International Law and Japan's Territorial Disputes *

Raul (Pete) Pedrozo ⋆

Abstract
The three highly contentious territorial disputes involving Japan – the Northern Territories, Liancourt Rocks, and Pinnacle Islands – have their roots in the San Francisco Peace Treaty; although Japan renounced its claims to such lands as Korea, Formosa, and the Kurile Islands, the treaty failed to declare a successor state. Furthermore, such countries as the two Chinas and Koreas as well as the Soviet Union did not sign the treaty. Over the years, these disputes have intensified as a result of rising nationalism and a growing demand for living and non-living resources. This paper elaborates on the factual and legal backgrounds of these territorial disputes and explains in detail the positions of the Japanese and U.S. governments in these disputes.

I. INTRODUCTION

On September 2, 1945, Japan formally[1] surrendered to the Allied Powers on board the *USS Missouri* (BB 63) anchored in Tokyo Bay, thus ending World War II.[2] For the next seven years, U.S. forces, under the command of General Douglas MacArthur as Supreme Commander of the Allied Powers (SCAP), occupied Japan, enacting "widespread military, political, economic and social reforms" to establish Japan as a peaceful and democratic nation.[3] Although other major allies had an advisory role in the occupation as part of

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⋆ Captain Pedrozo (U.S. Navy, Ret.) is the Deputy General Counsel for the Defense POW/MIA Accounting Agency. Previously he was a Professor of International Law in the Stockton Center for the Study of International Law at the U.S. Naval War College, where he now serves as a Non-Resident Scholar. Prior to his retirement from the U.S. Navy, he served in a number of key positions, including Staff Judge Advocate, U.S. Pacific Command, and Special Assistant to the Under Secretary of Defense for Policy. The views expressed in this article do not reflect the views of the U.S. Government, the Department of Defense, Department of the Navy, or the U.S. Naval War College.

1 The Emperor of Japan publicly announced the surrender of Japan on August 15, 1945.

2 Instrument of Surrender (Sept. 2, 1945), https://www.archives.gov/exhibits/featured_documents/japanese_surrender_document/.

3 *Occupation and Reconstruction of Japan 1945–52*, U.S. DEPARTMENT OF STATE OFFICE OF THE HISTORIAN, https://history.state.gov/milestones/1945-1952/japan-reconstruction (last visited Jan. 15, 2016).

the Allied Council, MacArthur had the final say on all matters.[4]

In September 1950, President Harry Truman directed Secretary of State John Foster Dulles to begin consultations with other governments to conclude a peace treaty with Japan.[5] After a year of painstaking negotiations, over fifty nations assembled in San Francisco on September 4, 1951, to discuss and conclude the treaty. Missing from the negotiations were, *inter alia*, the two Chinas and the two Koreas.[6] Four days later, forty-eight nations signed the Treaty of Peace with Japan (the San Francisco Peace Treaty, or SFPT), formally ending the state of war between Japan and the Allied Powers and recognizing Japan's sovereignty.[7] The Soviet Union, Poland and Yugoslavia participated in the conference, but refused to sign the treaty.[8] Taiwan and India signed separate peace treaties with Japan in April 1952 and June 1952, respectively, and the Soviet Union signed a Joint Declaration with Japan in 1956, ending the state of war and restoring diplomatic relations.[9]

Articles 2 and 3 of the SFPT additionally purported to settle a number of outstanding territorial issues. Japan renounced all right, title and claim to, *inter alia*, Korea (including the islands of Quelpart, Port Hamilton and Dagelet); Formosa (Taiwan) and the Pescadores; the Kurile Islands; and the portion of Sakhalin Island and its adjacent islands over which Japan acquired sovereignty in 1905 under the Treaty of Portsmouth.[10] Japan also gave the United States control over Nansei Shoto (including the Ryukyu Islands (Okinawa) and the Daito Islands), Nanpo Shoto (including the Bonin Islands, Rosario Island and the Volcano Islands), and Parece Vela and Marcus Island.[11]

Although Japan renounced its claims to these lands, the treaty failed to declare a successor State. Thus, five of the highly contentious territorial disputes that plague Asia-Pacific today have their roots in the SFPT, three of which involve Japan—Kurile Islands/Northern Territories, Liancourt Rocks (Dokdo/Takeshima) and Pinnacle Islands (Diaoyu/Senkakus).[12] Over the years, these disputes have intensified as a result of rising nationalism and a growing demand for living and non-living ocean resources. In particular, the exclusive economic zone (EEZ) provisions of

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4 *Id.*

5 Harry S. Truman, President, Address in San Francisco at the Opening of the Conference on the Japanese Peace Treaty, 7 PUBLIC PAPERS OF THE PRESIDENTS 504 (Sept. 4, 1951), https://trumanlibrary.org/publicpapers/index.php?pid=432&st=&st1=.

6 Other nations that were not invited or did not send a representative to the conference included Italy, Burma, India and Yugoslavia. C. Peter Chen, *San Francisco Peace Conference*, WORLD WAR II DATABASE, http://ww2db.com/battle_spec.php?battle_id=316 (last visited Jan. 15, 2016); John Price, *A Just Peace? The 1951 San Francisco Peace Treaty in Historical Perspective* (Japan Policy Research Institute, JPRI Working Paper No. 78, 2001), http://www.jpri.org/publications/workingpapers/wp78.html.

7 Treaty of Peace with Japan art. 1(a)–(b), Sept. 8, 1951 (entered into force Apr. 28, 1952), 3 U.S.T. 3169, 136 U.N.T.S. 45 [hereinafter SFPT].

8 Chen, *supra* note 6.

9 John Dower, *The San Francisco System: Past, Present, Future in U.S.-Japan-China Relations*, ASIA-PACIFIC JOURNAL (Feb. 24, 2014), http://japanfocus.org/-John_W_-Dower/ 4079.

10 SFPT, supra note 7, art. 2(a)–(c).

11 Article 3 provides that Japan will concur in any proposal of the United States to the United Nations to place under its trusteeship system, with the United States as the sole administering authority, Nan- sei Shoto south of 29 deg. north latitude (including the Ryukyu Islands and the Daito Islands), Nanpo Shoto south of Sofu Gan (including the Bonin Islands, Rosario Island and the Volcano Islands) and Parece Vela and Marcus Island. Pending the making of such a proposal and affirmative action thereon, the United States will have the right to exercise all and any powers of administration, legislation and jurisdiction over the territory and inhabitants of these islands, including their territorial waters. *Id.*

12 Dower, *supra* note 9.

the United Nations Convention on the Law of the Sea,[13] which were designed to accommodate the interests of the developing States in exercising exclusive resource rights out to two hundred nautical miles (nm), have had the unintended consequence of intensifying resource competition and rekindling these long-standing territorial disputes.

II. SOUTHERN KURILE ISLANDS/NORTHERN TERRITORIES (RUSSIAN FEDERATION V. JAPAN)

The northern boundary between Japan (Etorofu) and Russia (Uruppu) was established by the 1855 Treaty of Commerce, Navigation and Delimitation between Japan and Russia.[14] Islands to the south of the boundary line—Etorofu, Habomai, Kunashiri and Shikotan—were Japanese territory; Uruppu and all islands north of the boundary were Russian territory. In 1875, Russia ceded all of the Kurile Islands from Uruppu to Shumush (south of the Kamchatka Peninsula) to Japan in exchange for Japanese rights to Sakhalin Island.[15] In 1895, Japan and Russia signed a new Treaty of Commerce and Navigation, which superseded the 1855 Treaty and reaffirmed the boundary line established in the 1875 Treaty.[16] In the Treaty of Portsmouth, which ended the Russo-Japanese War, Russia ceded part of Sakhalin Island (south of the 50th parallel North) to Japan.[17] Twenty years later, when Japan and the Soviet Union (also referred to as the USSR) established diplomatic relations, the USSR agreed that the Treaty of Portsmouth remained in

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[13] United Nations Convention on the Law of the Sea arts. 55–75, Dec. 10, 1982,1833 U.N.T.S. 397.

[14] Treaty of Commerce, Navigation and Delimitation between Japan and Russia, Japan-Russ., Feb. 7, 1855, 112 Consol. T.S. 467. *See also Joint Compendium of Documents on the History of Territorial Issue between Japan and Russia*, MINISTRY OF FOREIGN AFFAIRS OF JAPAN (Mar. 1, 2001), http://www.mofa.go.jp/region/europe/russia/territory/edition92/in dex.html [hereinafter Joint Compendium of Documents].

[15] Treaty for the Exchange of Sakhalin for the Kurile Islands, Japan-Russ., art. 2, May 7, 1875, 149 Consol. T.S. 179, Joint Compendium of Documents, *supra* note 14 ("In exchange for the cession to Russia of the rights on the island of Karafuto (Sakhalin) . . . , His Majesty the Emperor of All the Russias . . . cedes to His Majesty the Emperor of Japan the group of the islands, called Kurile . . . , together with all the rights of sovereignty appertaining to this possession, so that henceforth all the Kurile Islands shall belong to the Empire of Japan and the boundary between the Empires of Japan and Russia in these areas shall pass through the Strait between Cape Lopatka of the Peninsula of Kamchatka and the island of Shumushu. The Kurile Islands comprises the following eighteen islands:1) Shumushu, 2) Araido, 3) Paramushiru, 4) Makanrushi, 5) Onekotan, 6) Harimukotan, 7) Ekaruma, 8) Shasukotan, 9) Mushiru, 10) Raikoke, 11) Matsua, 12) Rasutsua, 13) the islets of Suredonewa and Ushishiru, 14) Ketoi, 15) Shimushiru, 16) Buroton, 17) the islets of Cherupoi and Brat Cherupoefu and 18) Uruppu.").

[16] Treaty on Commerce and Navigation between Japan and Russia, Japan-Russ., art. 18, June 8, 1895, Joint Compendium of Documents, supra note 14 ("This treaty . . . shall replace the following documents: the Treaty of Commerce, Navigation and Delimitation. . . 1855; the Treaty of Friendship and Commerce . . . 1858; the convention signed on . . . December 11, 1867; and all additional agreements attached to the above."). An attached Declaration further provided:

> The parties . . . declare that Article 18 of the treaty . . . does not relate either to the treaty signed on . . . May 7, 1875 between His Majesty the Japanese Emperor and His Majesty the All Russian Emperor, or to the appendix, signed at Tokyo on August 10 (22) of the same year. The said treaty and article . . . remain in force. *Id.*

[17] Treaty of Portsmouth, Japan-Russ., art. 9, Sept. 5, 1905, 199 Consol. T.S. 144("The Imperial Russian Government shall cede 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, as well as all the public works and properties there situated. The fiftieth degree of north latitude shall be adopted as the northern boundary of the ceded territory.").

force.[18]

The situation remained unchanged until the Soviet Union declared war on Japan on August 9, 1945, and Soviet forces occupied the Northern Territories. The islands were subsequently incorporated into the Soviet Union by the Decree of the Presidium of the USSR Supreme Soviet on the Creation of the South-Sakhalin Province in the Khabarovsk Region on February 2, 1946.[19] Since then, Japan has argued that continued Russian occupation of the islands is illegal, citing a series of World War II and post-war documents.

In the Atlantic Charter, the United States and Great Britain affirmed that the Allies, *inter alia*, did not seek "aggrandizement, territorial or other" and that the Allies desired "to see no territorial changes that do not accord with the freely expressed wishes of the peoples concerned."[20] The USSR acceded to the Charter on September 2, 1941. Similarly, in the Cairo Declaration, which the Soviet Union acceded to on August 8, 1945, the Allies reaffirmed that they coveted "no gain[s] for themselves and have no thought of territorial expansion."[21] The Allies further agreed that Japan would "be stripped of all the islands in the Pacific which she has seized or occupied since the beginning of the First World War in 1914, and that all the territories Japan has stolen from the Chinese . . . shall be restored to . . . China," and that Japan will "be expelled from all other territories which she has taken by violence and greed."[22] In 1945, the USSR agreed to enter the war against Japan on the condition that, *inter alia*, "the southern part of Sakhalin as well as the islands adjacent to it" and "the Kurile Islands" would be returned to it at the conclusion of the war.[23] The Potsdam Declaration, which the Soviet Union acceded to on August 8, 1945, simply stated, in part, that "the terms of the Cairo Declaration shall be carried out" and that "Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku and such minor islands as the Allies would determine."[24] The Potsdam Declaration further provided that Allied forces would withdraw from Japan as soon as "a peacefully inclined and responsible government" was established by "the freely expressed will of the Japanese people."[25]

In 1951, Japan renounced its right, title and claim to the Kurile Islands, and to the part of Sakhalin Island and the islands adjacent to it over which Japan acquired sovereignty under Article 9 of the Treaty of Portsmouth.[26] The SFPT did not, however, determine the sovereignty of the islands renounced by Japan, leaving that question to "international solvents other than this

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[18] Convention on Fundamental Principles for Relations between Japan and the Union of Soviet Socialist Republics, Japan-U.S.S.R., Jan. 20, 1925, Joint Compendium of Documents, *supra* note 14.

[19] Decree of the Presidium of the USSR Supreme Soviet on the Creation of the South-Sakhalin Province in the Khabarovsk Region (1946), Joint Compendium of Documents, *supra* note 14.

[20] Atlantic Charter, Aug. 14, 1941, Declaration of Principles issued by the President of the United States and the Prime Minister of the United Kingdom, U.S.-U.K., Aug. 14, 1941, 55 Stat. 1600, http://avalon.law.yale.edu/wwii/atlantic.asp.

[21] Conference of President Roosevelt, Generalissimo Chiang Kai-shek and Prime Minister Churchill in North Africa, Dec. 1, 1943, 9 DEPARTMENT OF STATE BULLETIN 393 (1943), https://archive.org/stream/departmentofstat91943unit_0#page/392/mode/ 2up [hereinafter Cairo Declaration].

[22] *Id.*

[23] Report Signed at Crimea (Yalta) Conference, U.S.-U.K.-U.S.S.R, Feb. 11, 1945, 59 Stat. 1823, http://avalon.law.yale.edu/wwii/yalta.asp [hereinafter Yalta Agreement].

[24] Proclamation Defining Terms for Japanese Surrender ¶ 8, July 26, 1945, 13 DEPARTMENT OF STATE BULLETIN 137 (July 29, 1945), https://archive.org/stream/departmentofstat131945unit#page/136/mode/2up [hereinafter Potsdam Declaration].

[25] *Id.* ¶ 12.

[26] SFPT, *supra* note 7, art. 2(c).

treaty."[27] Moreover, since the Soviet Union did not sign the treaty, it conferred no rights upon the USSR.

As a result, Japan and the Soviet Union engaged in separate negotiations from June 1955 to October 1956 to conclude a peace treaty, but the two sides were unable to reach an agreement because of the dispute over the Northern Territories. Both sides agreed, however, to continue negotiations to conclude a treaty, which would address the territorial dispute after diplomatic relations were reestablished between the two countries.[28]

The state of war between Japan and the USSR ended and Japanese-Soviet diplomatic relations were restored in 1956 with the signing of the Joint Declaration by Japan and the USSR.[29] Paragraph nine provides that the two countries would continue negotiations on the conclusion of a peace treaty after the reestablishment of normal diplomatic relations, and that the USSR would hand over Habomai and Shikotan Islands to Japan after the peace treaty was concluded.[30] However, the signing of the Treaty of Mutual Cooperation and Security between the United States and Japan[31] prompted the USSR to walk away from its previous commitment to return the islands, which would not occur until such time as all foreign troops were withdrawn from Japan.[32] Japanese objections that the Joint Declaration was an international agreement between the two

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27 John Foster Dulles, Secretary of State, Address at the San Francisco Peace Conference (Sept. 5, 1951), http://www.ioc.u-tokyo.ac.jp/~worldjpn/documents/texts/ JPUS/19510905.S1E.html [hereinafter Dulles Address].

28 Letter from the Plenipotentiary Representative of the Japanese Government, S. Matsumoto, to the USSR First Deputy Minister of Foreign Affairs, A.A. Gromyko (1956), Joint Compendium of Documents, *supra* note 14 ("The Government of Japan is ready to enter into negotiations in Moscow on the normalization of Japanese-Soviet relations without the conclusion of a peace treaty at this time. . . . At the same time the Japanese Government thinks that after the reestablishment of diplomatic relations . . . , it is quite desirable that Japanese-Soviet relations develop even further on the basis of a formal peace treaty, which would also include the territorial issue. . . . [T]he Japanese Government assumes that negotiations on the conclusion of a peace treaty including the territorial issue will continue after the reestablishment of normal diplomatic relations between the two countries."); Letter from the USSR First Deputy Minister of Foreign Affairs, A.A. Gromyko, to the Plenipotentiary Representative of the Government of Japan, S. Matsumoto (1956), Joint Compendium of Documents, *supra* note 14 ("[T]he Soviet Government accepts the view of the Japanese Government . . . and announces its agreement to continue negotiations on the conclusion of a peace treaty, which would also include the territorial issue, after the reestablishment of normal diplomatic relations.").

29 Joint Declaration by the Union of Soviet Socialist Republics and Japan, USSR-Japan, Oct. 19, 1956, http://www.ioc.u-tokyo.ac.jp/~worldjpn/documents/texts/docs/19561019.D1E.html.

30 *Id.* ¶ 9 ("Japan and the Union of Soviet Socialist Republics agree to continue, af- ter the restoration of normal diplomatic relations . . . negotiations for the conclusion of a peace treaty. The Union of Soviet Socialist Republics . . . agrees to hand over to Japan the Habomai Islands and the island of Shikotan. However, the actual handing over of these islands to Japan shall take place after the conclusion of a peace treaty between Japan and the Union of Soviet Socialist Republics.").

31 Treaty of Mutual Cooperation and Security Between Japan and the United States of America, Japan-U.S., Jan. 19, 1960, 11 U.S.T. 1633, T.I.A.S. No. 4509, 33 U.N.T.S. 186 [hereinafter Japan-U.S. Mutual Security Treaty].

32 Memorandum from the Soviet Government to the Government of Japan (1960), Joint Compendium of Documents, *supra* note 14 ("Japan's conclusion of a new military treaty [with the United States] . . . creates obstacles to the development of Soviet-Japanese relations. . . . This situation makes it impossible for the Soviet Government to fulfill its promises to return the islands of Habomai and Shikotan to Japan. . . . Thus, . . . the islands of Habomai and Shikotan will be handed over to Japan, as was stated in the Soviet-Japanese Joint Declaration of October 19, 1956, only if all foreign troops are withdrawn from Japan and a Soviet-Japanese peace treaty is signed.").

nations and could not be changed unilaterally by the Soviet Union fell on deaf ears.[33]

In October 1973, the territorial issue was revived during the Japanese- Soviet summit meeting in Moscow. A Joint Communiqué issued at the conclusion of the summit recognized that the parties had "unresolved problems left over since World War II" and that "the conclusion of a peace treaty" would enhance relations between the two countries.[34] Twenty years later, the issue was still not resolved, but both sides agreed at a summit in Tokyo in 1991 to continue to discuss and accelerate the work on the conclusion of a peace treaty, to include resolution of the territorial dispute.[35]

Following the dissolution of the USSR in December 1991, Russia assumed responsibility for continuing the dialogue on these outstanding issues with the government of Japan. In a letter to the Russian people, President Boris Yeltsin acknowledged that his government had inherited unresolved issues with Japan, including the conclusion of a peace treaty and resolution of the Southern Kurile dispute.[36] Russia's commitment to resolve these outstanding issues was reaffirmed two years later in the Tokyo Declaration on Japan-Russia Relations,[37] and again in 1998 in the Moscow Declaration on Establishing a Creative Partnership between Japan and the Russian

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[33] Memorandum from the Japanese Government to the Soviet Government (1960), Joint Compendium of Documents, supra note 14 ("It is . . . incomprehensible that . . . the Soviet Government is connecting the issue of the revised Japan-US Security Treaty with the issue of handing over the islands of Habomai and Shikotan. . . . The Joint Declaration is an international agreement . . . which has been ratified by the highest organs of both countries. . . . [T]he contents of this solemn international undertaking cannot be changed unilaterally. Moreover, since the current [1951] Japan-U.S. Security Treaty . . . already existed and foreign troops were present in Japan when the Joint Declaration . . . was signed, .. . it must be said the Declaration was signed on the basis of these facts. Consequently, there is no reason that the agreements in the Joint Declaration should be affected in any way. . . . Japan cannot approve of the Soviet attempt to attach new conditions for the provisions of the Joint Declaration on the territorial issue. . . . Our country will keep insisting on the reversion not only of the islands of Habomai and Shikotan but also of the other islands which are inherent parts of Japanese territory.").

[34] Japanese-Soviet Joint Communiqué (Oct. 10, 1973), Joint Compendium of Documents, *supra* note 14 ("Recognizing that the settlement of unresolved problems left over from WWII and conclusion of a peace treaty would contribute to the establishment of truly good-neighborly and friendly relations between the two countries. . . . Both sides agreed to continue negotiations on the conclusion of a peace treaty between the two coun- tries at an appropriate time in 1974.").

[35] Japanese-Soviet Joint Communiqué (Apr. 18, 1991), Joint Compendium of Documents, *supra* note 14 ("Prime Minister . . . Kaifu . . . and President . . . Gorbachev . . . held . . . negotiations on a whole range of issues relating to the . . . conclusion of a peace treaty . . . , including the issue of territorial demarcation, taking into consideration the positions of both sides on the attribution of the islands of Habomai, Shikotan, Kunashiri, and Etorofu." The Prime Minister and the President also emphasized the "importance of accelerating work to conclude the preparations for a peace treaty.").

[36] Letter from the President of the Russian Federation, B.N. Yeltsin, to the Russian People (1991), Joint Compendium of Documents, *supra* note 14 ("[A]n obvious obligation of the new Russian leadership is to look for ways of resolving problems which we inherited from the policies of previous eras. . . . One of the problems we will have to resolve . . . is reaching a final post-War settlement in our relations with Japan. . . . [T]he main obstacle to the conclusion of this treaty is the issue of the demarcation of borders between Russia and Japan. . . .").

[37] Tokyo Declaration on Japan-Russia Relations, U.S.S.R.-Japan, Oct. 13, 1993, http://www.ioc.u-tokyo.ac.jp/~worldjpn/documents/texts/docs/19931013.D1E.html ("The Prime Minister of Japan and the President of the Russian Federation . . . have undertaken serious negotiations on the issue of where Etorofu, Kunashiri, Shikotan and the Habomai Islands belong. They agree that negotiations towards an early conclusion of a peace treaty . . . should continue.").

Federation.[38]

Despite Russia's stated intentions, a peace treaty has not been concluded and the dispute over the Northern Territories remains unresolved. In Japan's view, the islands of Habomai, Shikotan, Kunashiri and Etorofu have been under illegal occupation by the Soviet Union and then Russia since 1945.[39] The Soviet Union maintained that the 1945 Yalta Agreement legally transferred sovereignty of the Kurile Islands, including the islands of Etorofu, Habomai, Kunashiri and Shikotan, to the USSR at the conclusion of the war.[40] Russia argues that, as the successor State to the USSR, it holds sovereignty over the disputed islands.

Japan counters that the Yalta Agreement was not a final determination on the territorial issue, a position supported by the United States, which in 1956 stated "the United States regards the . . . Yalta agreement as simply a statement of common purposes by the then heads of the participating powers, and not as a final determination by those powers or of any legal effect in transferring territories."[41] Moreover, since Japan was not a party to the Agreement, it is not bound, legally or politically, by its provisions.[42]

Japan's renunciation of its rights to the Kurile Islands in the 1951 SFPT is also not determinative of the issue of sovereignty over the Northern Territories. During his speech at the San Francisco Peace Conference, U.S. Secretary of State John Foster Dulles, one of the principal architects of the SFPT, confirmed that the treaty did not determine the sovereignty of the islands renounced by Japan, but rather left that question to "international solvents other than this treaty."[43] Japan additionally points out that, since the Soviet Union did not sign the treaty, it conferred no rights upon the USSR, a point reaffirmed by Japan each time senior Russian officials

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38 Moscow Declaration on Establishing a Creative Partnership between Japan and the Russian Federation, Nov. 13, 1998, http://www.mofa.go.jp/region/europe/russia/ territory/edition01/moscow.html ("The Prime Minister of Japan and the President of the Russian Federation, taking into consideration . . . the proposal regarding a solution to the issue of the attribution of the islands of Etorofu, Kunashiri, Shikotan and Habomai made by the Japanese side at the Summit Meeting in Kawana . . . , instruct their Governments to accelerate negotiations on the conclusion of a peace treaty on the basis of the Tokyo Declaration. . . . The two leaders reaffirm their resolve to make their utmost efforts to conclude a peace treaty by the year 2000. . . .").

39 *Northern Territories*, MINISTRY OF FOREIGN AFFAIRS OF JAPAN (Apr. 4, 2014), http://www.mofa.go.jp/region/europe/russia/territory/index.html.

40 Yalta Agreement, *supra* note 23.

41 State Department Memorandum on the Japan-Soviet Negotiations, The Aide-Memoire (Sept. 7, 1956), http://www.ioc.u-tokyo.ac.jp/~worldjpn/documents/texts/JP RU/19560907.O1E.html [hereinafter Aide-Memoire].

42 *Id.*

43 Dulles Address, *supra* note 27. *See also* Aide-Memoire, *supra* note 41.

visit the Northern Territories or Russian forces conduct maneuvers in the disputed islands.[44]

The ongoing dispute remains a major stumbling block in Russo- Japanese bilateral relations. The most recent flare-up occurred in August 2015 after Russian Deputy Prime Minister Yuri Trutnev and Russian Prime Minister Dmitry Medvedev visited Iturup Island. Japan protested the visit as "'incompatible with Japan's stance' on the dispute."[45] Russia responded by calling the Japanese Foreign Ministry's comments "unacceptable," stating Japan's claims to the islands were "baseless" and that Japan was demonstrating "a dismissive attitude towards the results" of World War II.[46] During the visit, Prime Minister Medvedev announced that Russia had decided to base a "modern effective military force" on the disputed islands and that housing for the Russian force

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[44] On November 1, 2010, the Japanese Minister for Foreign Affairs summoned the Russian Ambassador to Japan to express his regret and protest the visit to Kunashiri Island by Russian President Dmitry Medvedev: "President Medvedev's visit to Kunashiri Island contradicts with Japan's basic position. . . . It is extremely regrettable and Japan lodges a protest." In response, the Russian Ambassador stated that President Medvedev's visit was purely a domestic matter and that "the worsening of Russo-Japan relations is not beneficial for both sides." Press Release, Ministry of Foreign Affairs of Japan, Minister for Foreign Affairs Seiji Maehara Lodges Representations to Mr. Mikhail Bely, Russian Ambassador to Japan, Concerning the Visit to the Northern Territories by Russian President Dmitry Medvedev (Nov. 1, 2010), http://www.mofa.go.jp/announce/announce/2010/11/1101_02.html. In May 2012, the Japanese Ministry of Foreign Affairs expressed its regret over a construction project by a Korean company (Keumto Construction Co., Ltd.) to build port infrastructure in Nayoka and Etorofu Islands in the Northern Territories:

> Any act by an enterprise of a third country in the Northern Territories which can be interpreted as following the Russian jurisdiction . . . is not compatible with Japan's position concerning the Northern Territories. We express our strong regret over the activities of this Korean enterprise, which run counter to the position of Japan.

Statement by the Press Secretary, Ministry of Foreign Affairs of Japan, on the Participation in the Infrastructure Building Work in the Northern Territories by an Enterprise of a Third Country (May 30, 2012), http://www.mofa.go.jp/announce/announce/2012/5/ 0530_02.html. On June 3, 2012, after Russian Prime Minister Dmitry Medvedev's visit to Kunashiri Island the Japanese Vice-Minister for Foreign Affairs stated to the Russian Ambassador to Japan that "Kunashiri Island is the inherent territory of Japan. The Japanese Government cannot accept this visit and finds it extremely regrettable. We express concern that this visit throws cold water on the positive atmosphere which has been constructed between Japan and Russia." Press Release, Ministry of Foreign Affairs of Japan, Mr. Kenichiro Sasae, Vice-Minister for Foreign Affairs, Summons Mr. Evgeny Vladimiro-vich Afanasiev, Ambassador of the Russian Federation to Japan, on the Visit of Russian Prime Minister Medvedev to the Northern Territories (July 3, 2012), http://www.mofa.go.jp/announce/announce/2012 /7/0703_02.html. In August 2014, over a thousand Russian troops, five attack helicopters and over a hundred vehicles conducted a series of military exercises on Kunashiri and Etorofu Islands aimed at defending the islands. Japan lodged a protest with Russia calling the exercise "totally unacceptable" and indicating that "the Northern Territories are an inherent part of Japan's territory." Russia responded that the exercise was not directed at Japan and that its protest was "groundless." *U.S. Recognizes Japan's Sovereignty over Russian-held Isles: Official*, JAPAN TIMES (Aug. 14, 2014), http://www.japantimes.co.jp/news/2014/08/14/national/u-s-recognizes-japans-sovereig nty-over-russian-held-isles-official/#.VfMzPXmFOUk.

[45] Dmitry Filippov, *The Northern Territories Remain the Stumbling Block in Russo–Japanese Relations*, EAST ASIA FORUM (Sept. 4, 2015), http://www.eastasiaforum.org/2015/09/04/the-northern-territories-remain-the-stumbling-block-in-russo-japanese-relations/.

[46] *Id. See also* Osamu Tsukimori, Denis Dyomkin & Jason Bush, *Japan Protests Russian PM's Visit to Disputed Island*, REUTERS (Aug. 22, 2015), http://www.reuters.com/article/2015/08/22/us-russia-medvedev-japan-idUSKCN0QR04A20150822 ("[Russia's] . . . position is simple: We want to be friends with Japan, Japan is our neighbor. We have a good attitude towards Japan, but this shouldn't be linked in any way with the Kurile islands, which are part of the Russian Federation. Therefore we have made visits, we are visiting and we will make visits to the Kuriles.").

would be constructed on Etorofu and Junishiri islands.[47] The following month, four Japanese fighters were scrambled to intercept a Russian aircraft that penetrated Japanese airspace off Hokkaido. A protest was immediately lodged with the Russian embassy in Tokyo.[48]

Despite the recent dust up, both sides agreed to meet in Moscow at the end of September 2015 to discuss bilateral relations, including the disputed islands and conclusion of a peace treaty.[49] Any hope of resolving the territorial disputes at the meeting was dashed, however, when Russian Foreign Minister Sergei Lavrov indicated to his counterpart Fumio Kishida that there was no room for compromise over the Southern Kurile Islands.[50] Notwithstanding Minister Lavrov's statement, Japanese Prime Minister Shinzo Abe met with Russian President Vladimir Putin on the margins of the U.N. General Assembly meeting in late September to discuss the issue.[51]

Since 1956, the United States' position has been that, "after careful examination of the historical facts . . . , the islands of Etorofu and Kunashiri (along with the Habomai Islands and Shikotan which are a part of Hokkaido) have always been part of Japan proper and should in justice be acknowledged as under Japanese sovereignty."[52] That position was reaffirmed in 2014 by a U.S. Department of State spokesperson.[53] Of U.S. concern is that an armed attack against Japan Self-Defense Force (JSDF) units in the area by Russian forces could trigger U.S. defense obligations under Article 5 of the 1960 U.S.-Japan Treaty of Mutual Cooperation and Security.[54]

III. LIANCOURT ROCKS (TAKESHIMA/DOKDO)(JAPAN V. SOUTH KOREA)

The Liancourt Rocks (Takeshima (Japan)/Dokdo (South Korea)) are claimed by both Japan and South Korea, but have been occupied by South Korea since 1954. Japan bases its claim primarily

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47 Maria Antonova, *Russian PM Visits Disputed Kuril Islands, Triggering Japan Protest*, YAHOO! NEWS (Aug. 22, 2015), http://news.yahoo.com/japan-protests-russian-pm-visits-disputed-kuril-islands-053050767.html. *See also Japan Premier Hits Out at Russian PM's Visit to Disputed Islands*, YAHOO! NEWS (Aug. 23, 2015), http://news.yahoo.com/japan-premier- hits-russian-pms-visit-disputed-islands-055614051.html.

48 *Japan Protests after "Russian" Plane Enters Airspace*, YAHOO! NEWS (Sept. 15, 2015), http://news.yahoo.com/japan-scrambles-jets-intercept-russian-plane-222619504.html.

49 *Japanese Foreign Minister to Discuss Disputed Isles in Moscow*, REUTERS (Sept. 19, 2015), http://www.reuters.com/article/2015/09/19/us-russia-japan-idUSKCN0RJ04R2015091 9; *Russia and Japan to Continue Discussions on Peace Treaty*, KSL.COM (Sept. 21, 2015), http://www.ksl.com/?nid=235&sid=36625923&title=russia-and-japan-to-continue- discussions-on-peace-treaty.

50 *Japan Must Recognise Kuril Islands for Peace Deal: Lavrov*, YAHOO! NEWS (Sept. 21, 2015), http://news.yahoo.com/japan-must-recognise-kuril-islands-peace-deal-lavrov-2002 16317.html ("Neither the 'northern territories' of Japan nor the 'northern territories' of Russia are the subject of our dialogue. On our agenda is reaching the peace deal. Moving forward on this issue is possible only after we see clearly Japan's recognition of historic realities. The work is difficult and the difference in positions is vast.").

51 Hyun Oh, *Residents of Russian-held Isles Disputed by Japan Await Diplomatic Resolution*, REUTERS (Sept. 25, 2015), http://www.reuters.com/article/2015/09/25/us-japan-russia- idUSKCN0RP1FZ20150925.

52 Aide-Memoire, *supra* note 41.

53 Daily Press Briefing, Marie Harf, Deputy Spokesperson, U.S. Department of State (Aug. 13, 2014), http://www.state.gov/r/pa/prs/dpb/2014/08/230586.htm#JA PAN ("The United States recognizes Japanese sovereignty over these islands [the Southern Kurile Islands].").

54 Japan-U.S. Mutual Security Treaty, *supra* note 31, art. 5 ("Each Party recognizes that an armed attack against either Party in the territories under the administration of Japan would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional provisions and processes.").

on historical documents and incorporation of Takeshima into Shimane Prefecture in 1905.[55] Japan additionally asserts that the negotiating history of the SFPT,[56] as well as a number of post-war documents, support its position that Japan retained sovereignty over the islets after World War II. South Korea's claim is likewise based primarily on historical records and its purported presence and administration of Dokdo, excluding the forty-year period of Japanese military occupation between 1905 and 1945. It relies heavily on a 1900 Imperial Ordnance that asserted sovereignty over Utsuryo Island (present day Ulleungdo), which South Korea contends included Dokdo.[57] South Korea additionally argues that the Cairo Declaration,[58] Yalta Agreement, Potsdam Declaration[59] and the SFPT, as well as instructions issued by General MacArthur as the SCAP,

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[55] In 1905, the Japanese government incorporated Takeshima into the Shimane Prefecture, identifying the islets by their geographic coordinates. Incorporation of Takeshima into Shimane Prefecture, MINISTRY OF FOREIGN AFFAIRS OF JAPAN (July 30, 2015). The location of the "uninhabited island" was specified as "latitude 37°9'30" N, longitude 131°55" E . . . located at 85 sea-miles northwest of Oki Island." Tsukamoto Takashi, *The Meaning of the Territorial Incorporation of Takeshima (1905)*, Review of Island Studies, Center for Island Studies, Dec 25, 2014, http://islandstudies.oprf-info.org/research/a00014/. The cabinet decision was published in Japanese newspapers in February 1905 and the governor of Shimane Prefecture registered the islands in the state land register. Lack of extensive publication of Takeshima's incorporation can be explained by the fact that Japan was still at war with Russia and was planning to use the islets as a communications and surveillance facility. It is understandable from an operational security standpoint that Japan did not widely advertise the incorporation of the islets. Had it done so, Japan would have alerted Russia that Japanese forces were on the island, making those forces vulnerable to attack by the Russian fleet in Vladivostok. Japanese sovereignty over Takeshima went uncontested for the next forty years.

[56] During the negotiations of the 1951 treaty, U.S. Assistant Secretary of State for Far Eastern Affairs, Dean Rusk, informed the South Korean Ambassador to the United States that the Liancourt Rocks were "normally uninhabited," had never been "treated as part of Korea" and since 1905 had "been under the jurisdiction of the Oki Islands Branch Office of Shimane Prefecture of Japan." The Rusk note went on to say that "the island does not appear ever before to have been claimed by Korea." Diplomatic Note of 10 August 1951 from the U.S. Assistant Secretary of State for Far Eastern Affairs, Dean Rusk, to the South Korean Ambassador to the United States, You Chan Yang, http://en.wikisource.org/wiki/Rusk_note_of_1951 [hereinafter Rusk Diplomatic Note]. *See also* Mark S. Lovmo, *The United States' Involvement with Dokdo Island (Liancourt Rocks): A Timeline of the Occupation and Korean War Era*, DOKDO RESEARCH (2004), http://dokdo-research.com/page9.html. The U.S. position was confirmed in July 1951 by the State Department geographer, S.W. Boggs, in a note to the Special Assistant to the Director of the Office of Northeast Asian Affairs, Robert A. Fearey, which stated that "while there is a Korean name for Dagelet [Ulleungdo], none exists for the Liancourt Rocks and they are not shown in maps made in Korea." *Id.*

[57] *Dokdo Development and Imperial Ordinance No. 41 of the Korean Empire*, NORTHEAST ASIAN HISTORY NETWORK, http://contents.nahf.or.kr/english/item/level.do?levelId=eddok_003e_0030_0010 (last visited Jan. 16, 2016). *See also The Dokdo/Takeshima Dispute*, KOREA.NET, http://www.korea.net/News/news/newsprint.asp?serial_no=20091228010 (last visited Jan. 16, 2016).

[58] But the Cairo Declaration only required Japan to return the Pacific islands it had seized since 1914 (Takeshima was incorporated into Japan in 1905) and determined that Korea would become a free and independent State following the war. Cairo Declaration, *supra* note 21.

[59] The Potsdam Declaration simply reaffirms the terms of the Cairo Declaration and limited Japanese sovereignty "to the islands of Honshu, Hokkaido, Kyushu, Shikoku and such minor islands as we determine." Potsdam Declaration, *supra* note 24, ¶ 8.

all support its position that Japan returned Dokdo to Korea at the conclusion of the war.[60] Based on evidence presented by the claimants and standards concerning island disputes articulated by the International Court of Justice (ICJ) in cases like *Indonesia v. Malaysia*[61] and *Malay-sia v. Singapore*,[62] it would appear that Japan has the superior claim to the islets.[63]

The island dispute has also resulted in a maritime boundary dispute between the claimants. South Korea asserts that the EEZ median line should be between Ulleungdo and Japan's Oki Island. Japan, on the other hand, maintains that the median line should be between Takeshima and Ulleungdo. Both sides have made some concessions in the context of joint development and allocation of fisheries resources in the vicinity of the islands.[64] A 1965 fisheries agreement, which was replaced in 1999 by a new agreement, established a joint fisheries control zone without mentioning the ongoing territorial dispute over the islets.[65] Similarly, a 1977 agreement established a Joint Development Zone, most of which lies on the Japanese side of a hypothetical equidistant line, which allows for exploration and exploitation of the continental shelf by both countries.[66]

Notwithstanding this limited progress, repeated efforts by Japan since 1954 to refer the dispute to the ICJ or other third-party intervention for adjudication have been consistently ejected by South Korea.[67] In South Korea's view, the dispute is not a legal issue that can be resolved by the ICJ, but rather a historical matter associated with Japan's invasion of Korea.[68] Bilateral discussions to resolve the long-standing territorial and maritime boundary disputes have been ongoing since the 1950s, with no resolution in sight.

As a result, relations between the two U.S. allies remain strained, and Japan has repeatedly called on South Korea to return the disputed islets. The most recent exchanges occurred in

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60 Notwithstanding South Korea's position, Dokdo is not mentioned in the Cairo Declaration, Potsdam Declaration or Yalta Agreement. Similarly, the 1951 SFPT does not mention the status of Dokdo despite a concerted effort by the Korean government to include Dokdo in the list of islands that Japan renounced title to in favor of Korea in Article 2(a) of the Treaty. Diplomatic Note of 19 July 1951 from the Korean Ambassador to the Secretary of State, https://en.wikisource.org/wiki/Letter_from_You_Chan_Yang_to_ Dean_Acheson,_19_July,_1951. Article 2(a) of the SFPT provides that Japan would recognize the "independence of Korea" and would renounce "all right, title and claim to Korea, including the islands of Quelpart [Cheju], Port Hamilton and Dagelet [Ulleungdo]."

61 Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon./Malay.), 2002 I.C.J. 625, 683 (Dec. 17).

62 Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malay./Sing.), 2008 I.C.J. 14 (May 23).

63 Raul (Pete) Pedrozo, *Sovereignty Claims over the Liancourt Rocks (Dokdo/Takeshima)*, 28 CHINESE (TAIWAN) YEARBOOK OF INTERNATIONAL LAW AND AFFAIRS 78 (2010).

64 Japan-Republic of Korea Joint Declaration, A New Japan-Republic of Korea Partnership towards the Twenty-first Century (Oct. 8, 1998), http://www.mofa.go.jp/region/asia-paci/korea/joint9810.html.

65 Japan unilaterally withdrew from the 1965 Agreement in 1998 after it declared its exclusive economic zone in June 1996. Kunwoo Kim, *Korea-Japan Fish Dispute*, INVENTORY OF CONFLICT AND ENVIRONMENT (ICE) (Apr. 23, 2002), http://www1.ameri can.edu/ted/ice/korea-japan-islands.htm.

66 OFFICE OF THE GEOGRAPHER, U.S. DEPARTMENT OF STATE, LIMITS IN THE SEAS NO. 75, CONTINENTAL SHELF BOUNDARY AND JOINT DEVELOPMENT ZONE JAPAN-REPUBLIC OF KOREA 4 (1977), http://www.state.gov/documents/organization/59588.pdf.

67 *An Outline of the Japanese Position on Sovereignty over Takeshima and the Illegal Occupation by the Republic of Korea*, MINISTRY OF FOREIGN AFFAIRS OF JAPAN (July 30, 2015), http://www.mofa.go.jp/region/asia-paci/takeshima/position.html.

68 *Dokdo & East Sea: Wrapping-up Review of Each Issue*, KOREA.NET (Feb. 2, 2012), http://m.korea.net/english/Government/Current-Affairs/Others/view?affairId=83&sub Id=233&articleId=1031.

early 2015.[69] Notwithstanding the recent row, on April 14, 2015, the two countries held their first high-level meeting—2+2 talks involving senior officials from the ministries of foreign affairs and defense—in more than five years to discuss territorial and historical differences.[70] Additionally, Prime Minister Shinzo Abe and President Park Geun-hye met in Seoul for the first time since taking office in 2012 and 2013, respectively.[71]

Historically, the United States viewed the Liancourt Rocks as sovereign Japanese territory.[72]

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[69] The Shimane prefectural government held its annual convention on February 22—Takeshima Day. The Parliamentary Vice Minister in the Cabinet Office, Yohei Matsumoto, attended the ceremony, reiterating Japan's position that Takeshima is sovereign Japanese territory and stating the Japan "was working to achieve a peaceful resolution of the problem." South Korean officials called the Japanese claim "ludicrous." *Japan Calls for Return of Isles from South Korea*, YAHOO! NEWS (Feb. 22, 2015), http://news.yahoo. com/japan-calls-return-isles-south-korea-085002588.html. Two months later, South Korea condemned the Japanese government for approving new textbooks that reflect that Takeshima is part of Japan, issuing a strongly worded protest that indicated that the Education Ministry's approval of the new geography books was "yet another provocation that distorts, reduces, and omits clear historic facts to strengthen its unjust claims to what is clearly our territory. The Japanese government is in effect saying it will repeat its mistakes of the past." Japanese Education Minister Hakubun Shimomura responded stating that "It's only natural that we want to teach children correctly about their country's territory." Jack Kim, *South Korea Condemns Japanese Books as Bid to Repeat 'Past Mistakes,'* REUTERS (Apr. 6, 2015), http://www.reuters.com/article/2015/04/06/us-southkorea-japan-idUSKBN0 MX0F720150406.

[70] *South Korea, Japan Hold First Security Talks for 5 Years*, YAHOO! NEWS (Apr. 14, 2015), http://news. yahoo.com/south-korea-japan-hold-first-security-talks-5-072152405.html.

[71] Justin McCurry, *Japan and South Korea Summit Signals Thaw in Relations*, THE GUARDIAN (Nov. 2, 2015), http://www.theguardian.com/world/2015/nov/02/japan- south-korea-summit-thaw-in-relations.

[72] Rusk Diplomatic Note, *supra* note 56.

The U.S. position changed, however, to one of "neutrality" shortly after the Korean War ended.[73] Since 1953, the United States has maintained its neutrality on the sovereignty issue, while calling on both sides to resolve their differences peacefully, either bilaterally or through third-party intervention. The U.S. position was reaffirmed by a State Department spokesperson in 2014—"Nothing has changed about our policy on the Liancourt Rocks. We don't take a position on the sovereignty of those islands."[74] The U.S. position is understandable given the fact that the United States has treaty obligations to both of the disputants and is concerned that the ongoing rift over the islets could hinder U.S. efforts to create a united front against Chinese assertiveness in the East and South China Seas.

IV. PINNACLE ISLANDS (DIAOYU/SENKAKUS) (CHINA/JAPAN)

The Pinnacle Islands are comprised of five uninhabited islands[75] and three barren rocks.[76] The island group is located approximately 120 nm Northeast of Taiwan, 200 nm east of mainland China and 190 nm southwest of Okinawa. The islands, which are claimed by China, Taiwan and Japan, are separated from the Ryukus Islands by the 2,270-meter-deep Okinawa Trough.

Historically, the Pinnacle Islands had little intrinsic value. However, the dispute over the islands intensified in 1969 after the United Nations Economic Commission for Asia and the Far East (ECAFE) released a report suggesting that the seabed around the islands could contain

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[73] An internal State Department memo suggested that the best way forward for the United States would be "to extricate itself from the dispute to the greatest extent possible" and suggest to the parties that "the matter might appropriately be referred to the International Court of Justice," noting that the United States had treaty obligations to both claimants and that the "United States would be placed in the embarrassing position . . . of seeming to choose between Japan or Korea." Letter from Kenneth T. Young, Jr., Director Office of Northeast Asian Affairs, U.S. Department of State to E. Allan Lightner, American Embassy, Korea, Possible Methods of Resolving Liancourt Rocks Dispute Between Japan and the Republic of Korea (July 22, 1953), https://en.wikisource.org/wiki/Possible_Methods_of_Resolving_Liancourt_Rocks_Dispute_between_Japan_and_ROK. A subsequent State Department memorandum dated November 11, 1953, similarly indicated that the United States should remind Korea of the Rusk note; "express strong hope that settlement can be reached with the Japanese; . . . [note that] the United States seeks to avoid any form of intervention in this matter;" if clashes continue to occur the United States "may be forced to give publicity to the Rusk letter and to reiterate the view expressed therein"; and if Korea cannot accept the views expressed in the Rusk letter, it should "take steps toward arbitration or appeal the matter to the ICJ." Memorandum by William T. Turner in Regard to the Liancourt Rocks (Takeshima Island) Controversy (Nov. 30, 1953), https://sites.google.com/site/liancourttakeshima/Home/-reconfirmation-liacnorut-rocks-is-terrotory-of-japan-by-san-fransisco-treaty-of-peace. The following month, Secretary of State John Foster Dulles again suggested that the parties refer the dispute to the ICJ for adjudication. Telegram from John Foster Dulles, U.S. Secretary of State, to American Embassy, Japan (Dec. 9, 1953), http://dokdo-or-takeshima.blogsp ot.com/2008/08/1953-december-secret-security.html. See also Lovmo, supra note 56. Similarly, a report submitted by Ambassador James Van Fleet after a trip to the Asia-Pacific region in August 1954 stated that the United States had informed South Korea that the Liancourt Rocks "remained under Japanese sovereignty and the Island was not included among the Islands that Japan released from its ownership under the Peace Treaty." The report additionally stated, however, that the United States has not "interfere[d] in the dispute." As a possible way forward, Ambassador Van Fleet informally recommended to South Korean officials that "that the dispute might properly be referred to the Interna- tional Court of Justice." Ownership of Dokto Island, MINISTRY OF FOREIGN AFFAIRS OF JAPAN, http://www.mofa.go.jp/mofaj/area/takeshima/pdfs/g_sfjoyaku04.pdf (last visited Jan. 16, 2016).

[74] Daily Press Briefing, Marie Harf, Deputy Spokesperson, U.S. Department of State (Feb. 13, 2014), http://www.state.gov/r/pa/prs/dpb/2014/02/221643.htm#SOUTHK OREA.

[75] Uotsurishima/Diaoyu Dao; Taisho-to/Chiwei Yu; Kubashima/Huangwei Yu; Kita-Kojima/Bei Xiaodao; and Minami-Kojima/Nan Xiaodao.

[76] Oki-no-Kita-iwa/Da Bei Xiaodao; Oki-no-Minami-iwa/Da Nan Xiaodao; and Tobise/Fei Jiao Yan.

rich oil and gas reserves.[77] Although no oil and gas has been produced from the Pinnacle Islands continental shelf to date,[78] an analysis brief published by the U.S. Energy Information Administration in September 2014 estimates "that the East China Sea has about 200 million barrels of oil in proven and probable reserves" and "between 1 and 2 trillion cubic feet in proven and probable natural gas reserves."[79]

The Pinnacle Islands are strategically located along some of the Asia-Pacific's most important sea lines of communication in the East China Sea. Additionally, the waters surrounding the islands are home to productive fisheries, which have been traditionally exploited by Chinese, Taiwanese and Japanese fishermen.[80]

The Japanese government incorporated some of the islands in 1895, and Japan has exercised effective administration and control over the islands, except for the period between 1951 and 1972 when the islands were under U.S. administration pursuant to the SFPT.[81] In 1896, four of the islands were leased by the Japanese government to a Japanese national free of charge.[82] The four remaining islands were sold by the government to a Japanese citizen in 1932.[83]

The United States transferred administrative control of the Pinnacle Islands back to Japan in 1972 pursuant to the Okinawa reversion treaty.[84] Since then, Kubashima/Huangwei and Taisho-

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77 Daniel Dzurek, *Comments on "Island Disputes in East Asia," in* SECURITY FLASH-POINTS: OIL, ISLANDS, SEA ACCESS AND MILITARY CONFRONTATION 419 (Myron H. Nordquist & John Norton Moore eds., 1998); Carlos Ramos-Mrosovsky, *International Law's Unhelpful Role in the Senkaku Islands*, 29 UNIVERSITY OF PENNSYLVANIA JOURNAL OF INTERNATIONAL LAW 903, 917 (2008). The ECAFE report indicated that a "high probability exists that the continental shelf between Taiwan and Japan may be one of the most prolific oil reservoirs in the world." K. O. EMERY ET AL., UNITED NATIONS ECONOMIC COMMISSION FOR ASIA AND THE FAR EAST, GEOLOGICAL SURVEY, GEOLOGICAL STRUCTURE AND SOME WATER CHARACTERISTICS OF THE EAST CHINA SEA AND THE YELLOW SEA 41 (1969), https://www.gsj.jp/data/ccop-bull/2-01.pdf [hereinafter ECAFE REPORT].

78 Therefore, "the question as to whether there is recoverable crude oil in commercially exploitable quantities remains unanswered." DIRECTORATE OF INTELLIGENCE, CENTRAL INTELLIGENCE AGENCY, THE SENKAKU ISLANDS DISPUTE: OIL UNDER TROUBLED WATERS? 25 (1971) [hereinafter CIA SENKAKU ISLANDS INTELLIGENCE REPORT].

79 *East China Sea Report*, U.S. ENERGY INFORMATION ADMINISTRATION 2–3 (Sept. 17, 2014), https://www.eia.gov/beta/international/analysis_includes/regions_of_interest/East_China_Sea/east_china_sea.pdf. "Chinese sources claim that undiscovered resources can run as high as 70 to 160 billion barrels of oil for the entire East China Sea"and "as much as 250 trillion cubic feet in undiscovered gas resources, mostly in the Xi-hu/Okinawa trough." *Id.*

80 Ji Guoxing, *Maritime Jurisdiction in the Three China Seas: Options for Equitable Settlement* 11 (Institute on Global Conflict and Cooperation, Policy Paper No. 19 (1995)).

81 Article 3 provides that Japan will concur in any proposal of the United States to the United Nations to place under its trusteeship system, with the United States as the sole administering authority, Nansei Shoto south of 29 deg. north latitude (including the Ryukyu Islands and the Daito Islands), Nanpo Shoto south of Sofu Gan (including the Bonin Islands, Rosario Island and the Volcano Islands) and Parece Vela and Marcus Island. Pending the making of such a proposal and affirmative action thereon, the United States will have the right to exercise all and any powers of administration, legislation and jurisdiction over the territory and inhabitants of these islands, including their territorial waters.
SFPT, *supra* note 7, art. 3.

82 Uotsurishima/Diaoyu Dao; Kubashima/Huangwei Yu; Kita-Kojima/Bei Xiaodao; and Minami-Kojima/Nan Xiaodao.

83 The government had retained ownership of Taisho-to/Chiwei Yu, Oki-no-Kitaiwa/Da Bei Xiaodao, Oki-no-Minami-iwa/Da Nan Xiaodao and Tobise/Fei Jiao Yan.

84 Agreement between the United States of America and Japan concerning the Ryukyu Islands and Daito Islands, U.S.-Japan, June 17, 1971, 23 U.S.T. 446 (1971).

to/Chiwei Yu have been provided to the U.S. military as facilities and areas under the Japan-U.S. Status of Forces Agreement.[85] Both China and Taiwan protested the transfer.

In 1978, the Japan Youth Association (JYA) erected a lighthouse on Uotsurishima as a demonstration of Japanese sovereignty over the islands.[86] China responded by sending a large flotilla of fishing boats to the islands.[87] The dispute simmered for the next twenty-plus years until the mid-1990s, when members of the JYA returned to Uotsurishima to construct a new lighthouse on the islet.[88] Taiwan and China both strongly protested the action.[89] Additionally, as in previous instances, a flotilla of Chinese protest boats was dispatched to the islands. The Japanese Coast Guard intercepted the flotilla, but one Chinese activist drowned when he tried to swim to one of the islets.[90] On October 7, 1996, a handful of Chinese protesters successfully landed, albeit briefly, on Uotsuri/Diaoyu Island and raised the Chinese and Taiwanese flags. The flags were removed by the Japanese Coast Guard and diplomatic protests were lodged with the two countries.[91] Over the next several years, both sides continued to take provocative actions that exacerbated the dispute.[92] Then in 2002, the private landowners of Uotsurishima, Kita-Kojima and Minami-Kojima leased the islands to the Japanese government.

Sino-Japanese relations suffered a serious setback in September 2010 after a Chinese fishing trawler intentionally rammed two Japanese Coast Guard vessels that were attempting to detain the ship for illegally fishing in the vicinity of the Pinnacle Islands. Following a series of high-level demands by China and threats of strong countermeasures if the captain was not unconditionally

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85 Agreement Under Article VI of the Treaty of Mutual Cooperation and Security between the United States of America and Japan, Regarding Facilities and Areas and the Status of U.S. Armed Forces in Japan, U.S.-Japan, Jan. 19, 1960, 11 U.S.T. 1652; T.I.A.S. No. 4510; 373 U.N.T.S. 248.

86 Zhongqi Pan, *Sino-Japanese Dispute over the Diaoyu/Senkaku Islands: The Pending Controversy from the Chinese Perspective*, 12 JOURNAL OF CHINESE POLITICAL SCIENCE 71, 74 (2007).

87 *Id.* In 2005, the Japanese government announced that it had placed the lighthouse under State control and protection. *Id.* at 76.

88 Daniel Dzurek, The Senkaku/Diaoyu Islands Dispute (Oct. 18, 1996) (on file with author), https://mulrickillion.wordpress.com/2009/03/01/the-senkakudiaoyu-islands-dis pute/. *See also* KERRY DUMBAUGH ET AL., CONG. RESEARCH SERV., RL31183, CHINA'S MARITIME TERRITORIAL CLAIMS: IMPLICATIONS FOR U.S. INTERESTS 19 (2001); Hungdah Chiu, *An Analysis of the Sino-Japanese Dispute over the T'iaoyutai Islets (Senkaku Gunto)* 22 (Occasional Papers/Reprint Series in Contemporary Asian Studies No. 1, University of Mary-land School of Law, 1999); Ramos-Mrosovsky, *supra* note 77, at 921; Pan, *supra* note 86, at 75.

89 Chinese protests were made on September 10, 1996, by the Director of Asian Affairs of the Foreign Ministry; on September 11, 1996, by its ambassador to Japan; and on March 30, 1997, by the China's Vice-Premier and Foreign Minister. Chiu, *supra* note 88, at 22–23. *See also* Pan, *supra* note 86, at 74.

90 Ramos-Mrosovsky, *supra* note 77, at 920; Pan, *supra* note 86, at 75.

91 Chiu, *supra* note 88, at 22–23. *See also* Pan, *supra* note 86, at 75.

92 In 1997, for example, a Japanese legislator landed on the one of the islets. The landing was denounced by China as a "serious violation of China's . . . sovereignty." The following year, Chinese protesters landed on Uotsuri/Diaoyu Island after their vessel, the *Baodiao Hao*, sank after clashing with the Japanese Coast Guard. Several years later, in 2000, Japanese activists landed on Uotsuri/Diaoyu Island and contructed a shrine. China condemned the action, demanding that Japan prevent similar incidents from recurring. Pan, *supra* note 86, at 75.

released, Japan ultimately succumbed and freed him.[93]

Since then, China's presence and aggressive behavior in the disputed area have been on the upswing. Some examples of Chinese provocative and potentially dangerous behavior include buzzing of Japan Maritime Self-Defense Force (JMSDF) warships,[94] locking fire control radar on JMSDF ships and aircraft,[95] and dangerous intercepts of Japanese surveillance aircraft.[96]

Relations between Japan and China hit a new low in September 2012 when the press reported that the Japanese government had agreed to buy three of the five disputed islands (Uotsurishima,

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[93] The captain was charged with deliberately colliding with the Coast Guard vessels and obstructing public officers in the performance of their duties. Following his arrest, China suspended ministerial-level contacts with Japan and threatened to withdraw from previously scheduled discussions on the East China Sea gas fields. In addition, public demonstrations were orchestrated outside Japanese diplomatic missions in Beijing, Shanghai, Shenzhen and Shenyang, and four Japanese nationals were detained for allegedly videotaping activities at a military base in Hebei Province. Finally, China imposed an embargo on the shipment of rare earth metals to Japan. Demands by China for an apology and compensation for the incident were rejected by Japan. Martin Fackler, *Japan Retreats with Release of Chinese Boat Captain*, NEW YORK TIMES (Sept. 24, 2010), http://www.ny times.com/2010/09/25/ world/asia/25chinajapan.html. The captain was subsequently indicted in abstentia by a Japanese judicial panel in July 2011. Chinese officials condemned the verdict, calling it an unlawful and invalid judicial procedure. *China Rejects Japanese Judicial Panel's Verdict to Indict Fishing Vessel Captain*, JAGRAN POST (July 23, 2011), http://post.jagran.com/China-rejects-Japanese-judicial-panels-verdict-to-indict-fishing- vessel-captain-1311431603.

[94] In April 2010, People's Liberation Army–Navy (PLA(N)) helicopters buzzed two Japanese warships—*JDS Asayuki* (DD 132) and *JDS Suzunami* (DDG 114)—that were shadowing a large Chinese task group off the coast of Okinawa. The helicopters dangerously approached to within ninety meters horizontally and fifty meters vertically of the JMSDF ships. Similarly, in March 2011, a State Oceanic Administration helicopter buzzed the *JDS Samidare* (DD 106) near the disputed East China Sea gas fields, approaching to within seventy meters of the Japanese destroyer. Rory Medcalf, Raoul Heinrichs & Justin Jones, *Crisis and Confidence: Major Powers and Maritime Security in Indo-Pacific Asia*, LOWY INSTITUTE (June 2011), http://www.lowyinstitute.org/files/pubfiles/Medcalf_and_Hein richs%2C_Crisis_and_ confidence-revised.pdf; JAPAN MINISTRY OF DEFENSE, DEFENSE OF JAPAN 2015 pt. 1, ch. 3, sec. 3, at 36 (2015), http://www.mod.go.jp/e/publ/ w_paper/pdf/2015/DOJ2015_1-1-3_web.pdf [hereinafter WHITE PAPER PT. I, CH. 1, SEC. 3].

[95] On January 19, 2013, a PLA(N) Jiangwei-I class frigate illuminated a JMSDF helicopter with its fire control radar. Ten days later a PLA(N) Jiangwei-II class missile frigate locked its fire control radar on the *JDS Yudachi* (DD 103), which was operating in the East China Sea. Japan protested both incidents, indicating that "projecting fire control radar is very unusual; one mistake, and the situation would become very dangerous." Linda Sieg & Kiyoshi Takenaka, *Japan Protests to China after Radar Pointed at Vessel*, REUTERS (Feb. 6, 2013), http://www.reuters.com/article/2013/02/05/us-china-japan-idUSBRE91410Q20 130205. *See also* WHITE PAPER PT. I, CH. 1, SEC. 3, *supra* note 94, at 36; JAPAN MINISTRY OF DEFENSE, DEFENSE OF JAPAN 2015 pt. 1, ch. 2, sec. 3, at 118 (2015), http://www.mod.go.jp/e/publ/w_paper/pdf/2015/DOJ2015_1-2-3_web.pdf [hereinafter WHITE PAPER PT. I, CH. 2, SEC. 3]. The United States also expressed concern over the fire control radar incident, stating that "we have seen and are concerned by the reports of the Chinese radar incident" and encouraged both sides to avoid steps "that raise tensions and increase the risk of miscalculations that could undermine peace and stability in the region." Yuka Hayashi, Jeremy Page & Julian E. Barnes, *Tensions Flare as Japan Says China Threatened Its Forces*, WALL STREET JOURNAL (Feb. 6, 2013), http://www.wsj.com/articles/SB10001424127887324445904578285442601856314.

[96] On two separate occasions in May and June 2014, Chinese Su-27 fighters conducted dangerous intercepts of Japanese reconnaissance aircraft operating in international airspace over the East China Sea, coming within two hundred feet of the Japanese aircraft. WHITE PAPER PT. I, CH. 1, SEC. 3, *supra* note 94, at 36; WHITE PAPER PT. I, CH. 2, SEC. 3, *supra* note 95, at 118; Adam Liff & Andrew Erickson, *Crowding the Waters: The Need for Crisis Management in the East China Sea*, FOREIGN AFFAIRS (Mar. 23, 2015), https://www. foreignaffairs.com/articles/east-asia/2015-03-23/crowding-waters.

Kita-Kojima and Minami-Kojima) from the Kurihara family for ¥2.05 billion (US$26.2 million).[97] The deal was approved by the Cabinet on September 10, 2012.[98] The purchase was ostensibly made to prevent Governor Shintaro Ishihara, then nationalist governor of Tokyo, from buying the islands. Earlier in the year he had expressed an interest in purchasing and developing the islands, a move that would certainly have inflamed tensions with China.[99] Despite Japan's professed good intentions in averting the purchase by Governor Ishihara, the sale of the islands to the Japanese government prompted diplomatic protests from China and Taiwan, as well as widespread anti-Japanese demonstrations across China.[100] China's Ministry of Foreign Affairs condemned the purchase, indicating that any unilateral actions taken by the Japanese regarding the Pinnacle Islands are "illegal and invalid."[101] It also deployed two Chinese marine surveillance ships to the islands as a show of force.[102]

Several weeks after the purchase was announced, China deposited a chart with the United Nations showing the baselines and outer limits of the territorial sea of China, as well as a list of geographical coordinates of points defining the baselines of China around the Pinnacle Islands.[103] Japan protested the Chinese submission on September 24, 2012.[104] Six months later, in April 2013, China elevated the status of the island dispute as a "core interest," signaling to Japan that it is not

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97 Chico Harlan, *Reports: Japan Agrees to Buy Disputed Islands from Private Landowner*, WASHINGTON POST (Sept. 5, 2012), https://www.washingtonpost.com/world/reports-japan-agrees-to-buy-disputed-islands-from-private-landowner/2012/09/05/c8c7bc46-f73c-11e1-8398-0327ab83ab91_story.html; Masami Ito & Mizuho Aoki, *Government Seen Sealing Senkaku Deal at ¥2.05 Billing*, JAPAN TIMES (Sept. 6, 2012), http://info.japan times.co.jp/text/nn20120906a1.html.

98 According to Chief Cabinet Secretary Osamu Fujimura, the Japanese government decided to purchase the islands "to keep them under peaceful control" after the private owners put the islands on the market. The other potential buyer, the Tokyo metropolitan government, led by the ultra-nationalist Governor Shintaro Ishihara, had indicated that it intended to station JSDF forces on the disputed islands and construct harbors for use by Japanese fishing boats. The Japanese government believed that development of the islands would inflame Chinese nationalism and therefore decided to purchase the islands to prevent Japanese nationalists from gaining control of the islands. Takashi Mochizuki, *Japan Plans to Buy Islands in Dispute*, WALL STREET JOURNAL (Sept. 11, 2012), http://www.wsj.com/articles/SB10000872396390443921504577643261139002438.

99 Jane Perlez, *China Accuses Japan of Stealing after Purchase of Group of Disputed Islands*, NEW YORK TIMES (Sept. 11, 2012), http://www.nytimes.com/2012/09/12/wor ld/asia/china-accuses-japan-of-stealing-disputed-islands.html. *See also Position Paper: Japan-China Relations Surrounding the Situation of the Senkaku Islands*, MINISTRY OF FOREIGN AFFAIRS OF JAPAN (Nov. 9, 2012), http://www.mofa.go.jp/region/asia-paci/senkaku/position_paper_en.html.

100 MARK E. MANYIN, CONG. RESEARCH SERV., R42761, SENKAKU (DIAOUYU/DIAOYUTAI) ISLANDS DISPUTE: U.S. TREATY OBLIGATIONS 1 (2012).

101 Mure Dickie & Kathrin Hille, *Japan Risks China's Wrath over Senkakua*, FINANCIAL TIMES (Sept. 10, 2012), http://www.ft.com/cms/s/0/babbfa2a-fb2b-11e1-87ae-00144feabdc0.html. The *People's Liberation Army Daily* likewise labeled the purchase "the most blatant challenge to China's sovereignty since the end of World War II." *Quoted in China Sends Patrol Ships to Island Held by Japan*, CSNSNEWS.COM (Sept. 11, 2012), http://www.cnsnews.com/news/article/china-sends-patrol-ships-islands-held-japan.

102 Perlez, *supra* note 99.

103 U.N. Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, Maritime Zone Notifications (Sept. 21, 2012),, http://www.un.org/depts/los/LEGIS LATIONANDTREATIES/PDF FILES/mzn_s/mzn89ef.pdf.

104 Permanent Mission of Japan to the United Nations, Note Verbale PM/12/303 (Sept. 24, 2012), *reprinted in* UNITED NATIONS, LAW OF THE SEA BULLETIN NO. 80, at 39 (2013), http://www.un.org/depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletin80e.pdf.

willing to make any concessions on the sovereignty dispute.[105]

The dispute was further exacerbated in November 2013 when China unexpectedly established an air defense identification zone (ADIZ) over much of the East China Sea.[106] All aircraft entering the zone must comply with the aircraft identification rules and provide flight information to Chinese air traffic controllers.[107] Additionally, aircraft operating in the ADIZ are required to follow the instructions of the Chinese Ministry of Defense or suffer "defensive emergency measures."[108]

The Japanese Ministry of Foreign Affairs immediately protested China's declaration, emphasizing (*inter alia*) that the ADIZ was "totally unacceptable . . . [and] was extremely dangerous as it could unilaterally escalate the situation surrounding the Senkaku Islands and lead to an unexpected occurrence of accidents in the airspace."[109] The following week, JSDF aircraft operationally challenged the ADIZ by conducting an unannounced reconnaissance mission in the zone near the Pinnacle Islands.[110] Japan also instructed Japanese civil aircraft to disregard the new ADIZ procedures, to include the requirement to file flight plans with the relevant Chinese au-

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[105] China's other "core interests" include Taiwan, Tibet, Xinjing and the South China Sea. *China Officially Labels Senkakus a "Core Interest,"* JAPAN TIMES (Apr. 27, 2013), http://www.japantimes.co.jp/news/2013/04/27/national/china-officially-labels-senkakus-a-core-interest/.

[106] On November 23, 2013, China declared an ADIZ over a large portion of the East China Sea that overlaps portions of the South Korean and Japanese ADIZs, which have been in existence since 1951. The zone includes the airspace within the area enclosed by China's outer limit of the territorial sea and the following six points: 33°11'N (North Latitude) and 121°47'E (East Longitude), 33°11'N and 125°00'E, 31°00'N and 128°20'E, 25°38'N and 125°00'E, 24°45'N and 123°00'E, 26°44'N and 120°58'E. *Statement by the Government of the People's Republic of China on Establishing the East China Sea Air Defense Identification Zone*, XINHUA NEWS AGENCY (Nov. 23, 2013), http://news.xinhuanet.com/english/china/2013-11/23/c_132911635.htm. The new ADIZ was purportedly established to protect China's sovereignty and territorial and airspace security, as well as maintain flying order. *China Exclusive: Defense Ministry Spokesman Responds to Air Defense Identification Zone Questions*, XINHUA NEWS AGENCY (Nov. 23, 2013), http://news.xinhuanet.com/english/china/2013-11/23/c_132912145.htm.

[107] Aircraft will provide the following information: (1) flight plan identification, (2) radio identification, (3) transponder identification and (4) logo identification. *Announcement of the Aircraft Identification Rules for the East China Sea Air Defense Identification Zone of the P.R.C.*, XINHUA NEWS AGENCY (Nov. 23, 2013), http://news.xinhuanet.com/english/ china/2013-11/23/c_132911634.htm.

[108] *Id.*

[109] Press Release, Ministry of Foreign Affairs of Japan, China's Establishment of an Air Defense Identification Zone in the East China Sea (Protest by Mr. Junichi Ihara, Director-General of the Asian and Oceanian Affairs Bureau, MOFA, to Mr. Han Zhingiang, Minister of the Chinese Embassy in Japan) (Nov. 23, 2013), http://www.mofa.go.jp/ press/release/press4e_000100.html. The following day Japanese Minister of Foreign Affairs, Fumio Kishida, stated (*inter alia*) that Japan would "respond firmly, but in a calm manner against China's attempt to unilaterally alter the status quo by coercive measures with determination to defend resolutely its territorial land, sea and airspace." Press Release, Ministry of Foreign Affairs of Japan, Statement by the Minister for Foreign Affairs on the Announcement on the "East China Sea Air Defense Identification Zone" by the Ministry of National Defense of the People's Republic of China (Nov. 24, 2013), http://www.mofa.go.jp/press/release/press4e_000098.html. The United States also expressed its concern that the ADIZ declaration will "increase tensions in the region and create risks of an incident." Press Statement, John Kerry, Secretary of State, Statement on the East China Sea Air Defense Identification Zone (Nov. 23, 2013), http://www.state.gov/secretary/remarks/2013/11/218013.htm. See also Press Statement, Chuck Hagel, Secretary of Defense, Statement on the East China Sea Air Defense Identification Zone (Nov. 23, 2013), http://archive.defense.gov/releases/release.aspx?rel easeid=16392 ("The United States . . . views this development as a destabilizing attempt to alter the status quo in the region. The unilateral action increases the risk of misunderstanding and miscalculations.").

[110] *Japanese and South Korean Aircraft Enter Chinese ADIZ*, WANT CHINA TIMES (Nov. 29, 2013), http://www.wantchinatimes.com/news-subclass-cnt.aspx?id=20131129000064 &cid=1101.

thorities.[111] As implemented by China, most nations would agree that the East China Sea ADIZ interferes with high seas freedoms of overflight and is therefore inconsistent with international law.[112]

Since 2013, Chinese intrusions into Japan's claimed airspace and waters around the islands have become commonplace in an apparent effort to demonstrate that Japan does not exercise effective administrative control of the islands. These increased incursions raise the possibility of a miscalculation or other unintended consequence.[113] In the three-month period between July 1 and September 30, 2015, JSDF fighters have been scrambled 117 times to intercept Chinese aircraft in the vicinity of the Senkakus.[114] China argues that the Japanese intercepts hamper its freedom of overflight and threaten the safety of its ships and aircraft.[115] In an apparent show of force, eleven Chinese military aircraft—eight bombers, two surveillance planes and an early-warning aircraft—conducted a drill near Miyako and Okinawa in November 2015 "to improve its long-range combat abilities," prompting the JSDF to scramble jets to intercept and monitor the aircraft.[116]

On the economic front, China also appears to be extracting gas from disputed gas fields near the hypothetical median line with Japan in the East China Sea, despite a 2008 agreement not to engage in individual drilling pending resolution of the maritime boundary dispute. Photographs published in Japan's 2015 defense White Paper confirm the construction of sixteen structures that are currently engaged in offshore drilling operations in the East China Sea.[117] On September 16, 2015, Japan protested the activity, indicating that "it is extremely regrettable that the Chinese side . . . has unilaterally gone ahead with the development while the border has not yet been settled."[118] Six weeks later, China agreed to restart talks on the contentious issue during the South Korea-China-Japan trilateral summit in Seoul.[119]

To counter Chinese activities in the region, Japan's defense ministry has requested a budget increase for the next fiscal year—¥5.09 trillion ($42 billion)—with a focus on strengthening

[111] Thom Shanker, *U.S. Sends Two B-52 Bombers into Air Zone Claimed by China*, NEW YORK TIMES (Nov. 26, 2013), http://www.nytimes.com/2013/11/27/world/asia/us-flies-b-52s-into-chinas-expanded-air-defense-zone.html?_r=0; Julian Barnes, Yuka Hayashi & Jeremy Page, *Stakes Escalate For Biden in Beijing*, WALL STREET JOURNAL (Dec. 4, 2013), http://www.wsj.com/articles/SB10001424052702304579404579236652947844062.

[112] Jonathan Odom, *A 'Rules-Based' Approach to Airspace Defense: A U.S. Perspective on the International Law of the Sea and Airspace, Air Defense Measures, and the Freedom of Navigation*, 1 BELGIUM REVIEW OF INTERNATIONAL LAW 65–93 (2014). *See also* Raul (Pete) Pedrozo, *The Bull in the China Shop: Raising Tensions in the Asia-Pacific Region*, 90 INTERNATIONAL LAW STUDIES 66, 68–77 (2014).

[113] In FY2014, JSDF force aircraft were scrambled 464 times to intercept Chinese aircraft intruding into Japan's claimed airspace around the Pinnacle Islands. WHITE PAPER PT. I, CH. 1, SEC. 3, *supra* note 94, at 44.

[114] Ben Blanchard, *China Calls on Japan to Stop "Hampering" Military Flights*, REUTERS (Oct. 29, 2015), http://www.reuters.com/article/2015/10/29/us-china-japan-idUSKCN 0SN0W020151029.

[115] *Id.*

[116] *"Large" Chinese Military Fleet Flies Near Japan Islands: Media*, YAHOO! NEWS (Nov. 27, 2015), http://news.yahoo.com/large-chinese-military-fleet-flies-near-japan-islands-035354583.html.

[117] Jeffrey W. Hornung, *Get Ready: China-Japan Tensions Set to Flare over East China Sea*, THE NATIONAL INTEREST (Aug. 12, 2015), http://nationalinterest.org/feature/get-ready-china-japan-tensions-set-flare-over-east-china-sea-13557?page=show; Felix K. Chang, *China's Energy Exploration In East China Sea And Japan's Security Debate – Analysis*, EURASIA REVIEW (July 30, 2015), http://www.eurasiareview.com/30072015-chinas-energy-exploration-in-east-china-sea-and-japans-security-debate-analysis/.

[118] *Japan Protests Chinese Gas Operation in Disputed Sea*, YAHOO! NEWS (Sept. 16, 2015), http://news.yahoo.com/japan-protests-chinese-gas-operation-disputed-sea-114447459.html.

[119] *Japan and China Agree on Moves to Mend Ties Further*, REUTERS (Nov. 1, 2015), http://www.reuters.com/article/2015/11/01/us-japan-china-idUSKCN0SQ1SY201511 01.

protection of the Senkaku Islands.[120] Japanese concern over Chinese aggression is likewise reflected in eleven security bills adopted by the Diet in September 2015 that reinterpret Article 9 of Japan's constitution[121] to allow the JSDF to provide collective self-defense for its allies in overseas conflicts.[122]

The U.S. position on the status of the Pinnacle Islands has wavered since the end of the World War II. Following the surrender of Japan in September 1945, U.S. forces assumed formal control over the main Japanese islands, as well as a number of other island groups including the Ama- ni, Okinawa, Miyako and Yaeyame island chains.[123] With regard to the Ryukyu Islands, U.S. Navy survey and reconnaissance operations initially did not extend beyond Kume Island.[124]

However, in January 1946, the commander of the Okinawa Naval Base was ordered "to extend Military Government operations . . . to include the Northern Ryukyus south of the 30th parallel North and to include Sakishima Gunto," which includes the Pinnacle Islands.[125] A map issued by the Supreme Commander for the Allied Powers reflected that the Ryukyus were not associated with Japan proper, nor were they part of Taiwan.[126] Japan was defined in SCAP Memorandum (SCAPIN-677) to include "the four main islands of Japan (Hokkaido, Honshu, Kyushu and Shikoku) and the approximately one thousand smaller adjacent islands, including the Tsushima Islands and the Ryukyu (Nansei) Islands north of 30° North Latitude (excluding Kuchinoshima

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[120] If approved, the request would be the biggest ever budget request by the Ministry of Defense, a 2.2 percent increase from the current fiscal year, and the fourth straight annual defense budget increase. *Japan Defense Ministry Asks for Record Budget*, DEFENSE NEWS (Aug. 31, 2015), http://www.defensenews.com/story/defense/international/asia-pacific/2015/08/31/japan-defense-ministry-asks-record-budget/71491924/.

[121] Article 9 provides:
Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes. In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.
NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 9 (Japan), http://japan.kantei.go.jp/constitution_and_government_of_japan/constitution_e.html. The Constitution, promulgated on November 3, 1946, came into effect on May 3, 1947.

[122] Prime Minister Shinzo Abe told reporters, "The legislation is necessary in order to protect the people's lives and their peaceful livelihood, and it is to prevent a war." Mari Yamaguchi,*Japan Enhances Military's Role as Security Bills Pass*, AP (Sept. 18, 2015), http://bigstory.ap.org/article/bf06b3fa661f47e689f6ccd50599f5d9/japan-ruling-party-final-push-expand-role-military.

[123] Jean-Marc F. Blanchard, *The U.S. Role in the Sino-Japanese Dispute over the Diaoyu (Senkaku) Islands, 1945–1971*, 161 THE CHINA QUARTERLY 95, 102 (2000). Japan was defined by the Joint Chiefs of Staff in a basic directive for the occupation and control of Japan as "the four main islands of Japan: Hokkaido (Yezo), Honshu, Kyushu and Shikoku and about 1,000 smaller adjacent islands including the Tsushima Islands." Joint Chiefs of Staff, J.C.S. 1380/15, Basic Initial Post Surrender Directive to Supreme Commander for the Allied Powers for the Occupation and Control of Japan (Nov. 3, 1945), https://assets.documentcloud.org/documents/1354730/us-jpn-rok-basic-directice-for-post-surrender.pdf.

[124] Blanchard, *supra* note 122, at 103.

[125] *Id.*

[126] *Id.* at 102 n.35.

Island)."[127] Thus, official documents issued by the U.S. State Department and the SCAP clearly associated the Pinnacle Islands with the Okinawa prefecture.[128]

Declassified records from the State Department note that the United States "rejected *in toto* Chinese claims to the Ryukyus" that were raised by Chinese Foreign Minister T.V. Soong in October 1944 and by Chiang Kai-Shek in 1947.[129] Similarly, a 1951 National Intelligence Estimate (NIE-19) by the Central Intelligence Agency "concluded that adherence to the territorial clauses of Cairo and Potsdam would require the return of the Ryukyus and Bonins to Japan."[130] Publications by U.S. Civil Administration of the Ryukyu Islands botanists and forestry officials likewise identified the Pinnacle Islands as part of the Ryukyus chain.[131]

The U.S. position at the San Francisco Peace Conference reflects that the United States considered the Pinnacle Islands to be part of Japan. During the negotiations, the United States rejected a proposal by the allies that Japan renounce its sovereignty over the Ryukyus in favor of U.S. sovereignty. The formula advanced by U.S. Secretary of State John Foster Dulles, and ultimately adopted by the conference, allowed "Japan to retain residual sovereignty, while making it possible for these islands to he brought into the United Nations trusteeship system, with the United States as administering authority."[132]

The Eisenhower, Kennedy and Johnson administrations followed suit, recognizing Japanese residual sovereignty over the Ryukyus Islands.[133] In a Joint Communiqué in 1957, President

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[127] Excluded from the definition were Utsuryo (Ullung) Island, Liancourt Rocks (Take Island) and Quelpart (Saishu or Cheju) Island, (b) the Ryukyu (Nansei) Islands south of 30° North Latitude (including Kuchinoshima Island), the Izu, Nanpo, Bonin (Ogasawara) and Volcano (Kazan or Iwo) Island Groups, and all the other outlying Pacific Islands [including the Daito (Ohigashi or Oagari) Island Group, and Parece Vela (Okino-tori), Marcus (Minami-tori) and Ganges (Nakano-tori) Islands], and (c) the Kurile (Chishima) Islands.
Formosa and the Pescadores were also excluded from the definition. Memorandum from General Headquarters, Supreme Commander for the Allied Powers (SCAPIN-677) to Imperial Japanese Government, Governmental and Administrative Separation of Certain Outlying Areas from Japan (Jan. 20, 1946), https://en.wikisource.org/wiki/SCAPIN677. Paragraph 6 made clear, however, that it did not purport to express Allied policy with respect "to the ultimate determination of the minor islands referred to in Article 8 of the Potsdam Declaration." *See also* Seokwoo Lee, *The 1951 San Francisco Peace Treaty with Japan and the Territorial Disputes in East Asia*, 11 PACIFIC RIM LAW & POLICY JOURNAL 63, 105–6 (2002).

[128] A map issued by the SCAP in December 1947 includes the Sakishima group as part of the Ryukyus and excludes them from the China theatre and Taiwan. Blanchard, *supra* note 122, at 103.

[129] Mao Zedong had also implied in 1939 that the Ryukyus had been stolen from China by the imperialists. *Id*. at 104.

[130] *Id*. at 108.

[131] *Id*. at 111 n.86. *See also* EGBERT H. WALKER, RYUKYU ISLANDS: PRELIMINARY NOTES ON THE USE, DISTRIBUTION, AND ADAPTABILITY OF NATIVE AND INTRODUCED TREE SPECIES (1952)).

[132] Dulles Address, *supra* note 27. *See also* KERRY DUMBAUGH (COORDINATOR), CONG. RESEARCH SERV, CHINA'S MARITIME TERRITORIAL CLAIMS, IMPLICATIONS FOR THE U.S. 21(2001); Blanchard, *supra* note 122, at 102, 109. The British delegate to the conference, Kenneth Younger, agreed with this approach, indicating that the SFPT "did not remove the Ryukyus from Japanese sovereignty." DUMBAUGH ET AL., *supra* note 89, at 21; Blanchard, *supra* note 122, at 110.

[133] "Residual sovereignty" was defined in 1969 to mean that "the United States would not transfer its sovereignty powers [administrative, legislative and judicial] over the Ryukyu Islands to any nation other than Japan." Blanchard, *supra* note 122, at 109 n.78. This definition was consistent with President Eisenhower's 1957 position that residual sovereignty meant "that the United States would exercise its rights for a period, and that the sovereignty would then return to Japan." Blanchard, *supra* note 122, at 117 n.115.

Dwight D. Eisenhower reaffirmed the U.S. position that "Japan possesses residual sovereignty over these islands."[134] President John F. Kennedy similarly noted in 1963, indicating, "I recognize the Ryukyus to be a part of the Japanese homeland and look forward to the day when the security interests of the free World will permit their restoration to full Japanese sovereignty."[135] The Johnson administration likewise "reaffirmed Japan's residual sovereignty over the islands" in a joint communiqué in January 1965.[136]

A declassified CIA report from 1971 states "the Senkaku Islands . . . [were] generally accepted as being Japanese owned" and were not claimed by China until December 1970 following the release of the 1969 ECAFE report that indicated there was a high probability that large deposits of oil may be present in the continental shelf between Taiwan and Japan.[137] The report additionally states that "strong support for the Japanese claim to the Senkakus exists not only on Japanese maps but also on maps published in Peking and Taipei."[138] The report concludes that "the Japanese claim to sovereignty over the Senkakus is strong, and the burden of proof of ownership would seem to fall on the Chinese."[139]

Nonetheless, the U.S. position on the sovereignty issue changed to one of neutrality during the Nixon administration. During the negotiations of the Okinawa reversion treaty, the State Department suggested in April 1971 that "in occupying the Ryukyus and the Senkakus in 1945, and in proposing to return them to Japan in 1972, the U.S. passes no judgment as to conflicting claims over any portion of them, which should be settled directly by the parties concerned."[140] The change in position was not, however, made because the United States believed that the islands were not Japanese territory, but rather to appease the Taiwanese government and break

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[134] Joint Communiqué of Japanese Prime Minister Kishi and U.S. President Eisenhower (June 21, 1957), http://www.ioc.u-tokyo.ac.jp/~worldjpn/documents/texts/JPU S/19570621.D1E.html.

[135] Statement by President John F. Kennedy upon Signing Order Relating to the Administration of the Ryukyu Islands (Mar. 19, 1962), http://www.presidency.ucs b.edu/ws/?pid=9114. President Kennedy's statement was consistent with a joint communiqué issued by the White House in June 1961 after a meeting between the President and Japanese Prime Minister Hayato Ikeda ("The President and the Prime Minister exchanged views on matters relating to the Ryukyu and Bonin Islands, which are under U.S. administration, but in which Japan retains residual sovereignty."). Blanchard, *supra* note 122, at 118.

[136] Blanchard, *supra* note 122, at 118.

[137] CIA SENKAKU ISLANDS INTELLIGENCE REPORT, *supra* note 78, at 1. *See also* ECAFE REPORT, *supra* note 77.

[138] Foreign maps cited by the report include the 1967 edition of the Soviet Union's official *Atlas of the World*, which specifically designates the Senkakus to be Japanese. CIA SENKAKU ISLANDS INTELLIGENCE REPORT, *supra* note 78, at 18–19.

[139] *Id*. at 29.

[140] Memorandum From John H. Holdridge of the National Security Council Staff to the President's Assistant for National Security Affairs (Kissinger) (Apr. 13, 1971), *reprinted in* 17 FOREIGN RELATIONS OF THE UNITED STATES, 1969–1976: CHINA 1969–1972, at 296 (2006), https://history.state.gov/historicaldocuments/frus1969-76v17/d115 [hereinafter Holdridge Memorandum]. A similar position was reflected in a State Department cable in June 1971 ("The United States cannot add to the legal rights Japan possessed before it transferred administration of the islands to the United States nor can the United States by giving back what it received diminish the rights of the Republic of China.") Lee, *supra* note 126, at 122–23. *See also* Choon-ho Park, *Oil Under Troubled Waters: The Northeast Asia Sea-Bed Controversy*, 14 HARVARD INTERNATIONAL LAW JOURNAL 212, 253 (1973).

the impasse of the ongoing textile negotiations in Taipei.[141] The change in position may also have been influenced by the administration's "overtures to China during 1971–1972, culminating in the Nixon visit to China."[142]

When the Okinawa reversion treaty was presented to the U.S. Senate for advice and consent in 1971, the Secretary of State indicated "that reversion of administrative rights to Japan did not prejudice any claims to the islands."[143] Acting Assistant Legal Adviser Robert Starr amplified the U.S. position in a letter dated October 20, 1971.[144] Since that date, successive U.S. administrations have maintained a position of neutrality concerning the dispute.[145]

The change in position by the United States is somewhat contradictory in that all U.S.

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[141] A memorandum from the Assistant for International Economic Affairs to President Richard Nixon indicated that "the Taiwan Government feels it has taken a heavy beating from the U.S. in recent months (oil moratorium, Two-China developments) and that it would lose a great deal more international face if they were to settle for a disadvantageous bargain" in the textile negotiations. Therefore, Ambassador-at-Large David Kennedy had suggested, *inter alia*, that the United States "offer certain concessions to Taiwan" to break the impasse "without causing disastrous side effects for either our industry or the Taiwan Government." Kennedy was convinced that the "only way to resolve the issues is to withhold turning the Senkaku Islands over to Japanese administrative control under the Okinawa Reversion Agreement." Memorandum From the President's Assistant for International Economic Affairs (Peterson) to President Nixon (June 7, 1971), *reprinted in* 17 FOREIGN RELATIONS OF THE UNITED STATES, 1969–1976: CHINA 1969–1972, at 341 (2006), https://history.state.gov/historicaldocuments/frus1969-76v17/pg_341. *See also* Backchannel Message from the President's Assistant for International Economic Affairs (Peterson) to Ambassador Kennedy, in Taipei (June 8, 1971), *reprinted in id.* at 343 (2006), https://history.state.gov/historicaldocuments/frus1969-76v17/pg_343; CIA SENKAKU ISLANDS INTELLIGENCE REPORT, *supra* note 78, at 16; Eisuke Suzuki, *The Origin of the Territorial Dispute of the Senkaku Islands*, HOJOROHNIN'S DIARY (Nov. 4, 2013), http://ho jorohnin.hatenablog.com/entry/2013/11/04/132324.

[142] DUMBAUGH ET AL., *supra* note 88, at 22. See also Suzuki, *supra* note 140.

[143] In response to a question by the Chairman of the Senate Foreign Relations Committee regarding the sovereignty dispute over the islands, Secretary of State William Rogers stated that "this treaty does not affect the legal status of those islands at all." LARRY A. NIKSCH, CONG. RESEARCH SERV, CRS-96-798, SENKAKU (DIAOYU) ISLANDS DISPUTE: THE U.S. LEGAL RELATIONSHIP AND OBLIGATIONS 3 (1996). *See also* Blanchard, *supra* note 122, at 120.

[144] The . . . the Republic of China and Japan are in disagreement as to sovereignty over the Senkaku Islands. . . . [T]he People's Republic of China has also claimed sovereignty over the islands. The United States believes that a return of administrative rights over those islands to Japan, from which the rights were received, can in no way prejudice any underlying claims. The United States cannot add to the legal rights Japan possessed before it transferred administration of the islands to us, nor can the United States, by giving back what it received, diminish the rights of other claimants. The United States . . . considers that any conflicting claims to the islands are a matter for resolution by the parties concerned. NIKSCH, *supra* note 143, at 3. *See also Hearing on Ex. J. 92-1 the Agreement Between the U.S.A. and Japan Concerning the Ryukyu Islands and the Daito Islands Before the Senate Committee on Foreign Relations*, 92nd Cong. 91 (1971).

[145] *See e.g.,* MANYIN, *supra* note 100, at 6. On August 16, 2010, Assistant Secretary of State Philip Crowley reiterated the U.S. position at a daily press briefing in Washington:
The U.S. position on this issue is longstanding and has not changed. The United States does not take a position on the question of the ultimate sovereignty of the Senkaku Islands. We expect the claimants to resolve this issue through peaceful means among themselves. But Article 5 of the 1960 U.S.-Japan Treaty of Mutual Cooperation and Security states that the treaty applies to the territories under the administration of Japan. . . .
Daily Press Briefing, Philip J. Crowley, Assistant Secretary, U.S. Department of State (Aug. 16, 2010), http://www.state.gov/r/pa/prs/dpb/2010/08/146001.htm#JAPAN. *See also* Daily Press Briefing, Victoria Nuland, Spokesperson, U.S. Department of State (Aug. 28, 2012), http://www.state.gov/r/pa/prs/dpb/2012/08/196986.htm.

administrations have stated that U.S. defense obligations under the U.S.-Japan defense treaty apply to the Pinnacle Islands. Therefore, U.S. "neutrality," albeit well-intended, is of little value in reducing the growing tensions between China and Japan over the disputed islands.[146] Rather, it encourages China to be more assertive by allowing it to exploit the U.S. distinction between sovereignty and administrative control, which helps explain the increased presence of Chinese patrol boats and aircraft around the Pinnacle Islands since the fall of 2012.[147]

The ongoing dispute between China and Japan is of concern to the United States since the Pinnacle Islands, which have been under the administrative control of Japan since 1972, fall within the scope of Article 5 of the 1960 U.S.-Japan Treaty of Mutual Cooperation and Security.[148] Renewed Chinese provocations in the vicinity of the islands have prompted the United States to

[146] Dr. Henry Kissinger, one of America's greatest statesmen, astutely observed in 1971 that the U.S. position was "nonsense." Kissinger's handwritten comment in the margin of a memorandum articulating the State Department's neutrality proposal indicated: "But that is nonsense since it gives the islands to Japan. How can we get a more neutral position?" Holdridge Memorandum, *supra* note 139.

[147] MANYIN, *supra* note 100, at 6.

[148] For the text of Article 5, see *supra* note 53. Article II of the Okinawa reversion treaty extends U.S. defense obligations to the islands:
It is confirmed that treaties, conventions and other agreements concluded between the United States . . . and Japan, including, but without limitation, the Treaty of Mutual Cooperation and Security between the United States of America and Japan signed at Washington on January 19, 1960, and its related arrangements and the Treaty of Friendship, Commerce and Navigation between the United States of American and Japan signed at Tokyo on April 2,1953, become applicable to the Ryukyu Islands and the Daito Islands. . .
Agreement between the United States of America and Japan concerning the Ryukyu Islands and Daito Islands, U.S.-Japan, June 17, 1971, 23 U.S.T. 446 (1971).

reaffirm U.S. defense obligations under Article 5 on numerous occasions.[149]

V. CONCLUSION

Despite Japan's best efforts to negotiate a peaceful settlement to its outstanding territorial matters, resolution of these disputes remains elusive. Although initially inclined to discuss the status of the Northern Territories/Southern Kurile Islands, Russia recently reversed course and indicated that there is no room for compromise on the sovereignty issue. South Korea has taken a similar position with regard to the Liancourt Rocks, repeatedly refusing Japan's proposal to have the dispute settled through third party adjudication. Finally by elevating the status of the Pinnacle Islands dispute to a "core interest," China has signaled that it has no intentions of resolving the sovereignty issue amicably and will do everything in its power to alter the status quo. Consequently, for the foreseeable future Japan must continue to enhance its defensive capabilities and cultivate and strengthen its alliance with the United States in order to deter aggressive countermeasures by the other disputants, as well as minimize the potential for miscalculation.

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[149] In August 2010, Assistant Secretary of State Philip Crowley reaffirmed U.S. defense obligations under Article 5 of the mutual defense treaty. Crowley, *supra* note 146. Two months later, in October 2010, Secretary of State Hillary Clinton re-confirmed U.S. obligations under the defense treaty during an official visit to Vietnam, indicating that the United States has "made it very clear that the [Pinnacle] islands are part of our mutual treaty obligations, and the obligation to defend Japan." Secretary of State Hillary Rodham Clinton, Remarks with Vietnamese Foreign Minister Pham Gia Khiem (Oct. 30, 2010), http://www.state.gov/secretary/20092013clinton/rm/2010/10/150189.htm. In 2012, the United States reiterated that the U.S.-Japan defense treaty applies to "any provocative set of circumstances." Hiroko Tabuchi, *Japan Scrambles Jets in Islands Dispute with China*, NEW YORK TIMES (Dec. 13, 2012), http://www.nytimes.com/2012/12/14/world/asia/japan-scrambles-jets-in-island-dispute-with-china.html?_r=0. In April 2013, then Chairman of the Joint Chiefs of Staff General Martin Dempsey told reporters in Beijing that he had reminded Chinese officials that the United States will live up to its treaty obligations with regard to the Senkakus—"In the case of Japan in particular, I was careful to remind . . . [the Chinese] that we do have certain treaty obligations with Japan that we would honor." Michael Martina & Terril Yue Jones, *China Calls Japan-U.S. Drill 'Provocative,'* REUTERS (Apr. 25, 2013), http://www.reuters.com/article/2013/04/24/us-china-japan-islands- idUSBRE93N0N720130424. Following a January 2013 meeting with Japanese Foreign Minister Fumio Kishida in Washington, Secretary of State Hillary Clinton reiterated the U.S. position over the Pinnacle Islands dispute, stating that, "although the United States does not take a position on the ultimate sovereignty of the islands, we acknowledge they are under the administration of Japan and we oppose any unilateral actions that would seek to undermine Japanese administration. . . ." Secretary of State Hillary Rodham Clinton, Remarks with Japanese Foreign Minister Fumio Kishida after Their Meeting (Jan. 18, 2013), http://www.state.gov/secretary/20092013clinton/rm/2013/01/ 203050.htm. In April 2013, then U.S. Secretary of Defense Chuck Hagel stressed that the United States would live up to its defense obligations to Japan and that Washington was opposed to any unilateral action to weaken Japan's administrative control over the disputed islets: "The United States does not take a position on the overall sovereignty of the islands but we do recognize they are under the administration of Japan and fall under our security treaty allocations." Yasushi Azuma, *Hagel Vows Defense Commitments to Japan, Including Nuclear Umbrella*, JAPAN TIMES (Apr. 30, 2013), http://www.japantimes.co.jp/news/2013/04/30/national/politics-diplomacy/hagel-vows-defense-commitments-to-japan-including- nuclear-umbrella/. Finally, in April 2014, President Barack Obama became the first sitting U.S. president to overtly state that the Pinnacle Islands fall under the U.S.-Japan defense treaty: "The policy of the United States is clear—the Senkaku Islands are administered by Japan and therefore fall within the scope of Article 5 of the U.S.-Japan Treaty of Mutual Cooperation and Security. And we oppose any unilateral attempts to undermine Japan's administration of these islands." Ankit Panda, *Obama: Senkakus Covered under US-Japan Secu- rity Treaty*, THE DIPLOMAT (Apr. 24, 2014), http://thediplomat.com/2014/04/obama-senkakus-covered-under-us-japan-security-treaty/.