも関わりのある国際

法上の概念は、無主地に対する先占 (occupation) であろう。先占のためには中国が主張するような「発見」だけでは不完全である。主権を主張するためには 1) 領有の意思と、2) 行政権の行使などの具体的な活動、つまり実効的支配があったことが必要である。

日本は 10 年間にわたる調査の結果、無人島であることを確認し、1895 年の閣議決定により領土に編入している。そして古賀氏一族がそこで、1940 年まで鯉節工場を営んだ。戦後は、アメリカの施政下となり、1971 年に日本に返還された。これらの実効的支配は日本の領有の意思と活動を示すものである。

もし編入時に島が無人島でなかったとしても、日本の主権獲得は時効 (prescription) によって有効とされる。1895 年から 1971 年にかけて、中国 (台湾も含む) は 76 年もの間日本の行動に反対も抗議もしてこなかった。このため時効の成立が認められると考えるのである。

日本の主権は黙認 / 承認 (acquiescence/recognition) によっても主張できる。アメリカが第三国として継続的に日本領であると認めていたことは明らかである。中国もまた、1971 年までは日本の主権を承認していたのである。

中国は二つの側面から主権を主張する。まず、1372 年に中国が発見したということ、そして、1895 年に下関条約で譲渡した地域にこれら諸島が含まれるため、それらはサンフランシスコ条約により返還されたということである。中国の主張にはいくつかの弱点がある。まず、主張が発見のみに基づいている点である。国際法判例も発見だけでは不完全な権限であると認めている。そして第二点として、1895 年に譲渡された地域にこれら諸島が含まれているという証拠がないことである。三点目に、1971 年の決定期日以前に中国は日本の尖閣諸島に対する主権を黙認・承認していたことである。東グリーンランド事件に見るように、決定期日以降の抗議は何の意味も成さない。

海洋上の境界画定では、日本は現在琉球諸島と中国大陆の中間線を提示しているが、この中間線には尖閣諸島は全く考慮されていない。尖閣諸島が日本領である以上、島としての地位が完全に認められなくても (121 条 3 項の「岩」であったとしても)、境界画定に何らかの影響を及ぼすと考えられるので、日本は今よりも広い範囲の領域主張が可能であろう。

したがって、尖閣諸島問題の解決のために日本がすべきことは、1) 主権の主張を続け、国際裁判所への付託を呼びかけ続けること、2) 中国の中間線を超えての侵害行為に抗議し続けること、3) 東シナ海でのガスの採掘を進めること、4) 軍事的衝突

を避け、中国との交渉を続けること、の4つである。

Ⅲ. 竹島

1. 概要

竹島は日本海の島根県沖に浮かぶ、日比谷公園ほどの大きさの島であり、韓国名では独島と呼ばれている。1954年から韓国が警察を常駐させるようになったほか住民はいない。竹島の領有権については、日本と韓国との間で紛争となっている。日本が紛争をICJへ付託するよう提案しているが、韓国側は拒絶している。

2. 評価

日本は、サンフランシスコ条約で日本が放棄した範囲に、竹島は含まれないと主張する。韓国は、竹島/独島は鬱陵島の一部であり、512年に新羅が千山国として領土に編入して以来自国領であるとする。

一つ目の決定的期日は、竹島が公式に日本に編入された1905年であろう。1905年までは両国とも竹島に関心をはらっていなかった。韓国が竹島/独島にあまり影響力を行使できなかった点については、クリッパートン島の事例のように、竹島が大陸から離れた場所にあること、人が住んでいなかったことなどを考慮することができる。

日本は1905年に正式に閣議決定によって島根県に編入したと主張するが、これは非公開の閣議で承認され、韓国への通達なしに秘密裏に行われたものであるので、違法である。1905年時点で、竹島は明らかに無主地ではなかったので、韓国政府に通達すべきであった。

1951年の平和条約で竹島が日本が放棄する範囲から除かれたことは、この島が日本領であることを宣言したものではない。冷戦時のアメリカの態度がそれを裏付けている。SCAPIN677で、アメリカは竹島を鬱陵島と共に日本の領土範囲から除いている。また、サンフランシスコ平和条約の草案は竹島を日本が放棄する場所として明記している。この記述は、日本の抗議により本案からは外されたのであるが、アメリカが竹島を日本に編入する意図を持っていたと示すものはない。さらに、韓国はサンフランシスコ条約から竹島が除外されたのを知りすぐに反応している。これらの客観的事実から見ると、韓国の主張のほうが正当性があるだろう。

IV. 北方領土

1. 概要

北方領土は北海道沖に並ぶ4つの島である。これらの島々は1945年の第二次世界大戦直後にソ連に併合されて以来ソ連／ロシア領となっている。1956年の日ソ共同声明により、平和条約締結後の二島返還が約束されたが、いまだ実現していない。現在も島はロシアに占領され、周辺海域での日本船による漁業も困難である。

2. 評価

北方領土に関しては、日本は四島全ての主権を正当に主張できると考える。ソ連の北方領土の併合は明らかに違法なものである。まず、ヤルタ会談において千島列島を参戦と引き換えに手に入れたと主張するが、ヤルタ会談は国際法上、同意を与えていない日本には何の効力ももたらさない。そして、1907年のハーグ条約47条が示すように、領土の占領はこの時にはすでに禁じられている。また、日本人を島から追い出した行為は、国際人権法にも違反する行為である。

もっとも問題となるのは、サンフランシスコ平和条約2条(c)である。この条項で日本は、千島列島に対する主権を放棄してしまっている。千島列島には択捉・国後が含まれると考えるが、ロシアはこの条項によりこれら2島の主権を獲得したと言うことはできない。ロシアはサンフランシスコ平和条約に参加していないからである。そして、正義と公平の観点から見ても、ロシアがむりやり奪ったこれら四島への主権を持つことは許されないだろう。

日本はこの紛争の解決のために、国際裁判所に紛争を付託すべきである。それができなければ、二国間交渉を続けていくべきである。ロシアがこれら諸島の返還をためらう理由の一つに、北方領土周辺に広がる肥沃な漁場がある。そのため、日本は領土返還と引き換えに、何らかの経済援助をする必要があるかもしれない。

これらの紛争は戦後周辺に顕在化したものであり、今も東アジアの外交関係に暗い影を落としている。東アジアの新しい未来のためには、これらの紛争の解決が不可欠なのである。