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Kazuhiro Nakatani

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Paul S. Reichler

Regional Cooperative Security in the Indo-Pacific: Synergizing Consultative Mechanisms across the Indian Ocean, East China Sea, South China Sea, and the Western Pacific

Monika Chansoria

International Law and Japan's Territorial Disputes

Raul (Pete) Pedrozo

Documents: Japan's Major Foreign Policy Statements (2017)

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1 The South China Sea Arbitration Award (Philippines v. China) and the Rule of Law at Sea03

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2 The Rule of Law and the Path to a Just and Lasting Peace in the South China Sea06

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3 Regional Cooperative Security in the Indo-Pacific: Synergizing Consultative Mechanisms across the Indian Ocean, East China Sea, South China Sea, and the Western Pacific13

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4 International Law and Japan's Territorial Disputes26

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Documents: Japan's Major Foreign Policy Statements (2017)51

The South China Sea Arbitration Award (Philippines v. China) and the Rule of Law at Sea

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Abstract

This paper summarizes the epoch-making findings in the South China Sea arbitration award (Philippines v. China) on July 12, 2016. It also elaborates on potential implications of noncompliance with the arbitration award by China and argues that, in light of the rule of law, when a country loses a case it must comply with the international ruling.

The arbitration award for the South China Sea (Philippines v. China) on July 12, 2016 has an epochal significance for the rule of law at sea. The award (together with the October 29, 2015 ruling on jurisdiction and admissibility) positively affirms jurisdiction and admissibility, advances the case, and rules that China's series of ambitious statements and activities in the South China Sea are illegal and invalid under international law.

In the arbitration, first, regarding the historical rights and "nine-dash line" claims by China, the award found that any such rights which are contrary to the United Nations Convention on the Law of the Sea (UNCLOS) were nullified when the Convention came into effect, and that China has no legal basis for claiming historical rights to resources in sea areas inside the "nine-dash line." Second, with regard to standards for being classified as an "island" under Article 121 of the Convention, the award found that an island must have the capacity to sustain either "a stable community of people" or "economic activity that is not dependent on outside resources or purely extractive in nature," and that the high-tide features in the Spratly Islands are all "rocks" with no exclusive economic zone (EEZ) or continental shelf, and not "islands."

Third, the award found that China's activities in the South China Sea are in violation of international law as follows: (1) China violated the sovereign rights of the Philippines with respect to its EEZ and continental shelf by prohibiting the Philippines from fishing in the EEZ and by constructing installations and artificial islands at Mischief Reef without the authorization of the Philippines; (2) China violated the traditional fishing rights of Philippine fishermen by prohibiting access to Scarborough Shoal; (3) China violated Articles 192–194 of the Convention, which make the preservation and protection of fragile ecosystems and the habitats of endangered species obligatory, by large-scale land reclamation and the construction of artificial islands; (4) China violated UNCLOS Article 94 and the Convention on the International Regulations for Preventing Collisions at Sea (COLREGs) by preventing Philippine vessels from approaching Scarborough Shoal, causing grave risk of collision at sea.

Because the arbitration award is legally binding (UNCLOS Annex VII Article 11), if China does not implement the award, which she currently shows no signs of doing, it will be in violation of international law. The immediate cessation of constructing artificial islands, withdrawal of the "nine-dash line," and other activities are now China's obligation under international law.

In general, the *res judicata* of arbitration awards itself is limited to the concerned case and states, but even when those states conduct diplomatic negotiations regarding the implementation

of an arbitration award, they must not deviate from the overall framework of the award. Moreover, because of the universal value of the sea, countries other than the Philippines and China (especially countries which make major use of the South China Sea such as Japan) are not solely third parties, but rather parties with legitimate interests in the China's faithful implementation of the arbitration award as countries with direct interests.

The Joint Statement of the Philippines and China of October 21, 2016 (paragraph 40) reads, “[R]egarding the South China Sea … both sides also reaffirm the importance of … addressing their territorial and jurisdictional disputes by peaceful means … through friendly consultations and negotiations by sovereign states directly concerned, in accordance with universally recognized principles of international law, including the Charter of the United Nations and the 1982 UNCLOS.” While the expression “sovereign states directly concerned” is believed to show China's intent to exclude not only third countries but also Taiwan, both the Philippines and China must recognize that “universally recognized principles of international law, including the Charter of the United Nations and the 1982 UNCLOS” include the arbitration award as a matter of course. The Philippines requested the arbitration tribunal to adjudge and declare that “China shall respect the rights and freedoms of the Philippines under the Convention, [and] shall comply with its duties under the Convention,” but the tribunal found such a declaration unnecessary, citing the fundamental principle of international law that “bad faith is not presumed.” Whether or not such an arbitration award, whose implementation depends on the good faith of the countries involved, is naive depends on the actions of the Chinese side. The good faith or bad faith of China has been placed under the scrutiny of the international community.

Because there is no systematic framework to ensure implementation of an arbitration award, in cases like this, where the state that lost the case has no intention of implementation, the arbitration award is inevitably ignored and not implemented. (Regarding judgments by the International Court of Justice, UN Charter Article 94 Paragraph 2 states, “the Security Council may … make recommendations or decide upon measures to be taken to give effect to the judgment,” but in cases where the country which lost the case is a permanent member of the Security Council, the invocation of that paragraph cannot possibly be expected.) The nonperformance of the April 18, 1977 Beagle Channel arbitration award in a territorial dispute between Chile and Argentina is a serious precedent of noncompliance with an arbitration award related to territory. Argentina, which effectively lost the case, was dissatisfied with the award and refused to comply. When Chile, which was seeking implementation, proposed referring the case to the International Court of Justice, Argentina refused, stating that would be *casus belli*, and then began an invasion of Chilean islands on December 22, 1978. Pope John Paul II sensed a crisis and proposed mediation; this proposal was accepted by both countries on January 9, 1979. The mediation was prolonged, during which the Falklands war took place, and a treaty of peace and friendship between the two countries was finally signed at the Vatican on November 29, 1984, resolving the conflict. In this treaty, the two countries agreed to essentially the same contents as the original arbitration award, but a huge price was paid to arrive at that point. It would be in the interest of the international community that China does not follow the negative precedent.

The Three Principles of the Rule of Law at Sea presented by Prime Minister Shinzo Abe at the Asian Security Summit (“Shangri-La Dialogue”) on May 30, 2014ⁱ point out items that are a matter of course under international law. Moreover, these points are of particular importance today when there are countries that do not observe international law and advance changes in the *status quo* made through force. The sea is an area where it is particularly necessary to stress the rule of law in the international community. There are great concerns that if the contents of the arbitration

ⁱ Three principles of Rule at Law of Sea presented by Prime Minister Shinzo Abe from Shangri-la Dialogue Speech 2014: Countries must: (1) make and clarify claims based on international law, (2) not use force or coercion in trying to drive their claims, and (3) seek to settle disputes by peaceful means.

award are ignored, that will have a harmful effect on the rule of law in all other sea areas.

In relation to international adjudication, simply stated, following the “rule of law” means when a country loses a case it must comply with the international ruling. Japan effectively lost what is known as the case concerning whaling in the Antarctic at the International Court of Justice, and implemented the contents of that ruling “as a nation that respects the international legal system and the rule of law as foundations of the international community.” As to whether or not China can implement the arbitration award as a responsible nation, the ball is now in China’s court. Recalling the words of the Joint Statement of the Japan and Philippines of October 26, 2016 (paragraph 12), “With regard to the South China Sea Arbitral Award, the two leaders acknowledged the importance of a rules-based approach to the peaceful settlement of maritime disputes without resorting to the threat or use of force, in accordance with the 1982 United Nations Convention on the Law of the Sea (UNCLOS), the UN Charter and other relevant international conventions,” the Philippines should act in a manner that does not remove the backbone of the effective contents of the arbitration award.

In relation to the “Declaration on the Conduct of Parties in the South China Sea” (DOC), which was agreed on by the Association of Southeast Asian Nations (ASEAN) member states and China in 2002, although the DOC is not legally binding, China’s actions in the South China Sea are in violation of the DOC. (For example, voicing objections to the navigation of U.S. warships is in violation of Paragraph 3 which reaffirms respect for the freedom of navigation, and constructing man-made islands and making the island habitable for humans are in violation of Paragraph 5, in which the parties undertake to exercise self-restraint in action of inhabiting presently uninhabited islands, reefs, etc.) In preparation for a future legally binding “Code of Conduct for the South China Sea” (COC), from the perspective of the rule of law at sea, the arbitration award should be used as a reference and caution exercised so the COC does not contradict the arbitration award’s contents.

The Rule of Law and the Path to a Just and Lasting Peace in the South China Sea

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Abstract

This article, by the lead counsel for the Philippines in the arbitration it brought against China under the United Nations Convention for the Law of the Sea, which resulted, in July 2016, in a unanimous award in favor of the Philippines on all key issues, sets forth the author's views on the critical findings by the arbitral tribunal, the impact of the award on the parties to the dispute and on the rule of law generally, and how the award can lead to a peaceful and equitable solution for China and its neighbors rimming the South China Sea, as well as a strengthening of the rules-based international order.

In this discussion of the *South China Sea* arbitration, in which I was privileged to serve as lead counsel for the Philippines, I will first summarize the key findings in the case. Then I will address its impact on the rule of law and the stability of the international legal system. And finally, I will offer my thoughts on how the arbitral award can serve as the basis for an equitable and lasting solution to the conflict between China and its neighbors in the South China Sea, as well as a strengthening of the rules-based international order as a whole.

The Philippines brought the case in January 2013 for two paramount reasons: First, China was insisting on exclusive jurisdiction over nearly all the waters and seabed of the South China Sea, within a so-called “nine-dash line” and the exclusive right to all of the natural resources within that line. China’s claim extended more than 650 miles from its coast and within 50 miles of the Philippines’ coast, and that is well beyond the 200-mile exclusive economic zone and continental shelf, to which China is entitled under the Law of the Sea Convention and it is well within the Philippines 200-mile entitlements. China depicted its nine-dash line claim in a map that it sent to the United Nations in 2009.

Based on its nine-dash line claim, Chinese law enforcement and naval vessels prevented Philippine fishermen from fishing in the waters encompassed by the nine-dash line and prevented Philippine licensees from exploring for oil and gas within the perimeter of the nine-dash line, while permitting Chinese nationals to carry out these activities.

The second principal cause of the Philippines’ resort to arbitration was China’s claimed sovereignty over all of the Spratly Islands, in the southern part of the South China Sea. The Spratly Islands consist of dozens of very tiny insular features, only a small number of which are above water at high tide and most of which are also claimed by the Philippines, Vietnam, or Malaysia. China occupied and built or started to build military facilities on top of seven of these features. China’s construction caused great environmental harm to these reefs and islands, which were previously some of the most pristine in the world. The Philippines claimed that China’s activities destroyed the surrounding marine environment including important fish breeding and feeding areas.

The Philippines had tried to address all of these issues with China by diplomacy over a

number of years, but China was inflexible. It demanded that the Philippines accept China's exclusive rights over all of the resources of the sea and seabed within the nine-dash line as well as Chinese sovereignty over all of the islands and other maritime features of the South China Sea. This would have amounted to a renunciation of the Philippines' rights under the Law of the Sea Convention. With diplomacy frustrated and military action out of the question, legal recourse became the only viable option for the Philippines.

But there were big challenges to bringing the case. First, an arbitral tribunal established under the Law of the Sea Convention has no jurisdiction over questions of land sovereignty, and for that reason the Philippines could not challenge China's assertion of sovereignty over the Spratly Islands or Scarborough Shoal, which represented a significant part of the conflict.

Second, the Philippines could not ask a tribunal to delimit a maritime boundary with China because China had exercised its right under Article 298 of the Convention to exclude itself from compulsory arbitral jurisdiction in regard to sea boundary delimitation.

The solution for the Philippines, after much thought, analysis and internal debate, was to bring a case about maritime entitlements rather than about sovereignty over islands, or delimitation of boundaries. Maritime entitlements, that is, the entitlements to the sea and seabed generated by coastal land territory – including a 12-mile territorial sea and 200-mile exclusive economic zone and continental shelf – are specifically provided for in the Convention; and thus, unlike sovereignty over coasts and islands, they do fall within the jurisdiction of an arbitral tribunal established under the Convention.

Also, and this proved to be a critical point, maritime entitlements can be determined without the need for engaging in the delimitation of boundaries. In fact, Law of the Sea tribunals must determine the entitlements of the parties to a dispute prior to and separately from delimiting a boundary, because it is only when two States' entitlements overlap that a boundary needs to be created. And this can be illustrated by example. When you have State A and State B separated by a body of water that is greater than 400 miles, their respective 200 mile entitlements to an exclusive economic zone and continental shelf will not overlap. Each will enjoy the exclusive right to exploit the living and non-living resources in its own 200 mile zone. There is no need for a delimitation of a common boundary. By contrast, where States A and B are separated by less than 400 miles, their 200 mile zones will overlap, and a boundary will have to be drawn to separate their respective zones.

In the South China Sea, with the exception of a small area to the northwest of the Philippines' northernmost islands (and southeast of China's southern coast), the Philippines and China are separated by more than 400 miles. Accordingly, except for that small area their 200 mile maritime entitlements do not overlap, and there is no cause for boundary delimitation.

Accordingly, the Philippines believed that by asserting claims to establish its own maritime entitlements and challenge those claimed by China based on the nine-dash line, it would overcome China's anticipated jurisdictional challenges. And this proved to be correct. Although China did not formally appear in the arbitral proceedings, it submitted to the tribunal a written pleading setting forth its jurisdictional objections. The tribunal accepted China's written pleading and considered it as China's jurisdictional objections. China's main arguments were that the tribunal lacked jurisdiction over matters of land sovereignty and boundary delimitation, but the tribunal was able to reject these arguments, unanimously, because the Philippines had been careful not to raise issues of land sovereignty or boundary delimitation, but had presented its case entirely as one regarding maritime entitlements.

On the merits, the Philippines claimed exclusive entitlements extending out to 200 miles from its coasts in all of the areas that were beyond 200 miles from China's coasts. This included the exclusive right to the resources of the sea and the seabed, meaning all of the fish, and the oil and gas beneath the seabed, in those areas.

The Philippines accepted that, as a party to the Convention, China enjoyed all of the entitlements guaranteed to it by the Convention, but that these did not extend beyond 200 miles from its coasts; therefore, any Chinese claim beyond 200 miles was a violation of the Convention and of the Philippines' rights thereunder. The arbitral tribunal unanimously agreed with this proposition.

In reaching this decision, the tribunal carefully considered China's claim to the waters and seabed encompassed by the nine-dash line, based on China's alleged historic rights beyond those enumerated in the Convention. The tribunal found that China's claim was unlawful on two grounds: first, it determined that when States became parties to the Law of the Sea Convention, they necessarily abandoned all claims to rights in the sea whether based on history or otherwise that were contradictory with the provisions of the Convention and, further, that they were expressly required by the Convention to withdraw all contradictory claims. China's claims to areas of sea and seabed beyond 200 miles from its coasts were plainly contradictory to the express terms of the Convention and therefore they were found to be unlawful.

Second, the tribunal found that even under preconvention international law, China's historic rights claims were invalid. Under customary international law, a claim of historic rights may be lawful only if a State has in fact exercised authority over the maritime area in question: under a claim of right, continuously over a long period of time, *and* with the acquiescence of neighboring States. China's historic rights claim in the South China Sea satisfied none of these well-established criteria. The evidence showed that China had never exercised authority over any maritime areas beyond those very close to its mainland coast, let alone continuously for a long period of time, and that no other State had ever acquiesced to China's authority in these areas.

China claimed entitlements not only from its mainland coast, but also from the Spratly Islands based on its alleged sovereignty over them. Consequently, another important issue in the case was whether these features were capable of generating maritime entitlements; and if so, to what extent.

This matter turned on the meaning of Article 121 of the Convention. The article provides that islands generate the same maritime entitlements as mainland coasts including an exclusive economic zone and continental shelf. However, there is an important exception in paragraph 3 of that article for islands that are considered uninhabitable, specifically features that are incapable of sustaining human habitation or economic life of their own. Those islands have a maritime entitlement only to a 12-mile territorial sea. For that reason, the Philippines argued and presented voluminous evidence that none of the Spratly Islands was habitable in its natural state and that none of the features therefore generated entitlements beyond 12 miles. This was the first case in which any international court or tribunal was required to interpret article 121, paragraph 3 or determine whether and on what basis an island should be deemed incapable of sustaining human habitation or economic life.

The tribunal delivered as part of its award an extensive analysis of the article's text and the manner in which it is to be applied. And it came to the conclusion, again unanimously, that none of the islands in question was habitable in its natural state and that none of them therefore generated entitlements beyond 12 miles. The result was that, except for the area northwest of the Philippines' coast where the entitlements generated by the Philippines' and China's mainland coast overlap slightly, and the 12-mile zones of some of the small islands claimed by China, the Philippines' exclusive economic zone and continental shelf are not overlapped by any entitlements that China may lawfully claim. On this basis, the tribunal ruled that it was unlawful for China to deprive the Philippines of the exclusive enjoyment of these areas of sea and seabed including the living and nonliving resources located there.

In regard to the impact of China's island-building and other activities on the marine environment, the tribunal retained its own independent experts to assess the harm caused

by these activities. The arbitrators found that the harm caused by China was devastating and irreparable, as the Philippines had claimed.

Thus, the Philippines prevailed on all its central claims; but as many have asked, “what does this mean if China does not comply with the award?” This is a legitimate question and one that reaches beyond China in this particular case, and it brings me to the second part of my analysis.

Put more broadly, the question might be phrased, what does it mean for the law of the sea and for the rule of law in general if States, especially great powers, refuse to comply with their legally-binding obligations under treaties to which they voluntarily became parties or with their obligations under judicial judgments or arbitral awards rendered by duly constituted and fully competent international courts or arbitral tribunals?

My first observation is that given the nature of the case, it would be extremely detrimental to the international legal order if China were to defy the arbitral award and if its defiance were to be accepted by the international community, and especially by the more than 160 States that are parties to the Law of the Sea Convention. This is a very special Convention. It was envisioned by its framers, including China (which played a large part in its adoption), as a constitution for the world’s oceans and seas, regulating virtually every activity, from navigation to environmental protection, to boundaries, to maritime zones, to rights to resources, to undersea cables, to deep seabed mining, and more. It has been one of the most successful treaties in the history of international law. It enjoys near-universal acceptance and it has kept peace and order on the seas and facilitated the orderly and equitable exploitation of resources for more than a generation.

China’s statements and actions in defiance of the arbitral award could threaten the viability of the Convention. If China can disregard the Convention’s most fundamental principles, then so can other States. This should not be acceptable to the international community and it should also be worrisome for China. China itself has much to lose from the unraveling or weakening of the Law of the Sea Convention. It has extensive rights in the South China Sea under the Convention that it would certainly not want to be challenged by other States. It might one day find these rights threatened by another great power with interests or naval forces in the South China Sea. In such case, the Law of the Sea Convention would protect China against the violation of its own rights unless the Convention has been weakened by China’s actions.

The United Nations Charter gives a special role to certain of the world’s most powerful States, including China. It makes them permanent members of the Security Council and it gives them veto power over council resolutions. But it does not exempt them from the rules set forth in the Charter or any other rules of international law; nor do United Nations conventions or other multilateral treaties make exceptions to their rules for the great powers. The same fundamental legal rules and principles reflected in international agreements like the Law of the Sea Convention or adopted by custom apply to all States, and it could not be otherwise. The majority of States simply would not accept being bound by rules that exempted other States solely on the basis of their size or power. They simply would not accept a system in which they are required to comply with the binding orders of competent international tribunals – but other States, even great powers, are not.

The great powers do set an example, however, and this can be either positive or negative. If they refuse to honor their legal obligations, then so will other States. And soon enough, international adjudication will be a hollow exercise. In 2012, when Columbia defiantly told the International Court of Justice that it would not comply with the Court’s judgment delimiting its maritime boundary with Nicaragua, it cited the United States’ rejection of a judgment in an earlier case brought by Nicaragua in the 1980s. China, too, cited the United States’ rejection of the Nicaragua judgment in support of its attempt to dismiss the arbitral award in the Philippines case.

Fortunately, these acts of defiance of international courts and tribunals are, at least so far, rare exceptions. The vast majority of States in the vast majority of cases comply with judicial

judgments and arbitral awards, even in cases where they consider themselves to have lost. The United States, despite the Nicaragua case, has a decent record of compliance with international judgments and awards overall. And so too does China, at least in the context of World Trade Organization panel rulings. There, China has generally complied with rulings that have gone against it.

There are important reasons why States on the whole generally comply even with unfavorable judicial or arbitral outcomes. First, there is an advantage in finally resolving a dispute with another State. Even if the resolution is less than fully desirable, the alternatives – prolongation of the conflict, tension, instability in the bilateral relationship and the imminent or eventual possibility of armed conflict – are often worse.

Second, neighboring States can never move out of the neighborhood. Geographical proximity among States is permanent. Disputes between neighbors are inevitable. If State A doesn't comply with the judgment or award resolving today's dispute, how can it expect its neighbor, State B, to comply with one in tomorrow's dispute? By refusing to comply, State A will have removed judicial or arbitral recourse from the list of possible means of resolving a future dispute that cannot be resolved diplomatically. What alternative does that leave it?

Third, there is the value of stature, prestige, and reputation, which translates into influence on the international level. States enhance their stature and with it their influence when they demonstrate that they are law-abiding, including by complying with international judgments and awards. For this reason, States inevitably seek to justify their actions on the basis of international law. We see this in all kinds of situations, even where the reliance on international law seems misplaced. China itself argued to the world that its nine-dash line claim was based on international law, namely its alleged historic rights.

My point here is not that States *correctly* invoke international law to justify their policies and actions, simply that they feel the need to invoke it as justification. And that is because they consider it important to their own self-interest to be seen by their neighbors and by the international community as a whole as law-abiding and respectful of the rights of other States.

Finally, I believe that the majority of States understand that the alternative to a rules-based international order is chaos. Respect for the rule of law not only serves ethical and moral interests, including justice and fairness, but practical ones. It fosters predictability, stability, security, and peace in international relations. These are goals shared by most States most of the time.

Two recent examples illustrate the point. The case of Bangladesh against India was brought under the same provisions of the Law of the Sea Convention as the Philippines' case against China. The arbitral award was widely viewed as more favorable to Bangladesh, and the arbitrator appointed by India issued a strong dissenting opinion. Nevertheless, India quickly announced that it would respect and comply with the award, and it has done so. The second example is Japan's acceptance of the judgment of the International Court of Justice in the whaling case despite its understandable disappointment with the result.

There can be no greater proof of a State's commitment to the rule of law than its compliance with judgments and awards that displease it. There is also no better way to strengthen the international legal order generally. When States like Japan and India set positive examples like these, other States are encouraged to follow. In fact, great powers may have the greatest interest in preserving the existing international order and their own privileged levels of influence under it. Maintaining and strengthening that order requires them to accept the consequences on those occasions when its rules are applied against them. No great power can reasonably expect to win its case automatically every time. There will be times when its behavior is found to be unlawful, but that may present as much of an opportunity for strengthening the legal order as a challenge to it.

There might be no better way to promote the rule of law than for a great power like the United States or China to accept and comply with an adverse judicial judgment or arbitral award. In fact, they have done so at least from time to time because they understand that there is no viable alternative to a rules-based system that will protect over the long-term their interests in a more orderly and secure world.

We may have an imperfect international legal order, but it is far better than having no rules-based system at all. The great powers may be powerful enough to get away with defying court orders and arbitral awards from time to time, but this is not a sufficient reason to legitimize such behavior by granting them exemptions from the rules, or adopting a policy of not seeking to hold them accountable for their unlawful acts. To the contrary, it is preferable to have a legal system that occasionally proves too weak to contain the lawless excesses of the most powerful States, rather than an even weaker system that, in formal recognition of its weakness, tolerates such excesses and avoids treating them as unlawful, or, worse yet, have no system at all.

In my opinion, the response to the imperfections of the international legal order should be to continue working to make the system better and stronger, and the rules more universally enforceable. There is, to be sure, a long way to go, but since the end of World War II great progress has been made, and there is no reason to give up the effort to make all States, including the most powerful, accept legal accountability for their breaches of the applicable rules.

In addition to these systemic considerations, there are particular reasons why, in regard to the South China Sea, China, with the passage of time, the dilution of passions, and the sober-minded reflection of an enlightened leadership, might come to see the award in the Philippines case as more of an opportunity for gain than as a defeat. And these bring me to the final part of my discussion: how the award may serve as a basis for peaceful and permanent resolution of the conflict.

First, China may come to appreciate that its core interests in the South China Sea have not been affected by the award. China's claim of sovereignty over all the islands, which it apparently considers vital to its strategic interests, is unaffected by the award because the tribunal did not have jurisdiction to address questions of sovereignty over islands. Accordingly, China can comply with the award without relinquishing either its sovereignty claim in general or its control over the small islands and rocks it currently occupies. Likewise, the award does not diminish China's freedom of navigation or overflight, or its ability to conduct naval exercises or other military activities in the South China Sea.

Under the award, the Philippines is obligated to respect China's freedom of navigation and overflight within the Philippines' own exclusive economic zone. China's freedoms of navigation and overflight, including for its naval and air-forces, are therefore fully protected.

What have been affected by the award, principally, are access to resources and protection of the marine environment. China may no longer lawfully claim for itself exclusive entitlement to the resources within the nine-dash line, but must respect the exclusive economic zone and continental shelf of the Philippines and, by implication, those of the other coastal States in the region. China also may not lawfully continue to destroy environmentally-sensitive coral reefs and their ecosystems for the purpose of building and expanding artificial islands.

But these should not be difficult consequences for China to accept. Until now, China and its neighbors along the South China Sea have been engaged in a competition for resources, especially fish and hydrocarbons. China's claim of exclusive entitlement to these resources based on the nine-dash line was explicitly rejected by all of the other coastal states even before the arbitration. China had to resort to shows of force on various occasions against vessels and nationals of the Philippines, Indonesia and Vietnam to enforce its claims. The risks of open conflict were growing. The award provides an equitable basis for a peaceful solution of this conflict. To be sure, it reinforces the positions of the Philippines, Indonesia and Vietnam among

others on the unlawfulness of China's nine-dash line claim and it encourages them to continue to assert their rights as against China within their own 200-mile exclusive economic zones and continental shelves. But at the same time, the award provides a path for China to negotiate its way out of a dangerous impasse of its own making and avoid a prolonged and destabilizing conflict not only with the Philippines, but with Vietnam, Indonesia, and others.

This certainly raises the benefit for China in ultimately finding an accommodation with its largest Southeast Asian neighbors, all of which have rejected China's nine-dash line claims and are unlikely ever to accept them. And such an accommodation should be possible. First, on issues like protecting the marine environment, China and its neighbors would appear to have common interests. All of the relevant States have strong interests in promoting the sustainability of fish stocks, which are an important source of nutrition for all of the local populations. On other issues, compromise should also be possible. Unlike sovereignty over land or islands, natural resources and access to them, whether fish or hydrocarbons, are more easily divisible. By recognizing that its neighbors too have rights as set forth in the Convention and reaffirmed in the arbitral award, China would be able to free itself to negotiate equitable sharing arrangements in regard to fish catches and oil and gas development.

China can thus become an indispensable partner to its neighbors in these activities. It is the only coastal State along the South China Sea with the financial and technological capacity to facilitate exploitation of hydrocarbons without participation from western or other extra-regional players. Good faith negotiations based on respect for the legal rights of all coastal States, including China's own, could produce a settlement favorable to every one of them.

For these reasons, I believe the arbitral award offers China as well as the Philippines and the other coastal States along the South China Sea the best path toward a secure, just, and lasting arrangement for the peaceful and equitable enjoyment of the sea and its resources. And this is why I believe there is reason to hope that China, in its wisdom, will ultimately come to the same conclusion and find an honorable way to reach a reasonable accommodation with its neighboring States based on its recognition of their and China's own fundamental rights under the Law of the Sea Convention as spelled out in the arbitral award.

Such an agreement, in my view would serve the interests of China, the Philippines, the other coastal States in the region, and the international community as a whole. It would strengthen the Law of the Sea Convention and the international legal order generally. For this to happen, it requires mainly for China to come to the enlightened conclusion that its long-term interests, like those of most other States, are best served by respecting, promoting, and strengthening the rule of law and recognizing the legal rights of all States, and by working with neighboring States in partnership for the sustainable and equitable enjoyment of the South China Sea and its resources.

This is an outcome that an enlightened Chinese leadership may come to see as a win-win situation for both China and its neighbors, and one that the international community would be wise to encourage.

Regional Cooperative Security in the Indo-Pacific: Synergizing Consultative Mechanisms across the Indian Ocean, East China Sea, South China Sea, and the Western Pacific

Monika Chansoria *

Abstract

Given the concept of a broader Asia that is fast transcending geographical boundaries and lines, the emerging proximities render the prospects for collective and cooperative regional security mechanisms, more deliverable than ever before. With the notion of the greater Indo-Pacific beginning to eclipse the limited spheres of influence of the Indian Ocean, East China Sea, South China Sea, and the Western Pacific, regional players are expected to make prudent choices, whilst pursuing a sovereign foreign policy path that best suits their national security interests. Indubitably, greater onus shall lie on the regional liberal democracies that have perennially demonstrated respect for the rule of international law, norms, and agreements and showcase their strategic sagacity in the emerging scenario developing in the Indo-Pacific. This paper intends to outline the pragmatist policy approach to be undertaken by India, Japan, Australia and the US towards a cooperative and consultative working framework to address common threats and challenges to regional peace and stability.

Collective Security, conceptually, provides rationality for international organizations to maintain and uphold international peace and stability.¹ Immanuel Kant presented this idea in his book *Perpetual Peace* towards the end of the 18th century, in which he stated, “The law of nations will be based on one federation of free states”.² Making cooperative security a major mode of interaction in the international system demands that states build a range of capabilities to implement international agreements, address transnational threats, and prevent or resolve conflicts.³ Impediments to enhanced cooperative security involve differences in perceptions of key actors. However, it is states’ perceptions of multiple security threats which could make them more reluctant to pursue cooperative security.⁴

Since the end of the Cold War, the term cooperative security became a catch-phrase used generally to describe a more peaceful approach to security through increased international cooperation. The cooperative security model embraced four concentric and mutually reinforcing

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¹ Stefan Aleksovski, et al., “Collective Security – The Role of International Organizations: Implications in International Security Order,” *Mediterranean Journal of Social Sciences*, vol. 5, no. 27, December 2014.

² Immanuel Kant, *Perpetual Peace* (Cambridge: Cambridge University Press, 1991), pp. 93-130.

³ Michael Moodie, “Cooperative Security: Implications for National Security and International Relations,” Occasional Paper/14, Cooperative Monitoring Center, Sandia National Laboratories, January 2000.

⁴ Ibid.

“rings of security”: *Individual Security, Collective Security, Collective Defense, and Promoting Stability*.⁵ What gained primacy among these was the traditional aspect of collective security – defending the integrity of member states. In 1992, American strategists — Ashton Carter, William Perry, and John Steinbruner spoke about cooperative security in terms of providing new avenues toward world peace, and said, “Organizing principles like deterrence, nuclear stability, and containment embodied the aspirations of the cold war ... Cooperative Security is the corresponding principle for international security in the post–cold war era.”⁶ Two years later, in 1994, former Australian Foreign Minister Gareth Evans described cooperative security as tending “... to connote consultation rather than confrontation, reassurance rather than deterrence, transparency rather than secrecy, prevention rather than correction, and interdependence rather than unilateralism.”⁷

In the contemporary and evolving understanding of cooperative security, promotion of stability outside the boundaries of the states has been regarded as an integral component that constitutes the cooperative security system. Cooperative Security can be described as a “strategic system,” as it does not easily fit the generic accepted definition of a “strategy” which has been described as “the integrated application of means to achieve desired ends.”⁸ The word “system” implies that the concept cannot be fully realized in abstract, and should be based on existing or newly-created, and resilient institutions.⁹ The starting point for cooperative security would be creation of a strong normative base.¹⁰ New age collective security can be inferred as an understanding/commitment among groups of nations with commonality of interests and values to protect the security interests of the individual members within their joint spheres of interest. This, to a large extent, applies to liberal democracies that demonstrate a respect for the rule of international law.¹¹

The term “collective security” has been cited as a principle of the United Nations, and the League of Nations and can be seen in reference to getting triggered when a threatened nation, exercising its inherent right of collective self-defense, can call on others for help.¹² The ‘ring’ of maintaining peace embodies the concept of collective security, per se, i.e., protection from threats and aggression. The cooperative security system is seen to be proactive and prepared to engage in collective diplomatic, economic, and, if necessary, military action in areas outside their common space which may threaten their own security and stability. Commenting on ‘status quo’ as a concept, Hans Morgenthau opined, “The policy of the status quo aims at the maintenance of the distribution of power as it exists at a particular moment in history.”¹³ As few nations become ever more revisionist, expansionist, and combative, the essential tenets of new age cooperative security, i.e., to reduce the risk of war [or conflict] which are not directed towards a specific

⁵ Richard Cohen, “Cooperative Security: From Individual Security to International Stability” in Richard Cohen and Michael Mihalka, *Cooperative Security: New Horizons for International Order*, The Marshall Center Papers, no. 3, The George C. Marshall European Center for Security Studies, 2001.

⁶ Ashton B. Carter, William J. Perry, and John D. Steinbruner, *A New Concept of Cooperative Security*, (Washington, DC: The Brookings Institution Press) 1993.

⁷ Gareth Evans, “Cooperative Security and Intra–State Conflict,” *Foreign Policy*, no. 96, Fall 1994.

⁸ Cohen, n. 5.

⁹ *Ibid.*

¹⁰ Moodie, n. 3.

¹¹ Aleksovski, et al., n. 1.

¹² Speech by U.S. Permanent Representative to the United Nations, Madeleine K. Albright, Transcript, *Building a Collective Security System* (US Department of State Dispatch, May 10, 1993.).

¹³ Hans J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace*, 5th ed. (New York: Alfred A. Knopf, 1978) p. 46.

country or coalition of countries¹⁴ shall be sought after. In order to develop the spirit of a common future, and promotion of stability, the system of cooperative security should seek for democratic countries to cooperate mutually for regional peace and security. The future success of cooperative security will hinge upon common systems, institutions and values that foster a sense of security based on global rules and commons.

Maritime Security and Stability in the Indo-Pacific: Charting a Sovereign Path

The term Indo-Pacific depicts centrality vis-à-vis approaches that regional nations seem to be adopting toward security competition/cooperation in maritime Asia. In fact, the proactive role and official policy positions adopted by major stakeholders in the region clearly reflects the primacy of the Indo-Pacific. These include the United States' "Rebalance/Pivot to Asia", China's "Maritime Silk Route Initiative", Japan's "Confluence of the Two Seas", India's "Act East Policy", and Australia's official embrace of the term Indo-Pacific in most policy documents and pronouncements. Maritime security, safety and cooperation within ocean spaces and its linkages to forging closer foreign policy ties between nations sharing converging ideals is well recognized. For that matter, numerous policy statements coming from Japan have indicated that security issues in the Indian Ocean, Pacific Ocean, South China Sea, and East China Sea cannot be treated separately, or, as stand-alone issues alone.

The strategic realities have become far more pertinent, given the rising centrality of the Indo-Pacific to regional security and stability. The renewed focus of India's active engagement in the region within the ambit of its "Act East" policy initiative compliments Japan's "Free and Open Indo-Pacific Strategy". Both these policy initiatives seek to nurture an open and transparent Indo-Pacific maritime zone as part of a broader Asia. This concept of a broader Asia is fast transcending geographical boundaries, with the Pacific and Indian Oceans' mergence becoming far more pronounced and evident. These emerging proximities render the prospects for collective and cooperative regional security mechanisms, more deliverable than ever before. Commensurate with the 'Act East' policy announcement and consequent re-orientation of India's strategic focus, establishing security norms and rules across the stretch of the Indo-Pacific region will be a vital objective for both India, and Japan. The two nations today, depict strong and united leadership with a determination to persevere, by virtue of sharing basic freedoms and democratic values. Given the post-war identity as a state unconstrained by great-power relationships, India's broader approach resonates and dovetails neatly with the omnidirectional pragmatism¹⁵ of the combined leadership of Prime Ministers, Shinzo Abe and Narendra Modi.

At its heart, a strategic system can be understood as a set of geopolitical power relationships among nations where major changes in one part of the system affect what happens in the other parts.¹⁶ The contemporary Indo-Pacific means recognizing the accelerating economic and security connections between the Western Pacific and the Indian Ocean region in creating a single strategic system. The 2013 Australian Defense White Paper defines Southeast Asia as

¹⁴ Aleksovski, et al., n. 1.

¹⁵ John Nilsson-Wright, "Creative Minilateralism in a Changing Asia: Opportunities for Security Convergence and Cooperation between Australia, India and Japan," Asia Programme, Chatham House (The Royal Institute of International Affairs) July 2017.

¹⁶ Rory Medcalf, "The evolving security order in the Indo-Pacific Professor," in David Brewster, ed., *Indo-Pacific Maritime Security: Challenges and Cooperation*, National Security College Crawford School of Public Policy ANU College of Asia & the Pacific, The Australian National University, July 2016; also see, Rory Medcalf, "The Indo-Pacific: What's in a Name?" *The American Interest*, vol. 9, no. 2, Nov/Dec 2013, pp. 58-66.

the 'geographic center' of the Indo-Pacific.¹⁷ The Indo-Pacific system is defined in part by the geographically expanding interests and reach of rising big powers, i.e., China, and the continued strategic role and presence of the United States, in both, the Pacific and Indian Oceans. A major driver of the interconnection between the Pacific and Indian Oceans, economically and strategically, has been the extension of Chinese interests and presence, south and west across the seas.¹⁸

Symbolizing acknowledgment of the economic and strategic dependence on developments across a much wider maritime region, Indo-Pacific prioritizes allocation of resources, security partners, membership and agendas of regional diplomatic and security institutions.¹⁹ This also suggests that the Indo-Pacific region will remain central in achieving its foreign policy objectives, whilst also underscoring that the history, geo-economics, geopolitics and strategic cultures amongst major players represents a fundamental clash of interests that would pose as a major obstacle to their co-existence.²⁰

The historical patterns of commercial, cultural and strategic interaction suggests that the artificial division of maritime Asia into East Asia and South Asia, the Indian Ocean and the Pacific, was something of a post-1945 anomaly, not a permanent state of affairs.²¹ With around 15.5 million barrels (i.e., 2/3rds of global oil shipments) passing through the Gulf of Hormuz, more than 40 percent of the global seaborne bulk cargo trade passing through the Strait of Malacca, and, 11 million barrels of oil passing through the Malacca and Singapore Straits, the region's significance and vitality can be judged by the statistics themselves. By 2030, the Indo-Pacific is expected to account for 21 of the top 25 sea and air trade routes. According to predictions, by 2050, half of the world's top 20 economies will belong to the Indo-Pacific region.²²

Other select indicators underscoring the dramatic shift in power relativities is China that is predicted to overtake the United States by 2030 as the world's largest economy in market exchange rate terms; and India, expected to become the world's third largest economy in US dollar terms by 2030. Further, *The Economist* predicts that by 2050, Indonesia will leap from being the 16th largest economy into the top 10 economies; Vietnam may become one of the fastest growing large economies; and; established economies such as Japan, South Korea and Australia will likely drop in relative GDP rankings. Thus, the Indian Ocean doubling up as a geopolitical and geo-economic nerve center remains critical to the regional construct, and its primacy. To a large extent, the Indian Ocean has significantly replaced the Atlantic in order to become the world's busiest and strategically most significant trade corridor.²³ Consequently, the major economies of East Asia have acute dependence on the oil imports across the Indian Ocean from the Middle East and Africa. The region can be labeled as the artery carrying the resources that

¹⁷ Commonwealth of Australia, *Defense White Paper 2013*, p. 69, available at <http://www.defence.gov.au/whitepaper/2013>

¹⁸ Medcalf, n. 16.

¹⁹ Rory Medcalf, "Reimagining Asia: From Asia-Pacific to Indo-Pacific," The Asan Forum, June 26, 2015, available at <http://www.theasanforum.org/reimagining-asia-from-asia-pacific-toindo-pacific/>

²⁰ For a detailed debate on India-China relations, see Mohan J. Malik, *China and India: Great Power Rivals*, (First Forum Press, Boulder, 2011) p. 9.

²¹ Medcalf, n. 16.

²² Speech by Australian Minister for Defence, Kevin Andrews, "Australia's Defence Policy and Relationship with India," September 2, 2015, available at <https://www.minister.defence.gov.au/minister/kevin-andrews/speeches/minister-defence-australias-defence-policy-and-relationship-india>

²³ Justin Jones, "Submarines and Maritime Strategy – Part 1," *The Strategist*, Australian Strategic Policy Institute, January 29, 2013; and see Commonwealth of Australia, *Defense White Paper 2013*, p. 13, available at <http://www.defence.gov.au/whitepaper/2013>

fuel the growth of regional economies. However, dependence of this nature can simultaneously take shape of becoming a strategic vulnerability that could well influence regional partnership-building and diplomatic relations.

Theory of Liberal Institutionalism and Confidence-Building Measures

There is a need for regional players in the Indo-Pacific to promote security cooperation in a free and flexible way. Confidence-building through exchanging official dialogue and information sharing, and consultative frameworks are among the broad generic characterization of confidence building measures (CBMs) being a set of unilateral, bilateral, or multilateral procedural actions that primarily are put in place to decrease military tensions. Consultative mechanisms include pre-notification requirements and joint military exercises. CBMs serve as an effective tool to make a breakthrough towards the larger goal of maintaining stability and conflict resolution. CBMs, thus, are not necessarily an end in themselves, but rather useful steps to negotiate and implement processes that could help in securing conditions of stability and preservation of status quo in a limited or extended sphere. CBMs, defense cooperation and military engagement can be clubbed under the liberal institutionalist school, arguing that international cooperation is not only possible, but also highly desirable, since it reduces transaction costs and makes interstate relations more predictable. Institutional liberalism, or liberal institutionalism, claims that international institutions and organizations have aided the possibility of cooperation between states.²⁴ In this reference, CBMs have emerged as an attractive option because they are low-cost and low-risk activities.²⁵ Besides, they can be implemented with limited resources and calculated risks. As CBMs are usually reciprocal in nature, they display goodwill²⁶ that will reflect regionally.

Growing Centrality of the Indo-Pacific and Emerging Challenges

Back in 1967, the Australian National University held a conference on the theme, *India, Japan, Australia: Partners in Asia?* The conference delegates thought 'the future in would be determined by how China behaved, and how others behaved towards China' and were concerned about Washington's actions in the region and securing lasting economic growth.²⁷ Fifty years on, the notion of enhanced cooperation between Australia, India and Japan is back, driven once more by the challenges posed by Beijing.²⁸ The Indo-Pacific region is undergoing a prolonged and dramatic period of flux and transformation bringing in its own set of opportunities and challenges, which require flexible and swift mechanisms for cooperation to manage change in the region.²⁹

More than anything else, it perhaps is uncertainty that is becoming the defining feature of the region with predictions that by 2020, the combined military budgets within the Indo-Pacific will exceed \$600 billion, matching military spending in North America for the first time ever. The Indo-Pacific is expected to drive 60 per cent of the global increase in defense acquisition, research and development with 19 countries in the region accounting for one third of global

²⁴ Robert O. Keohane and Lisa L. Martin, "The Promise of Institutional Theory," *International Security*, vol. 20, no. 1. p. 39.

²⁵ Simon JA Mason, and Matthias Siegfried, "Confidence Building Measures in Peace Processes," in *Managing Peace Processes: Process Related Questions—A Handbook for AU Practitioners*, vol. 1, African Union and the Centre for Humanitarian Dialogue, 2013, pp. 57-77.

²⁶ Ibid.

²⁷ Ian Hall, "The Australia-India-Japan trilateral: converging interests... and converging perceptions?" *The Strategist*, Australian Strategic Policy Institute, March 17, 2017.

²⁸ Ibid.

²⁹ Transcript, "Indo-Pacific Security Paradigm- Australia's Choices," Australian High Commissioner to India's Address, National Defence College, New Delhi, May 8, 2017.

defense budgets by 2020.³⁰ A prominent projection is that of China's likelihood of building 30 new submarines and another new aircraft carrier.³¹ These in turn, can be interpreted as vital indicators of Beijing's strategic priorities that lean towards the entire Indo-Pacific region per se. Beijing's maritime priorities are not likely to remain limited to the "near seas" off China's eastern seaboard. Recall the 2015 Defense White Paper which suggested China not necessarily remaining confined to East Asian waters, adding the role of "open seas protection" to the PLA Navy's existing task of "offshore waters defense". Additionally, the Chinese terminology of turning to the "far seas" is increasingly apparent in the South China Sea stretching till the Indian Ocean with instances of repeated deployments in the recent past. Not surprisingly, regional concerns are mounting regarding the rise of China, the direction and intent of which, continues to remain ambiguous.

All of this is to say that there are numerous challenges at a time of great transition in states' economic activity, strategic weight and international ambitions. Crises and transnational issues don't respect the boundaries of traditional groupings or stay neatly in a single region.³² Therefore, smaller group diplomacy / 'minilateralism' will matter more over time in the Indo-Pacific because every strategic issue that the region is confronted with, is different and will engage different countries in different combinations.³³

Teng Jianqun, Director of the Department for American Studies at China Institute of International Studies, presents the case for an understanding of China's maritime policy which requires at least two approaches: a historical one and a 'realistic' one (i.e. an approach that combines interests and pragmatism). For centuries, there has been a debate in China whether the country should 'go to sea' or should 'remain on the continent'. This essentially implies the 'blue' vs 'yellow' civilization argument. Teng highlights that China eventually would become a strong maritime power, when former President Hu Jintao told the National Congress, "We should enhance our capacity for exploiting marine resources, develop the marine economy, protect the marine ecological environment, resolutely safeguard China's maritime rights and interests, and build China into a maritime power."³⁴ According to the Chinese perspective, the maritime policy of China today, hinges on sovereignty issues and protection of its maritime interests and rights. After China adjusted its maritime policy under the current leadership of President Xi Jinping, the major transformation visible today is that of China placing security and sovereignty right on top of its foreign policy agenda.³⁵ Teng further asserts that "no matter whether they like it or not, the United States and other countries should have a new vision towards China ... The reason for such a change is simple: this is not an era of spheres of influence."³⁶

In the above reference, to an extent, it is the expansion of China's interests, diplomacy and strategic reach especially into the Indian Ocean that defines the Indo-Pacific most of all. It is notable that China's own overarching geo-economics' thrust since 2013 – with the Belt and Road initiative – includes an ambition to extend China-centric infrastructure and strategic partnerships into and through the Indian Ocean. The PRC's preference for combining military intimidation and stealth economic infiltration in redrawing borders and rewriting history is visible the world over, with its nearly uniform policy of injecting investments and reaping disproportionate economic

³⁰ For more details see, Deloitte Global Defense Outlook 2016, *Shifting Postures and Emerging Fault Lines*.

³¹ Ibid.

³² Transcript, n. 29.

³³ Ibid.

³⁴ President Hu Jintao, Report to the 18th National Congress, Chinese Communist Party, November 8, 2012.

³⁵ Teng Jianqun, "Understanding China's Maritime Policy: 21st Century Maritime Silk Road," in Brewster ed., n. 16.

³⁶ Ibid.

and strategic benefits out of it.³⁷ Strikingly reminiscent of mercantilism, this protracted endeavor led to a steep rise in Beijing's capacity to invest further and hold unprecedented foreign exchange reserves. The mercantilist policy approach adopted by Beijing can be credited for it becoming a global economic powerhouse that is launching strategic ambitions well beyond its immediate territory and shores.³⁸

China's much pronounced Maritime Silk Road strategy initiative needs to be read in conjunction with the cumulative maritime activity of the PLA Navy (PLAN) and its mounting forays into the Indian Ocean — the third-largest water body in the world. The expanding strategic naval footprint in the Indian Ocean by means of acquiring more maritime bases and berthing facilities is a core pillar of China's ports policy. The PLA Navy could well build as many as 18 overseas naval military bases in the greater Indian Ocean area³⁹. The long shadow of China's ports policy in the Indian Ocean being currently driven and characterized by both, state- and private-sponsored "infrastructure investment" foretells strategic ramifications militarily, as these facilities shall end up becoming communication and surveillance facilities, in addition to being repair and replenishment centers for the Chinese Navy. This underscores the intransigent course of Beijing's influence in South Asia and the Indian Ocean.⁴⁰ Palpably, Rory Medcalf terms the Maritime Silk Road as the 'Indo-Pacific with Chinese characteristics'.⁴¹

Indo-Japan Defense Framework

As far as India is concerned, its resolute posture and approach highlights the growing convergence of political, economic and security interests with stakeholders in the Indo-Pacific and Indian Ocean Regions that remain critical to India's strategic objectives. The momentum at which the Indo-Pacific has assumed focus in New Delhi's strategic thinking is unmistakable, both characteristically and substantively. And Japan, surely, remains among the key frontal pivots of this focus. Japanese Prime Minister Shinzo Abe and Indian PM Narendra Modi have long been in agreement to secure stability in the Indo-Pacific region, which remains indispensable to Tokyo and New Delhi's national security. India's growing regional standing has influenced its integration with key stakeholders in the Indo-Pacific region. Re-orientation of India's strategic focus from a "Look East" to an "Act East" policy, finds manifestation in the ensuing approach, by and large, towards the Indo-Pacific. What seems more pronounced is that New Delhi is likely to continue to pursue a sovereign foreign policy path and undertake decisions that best suit its national security interests in light of the hard-power priorities of naval modernization by nations in the region. Recall an Indian Defence Ministry statement five years ago, which argued, "As rising nations ... become more powerful, emerging risks require greater attention ... India remains conscious and watchful of the implications of China's military profile in the immediate and

³⁷ Monika Chansoria, "In Africa, it is China vs India and Japan," *The Sunday Guardian*, July 8, 2017.

³⁸ *Ibid.*

³⁹ According to reports in the Chinese media, Walvis Bay will be one of 18 naval bases that will be established in various regions; this has been cited in *The Namibian*, "Chinese naval base for Walvis Bay," November 19, 2014, available at <https://www.namibian.com.na/index.php?id=130693&page=archive-read>; also see, *China Daily Mail*, "China to build 18 naval bases in the Indian Ocean," November 22, 2014, available at <https://chinadailymail.com/2014/11/22/china-to-build-18-naval-bases-in-indian-ocean/>; and see, Kwame A. Insaïdoo, *China: The New Imperialists & Neo-Colonialists in Africa?* (Author House Publishers, 2016); also see, Monika Chansoria, "China eyes 18 overseas naval bases," *The Sunday Guardian*, August 15, 2015, available at <http://www.sundayguardian.com/analysis/china-eyes-18-overseas-naval-bases>

⁴⁰ Monika Chansoria, "China eyes 18 overseas naval bases," *The Sunday Guardian*, August 15, 2015.

⁴¹ Medcalf, n. 19.

extended neighborhood.”⁴² Besides, in a public interaction during his 2014 Tokyo official visit, Prime Minister Modi remarked on the presence of 18th century ‘expansionist mindset’ among certain regional actors – that of encroaching upon other countries, intruding in others’ waters, and capturing territory. This was widely interpreted as an oblique reference to China’s recent and recurring actions in the East China Sea and South China Sea.

The September 2014 Tokyo Declaration on the Special Strategic and Global Partnership acknowledged converging global interests and critical maritime inter-connections between India and Japan. It was in this declaration that both sides attached special importance to the regularization of bilateral maritime exercises as well as Japan’s continued participation in the India-US Malabar series of naval exercises. Speaking many years back while addressing the Indian Parliament in August 2007, Prime Minister Shinzo Abe averred, “ ... a strong India is in the best interest of Japan, and a strong Japan is in the best interest of India.” The role of India and Japan for stability, prosperity and engagement in the Indo-Pacific region by means of the “Act East Policy,” and “Free and Open Indo-Pacific Strategy” shall further be consolidated through bilateral and multilateral security and defense cooperation mechanisms. The entry into force of the two Defense Framework Agreements concerning the Transfer of Defense Equipment and Technology and concerning Security Measures for the Protection of Classified Military Information was considered a welcome move. Japan’s readiness to provide its state-of-the-art defense platform, US-2 amphibian aircraft is a key development and shall be an important bilateral security benchmark.

Further, the defense engagement needs to be expanded through greater two-way collaboration and technology cooperation, co-development and co-production, by expediting discussions for determining specific items through the Joint Working Group on Defense Equipment and Technology Cooperation.⁴³ Former Japanese Vice-Minister of Defense, Masanori Nishi has pointed out that Japanese Maritime Self-Defense Force (MSDF) deployment has significant reliance on Indian logistical support that would provide more opportunities for Japanese vessels to visit Indian ports during voyages across the Indian Ocean. Nishi opines that Japan could play an active role in stabilizing the Indian Ocean and reinforcing a rules-based order in areas including: 1) Engagement with key Bay of Bengal states such as Myanmar, Bangladesh and Sri Lanka through investments in infrastructure and capability-building; 2) Support for emerging regional institutions in the Indian Ocean such as the Indian Ocean Rim Association and the Indian Ocean Naval Symposium; 3) Maritime capacity-building among Indian Ocean island states and other developing states in the Indian Ocean, with a focus on blue economy; and 4) Enhanced role for the Japanese Coast Guard.⁴⁴

This emergent *realpolitik* reflected yet again in the November 2016 joint statement between Prime Ministers Abe and Modi that highlights safeguarding global commons in the maritime, space and cyber domains. Tokyo and New Delhi remain committed to respecting freedom of navigation and over flight, and unimpeded lawful commerce, based on the principles of international law, as reflected notably in the United Nations Convention on the Law of the Sea (UNCLOS), which establishes the international legal order of the seas and oceans. In this context, all parties need to resolve disputes through peaceful means without resorting to threat or use of force and exercise self-restraint in the conduct of activities, and avoid unilateral actions that raise

⁴² Indian Ministry of Defence, *Annual Report 2011-2012*, Government of India, 2012, available at <http://india.gov.in/outerwin.php?id=http://mod.nic.in/reports/welcome.html> pp. 6-9.

⁴³ *Japan-India Joint Statement*, November 11, 2016, Ministry of Foreign Affairs, Tokyo; also see, *Annual Report 2015-16* Ministry of Defence, Government of India.

⁴⁴ Masanori Nishi, “The role of Japan in Indian Ocean security: A Japanese perspective,” in Brewster, ed., n. 16.

tensions. Japan and India are in agreement that effective implementation of the 2002 Declaration on the Conduct of Parties in the South China Sea and early conclusion of the negotiations to establish a Code of Conduct in the South China Sea in accordance with universally recognized principles of international law. What featured prominently in the Japan-India Joint Statement was underscoring the UNCLOS, freedom of navigation and over flight and unimpeded lawful commerce in international waters. The ongoing strategic upheaval in the South China Sea caused by unilateral actions such as massive land reclamation of submerged reefs, and militarization of that converted land has notched up regional tensions, and the criticality of the sea lanes of communication, that underpin vitality of seeking to ensure continuing stability in the Indo-Pacific. This resonates well with the larger goal of cooperative security – which is not the creation of stability at any price.⁴⁵

During the latest India-Japan Annual Defense Ministerial Dialogue, held in September 2017, exchanges between Japan Ground Self Defence Force and the Indian Army were agreed upon, especially to develop counter-terrorism as a key area of common interest. In the context of enhanced co-operation between the two ground forces, it was decided to explore a joint field exercise in the field of counter-terrorism between the Indian Army and the JGSDF in 2018. In the maritime realm, the success of Japan-India-US Trilateral Maritime Exercise Malabar 2017 held in July was welcomed and Japan expressed its intention to have state-of-the-art Japanese assets including P-1 to participate in the Malabar 2018. The two sides shall also consider inclusion of Anti-Submarine Warfare (ASW) training to expand cooperation and pursue exchanges and training by ASW aviation units such as P-3C. The Japanese side proposed inviting the Indian Navy to mine-countermeasures training held by the JMSDF.⁴⁶ The two countries agreed to encourage equipment collaboration including defense and dual-use technologies and identified specific areas of collaboration in the field of defense equipment and technology cooperation, including commencing technical discussions for research collaboration in the areas of unmanned ground vehicles and robotics.⁴⁷

Consultative Trilateral Mechanisms and Joint Maritime Maneuvers in the Indo-Pacific

The steady upward trajectory in formal and informal cooperation between India, Japan, and Australia has been shaped by economic complementarity, as well as by political fundamentals such as the tradition of supporting the rule of law and international norms, including respect for state sovereignty and multilateral cooperation, democratic governance [in that, them being functioning liberal democracies] and multilateralism.⁴⁸ In addition to their geography, each country is strongly embedded in the Asian region in terms of history and contemporary interests, but equally, each has a national identity that incorporates an extra-regional identity.⁴⁹

With the “Indo-Pacific Region” featuring prominently in the very title of the 2025 joint vision statement between India and Japan, the writing on the wall is apparent. A vital demonstration of India’s growing maritime focus extending beyond the Indian Ocean comes with Japan’s participation in the trilateral maritime exercise [Malabar] between India, US and Japan. The bilateral Indo-US Malabar naval maneuvers got a boost in 2014, after being upgraded to a trilateral

⁴⁵ Moodie, n. 3.

⁴⁶ For more details see, *Joint Press Statement on India-Japan Annual Defence Ministerial Dialogue*, Press Information Bureau, Government of India, Ministry of Defence, September 6, 2017, available at <http://pib.nic.in/newsite/PrintRelease.aspx?relid=170560>

⁴⁷ Ibid.

⁴⁸ Nilsson-Wright, n. 15.

⁴⁹ Ibid.

initiative, this time including the Japanese navy. Since 2014, Exercise Malabar has involved the navies of India, and the United States, along with Japan's Maritime Self-Defense Forces. The trilateral exercises held in 2014, 2015, 2016, and most recently in 2017, have witnessed greater inter-operability and integration between the three navies. With the involvement of three aircraft carriers, the 2017 Malabar naval initiative was by far the biggest, since this exercise was first launched in 1992. Common political values, principles, democratic systems and convergence on regional and world views, renders the Malabar exercises carrying a political message that seeks to convey India, US and Japan's orientation towards the future of security in maritime Indo-Pacific. A priority area for trilateral cooperation lies in intelligence, surveillance and reconnaissance (ISR) to improve maritime domain awareness, and expanding nascent links between the respective Coast Guards of these nations. The vastness of distances across the Indian Ocean makes tracking of vessels and aircrafts a difficult task, which is beyond the resources of a single country.⁵⁰ To increase involvement in the existing maritime surveillance systems, such as the Malacca Straits Patrol (MSP) and the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAPP), Secretary General of the Japan Institute for National Fundamentals, Seiji Kurosawa, suggests setting up a new maritime surveillance framework in which Indo-Japanese armed forces can assume a leading role.⁵¹ Prioritizing creation of a continuous surveillance system, and expanding the scope of the multilateral Malabar naval maneuvers by expanding Japan's defense role and capability and anti-submarine warfare drills are the next vital steps in the way forward.

To an extent, a shared experience of having operated in the shadow of great-power politics, often in a subordinate or supporting role to more influential actors has helped in facilitating this trilateral cooperation.⁵² A report by the United States Studies Centre titled *Australia, India and the United States: The Challenge of Forging New Alignments in the Indo-Pacific* argues that Canberra must promote a trilateral security relationship with Washington and Delhi, focused on the Indian Ocean. The idea of an Indo-Pacific 'strategic arc' reinforces India's role as a key regional partner that could eventually rank alongside Australia's traditional partners in the Asia Pacific.⁵³ The Japan-India-US Foreign Ministers' Trilateral Dialogue as well as the inaugural Japan-India-Australia Trilateral Dialogue strongly echoes the twin themes of regional connectivity and maritime security. These trilateral dialogue mechanisms will contribute to a balanced, open, inclusive, stable, transparent and rules-based economic, political and security architecture in the Indo-Pacific region.⁵⁴ The recurring strains on durability of the regional and international order make it more incumbent upon India, Japan, and Australia to develop new forms of cooperation to hedge against uncertainty, consolidate and widen their existing bilateral partnerships, and explore new opportunities for trilateral cooperation.⁵⁵ This 'creative unilateralism' as John Nilsson-Wright states, could best be put into practice in case of the Malabar naval exercises along with the US. As key regional stakeholders, Tokyo, Canberra and New Delhi should look towards capitalizing on the positive momentum of their strategic and defense relationship, deepening engagement and increasing consistency and complexity of activities. For India to consolidate its position in

⁵⁰ David Brewster, "Security in the Indo-Pacific Needs India's Helping Hand," *The Wire*, September 5, 2016.

⁵¹ Seiji Kurosawa, "Challenges in Maintaining the Rules-based Maritime Order in the Indo-Pacific," Japan-India Bilateral Dialogue, May 23, 2017, available at <http://en.jinf.jp/news/archives/4898>

⁵² Ibid.

⁵³ Brewster, n. 50.

⁵⁴ As cited by the Press Information Bureau, Government of India, Prime Minister's Office, November 11, 2016.

⁵⁵ Nilsson-Wright, n. 15.

the Indo-Pacific, Japan and Australia for sure, will have to find greater prominence, both at the bilateral and multilateral levels. Multilaterally, India, Australia and Japan, notwithstanding their very substantive differences in population and economic power⁵⁶, share an identity informally defined as ‘middle powers’. This identity is less rooted in raw, quantifiable expressions of global and/or regional influence, but more in a common preference for pragmatic decision-making, rejection of doctrinaire policymaking, and support for humanitarian and non-traditional security cooperation, including a commitment to constructive dispute management and mediation.⁵⁷

The Third Japan-Australia-India Trilateral Dialogue was held in Canberra in April 2017 to exchanging views on wide ranging issues including regional affairs in the Indo-Pacific and more specifically on Japan-Australia-India trilateral cooperation. The trilateral arrangement (Japan-Australia-India) will prove to being among the most significant vehicle for shoring up regional stability, norms and institutions. Expanding cooperation among the partners and synchronizing capacity building efforts and outreach across the region shall remain future steps that the trilateral can take to bolster the regional order. A rules-based order should be upheld, but so should processes, by means of which, all get a say in suggesting how those rules should be set. Beijing cannot be allowed to undermine a rules-based order, by seeking to replace ‘rule of law’ and enforce ‘rule of force’. Upholding values of liberalism and democracy should be the ultimate objectives of the trilateral mechanisms. Perhaps the most vital area where the rule of law needs to be enforced at present is in the maritime realm – i.e., in maintaining a rule-based maritime order.⁵⁸

Co-opting Japan as a permanent member of the Malabar Trilateral Initiative and India’s accreditation of its Ambassador to a separate and dedicated diplomatic mission at the ASEAN are manifestations of Delhi’s intent. Moreover, India and Japan remain committed to strengthen the East Asia Summit (EAS) and make it a more dynamic proactive process and platform to discuss regional political, economic and security issues. New Delhi and Tokyo also are working towards convening the EAS Ambassadors’ meeting in Jakarta and establishment of the EAS Unit within the ASEAN Secretariat. Maritime cooperation and regional connectivity within the EAS framework needs to be enhanced further. This only highlights the significance and vitality of regional architecture through ASEAN-led fora such as ASEAN Regional Forum, ASEAN Defense Ministers’ Meeting Plus, Expanded ASEAN Maritime Forum and their coordination to tackle global and regional challenges including maritime security.⁵⁹

Corresponding with the “Act East” policy approach and course, the regular dispatch of warships, including frontline destroyers and stealth frigates on long overseas deployment to the Indian Ocean and South China Sea verify India’s renewed maritime intent.⁶⁰ The noticeable presence of the Indian flag on these strategically vital points, reiterates that New Delhi is fully cognizant of the ongoing movements in its strategic backyard, being a major stakeholder there, and is all set to emerge as a geared up player on the scene, and not a reluctant one. Given its 7,500 km coastline, 1,200 islands and 2.4 million sq km exclusive economic zone (EEZ), India’s reorientation and demonstration of being a consistent security partner for the region highlights

⁵⁶ Pricewaterhouse Coopers LLP (2015), *The World in 2050. Will the shift in global economic power continue?* p. 3, available at <https://www.pwc.com/gx/en/issues/the-economy/assets/world-in-2050-february-2015.pdf>

⁵⁷ T. Wilkins, “Australia and middle power approaches to Asia Pacific regionalism,” *Australian Journal of Political Science*, vol. 52, n. 1, 2017.

⁵⁸ Hall, n. 27.

⁵⁹ *Japan-India Joint Statement*, November 11, 2016, Ministry of Foreign Affairs, Tokyo; also see, *Annual Report 2015-16* Ministry of Defence, Government of India.

⁶⁰ *Annual Report 2016-17*, Ministry of Defence, Government of India.

its maritime interests and stakes in the larger Indo-Pacific. Notably, India's first Tri-Service Andaman and Nicobar Command in the southeast corner of the bay – lies just 90 miles (145 kilometers) from Indonesia's Aceh Province, bordering the strategically vital Strait of Malacca.

The Indo-Japanese-US equation should work towards integrating Australia in the existing Malabar Trilateral and upgrade it to a Quadrilateral Initiative. The term Indo-Pacific brings India, Japan, Australia and the US into the strategic frame of regional interests, stakes, and reflects greater institutional involvement. It is well accepted that policy dialogue works best when supported by practical cooperation including the existing bilateral frameworks for security cooperation that should be discussed and promoted to trilateral and quadrilateral initiatives to create a regional order that is flexible, resilient and vital to secure a collective future.⁶¹ Australia is already seeking to join this grouping, where it has previously held non-permanent membership. During a visit to Tokyo in April 2017, Australian Defense Minister, Marise Payne publicly acknowledged Canberra's desire to join the naval maneuvers stating, "Australia is very interested in a quadrilateral engagement with India, Japan and the United States."⁶² As the strategic games unfold in the region, incorporating Australia will prove to being an invaluable asset, and India, US, and Japan should not hand over a quasi-walkover to nations which are attempting to alter/change the existing status quo in the region, be it in the East China Sea, the South China Sea, or the Himalayan borderlands. It has been confirmed that India will be participating in Australia's multi-lateral air Exercise *Pitch Black* in northern Australia in 2018, and Australia's request of participating in the multilateral Malabar maritime exercise to be undertaken by India, Japan, and the United States, should positively be accepted at the next available opportunity.

The ominous shadow of China has been looming large on the "Quad" since 2007 when Australia's then government led by Kevin Rudd took the call of withdrawing from the exercises and accompanying security talks following negative feelers received from Beijing. Today, a decade later, the situation can result differently by means of prudent and futuristic scenario-based thinking and approach. Australian Prime Minister Malcolm Turnbull's government has been known to throw its support behind a Japanese initiative to re-establish a security dialogue between the US, India, Japan and Australia. This underscores that an Indo-Pacific security structure might just be evolving in reference to another such strengthening equation – namely between China and Russia. The 2016 Joint Sea naval exercise conducted by Russia and China was interpreted as maritime signaling by Beijing and Moscow that involved PLA's Nanhai Fleet and was China's biggest naval drill with Russia. Also, it was the first time that Russian and Chinese naval contingents met for combat drills in the South China Sea, shortly following the pronouncement of the verdict by the Permanent Court of Arbitration at The Hague, on the South China Sea Arbitration initiated by The Philippines. The Russian Navy has co-opted China as a 'core partner' in its new maritime doctrine, indicating shifting realignments in the regional balance of maritime politics.

Conclusion

In the above setting, managing China's rise shall remain the foremost challenging task for stakeholders. Although, the People's Republic of China is more integrated into, and supposedly more cooperative with global political and economic systems than ever before in its history, growing uneasiness in the Indo-Pacific region are indicators of China's increasing economic

⁶¹ Transcript, n. 29.

⁶² Minister for Foreign Affairs statement, Transcript released by the Australian Embassy, Tokyo, April 20, 2017.

and military power, and lack of China's adherence to regional and international norms.⁶³ The region, by and large, views the problem of China's rising power as a root source of instability in the greater Indo-Pacific region. With a rising regional and global footprint, coupled with a strategic outreach that is being backed by a strong and robust military characterized by the Chinese leadership as being essential in achieving great power status, China today is far more focused and adept at supporting missions beyond its immediate periphery. This includes power projection, development and focus of China's naval capabilities for long-range naval deployments. Issues pertaining the South China Sea including land reclamation, landing civilian aircraft and military transport aircraft, and the continued constructions at China's military outposts in this region shall definitely be the highlight among numerous tensions. Besides, investments in ports across various locations in the Indo-Pacific stretching from Southeast Asia to the Indian Ocean Region have critical strategic ramifications that shall likely shuffle security alignments regionally. All these coupled with pure military strategies such as anti-access/area-denial capabilities, long-range precision strikes, and surface and undersea operations, will render tensions across the Indo-Pacific to only rise further.

What seems more and more apparent and ostensible, is China's management of leveraging its growing economic and military power to assert over sovereignty claims with repeated attempts to change or alter the existing status quo, below the threshold of actual conflict, and bid to create a *new/fresh status quo situation* – be it over features in the East China Sea, South China Sea, or over the Himalayan borderlands. By means of balancing and mobilizing economic, technological, and human resources to translate into military/strategic power⁶⁴, China's domestic politics, has witnessed pressure on the central government to craft a strong Chinese national identity.

Based on the above geo-strategic graph of events, the Indo-Pacific, calls for enhanced security cooperation between regional democracies, i.e., India, Japan and Australia. Ensuring that dialogue participation will remain the lynchpin for mapping out a shared vision for a futuristic Indo-Pacific strategy, the trilateral must work together to build the political, economic and military capacity of regional states to retain and exercise their autonomy, defend their interests and identify common regional security challenges that straddle a geographic space extending from the Indian Ocean to the Pacific Ocean, and incorporate risks in South, Southeast and Northeast Asia.

Cooperative security shall only be realized when nations develop a sense of a common future, based upon shared political systems, forms of representation and governance, institutions and values that foster a sense of a security based on global commons and rules. Regular military and political dialogue, confidence-building and deterrence-enhancing regional exercises will be crucial in offsetting traditional security threats and challenges. Maritime security and stability in the Indo-Pacific can be rendered more effective with converging themes in the realms of maritime security and cooperation. These will constitute to being the benchmark in identifying potential challenges in the Indo-Pacific that remain common to major players. Also, it will be critical in analyzing gaps in the corresponding domestic and regional policy frameworks. Growing symmetry in defense cooperation will help creating stronger capabilities to deal with common maritime threats and challenges in the Indo-Pacific region – through enhanced disaster response and mitigation capacities. Exploring and emphasizing the potential arenas of maritime stability and security between India and Japan amid the respective triangular equations, i.e., India-Japan-US, and Japan-Australia-India, will be the major regional equations that shall determine the balance of power and future roadmap of Indo-Pacific security and stability.

⁶³ Alastair Iain Johnston, "Is China a Status Quo Power?" *International Security*, vol. 27, no. 4, Spring 2003, pp. 5-56.

⁶⁴ *Ibid.*

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 formally¹ 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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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/Senkaku).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

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, 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. *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

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) Araidō, 3) Paramushiru, 4) Makanrushi, 5) Onkotan, 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

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 Japan³¹ 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

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, after 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

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 countries 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

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

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 Vladimirovich 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-sovereignty-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

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-idUSKCN0RJ04R20150919>; *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-200216317.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#JAPAN> ("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 Ordinance 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 Declaration⁵⁹ and the SFPT, as well as instructions issued by General MacArthur as the SCAP,

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 *Malaysia 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

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.american.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&subId=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

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-idUSKBN0MX0F720150406>.

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 islands⁷⁵ 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

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-liancourt-rocks-is-territory-of-japan-by-san-francisco-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.blogspot.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 International Court of Justice.” Ownership of Dokdo 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#SOUTHKOREA>.

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-

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

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-dispute/>. 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 Maryland 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 constructed 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,

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.nytimes.com/2010/09/25/world/asia/25chinajapan.html>. The captain was subsequently indicted in absentia 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_Heinrichs%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-idUSBRE91410Q20130205>. 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

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/world/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 (DIAOYUYU/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*, CNSNEWS.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/LEGISLATIONANDTREATIES/PDFFILES/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-

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?releaseid=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-idUSKCN0SN0W020151029>.

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-idUSKCN0SQ1SY20151101>.

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 constitution¹²¹ 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 Amami, 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

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-directive-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 be 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

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

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](http://www.ioc.u-tokyo.ac.jp/~worldjpn/documents/texts/JPU%20S/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.ucsb.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.

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://hojorohnin.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 America 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.

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 Security Treaty*, THE DIPLOMAT (Apr. 24, 2014), <http://thediplomat.com/2014/04/obama-senkakus-covered-under-us-japan-security-treaty/>.

Documents: Japan's Major Foreign Policy Statements (2017)

[Japan-U.S.] Joint Statement *

February 10, 2017

President Donald J. Trump and Prime Minister Shinzo Abe held their first official meeting today in Washington D.C. and affirmed their strong determination to further strengthen the U.S.-Japan Alliance and economic relationship.

U.S.-Japan Alliance

The unshakable U.S.-Japan Alliance is the cornerstone of peace, prosperity, and freedom in the Asia-Pacific region. The U.S. commitment to defend Japan through the full range of U.S. military capabilities, both nuclear and conventional, is unwavering. Amid an increasingly difficult security environment in the Asia-Pacific region, the United States will strengthen its presence in the region, and Japan will assume larger roles and responsibilities in the alliance. The United States and Japan will continue to implement and expand defense cooperation as laid out in the 2015 U.S.-Japan Defense Guidelines. The United States and Japan will further enhance cooperation with allies and partners in the region. The two leaders underscored the importance of maintaining international order based upon the rule of law.

The two leaders affirmed the commitment of the United States and Japan to the realignment of U.S. forces in Japan, to ensure the long-term, sustainable presence of U.S. forces. They affirmed that the United States and Japan are committed to the plan to construct the Futenma Replacement Facility at the Camp Schwab/Henoko area and in adjacent waters. It is the only solution that avoids the continued use of Marine Corps Air Station Futenma.

The two leaders affirmed that Article V of the U.S.-Japan Treaty of Mutual Cooperation and Security covers the Senkaku Islands. They oppose any unilateral action that seeks to undermine Japan's administration of these islands. The United States and Japan will deepen cooperation to safeguard the peace and stability of the East China Sea. The two leaders underscored the importance of maintaining a maritime order based on international law, including freedom of navigation and overflight and other lawful uses of the sea. The United States and Japan oppose any attempt to assert maritime claims through the use of intimidation, coercion or force. The United States and Japan also call on countries concerned to avoid actions that would escalate tensions in the South China Sea, including the militarization of outposts, and to act in accordance with international law.

The United States and Japan strongly urge North Korea to abandon its nuclear and ballistic missile programs and not to take any further provocative actions. The U.S.-Japan Alliance is fully capable of ensuring the security of Japan. The United States is fully committed to defending its homeland, forces, and allies, through the full range of U.S. military capabilities. The two leaders

* Retrieved from URL <http://www.mofa.go.jp/files/000227768.pdf>

affirmed the importance of an early resolution of the abductions issue. They also affirmed the importance of trilateral cooperation among the United States, Japan and the Republic of Korea. The United States and Japan are also committed to rigorous implementation of the U.N. Security Council resolutions on North Korea.

The United States and Japan will strengthen their bilateral technological cooperation on defense innovation to meet the evolving security challenges. The United States and Japan will also expand bilateral security cooperation in the fields of space and cyberspace. The United States and Japan also strongly condemn terrorism in all forms and manifestations and will enhance our cooperation to fight against terrorist groups that pose a global threat.

The two leaders instructed their foreign and defense ministers to convene a Security Consultative Committee (SCC: "2+2") meeting to identify ways to further strengthen the U.S.-Japan Alliance, including through the review of the respective roles, missions, and capabilities of the two countries.

U.S.-Japan Economic Relations

The United States and Japan represent 30 percent of the world's GDP and share an interest in sustaining a strong global economy, ensuring financial stability, and growing job opportunities. To advance these interests, the President and the Prime Minister reaffirmed their commitments to using the three-pronged approach of mutually-reinforcing fiscal, monetary, and structural policies to strengthen domestic and global economic demand.

The two leaders discussed opportunities and challenges facing each of their economies and the need to promote inclusive growth and prosperity in their countries, the Asia-Pacific region, and the world. They emphasized that they remain fully committed to strengthening the economic relationships between their two countries and across the region, based on rules for free and fair trade. This will include setting high trade and investment standards, reducing market barriers, and enhancing opportunities for economic and job growth in the Asia-Pacific.

The United States and Japan reaffirmed the importance of both deepening their trade and investment relations and of their continued efforts in promoting trade, economic growth, and high standards throughout the Asia-Pacific region. Toward this end, and noting that the United States has withdrawn from the Trans-Pacific Partnership, the leaders pledged to explore how best to accomplish these shared objectives. This will include discussions between the United States and Japan on a bilateral framework as well as Japan continuing to advance regional progress on the basis of existing initiatives.

In addition, the two leaders expressed interest in exploring cooperation across sectors that promote mutual economic benefits to the United States and Japan.

The two leaders decided to have their countries engage in an economic dialogue to discuss these and other issues. They also reaffirmed their intent to continue cooperation in regional and global fora.

Invitations to Visit Japan

Prime Minister Abe invited President Trump for an official visit to Japan during the course of this year, and also welcomed an early visit of Vice President Pence to Tokyo. President Trump accepted these invitations.

24th Japan-EU Summit Joint Statement *

Brussels, 6 July 2017

Mr. Shinzo Abe, Prime Minister of Japan, Mr. Donald Tusk, President of the European Council and Mr. Jean-Claude Juncker, President of the European Commission, met in Brussels today for the 24th Summit between Japan and the European Union (EU) and issued the following statement:

"We, the leaders of Japan and the EU, met today in Brussels to reaffirm the strength of our Strategic Partnership and to demonstrate our resolve to work together for peace, prosperity and a rules-based international order. We remain united by our common values of democracy and the rule of law and by our determination to promote together an open and fair global economy that benefits everyone. These are the foundations of our political and economic Strategic Partnership for peace, prosperity and a rules-based international order – serving to unite us bilaterally and also to make us stronger internationally.

Today marks the beginning of a new chapter in the Strategic Partnership between Japan and the EU as we celebrate the agreement in principle of the Economic Partnership Agreement and the Strategic Partnership Agreement at political level.

The highly ambitious and comprehensive Economic Partnership Agreement will consolidate our solid and evolving trade and economic partnership and pave the way for the future. It will bring our two economies closer by addressing issues related to market access for goods, services and investment, procurement including railways, as well as those related to non-tariff measures and the protection of geographical indications as well as intellectual property rights. This agreement will allow us to renew and strengthen our joint commitment to international standards for an even closer cooperation in the future. At the same time, with this agreement in principle of the Economic Partnership Agreement, Japan and Europe demonstrate to the world - and to our citizens - that free trade, with clear and transparent rules fully respecting and enhancing our values, remains an important tool to promote prosperity in our societies. The Japan-EU Economic Partnership Agreement will constitute the basis for a strategic partnership for free and fair trade, against protectionism.

We tasked our respective negotiating teams with a rapid finalisation of the agreement that would allow for the internal procedures to start soon, both in Japan and the EU.

With shared responsibility for achieving peace, stability and prosperity of the world, Japan and the EU also reached agreement in principle of the

Strategic Partnership Agreement. This will provide a framework for an even deeper and more strategic Japan-EU cooperation that enables our partnership to grow and to face new types of challenges.

At a time where the rules-based international order is under increasing pressure, the Economic Partnership Agreement and the Strategic Partnership Agreement recapture the shared values and common principles that form the foundation of the Japan-EU partnership, including human rights, democracy and the rule of law.

We took the opportunity before attending the G20 Hamburg Summit tomorrow to discuss our cooperation in other important areas, including on our joint efforts to address the global threat of climate change and other international challenges."

* Retrieved from URL <http://www.mofa.go.jp/mofaj/files/000270692.pdf>

Japan-UK Joint Vision Statement *

Japan and the UK are global strategic partners, sharing common interests as outward-looking and free-trading island nations with a global reach, committed to the rules-based international system. We share the fundamental values of freedom, democracy, human rights and the rule of law. Building on our historic ties, we have today committed to elevating our security and prosperity partnership to the next level, focusing on the following areas.

Ensuring International Security

Japan and the UK are each other's closest security partners in Asia and Europe respectively, and security and defence is a cornerstone of our relationship. We strongly oppose any unilateral actions that seek to increase tension or change the status quo by force or coercion. In light of such serious challenges, including the unprecedented threat posed by North Korea, we are committed to elevating our security cooperation to the next level, and to tackling our shared challenges together globally, and particularly in the Indo-Pacific region.

That is why today we have issued the "Japan-UK Joint Declaration on Security Cooperation" to enhance our coordinated response to challenges to the rules-based international system, through our increased security and defence cooperation in such areas as joint defence forces exercises, defence equipment and technology, capacity- building of developing countries, cyber security, space, countering terrorism and violent extremism internationally, including aviation security, and combating serious and organised crime, including modern slavery. To support this, Japan and the UK will build on the Acquisition and Cross-Servicing Agreement (ACSA) and, as a priority, work on a framework to improve administrative, policy and legal procedures to facilitate joint operations and exercises.

We will cooperate to ensure the security and success of the Rugby World Cup 2019 and Olympic and Paralympic Games Tokyo 2020, building upon the recent experience of the UK in hosting such major international events.

Enhancing Economic Partnership

Japan and the UK are among the strongest global champions of free trade. It is more important now than ever that we work together to promote rules-based free and fair trade, for the benefit of our own people and economies, and in support of global prosperity.

Building on our strong existing bilateral trade and investment relationship, we have today decided to enhance Ministerial engagement to realise our shared long-term vision to deepen our bilateral prosperity relationship. We have set out how we will achieve this shared ambition in our "Japan-UK Joint Declaration on Prosperity Cooperation".

We will continue to champion the early signature and entry into force of the Japan-EU Economic Partnership Agreement. This will be our immediate priority. As the UK exits the EU, we will work quickly to establish a new economic partnership between Japan and the UK based on the final terms of the EPA.

The UK is clear that it wants a smooth and orderly transition to its new relationship with the EU and our key partners, including Japan.

The UK welcomes the many high value and high profile Japanese investments in the UK, and will work closely with Japanese business and government to build on these investments in future.

Promoting Innovation and Growth

Our vision for a deepened prosperity partnership will also harness our shared strengths in

* Retrieved from URL <http://www.mofa.go.jp/mofaj/files/000285428.pdf>

innovation, to deliver world-leading economies and societies that work for all in the 21st Century.

We will drive industrial productivity, lead the world's digital economy, build on our strategic partnership in the civil nuclear energy area, show the way for clean energy, and promote quality infrastructure with open and fair access for enhanced regional connectivity, as well as pioneer and share new approaches to demographic and health challenges, and ensuring gender equality.

We will also work together to tackle shared global challenges, including achieving the Sustainable Development Goals. We are committed to the Paris Agreement on climate change adopted at COP21 in 2015. We are determined to increase collaboration between our world-class research and development institutions.

Japan and the UK are committed to delivering on the above through our elevated security and prosperity partnership.

Tokyo, 31 August, 2017

Mr. Shinzo Abe
Prime Minister of Japan

Rt Hon Theresa May
Prime Minister of the UK

Japan-India Joint Statement * **Toward a Free, Open and Prosperous Indo-Pacific**

H.E. Shinzo Abe, Prime Minister of Japan is paying an official visit to India from 13 September to 14 September, 2017 at the invitation of H.E. Narendra Modi, Prime Minister of India. On 14 September, the two Prime Ministers held strategic discussions on a wide range of issues under the Special Strategic and Global Partnership between the two countries.

1. The two Prime Ministers welcomed significant deepening of bilateral relations in the past three years and the growing convergence in the political, economic and strategic interests, based on the firm foundation of common values and traditions, as well as on an emerging consensus on contemporary issues of peace, security and development. They decided to work together to elevate their partnership to the next level to advance common strategic objectives at a time when the global community is faced with new challenges.

2. The two Prime Ministers affirmed strong commitment to their values-based partnership in achieving a free, open and prosperous Indo-Pacific region where sovereignty and international law are respected, and differences are resolved through dialogue, and where all countries, large or small, enjoy freedom of navigation and overflight, sustainable development, and a free, fair, and open trade and investment system.

3. The two Prime Ministers underlined that India and Japan could play a central role in safeguarding and strengthening such a rules-based order. To this end, they pledged to reinforce their efforts to:

- align Japan's Free and Open Indo-Pacific Strategy with India's Act East Policy, including through enhancing maritime security cooperation, improving connectivity in the wider Indo-Pacific region, strengthening cooperation with ASEAN, and promoting discussions between strategists and experts of the two countries;
- enhance defence and security cooperation and dialogues, including the MALABAR and other joint exercises, defence equipment and technology cooperation in such areas as surveillance and unmanned system technologies, and defence industry cooperation.
- ensure partnerships for prosperity through the Japan-India Investment Promotion Partnership, speedy implementation of key infrastructure projects including the Mumbai Ahmedabad High Speed Railway (MAHSR), and advancing cooperation in the fields of energy, smart cities, information and communication technology, space, science and technology, biotechnology, pharmaceuticals and health.
- strengthen people-to-people and cultural ties through enhanced Japanese language teaching in India and collaboration in the fields of tourism, civil aviation, higher education, women's education, skills development and sports;
- work together on global challenges such as proliferation of Weapons of Mass Destruction (WMDs), terrorism, space and cyber security, United Nations Security Council (UNSC) reform, climate change and environment;
- strengthen trilateral cooperation frameworks with the United States, Australia and other countries.

* Retrieved from URL <http://www.mofa.go.jp/mofaj/files/000289999.pdf>

Reinforcing Defence and Security Cooperation

Para.4 through 9

Working Together for a Better Connected World

Para.10 through 14

Partnership for prosperity

Para.15 through 47

Working with Partners on Regional and Global Challenges

Para.48 through 60

Conclusion

Prime Minister Abe thanked the Government and the people of India for their warm hospitality and extended a cordial invitation to Prime Minister Modi to visit Japan at a mutually convenient time for the next annual summit meeting. Prime Minister Modi accepted the invitation with appreciation.

Prime Minister of Japan

Prime Minister of the Republic of India

Signed at Gandhinagar, Gujarat on 14 September 2017

Address by Prime Minister Shinzo Abe
at the Seventy-Second Session of the United Nations General Assembly *
September 20, 2017
New York

1.

Mr. President, ladies and gentlemen,

Today, I had intended first of all to tell you of the sincerity with which Japan is implementing the SDGs. I also had hoped to introduce to you the innovative ways by which we have been fostering public awareness within Japan towards those goals.

I wanted to tell you why the Women Entrepreneurs Finance Initiative, or “We-Fi,” is important to me personally as well as to the Government of Japan.

I have been saying we will make universal health coverage part of the “Japan brand.” We will hold a major conference this December in Tokyo taking up UHC as the theme.

The list of things I would have liked to raise here is long indeed – our contributions towards the rule of law; our determination to undertake the Paris Agreement in a steadfast manner; our policy of addressing global infrastructure demand through quality investments.

Moreover, what Japan wants to safeguard in every respect is the free, liberal, open international order and multilateral frameworks.

The world certainly holds high expectations towards the UN as the flagbearer upholding these. That is exactly why the Security Council should be reformed without delay, in response to the demands of the times.

Japan will strive together with its friends to achieve these reforms. I had intended to state that Japan's abiding determination is to play an active role for world peace as a permanent member of the Security Council.

However, I have no choice but to focus my remarks on a single issue, that of North Korea.

2.

North Korea conducted a nuclear test on September the 3rd. Whether or not it was a hydrogen bomb test, its scale far exceeded that of previous tests.

Both before and after that, on August 29, and again on September 15 before the ink on Resolution 2375, passed by the Security Council to impose sanctions on North Korea, was even dry, North Korea launched missiles.

Both of these were launched to fly over Japan and make a display of their cruising range.

The gravity of this threat is unprecedented. It is indisputably a matter of urgency.

North Korea is attempting to dismiss with a smirk the efforts towards disarmament we have assiduously undertaken over the years.

The non-proliferation regime is about to suffer a serious blow from its most confident disrupter ever.

Mr. President, distinguished colleagues,

This recent crisis is of an altogether different dimension qualitatively than those we have eluded every time some dictator has attempted to acquire weapons of mass destruction.

North Korea's nuclear weapons either already are, or are on the verge of becoming, hydrogen bombs.

Their means of delivery will sooner or later be ICBMs. Over the more than 20 years since the end of the Cold War, where and when else, and to what dictators, have we allowed such self-

* Retrieved from URL http://www.mofa.go.jp/fp/unp_a/page4e_000674.html

indulgence? As it turns out, it is only towards North Korea that this has been allowed. That is the reality we find before us. And, it was absolutely not a lack of dialogue that gave rise to this situation.

3.

Dialogue dissuaded North Korea from pursuing its nuclear ambitions. Dialogue has afforded many of us the relief that the world had been saved from a crisis. Believing thus, many of us have felt relieved, well, not just once, but twice.

The first time was in the early 1990s.

At the time, the threat that North Korea imposed amounted to little more than openly displaying its withdrawal from the IAEA and other inspection regimes.

However, tensions were felt by those of us who surmised the intent of that.

After many twists and turns, in October 1994, what is known as the “Agreed Framework” was realized between the U.S. and North Korea.

Under the framework, North Korea would be made to abandon its nuclear plans. In exchange, we would provide incentives to North Korea.

Towards that end, Japan, the U.S., and the ROK formed the Korean Peninsula Energy Development Organization, or “KEDO,” in March the following year.

Taking KEDO as the implementing agent, we pledged to build and hand over two light-water reactors (LWRs) to North Korea and also provide 500 thousand tons of heavy fuel oil annually as a stopgap measure for its energy demand.

This was all carried out accordingly. However, as time went by, it came to be known that North Korea had been continuing steadily with its uranium enrichment.

From the start, North Korea had never intended to abandon its nuclear ambitions. This had become readily apparent to all.

After 2002, seven years after it was founded, KEDO suspended its operations.

During that period, it can be said that North Korea defrauded the U.S., the ROK, and Japan of assistance.

Countries that recognized value in the KEDO framework of providing incentives to change North Korea's actions gradually came to join KEDO – the European Union, New Zealand, Australia, Canada, Indonesia, Chile, Argentina, Poland, the Czech Republic and Uzbekistan.

North Korea betrayed the good faith of all those KEDO members.

As one of the organization's founding members, Japan had pledged to give a non-interest loan to KEDO and had fulfilled roughly 40 percent of that.

The pledged amount was 1 billion US dollars, with about 400 million fulfilled.

4.

The second crisis occurred in 2002 when KEDO suspended its operations and North Korea, saying it would end the freeze on its nuclear-related facilities, expelled IAEA inspectors.

The concern was again that North Korea was continuing its uranium enrichment. And again we chose the path of defusing the situation through dialogue.

North Korea, China, and Russia joined the three founding members of KEDO, Japan, the U.S., and the ROK, to launch the Six-Party Talks. That was in August 2003.

Subsequently, after two years of twists and turns, through the summer of 2005 into the fall, the Six Parties once reached an agreement, resulting in the release of a joint statement.

North Korea committed to abandoning all nuclear weapons and existing nuclear programs and returning to the NPT and to IAEA safeguards.

Moreover, two years after that, in February 2007, an agreement was concluded regarding what each of the Six Parties should do towards implementing the joint statement.

A group of IAEA inspectors that had entered North Korea verified the shutdown of the nuclear-related facilities in Yongbyon, and in return, North Korea received heavy fuel oil.

The series of events made people think that tenaciously continuing dialogue had this time finally caused North Korea to change its actions.

But what actually happened?

In February 2005, while the Six-Party Talks were underway, North Korea declared unilaterally that it was already in possession of nuclear weapons. Moreover, in October 2006, it openly carried out its first nuclear test.

Its second nuclear test was in 2009. Ultimately that same year, North Korea announced its withdrawal from the Six-Party Talks, stating it will “never again take part in such talks.”

Furthermore, around this time it was firing ballistic missiles on a repeated basis.

5.

Mr. President, distinguished colleagues,

Over the course of more than a decade beginning in 1994, the international community continued its efforts towards dialogue with North Korea with great perseverance, first through the Agreed Framework, and later through the Six-Party Talks.

However, what we had to learn is that during the time this dialogue continued, North Korea had no intention whatsoever of abandoning its nuclear or missile development.

For North Korea, dialogue was instead the best means of deceiving us and buying time.

More than anything else, the following fact demonstrates that.

In 1994, North Korea had no nuclear weapons and even its ballistic missile technology was far from mature. Yet it is now working to attain hydrogen bombs and ICBMs.

Again and again, attempts to resolve issues through dialogue have all come to naught.

In what hope of success are we now repeating the very same failure a third time?

We must make North Korea abandon all nuclear and ballistic missile programs in a complete, verifiable, and irreversible manner.

What is needed to do that is not dialogue, but pressure.

6.

Mr. President, distinguished colleagues,

On November 15, already 40 years will have passed since a 13-year-old girl named Megumi Yokota was abducted by North Korea.

Megumi and many other Japanese remain abducted in North Korea even to this day.

I will continue to do all possible efforts so they can set foot on Japan's soil as soon as possible, until the day when they will finally be in the arms of their parents, and their family members.

Japan will face up to North Korea's nuclear and missile threat through the Japan-U.S. Alliance and through Japan, the U.S. and the ROK acting in unity.

We consistently support the stance of the United States: that “all options are on the table.”

Also, I appreciate the unanimous adoption by the Security Council of UNSC Resolution 2375 on September 11, which imposes strict sanctions against North Korea.

That clarified our intention to further intensify pressure on North Korea in order to force it to undertake a fundamental change in its path forward.

But I must make an appeal to you.

North Korea has already demonstrated its disregard of the resolution by launching yet another missile.

The resolution is nothing more than the beginning.

We must prevent the goods, funds, people, and technology necessary for nuclear and missile development from heading to North Korea.

We must make North Korea comply fully with the repeated resolutions.

We must ensure the strict and full implementation of the series of Security Council resolutions by all UN member nations.

What is necessary is action.

Whether or not we can put an end to the provocations by North Korea is dependent upon the solidarity of the international community.

There is not much time left.

7.

Mr. President, ladies and gentlemen,

North Korea is in a truly fortunate location, adjoining the growth region of Asia and the Pacific. It has an industrious labor force as well as underground resources.

If it were to make use of those, there could be a path towards North Korea dramatically growing its economy and improving public welfare.

That is where North Korea's bright future lies.

By failing to resolve the abduction, nuclear weapons and missiles issues, and by becoming a threat to all humanity, there is absolutely no future that North Korea can open up for itself.

In order to change North Korea's policies, we must strengthen our unity.

Thank you very much.

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