

# JAPAN REVIEW

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## Territory and Maritime Issues in East Asia

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## Territory and Maritime Issues in East Asia

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# East Asian and European Notions of Territory\*

Masaharu Yanagihara\*\*

## Abstract

The concepts of territory, territorial sovereignty, and territorial title were originally elaborated in the latter half of the 19th century and the beginning of the 20th century. Non-Western countries, and particularly Eastern countries such as the Ottoman Empire, Persia, Siam, China, Korea, and Japan, each existed within their own world order, but contact with the West around the beginning of the 19th century created pressure to apply to their own states the concepts of territory and borders as defined under modern European international law. When analyzing the process of accepting the European concept of territory, which may conflict with non-European ideas of territory, the issue is whether these concepts and the modern European concept of territorial right can really be understood as a continuum. Growing number of territorial disputes and maritime border delimitation disputes are brought before international courts for resolution in recent years. It is no easy matter to find a legal resolution to a territorial dispute. A comprehensive approach needs to be taken which also gives sufficient consideration to historical perspectives. In so doing, we should not underestimate the role played by international law as it stands but, at the same time, we must not forget to envision what international law ought to be as *lex ferenda*.

## The concept of territory in modern European international law

**T**erritory comprises that area over which a state exercises exclusive control or, in other words, the area over which territorial sovereignty extends. Issues in relation to the acquisition of an area (composed of land as principal and sea and air as accessory) as state territory are debated within the legal framework of territorial title. By contrast, according to international law, no matter the means by which a new state is formed—annexation, separation, division, etc.—the territory of that state has been explicated on completely different theoretical grounds to territorial title. The area effectively controlled<sup>1</sup> by a new state is regarded as that state's territory as of the point at which that state becomes a state under international law. In other words, the theoretical grounds for a new state's territory have rested on the reality of effective control and recognition as a state by other countries (although the constitutive view of recognition and declaratory view of recognition are opposed on the effect of state recognition).

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\* This article is a revised and enlarged version of an article in Japanese, “疆域、版図、邦土、そして領域” [Kyōiki, Hanto, Hōdo (Chinese and Japanese Notions of Territory), and Ryōiki (European Notion of Territory)], *Kokusai Mondai* [International Affairs], No. 624 (2013), pp.1-4.

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<sup>1</sup> Effective control or occupation means an actual taking of possession of an area through state activities to exercise exclusive authority there. Concrete terms and degree of state activities establishing effective control are richly diverse according to the geographical or social circumstances of that area such as a distance from the mainland, if it is an island, or whether that area remains without population.

Where an area is regarded as territory, another form emerges in addition to the two above—namely, state territory already in existence at the point when international law was formulated. The existence of international law is premised on the existence of a group of states, with the existence of a group of states and the existence of international law essentially two sides of the same coin. The territory of those states, too, must be treated as a given. It is rational to represent the core territories of England, France, etc., in this manner (see also the concepts of original title, inchoate title, and historical title discussed below).

### **The history of theories of territory**

The above concepts of territory, territorial sovereignty, and territorial title were originally elaborated in the latter half of the 19th century and the beginning of the 20th century. Territorial title is not discussed by Vitoria, Grotius, or Vattel—the foremost scholars in the 16th, 17th, and 18th century respectively—or indeed by any other scholars. In the case of Vitoria and Grotius, even the modern concept of territory had yet to mature. While Vattel advances something close to the modern concept of territorial sovereignty, he does not systematically address the causes of territorial acquisition and loss.

In the 19th century, the notion of (state) territory as falling under the exclusive reach of state sovereignty (variously called state ownership, state territorial right, territorial sovereignty, etc.) gradually became predominant (although there was no consensus as to whether that sovereignty was of an ownership or an authority nature). At the same time, the practice of debating all questions of the way in which territory was acquired within the categories of the mode of acquisition of state territorial right, or else title to state territory, had become virtually standard. However, a close look at international legal theory at the time as well as British Law Officers' Reports in relation to territorial acquisition reveals that, while there was almost complete agreement on occupation, cession, and conquest as means of acquiring territorial title, opinions were hugely divided on all other modes, with no standard theory yet to emerge. It is certainly not the case that the “traditional” theory of five modes of acquisition of territorial title comprising occupation, accretion, cession, subjugation, and prescription dominated international law as of the mid-19th century.

### **Different concepts of “territory”**

Does the modern state as the above-defined territorial state differ in essence from other “states”—the city states of ancient Greece (Athens, Sparta, etc.), the ancient Roman Empire, China's dynasties (Qin, Han, Yuan, Ming, etc.), the Islamic dynasties (the Umayyad and Abbasid Caliphates, etc.), and “Japan” prior to the Meiji Restoration, for example?

These “states,” too, were certainly political entities that controlled certain territories in one form or another. However, they do not appear to have shared the concept of territory in the sense discussed above. For example, the ancient Chinese concepts of 疆域 (*jiāngyù*; territory within boundary), 版圖 (*bǎntú*; territory), and 邦土 (*bāngtǔ*; domain) as well as pre-modern Japan's notions of 版圖 (*hanto*; territory), 所領 (*shoryō*; territory), 化外の地 (*kagai no chi*; lands outside imperial influence) and 異國境 (*ikokusakai*; the area next to a foreign country) did not correspond to modern Europe's ideas of “territory” and “borders.” Non-Western countries, and particularly Eastern countries such as the Ottoman Empire, Persia, Siam, China, Korea, and Japan, each existed within their own world order, but contact with the West around the beginning of the 19th century created pressure to apply to their own states the concepts of territory and borders as defined under modern European international law. In other words, faced with the West's overwhelming military superiority, non-Western countries were forced to conduct their relationships with the West based on modern European international law. These states received modern European international law along with its concept of territory, reforming themselves into

the territorial states of today.

### Establishment of territory in the late Edo and early Meiji periods

From around the end of the eighteenth century, when ships from Russia, France and England arrived to try to open up Japan, the Shogunate had to decide whether it could continue to maintain its conventional foreign policy. It at first used the maintenance of ancestral law as justification for refusing to open the country. The Shogunate, however, could not withstand demands to open its doors that were made by Commodore Matthew Perry's American East India Squadron, which carried out gunboat diplomacy with its overwhelming military power.

Through its growing contacts with Western countries, it became necessary for Japan to adopt concepts of modern European international law such as "territory" and "boundaries." In particular, the status of Ezochi and the Ryukyu Kingdom—conventionally regarded as a "foreign area" and a "foreign country," respectively—became subject to severe scrutiny. In addition, the treatment of the minor islands near Japan's main islands had to be clearly decided. Establishing what were Japan's territory<sup>2</sup> and boundaries became serious and urgent issues.

Settling issues with Russia was particularly problematic when it came to the process of demarcation, as this was closely related to the status of Ezochi.

Another problematic matter was the status of the Ryukyus. In the *uru'u* intercalary month of July in the traditional Japanese calendar, which was equivalent to early September 1854 in the Western Gregorian calendar, Rear Admiral James Stirling, the Commander-in-Chief of the British East Indies and the China Station, arrived in Nagasaki. He announced that Britain was fighting Russia in the Crimean War, and requested permission to enter the port of Nagasaki and other Japanese harbors. This presented an opportunity for Japan and England to discuss questions related to Japan's territories and boundaries. The Nagasaki *Bugyō* (Magistrate of Nagasaki)

<sup>2</sup> The term 領域 (*ryōiki*: territory) and similar terms (in Japanese; original terms in Chinese characters) such as 領土 (*ryōdo*; territorial land) and 領海 (*ryōkai*: territorial sea) came into common use only from the late Meiji era. The first treaty containing the word *ryōiki* was, as far as we could determine, the Franco-Japanese Treaty of 1907. Before that, terms such as 版図 (*hanto*; territory), 所領 (*shoryō*; territory), 邦土 (*hōdo*; domain), 領地 (*ryōchi*; appanage), 国土 (*kokudo*; domain), 境土 (*kyōdo*: territory within boundary) were used. Chinese official Li Hongzhang, in negotiations between Japan and Qing Dynasty China in 1876, and again when he met American ex-president Ulysses S. Grant on April 23, 1879, gave his interpretation of the word 邦土 (*bāng tǔ*; domain) used in the first article of the 1871 Sino-Japanese Friendship and Trade Treaty, which had the title "domains belonging to both countries." According to Li, the character 邦 referred to countries such as Korea (i.e. 外藩 (*gaihan*; territories governed by a ruler who is a subject of the king/emperor), 外属 (*gaizoku*; foreign countries) and 属国 (*zokkoku*; subject state), and the character 土 referred to territories directly governed by China (i.e. 内属 (*naizoku*; subject countries) or 内地 (*naichi*: mainland)). See "Furoku Amerika zen-daitōryō to no kaidan-roku" [Appendix: record of meeting with the former American president], *Shinpen Genten Chūgoku Kindai Shisō-shi: Dai 2-kan: Bankoku Kōhō no Jidai* [New Edition, Original Texts of Chinese Modern History of Thought, Vol. 2: Age of the Law of Nations] (Iwanami Shoten, 2010), p. 172. Motegi Toshio, "Nittchū kankeishi no katarikata: 19-seiki kōhan" [How to recount Japanese-Chinese history: the second half of the nineteenth century], Liu Jie et al., ed., *Kokkyō o Koeru Rekishi Ninshiki: Nittchū Taiwa no Kokoromi* [Contending issues in Sino-Japanese relations: toward a history beyond borders] (University of Tokyo Press, 2006), p. 14. A letter dated February 1, 1876 that was written by Japanese Minister Mori Arinori to Prince Gong of Qing China when Arinori was stationed in Qing China contains the sentence "Korea is actually a country that belongs to China..." (*Dai-nihon Gaikō Monjo Dai 9-kan* [Documents on Japanese Foreign Policy, Vol.9], p. 182.) Morita Yoshihiko sees the possibility that the Qing side intentionally communicated a different form of the meaning of 邦土 to Japan. Morita Yoshihiko, "Nisshin kankei no tenkan to nisshin shūkō jōki" [Turnaround in Sino-Japanese relations and Sino-Japanese Friendship and Trade Treaty], Okamoto Takashi and Kawashima Shin, ed., *Chūgoku Kindai Gaikō no Taitō* [Emerging diplomacy in late imperial China] (University of Tokyo Press, 2009), pp. 55-56.

expressed his opinion in an official letter to the Japanese government dated August 7, 1854: “Ryukyu is a dependency of Japan and Tsushima is within Japan’s territory.”<sup>3</sup> This letter clearly shows that, quite unlike the case of Tsushima, Ryukyu was not seen as an inherent territory of Japan. Was this the view generally accepted at the time? The letter further raises the issue of the status of Tsushima in connection with boundary issues with Korea.<sup>4</sup>

### The “inherent territory” argument

When analyzing the process of accepting the European concept of territory, which may conflict with non-European ideas of territory, we are required to discuss whether the notions of territory held by various states are simply a matter of historic interest that are not real and serious problems today.

As there is no space to go into detail on this issue in this short essay, I will limit myself to a simple explanation of the “inherent territory” argument put forward by Japan (and, more recently, Korea). There are differences of emphasis however in actual application of this argument—in the case of the Northern Territories, for example, the claim is that the Japanese people have inherited the territory as the land of their forefathers, and it has never once in history become foreign territory, while in the case of Takeshima/Dokdo, the Japanese claim is rather that the Koreans have presented no clear evidence that Korea had effective control over Takeshima prior to Japan taking effective control of the island and establishing territorial right, which is argued to have occurred at latest by the mid-17th century, i.e., the early Edo period. However, if the “inherent territory” argument claims that territorial right was established prior to Japan’s receiving modern European international law in the mid-19th century and establishing territory in line with the concept of territory espoused by modern European international law, this immediately presents the problem of whether concepts from modern European international law such as territorial right, territorial sovereignty, and borders can be applied directly to other eras and regions.

These ages and regions each had their own awareness of territory and borders. The issue is whether these concepts and the modern European concept of territorial right can really be understood as a continuum.

### Legal resolution of territorial disputes

There have been a growing number of cases in recent years where territorial disputes and maritime border delimitation disputes are brought before international courts for resolution. To resolve a dispute in court, the first hurdle is for the countries that are related to the dispute to recognize the existence of a dispute.<sup>5</sup> The second hurdle is for them to agree to recourse the dispute to a court. Even if these hurdles are cleared, the next issue is which international legal doctrines or framework to apply. The failure of the theory of territorial title to serve almost any useful role in court has been long bemoaned.

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<sup>3</sup> *Tsūkō Ichiran Zokushū*, Vol. 3, p.99.

<sup>4</sup> For more on the concept of territory in Japan, see Masaharu Yanagihara, “*Bakumatsuki Meiji shoki no ryōiki gainen ni kan suru ichikōsatsu*” [Some Thoughts on the Concept of Territory in the Late Edo and Early Meiji Periods] in Takeo Matsuda et al, *Gendai kokusaihō no shisō to kōzō I: Rekishi, kokka, kikō, jōyaku, jinken* [The Thought and Structure of Modern International Law I: History, States, Organizations, Treaties, and Human Rights] (Tōshindō, 2012), pp. 45-73.

<sup>5</sup> The International Court of Justice (ICJ) decision in the case *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)* said in its judgment of October 5, 2016 that “a dispute exists when it is demonstrated, on the basis of the evidence, that the respondent was aware, or could not have been unaware, that its views were ‘positively opposed’ by the applicant” (para. 41). Whether making “awareness of a dispute” a requirement that is universally acceptable is currently unclear.



In addition, as noted in relation to the “inherent territory” argument, there is the difficult question of which perspective to use in evaluating historical claims. This is particularly the case with non-Western countries. The traditional view of territory, 疆域 (*jiāngyù*; territory within boundary) and the traditional Chinese world order that China appears to be asserting in the case of the Senkaku Islands and the Spratly Islands can be interpreted within this context.<sup>6</sup> In international courts, it has been addressed in the context of how to evaluate original title, inchoate title, and historical title.<sup>7</sup>

It is no easy matter to find a legal resolution to a territorial dispute. A comprehensive approach needs to be taken which also gives sufficient consideration to historical perspectives. In so doing, we should not underestimate the role played by international law as it stands but, at the same time, we must not forget to envision what international law ought to be as *lex ferenda*. International law is neither a chimera, a mythical beast nor a panacea; it is “just one institution among others which we have at our disposal for the building up of a saner international order”.<sup>8</sup>

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<sup>6</sup> See Yoshirō Matsui, *Kokusaihgakusha ga yomu Senkaku shotō mondai* [Issues of the Senkaku Islands from the Perspective of International Law Specialists] (Nihonhyōronsha, 2014), pp. 113-118.

<sup>7</sup> ICJ decision in the 1953 Miquiers and Ecrehos Case, the ICJ decision in the 1992 El Salvador-Honduras Land, Island and Maritime Frontier Dispute, the 1998 Eritrea-Yemen Arbitration: Phase 1, the ICJ decision in the 2008 Pedra Branca Case, etc.

<sup>8</sup> J.L. Brierly, *Law of Nations: An Introduction to the International Law of Peace*, Oxford: Clarendon Press, 1928, p.vi.

# Validity of International Law over Historic Rights: The Arbitral Award (Merits) on the South China Sea Dispute\*

Atsuko Kanehara\*\*

## Abstract

This article examines validity of international law, UNCLOS, over historic rights, particularly focusing upon the Award on the South China Sea dispute.

The arbitral tribunal found that China's historic rights are contrary to UNCLOS by mainly emphasizing "comprehensiveness" of UNCLOS. This logic adopted by the arbitral tribunal seems different from the two kinds of logics that are to be applied to historic waters: first, to establish a general rule in permitting exceptions to it; and second, to deny a general rule due to varieties of international practices. As a third logic, in the 1951 Fishery Case, ICJ demonstrated logic that the Norwegian straight baseline method is an application of a general rule. By doing so, ICJ kept the sphere of legal regulation of a general rule over the Norwegian specific case.

For China's historic rights the arbitral tribunal did not adopt any of these kinds of logics. The tribunal's logic is critically analysed from the perspective of ensuring regulation of international law, UNCLOS, over those claims challenging against its regulation, such as claims to historic waters and historic rights.

From the same perspective, namely, keeping the sphere of international regulation over challenging phenomena, several findings in the Award are also considered. Since judicial and arbitral procedures that interpret and apply international law have close relation to maintenance of legal regulation of international law, particularly the tribunal's findings concerning its jurisdiction are also examined.

## 1. Introduction

### (1) Purpose of this Article

On the 12<sup>th</sup> of July, 2016, the arbitral tribunal (tribunal) rendered its award (Award)<sup>1</sup> on the merits concerning the South China Sea dispute<sup>2</sup> between the Philippines and China. The Award mainly dealt with three points: first, legal effect of the so-called nine-dash line<sup>3</sup> of China under international law; second, legal statuses of maritime features; and third, legal evaluations of Chinese activities, such as fishing, marine pollution, and law enforcement in a dangerous manner.

This paper will focus upon the first point. This is because it touches upon the fundamental

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<sup>1</sup> The South China Sea Arbitration (The Republic of Philippines v. The Republic of China), Award of 12 July 2016, <https://pca-cpa.org/wp-content/uploads/sites/175/2016/07/PH-CN-20160712-Award.pdf>. All URLs cited in this paper were last accessed on the 15th May, 2017.

<sup>2</sup> In accordance with the case name defined by the tribunal, in this paper the dispute is referred to as the South China Sea dispute.

<sup>3</sup> In the South China Sea, China has drawn a non-consecutive line that consists of nine dots. Within the

issue of what logic international law may apply in order to encompass maritime phenomena within its legal scope and in order to ensure its regulation over them. This paper will address this fundamental issue and call it an issue of validity of international law.

To clearly explain this purpose it is useful to confirm the formulations of the dispute or subjects of disputes both by the two party States and by the tribunal.

## **(2) The Formulations of the Dispute both by Party States and by the Tribunal**

① Regarding a party State, the submission No. 2 of the Philippines reads:

China's claims to sovereign rights and jurisdiction, and to 'historic rights' with respect to the maritime areas of the South China Sea encompassed by the so called "nine dash line" are contrary to the Convention and without lawful effect to the extent that they exceed the geographic and substantive limits of China's entitlements expressly permitted by UNCLOS; (the Award, 169. The numbers refer to the paragraphs and pages of the awards and the judgments cited there, unless otherwise indicated.)<sup>4</sup>

In comparison, as China did not formally participate in the arbitral procedure, any formal submissions were not provided on Chinese side.<sup>5</sup> The Chinese Note Verbale dated at the 14<sup>th</sup> of April, 2011 states that:

China's sovereignty and related rights and jurisdiction in the South China Sea are supported by abundant historical and legal evidence.<sup>6</sup>

In addition, the Award cited the Chinese statement dated at the 30<sup>th</sup> of October, 2015, which maintains that:

China's sovereignty and relevant rights in the South China Sea, formed in the long historical course, are upheld by successive Chinese governments, reaffirmed by China's

line, China has claimed rights over waters and seabed. It is called nine-dash line, nine-dotted line, and U-shaped line. In this paper it is referred to as nine-dash line. Domestically, China in 1948 issued an official map on which the nine (precisely, eleven)-dash line was drawn. Internationally it was not until China submitted to the Secretary General of the United Nations its Note Verbale dated at the 7<sup>th</sup> of May, 2009, in order to protest the joint submission by Viet Nam and Malaysia to the Commission of Limits of Continental Shelf in the same year, that China officially published the nine-dash line. CML/ 17/ 2009, CML/ 18/ 2009. The Note Verbales and the joint submission are available at [http://www.un.org/depts/los/clcs\\_new/submissions\\_files/submission\\_mysvnm\\_33\\_2009.htm](http://www.un.org/depts/los/clcs_new/submissions_files/submission_mysvnm_33_2009.htm). There are many scholarly writings regarding the historical background of the nine-dash line. As a detailed survey, for instance, see, Zhiguo Gao and Bing Bing Jia, "The Nine-Dash Line in the South China Sea: History, Status, and Implications," *The American Journal of International Law*, Vol. 107, 2013, pp. 100-108; Li Jinming and Li Dexia, "The Dotted Line on the Chinese Map of the South China Sea: A Note," *Ocean Development & International Law*, Vol. 34, pp. 287-290.

<sup>4</sup> The Submission No. 1 of the Philippines reads:

China's maritime entitlements in the South China Sea, like those of the Philippines, may not extend beyond those expressly permitted by the United Nations Convention on the Law of the Sea.

<sup>5</sup> While the foreign ministry of China issued its Position Paper on the 7<sup>th</sup> of December, 2014, which denied the jurisdiction of the tribunal, it did not formulate Chinese claims to rights and jurisdiction, and the subjects of the dispute. The Position Paper is available at [http://www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1217147.shtml](http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml).

<sup>6</sup> The Philippines protested the China's claim over the South China Sea on the 5<sup>th</sup> of April, 2011, in the Note Verbal No. 000228. In response, China issued Note Verbale which reads:

China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof. China's sovereignty and related rights and jurisdiction in the South China Sea are supported by abundant historical and legal evidence. (CML/ 8/ 2011)

These Note Verbales are available at the URL cited in supra note 3.

domestic laws,<sup>7</sup> on many occasions, and protected under international law including the United Nations Convention on the Law of the Sea (187).<sup>8</sup>

As another statement of China, on 12<sup>th</sup> of May, 2016, it states that

[T]he dotted line came into existence much earlier than the UNCLOS, which does not cover all aspects of the law of the sea. No matter from which lens we look at this, the Tribunal does not have jurisdiction over China's dotted line (200).<sup>9</sup>

Furthermore, interestingly, China's rights are evaluated as "sovereignty + UNCLOS + historic rights."<sup>10</sup>

Among Chinese scholars, some argue that China's claims to historic rights are based upon international law.<sup>11</sup> According to them, for instance, China's claim to historic rights supplements its claims to rights under the United Nations Convention on the Law of the Sea (UNCLOS).<sup>12</sup> Also some argue that while historic rights may take various forms depending on the contexts, such as delimitation of exclusive economic zones (EEZ) and continental shelf, distribution of fishery resources, international maritime navigation, marine environmental protection, utilization of mineral resources, and so on, the concept of historic rights is recognized by international law, and

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<sup>7</sup> The relevant domestic laws of China include Article 14 of the Exclusive Zone and Continental Shelf Act (26 June 1998) (available at [www.npc.gov.cn/english/Law/2007-12/11/content\\_1383573.htm](http://www.npc.gov.cn/english/Law/2007-12/11/content_1383573.htm)), and Article 2 of the revised Law on Marine Environmental Protection (25 December 1999), cited by Keyuan Zou, "Implementing Marine Environmental Protection Law in China: Progress, Problems and Prospects," *Marine Policy*, Vol. 23, No. 3, 1999, p. 211. The latter was further amended in 2014.

<sup>8</sup> In the Chinese Note Verbale of the 7<sup>th</sup> of May, 2009, cited above (*supra* n. 3) it states that:  
China has indisputable sovereignty over islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof, and that the above position is consistently held by the Chinese government, and is widely known by the international community.

See also, the Chinese Note Verbale of the 14<sup>th</sup> of April, 2011, cited above (*supra* n. 6). As an analysis of the Chinese Note Verbales and claims of other States including Indonesia and Malaysia, see, Nguyen-Dang Thang and Nguyen Hong Thao, "China's Nine Dotted Lines in the South China Sea: The 2011 Exchange of Diplomatic Note Between the Philippines and China," *Ocean Development & International Law*, Vol. 43, 2012, p. 35 *et seq.* A scholar points out that while the Chinese Note Verbale in 2009 does not mention the historical basis for the Chinese claims over the South China Sea, the Chinese Note Verbale in 2011 does. Melda Malek, "A Legal Assessment of China's Historic Claims in the South China Sea," *Australian Journal of Maritime and Ocean Affairs*, Vol. 5, (1), 2013, pp. 28-29.

<sup>9</sup> The concept of "comprehensiveness" or "exclusiveness" emphasized by the tribunal is understood as responding to such China's claim. That will be examined later.

<sup>10</sup> The President of the National Institute for South China Sea Studies, a Chinese Think Tank, specifically focusing on the South China Sea issues, expressed his view that reads:

The nine-dash line "...is based on the theory of 'sovereignty + UNCLOS + historic rights.' According to this theory, China enjoys sovereignty over all the features within this line, and enjoys sovereign right and jurisdiction, defined by the UNCLOS, for instance, EEZ and continental shelf...In addition to that China enjoys certain historic rights within this line, such as fishing rights, navigation rights and priority rights of resource development."

Cited by Zou Keyuan, "China and the South China Sea Conundrum: Any Prospective Solution in Future?", *German Yearbook of International Law*, Vol. 56, 2013, p. 16, footnote 14.

<sup>11</sup> Gao and Jia, *op. cit.*, *supra* n. 3, p. 98.

<sup>12</sup> *Ibid.*, p. 99. In addition, it is opined that since historic rights are recognized by international law, China's claim to rights in the South China Sea is based upon UNCLOS. It further argues that the claims to historic rights as being an exception to UNCLOS, as general international law, supplement the claims to rights recognized by it. Keyuan Zou and Xinchang Liu, "The U-Shaped Line and Historic Rights in the Philippines v. China Arbitration Case," in Shicun Wu and Keyuan Zou eds., *Arbitration Concerning the South China Sea-Philippines versus China*, Routledge, 2016, pp. 138, 142-143.

thus, UNCLOS may not deny historic rights.<sup>13</sup>

Considering the dispute was entertained by the dispute settlement procedure established under UNCLOS,<sup>14</sup> it was totally natural and understandable that the Philippines formulated its submissions pursuant to it.<sup>15</sup> On Chinese side, in some occasions it is maintained that China's rights are based upon history.<sup>16</sup> If a right can be established by history, an existence of such a right not based upon law would be a serious challenge against international law. However, many Chinese statements and scholarly writings seek the ground for China's claims to historic rights in UNCLOS or customary international law or general international law. Thus, Chinese position is understood that although China's rights have formed themselves in a historical process, customary international law or general international law recognizes these rights. In this sense, it does not take a challenging position against international law as that history surpasses law.

Compared to these positions of party States to the dispute, how did the tribunal formulate the dispute or the subjects of the dispute?

② Concerning the characterization of this dispute, the award on jurisdiction and admissibility (Award on Jurisdiction)<sup>17</sup> reads:

[A] dispute concerning the interaction of the Convention (UNCLOS, by the author) with *another instrument or body of law*, including the question of whether rights arising under *another body of law* were or were not preserved by the Convention, is unequivocally a dispute concerning the interpretation and application of the Convention (emphasis added) (168).<sup>18</sup>

<sup>13</sup> *Ibid.*, pp. 138-139.

<sup>14</sup> The arbitral tribunal was established under Annex VII of UNCLOS.

<sup>15</sup> Regarding the fact that the Philippines intended to resolve the dispute by the dispute settlement procedure under UNCLOS, it is pointed out that such a procedure may not be successful, as the problems concerning the South China Sea include various issues, such as territorial sovereignty, maritime delimitation, international maritime navigation, maritime security, marine biological diversity, exploitation of mineral resources. Zou and Liu, *op. cit.*, *supra* n. 12, pp. 130-131. More specifically, it is opined that considering the Chinese Note Verbale of the 14th of April, 2011 (*supra* n. 6), basically China's claims on the South China Sea are grounded on the provisions concerning the territorial sea, the exclusive economic zone and continental shelf under UNCLOS, rather than historic rights deriving from the nine-dash line. Therefore, it is said that the Philippines mistakenly attributed all the China's claims to the nine-dash line, and that it distorted the legal nature and status of the line. *Ibid.*, p. 143. As an analysis from a wider perspective of dispute management in the South China Sea, Ngyuen Hong Thao and Ramses Amer, "A New Legal Arrangement for the South China Sea?" *Ocean Development & International Law*, Vol. 40, p. 333 *et seq.* It states that although Southeast Asia is known as a region with tradition of non-adjudication, this tradition has undergone important changes. The International Court of Justice has recently dealt with two sovereignty disputes over islands between Southeast Asian countries: the dispute over Pulau Ligitan and Pulau Sipadan between Indonesia and Malaysia (Judgment of 17 December 2002); and the dispute over Pedra Branca/ Pulau Batu Puteh, Middle Rocks and South Ledge between Malaysia and Singapore (Judgment of 23 May 2008). *Ibid.*, p. 341. The significance of the resolution of the South China Sea dispute by the tribunal needs to be assessed from such a perspective, which is beyond the purpose of this paper.

<sup>16</sup> As an opinion that China's claims to rights in the South China Sea are based not only on UNCLOS but also on history, see, Robert Beckman, "The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea," *American Journal of International Law*, Vol. 107, 2013, p. 153.

<sup>17</sup> The South China Sea Arbitration (The Republic of Philippines v. The Republic of China), Award on Jurisdiction and Admissibility, 29 October 2016, <http://www.pcacases.com/web/sendAttach/1506>.

<sup>18</sup> Such an understanding itself of a dispute concerning the interpretation and application of UNCLOS reflects an idea of how judicial or arbitral organs ensure their function of dispute resolution so that it relates to the question of how and to what extent international law realizes its regulation. Regarding the meaning of "a dispute concerning interpretation or application of law," *see*, Atsuko Kanehara,

The Award similarly reads:

The Tribunal is faced with the question of whether the Convention (UNCLOS, by the author) allows the preservation of rights to resources which are at variance with the Convention and established anterior to its entry into force. To answer this, it is necessary to examine the relationship between the Convention and *other possible sources of rights under international law* (emphasis added) (235).

By looking at these formulations of this dispute from a viewpoint of grounds for China's claims to rights in the South China Sea, the tribunal defined the grounds as "another instrument or body of law" and "other possible sources of rights under international law." Thus, while "another instrument" may differently imply, it is understood that the tribunal sought within law for the ground for China's claims to rights in the South China Sea.

### **(3) The Issue of Validity of International Law in this Dispute**

The Philippines argued that any rights that China may have had in the maritime areas of the South China Sea beyond those provided for in UNCLOS were extinguished by China's accession to UNCLOS (188). In responding to this argument, as a conclusion, the tribunal denied the rights claimed by China, since they were superseded by those under UNCLOS.

What characteristics may be found in this logic of the tribunal? Was it the only applicable logic in determining the subjects of the dispute? Considering the discussion relating to historic waters and historic rights, and from a perspective of "elastic" interaction between UNCLOS and another "body of law," what evaluation is given to the Award?

These are questions of validity of international law or ensuring international regulation over any phenomena taking place on the sea. The Award applied UNCLOS solely between the party States to the dispute, the Philippines and China. Therefore, the analysis of this paper on the validity of UNCLOS will be conducted on the assumption of relation between party States to it. This paper does not intend to examine issues of a legal effect of the nine-dash line under international law and requirements for historic rights to be established under international law as such.<sup>19</sup> It will somehow touch upon them and the logic in the Award on Jurisdiction in finding the

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"Determination of the Dispute in the Southern Bluefin Tuna Case," *St. Paul's Review of Law and Politics (Rikkyo Hogaku)*, Vol. 60, 2002, pp. 138-152.

<sup>19</sup> As comprehensive analyses of historic rights, for instance, see, Clive R. Symmons, *Historic Waters in the Law of the Sea*, Martinus Nijhoff Publishers, 2008; Leo J. Bouchez, *The Regime of Bays in International Law*, A. W. Sythoff, 1964. There are many works that deal with the legal effect of the nine-dash line with an examination of the requirements for a historic right to have a legal effect under international law. Among them, for instance, Tai Ikeshima, "China's Dashed Line in the South China Sea: Legal Limits and Future Prospects," *World Global Forum*, No. 10, 2013, pp. 33-36; Gao and Jia, *op. cit., supra* n. 3, p. 123; Zou, *op. cit., supra* n. 10, pp. 16-17; Li and Li, *op. cit., supra* n. 3, pp. 292-294; Masahiro Miyoshi, "China's 'U-Shaped Line' Claim in the South China Sea: Any Validity under International Law," *Ocean Development & International Law*, Vol. 43, 2012, pp. 5-8; Peter A. Dutton, "An Analysis of China's Claim to Historic Rights in the South China Sea," in Yonn-Huei Song and Keyuan Zou eds., *Major Law and Policy Issues in the South China Sea*, Ashgate, 2014, p.71-73; Malek, *op. cit., supra* n. 8, pp. 31-34; Kentaro Nishimoto, "Minami Shinakai ni Okeru Chugoku no Shuchou to Kokusaihou Jou no Hyouka (An Assessment from a Perspective of International Law of China's Claims in the South China Sea)," *78 Hogaku (Jurisprudence)*, 2014, pp. 238-246; Yasuyuki Yoshida, "Minami Sinakai ni Okeru Chugoku no 'Kyudansen' to Kokusaiho- Rekishiteki Suiiki to Rekishiteki Kenri wo Chusin ni (China's 'Nine-Dash Line' in the South China Sea and International Law- Historic Waters and Historic Rights)," *Kaikanko Senryaku Kenkyu (Japan Maritime Self-Defense Force Command and Staff College Review)*, June 2015 (5-1), p. 15 *et seq*; Shigeki Sakamoto, "Kyudansen no Hoteki Chii-Rekishiteki Suiiki to Rekishiteki Kenri no Kanten Kara (Legal Status of the Nine-Dash Line - form a Perspective of Historic Waters and Historic Rights)," in Yoshiro Matsui *et al* eds., *21 Seiki no Kokusaiho to Kaiyoho no Kadai (Agendas of International Law and the Law of the Sea in the 21<sup>st</sup> Century)*, Toshindo, 2016, pp. 170-182. Concerning

tribunal's jurisdiction in this case, but it will do so from the perspective of validity of international law.

In the following sections, in a different order from the Award, after clarifying the terminology of the Award regarding a historic right, the logic of the Award will be considered with respect to the nature of China's historic right, the relationship between China's historic rights and UNCLOS, exceptions from the compulsory procedures entailing binding decisions under Article 298, Paragraph 1 (a) (i) of UNCLOS. Some critical analysis will follow from the perspective of this paper.

## 2. The Nature of China's Historic Rights

### (1) The Finding by the Tribunal

In order to decide the question of whether Chinese declaration of 2006<sup>20</sup> pursuant to Article 298, Paragraph 1 (a) (i) of UNCLOS<sup>21</sup> made this dispute an exception to the jurisdiction of the tribunal, the tribunal considered the legal nature of the rights that China claims in the South China Sea (207-214).<sup>22</sup> It examined the terms, such as historic rights, historic titles, and historic waters in interpreting Article 298, Paragraph 1 (a) (i) (217-225).

According to the tribunal, "[t]he term 'historic rights' is general in nature and can describe any rights that a State may possess that would not normally arise under the general international law, absent particular historical circumstances. Historic rights may include sovereignty, but may equally include more limited rights, such as fishing rights or rights of access, that fall well short of a claim of sovereignty" (225). "Historic title" is historic sovereignty to land or maritime areas, and "historic waters" is simply a term for historic title over maritime areas, typically internal waters or territorial sea (225).<sup>23</sup> Depending on this terminology set by the tribunal, in this paper hereinafter "China's historic right(s)" will be used to describe the right(s) that China claims in the South China Sea.

Regarding China's historic rights, the tribunal found as follows. China's historic right is "formed in the long historical course" (206), and a right arising independently from UNCLOS (207, 211). The rights that China actually claims are a right for petroleum exploration (208) and a right for fishing regulation (210). In the sea areas where China exercises these rights, it respects freedom

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the requirements for historic waters, many scholars mention the 1962 Report of the Secretariat of the General Assembly of the United Nations (1962 Report), *Juridical Regime of Historic Waters, Including Historic Bays*, A/ CN.4/ 143, *Yearbook of International Law Commission*, 1962, Vol. II, pp. 1-26.

<sup>20</sup> China's declaration of 2006 is available at: [http://www.un.org/depts/los/convention\\_agreements/convention\\_declarations.htm#China](http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#China) after ratification.

<sup>21</sup> Under Article 298, Paragraph 1 (a) (i), when signing, ratifying or acceding to UNCLOS, a State may declare that it does not accept any one or more of the procedures provided for in Section 2 of Part XV with respect to disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles.

<sup>22</sup> The tribunal found that the Philippines' Submissions No. 1 and No. 2 would involve consideration of issues that did not possess an exclusively preliminary character, and it reserved consideration of its jurisdiction to rule on them until the merits stage (413).

<sup>23</sup> While the tribunal said that "historic waters" is simply a term for historic title over maritime areas, it referred to the judgment in the *Tunisia/ Libya Continental Shelf* case. It reads:

It seems clear that the matter continues to be governed by general international law which does not provide a single "régime" for "historic waters" or "historic bays," but only for a particular régime for each of the concrete, recognized cases of "historic waters" or "historic bays."

*Continental Shelf (Tunisia/ Libya Arab Jamahiya)*, Judgment, *ICJ Reports 1982*, para. 100.

The tribunal defined a historic bay as simply a bay in which a State claims historic waters.

of navigation and overflight, and, thus, China does not consider that these sea areas form part of its territorial sea or internal waters (214). In sum, China claims rights to living and non-living resources within the nine-dash line (214).<sup>24</sup>

Since the issue of Article 298 of UNCLOS will be succinctly dealt with later, it suffices here to confirm that the tribunal found its jurisdiction to entertain this dispute irrespective of China's declaration pursuant to Article 298, Paragraph 1 (a) (i). This is because China's claim does not mean the historic title under the provision but a historic right, and thus, the tribunal has jurisdiction over the dispute concerning the historic right (229).

Next, this characterization by the tribunal of China's historic rights will be examined in considering scholarly writings<sup>25</sup> with respect to historic rights and historic waters.

## (2) Examination

① The tribunal concluded that China's historic rights were those to specific resources and activities. Nonetheless, considering that the nine-dash line indicates the scope of sea areas over which the historic rights are exercised, implication of "zone" is not necessarily excluded from

<sup>24</sup> According to Gao and Jia, China can assert historic rights within the nine-dash line in respect of fishing, navigation, and exploration and exploitation of resources. Gao and Jia, *op. cit., supra* n. 3, pp. 109-110. Similar understanding as that of the Award is seen in Zou's position in that he interprets the nine-dash line in relation to continental shelf and exclusive economic zone under UNCLOS. He recognizes two types of historic rights: one is exclusive with full sovereignty, such as historic waters and historic bays; and the other is nonexclusive without full sovereignty, such as historic fishing rights in the high seas. Based upon this distinction, he maintains that China's claim does not fit in either of the two types, and that it is understood by referring to the exclusive economic zone and continental shelf regimes. According to him, China's claim involves not full sovereignty but sovereign rights and jurisdiction in respect to marine scientific research, installation of artificial islands, and protection of the marine environment. He calls such rights "historic rights with tempered sovereignty." Zou Keyuan, "Historic Rights in International Law and in China's Practice," *Ocean Development & International Law*, Vol. 32, 2001, p.160. He seems to understand China's claim as implying "sea areas" rather than as historic rights to specific activities or resources, such as fishing, navigation, exploration and exploitation of resources. Even if the nine-dash line is understood as claims of historic rights to specific activities and resources, that understanding may not substantially exclude understanding that the nine-dash line reflects claims to sea areas. This is because even the former regards the nine-dash line as depicting the limits of waters to which the exercises of the historic rights reach. Also Zou considers China's claim as unique in the sense that it is not only a right to fisheries on the high seas, but in fact it goes beyond this. To him it seems that China has made precedent in international law relating to the concept of historic rights. Zou Keyuan, *op. cit., supra* n. 10, pp. 15-16. In sum, Zou's position is interpreted that as the nine-dash line reflects China's claims to exclusive economic zone and continental shelf, and even beyond their definitions of UNCLOS, China claims its exclusive economic zone and continental shelf. By interpreting in this way, Symmons' evaluation of Zou's position is understandable in that according to Symmons, Zou assumes "historic exclusive economic zone" and "historic continental shelf." Clive R. Symmons, "Rights and Jurisdiction over Resources and Obligations of Coastal States: Validity of Historic Rights Claims," *Tran Truong Thuy and Le Thuy Trang eds., Power, Law, and Maritime Order in the South China Sea*, Lexington Books, 2015, pp. 148-150. As another work that understands the nine-dash line as claims to historic exclusive zone and historic continental shelf, Jiao Yongke, "There Exists No Question of Redelimiting Boundaries in the Southern Sea," 17 *Ocean Development & Management*, Vol. 17, 2000, p. 52, cited by Florian Dupuy and Pierre-Marie Dupuy, "A Legal Analysis of China's Historic Rights Claim in the South China Sea," *American Journal of International Law*, Vol. 107, 2013, p. 135.

<sup>25</sup> Symmons who examines historic rights in detail, writes that while vagueness in terminology still remains, historic rights in their broadest sense, have been defined as "rights possessed by a State over maritime areas that would not normally accrue to it under the general rules of international law, but have been acquired by that State 'through a process of historical consolidation' and also are 'acquired vis-à-vis one or more States.'" Symmons, *op. cit., supra* n. 24, p. 147.



this tribunal's conclusion.<sup>26</sup> In this sense, the two interpretations are not exclusive to each other: first, interpretation of the nine-dash line as indicating claims to rights to specific activities and resources; and second, interpretation of the nine-dash line as indicating claims over zones. The difference between the two, if any, is that of weight placed on whether activities and resources, or zones.<sup>27</sup>

China itself has not officially made clear the meaning of the nine-dash line (179),<sup>28</sup> and the reason is said to be China's strategy<sup>29</sup>. According to scholars, especially Chinese ones, there may be four types of interpretation of the nine-dash line.<sup>30</sup> The nine-dash line signifies, first, the line determining that islands within it belongs to China,<sup>31</sup> second, the line determining the zones over which historic rights are exercised (according to this interpretation, maritime features, such as islands and shoals within the line are Chinese territories, and sea areas except for internal waters become Chinese EEZ and continental shelf),<sup>32</sup> third, the line is demarcating historic waters (according to this interpretation, China has historic rights to islands, shoals and surrounding sea areas of them, and all the sea areas within the line are Chinese historic waters, and therefore, passage and overflight of foreign vessels and aircraft are prohibited without

<sup>26</sup> On the other hand, relating to historic waters, as confirmed above, the Award defined it as simply a term for historic title over maritime areas, typically internal waters or territorial sea. In this regard, scholarly writings accord.

<sup>27</sup> One of the reasons why Zou, in his work referred to at *supra* n. 24, understands China's claims to rights as implicating claims over zones is that he attaches importance to Article 2 of 1999 Law on Marine Environmental Protection (revised) that reads:

[T]he Law shall apply to internal waters, territorial sea, contiguous zone, exclusive economic zone, continental shelf of the People's Republic of China and *other sea areas under the jurisdiction of the People's Republic of China* (emphasis added)"

Zou *op. cit.*, *supra* n. 24 ("Historic Rights..."), p. 160.

<sup>28</sup> Mostly scholarly writings accord in such evaluation.

<sup>29</sup> Some scholars describe this Chinese attitude as strategic ambiguity. Beckman, *op. cit.*, *supra* n. 16, p. 156. See also, Nishimoto, *op. cit.*, *supra* n. 19, p. 228, footnote 16.

<sup>30</sup> Guoqiang Li, "Chugokku to Shuhen Kokka no Kaijo Kokkyo Mondai (Border Issues between China and Neighboring States)," *Kyokai Kenkyu (Border Studies)*, Vol. 1, 2010, pp. 51-52. As another categorization of Chinese scholarly writings regarding the meaning of the nine-dash line, see, Thang and Thao, *op. cit.*, *supra* n. 8, p. 50, note 11.

<sup>31</sup> Recent Chinese scholars, in general, do not limit the meaning of the nine-dash line to determining that islands within it belong to China, and they consider the nine-dash line both from the aspect of China's claims over islands and other land areas, and from the aspect of China's claims over sea areas. Most of the works cited at *supra* n. 19 take such a method of examination as explained here. See also, Dupuy and Dupuy, *op. cit.*, *supra* n. 24, p. 126 *et seq.* There are also scholarly writings that place weight on China's sovereignty over lands, such as, Gao and Jia, *op. cit.*, *supra* n. 3. As for an examination of the nine-dash line from a perspective of China's sovereignty over islands, see, Jianming Shen, "The China's Sovereignty over the South China Sea Islands: A Historical Perspective," *Chinese Journal of International Law*, Vol. 1, 2002, p. 94 *et seq.*; by the same author, "International Rules and Historical Supporting China's Title to the South China Sea Islands," *Hastings International and Comparative Law Review*, Vol. 21, 1997, p. 1 *et seq.*

<sup>32</sup> As in the arbitral procedure for the merits of the South China Sea dispute, territorial sovereignty over islands was not included in the subjects of the dispute, the limits of Chinese EEZs and continental shelf in the South China Sea cannot be determined based upon the Award. When the nine-dash line demarcates Chinese EEZs and continental shelf beyond 200 nautical miles, the second interpretation of the nine-dash line would mean that China claims EEZs and continental shelf based upon an inherent ground as the nine-dash line. Such EEZs and continental shelf are "historic EEZs" and "historic continental shelf" explained at *supra* n. 24.

China's permission),<sup>33</sup> and fourth, the line sets traditional Chinese borders. Regarding sea areas including seabed and subsoil, the understanding of the Award of China's historic rights is close to the second interpretation. However, while according to the second interpretation the nine-dash line determines the zones over which China's historic rights are exercised, and the zones become Chinese EEZs or continental shelf, it remains unclear whether the EEZs and continental shelf are not beyond the 200 nautical mile limit set by UNCLOS. The Award did not interpret the nine-dash line from a zonal perspective.

② Concerning the distinction between historic waters and historic rights, scholarly writings, in general, make distinction between the two. They find in the former sovereignty over sea areas, and in the latter rights short of sovereignty relating to specific activities and resources (sovereign rights).<sup>34</sup> In this regard, the Award seems to have taken the same position. In addition, it is said that while claims over historic waters are claims of rights toward international society, or rights *erga omnes*, claims to historic rights are vis-à-vis the one or plural related States.<sup>35</sup> Such understanding of historic rights is also reflected in an opinion that historic rights may be disputed solely between the related States, so that the disputes may be resolved by negotiation between those States with defining historic rights on a case-by-case basis.<sup>36</sup> A conclusion cannot be derived from scholarly writings as to whether there is difference in requirements for historic waters and those for historic rights.<sup>37</sup> Furthermore, it is opined that while most often adjacent States may claim historic waters, it is not the case for historic rights.<sup>38</sup>

The tribunal did not examine all of these issues. This may be because once it could decide the issue of whether its jurisdiction was denied or not by Chinese declaration of 2006 pursuant to

<sup>33</sup> In Policy Guidelines for the South China Sea (SCS Guidelines) adopted on the 13th of April, 1993, the Republic of China demonstrated that the sea areas within the nine-dash line are historic waters. However, on the 15th of December, 2005, it terminated the SCS Guidelines, and recently it does not take such a position as claiming historic waters. Miahcel Sheng-Ti Gau, "The U-Shaped Line and a Categorization of Ocean Disputes in the South China Sea," *Ocean Development & International Law*, Vol. 43, p. 58.

<sup>34</sup> For instance, Ted L. McDorman, "The Law of the Sea Convention and the U-Shaped Line: Some Comments," in Shicun Wu and Keyuan Zou eds., *Arbitration Concerning the South China Sea-Philippines versus China*, Routledge, 2016, p. 150; by the same author, "Rights and Jurisdiction over Resources in the South China Sea: UNCLOS and the 'Nine-Dash Line,'" in S. Jayakumar et al. eds., *The South China Sea Disputes and Law of the Sea*, NUS Centre for International Law, Edward Elgar, 2014, p. 150; Zou and Liu, *op. cit.*, *supra* n. 12, p. 134. As a similar opinion, see, Symmons, *op. cit.*, *supra* n. 19, p. 6. In his recent work, Symmons divides historic titles into historic waters and historic rights, and explains the difference between the two by the elements mentioned here. Symmons, *op. cit.*, *supra* n. 24, p. 146.

<sup>35</sup> See the works cited at the footnote above (34). Sakamoto emphasizes that the denial by the Award of China's historic rights is not a denial of their opposability solely in relation to the Philippines, but a denial of their effect *erga omnes*. Sakamoto, *op. cit.*, *supra* n. 19, p. 200.

<sup>36</sup> Shabtai Rosenne, "Historic Waters in the Third United Nations Conference on the Law of the Sea," in Terry D. Gill & Wybo P. Heere eds., *Reflections on Principles and Practice of International Law: Essays in Honour of Leo J. Bouchez*, Martinus Nijhoff, 2000, p. 203.

<sup>37</sup> The tribunal, in considering the relationship between China's historic rights and UNCLOS, posed three questions, as explained later. The second question is whether China had held historic rights in the South China Sea prior to the entry into force of UNCLOS. When addressing it, the tribunal, based upon the 1962 Report, stated that historic waters are merely one form of historic rights, and that the process is the same for claims to rights short of sovereignty (265). Although reservation is needed that this part of the Award was in relation to the 1962 Report, the tribunal might not assume difference in requirements for historic waters and those for historic rights.

<sup>38</sup> Among the works cited at *supra* n. 34, for instance, McDorman (The Law of the Sea Convention...), p. 150; McDorman (Rights and Jurisdiction...), pp. 150-151. See also, Symmons, *op. cit.*, *supra* n. 24, pp. 146-147.

Article 298, Paragraph 1 (a) (i) of UNCLOS, it did not need to proceed to further examinations.<sup>39</sup>

③ The tribunal declared that China's historic rights are independent from UNCLOS. However, as confirmed at the beginning of this article, the formulation of this dispute by the tribunal was as follows:

[T] he Tribunal is faced with the question of whether the Convention (UNCLOS, by the author) allows the preservation of rights to resources which are at variance with the Convention and established anterior to its entry into force. To answer this, it is necessary to examine the relationship between the Convention and *other possible sources of rights under international law* (emphasis added) (235).

Accordingly, it is clear that the tribunal did not seek for any grounds for China's historic rights that exist outside of law. For this very reason, the tribunal needed to proceed to the examination of the relationship between rights that are independent from UNCLOS and that should be based upon "other possible sources of rights under international law," on the one hand, and rights under UNCLOS, on the other hand (or, the relationship between UNCLOS and "other possible sources of "international law").<sup>40</sup>

In the next section, the finding by the Award will be analyzed regarding the relationship between UNCLOS and China's historic rights.

### 3. The Relationship between UNCLOS and China's Historic Rights

#### (1) The Finding by the Tribunal

The tribunal posed three questions to be dealt with in addressing the issue of the relationship between UNCLOS and China's historic rights (234). First, does UNCLOS "and in particular its rules for the exclusive economic zone and continental shelf, allow for the preservation of rights to living and non-living resources that are at variance with the provisions" of UNCLOS? Second, prior to the entry into force of UNCLOS, did China have historic rights and jurisdiction over living and non-living resources in the waters of the South China Sea beyond the limits of the territorial sea? Third, has China in the years since the conclusion of UNCLOS established rights and jurisdiction over living and non-living resources in the waters of the South China Sea that are at variance with the provisions of UNCLOS? From the perspective of this paper, focus is placed on the first question.<sup>41</sup>

Regarding the first question, the line of argument of the Award is as follows. The tribunal declared that the applicable principle and rules are, first, Article 311 which deals with the relationship between UNCLOS and other sources, second, Article 293, Paragraph 1 of UNCLOS which provides for applicable law of the tribunal, and third, the principle reflected in Article 30, Paragraphs 2 and 3 of the Vienna Convention on the Law of Treaties - "the later treaty will

<sup>39</sup> However, as mentioned later, this did not hamper the tribunal from denying China's historic rights, so that the denial by it may contribute to resolution of disputes in the South China Sea. As such a position, see, Naoki Iwatsuki, "Minami Shinakai Chusaisaiban to Kokusai Hunso no Heiwateki Kaiketsu (The Arbitration of the South China Sea Dispute and Peaceful Solution of International Disputes)," *Hogaku Kyositsu (Legal Learning)*, No. 435, 2016, p. 52.

<sup>40</sup> The meaning of "independence" is related to "comprehensiveness" of UNCLOS that the tribunal emphasized. It will be discussed later.

<sup>41</sup> With respect to the second question, the tribunal determined that the rights, which China has exercised, are a fishing right and a right of navigation, so that it has exercised the freedom of the high seas. Accordingly, these exercises of the rights did not produce historic rights (263-272). As for the third question, the tribunal stated that in order to amend conventions unilateral acts are not sufficient, and that regarding China's claim to historic rights there are not acquiescence by other States and the passage of sufficient time, either (273-275).

prevail to the extent of any incompatibility” - as general international law which regulates the interaction between bodies of law (235-237). Article 311 of UNCLOS is a provision addressing the relationship between UNCLOS, on the other hand, and other conventions and international agreements, on the other hand. According to the tribunal, “this provision applies equally to the interaction of UNCLOS with other norms of international law, such as historic rights, that do not take the form of agreement” (235). “Other norms of international law, such as historic rights” is understood to mean international norms relating to historic rights.

Such an interpretation of Article 311 by the tribunal may raise a doubt. There is an opinion that historic rights are those under general international law, and actually Chinese statements and Chinese scholars have voiced such an opinion. If so, the relationship between UNCLOS and historic rights means that between UNCLOS and general international law that prescribes historic rights. General international law takes a form of customary international law. The relationship between UNCLOS and customary international law is not necessarily the same as that between UNCLOS and other conventions and international agreements. While Article 311 deals with the relationship between UNCLOS and other conventions and international agreement, it does not expressly address the relationship between UNCLOS and customary international law. Nonetheless, the tribunal interpreted that Article 311 applies to the relationship between UNCLOS and customary international law, namely, “other norms of international law, such as historic rights.”

Considering that there is no priority between conventions and customary international law as sources of international law, the tribunal’s interpretation of Article 311 may have a reason in that it did not make any distinction between “other conventions and international agreement,” on the one hand, and customary international law, on the other hand. However, here it is needed to clearly recognize the effect that such tribunal’s interpretation of Article 311 may have. Some Chinese scholars argue that historic rights have been established under general international law (this is understood as customary international law), so that these rights cannot be denied solely for the reason of UNCLOS.<sup>42</sup> It is not clear on what understanding of the relationship between UNCLOS and customary international law such an argument is based. Such an argument might place customary international law that gives grounds for historic rights and UNCLOS on an equal status. In that case, such an argument would lose any room to be approved by the tribunal’s interpretation of Article 311. This is because, according to its interpretation of Article 311, customary international law (that forms a basis for historic rights) may have its effect solely as far as it satisfies the requirements set by Article 311.

The tribunal may apply international law under Article 293, unless it is not at variance with UNCLOS. The tribunal could have determined the customary international law that gives a ground for historic rights, and assessed China’s historic rights by applying the customary international law. After these considerations it could have decided the relationship between UNCLOS and China’s historic rights. Furthermore, the tribunal could have reflected the historic rights under the customary international law in interpreting and applying the relevant provision of UNCLOS, such as provisions that prescribe the EEZ regime. In place of examining these possibilities, the tribunal intended to decide the effect of the customary international law on which historic rights are based, by applying Article 311. It can be questioned whether the party States to UNCLOS have agreed to such interpretation of Article 311. Even if the tribunal’s interpretation is approved, it can be maintained solely between the party States to UNCLOS. In that case, the effect of the customary international law that forms a basis for historic rights may be determined by such interpretation of Article 311.

In addition, according to the tribunal’s opinion, Article 311 and Article 293, Paragraph

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<sup>42</sup> For instance, Zou and Liu, *op. cit.*, *supra* n. 12, p. 139.

1<sup>43</sup>“mirror the general rule of international law concerning the interaction of different bodies of law, which provide that the intent of the parties to a convention will control its relationship with other instruments (237).”<sup>44</sup> It is undeniably a general rule of international law that the intent of the parties to a convention decides the interaction of the convention with other bodies of law. However, it requires an examination whether whole the contents of Article 311 have been established as general international law. Unless it is approved, the rules contained in Article 311 concerning the interaction of UNCLOS with other bodies of law would apply solely to UNCLOS and solely between party States to UNCLOS.<sup>45</sup>

From the provisions and rules that the tribunal referred to, it derived four propositions concerning the relationship between UNCLOS and other bodies of law. Concerning historic rights to living and non-living resources, first, when UNCLOS explicitly provides for them, and they take a form of an agreement that Article 311 prescribes, they shall remain unaffected.<sup>46</sup> Second, while UNCLOS does not expressly permit or preserve a prior agreement, rule of customary international law, or historic rights, such prior norms will not be incompatible with UNCLOS where their operation does not conflict with any provisions of UNCLOS or to the extent that interpretation indicates that UNCLOS intended the prior agreement, rules, or rights to continue in operation. Third, where rights and obligations arising independently of UNCLOS are not incompatible with its provisions, Article 311, Paragraph 2 provides that their operation will remain unaffected. Fourth, where independent<sup>47</sup> rights and obligations have arisen prior to the entry into force of UNCLOS and are incompatible with its provisions, the principles set out in Article 30, Paragraph 3 of the Vienna Convention on the Law of Treaties and Article 293<sup>48</sup> of UNCLOS provide that UNCLOS will prevail over the earlier, incompatible rights and obligations (238).

Assuming these propositions, after the tribunal found that no articles of UNCLOS expressly provide the continued existence of historic rights to the living and non-living resources (239), it moved onto an examination of whether China’s historic rights should be considered not incompatible with UNCLOS. Its examination covered the relevant provisions of UNCLOS (240-245), the drafting process of UNCLOS and establishment of the EEZ regime (248-254), and

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<sup>43</sup> It is not plainly explicable whether the reference to Article 293, Paragraph 1 is needed here. That provision reads:

A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention.

It might be said that the reference to this provision by the tribunal here is for the reason that this provision forms a ground for the supremacy of UNCLOS over other bodies of law.

<sup>44</sup> The tribunal referred to Article 30, Paragraph 2 and Paragraph 3 of the Vienna Convention on the Law of Treaties.

<sup>45</sup> The relation between historic rights or the rules that prescribe them, on the one hand, and the rules contained in UNCLOS, on the other hand, becomes complicated in cases in which non-party States are involved. As for an examination of the relationship between treaties and historic rights as exceptions to them, see, the 1962 Report, paras. 73-78.

<sup>46</sup> As the cases that fall under the first proposition, the tribunal referred to Article 10 and Article 15 of UNCLOS. Article 10, Paragraph 6 provides that the rules concerning bays do not apply to historic bays. Article 15 provides that the median line method concerning territorial sea delimitation does not apply to cases in which historic titles are involved.

<sup>47</sup> The “independence” mentioned in the third and the fourth propositions may be understood as that from UNCLOS. Such remarks by the tribunal of the “independence” are based upon its finding that China’s historic rights are independent from UNCLOS, as confirmed above.

<sup>48</sup> The reference to Article 293 here also raises a doubt concerning its necessity and appropriateness. However, it might be understood that the tribunal referred to the provision as a ground for supremacy of UNCLOS over other international law rules.

precedents (257-260). Then, it reached the conclusion that China's claim to historic rights to living and non-living resources within the nine-dash line is incompatible with UNCLOS (261). It is not easily understood which propositions among the second, third, and fourth propositions, referred to above was applied by the tribunal. Nonetheless, the critical point is that by this conclusion the tribunal definitely denied the arguments of China and Chinese scholars that China's historic rights, having established prior to UNCLOS, cannot be denied by it.<sup>49</sup>

Here, the above mentioned point needs to be recalled that the conclusion of the tribunal is based upon the application of Article 311 of UNCLOS, and that whether whole the contents of the article reflect general international law requires further examination. Unless this point is affirmed, the tribunal's conclusion may be applied solely between party States to UNCLOS, when party States approve the tribunal's interpretation of Article 311. When a non-party State to UNCLOS claims historic rights and denies the regulation of UNCLOS over the claims, party States to UNCLOS could not necessarily oppose to such an argument by applying the tribunal's conclusion.

## (2) The "Comprehensiveness" of UNCLOS

① When the tribunal decided that China's historic rights are at variance with UNCLOS considering its relevant provisions and its drafting process, it emphasized above all the "comprehensiveness" of UNCLOS (231, 245, 261). From the perspective of this paper, namely that of validity of international law, the "comprehensiveness" requires most detailed scrutiny.

As to the meaning of comprehensiveness, the tribunal seems to imply the following two meanings. First, UNCLOS covers all the sea areas including seabed and subsoil, and it regulates all the uses of the sea. It may be described as the material or spatial coverage of UNCLOS, and the comprehensiveness is the word to express this meaning (231).<sup>50</sup> Second, rather than other international law rules, it is UNCLOS that establishes the ocean regimes and that regulates the uses of the sea (245)<sup>51</sup>. This meaning, although it is somehow close to exhaustiveness, may be described as exclusiveness.<sup>52</sup> These two meanings are not exclusive to each other. Nonetheless, it may not be denied to derive the two meanings from the tribunal's ruling. The first, the comprehensiveness of UNCLOS, means denial of any vacuums of UNCLOS, as it regulates all the

<sup>49</sup> As a typical example of it, see, Li, *op. cit.*, *supra* n. 30, p. 52. The Chinese statement on the 12 of May, 2016, referred to by the tribunal (200), stated that:

[T]he dotted line came into existence much earlier than UNCLOS, which does not cover all aspects of the law of the sea, and that the tribunal does not have jurisdiction over China's dotted line.

It is interpreted that the nine-dash line (and China's historic rights being claimed within the line) may not be, at least legally, assessed by UNCLOS. Gao and Jia take a position that China's historic rights are prior to UNCLOS and that they continue their operation even under UNCLOS. Gao and Jia, *op. cit.*, *supra* n. 13, p. 123.

<sup>50</sup> Looking at the Preamble of UNCLOS, the tribunal stated that UNCLOS intends to settle "all issues" relating to the law of the sea and that it emphasizes the desirability of establishing "a legal order for the sea (245)." However, Paragraph 8 of the Preamble of UNCLOS, assumes existence of issues that UNCLOS does not addresses, and provides that "matters not regulated by this Convention continue to be governed by the rules and principles of general international law." The tribunal, for an unknown reason, did not mention it.

<sup>51</sup> This is understanding based upon the tribunal's reference to Article 309 of UNCLOS that prohibits reservations and exceptions to UNCLOS. Nevertheless, as the tribunal also referred to the Preamble of UNCLOS, as confirmed *supra* note 50, it is not determinable whether it placed weight on either of the two meanings, or it intended to mean both.

<sup>52</sup> McDorman uses the term of exhaustiveness, and he denies the exhaustiveness of UNCLOS regarding the rights that States claim regarding sea areas and natural resources. McDorman, *op. cit.*, *supra* n. 34 (Rights and Jurisdiction...), p. 153.

regimes of the sea and all the uses of the sea.<sup>53</sup> In comparison, the second, the exclusiveness of UNCLOS, gives priority to it over other international rules, if there is any, which provide for the ocean regimes and regulates all the uses of the sea.

Looking at the tribunal's logic, it did not accept such an argument that China's relevant rights in the South China Sea are protected by international law including UNCLOS,<sup>54</sup> as far as those rights are to living and non-living sources of EEZ of the Philippines. This is because UNCLOS is comprehensive in terms of determination of the EEZ and continental shelf regimes, and, thus, UNCLOS supersedes any rights that are prior to UNCLOS and at variance with it. While the tribunal used the term comprehensiveness, it may be interpreted not only that UNCLOS regulates all the sea areas and all the uses of the sea, but also that UNCLOS supersedes any rights and obligations with grounds apart from UNCLOS and being not in conformity with it. If this is the case, the "comprehensiveness" mentioned by the tribunal is understood as containing the two meanings that are explained here.

With respect to the logical consequences of the "comprehensiveness," the terms used by the tribunal, such as "independence" and "exception" are so closely related to the "comprehensiveness" that they require some consideration. As confirmed before, the tribunal regarded China's historic rights as independent from UNCLOS.<sup>55</sup> Its meaning should be clarified in relation to the comprehensiveness of UNCLOS. On the one hand, if UNCLOS is comprehensive in that it regulates all the sea areas and all the uses of the sea, the sea areas and the uses of the sea that are independent from UNCLOS are not regulated by it, so that they would not come into existence under UNCLOS. On the other hand, if UNCLOS is exclusive in that solely UNCLOS establishes the ocean regimes and regulates the uses of the sea excluding other international law rules regarding them, if any, the "independence" means that other international regulation on the ocean regimes and the uses of the sea would be excluded and surpassed by UNCLOS.<sup>56</sup>

② Regarding the term "exception" used by the tribunal, the following observation is important. The tribunal posed the three questions concerning the relationship between UNCLOS and China's historic rights. In addressing the second question, namely that of whether China had acquired the historic rights prior to the entry into force of UNCLOS, the tribunal stated that historic rights are exceptional rights and that they come into existence by acquiescence by other States in the historical process (268). The "exception" also relates to the comprehensiveness of UNCLOS. However, the tribunal mentioned "exceptional rights" in relation to the international order of the sea that was prior to UNCLOS. It did not so in relation to UNCLOS. If historic rights form exceptions in relation to UNCLOS, and UNCLOS are both comprehensive and exclusive

<sup>53</sup> Sakamoto, referring to Paragraph 8 of the Preamble of UNCLOS that provides as reproduced at *supra* n. 50, argues there are no vacuums under international law. It does not mean that UNCLOS is comprehensive to deny vacuums, but that the issues remaining unregulated by UNCLOS will be regulated by general international law. Therefore, his position is to deny "vacuums" of general international law. Shigeki Sakamoto, "Historic Waters and Rights Revisited: UNCLOS and Beyond?," in *The Rule of Law in the Sea of Asia-Navigational Chart for Peace and Stability* (not for sale), Paper submitted for the International Symposium of the Law of the Sea hosted by the Ministry of Foreign Affairs of Japan, 12-13 February, 2015, p. 67.

<sup>54</sup> The tribunal referred to the Chinese statement of the 30th of October, 2015, which maintains that China's sovereignty and relevant rights are protected under international law including UNCLOS (187). As Chinese similar statement of 2011, see, *supra* n. 6.

<sup>55</sup> See, Section 2 (1) of this paper.

<sup>56</sup> These logical consequences are applied, at least in assuming cases between party States of UNCLOS. In cases between non-party States or between a non-party State and a party State, they may conclude different agreements from UNCLOS that regulated the sea areas and uses of the sea. Such agreements as establishing special laws are not excluded by UNCLOS between non-party States, and between a non-party State and a party State.

in the meanings as explained here, as a logical consequence, neither exceptional ocean regimes nor exceptional uses of the sea can exist or they should be excluded, unless UNCLOS expressly admits the exceptions. The tribunal did not discuss this point. It only confirmed that UNCLOS does not contain any explicit provisions that permit historic rights to living and non-living resources. While the tribunal did not provide further examination, even if the second question was answered affirmatively, there would be no room for historic rights, as being exceptional rights, to be preserved in relation to UNCLOS that is comprehensive and exclusive. If this is the case, the significance would be doubtful in posing the second question.

It is possible to understand that the tribunal defined the requirements for historic rights as the historical process of creation and no protests from other States. Then, is it customary international law or general international law that provides for those requirements for historic rights to exist? The tribunal gave no mention concerning this point. The statement of the tribunal that historic rights are exceptional rights set forth a presupposition based upon which it reached the conclusion that as China's rights in the South China Sea were derived from the principle of the freedom of the high seas, the exercise of rights permitted by international law did not create historic rights, as being exceptions to the law.<sup>57</sup>

In the argument concerning historic waters, there has been a division of opinions as to whether or not they set exceptions to a general rule. The logics applied in the argument bear critical importance from the perspective of a way for international law to ensure its regulation over claims to historic rights. In relation to "historic waters," as a general rule mainly the rules of maritime delimitation and demarcation of maritime zones are assumed. In comparison, in relation to "historic rights" it is likely that rules concerning the regimes of territorial sea, EEZ, and continental shelf are presupposed as general rules. Despite this difference, as far as focus is placed upon the logics themselves, it is not unreasonable to consider that the logics in the argument of "historic waters" are expected to be also applied in the argument of "historic rights."

With bearing this in mind, next, succinct examination will be given of the argument concerning historic waters, in order to evaluate the logic applied by the tribunal in the Award in dealing with historic rights.

### **(3) Definitions of Exceptions and a General Rule as Logics Applied in Order for Securing International Regulation**

① As an analysis of the legal regime of historic waters, the 1962 Report<sup>58</sup> provides an important starting point.<sup>59</sup> It demonstrates denial of the logic that regards historic waters as exceptions to a general rule of international law. It reads:

[T] he widely held opinion that the régime of "historic waters" constitutes an exception to the general rule of international law regarding the delimitation of the maritime domain of the State is debatable. The realistic view would seem to be not to relate "historic waters"

<sup>57</sup> The tribunal found that historical navigation and fishing as well as trade in the South China Sea represented the freedom of the high seas, so that they did not create historic rights. According to it, when China ratified UNCLOS which established the EEZ regime, China relinquished the freedom of the high seas (269-271).

<sup>58</sup> As a detailed analysis of the 1962 Report, see, Ko Nakamura, "(Rekishiteki Suiiki no Seido no Hotenka ni Tsuite-Rekishiteki Wan wo Hukumu Rekishiteki Suiiki no Horitsu Seido · Kokusai Rengo no Jimukyoku ni Yotte Junbi Sareta Kenkyu Kiroku ni Kanren Shite-(The Codification of the Regime of Historic Waters-The Legal Regime of Historic Waters Including Historic Bays and Research and Report Provided by The Secretariat of the United Nations-)," *Hogaku Kenkyu (Journal of Law, Politics, and Sociology)*, Vol. 38, No. 4, 1965, p. 30 *et seq.*

<sup>59</sup> As for the background for this research, see, the 1962 Report, pp. 1-6; Rosenne, *op. cit.*, *supra* n. 36, pp. 193-195.



to such rules as an exception or not an exception, but consider the title to “historic waters” independently, on its own merits. As a consequence one should avoid, in discussing the theory of “historic waters,” to base any proposed principles or rules on the alleged exceptional character of such waters.<sup>60</sup>

The opposition to the logic that defines historic waters as exceptions to a general rule is based upon the understanding that as general rules on bays and other rules concerning maritime delimitation have not been established, so that historic waters cannot form exceptions to general rules that do not exist.<sup>61</sup>

In contrast to this, there is a position that the legal regime of historic waters is defined as exceptions to a general rule.<sup>62</sup> Critical importance exists in the reasons for adopting such a logic. A scholarly writing explains that such a logic is needed for claims to historic waters, or a preexisting law to survive a changing law.<sup>63</sup> Another scholar points out the impossibility of establishing a general rule without permitting exceptions to it,<sup>64</sup> and in this sense, historic waters fulfil the function of a safety valve (*une soupape de sûreté*).<sup>65</sup> In sum, the object of these positions is to give somehow elasticity, which is called a safety valve, to international law in its regulation in that it permits preservation of some effects of preexisting laws and historic waters. By admitting exceptions as a safety valve, when facing different and incoherent international practice it would become possible to derive international rules. It is true that by admitting exceptions, general rules may be hampered from effectively regulating. To avoid such a risk, at least to a certain degree, a possible way is to ensure dispute settlement procedures, particularly judicial or arbitral procedures that legally define exceptions in interpreting and applying the general rule concerned. Here it may suffice to point out that possibility. Looking at UNCLOS, Article 10, Paragraph 6 provides that the rule of bays is not applied to historic bays.<sup>66</sup> In this regard, by permitting exceptions a general rule concerning bays could be established. In the same manner, Article 15 recognizes that a historic title as well as special circumstances set exceptions to which the general rule concerning territorial sea delimitation is not applied.<sup>67</sup> In the same line of argument, the tribunal in the Award confirmed that Article 12 of the 1958 Convention on Territorial Sea and Contiguous Zone and Article 15 of UNCLOS expressly provide for historic titles (221, 223).<sup>68</sup>

② When the logics proposed by the 1962 Report and in the scholarly writings concerning “historic

<sup>60</sup> The 1962 Report, para. 184.

<sup>61</sup> As for such positions and the Norwegian claims in the Fishery Case, see, *ibid.*, paras.49-53.

<sup>62</sup> The 1962 Report introduces the position that defines the legal regime of historic waters as an exception, and the British claims in the Fishery Case, paras. 42-48.

<sup>63</sup> Andrea Gioia, “Historic Titles,” in Rüdiger Wolflum ed., *The Max Planck Encyclopedia of Public International Law*, Oxford University Press, Vol. IV, p. 817, para. 11.

<sup>64</sup> Gilbert Gidel, *Droit international public de la mer*, Vol. III, Topos Verlag, 1934, p. 651.

<sup>65</sup> When both the general rule and its exceptions are established as customary international law rules, it is not explicable why the former has priority over the latter in the sense that the latter forms an exception to the former. The 1962 Report, para. 54.

<sup>66</sup> The Virginia Commentary interprets that Article 10, Paragraph 6 provides for historic bays as “exceptions” to the general rule of bays. Sataya N. Nandan and Shabtai Rosenne, eds., *United Nations Convention on the Law of the Sea 1982 - A Commentary*, Vol. II, Martinus Nijhoff Publishers, 1993, Article 10, 10. 1, 10.5 (e).

<sup>67</sup> *Ibid.*, Article 15, 15. 1, 15. 12 (a).

<sup>68</sup> Here the tribunal did not refer to Article 10, Paragraph 6, while it did in para. 238 of the Award. The reason for that is not clear. It referred to the mention of the 1962 Report of the Fishery Case as a precedent which reads:

‘Historic waters’ are usually meant waters which are treated as internal waters but which would not have that character were it not for the existence of an historic title (para. 220 of the Award).

waters” are applied to “historic rights,” there will be the two logics: first, historic rights are exceptions to general rules; and second, they do not form exceptions. The difference between the two is mainly resulted from the different judgment concerning the possibility to set forth the assumed general rules. In other words, the both logics are the same in respecting concrete and individual circumstances that introduce claims to historic rights. While the first logic admits such weight on the concrete and individual circumstances as forming exceptions to general rules, the second logic admits such weight on them as denying general rules. In addition to the two logics, in presupposing an existence of general rules, in contrast to the first logic, the third logic can be proposed, which assumes a general rule that regulates historic rights with concrete and individual circumstances without admitting them as exceptions to the rule. In the Award, since UNCLOS, as a general rule, is presupposed, the contrast between the first and the third logics is significant rather than the contrast between the first and the second logics.

Regarding the third logic, although it is the case relating to historic waters, the logic applied by the International Court of Justice (ICJ) in the Fishery Case is remarkable.<sup>69</sup> It adopted the logic that defined the Norwegian straight baseline method as one application of a general rule, not as an exception to it. The United Kingdom maintained that there was a 10 nautical mile rule concerning a closing line of a bay, and that exceptions to it may be permitted on historic grounds (130. For this case, the numbers indicate pages in the judgment).<sup>70</sup> ICJ denied existence of such a general rule.<sup>71</sup> It determined that Norwegian straight baseline method is not an exception to general international law, but one application of it to a specific case (131). In reaching this conclusion, regarding the general international law, ICJ defined three considerations:<sup>72</sup> first, the drawing of baselines not departing to any appreciable extent from the general direction of the coast; second, the more or less close relationship existing between certain sea areas and the land formations which divide or surround them; and third, certain economic interests peculiar to a region, the reality and importance of which are clearly evidences by a long usage (133).<sup>73</sup> The three considerations may be understood as setting forth the requirements for the legality of the Norwegian unilateral measure.

In reality, ICJ determined not the legality but the opposability of the Norwegian straight baseline method in relation solely to the UK.<sup>74</sup> The opposability in relation to the UK is different

<sup>69</sup> Fisheries Case (United Kingdom v. Norway), Judgment of December 18th, 1951, *ICJ Reports 1951*, p. 116.

<sup>70</sup> While the UK adopted the logic that historic waters form exceptions to a general rule, Norway alleged that Norwegian straight baseline method is one application of general international law to a special case. As for detailed analyses of the positions of the two parties, see, the 1962 Report, paras. 46-53; Nakamura, *op. cit.*, *supra* n. 58, pp. 39-41.

<sup>71</sup> In this regard, ICJ stated (130) as reproduced at *supra* n. 68.

<sup>72</sup> While here ICJ used the term “considerations,” at page 129 of the judgment, it did the term “principle” in describing almost the same contents. It states that:

[T]he *principle* that the belt of territorial waters must follow the general direction of the coast makes it possible to fix certain criteria valid for any delimitation of the territorial sea (emphasis added).

Considering the part of the judgment, the three “considerations” may be expressed as “requirements” for legal or valid baselines under general international law. In this regard, Okuwaki, as seen at *infra* n. 75, interpreted the three “considerations” as “requirements” in Japanese.

<sup>73</sup> These three considerations are reflected in Article 4 of the 1958 Convention on Territorial Sea and Contiguous Zone, and maintained in Article 7 of UNCLOS.

<sup>74</sup> ICJ examined whether Norway coherently adopted the straight baseline method, and whether there were protests by other States (136-139). Then, it found that the actual Norwegian straight baselines were not diverted from the general direction of the coast, and that even there were basepoints that were diverted from the general direction of the coast, it was due to consideration of traditional rights of fishing, being reserved to its inhabitants. ICJ also admitted considerations of such traditional rights

from the legality *erga omnes*. Although legality and opposability need to be examined in detail as to the Fishery Case, here it suffices to point out the issue. Before determining the opposability, ICJ declared the two important presuppositions that have been frequently cited: first, the act of delimitation is necessarily a unilateral act; and second, the validity of the delimitation with regard to other States depends upon international law (131).<sup>75</sup> The conclusion that the Norwegian straight baseline method is one application of general international law to a specific case was derived when ICJ faced the conflict of two logics: first, the Norwegian straight baseline method forms exception to a general rule; and second, it is application of a general rule to a specific case.<sup>76</sup>

Thus, ICJ encompassed Norwegian straight baseline method, which was based upon special circumstances including historical one, within the legal sphere of the general rule by defining the method as one application of the rule.<sup>77</sup> In addition, the general rule was declared as one that admitted consideration of concrete and individual circumstances of the case concerned, in examining the three conditions that were set forth by ICJ.

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of fishing, when they were founded on the vital needs of the population and attested by very ancient and peaceful usage (142). It cannot be easily understood the reason why ICJ did not find the legality of the Norwegian straight baselines solely based upon the three considerations that it set forth, and the reason why the coherency of Norwegian straight baseline method and no protest from other States were needed to be considered in addition to the examination of the three considerations in order to determine the opposability of the Norwegian straight baseline method in relation to the UK. In this regard, Eto points out that although the line of argument of ICJ is not easy to be traced, its weight is clearly shifted to the consideration of attitudes of other States from application of the standards of general international law. Junichi Eto, "Ippoteki Koi no Kokusaiho jo no Koka - Gyogyou Jiken (The Effect of Unilateral Acts under International Law- The Fishery Case)," in Yamamoto *et al* eds., *Kokusaiho Hanrei Hyakusen (100 Cases in International Law)*, Yuhikaku, 2001, p. 13. ICJ did not find the legality of Norwegian straight baseline method but it did its opposability in relation to the UK. Difference between legality and opposability may form one reason for the not understandable line of argument of ICJ. In order for finding legality of Norwegian straight baseline method, three considerations may be enough. In contrast, in order for finding opposability of it, further examination of the two factors, which ICJ examined, may be needed. However, as ICJ did not determine legality of it, any conclusion could not be derived that the three "consideration" are "requirements" for legality of it. Thus, as explained at *supra* n. 72, in this paper, the three considerations are not regarded as "requirements" for the legality of straights baselines.

<sup>75</sup> Okuwaki focusses upon the fact that ICJ found the opposability of Norwegian straight baseline method as a unilateral act, when the three "considerations" (Okuwaki translated "considerations" into "yoken" which means "requirements" in Japanese) are affirmatively determined. According to him, in this context the opposability is used as a concept that resides within the world of legal rules not as a concept to evaluate the effect of unilateral domestic measures in case of a vacuum of law, which means non-existence of a legal rule relating to a closing line of a bay. Therefore, the opposability is admitted as far as the unilateral measures remain within the discretion that international law allows. Naoya Okuwaki, "Katei to Shite no Kokusaiho - Jisshoshugi Kokusaiho Ron ni Okeru Ho no Henka to Jikan no seigyo (International Law as a Process - Changes of Law and Restriction on Law by Time in the Positivist International Law Theory-)," 22 *Sekaiho Nenpo (Yearbook of World Law)*, 2003, p. 75.

<sup>76</sup> Opposing the first logic alleged by the UK, Norway stated that:  
The Norwegian Government does not rely upon history to justify exceptional rights, to claim areas of sea which the general law would deny; it invokes history, together with other factors, to justify the way in which it applies the general law (133).

<sup>77</sup> A different evaluation of the judgment places weight on the finding of ICJ that considering the publicity, together with other international factors, the straight baseline method became solid by the coherent and long practice. That practice proves that other States did not regard Norwegian straight baseline method as being at variance with international law. Tomoyuki Yuyama, "Rekishiteki Suiiki ni Kansuru Beikoku SAiko Saibansho no Hanrei (Jurisprudence of the Supreme Court of the US Relating to Historic Waters)," 333 · 334 *Ritsumeikan Hogaku (Ritsumeikan Law Review)*, 2010, pp. 1682-1683.

The logic of ICJ is evaluated as follows. The logic itself ensures international regulation over claims to rights based upon historic facts and other circumstances (in Norway's case, they are claims to sovereignty over internal waters and territorial sea demarcated by drawing straight baselines), in that it keeps such claims to rights being under international regulation as one application of a general rule of international law. In this very sense, the logic maintains international regulation and validity of international law over such claims to rights. If it is the case, however, reservation should be immediately added that as a result of international regulation over those claims to rights, the contents of the rights will not necessarily become clear and objective enough. When the three conditions set forth by ICJ are "requirements" for legality of straight baselines under international law, the contents cannot be said to be objective enough, and the judgment as to whether they are satisfied may not be easy.

③ When, in accordance with the first logic, historic rights are regarded as "exceptions" to a general rule, a general rule maintains to be a law even in facing opposing phenomena to it. In this sense, to admit exceptions would make a general rule elastic so that it would not stop being a law, by allegations of phenomena contrary to it. When, in accordance with the third logic, considerations of historic rights are regarded as application of a general rule, in this very sense, in other words, by allowing considerations of concrete and individual circumstances, it would bear elasticity, too. Either of the two logics has the common nature to provide a general rule, a law, with elasticity.<sup>78</sup> The first logic and the third logics may be substantially distinguished from each other, only if in the case of the third logic a general rule precisely provides in detail for concrete and individual circumstances to be considered, so that legal assessment of those circumstances is possible as a consequence of "interpretation" or "application" of a general rule. In order to keep such substantial difference between the two logics, in addition to appropriate drafting of a general rule to precisely prescribe concrete and individual circumstances, to secure the "interpretation" and "application" of a general rule, as a legal function, in evaluating in legal terms of those circumstances is critically important, through proper dispute settlement procedures, particularly judicial or arbitral procedures that interpret and apply a general rule.

Different from these logics, it may be opined that the requirement for historic waters are determined by considering concrete and individual circumstances on a case-by-case basis. Such a position may be seen in the judgment of the Tunisia/ Libya Continental Shelf Case.<sup>79</sup> ICJ stated that:

[I] t seems clear that the matter (of historic waters or historic bays, added by the author) continues to be governed by general international law which does not provide for a *single* "régime" for "historic waters" or "historic bays," but only for a particular régime for each of the concrete, recognized cases of "historic waters" or "historic bays" (italics original) (100).

In addition, there is a scholarly writing that does not admit establishment of general international law relating to historic waters.<sup>80</sup> Such a position is led by a judgement that due to

<sup>78</sup> In this regard, regarding Tunisian claims to historic rights in the Tunisia/ Libya Continental Shelf Case, one scholar pointed out that they were not claims to historic rights and claims of exceptions to a general rule, either. According to this scholar, Tunisia alleged factors to be considered in drawing straight baselines. Such an idea is similar to that of this paper in admitting that both exceptions to a general rule, on the one hand, and drafting of a general rule to allow considerations of concrete and individual circumstances, on the other hands, are common as a way to respect individual and concrete claims to rights. Andrea Gioia, "Tunisia's Claims over Adjacent Seas and the Doctrine of 'Historic Rights,'" *Syracuse Journal of International Law*, vol. 11, 1984, p. 339. The same idea is found in the examination of Tunisian claims by posing a question: whether they were claims of historic waters, or claims of straight baselines, *ibid.*, p. 345 *et seq.*

<sup>79</sup> *Op. cit.*, *supra* n. 23, p. 18.

<sup>80</sup> Rosenne, *op cit.*, *supra* n. 36, p. 203. If this position denies that title to historic waters and the definition

too much variety of claims to historic waters to derive common elements, although there is an attempt to set forth the requirements for historic waters,<sup>81</sup> it is not possible to precisely define them,<sup>82</sup> or it is even inappropriate to do that. Such suggestion of the inappropriateness may lead to a conclusion that historic rights are not matters for legal regulation, and that they should be considered as extra legal issues. Actually, after the 1962 Report was released, ILC did not work on the issue, and in 1967 many members of ILC raised a doubt about the timing of ILC's intensive works on this issue, because it provoked political claims.<sup>83</sup> Such a doubt, too, reflects the idea that the issue of historic waters do not fall within a sphere of legal regulation.

Whatever the legal status of historic waters may have under international law, it is really true that the issue strongly requires consideration of concrete and individual circumstances of each case. Doubtlessly, it holds true with historic rights.

Thus far, the possible logics have been analyzed, which are applied to the issue of historic waters, and historic rights, too. Based upon this analysis, evaluation can be given on the logic which the tribunal adopted in the Award.

#### (4) The Logic of the Tribunal in the Award with Respect to Regulation by UNCLOS over Historic Rights

① The tribunal found that China's historic rights are independent from UNCLOS, and that UNCLOS is comprehensive. Independence from UNCLOS signifies no ground for China's historic rights under UNCLOS. Therefore, as far as comprehensiveness of UNCLOS is presupposed, the conclusion that rights under UNCLOS superseded China's historic rights (and that China's historic rights are not preserved as exceptions to UNCLOS) is said to be logically self-evident. The tribunal regarded China's historic rights as exceptions in relation to the legal ocean order prior to UNCLOS. However, it did not mention possible status of China's historic rights as exceptions to UNCLOS. Irrespective of that, as a logical conclusion derived from the comprehensiveness of UNCLOS, exceptions to it would not be admitted, unless UNCLOS

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are regulated by customary international law and general international law, historic waters would go beyond the sphere of international law regulation. In this regard, attention should be paid to the analysis conducted in the 1962 Report. It introduces two positions regarding historic waters: first, they form exceptions to a general rule, and second, they are not be defined as exceptions to a general rule. The logic of the second position is that as there has not established a general rule relating to bays, exceptions to a general rule is unthinkable. The point is that this position denies a general rule relating to historic waters, but it does not mean denial of legal regulation itself over historic waters. The 1962 Report, paras. 49-50.

<sup>81</sup> The 1962 Report proposes three requirements for historic waters: first, the authority exercised over the area by the State claiming it is as "historic waters"; second, the continuity of such exercise of authority; and third, the attitude of foreign States. The 1962 Report, para. 185. In Japan, in the Tekisada case in which the legal status of Setonaikai was disputed, both Wakayama District Court and Osaka High Court declared two requirements for historic waters: first, the claims to internal waters have become continuous and historical practice; and second, inexistence of disputes over the claims. Judgment of 15 July of 1974, Wakayama District Court, *Hanrei Jiho (Law Cases Report)*, No. 844, p. 105; Judgment of 19 November 1976, Osaka High Court, *Hanrei Jiho (Law Cases Reports)*, No. 844, p. 102.

<sup>82</sup> Scovazzi seems to take such a position. Tullio Scovazzi, "Le régime des eaux historiques," in D. Pharand & U. Leanza eds., *The Continental Shelf and the Exclusive Economic Zone: Delimitation and Legal Regime*, Martinus Nijhoff, 1993, p. 326 *et seq.*

<sup>83</sup> Report of the Commission on the Work of Its 19th Session, A/ 6709/ Rev. 1 and Rev. 1/ Corr.1, para. 45. In a preliminary work for the 1962 Report, opinions were divided into two possibilities: first, inductive method to examine State practice; and second presupposing a general rule relating to historic waters. The second position was based upon a worry about extravagant claims to be found in State practice, and in that sense, such a political consideration might provoke a doubt about verification of State practice. The 1962 Report, para. 62; Nakamura, *op. cit.*, *supra* n. 58, p. 32.

expressly provides for exceptions.

Referring to the first, second, and third logics explained above, the tribunal's logic is different from the first logic, in that it did not admit exceptions to a general rule, namely UNCLOS. Although by express provisions they would be admitted, the tribunal's logic rather placed emphasis on the comprehensiveness of UNCLOS. Is it proper to deny any grounds for historic rights under UNCLOS, except for in cases of Article 10, Paragraph 6 (historic bays), Article 15 (historic titles), and Article 298, Paragraph 1 (a) (i) (historic bays, historic titles)?<sup>84</sup> In this regard, doubt is raised concerning the propriety, because the tribunal denied China's historic rights not in terms of the opposability in relation to the Philippines, but in terms of the effect *erga omnes*.<sup>85</sup> The tribunal's logic is also different from the second logic that denies existence of a general rule, as the tribunal presupposes UNCLOS.

② As the final choice, did the tribunal adopt the third logic so that it considered China's historic rights in interpreting and applying the provisions of UNCLOS? Did it secure international regulation by UNCLOS over historic rights by providing UNCLOS with such elasticity as considerations of historic rights with concrete and individual circumstances?

With regard to territorial sea, the tribunal admitted artisanal, traditional fishing of the Philippines in territorial seas (805 *et seq.*). This is because Article 2, Paragraph 3 of UNCLOS contains an obligation on States to exercise their sovereignty subject to "other rules of international law" that include the rules on the treatment of a vested right, such as traditional fishing rights. Some provision among those regarding the EEZ regime is interpreted as indicating considerations of historic rights. Depending on such a provision, without hampering the comprehensiveness of UNCLOS that the tribunal emphasized, historic rights would have room to be preserved.

Concerning the provisions on the EEZ regime, the tribunal examined Article 56, Paragraph 1, Article 58, and Article 62. Article 62, Paragraph 3 may be interpreted as reflecting considerations of historic rights to fishing. Scholarly writings point out that this provision indirectly admits historic rights to fishing.<sup>86</sup> In contrast, irrespective of reference to the provision (804), the tribunal interpreted the provision as follows. It does not intend to preserve historic fishing rights, while it does not exclude them being based upon domestic laws of coastal States and international agreements. As a conclusion, the tribunal found that by establishing the EEZ and continental shelf regimes UNCLOS superseded historic rights to living and non-living resources.<sup>87</sup> It is voiced that as UNCLOS "overwrote" historic fishing rights by Article 62, Paragraph 3, there would be no room for historic fishing rights beyond that.<sup>88</sup>

The tribunal's interpretation of UNCLOS is not easily understood in that while it admitted historic fishing rights (vested rights) within territorial sea under Article 2, Paragraph 3, in EEZ, despite the existence of Article 62, Paragraph 3, it denied an intention of UNCLOS to preserve historic fishing rights. Particularly considering that although coastal States have full sovereignty over territorial seas, they have solely sovereign rights with limitation on its purpose and function over EEZs, the tribunal's conclusion is not easy to understand. One possible explanation for the tribunal's position would be different understandings by the tribunal of the territorial sea

<sup>84</sup> Article 46 (b) is also related to historic rights.

<sup>85</sup> Sakamoto emphasizes this point. Sakamoto, *op. cit. supra* n. 35, p. 200.

<sup>86</sup> McDorman, *op. cit., supra* n. 34 (Rights and Jurisdiction...), p. 157; McDorman, *op. cit., supra* n. 34 (The Law of the Sea Convention...), p. 153; Symmons, *op. cit., supra* n. 24, p. 148.

<sup>87</sup> Submission No. 10 of the Philippines referred to Article 62, Paragraph 3 as a provision addressing a traditional fishing right, in alleging the preservation of such a right as the Philippines enjoys at Scarborough Shoal (782-783).

<sup>88</sup> Nishimoto, *op. cit., supra* n. 19, pp. 243-244.

and EEZ regimes. On the one hand, the EEZ regime bears the *sui generis* nature (Article 55) that UNCLOS itself regulates, and UNCLOS does not permit diversion from it unless there are domestic laws and international agreements to provide for historic fishing rights. On the other hand, with regard to territorial seas, UNCLOS intends to respect restriction imposed on sovereignty by “other rules of international law.”

Even if Article 62, Paragraph 3 is interpreted as providing for consideration of historic rights, a clear conclusion is difficult to derive regarding the degree to which China’s historic rights are preserved. This is because the article stops at providing that:

“[I]n giving access to other States ...the coastal State shall take into account ... the need to minimize economic dislocation in States whose nationals have habitually fished in the zone.”

In the end, the tribunal did not see such significance in Article 62, Paragraph 3 as examined here. There is no idea to be seen in the tribunal to provide UNCLOS, which is comprehensive, with such elasticity as considering China’s historic rights in “interpreting” and “applying” the article.<sup>89</sup> As a matter of logic the tribunal might be said to be coherent in that without seeing the significance of Article 62, Paragraph 3, based upon the comprehensiveness of UNCLOS it regarded China’s historic rights as having been superseded by it. Nonetheless, incorporation of considerations of historic rights into legal function of interpretation and application of Article 62, Paragraph 3 could be possible without hampering the comprehensiveness of UNCLOS. By doing so, the tribunal could have substantially given legal assessment to China’s claim to historic rights.

③ Furthermore, the tribunal seems to apply the same logic regarding the relationship between historic rights and the EEZ regime to that between historic rights and the continental shelf regime. It did not expressly make any distinction between the two regimes.<sup>90</sup> It found that China’s historic rights are superseded in the sea areas (and seabed) to which the EEZ regime or the continental shelf regime applies under UNCLOS (247). The tendency of disregarding distinction between the EEZ and the continental shelf regimes is seen also in the Award on the Merits of the Arctic Sunrise Arbitration.<sup>91</sup> In this case, the arbitral tribunal seemed to equate the EEZ and the continental shelf regimes in relation to non-living resources.<sup>92</sup> Such an equation is also opined by some scholars.<sup>93</sup> In the South China Sea dispute, the tribunal found that China’s historic rights

<sup>89</sup> The tribunal interpreted the arbitral award on the Eritrea v. Yemen arbitration that the preservation of the traditional fishing practices was a result of the application of the applicable laws in that case (259, 803).

<sup>90</sup> Regarding continental shelf, the tribunal mentioned Article 77 and Article 81 (244).

<sup>91</sup> The Arctic Sunrise Arbitration (Netherlands v. Russia), Award on the Merits of 14 August 2015, <https://pcacases.com/web/sendAttach/1438>, for instance, paras. 278, 330.

<sup>92</sup> Atsuko Kanehara, “Haitateki Keizaisuiiki no Engankoku no Kenri-Arctic Sunrise go Jiken wo Sozai to Shite - (The Rights of Coastal States of Exclusive Economic Zones- An Analysis of the Arctic Sunrise Arbitration),” *Jochi Hogaku Ronshu (Sophia Law Review)*, Vol. 64, No. 3 · 4, 2017, pp. 245-246, 254, 269-271.

<sup>93</sup> Irrespective of the fact that difference is pointed out between the EEZ and the continental shelf regimes regarding living resources, with respect to non-living resources, the two regimes are said to overlap each other. D. D. Rothwell and T. Stephens, *The International Law of the Sea*, the 2nd ed., Hart Publishing, Oxford and Portland, Oregon, 2016, p. 125. In comparison, although it was somehow in a different context, so-called “grey areas” also have some implications on the relationship between the two regimes. The “grey areas” were determined by the International Tribunal of the Law of the Sea and the arbitral tribunal on the Bay of Bengal Case. They mean that seabed of one State’s EEZ may become extended continental shelf of the other State. Admission of grey areas may imply that the EEZ regime applies solely to water areas, and it is the continental shelf regime that applies to seabed both within and beyond 200 nautical miles. In the following judgment and award grey areas were found. Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of

are at variance with both the EEZ and the Continental shelf regimes in relation to living and non-living resources.

With respect to continental shelf, some scholars doubt acquisition of historic rights over continental shelf.<sup>94</sup> The tribunal in the Award mentioned Article 77 of UNCLOS, and it equated the EEZ and the continental shelf regimes in terms of living and non-living resources. It did not declare any special meaning of the article relating to the continental shelf regime.<sup>95</sup> The right of a coastal State over continental shelf, as declared by ICJ in the North Continental Shelf Case,<sup>96</sup> “*ipso facto*” and “*ab initio*” belongs to it, and occupation and other measures are not needed for it to establish its right over continental shelf.<sup>97</sup> This nature is frequently described as “inherency.” As a logical consequence, it is argued that the rights to continental shelf is not based upon UNCLOS and the 1958 Convention on Continental Shelf, but based upon customary international law.<sup>98</sup> Even it is argued that initially the basis of the rights to continental shelf can be traced to the principle “land dominates sea,”<sup>99</sup> so that they are established by this very fundamental principle without being based upon treaties and customary international law.<sup>100</sup>

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Bengal (Bangladesh/ Myanmar), Judgment of 14 March 2012, [https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_16/C16\\_Judgment\\_14\\_03\\_2012\\_rev.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/C16_Judgment_14_03_2012_rev.pdf), paras. 463-476; In the Matter of the Bay of Bengal Maritime Boundary Arbitration between The People's Republic of Bangladesh and The Republic of India, Award, 7 July 2014, <https://pcacases.com/web/sendAttach/383>, paras. 498-508. It is pointed out that admission of grey areas connotes supremacy of rights to (extended) continental shelf over rights to seabed of EEZs. T. L. McDorman, “The Continental Shelf,” in D. D. Rothwell *et al* eds., *The Oxford Handbook of the Law of the Sea*, Oxford University Press, 2015, p. 200.

<sup>94</sup> Nishimoto, *op. cit.*, *supra* n. 19, p. 245.

<sup>95</sup> The rights of coastal States to EEZs are based upon the *sui generis* regime established under Article 55 of UNCLOS. In contrast, the rights of coastal States to continental shelves bear inherency in accordance with Article 77. In this sense, the two kinds of rights may be distinguished.

<sup>96</sup> North Sea Continental Shelf Cases (Federal Republic of Germany/ Denmark; Federal Republic of Germany/ Netherlands), Judgment of 20 February 1969, *ICJ Reports 1969*, p. 3.

<sup>97</sup> Based upon this point it is said that historic rights cannot be claimed against rights of coastal States to continental shelves. McDorman, *op. cit.*, *supra* n. 34 (Rights and Jurisdiction…), p. 160; McDorman, *op. cit.*, *supra* n. 34 (The Law of the Sea Convention…), pp. 152-153.

<sup>98</sup> In the Odeko Nihon Case, it was ruled that although Japan was not a party to the 1958 convention on Continental Shelf, it may enjoy the rights based upon customary international law relating to the continental shelf regime. Judgment of 22 April 1982, Tokyo District Court, *Gyosei Jiken Saiban Rei Shu (Administrative Cases Reports)*, Vol. 33, No. 4, p. 868.

<sup>99</sup> In the Fishery Case, ICJ stated that: [i] t is the land which confers upon the coastal State a right to the waters off its coast (133). Similar remarks are found in the judgment of the North Sea Continental Shelf Case (30), *op. cit.*, *supra* n. 96, and the judgment in the Bay of Bengal Case (409), *op. cit.*, *supra* n. 93.

<sup>100</sup> As a different opinion concerning the “inherency” of the rights to continental shelf, it is voiced that One of the aims behind the propagation of the doctrine was to annul any priority of claim in time or nature over the rights of the coastal State, so that, for example the doctrines of historic rights or acquisitive prescription would not be available.

Daniel Patrick O’Connell, edited by I. A. Shearer, *The International Law of the Sea*, Vol. I, Clarendon Press, 1982, p. 482; see also, *ibid.*, vol. II, p. 713; Gioia, *op. cit.*, *supra* n. 78, pp.

371-372. Regarding the territorial sea regime, O’Connell stated that:

There is no precedent for a successful claim to continued fishing rights in waters newly converted to territorial waters, so that the claim made in this case of adjacent fishery zone had the appearance of a novel institution - in the absence of treaty rights - which could be rationalized only on the basis of practice. However, the practice has favoured phasing-out rather than maintenance of rights, and phasing-out presupposes a concession rather than a recognition of a right, so that, it is difficult to regard the practice as more than diplomatic expediency, although it has been widespread, and therefore politically influential. While most traditional fishing rights are opposable to states extending their fishery limits…only when derived from treaty, it is possible for them to derive from



Such arguments would provoke an issue of validity of international law, or maintenance of international regulation over the rights to continental shelf. Here, it suffices to point out the fact that concerning the rights to continental shelf, too, there would be an issue of validity of international law,<sup>101</sup> because the tribunal in the Award did not touch upon the issue. As a matter of logic, it was enough for the tribunal to emphasize the comprehensiveness of UNCLOS and to find the contradiction between China's historic rights and the rights to continental shelf under UNCLOS, in order to deny China's historic rights. In the Award there was no need to address the issue of the inherency of the rights to continental shelf. Apart from this, there would be an argument concerning the relationship between historic rights and the rights to continental shelf that are "inherent."<sup>102</sup> Here it is also meaningful to note that there is an opinion that while in relation to the rights to EEZ historic rights may be considered, in relation to the rights to continental shelf, because of the "inherent" nature, no historic rights may be claimed.<sup>103</sup>

## 4. Concluding Remarks

### (1) A Doubt Concerning the Logic of the Tribunal in the Award

This paper examined the Award from the perspective of the logic for international regulation by

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a domestic legal source in the coastal State, although in this case it is questionable whether the coastal State may not revoke them without breach of international law.

*Ibid.*, Vol. I, p. 538.

<sup>101</sup> The issue of validity of international law or maintenance of international regulation may be raised in relation to outer continental shelf. It would be questioned on what basis non-party States to UNCLOS enjoy the rights to outer continental shelf, and if they do, whether they should comply the procedures including those relating to the Commission of Limits of Continental Shelf that was established by UNCLOS. As an opinion that emphasizes that the rights of a coastal State to outer continental shelf exist "ipso facto" and "ab initio" as being declared by ICJ in the judgment of the North Sea Continental Shelf Case, see, Ted L. McDorman, "The International Legal Framework and the States Activities Regarding the Continental Shelf beyond 200-n. Miles in and Adjacent to the East and South China Sea," in Jon M. Van Dyke et al. eds., *Governing Ocean Resources-New Challenges and Emerging Regimes, A Tribute to Judge Choon-Ho Park*, Martinus Nijhoff Publishes, 2013, p. 169. Nonetheless, he cited an opinion that a coastal State's "inherent" right to continental shelf under Article 77, Paragraph 3 of UNCLOS does not remove from the coastal State the burden of demonstrating its entitlement. Ted L. McDorman, "The Outer Continental Shelf in the Arctic Ocean: Legal Framework and Recent Developments," in Davor Vidas ed., *Law, Technology and Science for Oceans in Globalization - IUU Fishing, Oil Pollution, Bioprospecting, Outer Continental Shelf*, Martinus Nijhoff Publishers, 2010, pp. 504-506. See also, Atsuko Kanehara "200 Kairi wo Koeru Tairikudana no Genkai Settei wo Meguru Itikosatsu (Some Considerations Concerning the Limitation of Outer Continental Shelf)," Murase and Eto eds., *Kaiyo Kyokai Kakutei no Kokusaiho (International Law of Maritime Delimitation)*, Toshindo, 2008, pp. 109-116.

<sup>102</sup> In his Separate Opinion in the Tunisia/ Libya Continental Shelf Case, Aréchaga stated that:  
 "[A] new legal concept, consisting in the notion introduced in 1958 that continental shelf rights are inherent or 'ab initio' cannot by itself have the effect of abolishing or denying acquired and existing rights. That would be contrary to elementary legal notions and to basic principles of intertemporal law."

Separate Opinion of Judge Jiménez Aréchaga, *op. cit.*, *supra* n. 23, para. 82, cited by Gioia, *op. cit.*, *supra* n. 78, p. 372.

It was not indicated by him what the elementary notions and basic principles of intertemporal law are. If they were the concept and/ or principle of non-retroactivity, according to them, law could not deny or change acquired and existing rights. As an observation on this point, see, Gioia, *op. cit.*, *supra* n. 78, p. 372.

<sup>103</sup> See, *supra* n. 97.

UNCLOS and its validity over China's claims to historic rights.

The tribunal, on the one hand, did not adopt the logic that admits exceptions to a general rule, setting aside the cases in which provisions expressly permit exceptions. On the other hand, it did not follow the logic to leave room for considerations of concrete and individual rights, such as historic rights in interpreting and applying a general rule. These two logics provide a law with elasticity, in that the former assumes a general rule which admits exceptions to it, and in that the latter assumes a general rule which permits considerations of rights based upon concrete and individual circumstances. In sum, the tribunal denied to give elasticity to UNCLOS in either way. It is doubtful whether such interpretation of UNCLOS is the best one in order to ensure the regulation and the validity of UNCLOS when it faces claims to historic rights that strongly require considerations of concrete and individual circumstances. The tribunal's logic that emphasizes the comprehensiveness of UNCLOS may have a risk of making UNCLOS inflexible so that validity of UNCLOS as a law and regulation by UNCLOS over various phenomena would fall in danger. Neither the tribunal maintains validity of UNCLOS as a law that would be maintained if it were interpreted as permitting exceptions in case of phenomena being at variance with it, unless it explicitly admits exceptions. Nor the tribunal keeps the regulation of UNCLOS over historic rights based upon concrete and individual circumstances, which would be preserved if it were interpreted as giving the room for considerations of those circumstances. In the end, it did not substantially give legal assessment to China's claim to historic rights.<sup>104</sup>

One of the most important rulings of the Award is that the tribunal clearly denied China's historic rights by emphasizing the comprehensiveness of UNCLOS. However, assessment to be given is that it was not successful to build logic for UNCLOS and international law to secure incessantly and in a solid manner their validity as laws in facing various phenomena to be expected to be legally regulated. International law really needs to keep its validity as a law and its regulation over emerging phenomena and claims to rights based upon pre-existing laws, as well.

Regarding an issue of validity of international law, in addition to the issue of the logic of how to regulate phenomena, which has been thus far analyzed in this paper, dispute settlement procedures, particularly judicial or arbitral procedures that interpret and apply laws have a close relation to it. Thus, in the ending part

of this paper, the finding of the Award on Article 298, Paragraph 1 (a) (i) and the tribunal's determination of jurisdiction to entertain the dispute will be succinctly addressed.

## **(2) The Finding of the Tribunal in the Award on Article 298, Paragraph 1 (a) (i) of UNCLOS**

① The tribunal concluded that the dispute concerning China's historic rights are not excluded from its jurisdiction by Chinese declaration of 2006 pursuant to Article 298, Paragraph 1 (a) (i), for the reason that according to the tribunal, China's historic rights are rights to living and non-living resources being different from historic titles under the article. Considering the scholarly writings in relation to historic waters and historic rights that were referred to above,<sup>105</sup> it is well grounded to make distinction between titles to historic waters and rights, short of sovereignty, to particular activities and resources. Nevertheless, it is not clear whether Article 298, Paragraph 1 (a) (i) was drafted with intention to give the term "title" such a definitely limited meaning as excluding

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<sup>104</sup> As observed above, in Section 3 (1), the Tribunal's interpretation of Article 311 of UNCLOS is also said to prevent it from determining the customary international law that may give grounds for historic rights and providing substantial consideration on China's claim to historic rights in accordance with the customary international law, if there is any.

<sup>105</sup> Section 2 (2).

a right to particular activities and resources.<sup>106</sup> If the tribunal reached this conclusion in the situations that the interpretation of the term historic titles has not been established yet,<sup>107</sup> and that there is not generally shared view of its meaning,<sup>108</sup> the tribunal's position may be understood as remarkable interpretation in limiting the meaning of the term titles. That means the tribunal adopted interpretation by which possibility of compulsory dispute settlement procedures entailing binding force (hereinafter referred to as judicial procedures as far as no misunderstanding would be expected) increases.<sup>109</sup> It is not difficult to speculate existence of motivation for jurisdiction of the tribunal at the background for such interpretation by the tribunal.

② Another point is to be raised, concerning the tribunal's interpretation of the term historic titles. Article 298, Paragraph 1 (a) (i) might not make definite distinction between historic bays or titles, on the one hand, and historic rights on the other hand. If it is the case, the object of the article could be to deny judicial procedures for any claims to "historic" things (claims to historic bays, historic waters and historic rights), and thus, to deny interpretation and application of law by judicial procedures in relation to any claims to "historic" things.<sup>110</sup> In other words, the object of UNCLOS could be to deny legal regulation over any claims to "historic" things, at least in the sense that interpretation and application of UNCLOS by judicial procedures are not given to these things.<sup>111</sup> In contrast, if the tribunal's interpretation of Article 298, Paragraph 1 (a) (i) purported to limit the meaning of historic bays or titles, in other words to limit exceptions to judicial procedures, so that it kept "wide" jurisdiction of judicial procedures, such interpretation,

<sup>106</sup> The Virginia Commentary does not provide commentaries to the provision. Myron H. Nordquist et al eds., *United Nations Convention on the Law of the Sea 1982 - A Commentary*, Vol. V, Article 298. Accordingly it did not give support to either of interpretations of "titles," that by the tribunal and other.

<sup>107</sup> Donald R. Rothwell. "Conciliation and Article 298 Dispute Resolution Procedures under the Law of the Sea Convention," in Shicun Wu and Keyuan Zou eds., *Arbitration Concerning the South China Sea - Philippines versus China*, Routledge, 2016, p. 62.

<sup>108</sup> It is pointed out that while under Article 298, Paragraph 1 (a) (i) historic bays have specific meaning, it does not the case for historic titles, which may have wider meaning than historic titles under Article 15 of UNCLOS. McDorman, *op. cit., supra* n. 34 (Rights and Jurisdiction...), p. 152; McDorman, *op. cit., supra* n. 34 (The Law of the Sea Convention...), p. 152; Zou and Liu, *op. cit., supra* n. 12, p. 144. As understanding of the terms, historic rights, historic titles, and historic waters, the tribunal's terminology may be a possible one. However, in State practice and scholarly writings these terms are sometimes used interchangeably, and thus, it is said that they do not have coherent meanings. Concerning the terminology in scholarly writings, see, Li and Li, *op. cit., supra* n. 3, pp. 291-293. As to the incoherency in State practice, see, McDorman, *op. cit., supra* n. 34 (The Law of the Sea Convention...), p. 150. Symmons opines that under Article 298, Paragraph 1(a) (i) "title" has wider meaning than "bay" to include claims to historic rights. Symmons, *op. cit., supra* n. 24, pp. 146, 155.

<sup>109</sup> Zou maintains that China can invoke exclusion of the dispute over the nine-dash line from jurisdiction of judicial procedures in accordance with Article 298, Paragraph 1 (a) (i) and that China has preferred bilateral negotiations to judicial procedures regarding territorial and maritime disputes. Zou Keyuan, "China's U-Shaped Line in the South China Sea Revisited," *Ocean Development & International Law*, Vol. 43, 2012, p. 29. In his other work, Zou defines China's historic rights as "tempered sovereignty" that is different from both an exclusive right and a non-exclusive right to fishing on the high seas. Although he suggests that China can invoke Article 298, Paragraph 1 (a) (i), it cannot be judged whether this position is consistent with his understanding of China's historic rights, as he does not provide any interpretation of "titles" under the provision.

<sup>110</sup> Strupp criticizes the Chinese scholarly writings that interpret the object of Article 298, Paragraph 1 (a) (i) as to freeze the situations prior to UNCLOS. Michael Strupp, "Maritime and Insular Claims of the PRC in the South China Sea under International Law," *Zeitschrift für Chinesisches Recht*, Bd. 16, 2004, pp. 8-9.

<sup>111</sup> As an analysis of the conciliation under UNCLOS as a possible dispute settlement procedure for the South China Sea dispute, in case in which the tribunal denies its jurisdiction to entertain it, see, Rothwell, *op. cit., supra* n. 106, pp. 55-69.

although possibly different from the object of UNCLOS, may widen the sphere of legal regulation by UNCLOS, as far as interpretation and application of UNCLOS by judicial procedures are concerned.

③ In contrast, the tribunal in the Award took a position that may increase exceptions to judicial procedures in interpretation of Article 298, paragraph 1 (a) (i), which means limiting its jurisdiction.

The tribunal denied (215) the Philippines' argument that historic bays and titles under Article 298, Paragraph 1 (a) (i) should be interpreted in connection with maritime delimitation (191).

However, in the drafting process there existed an opinion that purported to provide for the disputes concerning maritime delimitation separately from those concerning historic bays, and an opinion that combined the two types of disputes. The latter was adopted.<sup>112</sup> Considering this, the fact that the tribunal separated the disputes concerning historic bays or titles from those concerning maritime delimitation, is understood as interpretation that may increase exceptions to judicial procedures. This is because according to the tribunal's interpretation, the disputes concerning historic bays or titles form exceptions to judicial procedures, which are independent from exceptions of disputes concerning maritime delimitation.

### **(3) Relation between Interpretation of Article 62, Paragraph 3 of UNCLOS and Dispute Settlement Procedures**

Relating to regulation by UNCLOS, in this paper a possibility was already suggested to interpret Article 62, Paragraph 3 as allowing considerations of historic rights. In that case, historic rights are considered by interpreting and applying the provision of UNCLOS, which enables UNCLOS, a law, to regulate them and to legally appreciate them. In doing that, the tribunal could have substantially assessed China's historic rights. Such interpretation of Article 62, Paragraph 3, from a logical perspective, would not hamper the comprehensiveness of UNCLOS that the tribunal emphasized. A reservation should be immediately added, however, that even if such interpretation of Article 62, Paragraph 3 is adopted, whether UNCLOS can legally assess historic rights with concrete and individual circumstances would depend on the following factors: first, to what extent the provision precisely and objectively provides for the contents of concrete and individual circumstances that are to be considered in its interpretation and application; and second, to what extent judicial or arbitral procedures are used, which fulfill the function of interpretation and application of Article 62, Paragraph 3.

From this perspective, it is noted that Article 297, Paragraph 3 (a) disputes concerning Article 62, Paragraph 3 form exceptions to compulsory judicial or arbitral procedures. Accordingly, even if the tribunal had adopted such interpretation of Article 62, Paragraph 3 as allowing consideration of historic rights so that historic rights as being within the reach of its regulation are to be legally assessed, it would have been difficult for judicial or arbitral procedures to treat disputes concerning claims to historic rights. To the extent that Article 297, Paragraph 3 (a) excludes the disputes concerning claims to historic rights from compulsory judicial and arbitral procedures, so that application of UNCLOS by these procedures to those disputes are not ensured, UNCLOS is said to release historic rights from its regulation.

### **(4) The Finding of the Jurisdiction of the Tribunal in This Case**

Finally, it is useful to consider the characteristic of the tribunal's finding of its jurisdiction over this dispute. The tribunal, in the Award on Jurisdiction and Admissibility, defined this dispute as follows:

“[A] dispute concerning the interaction of the Convention (UNCLOS, by the author) with

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<sup>112</sup> The Virginia Commentary, *op. cit.*, *supra* n. 106, Article 298. 17.

*another instrument or body of law*, including the question of whether rights arising under *another body of law* were or were not preserved by the Convention, is unequivocally a dispute concerning the interpretation and application of the Convention (emphasis added)” (168).

Here the tribunal included a dispute concerning the interaction of UNCLOS with another instrument or body of law in the disputes concerning interpretation or application of UNCLOS. It might be said that by doing this, the tribunal widened the concept of a dispute concerning interpretation or application of UNCLOS, so that the number of disputes that are subject to the dispute settlement procedures under UNCLOS would increase.<sup>113</sup> Although wide possibility is not guaranteed, to the extent that at least some of these disputes are subject to judicial or arbitral procedures that interpret and apply UNCLOS, its regulation over them is ensured. In that sense, the tribunal's definition of a dispute concerning interpretation or application of UNCLOS may demonstrate its positive attitude toward widening the sphere of regulation by UNCLOS.

This paper focused upon the logic of the tribunal relating to regulation by UNCLOS from a perspective of validity of international law. It raised a doubt to the tribunal's logic in the Award. ICJ in the judgment of the Fishery Case ruled that the Norwegian straight baseline method is one application of a general rule, and scholarly writings define claims to historic waters as exceptions to a general rule. The logics found in them are really devices to provide international law with elasticity, in order to maintain legal regulation over phenomena that require considerations of concrete and individual circumstances, and in order to keep it as a law even in facing exceptional phenomena. In sum, these logics are devices in order to keep validity of international law. In contrast to them the tribunal's logic in the Award is problematical.

As examined in the ending part of this article, the goal of ensuring validity of UNCLOS is not achieved solely by devising logic of international regulation. The dispute settlement procedures, mainly judicial or arbitral procedures that interpret and apply UNCLOS, are closely related to the achievement of the goal. Furthermore, in the South China Sea dispute, the tribunal's logic of legal regulation is applied solely to the interaction between a body of law concerning historic rights, and the EEZ and the continental shelf regimes. For other issues, UNCLOS would need different logical devices in order to maintain its validity and regulation. The tribunal's logic is only one possibility. Accordingly, how to ensure validity of UNCLOS, validity of international law still requires further considerations including examination of dispute settlement procedures.

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<sup>113</sup> As an analysis of the concept of a dispute concerning interpretation or application of international law, Kanehara, *op. cit., supra* n. 18.

# 1969 Report by UN Economic Commission for Asia and the Far East: A Turning Point in the Historical Debate over Senkaku Islands

Monika Chansoria\*

## Abstract

Historical narratives, re-interpretations, and/or distortions of history have been critically linked to colonial legacies and experiences, with the objective to redraw frontiers and expand spheres of influence by some states in the name of history. In this reference, a seemingly escalating contest in the East China Sea appears to be getting intensely trapped in an unending state – a state, that of perpetuity involving a geo-strategic struggle between China and Japan revolving, among other issues, around the increasingly strained and strategically located Senkaku Gunto (Islands). This paper chronicles the history of the Senkaku Islands that can be segmented in sections highlighting the key milestones and defining the course of their existence. It remains well recorded and archived that the debate over the status of the Senkaku Islands was not highlighted as much until the decade of the 1960s. The contest being witnessed today remained relatively dormant till it reached a turning point in 1969. The contemporary history and ensuing future of the Senkakus potentially got ‘rediscovered’ by China with the discovery of huge deposits of oil and hydrocarbons in the waters surrounding the Islands in 1969 – a detection that prompted a series of vehement statements and counter-statements. The UN Economic Commission for Asia and the Far East (ECAFE) [thereafter known as the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP)] conducted extensive geophysical surveys in 1968 and 1969, which suggested the possible existence of the ‘richest seabed with oil and hydrocarbon deposits’ in the waters off the Senkaku Islands, to the extent of being close to the one existing in the Persian Gulf. The strategic and economic consequences of the 1969 UN discovery provided fresh impetus to the interests, claims, and contest over the Senkaku Islands. This, in a way, summarizes the vital contemporary geopolitical and geo-strategic relevance to the Senkaku Islands, which remains embedded in history. Asia’s historical past during the 20th century and its preceding period will likely continue casting a shadow on its future stability.

Re-visiting Asia’s historical and geopolitical narratives often sparks the debate as to how nation-states and its peoples view the impact and fallout of political and strategic legacies carved out from the dusty pages of history. Asia’s past remains enmeshed in disputes, wars, economics, and politics, thus making an indelible mark on demographics, borders, political systems, laws and customs, economies, cultural influx, and, identities.<sup>1</sup> The defining trends of Asia’s colonial past continue to cast a shadow upon Asia’s future that remains firmly weaved with it.<sup>2</sup> The Asian experience does not get limited to historical connotations only. Historical narratives, re-interpretations, and/or distortions of history have been critically linked to colonial legacies and experiences, with the objective to redraw frontiers and expand spheres of

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<sup>1</sup> Monika Chansoria, “Influence of Asia’s Colonization: Debating the Past, Present, and Future of Territorial Issues,” *Japan Review*, vol. 2, no. 1, Summer 2018.

<sup>2</sup> *Ibid.*

influence by some states in the name of history.<sup>3</sup> In this reference, a seemingly escalating contest in the East China Sea is trapped in an unending state. This state is one of perpetuity involving a geo-strategic struggle between China and Japan revolving, among other issues, around the increasingly strained and strategically located Senkaku Gunto (Islands). China's claims over the Senkaku Islands, which it refers to as Diaoyu Islands is structured around economic interests, domestic political compulsions, issues surrounding national identity and allegiance, requirements of international law and the long-standing baggage of historical grievances.

The history of the Senkaku Islands can be segmented in sections that highlight the key milestones, defining the course of their chronicled journey and existence. Even before the conclusion of the Treaty of Shimonoseki, archival evidence illustrates that Japan exercised effective control over the Senkaku Islands including the Cabinet Decision in January 1895.

Japan maintains that the Senkaku Islands were *terra nullius* before 1895 (i.e. islands that no nation has/had claimed sovereignty over) and “showed no trace of having been under the control of China”.<sup>4</sup> Justifying this *terra nullius* status, Shimojo Masao states that the Chinese claim over Senkaku Islands, i.e., it being a part of Taiwan when it was incorporated into Qing China is contrary to the extent of the Qing China empire, based on documents from that period.<sup>5</sup>

The boundaries of Qing China ended at Mount Jilongshan on Taiwan, while the extent of the Ryukyu Kingdom ended at Gumishan (present-day Kumejima).<sup>6</sup> Therefore, the Islands in between, including the Senkakus, were placed in “no-man’s land” [emphasis added]. For that matter, Japan’s contentions primarily stem out of them being *terra nullius* as per the contemporary mode of *effective occupation and control*.

On January 12, 1895, Japanese Prime Minister, Ito Hirobumi, and other members of the Cabinet were presented with an attachment paper under the title, “Secret No. 133: Matter Concerning the Placement of Markers.” Two days later, the proposal was brought before the Cabinet in a meeting held on January 14, 1895 and the following resolution was adopted:

The Home Minister has requested a cabinet decision on the following matter: the Islands, Kuba-shima and Uotsuri-shima, located north-westward of Yaeyama Islands under the jurisdiction of Okinawa Prefecture, have heretofore been uninhabited islands. Due to recent visits to the said islands by individuals attempting to conduct fishing related businesses, and that such matters require regulation, it is decided that [the islands] be placed under the jurisdiction of Okinawa Prefecture. Based on this decision, the Okinawa Prefectural Governor’s petition should be approved. Since there are no disagreements on the matter, it shall proceed based on the above decision.<sup>7</sup>

With Hirobumi’s final approval to the cabinet decision on January 21, 1895, Meiji Japan formally incorporated the Senkaku Islands into the Okinawa Prefecture. Thereafter, since 1895,

<sup>3</sup> Ibid.

<sup>4</sup> *Terra nullius* is a term used in international law to describe territory which has never been subject to the sovereignty of any state, or over which any prior sovereign state has expressly or implicitly relinquished sovereignty.

<sup>5</sup> For more details see, Shimojo Masao, “A Rebuttal to China’s Fraudulent Claims on the Senkaku Islands,” [Shimane Prefectural Government publication, Tonomachi, Matsue city] available at <https://www.pref.shimane.lg.jp/admin/pref/takeshima/web-takeshima/takeshima04/takeshima04-2/jitsuji-41.data/SENKAKU-Shimojo.pdf>

<sup>6</sup> Monika Chansoria, *China, Japan, and Senkaku Islands: Conflict in the East China Sea Amid an American Shadow* (Routledge, 2018).

<sup>7</sup> Ryukyu Government, “Reference 3: Official Documents,” *History of Okinawa Prefecture*, vol. 13, 1967, p. 593.

they have been a part of the Okinawan Prefecture. Every successive Japanese government, till date, consistently regards the Cabinet Decision of January 14, 1895 as the foundation of its legal basis for asserting and justifying its claims over the Islands. Japan bases its sovereignty claim on the fact that it incorporated the Islands as *terra nullius* on January 14, 1895 and has continuously been occupying the Islands since then. The Government of Japan incorporated the Islands into Japanese territory by lawful means under the international legal framework, existing at that time. After the incorporation of the Senkaku Islands into Japanese territory, Japanese civilians settled on the previously uninhabited islands, having obtained permission from the Japanese government. Settlers ran businesses such as dried bonito manufacture and feather collecting. At one point, the Islands counted more than 200 inhabitants, and taxes were collected from the inhabitants. The Japanese government originally owned all of the Islands until 1932, when the ownership of Uotsuri, Kitakojima and Minamikojima, was transferred to a private Japanese citizen.<sup>8</sup> After Japan's incorporation of the Islands in 1895, a private individual, Koga Tatsushiro and his descendant used some of the Islands for commercial purposes for several decades until World War II, also providing habitation for workers who were employed in his fish processing plant.

### **1920 Certificate of Appreciation by Consul of the Republic of China in Nagasaki**

On an occasion in 1920, it was pointed out by a Japanese writer that the Chinese Consul stationed in Nagasaki acknowledged the Islands as part of the Okinawa District of the Japanese Empire by means of an official letter of appreciation issued by him. This incident is recorded evidence as it involved an emergency rescue mission. The contents of the letter thanked the people of Ishigakijima for rescuing Chinese fishermen who were washed ashore on one of the Senkaku Islands chain, identifying the Islands as part of the Okinawa prefecture.<sup>9</sup> The contents of this letter of appreciation acknowledged that the Chinese Consul recognized the Islands as Japanese territory. This letter was first cited as evidence in the December 1972 edition of the *Okinawa Quarterly*, reading as follows:

During the winter of the eighth year of the Republic of China (1919), Guo Heshun, and thirty-one other fisherman from Huei'an Prefecture, Fujian Province, were met with contrary winds and drifted to Wayo Island, Senkaku Islands, Yaeyama District, Okinawa Prefecture, Empire of Japan. With the earnest rescue by Mr. Tamaesu from Ishigaki Village, the fishermen were able to survive and return to their homeland. Deeply moved by such neighboring sympathy and willingness to perform charity without hesitance, I hereby present this certificate to express my gratitude and thankfulness.

Feng Mian, Consul of the Republic of China in Nagasaki  
May 20<sup>th</sup> The Ninth Year of the Republic of China [1920]

According to another letter by Robert Starr, Acting Assistant Legal Adviser for East Asian

<sup>8</sup> Akira Kato, "The United States: The Hidden Actor in the Senkaku Islands," *Asia Pacific Bulletin*, no. 205, April 2, 2013, East-West Center, Honolulu (HI).

<sup>9</sup> Text of the entire communication is available at [http://www.mofa.go.jp/region/asia-paci/senkaku/pdfs/fact\\_sheet\\_03.pdf](http://www.mofa.go.jp/region/asia-paci/senkaku/pdfs/fact_sheet_03.pdf); for related reference and reading, also see, Okuhara "Senkaku Retto to Ryoyuken Kizoku Montai" (The Problem of the Right of Sovereignty Over the Senkaku Island) *Asahi Asian Review*, no. 22, 1972; also see, Official Release by the Japanese Ministry of Foreign Affairs; and see, "Japan-China Relations Surrounding the Situation of the Senkaku Islands in response to China's Airspace Incursion" *Gaimusho, Position Paper*, December 18, 2012; also see, S. Wei, "The Territorial Dispute over the Tiaoyu/Senkaku Islands: An Update," *Ocean Development & International Law*, vol. 36, no. 1, 2005.



and Pacific Affairs, dated October 20, 1971 – on the instructions of US Secretary of State William Rogers – the Okinawa Reversion Treaty, signed on June 17, 1971, and ratified by the US Senate on November 10, 1971, contained “the terms and conditions for the reversion of the Ryukyu Islands, including the Senkakus.”<sup>10</sup> The Japanese Ministry of Foreign Affairs issued a statement on March 8, 1972, regarding “Rights to Ownership over the Senkaku Islands” making key assertions interpreted as follows:<sup>11</sup>

- 1) Japan conducted deliberate investigation on the Islands between 1885-1895 and confirmed that China did not exercise control over the Islands and that they were *terra nullius*. The Japanese Cabinet Decision of January 14, 1895 incorporated the Senkaku Islands into Japanese territory.
- 2) The Senkaku Islands were *not* included in Taiwan and the Pescadores which were ceded by Article 2 of the Treaty of Shimonoseki in 1895. The Senkaku Islands were *not* part of the territory, which Japan relinquished under the San Francisco Peace Treaty.
- 3) The Senkaku Islands were legitimately transferred to Japan through the Okinawa Reversion Treaty 1971.
- 4) There was Chinese acquiescence until 1969-70.

As an institution, sovereignty revolves around the normative understanding and acceptance of political authority and international recognition, often interpreted to being the immovable cornerstone of the world order based on rule of international law. Traditionally, sovereignty has been conceived of as a singular, unified concept, recalling Hans Morgenthau’s argument that “If sovereignty means supreme authority, it stands to reason that no two, or more, entities can be sovereign within the same time and space”.<sup>12</sup> This primarily renders sovereignty as the final and absolute authority in a political comity. Placing this in the contemporary context, there are multiple and overlapping challenges to sovereignty and imbricating visions due to increase in global flows, and burgeoning economic and political interdependence. Between the autumn of 1969 and spring of 1971, the ‘revival of Japanese militarism’ came up to be a major foreign policy concern in Beijing, and, became the second-most visible international topic in the Chinese press, following the Indochina war.<sup>13</sup> The Chinese perception of threats to regional security saw a marked swing to Japan, away from the border clashes with the Soviet Union which dominated the pages of Beijing’s major publications in 1969. According to a content analysis of *Peking Review*, between February 1969 and February 1971, there was relatively little attention to Japan prior to the autumn of 1969.<sup>14</sup> Thereafter, there was a noticeably steady upswing in the space devoted to Japan until February 1971. During the initial few months of this period, the space devoted to Japan was consistently less than that on either the United States or the Soviet Union. Thereafter, the total pages devoted to Japan exceeded those on the Soviet Union for every month from November 1969 to February 1971, despite China’s major and more immediate concern over the

<sup>10</sup> According to the Okinawa Reversion Treaty Hearings, 91<sup>st</sup> Congress, and see, Larry A Niksch, “Senkaku (Diaoyu) Islands Dispute: The US Legal Relationship and Obligation,” *Asian Affairs*, Foreign Affairs and National Defense Division, US Congressional Research Service, September 30, 1996.

<sup>11</sup> Published by *The Japan Times Online* 2004; for related reference also see, Caleb Wan, “Security Flashpoint: International Law and the Islands Dispute in the Far East,” *New Zealand Post-Graduate Law e-Journal*, no. 2, 2005, p. 18; and see, Reiji Yoshida “Is the Senkaku Row About Nationalism, or Oil?” *The Japan Times*, March 27, 2004.

<sup>12</sup> Hans Morgenthau, *Politics Among Nations: The Struggle for Power and Peace*, (Knopf, New York, 1960).

<sup>13</sup> William Saywell, “Japan’s Role in the Pacific and China’s Response,” *International Journal*, vol. 26, no. 3, Summer 1971 p. 508.

<sup>14</sup> *Ibid*”.

expansion of the Indochina war.<sup>15</sup>

### **1969 UN Report: The Turning Point in Chinese Claims over Senkakus**

As opposed to all the above, China has seemingly failed to provide hard evidence in backing up its purported claim of its presence and/or control/sovereignty over the Islands prior to the late 1800s, other than the usual “... since historical [ancient] times” argument. Under international law, appropriation of territory is legally strengthened by making it public and by not being contested during that particular period. The official incorporation of the Senkaku Islands by Japan would surely have come to the attention of succeeding generational leadership eras whilst they were put to use for economic purposes, resultant tax collection, and inhabitation by Japanese citizens, given that fishermen from Taiwan and China pursuing fishing activities in the area sometimes landed there to escape fiery storms. During the beginning of the 1950s, fishermen from Irabujima near Miyakojima were known to have stayed on Minami Kojima for up to three months to process bonito and maintain vegetable gardens.<sup>16</sup>

It remains well recorded and archived that the debate over the status of the Senkaku Islands was not highlighted as much until the decade of the 1960s. The contest being witnessed today remained relatively dormant till the time when it reached a turning point in 1969. The contemporary history and ensuing future of the Senkakus potentially got ‘rediscovered by China’ with the discovery of huge deposits of oil and hydrocarbons in the waters surrounding the Islands in 1969 – a detection that prompted a series of vehement statements and counter-statements among the claimants. The future of offshore oil development was conceivably one of the primary drivers behind China’s claims over the Senkaku Islands affecting 20, 750 square nautical miles of marine space and mineral resources in the region.<sup>17</sup>

### **Findings of the 1969 UN Economic Commission for Asia and the Far East**

The UN Economic Commission for Asia and the Far East (ECAFE) [presently known as the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP)] – the parent body of CCOP, conducted extensive geophysical surveys in 1968 and 1969, which suggested the possible existence of the ‘richest seabed with oil and hydrocarbon deposits’ in the waters off the Senkaku Islands. The ECAFE surveys further revealed that the continental shelf in the Yellow and East China Seas might be among the richest oil reserves in the world.<sup>18</sup> The geophysical survey conducted in the East China Sea and Yellow Sea in October/November 1968 indicated that the continental shelf between Taiwan and Japan could contain one of the most prolific oil and gas reservoirs in the world, to the extent of being close to the one existing in the Persian Gulf. The survey was undertaken by the United States Government with participating geologists and geophysicists from Taiwan, Japan, and the Republic of Korea. During the cruise, more than 12,000 line-kms of continuous seismic reflection profiles were run with a 30,000 joule

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<sup>15</sup> Ibid., pp. 508, 513.

<sup>16</sup> “A home away from home / Fishermen worked, took shelter, grew vegetables on Senkakus,” *Yomiuri Shimbun*, July 7, 2012; also see, Anthony Reedman and Yoshihiko Shimzaki, *A World of Difference: Forty Years of the Coordinating Committee for Geoscience Programmes in East And Southeast Asia, 1966-2006* (Bangkok, September 2006) p. 43.

<sup>17</sup> For more details see, Martin A. Pratt, et al., *Jane’s Exclusive Economic Zones 1999-2000*; also see, Seokwoo Lee, “The 1951 San Francisco Peace Treaty with Japan and the Territorial Disputes in East Asia,” *Pacific Rim Law and Policy Journal*, vol. 11, no. 1, 2002, pp. 87-88.

<sup>18</sup> For details see, Seokwoo Lee, “Territorial Disputes among Japan, China and Taiwan concerning Senkaku Islands,” *Boundary and Territory Briefing*, vol. 3, no. 7, 2002, International Boundaries Research Unit, Department of Geography, University of Durham, UK.

sparker and continuous geomagnetic profiles created simultaneously.<sup>19</sup> The sixth session of the Committee for Co-ordination of Joint Prospecting for Mineral Resources in Asian Offshore Areas (CCOP) was held at Bangkok, Thailand, 21-27 May 1969. The meeting was preceded by the fifth session of its Technical Advisory Group in the same month.<sup>20</sup>

Following completion of the final analyses, compilations and illustrations ashore in the United States, the results of the survey were made public and published in the second volume of the Committee's Technical Bulletin.<sup>21</sup> According to the results of the reconnaissance seismic profiling in the Yellow and East China Seas (Project CCOP-1/IZ.3) conducted in late 1968, Neogene sediments with a thickness of more than 1,000 meters distributed on the Korean continental shelf over three areas (D-1, D-2, and D-3) totaling about 80,000 sq km, were declared to be potentially containing huge accumulations of oil and natural gas.<sup>22</sup> To obtain more definitive data on the extent and limits of favorable areas, and to determine the structure within these sedimentary basins, it was recommended that more detailed seismic explorations be conducted over the specified areas.<sup>23</sup> The spokesman for the US Woods Hole Oceanographic Institution, which conducted the UN survey, stated additionally that 80,000 miles<sup>2</sup> of the Taiwanese basin has late tertiary sediment which is more than 2,000 meters thick.<sup>24</sup>

The May 1969 report<sup>25</sup> was reconfirmed later by independent Japanese as well as Chinese research – thereby strengthening China's desire and strategy to make abrupt and sudden post-1969 claims on sovereignty over a huge area of continental shelf and Exclusive Economic Zone. This conveyed China's objective to stake claim over billions of barrels of oil and rich fishing grounds which additionally were also very close to the strategic sea-lanes in East Asia.<sup>26</sup> This led to a sudden turn of events, and in 1971, China began publicly asserting claim to its sovereignty over the Senkaku Islands. The initial reports surrounding the Chinese claim appeared in print only in May 1970 followed by the government of the People's Republic of China putting forth its claim to the Islands, officially, only on December 30, 1971 following the report of the United

<sup>19</sup> *UN Economic Commission for Asia and the Far East Committee for Co-ordination of Joint Prospecting for Mineral Resources in Asian Offshore Areas (Report of the Sixth Session)* Held at Bangkok, Thailand, 13 – 27 May 1969, Published by the Department of Mineral Resources, Ministry of National Development, Thailand, June 26, 1969, pp. 5-6.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*, p. 87.

<sup>23</sup> *Ibid.*

<sup>24</sup> V. H. Li, "China and Off-Shore Oil: The Tiao-yü Tai Dispute," *Stanford Journal of International Studies*, 1975, p. 143; for related reading see, *The Oil and Gas Journal*, August 10, 1970, p. 83.

<sup>25</sup> Zhiguo Gao and Wu Jilu, "Key Issues in the East China Sea: A Status Report and recommended Approaches" in Selig Harrison, ed., *Seabed Petroleum in Northeast Asia: Conflict or Cooperation?* (Washington D.C., Woodrow Wilson International Center for Scholars, 2005), p. 32; also see, *Report of the Sixth Session of the Committee for Co-ordination of Joint Prospecting for Mineral Resources in Asian Offshore Areas*, U.N. Doc. E/CN.11/L.239 (1970), pp. 51-67.

<sup>26</sup> For related references see, Daniel J. Dzurek, "Effect of the Diaoyu/Senkaku Islands dispute on maritime delimitation," paper presented at the IBRU Conference on Borderlands under University of Durham, July 16, 1998, pp. 1-9; also see, Robert G. Sutter, "East Asia: Disputed Islands and Offshore Claims - Issues for U.S. Policy," Congressional Research Service Report for Congress, July 28, 1992; Ji Guoxing, "Maritime jurisdiction in the three China seas: options for equitable settlement," available at [gopher://gopher-igcc.ucsd.edu](http://gopher://gopher-igcc.ucsd.edu);

Nations Economic Commission for Asia and the Far East.<sup>27</sup> Rejecting Japan's *terra nullius* claim, China contends that the Senkaku Islands were under Chinese jurisdiction since ancient times.<sup>28</sup> The valid title was obtained through the principle of discovery-occupation as early as 1372.<sup>29</sup> The official Chinese news agency, *Xinhua*, issued a dispatch in this reference in 2012 stating:

Diaoyu (Senkaku) and its affiliated islands have been considered part of China since ancient times. Chinese people were the first to discover, name and administer these islands...

However, having never established a permanent settlement of civilians or military personnel on the islands, nor collecting taxes, nor maintaining permanent naval forces in adjacent waters, remains a factual reality that is hard to deny or refute by providing evidence – thereby substantially weakening the purported Chinese claim over the Senkakus.<sup>30</sup> By not laying claim to sovereignty over the Senkakus, and more significantly, by not challenging the Japanese incorporation of the Islands officially till 1969, will be interpreted as a tacit acceptance by the People's Republic of China that the Islands were uncontested and that Japan, in fact, controlled the Islands that were *terra nullius* to begin with. Academics and experts in the PRC explain China's 'silence' for the above argument by stating that there was an absence of diplomatic relations between Beijing and Tokyo until 1972. The immediate fallout counter-question arising is, why would that prevent Beijing from protesting against Japan's "territorial claims to the Islands" on the international stage? For that matter, China was known to be lodging protests against Japan on many other issues and occasions before 1972. Another argument often presented from the Chinese side that took attention away from the Islands revolves around its domestic instability arising due to the Cultural Revolution (1966-69). The Cultural Revolution happened for a finite time period during the late 1960s. That period apart, there still is no recorded evidence of Chinese claims or protests over the Senkakus even prior to the Cultural Revolution.

In July 1970, the Japanese government communicated to the Taiwanese government that Taipei's bid to explore oil potential around the Islands was not valid. Over the next two months, the ROC planted a flag on one of the Islands and ROC's parliament members visiting the area. By December 1970, the PRC too, began describing the Senkaku Islands as "Diaoyu – a sacred territory."<sup>31</sup> The prospect of availability of large oil deposits moved China to declare the priority of its claims. In order to meet its ever-growing demand for oil and gas, and diversify away from high dependence on supplies from the Middle East, China began prospecting about extraction of energy resources in the East China Sea in the 1970s. The PRC began claiming the Senkaku Islands vocally in various UN Committees in 1971.<sup>32</sup> Similarly, in a statement dated April 20, 1971,

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<sup>27</sup> For more details see, Committee for Co-ordination of Joint Prospecting for Mineral Resources in Asian Offshore Areas, *Technical Bulletin*, vol. 2, Geological Structure and Characteristics of the East China Sea and the Yellow Sea, pp. 39–41, 1969.

<sup>28</sup> As cited in the Statement of the Ministry of Foreign Affairs of the People's Republic of China, September 10, 2012, available at <http://www.fmprc.gov.cn/eng/topics/diaodao/t968188.htm>

<sup>29</sup> Tsui Hsueh, "Tsung Shih Liu Chiu Lu KanTiao-yu-yu" (To View the Diaoyu Tai Through the 'Mission to the Ryukyu Records) *Sinological Studies*, vol. 2, 1972, p. 48.

<sup>30</sup> Tao Cheng, "The Sino-Japanese Dispute over the Tiao-yu-tai (Senkaku) Island and the Law of Territorial Acquisition," *Virginia Journal of International Law*, vol. 14, Winter 1974, pp. 244-246; and see, R Jade Harry, A Solution Acceptable to All? A Legal Analysis of the Senkaku-Diaoyu Island Dispute, *Cornell International Law Journal*, vol. 46, no. 653, 2013.

<sup>31</sup> Jean-Marc F. Blanchard, "The U. S. Role in the Sino-Japanese Dispute over the Diaoyu (Senkaku) Islands, 1945-1971," *The China Quarterly*, no. 161, March 2000, p. 98.

<sup>32</sup> United States, Department of the Army, 7<sup>th</sup> Psychological Operations Group, "Oil in troubled waters: the Senkakus," May 22, 1972, p. SR 8-3.

the spokesperson of the Taiwanese Foreign Minister, Yu-Sun Wei, defended Taiwanese inaction over the Senkaku Islands, and further articulated the Taiwanese position on the Senkaku Islands as follows:

China's sovereign right over Tiaoyutai does not permit any doubt historically, geographically, or legally... It should be explained that when the islets were placed under the US military control after World War II, the Chinese Government regarded this as a necessary measure based on the maintenance of regional security.<sup>33</sup>

In the midst of all these geo-political and geostrategic developments, Japan and China embarked upon a new era of diplomatic relations with a Sino-Japanese Joint Communiqué issued at Shanghai on September 29, 1972. This epoch-making event became possible due to a number of significant international developments: the rapid thaw in Sino-American relations after President Nixon's announced intention on July 15, 1971, to visit China (often referred to as the "Nixon shock" inside Japan); the seating of the People's Republic of China and expulsion of Nationalist China from the United Nations in October 1971; and the Nixon-Chou Joint Communiqué issued at Shanghai on February 28, 1972.<sup>34</sup> The Sino-Japanese rapprochement was also made possible by the flexibility in Japan's China policy pursued post-July 7, 1972, following Japanese Prime Minister Kakuei Tanaka's historic trip to Beijing in September 1972.<sup>35</sup>

The discovery of oil and hydrocarbons around the Senkaku Islands rendered Japan's national security becoming critically linked to the existing power arrangements in East Asia.<sup>36</sup> For Japan as a highly industrialized island nation, its Achilles Heel was, and continues to be, the extreme dependence on stable markets and dependable sources of raw materials and energy. This apparently made Tokyo's shipping lanes highly vulnerable to the pressures exerted by the Arabs during the 1973 Middle East War.<sup>37</sup> The distance from Japan to the Strait of Malacca is 2,500 miles, and to the Arabian Gulf is another 5,000 miles.<sup>38</sup> Japanese shipping being a worldwide pattern did not remain confined to the vital shipping lanes through which most of Japan's oil supplies from the Middle East came through.<sup>39</sup>

### **Economics and Geo-Strategy of the Contest**

To the extent that national identity, sovereignty claims or military-strategic interests overlap over these Islands, it becomes questionable whether economic ties alone will be sufficient to constrain

<sup>33</sup> China and the United States have reached an agreement on the demarcation of area of patrol [documents of the United States National Archives and Records Administration II [hereinafter 'USNARA'] located in College Park, Maryland. The USNARA guidelines say that generally, citations for textual records of federal agencies such as USDOS 1971e "Telegram: ROC Statement on Senkakus", 1971/4/21, [USNARA/Doc. No.: Pol 32-6 Senkaku Is; XR Pol 19 Ryu Is; Taipei 1831] cited in, Seokwoo Lee, n. 18, p. 22.

<sup>34</sup> Hong N. Kim, "Sino-Japanese Relations since the Rapprochement," *Asian Survey*, vol. 15, no. 7, July 1975, p. 559.

<sup>35</sup> *Ibid.*

<sup>36</sup> Jay B. Sorenson, "Japan: The Dilemmas of Security," *Asian Affairs: An American Review*, vol. 2, no. 6, July – Aug 1975, p. 365.

<sup>37</sup> *Ibid.*, pp. 367-68.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

China and Japan from escalating towards a potential conflict in the future.<sup>40</sup> According to a 1994 estimate by the Japanese Ministry of Economy, Trade and Industry (METI), deposits of oil and natural gas on the Japanese side of the East China Sea amounted to 500 million kilolitres in crude oil volume.<sup>41</sup> The Chinese estimates of undiscovered gas reserves in the Xihu/Okinawa trough region in the East China Sea ranged 175–250 trillion cubic feet.<sup>42</sup> Other estimates placed potential oil reserves on the shelf to be as high as 100 billion barrels (as compared to Saudi Arabia's 261.7 billion barrels).<sup>43</sup> Although foreign companies continued to remain hesitant in investing, the US Energy Information Administration estimated the region, in and around Senkakus, to hold 60 to 100 million barrels of oil and 1 to 2 trillion cubic feet of natural gas – considered enough to provide energy sources to either state for 50–80 years.<sup>44</sup> Beginning of this decade, China National Offshore Oil Corporation (CNOOC) listed its East China Sea proven gas reserves at 300 billion cubic feet (Bcf) and proven oil reserves at 18 million barrels in 2011, according to the annual report. In 2012, an independent evaluation estimated probable reserves of 119 Bcf of natural gas in LS 36-1, a promising gas field north of Taiwan, currently being developed as a joint venture between CNOOC and UK firm, Primeline Petroleum Corp.<sup>45</sup>

The US Energy Administration has forecasted that China's oil and natural gas consumption will continue to grow, thereby putting additional pressure on the Chinese government to seek new sources of supplies to meet the ever-increasing domestic demand. China surpassed the United States as the world's largest crude oil importer in 2017, importing 8.4 million barrels per day (b/d). In 2017, 56 percent of China's crude oil imports came from countries within the Organization of the Petroleum Exporting Countries (OPEC), a decline from the peak of 67 percent in 2012. Russia surpassed Saudi Arabia as China's largest source of foreign crude oil in 2016, exporting 1.2 million b/d to China in 2017 compared to Saudi Arabia's 1.0 million b/d.<sup>46</sup> In January 2018, China and Russia began expansion of the East-Siberia Pacific Ocean (ESPO) pipeline, doubling its delivery capacity to approximately 0.6 million b/d. As per reports, as much as 1.4 million b/d of new refinery capacity is planned to open in China by the end of 2019.<sup>47</sup> Given China's expected decline in domestic crude oil production, imports will likely increase during the next two years. A major factor driving the increase in Chinese crude oil imports is Beijing's large-

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<sup>40</sup> Blanchard, n. 31, pp. 122-23; The view that economic interdependence will constrain East Asian countries is noted in Gerald Segal, "East Asia and the 'constraint' of China," *International Security*, vol. 20, no. 4, Spring 1996, p. 107; for related reading and reference see, Norrin M. Ripsman and Jean-Marc F. Blanchard, "Commercial liberalism under fire: evidence from 1914 and 1936," *Security Studies*, vol. 6, no. 2, Winter 1996/97, pp. 4-50.

<sup>41</sup> As per a report, cited in, *Yomiuri Shimbun*, August 28, 2004.

<sup>42</sup> In comparative reference, Saudi Arabia has proven gas reserves worth 21.8 trillion cubic feet.

<sup>43</sup> United Nations, *Report of the Sixth Session of the Committee for Co-ordination of Joint Prospecting for Mineral Resources in Asian Offshore Areas*, UN Doc. E/CN.11/L.239, 1970, pp. 51-67; see also, C.H. Park, "Oil under Troubled Waters: The Northeast Asia Seabed Controversy," *Harvard International Law Journal*, no. 212, 1973, pp. 248-49; also see, U Suganuma, "Sovereign Rights and Territorial Space in Sino-Japanese Relations: Irredentism and the Diaoyu/Senkaku Islands, (Honolulu: Association for Asian Studies and University of Hawai'i Press, 2000) pp. 129-31.

<sup>44</sup> For details see, J. Curtin, "Stakes Rise in Japan, China Gas Dispute," *Asia Times*, October 19, 2005; also see, Lee Jae-Hyung, "China's Expanding Maritime Ambitions in the Western Pacific and the Indian Ocean," *Contemporary Southeast Asia*, vol. 24, no. 3, 2002, pp. 549-568.

<sup>45</sup> Chansoria, n. 6, p. 105; and see, *East China Sea*, US Energy Information Administration, September 25, 2012, p. 2.

<sup>46</sup> *Energy Update*, Independent Statistics and Analysis, US Energy Information Administration, February 5, 2018.

<sup>47</sup> *Ibid.*

scale decline in domestic petroleum and other liquids production among non-OPEC countries in 2016 and US Energy Information Administration (EIA) estimates it of it having the second-largest decline in 2017.<sup>48</sup> In contrast to declining domestic production, EIA estimates that Chinese growth in consumption of petroleum and other liquid fuels in 2017 remained the world's largest for the ninth consecutive year, growing from 0.4 million b/d (3 percent) to 13.2 million b/d. Since mid-2015, China granted crude oil import licenses to independent refineries in northeast China, which have since increased refinery utilization and crude oil imports.<sup>49</sup>

As for Japan, it was the third largest net importer of crude oil and petroleum products in the world after United States and China in 2012. Following the Fukushima incident, Japan increased the imports of crude oil for direct burn in power plants, remaining primarily dependent on the Middle East for its crude oil imports, with 83 percent of Japanese crude oil imports originating from the Middle East in 2012, up from 70 percent in the mid-1980s. Because of its limited natural gas resources, Tokyo remains heavily reliant on imports to meet nearly all of its natural gas needs. In 2012, it consumed 4.4 trillion cubic feet (Tcf) of natural gas, up 50 percent from 2000.<sup>50</sup> More than 95 percent of Japan's gas demands are being met by liquefied natural gas (LNG) imports. Japan, the world's largest LNG importer in 2012, accounted for 37 percent of global LNG demand. These statistics are proof enough that both Tokyo and Beijing hold immense stakes in extracting hydrocarbon resources from the East China Sea to help meet their respective domestic demands – adding greater criticality to the tensions around the Senkaku Islands.<sup>51</sup>

According to a *World Energy Outlook* survey, released by the International Energy Agency, China's oil imports will likely reach close to 500 million tons by 2030 – the highest in absolute terms for any country or region.<sup>52</sup> In this context, Southeast China's coastal areas, particularly the Shanghai municipality and Zhejiang province, remain its most critical industrial (and thus energy-consuming) bases having almost no hydrocarbon resources in their own territory. Consequently, the domestic oil/gas supply for these regions relies on imports from the far northern and western provinces, thus proving to be very costly and insufficient. By contrast, the transportation of oil and gas from the East China Sea's continental shelf would be much easier and cheaper (given that it is located within 500 kilometers approximately).<sup>53</sup> These economic and logistical drivers render the oil and gas reserves in the East China Sea far more beneficial for China. It needs to be highlighted that gas being the most important hydrocarbon resource in the East China Sea is being produced by China from a field in a part of the East China Sea pending delimitation that Beijing claims to be within its EEZ. However, Japan protested against this unilateral move in 2009 and did so again in July 2013.

Since the 1969 report established possibility of substantial oil and gas resources in the East China Sea in and around the Senkakus, China was goaded to press for its territorial claims including the whole continental shelf up to the Okinawa Trough for the delimitation of the EEZ. China's official insistence is that its continental shelf demand is in accordance with UNCLOS, because of the length of its coastal line and its population there, in contrast to the narrow and sparsely populated Okinawa Island chain. The determination and relevance of the 'critical date'

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<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

<sup>50</sup> *Energy Update*, Independent Statistics and Analysis, US Energy Information Administration, November 7, 2013.

<sup>51</sup> *East China Sea*, n. 45.

<sup>52</sup> Chansoria, n. 6, pp. 96-97.

<sup>53</sup> Guo Rongxing, "Territorial Disputes and Seabed Petroleum Exploitation: Some Options for the East China Sea," Center for Northeast Asian Policy Studies, Brookings Institution September 2010, Washington D.C.

becomes a key point for understanding the complexity of China's claims over the Senkaku Islands, and more so China's failure to stake claim to the Islands until 1970-71. China, as well as Taiwan, have chosen to mainly rely on historical timelines, which remain self-contradictory going by the evidence on archived records. On the other hand, Japanese position is premised on acts of exercising state authority, directly relating to the Senkaku Islands. There is a critical legal implication of the Chinese/Taiwanese inaction on their claims over the Senkaku Islands during the material period from 1895 until 1969 when the existence of vast oil deposits were unearthed and announced. Should the Chinese/Taiwanese inaction during the said period be construed as acquiescence over the Senkaku Islands as being part of the Ryukyu Islands?

## Conclusion

The Islands being "*terra nullius*" depends upon the doctrines of occupation and inter-temporality. The former holds that a state can appropriate unclaimed territory by occupying and possessing it. The latter holds that one must judge the legality of events in light of the law concurrent with their occurrence, rather than with the law in force at the time the dispute is ultimately resolved. In other words, lawful incorporation by Japan requires that China had not already engaged in acts sufficient to appropriate the Islands under the law of occupation that existed up to 1895.<sup>54</sup> An apparent paucity of Chinese effectivities' in the 19<sup>th</sup> Century supports this view. The Senkaku Islands have been Japanese sovereign territory since 1895 and thereafter, archival research not displaying any record of China protesting/contesting Japan's exercise of authority and occupational control over the Islands from 1895-1945 and thereafter. In the backdrop that "administration" rather than "sovereignty" shall be a key distinction that applies to the islets, while China argues its establishment through the classical mode of discovery of the Islands, it is Japan that comes closer in fulfilling all requisite legal requirements to acquire title over the Islands under international rules and law.

An arm of the Pacific Ocean borders on the East Asian mainland. The East China Sea extends to the Chain of the Ryukyu Islands in the east; northeast to Kyushu (the southernmost of Japan's main islands) and north to Cheju Island, off the Korean peninsula, falling west of China's eastern coast. On the south, the Sea extends to the South China Sea through a shallow strait between Taiwan and Mainland China. Thus, whoever controls the Senkakus could well claim economic and political control over a huge area of the East China Sea.<sup>55</sup> Unsurprisingly, China's endless status quo revisionism in almost all its existing territorial disputes – from the East China Sea to the South China Sea and Himalayan borderlands – suggests that 21<sup>st</sup> century Asian political geography shall continue to be shaped, and reshaped, by Beijing's cartographic subjectivity. Unilateral actions being undertaken by Beijing are upping the ante in the name of "sovereignty" and remains driven among others, by Chinese domestic politics, including pressures on the central government to craft a strong Chinese national identity. What needs to be carefully noted is that stirring nationalist sentiment shall always remain a double-edged sword for the Chinese leadership – since there is a very thin line that separates it from assuming the shape of becoming a threat to the existence of the Party and the Communist State.

The strategic and economic consequences of the 1969 UN discovery provided fresh impetus to the interests- and claims over the Senkaku Islands. Referring to the Senkaku Islands, mass

<sup>54</sup> For more details see, Ryan M Scoville, "A Defense of Japanese Sovereignty over the Senkaku/Diaoyu Islands," *Legal Studies Research Paper Series*, no. 13-16, Marquette University Law School, Wisconsin, June 2013.

<sup>55</sup> United Nations, *United Nations Convention on the Law of Sea 1982*, available at [http://www.un.org/Depts/los/convention\\_agreements/texts/unclos/closindx.htm](http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm); also see, Erica S Downs and Phillip C Saunders, "Legitimacy and the Limits of Nationalism: China and the Diaoyu Islands," *International Security*, vol. 23, no. 3, Winter 1998/99, pp. 114-146.



circulation American periodical, *Time*, put out a cover story in 1996 asking, “Will the next Asian war be fought over a few tiny islands” lying west of Okinawa?<sup>56</sup> This, in a way, summarizes the vital contemporary geopolitical and geo-strategic relevance to the Senkaku Islands, which remains embedded in history. Contemporary debates on the history of Asia’s regional security issues strongly echo that Asia’s history and onerous colonial past has made an indelible mark on demographics, border disputes, political systems, laws, economies, cultural influx, and identities. In all, the defining trends of Asia’s historical past during the 20<sup>th</sup> century and its preceding period will likely continue casting a shadow on its ensuing future stability.

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<sup>56</sup> “In an Ocean of Controversy,” *Time*, October 7, 1996.

# The Invention of a Basis for the Possession of Takeshima by the Korean Government\*

Yoshiko Yamasaki

## Abstract

With respect to Takeshima, the ROK has asserted that (i) Dokdo (the Korean name for Takeshima) was the first Korean territory to fall victim to the Japanese aggression against Korea, (ii) Because it was not a signatory to the Peace Treaty, the ROK was unable to receive any benefits or assurances with regard to the issue of territorial rights over “Dokdo;”, (iii) Up until the mid-1950s the United States strongly supported Japan’s position on Takeshima as a result of Japan’s vigorous diplomacy toward the United States. This research paper aims to critically examine the legitimacy of the ROK’s assertions. The author examined ROK and US government documents including those the author has found and concluded that the ROK government has invented historical basis for its claims by concealing a part of the documents that are inconvenient for them.

## Introduction

In recent years, newly acquired and released diplomatic documents have provided the basis for numerous studies on the territorial dispute over the islets known as Takeshima that flared up after the end of World War II and continued during the negotiations for the San Francisco Peace Treaty in 1951 and the talks for normalizing ties between Japan and the Republic of Korea (ROK) in 1965. Among the documents acquired and released by ROK-based organizations and researchers in particular, many have provided information regarding previously unclear matters. Particularly noteworthy is Note Verbale (No. 187), sent by the US Embassy in the ROK to the ROK’s Ministry of Foreign Affairs on December 4, 1952. It constituted an official re-iteration of the US position, invoking a letter from Dean Rusk, the United States Assistant Secretary of State for Far Eastern Affairs.<sup>1</sup> The letter was sent from Dean Rusk to Yang You-chan, Ambassador of Korea to the United States, in August 10, 1951, about a month before the signing of the San Francisco Peace Treaty. The letter rejected a request of the ROK government to have Takeshima renounced by Japan under the Peace Treaty because the island “had been under the jurisdiction of the Oki Islands Branch Office of Shimane Prefecture of Japan” and “did not appear ever before to have been claimed by Korea.” Note Verbale (No. 187) was sent in response to the ROK government’s protest against an incident in September 1952 in which the US armed forces conducted bombing training using Takeshima as a target, thereby endangering people from Ulleungdo (a larger island to the west-northwest about 88 km away from Takeshima) who were reportedly fishing nearby.

A review of research, analysis, and assertions made by the government, researchers,

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<sup>1</sup> United States National Archives and Records Administration (NARA) (RG59) Lot 54 D422, “Japanese Peace Treaty Files of John Foster Dulles”, Box 8, Korea (in English). The content of this letter was first made public in Foreign Relations of the United States (FRUS) Vol.6, Part 1, 1951, p. 1203, Footnote 3, issued in 1977 and made publicly available in April 1978.

and media in the ROK reveals that their main assertions are (i) Dokdo (the Korean name for Takeshima, known in English as “Liancourt Rocks”) was the first Korean territory to fall victim to the Japanese aggression against Korea; upon the liberation of Korea, it returned to its country. It is a symbol of Korea’s independence; historically it was Korean territory but it was seized by Japan and returned to the ROK when Japan was defeated;<sup>2</sup> (ii) Because it was not a signatory to the Peace Treaty, the ROK was unable to receive any benefits or assurances with regard to issues including the issue of territorial rights over “Dokdo;”<sup>3</sup> and (iii) Up until the mid-1950s the United States strongly supported Japan’s position on Takeshima as a result of Japan’s vigorous diplomacy toward the United States and lobbying by Japanophiles such as William J. Sebald, who was US Political Adviser to the Supreme Commander for the Allied Powers (SCAP), head of the Diplomatic Section of SCAP, and chairman and member of the Allied Council for Japan,<sup>4</sup> but later switched to a neutral position.

The second session of Shimane Prefectural Government’s Takeshima Issue Research Group also focused on the post-war territorial dispute over Takeshima and studied documents that it acquired that were related to the dispute. The documents show that there is no basis for the Korean assertions.

This research paper aims to critically examine the legitimacy of the ROK’s assertions by presenting new documents in addition to those already discussed in existing research to reconstruct the circumstances that led to Takeshima being omitted from the list of islands to be renounced by Japan under the San Francisco Peace Treaty. Detailed examination of assertion (i) in particular highlights the process by which, despite a lack of clear historical evidence, the post-war government of the ROK asserted that Takeshima was historically the ROK’s territory and brought it inside the Syngman Rhee line, then distorted official letters and statements from the United States describing Takeshima as Japanese territory in order to fabricate new “evidence.”

### **(1) Pre-World War II—The Origins of the Territorial Dispute over Takeshima**

At a routine press conference on August 12, 2011, the ROK’s minister of foreign affairs and trade, Kim Sung-hwan, alleged that Dokdo was the first victim of Japan’s aggression against Korea, and that upon the liberation of Korea, Dokdo had returned to its country’s embrace. It was indeed the symbol of Korean independence, he claimed, and whoever touched this island should be prepared to face stubborn strong resistance from all the Korean people. Any attempt by Japan to seize Dokdo would signify the re-invasion of Korea, according to Kim.

Kim was said to be directly quoting an official letter written 57 years earlier by minister for foreign affairs Byun Young-tae.<sup>5</sup> Likewise, the ROK’s Ministry of Foreign Affairs uses the 1943

<sup>2</sup> “Why did Kim Sung-hwan bring up Byun Young-tae’s letter of 57 years ago?,” *Joong-ang ilbo* (Korea Joongang daily), online version, August 15, 2011 (in Korean), available at [http://article.joinsmsn.com/news/article/article.asp?total\\_id=5973972](http://article.joinsmsn.com/news/article/article.asp?total_id=5973972) (as of February 15, 2012).

<sup>3</sup> Park Jin-hee, “The Korea-Japan post-war relationship and the San Francisco Peace Treaty,” *Korean Historical Research*, No.131, 2005, pp. 3–4 (in Korean).

<sup>4</sup> Jung Byung-joon, “William J. Sebald and the Dokdo Territorial Dispute,” *Korea Focus* Vol.13, No. 4, 2006, p. 80 (in English). Jung states that Japan spread inaccurate information and engaged in “intrigue” without the knowledge of Korea before the creation of the ROK, using Sebald to actively lobby the United States in order to have Dokdo recognized as part of Japan’s territory (p.77).

<sup>5</sup> *Supra* note 2.

Cairo Declaration regarding territories “which Japan has taken by violence and greed”<sup>6</sup> as its foundation to assert the illegality of Japan’s claim to ownership. However, no maps or documents have yet been found to prove categorically that Korea historically recognized Takeshima as its territory prior to the formal incorporation of Takeshima by Japan in 1905. In order to establish that Takeshima was “the first victim of Japan’s aggression against Korea” and Japan had “taken” the islands, the ROK’s historical records must clearly show that Takeshima was a territory of the ROK before it was incorporated into Japan’s Shimane Prefecture.

However, from the 18th century, when inspectors began to be posted regularly to Ulleungdo, maps of Korea compiled by the government depicted Usando (alleged by the ROK to be the previous Korean name for Dokdo) not as Takeshima (Dokdo), but as Chikusho (called “Jukdo” in the ROK),<sup>7</sup> and Takeshima was not included in any of the geographies, pre-modern maps, and annotated charts with coordinates produced from the end of the Kingdom of Joseon until the Empire of Korea.<sup>8</sup> The “Seokdo” referred to in the Empire of Korea’s Imperial Edict No. 41<sup>9</sup> issued on October 25, 1900 (Seokdo being the old name for Takeshima, according to the government of the ROK) has never been directly proved to correspond to Dokdo,<sup>10</sup> and even in printed materials written by those not under the sway of the Japanese government, such as Korean independence campaigners in exile overseas or members of the Korean diaspora living in the United States,

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<sup>6</sup> “(omitted)···in the midst of the Russo-Japanese War (1904-1905), which had been triggered by Japan’s imperialistic invasion scheme toward Northeast Asia since the 1890s, disseized Dokdo and incorporated the islands into the Shimane Prefecture by issuing Shimane Prefecture Public Notice No. 40(1905). Japan’s annexation of Dokdo constituted a violation of international law, and cannot be justified under any circumstances, for it is a clear infringement on the undeniable sovereignty of Korea over the islands from ancient times to the recent Empire of Korea. More importantly, Japan’s actions carry no legal validity under international law.” “Korea was annexed to Japan in 1910 and the colonial rule ended in 1945 with Japan’s defeat in World War II. In 1943, while the war was still being fought, the three Allied Powers—the United States, Britain and China—issued the Cairo Declaration, vowing that Japan would “···be expelled from all other territories which she has taken by violence and greed.” In 1945, when Korea regained its independence, Dokdo, too, was returned to Korea as a matter of course.” Ministry of Foreign Affairs, Republic of Korea, “Dokdo: Korean Territory—The Basic Position of the Government of the Republic of Korea on Dokdo”, 2008, p. 6–7.

<sup>7</sup> Park Chang-seok, *Ulleungdo Do-hyeong* (Map of Ulleungdo), 1711; “Ulleungdo Jido” (Map of Ulleungdo), *Joseon-jido* (Map of Korea), around 1770, etc. (all in Korean). Until then Usando had generally been depicted to the west of Ulleungdo.

<sup>8</sup> Lee Kyu-won, *Ul-leung-do-oe-do* (Survey map of outer Ulleungdo), 1882; Heul-beop (Homer Hulbert), *Sa-min-pil-ji* (Knowledge necessary for all) (Baek Nam-kyu and Lee Myung-sang, Trans.), 1895; Hyun Chae, *Dae-han-ji-ji* (Geography of the Korean Empire), 1899; *Dae-han-Jeondo* (Complete map of Korea), 1899; *Dae-han-yeu-ji-do* (Map of the Korean Empire), around 1900; Jang Ji-yeon, “Ji-ri-il” (Geography 1), *Dae-han-ja-gang-hoe-wol-bo* (Korean Self-Strengthening Society monthly magazine), No. 3, 1906, pp. 25–28; Jang, *Dae-han-sin-ji-ji* (A new geography of Korea), 1907, etc. (all in Korean).

<sup>9</sup> Even in the ROK, scholars have not been aware of this edict for very long. It was first introduced in Lee Han-ki, *Territory of Korea*, Seoul National University Press, 1969, p. 57 (in Korean).

<sup>10</sup> Ikeuchi Satoshi, “Takeshima/dokdo to ishijima no hitei mondai: noto” (Is there any island referred to as Seokdo?) *Tekusuto fuchi no kaishakugakuteki kenkyu to kyoiku* (HERSETEC), Vol.4, No. 2, 2010, pp. 1–9 (in Japanese).

there is no mention of Takeshima as being a seized territory, as far as I am aware.<sup>11</sup>

Following a Japanese cabinet decision on January 28, 1905 to incorporate Takeshima into the country, and Shimane Prefecture's issuance of Notification No. 40 on February 22, Takeshima's incorporation into Shimane Prefecture was reported in newspapers<sup>12</sup> and academic journals on numerous occasions.<sup>13</sup> The year 1905 was also when the Battle of Tsushima took place. On May 28, the battle was decided in the vicinity of Takeshima, so the island and its location came to be known throughout Japan via official gazettes,<sup>14</sup> newspapers,<sup>15</sup> and magazines.<sup>16</sup>

The name Takeshima would naturally have come to the notice of the more than 300 Koreans,<sup>17</sup> including members of legation staff and students, said to be living in Japan in 1905, and the information in the Japanese official gazettes was also reported in Korea.<sup>18</sup> However, there is nothing in the historical records to suggest that Koreans appeared to harbor any reservations with regard to the territorial incorporation of Takeshima into Japan.

In March 1906, a party from Shimane Prefecture stopped off at Ulleungdo as it was going to inspect Takeshima and informed Sim Heung-Taek, the magistrate of Uldo-gun (the Korean county within which Ulleungdo was located), of the incorporation of Takeshima into Shimane Prefecture. The magistrate filed a report notifying the government of the Empire of Korea about

<sup>11</sup> Tae-Baek-Gwang-No, *Han-guk-tong-sa* (Painful history of Korea), 1915; Park Eun-sik, *Han-guk-dok-lib-un-dong-ji-hyeol-sa* (The bloody history of the Korean independence movement), 1919–20 (both in Korean). Tae-Baek-Gwang-No was the pen-name of Park Eun-sik, the second president of the Provisional Government of the Republic of Korea in Shanghai. The former work put the eastern boundary of Korea at 130 ° 50' east longitude, while the latter work records the 1906 incident in which the party from Shimane Prefecture visited Ulleungdo and reported the news of Takeshima's formal incorporation into the prefecture as an event that had to do with Ulleungdo. *Sin-han-min-bo* (The new Korea) (San Francisco 02.10.1909–1980) was a newspaper published in San Francisco by North and South Koreans living in the United States. All these publications had a strongly nationalist bent.

<sup>12</sup> "Oki no shinto" (Oki's new island), *San-in shimbun* (San-in newspaper), February 24, 1905; "Shogen," *ibid.*, February 25, 1905; "Oki-no-kuni kyodo no bocho" (Oki boundary expanded), *Oki Shimpō* (Oki news), No. 16, March 1905, etc. (all in Japanese). Thereafter, the *San-in Shimbun* continued to carry articles relating to Takeshima.

<sup>13</sup> "Teikoku shinryodo takeshima" (The Empire's new territory of Takeshima), *Chigaku zasshi* (Journal of Geography), Vol.17, No. 4, 1905, p. 282 (in Japanese).

<sup>14</sup> "Correction," *Official gazette*, June 5, 1905 (in Japanese). The initial account of the report of Togo Heihachiro, Commander-in-Chief of the Combined Fleet of the Imperial Japanese Navy, received by telegram on the morning of May 29 of the same year, had referred to Liancourt Rocks, but this was corrected to Takeshima.

<sup>15</sup> "Riyankorudo iwa" (Liancourt Rocks), *Yomiuri Shimbun* (Yomiuri newspaper), June 1, 1905; "Tenchi genko" *Niroku Shimbun* (Niroku newspaper), June 16, 1905; "Daikaisen no ato (matsue)" (The site of a great sea battle (Matsue)), *Tokyo Asahi Shimbun* (Tokyo Asahi newspaper), June 25, 1905; "Shin sagamimaru to takeshimamaru" (The new Sagami-maru and Takeshima-maru vessels), *Tokyo Asahi Shimbun*, August 11, 1905, etc. (all in Japanese).

<sup>16</sup> Tayama Katai, "Senji sowa—riyankorudo iwa" (Collection of Wartime Stories—Liancourt Rocks), *Nichiro senso jikki* (True Record of the Russo-Japanese War, 75th edition, 1905, pp. 115–117; Nozu Chosui, "Aa takeshima" (Ah, Takeshima), *ibid.*, 76th edition ("Kankoku shashinjo" (Album of Korea), *Shashin gaho rinji zokan* (Special illustrated supplement) 25), 1905, p. 35, etc. (both in Japanese).

<sup>17</sup> Morita Yoshio, "Zainichi chosenjin shogu no suii to genjo" (Present circumstances and trends in the treatment of Koreans in Japan), *Homu kenshujo homu kenkyu hokokusho* (Training Institute of the Ministry of Justice legal research report), 43rd series, No. 3, 1955, p. 4; Morita, *Suji ga kataru zainichi kankokujin, chosenjin no rekishi* (A history of North and South Koreans in Japan through numerical data) (new edition), Akashi Shoten, 1996, p. 173 (both in Japanese).

<sup>18</sup> "Miscellaneous—Official gazette of the Japanese fleet," *Hwang-sung sin-mun* (Hwang-sung newspaper), June 2, 1905, (in Korean).

the incorporation of Takeshima into Japan (in his report, the magistrate referred to Dokdo “being under our jurisdiction”), and the government ordered an investigation,<sup>19</sup> but there is no evidence of the Japanese resident-general of Korea subsequently being approached with any inquiry regarding the matter, let alone any protest. The ROK government and researchers who support its position assert that “Korea’s situation was such that it had been deprived of its diplomatic power and it was therefore not able to lodge any diplomatic protest,”<sup>20</sup> but this assertion is not based on historical records.

The Empire of Korea was at that time frequently lodging protests and taking other administrative and diplomatic measures to address tree felling and other acts by Japanese citizens that had become common on Ulleungdo before 1900. However, right up to the compilation of the Uldo-gun rule book (*Uldogunjeolmok*; 1902), in which the Empire of Korea’s Ministry of Home Affairs laid down administrative guidelines for Uldo-gun, and which was discovered in Korea in 2010, there were no statements indicating that islands such as Takeshima, which was 90 km away, were included within Korea’s area of administration.<sup>21</sup> Moreover, there is no evidence that any measures were taken to deal with fishing by Japanese citizens around Takeshima, which had most likely already started by 1903, or surveys by the Ministry of the Navy of Japan.<sup>22</sup>

Moreover, a Japanese diplomatic note of October 1905 records that the Korean minister for foreign affairs, Park Che-soon, protested verbally to Hayashi Gonsuke, Japan’s minister to Korea, as well as in a letter to the British minister,<sup>23</sup> about the description of Korea’s status included in the treaty for the second Anglo-Japanese Alliance. Subsequently, in February 1906, a Japanese resident-general of Korea was appointed, and from March 13 the Council for Improvement of Korean Administration met every Tuesday, providing a forum for ministers of the Empire of Korea’s State Council to discuss a diverse range of matters including Korea’s judicial system with residents-general such as Ito Hirobumi and Japanese advisors.<sup>24</sup> Moreover, the historical records of the Empire of Korea’s State Council (the Ministry of Home Affairs) include records stating that inquiries were made to the resident-general and others on the Japanese side with regard to a wide

<sup>19</sup> “Special report,” “Directive No. 3,” *Gak-gwan-chal-do-geo-re-an* (各觀察道去來案), Kyujanggak Archives of Seoul National University, 奎 17990, 1906 (in Korean). This historical document was first introduced in Shin Yong-ha (1989), “Joseon wangjo eui dokdo ryeongyu wa ilbon jegukjueui eui dokdo chimryak” (Korean dynasty’s possession of Dokdo and invasion of Dokdo by imperialistic Japan), *Han-guk-dok-lib-un-dong-sa-yeon-gu* (Journal of Korean independence movement studies) 3rd series (also in Korean).

<sup>20</sup> ROK Ministry of Foreign Affairs and Trade, *Refutation of the assertion of sovereignty over Dokdo by Japan’s Ministry of Foreign Affairs*, 2008, p. 12 (in Japanese).

<sup>21</sup> *Daegu Internet News*, January 4, 2011 (in Korean), available at <http://www.dgnews.co.kr/ArticleView.asp?intNum=23465&ASection=001003> (as of January 14, 2012).

<sup>22</sup> JACAR (Japan Center for Asian Historical Records), Ref. C09050402800, *Gunkan Tsushima senji nisshi* (Wartime journal of the battleship Tsushima), Vol.5, National Institute for Defense Studies (in Japanese).

<sup>23</sup> “Dai 384-go nichiei domei joyakuchu kankoku ni kansuru kitei ni tsuki kan gaibudaijin yori eikoku koshi ni kogi no ken” (No. 384 The Korean foreign minister’s protest to the British minister regarding provisions relating to Korea in the Anglo-Japanese alliance treaty), *Nikkan kyoyaku teiketsu narabini tokanfu secchi no ken fu zaikan kakkoku koshikan teppai no ken* (Conclusion of the Japan-Korea Treaty and appointment of the Japanese resident-general of Korea & removal of countries’ legations in Korea), October 17, 1905 in *Gaimusho—Nihon gaikobunsho dijitaru akaibu*, (Ministry of Foreign Affairs of Japan—Digital Archive of the Documents on Japanese Foreign Policy) Vol.38, Part 1, 1905 (in Japanese).

<sup>24</sup> JACAR, Ref. A04017269100, *Tankosho—Kankoku shisei kaizen ni kansuru kyogikai yoryo hikki—kankoku genro no ito tokan shotaikai sekijo danwa yoryo* (Monograph—Notes on key points from the Council for Improvement of Korean Administration—Key points of discussions at banquet of Korean elder statesmen attended by resident-general Ito (National Archives of Japan) (in Japanese).

range of matters that came up involving the Japanese. Particularly notable was the fact that the Empire of Korea made inquiries to the resident-general about a suspected transaction of land at a coastal area in Jukbyeon, Uljin-gun. In December 1905, the Korean minister of internal affairs, Lee Ji-yong, suspected that a Japanese citizen had illegally obtained land on the former site of the Japanese Navy's watchtower. He reported the suspected transaction to Park Che-soon, who was by then prime minister, and unlike Takeshima, Park made an inquiry to the resident-general. As a result, Park received a response that no land transaction had taken place, and in April of the same year Lee received a report to that effect.<sup>25</sup>

In July 1906, after the incorporation of Takeshima into Japan, when Ikeda Juzaburo, chief of the Administrative Bureau of Communications of the Japanese resident-general, inquired about the islands belonging to the county of Uldo-gun and the date when the county office was established, the official response of the Empire of Korea was: "The islands under that county's jurisdiction are Jukdo and Seokdo, and the county extends 60 *ri* (approximately 24 km) from east to west and 40 *ri* (approximately 16 km) from north to south, totaling over 200 *ri* (approximately 80 km)" Thus the response excluded Takeshima, at a distance of 90 km from Ulleungdo, from the area included in Uldo-gun.<sup>26</sup> Yet, if one follows the ROK government's subsequent assertion that Takeshima was originally under Korean jurisdiction, the Uldo-gun magistrate Sim Heung-Taek would have committed a blunder by overlooking the incorporation of Takeshima into Japan's Shimane Prefecture for more than a year. However, there was no evidence that he suffered any kind of punishment by the Korean central government, and what is more, he continued to receive pay raises and promotions steadily thereafter.<sup>27</sup>

In light of these facts, it would be most natural to infer that the investigation by the government of the Empire of Korea, after it had received a report from the magistrate referring to "Dokdo... being under our jurisdiction," revealed that Dokdo was neither an alternative name for Ulleungdo, nor was it Chikusho (Jukdo), which was 2 km off the east coast of Ulleungdo, nor was it any of the islands or reefs in the waters around Ulleungdo. It was, rather, an island outside the Empire of Korea's territory that had never before appeared in any maps of Korea. Thus the central government must have noticed the report by the local official was mistaken in saying Dokdo was an island "under our jurisdiction," and it did not lodge any protest.

This awareness about Takeshima being outside Korea is also evident from the petition of the Korean minister of internal affairs, Lee Geon-ha, for Imperial Edict No. 41 of 1900, which raised the status of Ulleungdo to a *gun* (county). He stipulated an area that excluded Dokdo from the

<sup>25</sup> *Official documents of the Ministry of Internal Affairs*, Vol.1, February 26, 1906 in *Inquiry No. 3*, (Kyujanggak Archives of Seoul National University, 奎 17768), and *State Council Inquiry No. 56*, April 17, 1906. These documents were introduced in Shin Yong-ha, "The Japanese Empire's attempt to annex Dokdo during 1904–1905 and criticism thereof", *Research on the history of the Korean independence movement*, 11th series, Institute of Korean Independence Movement Studies, Independence Hall of Korea, 1996 (all in Korean).

<sup>26</sup> "Facts on arrangement of Uldo County," *Hwang-sung-sin-mun* (Hwangsung newspaper), July 13, 1906 (in Korean); this document was discovered by Sugino Yomei; "Ishijima=Dokdo setsu hitei no kijutsu mitsukaru" (Description negating the theory that Seokdo corresponds to Dokdo discovered), *San-in Chuo Shimpo* (San-in Chuo News), February 22, 2008 (in Japanese); "Ikeda's official letter," *Dae-han-mae-il-sin-bo* (The Korea daily news), July 13, 1906 (in Korean).

<sup>27</sup> Sim Heung-Taek was appointed to the post of Uldo-gun magistrate and *sonin* (senior official) of the 6th rank on January 26, 1903 (*Dae-han-je-guk-gwan-bo* (Official gazette of the Empire of Korea), January 29, 1903) and was promoted to the post of Hoengseong-gun magistrate and *sonin* (senior official) of the 3rd rank on March 13, 1907 (*ibid.*, March 15, 1907). Furthermore, on October 1, 1906 he received a pay increase to wage grade five (*ibid.*, October 13, 1906), and a further increase to wage grade four on March 14, 1907 (*ibid.*, March 27, 1907). I was informed about this document and related information by Matsuzawa Kanji.

new Uldo-gun, saying “the area where the islands are located should be about 80 *ri* in length and 50 *ri* in width.” The name Dokdo that first appeared as the written name for Takeshima in the magistrate’s report had not existed in any Korean records until then, and despite the fact that newspapers and other media had carried stories on the magistrate’s report and the directive from the Empire of Korea’s Ministry of Home Affairs,<sup>28</sup> there were no Korean references to Dokdo immediately afterwards. Even after Korea was annexed by Japan, the issue of territorial rights was raised with regard to another island, Tsushima,<sup>29</sup> but in the records relating to the issue of Ulleungdo’s ownership,<sup>30</sup> there is nothing referring to Takeshima. This is further underlined by the fact that even among independence campaigners and members of the Korean diaspora living in the United States, there were no Koreans who asserted Korea’s territorial rights over Takeshima. As the above account shows, the Korean historical records found to date contain no evidence that Korea officially owned Takeshima in 1905 or earlier. When the ROK government claims that Takeshima was “the first victim of Japan’s aggression against Korea,” or that Japan took Takeshima “by violence and greed” or “invaded” the island, it is therefore alleging actions that were by definition impossible.

## (2) From the End of World War II to the Signing of the Peace Treaty

So, is it true to say that “upon the liberation of Korea, Dokdo returned to its country’s embrace”? In fact, even during the period of US military administration immediately after the war, when Korea was “liberated” from Japanese rule, Takeshima was still not depicted in Korean maps

<sup>28</sup> “Mu-byeon-bu-yu” (無變不有), *Dae-han-mae-il-sin-mun* (The Korea daily newspaper), May 1, 1906 and “Ur-sui-bo -go-ne-bu” (鬱倅報告内部), the *Hwang-sung-sin-mun* (Hwangsung newspaper), May 9, 1906 had stories on Sim’s report and the content of the directive by the ministry of internal affairs, but the accounts show no accurate understanding of the location of “Dokdo” or the fact that it was an uninhabited island. Hwang Hyun’s *O-ha-gi-mun* (梧下記聞) and *Mae-cheon-ya-rok* (梅泉野錄) (Vol. 5, April 5, 1906) (both 1906) also have stories on the articles carried in the *Hwang-sung-sin-mun*, but the same limitations apply (all sources in Korean).

<sup>29</sup> “The appeal of an isolated island—Visits to Tsushima Island (5)—Tsushima Island definitely Korean territory in ancient times,” *The Dong-a ilbo* (East Asia daily), August 7, 1926 (in Korean). Moreover, according to Morita Yoshio, Syngman Rhee described the return of Tsushima Island as one aspect of the Korean provisional government’s policy toward Japan in his letter of November 1942 to Victor Chitsai Hoo (胡世沢), vice-minister for foreign affairs of the government of the Republic of China (Morita Yoshio, “Nikkan kankei” (Japan-Korea Relations), edited by Yoshizawa Seijiro, *Nihon gaikoshi dai 28-kan—Kowago no gaiko 1—tai rekkoku kankei (jo)* ((Diplomatic history of Japan) Vol. 28—Diplomacy after peace 1—Relations with other nations (first part)), Kajima Kenkyujo Shuppankai, 1973, p. 23.

<sup>30</sup> There were many articles that referred to territorial disputes with Japan during Ulleungdo’s history: Lee Eul, “Ul-leung-do-tam-bang-gi” (Ulleungdo report), *Gae-Byeok* (開闢) No. 41, 1923; Lee Yoon-jae, “The marvelous An Yong-bok—Korean diplomatic issues of two hundred years ago, focusing on Ulleungdo,” *Dong-gwang* (Eastern Light), No. 1 & No. 2, 1926; “Island pilgrimage toward Ulleungdo (6)—Lush forests on every cliff, just like an enchanted land at sea,” *The Dong-a ilbo* (East Asia daily), September 6, 1928; Su-chun-san-in, “An Yong-bok—The pleasant hero of the sea who won back Ulleungdo with his eloquence,” *Byeol-Gun-Gon* (別乾坤) No. 65, 1933; Chwi Un-saeng (翠雲生), “Seol-hwan Ul-leung-do-bi-sa” (Seol-hwa (雪禍)—A secret history of Ulleungdo), *Byeol-Gun-Gon* (別乾坤), No. 70, 1934, etc. (all in Korean). Most of these articles alleged that Ulleungdo had come close to being seized by Japan, but Korea had managed to take the island back; however, there was no mention of the present-day Takeshima.



and documents.<sup>31</sup> It was not included within the eastern limit of Korean territory specified in geography textbooks and other reference works of the period.<sup>32</sup> Indeed, Korean textbooks and maps during the US military administration set Ulleungdo as the country's eastern limit, placing Takeshima outside national territory.<sup>33</sup>

This lack of awareness of Takeshima ended in the summer of 1947, when the citizens of Ulleungdo complained to the military government in North Gyeongsang Province that Japanese citizens had traveled to Takeshima and asserted ownership rights over the island. This was the beginning of the Takeshima issue in the ROK after World War II.<sup>34</sup> Subsequently, a range of research was conducted within the ROK,<sup>35</sup> including surveys by the Korea Alpine Club, but historical evidence for Korean ownership of Takeshima remained inconclusive. Up to 1952, the year the peace treaty went into effect, the ROK identified Sambongdo, which was another name for Ulleungdo, as the old name for Takeshima,<sup>36</sup> and the key current assertion that the island referred to as Usando in pre-modern maps and documents is the modern-day Takeshima did not appear until 1953, after the territorial dispute had flared up.<sup>37</sup>

On June 8, 1948 an incident occurred in which a large number of Korean fishermen who had landed on Takeshima were killed or injured by bombing conducted by the armed forces of the United States. The US forces apologized and paid compensation to the victims and their families, and subsequently, the ROK used this incident as grounds to assert that the United States had recognized the ROK's ownership of Takeshima. According to reports at that time, the ROK claimed that Takeshima was the ROK's territory for a number of reasons, including (i) assertions to the effect that Takeshima had been called Sambongdo since ancient times, (ii) assertions to the effect that in the local dialect, the name Dolseom (Seokdo) had changed to Dokseom (Dokdo), and (iii) the victims of the bombing were Korean citizens and the US forces had dealt with the ROK to resolve the matter.<sup>38</sup> However, the key assertions of the ROK government during negotiations with the United States over reparations immediately after the signing of the peace treaty were that Takeshima had historically been under Korean jurisdiction and comprised islets

<sup>31</sup> Kim Jin-bok, *Complete Map of Korea*, Joong-ang Publishing, 1946; (in Korean), etc. According to Jung Byung-jun in "The Post-Liberation ROK's Awareness of Dokdo and Policy Toward It (1945–51)", *Journal of Northeast Asian History* 5-2, 2008, p. 3 (in English), the first map issued in hangul (the Korean alphabetic script) after liberation was the *Map Attached to the Geography of Korea* published by the interim government's printing office and edited by the education ministry's editorial office. He states that he was not able to view the map itself, but it is very likely that Dokdo was not included in it.

<sup>32</sup> Jung Hong-heon et al., *Jo-seon-ji-ri* (Geography of Korea), Jeong-eum-sa, 1946, etc. (in Korean).

<sup>33</sup> *Supra* notes 15 and 16, No Do-yang, *Jung-deung-guk-to-ji-ri-bu-do* (National geographic student atlas for middle school), Mun-u-sa, 1947; Choi Nam-sun, *Jo-seon-sang-sik-mun-dap* (Questions and answers regarding common knowledge of Korea), 1947; Choi, *Jo-seon-sang-sik* (Common knowledge of Korea), 1948, etc. (all in Korean).

<sup>34</sup> *Supra* note 31 (Jung, 2008), pp. 3–5.

<sup>35</sup> One typical example of such research is Shin Seok-ho, "On where Dokdo belongs", *Sa-hae*, first issue, 1948 (in Korean).

<sup>36</sup> Song Seok-ha, "Seeking the ancient, historic site of Ulleungdo," *Guk-je-bo-do* (International Report), January 1948, Part 3, No. 1 (new year's issue; in Korean), etc. In the section on the "Ulleungdo-Jaeng-gye" (Ulleungdo dispute) in his set of books entitled *Chun-gwan-ji* (春官志) (1745), which was a compilation of the records of the ministry of rites (the governmental department charged with diplomacy and protocol), Lee Maeng-hyu stated that Sam-bong-do was Ulleungdo.

<sup>37</sup> Fujii Kenji, "Takeshima mondai ni okeru kankoku no shucho no keisei" (The shaping of the ROK's position on the Takeshima issue), *Shimane-ken [dai-ni-ki] Takeshima Mondai Kenkyukai Saishu Hokoku-sho* (Final report of the Shimane Prefectural Government Takeshima Issue Research Group [second session]), 2012, pp. 52–53 (in Japanese).

<sup>38</sup> *Supra* note 31 (Jung, 2008), pp. 18–21.

that “belonged to” Ulleungdo, that in 1905 Japan had “seized” Takeshima for the purposes of the Russo-Japanese War, and that Supreme Commander for the Allied Powers Instruction Note (SCAPIN) 1033, addressed to Japan, had placed Takeshima in the “Korean fishing zone.”<sup>39</sup>

SCAPIN 1033 demarcated the boundary within which Japanese fishing boats could operate. In accordance with the “MacArthur line,” Japanese vessels were prohibited from approaching or landing on Takeshima, but waters outside the line (i.e. on the Korean side) were not designated as an area in which Korean fishing boats could operate exclusively, and the line did not lay down stipulations on territory. The Supreme Commander for the Allied Powers (SCAP) was not authorized to transfer territory, and the fifth paragraph of SCAPIN 1033 specified that “[t]he present authorization is not an expression of allied policy relative to ultimate determination of national jurisdiction, international boundaries or fishing rights in the area concerned or in any other area.” This statement was backed up by the August 1947 activity report issued by the US armed forces administration<sup>40</sup> and the November 27, 1952 letter to the US Embassy in Korea from the US Army Forces, Far East<sup>41</sup> (communicated as the opinion of Mark Clark, commanding general, US Army Forces, Far East and commander in chief, UN Command). Both of these documents stated that SCAPIN 1033 did not lay down stipulations on territory.

In 1951 the ROK government asserted its basis for the ownership of Takeshima by citing SCAPIN 677,<sup>42</sup> which excluded Takeshima from the scope of Japanese administrative authority. However, the sixth paragraph of this instruction note stated that “[n]othing in this directive shall be construed as an indication of Allied policy relating to the ultimate determination of the minor islands referred to in Article 8 of the Potsdam Declaration.” Furthermore, the fact that this instruction note bears no relation to territorial rights over Takeshima is indicated by the fact that on February 13, 1946, the officer in charge of the Government Section at the General Headquarters of the Allied Powers (GHQ) replied to an inquiry by a liaison officer of the Japanese Ministry of Foreign Affairs that “the directive relating to administrative separation was issued merely for the administrative convenience of the Allied Powers and it had nothing to do with the territorial issue, which should be decided by means of a peace treaty to be concluded at a later date.”<sup>43</sup> Moreover, the article reporting SCAPIN 677 in *The Dong-a Ilbo* (East Asia Daily), then the leading Korean newspaper, did not mention that Takeshima had been specifically cited

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<sup>39</sup> *Supra* Note 37, p. 53.

<sup>40</sup> NARA (RG331), GHQ/SCAP Records, United States Army Forces in Korea, No. 1, Aug. 1947 (U.S. Army Military Government—South Korea Interim Government activities; in English). According to this report, “Formerly belonging to Japan, a recent occupation directive which drew an arbitrary line demarcating Japanese and Korean fishing waters placed Tok-to within the Korean zone. Final disposition of the islands’ jurisdiction awaits the peace treaty.” However, the US armed forces administration in Korea was misunderstanding the nature of the MacArthur line (M line) when it described the seas that lay outside the M line from the Japanese point of view as Korean fishing waters. The M line was drawn up under the exclusive authority of SCAP and was supposed to be beyond any interference by other countries (Fujii Kenji, “Kankoku no kaiyo ninshiki—Ri shoban rain mondai o chushin ni” (Maritime perceptions of South Korea—Centered on the Syngman Rhee line problem), *Kankoku Kenkyu Senta nenpo* (Annual report, the Research Center for Korean Studies), 2011, p. 55 (in Japanese).

<sup>41</sup> NARA (RG84), “Records of Foreign Service Posts of the Department of State,” Entry 2846, Korea, Seoul Embassy, *Classified General Records*, 1953–55, Box 12 (in English).

<sup>42</sup> *Supra* note 37, p. 53.

<sup>43</sup> Public documents of the Ministry of Foreign Affairs of Japan, “2. Gyosei no bunri ni kansuru shireibu gawa to no kaidan” (2. Talks with SCAP regarding administrative separation), *Kyu Nihongaichi jokyo zakken* (Miscellaneous matters relating to circumstances in former Japanese territories outside Japan) (in Japanese).

in the instruction note;<sup>44</sup> Takeshima thus was clearly of no concern to Korean people at that time. Subsequently, on July 6, 1951, SCAPIN 2160 designated Takeshima as a bombing range, and Japan's government was informed of this designation.<sup>45</sup>

Meanwhile, on November 21, 1945, the Japanese government established the Research Committee on Peace Treaty Issues within the Ministry of Foreign Affairs and started preparing for the eventual signing of the treaty. The committee prepared seven booklets of documents regarding territorial issues, which it submitted to the United States. Included among these was a document entitled "Minor Islands Adjacent to Japan Proper, Part IV. Minor Islands in the Pacific, Minor Islands in the Japan Sea" (June 1947), which cited the two islands of Takeshima and Ulleungdo in the Sea of Japan, describing their geographies, histories, and industries. The document stated that Korea could not assert its territorial rights over Takeshima because, unlike Ulleungdo, "Liancourt Rocks" had no Korean name and did not appear on any maps drawn up in Korea. On the last page of the booklet, a map by Nagakubo Sekisui (Revised Complete Map of Japanese Lands and Roads) was attached. In 1946 the election regulations for the lower house of the Japanese Diet (the national legislature) designated "Takeshima within Goka Village under the Oki Islands Branch Office of Shimane Prefecture" as an area for the purposes of elections (Imperial Ordinance No. 97),<sup>46</sup> and in the same year, Japan's Ministry of Commerce and Industry registered prospecting rights for two Japanese citizens, including a person named Hidaka Fusaichi, to mine resources such as silver, copper, and iron sulfide.<sup>47</sup>

As it dealt with the aftermath of World War II, the South Korean government at the time was focusing on issues relating to the return of national assets and demands for reparations from Japan; its demands in terms of territorial issues centered on frequent demands for the "return" of the island of Tsushima, rather than Takeshima. On January 23, 1948, 60 members of South Korea's interim legislature signed and submitted a "petition for the return of Tsushima Island,"<sup>48</sup> and in a session of the National Assembly on February 17, the lawmakers proposed requesting the return of Tsushima Island at the peace conference with Japan.<sup>49</sup> In a press conference on August 17, 1948, immediately after the new government of the ROK was established, President

<sup>44</sup> "Reduced Japanese territory—Only the mainland remains as the country is torn apart," *The Dong-a ilbo* (East Asia daily), February 5, 1946 (in Korean).

<sup>45</sup> On March 22, 1951, the US Pacific Air Force Headquarters drew up the Korean Air Defense Identification Zone (KADIZ) to include Takeshima, and on June 20 the second-in-command of the Eighth United States Army (EUSA) asked the ROK government for permission to use Takeshima as a bombing range. The ROK's view is that this action by the US armed forces constitutes proof that the United States recognized Takeshima as Korean territory. However, the US forces had no authority to determine territorial boundaries, and as stated in the aforementioned activity report by the US armed forces administration, they assumed that territorial boundaries would be defined in the subsequent peace treaty.

<sup>46</sup> JACAR, Ref. A04017805000, "Showa niju nen chokurei dai nana hyaku nana go (Shugiingiin senkyo ho shikorei chu kaisei no ken)" (1945 Imperial ordinance No. 707 (Amendment of enforcement ordinance for election law of the members of the House of Representatives)), Original with imperial signature and seal; "Showa nujuichi nen chokurei dai kyuuju nana go" (1946 Imperial ordinance no.97) (National Archives of Japan; both in Japanese).

<sup>47</sup> March 5, 1953, 15th Diet Session, "Sangiin gaimu, homu rengo iinkai kaigiroku" (Minutes of the Foreign and Legal Affairs Commission of the House of Councillors), No. 1 (in Japanese).

<sup>48</sup> "Tsushima Island was originally Korean territory—Should its return be demanded in the peace conference with Japan?" *Seoul-sin-mun* (Seoul newspaper), January 25, 1948 (in Korean).

<sup>49</sup> "Proposal to request the return of Tsushima Island," *The Dong-a ilbo* (East Asia daily), February 19, 1948 (in Korean).

Syngman Rhee stated that “Tsushima is Korean territory.”<sup>50</sup> On September 10 of the same year, a South Korean presidential envoy held a press conference in Tokyo, where he proposed that Tsushima be made part of the ROK.<sup>51</sup> On January 7, 1949, Rhee strongly asserted his country’s territorial rights over Tsushima, saying in his new year’s press conference that “Tsushima should be returned.”<sup>52</sup> On August 5, 1948, members of a private organization in the ROK called the Patriotic Old Men’s Association sent a petition to Douglas MacArthur, the Supreme Commander for the Allied Powers, in which they called for the return of Dokdo and Parangdo, as well as Tsushima, to the ROK.<sup>53</sup>

These events demonstrate that there was no evidence the South Korean government recognized Takeshima as part of its own country’s territory immediately after World War II, and it was only after an incident relating to territorial rights occurred in the summer of 1947 that it became aware of the existence of “Dokdo” for the first time. Moreover, Japan had clearly indicated the historical basis for its sovereignty over Takeshima to the Allied Powers early on, whereas Korea, which continually insisted on the return of Tsushima from Japan, failed to give a clear historical basis for ownership of Takeshima—an island which did not appear on any of its own maps—instead relying mainly on SCAP’s directives to provide the basis for its territorial claims. Thus the ROK’s assertion that “upon the liberation of Korea, Dokdo came back to its country’s embrace” does not hold true either.

### (3) Preparation of the peace treaty draft and the ROK government’s actions

The peace treaty draft went through several rounds of revisions,<sup>54</sup> after which the US draft dated March 23, 1951, was passed on to the ROK government. The ROK government then sent a letter dated April 26 requesting amendments to the draft.<sup>55</sup> These included a request to specify Tsushima as ROK territory, but there was no mention of Takeshima, and the activities log of the Committee to Investigate Peace with Japan established by the South Korean diplomatic mission in Japan made no mention of Takeshima in connection with any territorial issue.<sup>56</sup> The islets were also not mentioned in the opinions presented by various countries with regard to Article 2, Paragraph 2 of the joint US-UK peace treaty draft of May 3 (which excluded the ROK’s

<sup>50</sup> “Tsushima no katsujo—Ri daitoryo yokyu” (President Rhee to demand that Tsushima is ceded), *Yomiuri Shimbun* (Yomiuri newspaper), August 19, 1948. The *Asahi Shimbun* (Asahi newspaper) article of August 19, 1948, “Tsushima no henkan—Ri daitoryo yokyu” (President Rhee to demand return of Tsushima), reported that on August 18 Rhee responded to a question by an AP reporter, saying that he would demand the return of Tsushima.

<sup>51</sup> “Tsushima Island was Korean territory 300 years ago: Its return to the ROK is reasonable in terms of national defense,” *Kyung-hyang-sin-mun* (Kyunghyang newspaper), September 12, 1948 (in Korean).

<sup>52</sup> “Plans for participation in peace conference with Japan— President Rhee states in new year press conference that he will demand the return of Tsushima Island,” *The Dong-a ilbo* (East Asia daily), January 8, 1949 (in Korean).

<sup>53</sup> “Request for Arrangement of Lands Between Korea and Japan” (Records of the U.S. Department of State relating to the internal affairs of Japan, 1945–1949: Department of State decimal file 894; in English).

<sup>54</sup> Tsukamoto Takashi, “Heiwa joyaku to takeshima (sairon)” (The Peace Treaty and Takeshima (revisited)), *Refarensu* (The Reference), No. 518 (March edition), National Diet Library, 1994, pp. 31–56 (in Japanese).

<sup>55</sup> *Dae-han-min-guk-sa-ja-ryo-jip 30, Rhee Syng-man Gwan-gye-seo-han-ja-ryo-jip 3* (Documents on the history of the ROK 30—Letters relating to Syngman Rhee 3), National Institute of Korean History, 1951, pp. 233–236 (in Korean).

<sup>56</sup> Nam, Kijeong, “saenpeulansiseuko pyeonghwajoyag han-ilgwangye -'gwandaehan pyeonghwa' wa naengjeon-ui sang-gwanseong- (Taking Diplomacy Seriously: Japan and Korea on the Road to the Treaty of Peace with Japan),” *Journal of Northeast Asian History*, Vol. 22, 2008 (in Korean), pp.63- 64.

request regarding Tsushima). Subsequently, on July 9, the revised US-UK draft dated June 14 was presented to South Korea via Yang You-chan, the ROK ambassador to the United States. As the request for Tsushima had been rejected immediately by the United States, on July 19 the ROK agreed to withdraw its request on Tsushima, but sent a letter asking that Takeshima and Parangdo instead be deemed to belong to Korea.<sup>57</sup> President Rhee sent a letter dated August 3 to ambassador Yang expressing fury that the request for Tsushima had been rejected.<sup>58</sup> Yet there was nothing in the eight-page letter referring to Takeshima. Thereafter, the opinions of various countries relating to the US-UK joint draft were compiled in the “Treaty Changes” document dated August 7, and the ROK’s requests for Takeshima and Parangdo were included in Article 2, Paragraph a.<sup>59</sup> However, other countries’ opinions with regard to the paragraph were not recorded.

In talks on July 19, the ROK requested John Foster Dulles to have Takeshima and Parangdo specified as territories to be renounced by Japan in the peace treaty. Dulles replied that provided there were historical justifications for the requests, there would be no problems. However, an internal investigation conducted by the State Department showed that the ROK had no historical basis for its requests. Robert A. Fearey of the US Embassy in Japan wrote a letter dated August 3 to the Assistant Secretary of State for Far Eastern Affairs, John M. Allison, informing him that S.W. Boggs, the Department of State’s geographer, had “tried all resources in Washington, but had been unable to identify Dokdo (Takeshima) and Parangdo”. Fearey said he also “asked the South Korean Embassy and they told him they believed Dokdo was near Ulleungdo, or Takeshima Rock, and suspected that Parangdo was too. Apparently, he said, that was all they could learn, short of sending a cable to Muccio.”<sup>60</sup> In response, on August 7, US Secretary of State Dean Acheson

<sup>57</sup> *Supra* note 54. The ROK government currently asserts its territorial rights based on the reasoning that Takeshima is a satellite island that is an extension of Ulleungdo, but this letter indicates that there was no such recognition. Prior to this, a letter from S.W. Boggs of the Department of State’s Geographical Office to Robert A. Fearey dated July 16, 1951, stated “If it is decided to give them [the Liancourt Rocks/Takeshima] to Korea, it would be necessary only to add ‘and Liancourt Rocks’ at the end of Art. 2, par. (a).” This again makes it clear that Takeshima was treated as Japanese territory in the peace treaty (NARA [RG59], Department of State, Decimal File 1950–54, 694.001/7-1351; in English), and the preamble to the Treaty on Basic Relations between Japan and the Republic of Korea signed in 1965 also invokes the peace treaty provisions.

<sup>58</sup> *Supra* note 55, pp. 330–331.

<sup>59</sup> NARA (RG59) Records of the Bureau of Public Affairs, Records Relating to the Japanese Peace Treaties, 1946–1952, Lot 78D173, Box 2 (in English). In recent years there have been comments posted on the Internet to the effect that the Rusk letter lacks force because it was not disclosed to the Allies and the Japanese government at the time, and because Secretary of State Dulles wrote in an internal memorandum a couple of years later that the US view regarding Takeshima was simply that of one of many signatories to the treaty. However, the Rusk letter was a diplomatic document exchanged between the US and the ROK in the process of drafting the peace treaty and it serves as a supplementary means of interpreting the treaty, attesting to the course of events by which Takeshima came to be regarded as Japanese territory as a result of the two governments discussing the issue of the attribution of Takeshima. As such, it was not the type of document that would usually have been made available to third parties, let alone one for which the issue of validity or invalidity was applicable. Bearing in mind, moreover, that drafts of the treaty were sent to the relevant countries other than the United States and that the treaty was drafted, agreed to and signed after the opinions of the countries were incorporated, it is clear that the assertions about the letter’s lack of validity are not true. It is also significant that the 1965 preamble to the Treaty on Basic Relations between Japan and the Republic of Korea invokes the relevant peace treaty provisions.

<sup>60</sup> NARA Confidential U.S. Lot 58 D118 and D637, Records of the Office of Northeast Asian Affairs, Japan Subject Files, 1947–1956, Reel 39 (in English). “Muccio” refers to John J. Muccio, the US ambassador in the ROK’s Busan (then known as Pusan).

notified Muccio that “Neither our geographers nor [the] South Korean Embassy have been able locate Dokdo and Parangdo Islands. Therefore unless we hear immediately [we] cannot consider this South Korean proposal to confirm their sovereignty over these islands.”<sup>61</sup> The following day the US was informed of Takeshima’s coordinates (latitude and longitude), and at the same time, the US was notified that the ROK government had withdrawn its demand for Parangdo. As a result of this course of events, the Assistant Secretary of State for Far Eastern Affairs, Dean Rusk, formally notified Ambassador Yang on August 10 of the US view that Takeshima was Japanese territory, stating (in the Rusk letter) that Takeshima had not been claimed by Korea as its own territory prior to 1905. Subsequently, on August 16, Yang and Rusk held talks, but no opinions relating to Takeshima were recorded.<sup>62</sup>

Thus, up until July 19, 1951, there was no evidence that the ROK government had made any official assertions of territorial rights over Takeshima directed toward third parties. Moreover, the peace treaty was signed without any of the other countries involved raising any objection to the fact that Takeshima was excluded from the territories to be renounced by Japan. However, perhaps in an attempt to avoid US intervention in a dispute between the ROK and Japan, the Rusk letter notifying the official view of the United States was not made public until 1978. As a result, therefore, the letter failed to prevent the ROK’s illegal occupation of Takeshima and perpetuated the cause of conflict thereafter.

The only historical document of this period indicating the Japanese government’s assertions with regard to sovereignty over Takeshima is entitled “Minor Islands Adjacent to Japan Proper, Part IV. Minor Islands in the Pacific, Minor Islands in the Japan Sea,” and no records have been found to suggest that Japan actively lobbied the Allied Powers. As demonstrated by a series of US Department of State documents, the South Korean government asserted its territorial rights over not only Tsushima, but also over Takeshima when the treaty was being drafted. And despite the fact that the ROK was given an opportunity to explain the historical evidence for its ownership of Dokdo (Takeshima), which did not appear on any of its maps, it failed to do so. These, therefore, are the likely reasons why Takeshima was regarded as Japanese territory in the peace treaty. Accordingly, the ROK’s second and third assertions as described in this research paper’s introduction are also incorrect in the sense that, with regard to the second assertion, the ROK was given several opportunities to make comments on drafts of the peace treaty despite the fact that it was not a signatory to the treaty. With respect to the third assertion, the US declined to support the South Korean claim over Dokdo not because of Japanese lobbying, but because South Korea could not provide historical evidence for its claim.

Having had both its ownership of Takeshima and the continuing existence of the MacArthur line rejected during the drafting of the peace treaty, the ROK government decided on the day before the treaty’s signing to establish a “fisheries protection zone.” A vast expanse of the Sea of Japan that was not a major fishing area, including Takeshima, was added to a “fisheries jurisdiction zone” that had been created by the ROK’s Ministry of Commerce and Industry.<sup>63</sup> That “fisheries jurisdiction zone” had added Socotra Rock (a submerged rock that the ROK asserted was Parangdo, located in a valuable fishing area in the Yellow Sea) to the area marked out by

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<sup>61</sup> *Supra* note 55, p. 110.

<sup>62</sup> For more details on the series of events, see *supra* note 54.

<sup>63</sup> The actions taken within the ROK government at the time are analyzed in detail in Fujii Kenji, “Ri shoban rain senpu e no katei ni kansuru kenkyu” (Research on the process leading to proclamation of the Syngman Rhee line), *Chosen gakuho* (Journal of the Academic Association of Koreanology in Japan), Vol. 185; 2002, and Fujii, “Ri shoban rain sengen to kankoku seifu” (The declaration of the Syngman Rhee line and the ROK government), *Dai-ni-ki Takeshima Mondai ni Kansuru Chosa Kenkyu Saishu Hokoku-sho* (Final Report of the Research Survey on the Takeshima Issue (second session)), Shimane Prefecture, 2011 (both in Japanese).

the MacArthur line and the “fisheries protection zone” was even wider, adding vast areas of the Sea of Japan that included Takeshima to the “fisheries jurisdiction zone.” Kim Dong-jo, leader of the Government Affairs Bureau in the ROK’s Ministry of Foreign Affairs, recalls that the reason they included Takeshima within the Syngman Rhee line despite opposition from some quarters was that the ROK had become convinced it was necessary to create a precedent for exercising sovereignty.<sup>64</sup>

As described above, a mere two months before the signing of the peace treaty, the ROK demanded that Takeshima, rather than Tsushima, be specified as one of the islands to be renounced by Japan. However, the ROK was unable to respond to inquiries regarding Takeshima’s exact location and a clear historical basis for its sovereignty over the islets, and its demand was consequently rejected by the United States. Then, immediately before the peace treaty was signed, the ROK’s Ministry of Foreign Affairs attempted to expand the country’s territory by making preparations to incorporate Takeshima into South Korea by force, under the pretext of protecting fisheries.

#### **(4) Actions after the signing of the peace treaty and the ROK’s tricks**

The seizure and detention of Japanese fishing boats by the ROK that had started in 1947 took place even more frequently after the Syngman Rhee line was declared, while the ROK’s government maintained an uncompromising stance with regard to Takeshima, and started to construct an after-the-fact basis for its actions to make up for the lack of historical evidence to defend its positions.

On September 21, 1951, following the signing of the San Francisco Peace Treaty on September 8, the ROK’s foreign minister, Byun Young-tae, again contacted Ambassador Muccio to assert South Korea’s ownership of Takeshima.<sup>65</sup> The “definitive” grounds Byun gave for his argument were largely based on SCAPIN 677, followed by the fact that Takeshima had been placed on “the Korean side” of the MacArthur line, and also the fact that after the bombing incident by the US military aircraft over Takeshima in 1948, the US armed forces had apologized to the Korean victims. Byun also alleged that substantial documented evidence existed to demonstrate that Takeshima had been Korean territory for several hundred years before it was “surreptitiously incorporated into Japan” in 1905. However, in a letter dated October 3 from the US Embassy in the ROK’s Busan to the Department of State, the embassy official who dealt with the matter wrote, “the Ministry of Foreign Affairs did not possess a compilation of such ‘evidence’ at this time. Although it was pointed out to the Minister that the Embassy would welcome the submission of such ‘evidence’ for transmittal to the Department, it appears doubtful that such information will be forthcoming.” Subsequently, in the preparatory discussions held from October 20, 1951 prior to ROK-Japan diplomatic normalization talks, the ROK’s proposal to replace the MacArthur line with an alternative zone excluding Japanese fishing boats from international waters was rejected. In a special committee meeting of Japan’s House of Representatives on October 22, Kusaba Ryuen, the parliamentary vice-minister for foreign affairs, who served as plenipotentiary advisor for the Japanese delegation to the San Francisco peace conference, expressed the opinion that the peace treaty clearly confirmed Takeshima as Japanese territory. Spurred by his words, an *Asahi Shimbun* newspaper reporter went ashore on Takeshima and wrote an article for the newspaper

<sup>64</sup> Kim Dong-jo, *Hoe-sang-30-nyeon Han-il-hoe-dam* (30 Years of ROK-Japan talks recollected), Joong-ang-ilbo-sa, Seoul, 1986, p. 16 (in Korean), translated into Japanese by Hayashi Takehiko, “Kan-nichi no wakai—Nikkan kosho 14 nen no kiroku” (Reconciliation between the ROK and Japan—A record of 14 years of Korea-Japan negotiations), Simul Press, 1993, p. 11.

<sup>65</sup> *Dok-do-ja-ryo—Mi-guk-pyeon* 卷 2 (Dokdo documents—The United States, Vol. 2), National Institute of Korean History, 2008, p. 110 (in Korean and English).

dated November 24.<sup>66</sup> The ROK government issued a condemnation following the article, but the grounds it gave for Korean ownership were SCAPIN 677 and the fact that the governor of the ROK's Gyeongsang Province had built a memorial monument to the 1948 bombing incident.<sup>67</sup>

Then on January 18, 1952, the ROK declared the creation of the Syngman Rhee line. The line excluded Japanese fishing boats from valuable fishing areas in the East China Sea and the Yellow Sea, while at the same time asserting South Korea's sovereignty over an extensive area of international waters included within the line and also designating Takeshima and Socotra Rock as ROK territory. By declaring the line, the ROK asserted its intention to maintain and exercise its national sovereignty, as well as its fisheries jurisdiction rights by placing the marine products and fisheries industries under the control of the government in order to preserve natural resources.<sup>68</sup>

In response, the Japanese protested by sending a Note Verbale dated January 28, 1952, indicating their concern about the illegality of the Syngman Rhee line and the occupation of Takeshima. The United States also sent a letter on February 11, expressing considerable concern about the ROK wielding administrative authority over an extensive area of international waters.<sup>69</sup> On February 12, the ROK government issued a Note Verbale rebutting the Japanese government's concerns, but with regard to Takeshima it made only a brief assertion of its territorial rights based on SCAPIN 677 and the MacArthur line. On April 25 of the same year, three days before the peace treaty went into effect, the MacArthur line was abolished, and on the same day the Japanese government issued a rebuttal to the ROK government's Note Verbale. However, the ROK government was unable to respond to the rebuttal with any clear indication of the historical basis for claiming Korean sovereignty over Takeshima. On May 20, the Shimane prefectural government submitted a petition to Japan's minister for foreign affairs and the minister for agriculture and forestry asking for Takeshima, which it described as within the jurisdiction of the Oki Islands Branch Office of Shimane Prefecture, to be excluded from use by the US armed forces in Japan as a bombing range.<sup>70</sup> However, on July 26, 1952, pursuant to an

<sup>66</sup> "Nihon ni kaeru mujin no takeshima—Kuhaku junen no shima no zenyo o saguru" (The uninhabited Takeshima returns to Japan—Exploring 10 blank years in the island's full story), *Asahi Shimbun* (Asahi newspaper), November 24, 1951. For more details, see Terao Munefuyu, "Hi wa tsuketa kedo—Takeshima shuzai hoi" (I lit it: Supplement to Takeshima reporting), *Asahi Shimbun* Osaka head office local news section, ed., *Osaka Shakai-bu Sengo Nijunen-shi Nakanoshima San-chome San-banchi* (Osaka local news section history of the 20 years after the war, Nakanoshima 3-chome, 3-banchi), 1966, pp. 168–175 (both articles in Japanese).

<sup>67</sup> "November 26, 1951, Comments on Dokdo by Chief of Public Relations Lee," *Gwang-bok-30-nyeon Jung-yo-ja-ryo-jip Wol-gan-jung-ang 1-wol-ho Byeol-chaek-gi-rok* (30 years since liberation: Key documents, Monthly Joongang, January edition, supplementary volume of records), Joong-ang-ilbo-sa, Seoul, January 1975, p. 140 (in Korean).

<sup>68</sup> Fujii Kenji, "Kankoku no kaiyo ninshiki—Ri shoban rain mondai o chushin ni" (Maritime perceptions of South Korea, centering on the Syngman Rhee line problem), *Kankoku Kenkyu Senta nenpo* (Annual report, the Research Center for Korean Studies), 2011, p. 58 (in Japanese). Socotra Rock is a submerged rock located southwest of Jeju Island in the East China Sea. At the time the Syngman Rhee line was declared, the ROK government called this submerged rock Parangdo and asserted that it was Korean territory. The ROK has now named it Ieodo and built a maritime research station there. This has resulted in friction with China, which calls it the Suyan Rock.

<sup>69</sup> "Issues associated with the proclamation of the peace line 1953–55" (Documents of the ROK relating to the Japan-ROK talks), 0119–0122 コマ (in Korean).

<sup>70</sup> Sugihara Takashi, "Zoku takeshima no gyogyoken no henshen ni tsuite—okinoshima gyogyo kyodokumiai rengokai no doko o chushin ni" (Regarding the changes in fishing rights around Takeshima, Part 2—Centered on movements of the Okinoshima Federation of Fisheries Cooperatives), Shimane Prefecture Web Takeshima Issue Research (in Japanese), available at <http://www.pref.shimane.lg.jp/admin/pref/takeshima/web-takeshima/takeshima04/takeshima04-1/takeshima04-230701.html> (as of February 16, 2012).



administrative agreement between the United States and Japan, Takeshima was re-designated as one of the marine exercise and training zones to be provided to the US forces in Japan by the Japanese nation.<sup>71</sup>

On September 15, 1952, an incident occurred whereby some people from Ulleungdo who were fishing around Takeshima narrowly escaped injury by a US bomber conducting exercises over the islets. At the time, the second Ulleungdo/Dokdo academic survey team sponsored by the Corea Alpine Club was staying in Ulleungdo to conduct a survey. The team reported the incident to the ROK government on September 20, and on November 10 the ROK government issued a protest to the US Embassy in Busan alleging that the bombing had targeted “ROK territory.”<sup>72</sup>

The correspondence between the US Embassy and the Department of State relating to territorial sovereignty over Takeshima in relation to this incident is explained in the final report of the first session of the Research Survey on the Takeshima Issue.<sup>73</sup> The exchange of messages indicates that the content of the Rusk letter of August 10, 1951 (i.e., the US position that Takeshima was Japanese territory) had been communicated to US diplomats in overseas diplomatic missions, and had been notified to the ROK government for a second time on December 4. The original text of the Note Verbale of December 4, 1952, written by the US Embassy in reply to the ROK government’s protest, was not available when the final report of the research study’s first session was compiled. However, the author has obtained Note Verbale No. 187, which was a US reply to the ROK government’s protest. The Note Verbale focused on the claim in the ROK government’s protest that Takeshima was ROK territory and stated that the US position remained as described in the Rusk letter of August 10, 1951. The Note Verbale was repeating the official view of the United States that Takeshima was Japanese territory.<sup>74</sup>

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<sup>71</sup> For more details, see the Ministry of Foreign Affairs of Japan website, *available at* [http://www.mofa.go.jp/mofaj/area/takeshima/g\\_beigun.html](http://www.mofa.go.jp/mofaj/area/takeshima/g_beigun.html) (as of February 16, 2012; in Japanese). <http://www.mofa.go.jp/region/asia-paci/takeshima/index.html> (in English)

<sup>72</sup> ROK Ministry of Foreign Affairs Government Affairs Bureau, *Dok-do-mun-je-gae-ron* (“Introduction to the Dokdo Issue”), Annex 5 (in Korean and English), 1955.

<sup>73</sup> Tsukamoto Takashi, “Takeshima ryo-yuken funso ni kanren suru beikoku kokumusho bunsho (tsuiho)” (Documents of the US Department of State relating to the Takeshima territorial dispute (addendum)), Takeshima Issue Research Group, *Takeshima mondai ni kansuru chosa kenkyu saishu hokokusho* (Final Report of the Research Survey on the Takeshima Issue), 2007, pp. 79–89 (in Japanese).

<sup>74</sup> *Supra* note 65, p. 255.

**Fig. 1 Note Verbale No. 187 from the Embassy of the United States of America to the ROK government, December 4, 1952\***

No. 187

The Embassy of the United States of America presents its compliments to the Ministry of Foreign Affairs and has the honor to refer to the latter's note of November 10, 1952 stating that a single engined airplane described as being under the command of the United States Forces in the Far East dropped bombs on Dokdo Island on September 15, 1952. The Embassy is advised that the limited amount of information provided in the Ministry's note as well as the very long time which has elapsed since the incident is said to have taken place make it virtually impossible for the United Nations Command to determine the facts in the case. Preparations have, however, been expedited to dispense with the use of Dokdo Island as a bombing range.

The Embassy has taken note of the statement contained in the Ministry's Note that "Dokdo Island (Liancourt Rocks) is a part of the territory of the Republic of Korea". The United States Government's understanding of the territorial status of this island was stated in Assistant Secretary of State Dean Rusk's letter to the Korean Ambassador in Washington dated August 10, 1951.

American Embassy,

Pusan, December 4, 1952

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\* National Archives of the United States, RG84, Entry 2846, Record of Foreign Service Posts of the Department of States, Korea, Seoul Embassy, Classified General Records, 1953-1955, box12

*Re: Embassy 204*

No. 187

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American Embassy,  
 Pusan, December 4, 1952.  
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This Note Verbale was included as an annex to the book entitled *Introduction to the Dokdo Issue* published by the ROK Ministry of Foreign Affairs Government Affairs Bureau in 1955.<sup>75</sup> It was used as a basis to argue that since the US armed forces had responded to the ROK's protest by deciding that Takeshima would no longer be a bombing range, the US had recognized that Takeshima was ROK territory. Kim Dong-jo, leader of the Government Affairs Bureau in the Ministry of Foreign Affairs, explained in the preface to *Introduction to the Dokdo Issue* that the book's purpose was not to notify the general public of the Dokdo issue, but to enable the heads of diplomatic missions overseas to correctly understand the matter and to provide them with information necessary to counter the unwarranted propaganda of the Japanese—a purpose for which he hoped the book would be frequently put to use. Shockingly, however, the book omitted the section of the Note Verbale that reaffirmed the Rusk letter, thereby concealing the fact that the US considered Takeshima to be Japanese territory not only from ROK citizens, but also from the ROK's own diplomats.<sup>76</sup>

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<sup>75</sup> *Supra* note 72, Annex 6.

<sup>76</sup> This falsification was first pointed out on Gerry Bevers' blog (in English), available at <http://dokdo-or-takeshima.blogspot.com/2011/08/1955-introduction-to-dokdo-issue-rok.html> (as of February 16, 2012).

Fig. 2 Note No. 187 from the United States Embassy to the ROK government, December 4, 1952, as it appeared in the Ministry of Foreign Affairs Government Affairs Bureau Introduction to the Dokdo Issue (1955). The final paragraph reaffirming the letter from Rusk has been abbreviated to "etc."

ANNEX 6

No. 187

The Embassy of the United States of America presents its compliments to the Ministry of Foreign Affairs and has the honor to refer to the latter's note of November 10, 1952 stating that a single engine airplane described as being under the Command of the United States Forces in the Far East dropped bombs on Dokdo Island on September 15, 1952. The Embassy is advised that the limited amount of information provided in the Ministry's note as well as the very long time which has elapsed since the incident is said to have taken place make it virtually impossible for the United Nations Command to determine the facts in the case.

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Preparations have, however, been expedited to dispense with the use of Dokdo Island as a bombing range, etc.

American Embassy,

Pusan, December 4, 1952

Meanwhile, E. Allan Lightner, Jr., the charge d'affaires ad interim of the US Embassy in Korea, made inquiries to establish the facts about the bombing following the ROK government's protest. He received a reply from a representative on behalf of the commander-in-chief of United Nations Command, Mark W. Clark, stating that, although they had been unable to confirm the facts regarding the bombing, if the use of Liancourt Rocks (Takeshima) as a bombing range were to be suspended, the ROK as well as other interested agencies would be notified, but that questions of territorial sovereignty were beyond the scope of SCAP's authority.<sup>77</sup> The letter also pointed out that SCAPIN 1033, relating to fisheries, had specified that "it was not to be construed as an expression of Allied policy relative to the ultimate determination of national jurisdiction, international boundaries or fishing rights in the area concerned." Lightner replied enclosing the December 4 notification to the ROK government,<sup>78</sup> urging that attention be paid to the section invoking the content of the Rusk letter.

On December 13, 1952, the Commander in Chief, Far East (CINCFE) decided to revoke the designation of Takeshima as a bombing range, and the US Embassies in Japan and the ROK deliberated with the commanding general of the Korean Communications Zone (KComZ), Thomas W. Herren, about whether they should notify the ROK of this revocation.<sup>79</sup> On January 20, 1953, Herren notified the ROK's minister for foreign affairs that Takeshima would no longer be used as a bombing range,<sup>80</sup> but despite the fact that the Note Verbale of December 4 clearly notified the ROK government that the United States recognized Takeshima as Japanese territory, the December 4 memo was appended as documentary material to a publication compiled for the ROK government's embassy officials to use as grounds to assert the ROK's ownership of Takeshima.<sup>81</sup> Furthermore, the Note Verbale had been falsified by omitting the section reiterating the Rusk letter to give the impression that the United States had acknowledged the ROK's ownership of Takeshima and revoked the designation of Takeshima as a bombing range as a result of the ROK government's protests and demands. Its inclusion in the publication was intended as evidence that the United States had acknowledged the ROK's ownership of Takeshima.

Subsequently, on February 4, 1953, there was an incident in which the Japanese Dai Ichi Daihomaru fishing boat was fired at by the ROK navy in international waters near Jeju Island, resulting in the death of its chief fisherman.<sup>82</sup> On February 13, the Japanese government protested by sending a Note Verbale to the ROK legation, and on February 18, it demanded compensation and measures to prevent a reoccurrence<sup>83</sup>. On February 23, after the incident was taken up in the Japanese Diet, the ROK presidential secretariat sent a letter to the Japanese government stating that the ROK had established "a line of sovereignty for the sake of peace"

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<sup>77</sup> *Supra* note 65, p. 251.

<sup>78</sup> *Supra* note 65, p. 252.

<sup>79</sup> *Supra* note 65, pp. 262–264.

<sup>80</sup> *Supra* note 72, Annex 7.

<sup>81</sup> *Supra* note 72.

<sup>82</sup> February 23, 1953, 15th Diet Session, "Suisan, homu, gaimu iinkai rengo shinsakai kaigiroku" (Minutes of the Joint Review Board for the Fisheries, Judicial Affairs, and Foreign Affairs Committees), no. 1 (in Japanese).

<sup>83</sup> February 25, 1953, 15th Diet Session, "Gaimu iinkai kaigiroku" (Minutes of the Foreign Affairs Committee), No. 20 (in Japanese).

called the Syngman Rhee Line.<sup>84</sup> This was followed on February 24 by an announcement of “the truth about the incident” by the ROK Government Information Agency,<sup>85</sup> and on February 26, an official at the ROK’s Home Affairs Ministry released a statement about the incident.<sup>86</sup> Tensions were building between Japan and the ROK, and it was within this context that, on February 27, newspapers reported that the ROK Defense Ministry had issued a statement alleging that the commander of the Far East Air Forces (FEAF), General Otto Paul Weyland, had sent the Ministry a letter acknowledging Takeshima as ROK territory,<sup>87</sup> and this became a major issue in Japan.<sup>88</sup> On March 3, Ellis O. Briggs, the US ambassador to Korea, filed a report with the State Department saying that he hoped any future communications relating to Dokdo would be transmitted through the Embassy, thus ensuring there could be no distortion of the US position that the islets were not subject to Korean jurisdiction. He added that the Embassy had not obtained an original copy of the ROK defense minister’s statement, but it was clear that the ROK government (or at least certain elements within it) had distorted the meaning of any such note from Weyland to suit its own purposes.<sup>89</sup> On March 5 (or 4), the Japanese Ministry of Foreign Affairs asked the US Embassy about whether Weyland had actually acknowledged Takeshima as ROK territory,<sup>90</sup> and the Japanese Diet also held deliberations on the matter.<sup>91</sup> On March 12, Secretary of State Dulles sent notification to the US Embassies in both Japan and the ROK that the Department of State and the Department of Defense had conducted thorough investigations, but they were unable to discover Weyland’s letter. He also indicated that the Department of State would maintain its position as outlined in Note No. 365 to Busan and Note No. 1360 to Tokyo, both dated November 26. In future, he said, any formal statements affirming or denying the matter would need to be reviewed before being made public.<sup>92</sup> Note No. 365 to Busan states that the reiteration of the Rusk letter serves only to repeat the existing position of the United States, so it distances the United States from the dispute and might dissuade the ROK from introducing a “gratuitous” issue into Japan-ROK negotiations that have already fallen into considerable difficulties.<sup>93</sup> In the end, the ROK government never offered the Weyland letter as evidence of

<sup>84</sup> “Sovereignty line demarcated for the sake of peace— Letter to Japanese representative from presidential secretariat on Japanese fisherman incident,” *The Dong-a ilbo* (East Asia daily), February 26, 1953 (in Korean).

<sup>85</sup> “The truth about the Daihomaru incident—Announcement by the Government Information Agency,” *The Dong-a ilbo* (East Asia daily), February 25, 1953 (in Korean).

<sup>86</sup> “Reinforcement of maritime security unavoidable— Home Affairs Ministry official Jin—Comments relating to ROK-Japan dispute over Japanese fisherman incident,” *The Dong-a ilbo* (East Asia daily), February 27, 1953 (in Korean).

<sup>87</sup> “Takeshima ryoyu o kakunin—kankoku kokubobu de seimei” (Ownership of Takeshima confirmed—ROK Defense Ministry issues statement), *Mainichi Shimbun* (Mainichi newspaper), February 28, 1953 (in Japanese); “Fears of Dokdo fishermen dispelled—US forces guarantee end of aerial bombing exercises,” *The Dong-a ilbo* (East Asia daily), February 28, 1953 (in Korean), etc.

<sup>88</sup> February 28, 1953, 15th Diet Session, “Shugiin gaimu iinkai kaigiroku” (Minutes of the House of Representatives Foreign Affairs Committee), no. 21 (in Japanese).

<sup>89</sup> *Supra* note 65, pp. 272–273.

<sup>90</sup> *Supra* note 65, p. 279.

<sup>91</sup> March 5, 1953, 15th Diet Session, “Sangiin gaimu, homu iinkai rengo shinsakai kaigiroku” (House of Councillors—Minutes of the Joint Review Board for the Foreign and Legal Affairs Committees), no. 1 (in Japanese).

<sup>92</sup> *Supra* note 65, p. 285.

<sup>93</sup> *Supra* note 65, p. 250. It can be inferred from the content that Note no. 187 was modelled on this.

territorial rights<sup>94</sup> and consequently it is assumed that the letter was a falsification by the ROK Defense Ministry.

On March 19, 1953, it was agreed at the Japan-US Joint Committee's Marine Subcommittee that the bombing training area at Takeshima would be eliminated, and following approval by the Japan-US Joint Committee, Takeshima was formally removed from the exercise zone.<sup>95</sup> But it does not follow that the United States and its armed forces acknowledged that Takeshima was Korean territory as a result of the agreement in the Subcommittee, as has been argued by the ROK. It is evident that the US government was treating Takeshima as Japanese territory. Subsequently, a letter from R. B. Finn of the US Embassy in Japan to William Leonhart, First Secretary of the US Embassy in the ROK,<sup>96</sup> suggested that when the time was right, the US government might consider issuing a statement to clarify the fact that, according to the US interpretation of the peace treaty, sovereignty over the Liancourt Rocks remained with Japan. The letter is believed to have been written in April 1953.<sup>97</sup>

As outlined above, therefore, the ROK government, having been denied sovereignty over Takeshima under the peace treaty, used the Syngman Rhee line to forcefully incorporate Takeshima into its own territory just before the ROK-Japan diplomatic normalization talks were to be held and the peace treaty was to enter into effect. Then it attempted to gloss over its illegal action by concealing a part of an official US document to twist the truth, and may even have gone so far as to distort the words of a high-ranking US military officer to provide a basis for its assertion that the United States had recognized the ROK's territorial rights over Takeshima.

In September 1953, the ROK government sent a Note Verbale to the Japanese government stating for the first time the historical basis for Takeshima to be considered as ROK territory. However, the legitimacy of that alleged historical basis has already been empirically denied for a number of reasons, including the claim that the present-day Takeshima was identified as Usando, an island that appeared on old maps of Korea. The Note Verbale was therefore just another attempt by the ROK government to fabricate a historical basis for its claims.

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<sup>94</sup> *Supra* note 72.

<sup>95</sup> According to Naito Seichu, the revocation of Takeshima's designation as a bombing range within less than one year was in response to the protest by the ROK government, which knew that the Japan-US Joint Committee had made the designation. In other words, it was based on the official letter sent by the ROK government on February 27, 1953, demanding that the designation be revoked (Naito, *Takeshima=Dokdo mondai nyumon—Nihon gaimusho "Takeshima" hihan* (Territorial issue between Japan and Korea; case of Takeshima/Dokdo: A critique of the "10 issues of Takeshima" published by the Ministry of Foreign Affairs of Japan), Shinkansha, 2008, p. 53 (in Japanese)). Naito also says that for this reason the ROK government sent a letter demanding measures to prevent reoccurrence of the incident to the US ambassador in the ROK on November 10, and after receiving notice on December 24 from the commanding general of the US Army Forces Far East that there would be no more bombing exercises around Dokdo, the ROK-US Joint Committee decided on March 19, 1953 to revoke its status as an exercise area. Naito therefore concludes that the course of events indicates that this series of measures was taken based on recognition by the US armed forces in the ROK that Dokdo was ROK territory (*ibid.*, p. 54). However, I was not able to locate records confirming that a meeting of the ROK-US Joint Committee was held on that date (for details refer to the answer to the third question in the opinions on the Takeshima issue for Dec. 2009 and Jan. 2010 in Shimane Prefecture Web Takeshima Issue Research (in Japanese), available at <http://www.pref.shimane.lg.jp/soumu/web-takeshima/takeshima08/2007/record200912.html> Note that I was also not able to locate the official letter sent by the ROK government on February 27, 1953, or the notice of December 24, 1952.

<sup>96</sup> *Supra* note 31 (Jung, 2008).

<sup>97</sup> NARA (RG 84) Memorandum by R. B. Finn to Leonhart, Japan, Tokyo Embassy, Classified General Records 1952-63, Box 23, folder 322.1 (in English).



## Conclusion

The ROK government asserts that “Dokdo is a historic land that was invaded in the process of Japan’s imperialist invasion of the Korean peninsula, but then recovered.”<sup>98</sup> This assertion comes from the “official letter of 57 years earlier” written by minister for foreign affairs Byun Young-tae that was cited earlier in this paper, which is thought to be the basis for the Note Verbale sent by the ROK government on October 28, 1954.<sup>99</sup> However, as this study has demonstrated, sensationalist comments, such as this, that incite nationalism run counter to the facts of the matter. Nonetheless, the ROK government has for more than 60 years repeatedly incited anti-Japanese sentiment among its citizens and stirred up public opinion for political purposes, or to put diplomatic pressure on Japan.

After World War II, the ROK shocked Japan by petitioning the United States to demand the “return” of Tsushima, an inherent part of Japanese territory.<sup>100</sup> Although the ROK made another formal demand on Tsushima just before the peace treaty was signed, it was denied by the United States. The ROK then immediately asserted territorial rights over Takeshima instead, and despite lacking any basis in the form of geographical or historical documents, it adopted the unquestioning belief that Takeshima was its own territory and demanded that Takeshima be specified in the peace treaty alongside Ulleungdo as one of the islands Japan would renounce. With inadequate historical documents or knowledge relating to the island, however, the ROK was unable to secure US support, and instead ended up prompting the decision to make Takeshima Japanese territory under the peace treaty. The ROK then used force to occupy Takeshima illegally—still without any legal basis—thereby creating a future source of trouble between South Korea and Japan. Furthermore, as this research paper has demonstrated, the ROK did not present documents as they were, but knowingly falsified them prior to inclusion in official publications. The ROK may have distorted or stretched the meaning of the words of a high-ranking US military officer in an attempt to create new evidence for Korean ownership of Takeshima. Consequently, for nearly 60 years, researchers in the ROK were forced to conduct studies and write research papers based on erroneous information,<sup>101</sup> thus depriving South Korean citizens of their right to know the truth.

<sup>98</sup> ROK Ministry of Foreign Affairs and Trade, *Refutation of the assertion of territorial rights over Dokdo by the Japanese Ministry of Foreign Affairs*, 2008 (in Japanese).

<sup>99</sup> Hyun Dae-song maintains that the minister for foreign affairs, Byun Young-tae, also refuted Japan’s assertion of territorial rights over Dokdo in comments made in September 1954. His comment indicated “a heroic resolve to fight to the last in defense of Dokdo.” (Hyun, *The Birth of Territorial Nationalism: The Politics of the Dokdo/Takeshima Issue*), 2006, p. 278 (in English)).

<sup>100</sup> “Tsushima henkan wa gensoku ni kaesu” (The return of Tsushima goes against fundamental principles), *Asahi Shimbun* (Asahi newspaper), August 28, 1948 (in Japanese). In recent years there have been reports of the discovery of historical documents indicating that the official responsible for the matter at the Japanese Ministry of Foreign Affairs at the time was considering measures to counter the ROK’s demand, in addition to reports of testimony by archaeologists (“Tsushima wa kankokuryo ni taio: shiryō hakken” (Dealing with the assertion that Tsushima is ROK territory: Documents discovered), *NHK Nyusu* (NHK News), July 3, 2008; “Kuni o tadorite—kokkyō to ryōdo no kokogaku, daini-bu (2)—Tsukushiboko nihon wo urazuke” (Tracing the nation—the archaeology of borders and territories, Part 2 (2)—Tsukushiboko (ancient bronze pikes) provide evidence for Japanese territory), *Sankei Shimbun* (Sankei newspaper), May 5, 2011.

<sup>101</sup> Kim Myung-ki, “A critique of Paragraph 3 of the items relating to the peace treaty with Japan in the “10 issues of Takeshima” published by the Ministry of Foreign Affairs of Japan,” *Dok-do-yeon-gu* (Dokdo Research), 2009 fall issue (No. 7), 2009, pp. 62–70 (in Korean). In this article, Kim states that following the response from the US Department of State, the official intent of the United States was to view Dokdo as ROK territory, “as shown below (in the Annex).” He then quotes Annex 6 of *Dok-do-mun-je-gae-ron* (the Introduction to the Dokdo Issue), which omitted the section relating to the Rusk letter.

However, fewer and fewer people are asserting that the United States discontinued use of Takeshima as a bombing exercise site and recognized the ROK's ownership of the island in response to the ROK's protest. In recent years, even some South Korean researchers are recognizing Usando in the old maps as Chikusho (called "Jukdo" in the ROK),<sup>102</sup> and we are also seeing researchers who, after analyzing official US documents and the ROK's historical documents from when the country was ruled by the US military after World War II, acknowledge that the ROK had only a tenuous awareness of Takeshima.

There have been other developments. In September 2011, the ROK's Ministry of Foreign Affairs and Trade invited a judge who had written a novel imagining that the Takeshima issue had been referred to the International Court of Justice to join the ministry,<sup>103</sup> and requested budget funds for researching litigation and preparing English-language documents.<sup>104</sup> After the discovery in 2010 of the Uldo-gun rule book, there was a separate announcement about the unearthing of some questions and answer sheets for the civil service exam known as *gwageo* that was administered during the Joseon Dynasty. The test materials, which were discovered as this research paper was being written, asked candidates about measures to deal with the Ulleungdo Dispute that occurred during the reign of King Sukjong.<sup>105</sup> If one reads the texts released, neither the questions nor the answers include any information about Takeshima, and only Ulleungdo is mentioned in connection with the borders of the Kingdom of Joseon and the subsequent Empire of Korea, as well as in territorial disputes with Japan. If anything, the texts that were made public seem to show that Korea's central government, regional officials, and the intellectuals of the day did not recognize the country's boundaries to extend as far as Takeshima. We can only hope that the results of further document collection and empirical research on the part of the ROK will be made available.

Japan's yearly budget for Takeshima is less than 50 million yen, including the budgets for both the Ministry of Foreign Affairs and Shimane Prefecture. The ROK, on the other hand, expends an enormous budget equivalent to more than 5 billion yen annually. Even greater sums will soon be required. It has been reported that there are plans to refurbish accommodations on the islets and to construct sightseeing facilities that will enable visitors to observe a local maritime research station and get views of the sea. Plans are also reportedly being drawn up for facilities such as a quay where 5,000-ton class vessels can berth. Meanwhile, the Japanese government constantly files protests, and while these types of actions by the ROK do not result in Takeshima becoming ROK territory, there is a concern that the ROK may make headway in establishing *de facto* occupation of the island. Japan therefore needs to respond properly. As explained previously,

<sup>102</sup> Oh Sang-hak, (The change in perception of Ulleungdo and Dokdo represented in maps of the Joseon Dynasty), *Mun-hwa-yeok-sa-ji-ri* (Journal of cultural and historical geography), Part 18, No. 1, 2006, p. 92; Kim Hwa-kyung, (Research on perception of Dokdo as it appeared in old Korean maps), *Dok-do-yeong-yu-gwon-hwak-lib-eul-wi-han-yeon-gu* (Research to establish territorial rights over Dokdo), edited by Yeungnam University Dokdo Research Institute, 2010, p. 25 (both in Korean), etc.

<sup>103</sup> "Dokdo horitsu shimonkan ni hanji ninmei—Gemba gaisho no hatsugen, ikan—kankoku", (Judge appointed as Dokdo legal advisory attorney; ROK expresses regrets over Japan foreign minister Gemba's statement) (in Japanese), *Jiji Tsushin* (Jiji Press; online version), September 6, 2011, available at <http://www.jiji.com/jc/zc?k=201109/2011090600633> (as of February 15, 2012).

<sup>104</sup> "Kankoku seifu, rainen no dokdo kanren gaiko yosan ni go-oku won o tonyu" (ROK government allocates 500 million won in next year's Dokdo-related diplomatic budget), *Joong-ang ilbo* (Korea Joongang daily), Japanese-language online version, October 17, 2011 (in Japanese), available at <http://japanese.joins.com/article/671/144671.html> (as of February 15, 2012).

<sup>105</sup> Daegu District Bar Association website, "Dokdo Committee discovers historical documents relating to Dokdo" (in Korean), available at <http://www.daegubar.or.kr/index.php?status=menu5&code=01&no=420> (as of February 16, 2012).

what the ROK is doing is illegally occupying Takeshima without any evidence that is backed up by historical documents. However, as the number of researchers and government officials in the ROK who use historical documents as a basis for discussions is increasing, it is to be hoped that more people will see through their government's tricks and express their concerns about taxes being squandered.

When Shimane Prefecture established local regulations for Takeshima Day in 2005, many people voiced their concerns about the impact of the measure on Japan-ROK relations, and there was a temporary deterioration in how the citizens of the ROK viewed Japan. As the empirical research of Shimane Prefecture's Takeshima Issue Research Group proceeded, the loud and emotional reaction in South Korea tapered off, and there have been some attempts at conducting empirical research on the subject in the ROK. Meanwhile, there also seems to be a shift in South Korea toward lobbying the Japanese political world<sup>106</sup> and academic circles.<sup>107</sup> The people of Japan need to be aware that territory that is inherently Japanese, Takeshima, has been occupied, and that Japan's sovereignty continues to be violated. The Japanese government needs to make even greater efforts to resolve the issue peacefully by investing funds in empirical research and activities to inform the public.

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<sup>106</sup> "Possibility of Dokdo being misused politically because Japan's Democratic Party administration is weak—Interview with Northeast Asian History Foundation," *Jugan Chosun* (Weekly chosun), No. 2136, 2010, pp. 22–23 (in Korean).

<sup>107</sup> Kyoto Sangyo University Institute for World Affairs, ROK and Northeast Asia history foundation, Joint academic seminar, "Kagami no naka no jiko ninshiki—nihon to kankoku no rekishi, bunka, mirai" (Self-perception in the mirror—The histories, cultures, and futures of Japan and the ROK), (October 9–10, 2010) (in Japanese).

# Territorial Issues in the Indo-Pacific: the East China Sea... and Beyond

June Teufel Dreyer\*

## Abstract

Chinese actions over the past decade indicate that the PRC intends to assert functional control over broad areas of the globe, including the Indo-Pacific, Eurasia, Africa, Latin America and the antipodes. The stated motivation for these actions, the need to protect energy sources crucial to support the nation's economy is valid, although the means employed to do so have sometimes violated both international law, the laws of the countries impacted, and the Beijing government's own promises. Militarization of certain areas, the threat of force, cyberattacks, economic pressures, and united front efforts to influence the domestic politics of target countries in ways that favor Chinese interests have all been employed. This article summarizes these actions, the countermeasures that have been taken against them, and their possible consequences.

## What Issues?

According to China, there are no issues in the Indo-Pacific. Although the numerous other claimants to territories disagree, influential voices within them have reluctantly concluded that territorial disputes have indeed been resolved, or are well on their way to resolution, and in China's favor. The headline of a recent article in *the New York Times* stated flatly that China's sea control is a "done deal."<sup>1</sup> This perhaps startling statement is supported by congressional testimony: at his confirmation hearing as head of the United States Indo-Pacific Command by the Senate Arms Services Committee in April 2017, Admiral Philip Davidson stated that that "China is now capable of controlling the South China Sea in all scenarios short of war with the United States."<sup>2</sup> Beijing's construction of artificial islands, after first denying any intention to militarize them, was followed quickly by their doing so. Bases, hangars, barracks, bunkers, underground fuel and water storage facilities appeared, all carefully constructed to resist the punishing typhoons that regularly afflict the area.<sup>3</sup> Western countries frequently abet the PRC's rapidly enhancing capabilities, as evidenced by Britain's decision to sell unlimited amounts

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<sup>1</sup> Hannah Beech, "China's Sea Control Is a Done Deal, 'Short of War With the U.S.,'" *The New York Times*, September 20, 2018, <https://www.nytimes.com/2018/09/20/world/asia/south-china-sea-navy.html>.

<sup>2</sup> "Advance Policy Questions for Admiral Philip Davidson, USN Expected Nominee for Commander, U.S. Pacific Command." *United States Senate Committee on Armed Services*, last modified January 29, 2018, [https://www.armed-services.senate.gov/imo/media/doc/Davidson\\_APQs\\_04-17-18.pdf](https://www.armed-services.senate.gov/imo/media/doc/Davidson_APQs_04-17-18.pdf).

<sup>3</sup> David Brunnstrom and Michael Martina, "Xi denies China turning artificial islands into military bases," *REUTERS*, September 26, 2015, <https://www.reuters.com/article/us-usa-china-pacific/xi-denies-china-turning-artificial-islands-into-military-bases-idUSKCN0RP1ZH20150925>.

of military radars and technology to China.<sup>4</sup>

The situation in the East China Sea seems to be moving in a similar direction, with incidents of incursion into Japan's claimed exclusive economic zone (EEZ) increasing after a Chinese fishing boat rammed two Japan Coast Guard (JCG) vessels in September 2010. Beijing announced that, since the waters involved belonged to China, its fishermen had a legitimate right to ply its waters, it would henceforth patrol the area. And so it has, less often at first, more frequently since then, although the pace has been measured and the increases sporadic—the so-called salami tactics that make defining a threshold that would trigger retaliation difficult for Japanese authorities to determine. Japanese fishing boats, fearing for their safety, now rarely venture into the area. Recent cases in point include:

- More Japanese Air Self Defense (ASDF) scrambles near the contested Senkaku/Diaoyu Islands from April to June 2018 than in January through March (173 versus 105) or in April to June 2017 (105 versus 101).
- Chinese Coast Guard (CCG) ships entered the territorial waters of the Senkakus 23 times from April to June 2018 versus 20 from January to March.
- What appeared to be a Chinese unmanned aerial vehicle (UAV) flew north of the Senkakus in April 2018, albeit without entering Japanese airspace, for the first time since May 2017.<sup>5</sup>
- In June 2018, a hospital ship of the Chinese navy entered the contiguous zone adjacent to the Senkakus for the third time in a year.<sup>6</sup>
- The PRC's State Oceanic Administration statement that it had installed a large buoy within Japan's claimed EEZ in the vicinity of the Senkaku, presumably to collect weather and other data for military purposes.<sup>7</sup>
- A JCG report revealed that the Chinese oceanographic ship Xiangyanghong10 had conducted unauthorized activities inside Japan's claimed EEZ.<sup>8</sup>

## Port Facilities

China's expansionism is also evident in its activities relevant to the Indian Ocean and the Persian Gulf. These passages are important to the PRC's energy needs, since 82 percent of the oil and gas that China imports pass through the Indian Ocean. Pakistan has leased its port of Gwadar, located just outside the Straits of Hormuz at the mouth of the Persian Gulf and Indian Ocean, to China until 2059. In July 2018, Sri Lanka awarded a 99 year lease on Hambantota, at the country's

<sup>4</sup> Stephen Chen, "Britain to sell China 'unlimited' amount of military radar equipment, technology," *South China Morning Post*, November 1, 2018, <https://www.scmp.com/news/china/society/article/2171242/britain-sell-china-unlimited-amount-military-radar-equipment>.

<sup>5</sup> Ministry of Defence Joint Staff Office, "Suitei Chūgokuki no Higashishinakai ni okeru hikou ni tsuite [Regarding what it appears to be a Chinese aircraft flying over East China Sea]," *Joint Staff Press Release*, April 18, 2018, [http://www.mod.go.jp/js/Press/press2018/press\\_pdf/p20180418\\_01.pdf](http://www.mod.go.jp/js/Press/press2018/press_pdf/p20180418_01.pdf).

<sup>6</sup> "Chinese naval vessel spotted near disputed islands, Japan airs concern," *Kyodo News*, June 29, 2018, <https://english.kyodonews.net/news/2018/06/caaf411aa97a-chinese-naval-vessel-spotted-near-disputed-islands-japan-airs-concern.html>.

<sup>7</sup> "Nihon no EEZnai de chugoku no aratana bui: gunji mokuteki demo shushu ka [New Chinese buoy in Japanese EEZ: information gathering for military purpose too?]," *Sankei Shimbun*, Oct. 2, 2018, <https://www.sankei.com/affairs/news/181002/afr1810020003-n1.html>.

<sup>8</sup> Japan Coast Gard, "Waga kuni shūhen kaiiki ni okeru kaiyō chōsasen no katsudō jōkyō [The activities of marine research vessels within ocean surrounding Japan]," last modified March 1, 2019, <https://www.kaiho.mlit.go.jp/info/topics/post-485.html>.

southern extremity and overlooking South Asian sea lanes, to China Merchant Port Holdings.<sup>9</sup> At the same time, the Sri Lankan government announced that it would move the headquarters of its southern fleet to the Chinese-operated port. Whether observers' concerns that this could result in Chinese constraints upon Sri Lanka's freedom of action are justified remains to be seen.

Djibouti, on the Horn of Africa, may be the most strategically valuable acquisition of all. The Bab al-Mandeb, a twenty-mile passage between Djibouti and Yemen, connects the Suez Canal through the Red Sea, with the Indian Ocean and the Arabian Sea. In July 2017, it became the first formal overseas Chinese military base.<sup>10</sup> China will not be alone in Djibouti, however, since the United States, Japan, France, and Italy also maintain facilities there.

China also expressed an interest in constructing a naval facility in the Maldives' Southern Laamu Atoll, near the main trading route between Africa and Asia. In 2018, India, already involved in a long-simmering land border conflict with China as well as concerned with maritime encirclement from Gwadar and Hambantota, spent millions of dollars helping Ibrahim Mohamed Solih, a leading opponent of the facility, to defeat then-president Abdulla Yameen, who favored it.<sup>11</sup>

New Zealand media described their country as "blindsided" when Niue and the Cook Islands, self-governing nations in free association with New Zealand and subsidized by its aid and investment, signed memoranda of free association to join China's belt and road initiative in return for nearly \$15 million for wharf renovation and an upgraded expressway<sup>12</sup>; Beijing has already paid the Cook Islands for pelagic tuna fisheries licenses and is discussing development of a deep-water port on its Penrhryn Island.

Acquisition of overseas bases and basing rights is not confined to the Indo-Pacific. China has expressed interest in the polar route, now ice-free for longer periods of the year. It has also announced plans to build a permanent airfield in Antarctica.<sup>13</sup> This will insert the PRC into the management of the continent's air traffic network. While there are legitimate scientific research reasons for the facility, its associated radar and other communications facilities can be used for missile guidance and surveillance operations that would give Beijing the ability to shift the strategic balance in the area. In Latin America, soon after El Salvador broke diplomatic relations with Taipei in favor of recognizing Beijing, reports circulated that the PRC was negotiating to establish a military base in El Salvador's strategically located Gulf of Fonseca. These were promptly denied by a Chinese official<sup>14</sup>, with Salvadorian President Salvador Sanchez Ceren reiterating that

<sup>9</sup> Abhijit Singh, "China's strategic ambitions seen in the Hambantota port in Sri Lanka," *Hindustan Times*, July 26, 2018, <https://www.hindustantimes.com/analysis/china-s-strategic-ambitions-seen-in-the-hambantota-port-in-sri-lanka/story-PErf7dzG8lZINVGuF37gxK.html>.

<sup>10</sup> "For Djibouti, It's All About Location," *Stratfor Worldview*, last modified January 29, 2018, <https://worldview.stratfor.com/article/djibouti-its-all-about-location>.

<sup>11</sup> Yuji Kuronuma and Oki Nagai, "Maldives election marks setback for China's Belt and Road," *Nikkei Asian Review*, September 25, 2018, <https://asia.nikkei.com/Spotlight/Belt-and-Road/Maldives-election-marks-setback-for-China-s-Belt-and-Road2>.

<sup>12</sup> Matthew Rosenberg and Hamish Rutherford, "Government blindsided as Niue signs up to Chinese blandishments," *stuff*, November 4, 2018, <https://www.stuff.co.nz/national/108331406/government-blindsided-as-niue-signs-up-to-chinese-blandishments>.

<sup>13</sup> "China expands its presence in Antarctica," *The Japan Times*, November 1, 2018, <https://www.japantimes.co.jp/opinion/2018/11/01/editorials/china-expands-presence-antarctica/#.XFKhgVz7SUL>.

<sup>14</sup> Rosa María Pastrán, "China niega una intención militar en golfo de Fonseca," *La Prensa Grafica*, October 1, 2018, <https://www.laprensagrafica.com/economia/China-niega-una-intencion-militar-en-golfo-de-Fonseca-20180930-0070.html>.

there were no such plans<sup>15</sup>. Skeptics recalled that this is exactly what Xi Jinping said about not militarizing the islands in the South China Sea, just before China began to militarize them.

While Beijing states that its port facilities are to be used for commercial purposes, or, in the case of Djibouti, to support its humanitarian assistance and disaster relief operations in the area, having access to foreign ports allows the PLA to pre-position the logistics support that it needs to regularize and sustain military deployments, hence enabling the projection of military power at greater distances from China. The acquisition of what has been called a “string of pearls” has been accompanied by annual increases in the defense budget that would be the envy of any military in the world. Since the PRC faces no external enemy, increasing capabilities raise concerns about its geostrategic intentions. China avows that it is a good global citizen and abides by international law. Still, its angry response to a 2016 international court ruling that invalidated the PRC’s claims to the 9-dash line in the South China Sea, stating that this made war more likely, did not inspire confidence.<sup>16</sup> China has also prolonged discussions on a code of conduct (COC) for the South China Sea, with the latest draft indicating that it will be able to impose its conditions on signatories in such a way as to ensure that its rules rather than their preferences will be definitive.<sup>17</sup>

Threats aside, and in no way to minimize the threat posed by an increasingly powerful Chinese military and its increasingly assertive leadership, it should be recognized that the danger posed to Indo-Pacific security is not simply a kinetic threat but involves what is known in basketball terminology as a full-court press. Chinese leaders recognize the dangers of war to its hard-won and precariously poised financial prosperity. Despite government stimulus efforts that Chinese and foreign economists warn are unwise, the 2018 rate of growth is the lowest in decades.<sup>18</sup> The debt to GDP ratio has reached worrisome levels, and although the citizenry remains politically inactive, it is angry over such issues as choking pollution and massive official corruption. China’s budget for domestic security exceeds its defense budget, indicating insecurity at the highest level. While belligerent international behavior increases national pride, an actual war could not only derail economic growth but lead to the fall of the ruling elite.

### The Three Warfares

Whether through study of the revered 500 B.C. military strategist Sun Zi or their own common sense, the Chinese leadership seems to have determined to win without fighting. None of the “three warfares”—legal warfare, which is sometimes referred to as “lawfare;” public opinion warfare, and media warfare—involve the use of physical force. With regard to lawfare, Beijing has acted as if its domestic laws trump international law, citing a February 1992 decision of its National People’s Conference to unilaterally annex all disputed territories: the Spratlys, the Paracels, the Diaoyu/Senkakus, and Taiwan. When international law provides a claim that favors Beijing’s case, it will be utilized as well, often by omitting references that would qualify its claims. For example, although purportedly authentic ancient documents have been produced to back

<sup>15</sup> “Presidente Sánchez Cerén: En El Salvador solo existirá una base military [President Sánchez Cerén: In El Salvador there will only be one military base],” *El Mundo*, October 6, 2018, <https://elmundo.sv/presidente-sanchez-ceren-en-el-salvador-solo-existira-una-base-militar/>.

<sup>16</sup> Tom Phillips, “China attacks international court after South China Sea ruling,” *The Guardian*, July 13, 2016, <https://www.theguardian.com/world/2016/jul/13/china-damns-international-court-after-south-china-sea-slapdown>.

<sup>17</sup> Carl Thayer, “A Closer Look at the ASEAN-China Single Draft South China Sea Code of Conduct,” *The Diplomat*, August 3, 2018, <https://thediplomat.com/2018/08/a-closer-look-at-the-asean-china-single-draft-south-china-sea-code-of-conduct/>.

<sup>18</sup> Chao Deng, “China Finds Big-Ticket Spending Is a Road to Nowhere,” *The Wall Street Journal*, Oct 20, 2018, <https://www.wsj.com/articles/china-finds-big-ticket-spending-is-a-road-to-nowhere-1540036800>.

the claim that China discovered their areas first, international law states that first discovery does not automatically confer ownership, which requires other actions such as continued assertions of the country's claim to the territory, the placing of plaques or flags on the area claimed, and or habitation by its nationals. All are lacking. Beijing adds to its claims that Chinese mariners discovered the Diaoyu/Senkakus first that, since Japan ruled the islands from its then-colony of Taiwan, the Diaoyu/Senkakus reverted to China when Japan relinquished control of Taiwan after World War II. So far, neither China nor Taiwan, which also claims the islands, has been able to find any evidence to back this assertion. Japan states that it administered the islands as part of Okinawa prefecture, as it has done since reversion from American stewardship in 1972.

### **United Front Work**

In the case of the other two warfares, numerous tactics to win hearts and minds have been employed. In effect, they seek to use the openness of the society to undermine and subvert its democratic processes. The CCP's United Front Work Department has been charged with coordinating these activities though, as New Zealand scholar Anne-Marie Brady has pointed out, all CCP agencies and every party member are tasked with united front work, albeit some more than others.<sup>19</sup> A particular focus of its efforts are the many Chinese diaspora communities. These overseas Chinese associations, often pre-existing ones, receive infusions of funds and guidance designed to create sympathy for the PRC government's positions on such matters as the disputed territories. Chinese-language newspapers have been bought and transformed to reflect the CCP's position. Candidates for public office, sometimes ethnic Chinese and sometimes not, have been effectively suborned.

### **Australia**

In Australia, a joint investigation by journalists from the country's Four Corners and Fairfax Media exposed what it called a wide-ranging campaign by the Chinese government and its proxies to infiltrate Australia's political process through its universities, local student and community groups, the Chinese language media, and some of the nation's leading politicians. In one much-publicized case, a woman who had emigrated from China and married the assistant secretary of Australia's Office of Net Assessments, which provides secret intelligence briefings to the prime minister, was later discovered to have been the conduit between funds from China to politicians with whom they wanted to become "sincere friends." Sam Dastyari, an Iranian-born Labor member of parliament whose campaigns had been generously supported by Chinese donors, resigned after it was revealed that he had contradicted both the Australian government's and his own party's position supporting the international tribunal's ruling on the South China Sea and that he had warned a major Chinese donor that his phone was probably being tapped by Australian security.<sup>20</sup> He is now a radio show host in Sydney.

### **New Zealand**

In New Zealand, the issue of Chinese interference in politics came to a head with the case of

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<sup>19</sup> Anne-Marie Brady, "Exploit Every Rift: United Front Work Goes Global," *Party Watch Annual Report 2018*, October 19, 2018, <https://www.ccpwatch.org/single-post/2018/10/18/Party-Watch-Annual-Report-2018>.

<sup>20</sup> Katharine Murphy, "Sam Dastyari: senator recorded contradicting Labor on South China Sea," *The Guardian*, November 29, 2017, <https://www.theguardian.com/australia-news/2017/nov/29/sam-dastyari-senator-recorded-contradicting-labor-on-south-china-sea>.



member of parliament Yang Jian.<sup>21</sup> Yang, born and educated in the PRC, omitted to mention on his application for New Zealand citizenship that he had worked in China's military intelligence sector for fifteen years. The People's Liberation Army would not have allowed individuals with his background to go overseas to further their studies unless they had official permission; even so, Yang would have had to wait at least two years to leave China. This did not happen. After entering parliament, Yang accompanied two successive prime ministers to meetings with visiting senior Chinese leaders, which gave him privileged access to New Zealand's China policy briefing notes and positions. Normally, someone with a foreign military intelligence background would not have been given the security clearances necessary for this access, but elected members of parliament need not apply for such clearances. Yang remains a member of parliament, with Deputy Prime Minister Winston Peters angrily defending this continued presence there. He has, however, been removed from committees that deal with classified information.

## United Kingdom

After resigning as prime minister, David Cameron announced that he would lead a billion-dollar infrastructure investment initiative between the UK and China that is connected to the PRC's belt and road initiative.<sup>22</sup> As described by the U.S.-published journal *Foreign Policy*, this initiative "has revealed itself to be rather uncompromisingly aligned with an aggressive interpretation of Chinese interests."<sup>23</sup> (For more on the Belt and Road, see below.)

## Taiwan

Perhaps the biggest territorial prize of all is Taiwan, the overwhelming majority of whose citizens reject unification with a country they have never been part of. Here, too, united front work has been utilized. Efforts to bring the island under control through economic agreements arranged with a compliant Taiwan president backfired when the compliant president attempted an extraparliamentary maneuver to gain approval of yet another trade pact. Hundreds of thousands of opponents streamed into the streets and occupied the country's parliament building for over three weeks, leading to a humiliating defeat for the president's party in the next, 2016, election. Beijing then strengthened its ties with other political groups on the island.

These ties had actually existed for many years. Information revealed by the *Taipei Times* disclosed that in 2005, Wang Huning, then director of the CCP's Central Party Research Office and since promoted to Politburo membership, identified more than twenty people who had been marginalized by their respective political parties and invited them to organize a new, pro-Beijing party. The *Taipei Times'* investigation was corroborated by an exiled Chinese dissident, Yuan Hongbing, whose book *The Taiwan Crisis*, stated that in June 2008, the Politburo had approved a political strategy for Taiwan that named organizing a political party as its most important united front tactic. There are at least two of these, the New Party and the Chinese Unity Promotion Party (CUPP), both of which are perfectly legal under Taiwan's constitution.

What is not legal are their sources of funding and certain of their activities. In late 2017, investigators searched the residences of four prominent members of the New Party for documents relevant to subsidies for its newspaper and for founding a paramilitary New China

<sup>21</sup> Anne-Marie Brady, "Magic Weapons: China's political influence activities under Xi Jinping," *Document Cloud*, last modified January 29, 2018, <https://www.documentcloud.org/documents/4053774-Magic-Weapons-China-s-political-influence.html#document/p22/a376225>.

<sup>22</sup> Rowena Mason, "What is David Cameron doing now?," *The Guardian*, December 29, 2017, <https://www.theguardian.com/politics/2017/dec/29/what-is-david-cameron-doing-now>.

<sup>23</sup> Bruno Maçães, "David Cameron Didn't Just Sell Out to China," *Foreign Policy*, December 20, 2017, <https://foreignpolicy.com/2017/12/20/david-cameron-didnt-just-sell-out-to-china/>.

Youth Association with the goal of “wartime control.” A party spokesman has denied all charges.<sup>24</sup> The CUPP’s chairman, Chang An-le, also known as “White Wolf,” is an acknowledged former gangster. His son, Chang Wei, who is a CUPP activist, and an associate were charged with attempted murder after CUPP members assaulted university students during a cross-strait music event on their campus on behalf of a CCP effort to absorb Taiwan.<sup>25</sup> The charges, corroborated by videos of the attack, were later dropped to assault, and the accused given 40-day prison sentences.<sup>26</sup>

Particular targets of China’s penetration of Taiwanese society are businesspeople with assets in the PRC, the younger generation who have no memories of what life under communism was like for those who escaped it, and the estimated 300,000 Chinese women who married Taiwanese and live on the island. Some of these activities are legally unobjectionable—for example, inviting youth baseball teams, baseball being Taiwan’s national game—for exchanges in China, entertaining them lavishly, and having them play in stadia adorned with banners proclaiming that there is only one China, with Taiwan a part of it. Scholarships to major Chinese universities have also been made available, with lucrative job offers extended to some of the island’s top technological talent.

### Soft Power versus Sharp Power

Most countries seek to create good will in others through such methods as sending abroad dance and theater groups that reflect their national cultures, making their literature available in translation, and showcasing such aspects as their cuisine, cinema, and couture. This is soft power: it seeks to attract through its culture and values. Sharp power, by contrast, attempts to pierce, penetrate, or perforate the political and information environments in targeted countries to create support for itself and its values. It typically seeks to silence or counter critical voices through rejecting foreign scrutiny of its human rights record, and asserting its own alternative conceptions of human rights, insisting that target countries back its positions on sovereignty. In Australia and New Zealand, ethnic Chinese who resist the united front blandishments have received hate mail; the home and the office of Professor Anne-Marie Brady, the scholar whose work brought these and other united front activities to light, were broken into and rifled for data<sup>27</sup>—clearly not the work of common thieves. One observer describes Beijing as having adopted the stance of the wounded bully: a powerful state that describes itself as victimized, shouting that the world is treating it unfairly.<sup>28</sup>

### Debt Traps

In 2013, Chinese President Xi Jinping announced an ambitious economic plan that would re-write the rules and norms of international trade, replacing a system heretofore dominated by seven of the earliest industrialized states (G-7) with a creatively reimagined globe-spanning silk route emanating from and financed by China. The vehicle that would underwrite this, the Asian Infrastructure Investment Bank (AIIB) was established in Beijing with a Chinese national as

<sup>24</sup> Stacy Hsu, “New Party spokesman denies allegations of collusion,” *Taipei Times*, January 3, 2018, <http://www.taipeitimes.com/News/front/archives/2018/01/03/2003685093>.

<sup>25</sup> Jason Pan, “Prosecutors charge five CUPP members with assault,” *Taipei Times*, December 2, 2017, <http://www.taipeitimes.com/News/front/archives/2017/12/02/2003683283>.

<sup>26</sup> Aris Teon, “Pro-China Gangsters Jailed In Taiwan For Injuring Students,” *Global perspectives*, July 31, 2018, <https://www.aristeon.net/2018/07/pro-china-gangsters-jailed-in-taiwan-for-injuring-students.html>.

<sup>27</sup> Matt Nippert, “The curious case of the burgled professor,” *NZ Herald*, September 15, 2018, [https://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=12125210](https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=12125210).

<sup>28</sup> Professor Jacques de Lisle, October 6, 2018.

head. The PRC, having contributed the majority of capital, holds the largest number of shares. At first attracted by the prospect of “free money,” often by states of doubtful credit worthiness, or who wanted to undertake projects that other lending agencies had considered unacceptably financially risky, countries contracted loans that they were unable to pay back, and that they later complained had been accompanied by demands and conditions that benefited China rather than themselves.

This is the genesis of leaseholds or basing rights to the strategically positioned ports that the PRC has been acquiring. Several states, already unable to repay the loans, are caught in a debt trap, as happened to Sri Lanka with regard to Hambantota. Large infusions of aid to Venezuela—over \$50 billion through oil-for-loans over the past decade, beginning even before the OBOR plan was announced, have also proved impossible for its beleaguered economy to repay. New infusions of Chinese money halted nearly three years ago, when declines in oil prices and Venezuela’s badly mismanaged petroleum sector pushed the country’s economy into a hyperinflationary collapse. The Caracas government then requested a change in the terms of payment. In September 2018, President Nicolás Maduro Moros traveled to Beijing to seek relief, but apparently failed to secure the new credit lines he sought.<sup>29</sup> Maduro agreed to sell 9.9 percent of the shares in joint venture Sinovensa to the PRC’s state-owned China National Petroleum Corporation (CNPC), which, added to the 40 percent CNPC already held, means that China now owns 49.9 percent of the company.

The situation in Africa is similar. According to *Africa Confidential*, 23 of the 68 developing countries participating in OBOR are in debt distress or close to it because of their participation in the project.<sup>30</sup> Kenya is at risk of losing control of Mombasa, its major port, if, as expected, it default on loans from The China EximBank.<sup>31</sup> Uganda, which waved sovereignty over certain properties as a condition of loans from China, may lose them for similar reasons.<sup>32</sup>

Malaysia almost immediately became dissatisfied with the terms of Chinese loans, with Prime Minister Mahathir Mohamed criticizing the “stupidity” of previous negotiations and announcing the cancellation of two major projects, the East Coast Rail Link and the Trans-Sabah Pipeline, that had been part of the OBOR infrastructure initiative.<sup>33</sup> They had been valued at \$23 billion. Pakistani officials have voiced nearly identical concerns that the deals were badly negotiated, too expensive, and overly favorable to China. The Pakistan government refused China’s demand to accept Chinese currency within the Gwadar free zone; a Chinese national was assassinated in the capital city of Karachi, and another murdered in Balochistan, through which a crucial stretch of the China Pakistan Economic Corridor (CPEC) passes. The principal goal of the CPEC is to connect China’s restive northwestern province of Xinjiang with Gwadar and from there to the

<sup>29</sup> Brian Ellsworth and Corina Pons, “Venezuela sold 9.9 percent of joint venture to China oil firm: Maduro,” *Reuters*, September 19, 2018, <https://www.reuters.com/article/us-venezuela-china/venezuela-sold-9-9-percent-of-joint-venture-to-china-oil-firm-maduro-idUSKCN1LY2NN>.

<sup>30</sup> “Bonds, bills and ever bigger debts,” *Africa Confidential*, September 14, 2018, [https://www.africa-confidential.com/article-preview/id/12424/Bonds%2C\\_bills\\_and\\_ever\\_bigger\\_debts](https://www.africa-confidential.com/article-preview/id/12424/Bonds%2C_bills_and_ever_bigger_debts).

<sup>31</sup> “Report: Kenya Risks Losing Port of Mombasa to China,” *The Maritime Executive*, December 20, 2018, <https://www.maritime-executive.com/article/kenya-risks-losing-port-of-mombasa-to-china>.

<sup>32</sup> “China to take over Uganda’s main assets over unpaid rising huge debt,” *African Stand*, January 12, 2019, <https://www.africanstand.com/news/africa/east-africa/china-to-take-over-ugandas-main-assets-over-unpaid-rising-huge-debt/>.

<sup>33</sup> Isabel Van Brugen, “Malaysia Cancels Megaprojects Under China’s OBOR to Save Country From Debt,” *The Epoch Times*, August 21, [https://www.theepochtimes.com/malaysia-cancels-megaprojects-under-chinas-obor-to-save-country-from-debt\\_2629309.html](https://www.theepochtimes.com/malaysia-cancels-megaprojects-under-chinas-obor-to-save-country-from-debt_2629309.html).

Arabian Sea.<sup>34</sup> The Pakistani component of this initiative is \$60 billion, equal to 20 percent of the country's entire GDP.

China has responded to these and other criticisms by pointing out that the infrastructure projects are usually initiated by host countries, who then choose to enter into contracts on terms they deem appropriate.<sup>35</sup> The Sri Lankan government, for example, wanted to develop Hambantota into a transportation hub on the Indian Ocean; the Chinese company that now controls it is responsible for no more than the operation and management of the port, and the port is being used for commercial use only. China's interest rates, they aver, are not high in percentage terms. Those who call OBOR a debt trap are simply trying to stoke the perception of a China threat.

Countries indebted to China would nonetheless be ill-advised to challenge Beijing's claims to disputed territories. Even countries that do not have territorial disputes find it expedient to endorse the PRC's claims. In Greece, where China has taken out a lease on the country's major port of Piraeus, locals grumble about their government selling the country's strategic assets to China.<sup>36</sup> But the parliament's foreign affairs and defense committee head, Costas Douzinas, contrasted the PRC's willingness to provide money with the European Union [EU]'s "medieval leech" behavior.<sup>37</sup> Although China never explicitly asked for support on such sensitive issues, he said "when you can do something in return, who will you help, the one who helped you or the one who slapped you?"

Hungary, where China has promised to provide billions of dollars for railway construction, has blocked an EU statement on the South China Sea, with EU officials expressing concern that such pre-emptive deference to Beijing's wishes is undermining the organization's ability to speak with one voice. U.S. Secretary of State Mike Pompeo has also warned of China's "predatory economic activity"<sup>38</sup>—an interesting parallel, or perhaps counterpoint, to Douzinas' description of EU medieval leeches—noting that "when China comes calling, it's not always to the benefit of your citizens."

The sum total of these developments have raised concern that OBOR's real purpose is control of the seas and strategic overland routes rather than the "win-win" future of global prosperity through enhanced connectivity that the Chinese government advertises the initiative as.

## The Weaponization of Trade

Trade has also been employed to extract compliance with the PRC's territorial policies. When in 2010, Japan announced its intention to put on trial the captain of a Chinese fishing boat that had rammed two Japanese coast guard vessels off the Diaoyu/Senkaku Islands, the Chinese government announced that it would halt sales of rare earth to Japan, these being necessary for the catalytic converters used in the Japanese auto industry. It also imposed meticulous inspection procedures for all Japanese exports entering China, thereby slowing trade, and arrested several Japanese nationals on spying charges. The captain was soon released. Something similar

<sup>34</sup> Adnan Aamir, "China's Belt and Road plans dismay Pakistan's poorest province," *Financial Times*, June 14, 2018, <https://www.ft.com/content/c4b78fe0-5399-11e8-84f4-43d65af59d43>.

<sup>35</sup> Zhao Minghao, "The BRI is Not a Debt Trap!," *China US Focus*, October 16, 2018, <https://www.chinausfocus.com/article/2018/1016/17257.html>.

<sup>36</sup> Alexander Bowe, October 22, 2018.

<sup>37</sup> Jason Horowitz and Liz Alderman, "Chastised by E.U., a Resentful Greece Embraces China's Cash and Interests," *The New York Times*, August 26, 2017, <https://www.nytimes.com/2017/08/26/world/europe/greece-china-piraeus-alexis-tsipras.html>.

<sup>38</sup> Edward Wong, "Mike Pompeo Warns Panama Against Doing Business With China," *The New York Times*, October 19, 2018, <https://www.nytimes.com/2018/10/19/world/americas/mike-pompeo-panama-china.html>.

happened to the Philippines two years later with regard to Chinese fishing boats off Scarborough Shoal. Manila's protests were followed by Beijing announcing a halt on the import of fruit it claimed was infested.<sup>39</sup> Manila quickly backed down: China now controls the area, although it is within the Philippines' exclusive economic zone. A commentator for the *Asia Sentinel* noted that the effect of Chinese action would not be lost on the other claimants to disputed territories in the area.<sup>40</sup>

Private and semi-private companies have also been forced to comply with Chinese rules. The app and websites of international hotel giant Marriott were taken off line for a week in punishment for its showing Taiwan as a separate entity. The hotel chain apologized as well as announcing "disciplinary action" against an employee who had supported independence for Tibet.<sup>41</sup> Clothing manufacturers must also comply, as Zara, among others, was told. Airlines have been affected, as well: while White House spokesperson Sarah Sanders denounced<sup>42</sup> Beijing's demand<sup>43</sup> that Taiwan be referred to as "Taiwan, China," as "Orwellian nonsense," most airlines, including private, state-owned or partially state-owned carriers such as Air India, Lufthansa, Qantas, and Delta quickly changed their websites. The airline of Palau, one of the 17 remaining states who accord diplomatic recognition to Taiwan, went out of business after Beijing banned all group tours to the island and announced fines for those who violated the new rule.<sup>44</sup> Tourism accounts for most of the GDP of the small island, which has only 21,000 inhabitants.

Sometimes, capitulation appears to result from self-censorship, since it occurs even when there is no evidence, or perhaps no public evidence, of Chinese demands. In Australia, a local beef council painted over the Taiwan flags that two little girls had contributed to the statue of a bull meant to show the cultural diversity of their community.<sup>45</sup>

## Cyberattacks

Cyberattacks have also been used against many countries, including but not limited to the U.S., India, the Philippines, and Japan, with the Beijing government disclaiming any responsibility.<sup>46</sup> Some instances in the latter two appear to be the work of nationalist forces, since they are accompanied by strident claims over the disputed territories. It has, however, been pointed out that, given the degree of surveillance the Chinese government exercises over its population, the hackers are likely to have had official approval for their actions. In cyber intrusions in the

<sup>39</sup> "The China-Philippine Banana War," *Asia Sentinel*, June 6, 2012, <https://www.asiasentinel.com/society/the-china-philippine-banana-war/>.

<sup>40</sup> Isabel Van Brugen, "Malaysia Cancels Megaprojects Under China's OBOR to Save Country From Debt," *The Epoch Times*, August 21, 2018 (Updated: August 22, 2018), [https://www.theepochtimes.com/malaysia-cancels-megaprojects-under-chinas-obor-to-save-country-from-debt\\_2629309.html](https://www.theepochtimes.com/malaysia-cancels-megaprojects-under-chinas-obor-to-save-country-from-debt_2629309.html)

<sup>41</sup> Abha Bhattarai, "China asked Marriott to shut down its website. The company complied.," *The Washington Post*, January 18, 2018, [https://www.washingtonpost.com/news/business/wp/2018/01/18/china-demanded-marriott-change-its-website-the-company-complied/?utm\\_term=.2f16e53ae5aa](https://www.washingtonpost.com/news/business/wp/2018/01/18/china-demanded-marriott-change-its-website-the-company-complied/?utm_term=.2f16e53ae5aa).

<sup>42</sup> Erica Pandey, "Go deeper: The list of airlines bending to China's will," *Axios*, last modified January 29, 2019, <https://www.axios.com/go-deeper-list-of-airlines-china-taiwan-references-orwellian-nonsense-e514d38e-d155-4bcf-8a76-7c0bec4b7033.html>.

<sup>43</sup> *Ibid.*

<sup>44</sup> Michael Auslin, "The New China Rules," *National Review*, September 27, 2018, <https://www.nationalreview.com/magazine/2018/10/15/chinas-geopolitical-power-play/>.

<sup>45</sup> Paul Robinson and Emilia Terzon, "Taiwan flag design painted over by council ahead of beef industry event," *ABC News*, May 9, 2018, <https://www.abc.net.au/news/2018-05-09/childrens-cow-statue-design-altered-taiwan-flag-painted-over-qld/9739574>.

<sup>46</sup> Christopher Bing, "U.S. Warns of New Cyber Attacks by Group with China Ties," *Insurance Journal*, October 4, 2018, <https://www.insurancejournal.com/news/national/2018/10/04/503399.htm>.

Philippines, for example, the patriotic hackers have claimed that China will never surrender sovereignty over Huangyan, the Chinese name for Scarborough Shoal.<sup>47</sup> In Japan, a favorite target is the Yasukuni Shrine, since Chinese nationalists regard it symbolic of Japanese warlike instincts. The massive theft of information from the U.S. Office of Personnel Management, involving data on more than 20 million people, is believed to have been a Chinese government effort that is part of a larger strategic plan. The data could be used, for example, to identify U.S. intelligence personnel, or to recruit spies for China. Along with Russia, Beijing is also believed to be involved in efforts to influence voting in the elections of democratic countries including the U.S. and Taiwan. According to a Reuters report, China has been exporting this technology to other countries.

## What Can Be Done

Although the Chinese leadership has for decades stated its preference for a multipolar world order, its recent actions indicate that it intends to establish a world order in which Beijing makes the rules, and will enforce its claims, territorial and otherwise, through united front techniques, economic inducements, economic sanctions, cyberattacks, and threats to use force backed up by impressive increases in its ability to actually use force.

Assuming that other countries do not want to accept these rules—although there are many who apparently are willing to, however reluctantly, what sorts of counterstrategies exist? Certain counterstrategies have been undertaken.

- Australia has not only passed more stringent laws on financial contributions from abroad but also on acquisition of assets such as its electricity grid.<sup>48</sup>
- After a wave of Chinese purchases of high technology German firms, the government of Chancellor Merkel enacted rules that will make future acquisitions more difficult.<sup>49</sup>
- The UK's Office of the Advisory Committee on Business Appointments informed former prime minister David Cameron that, although it had approved his petition to head the China investment fund, the approval was subject to certain conditions including that he must not draw on any privileged information available to him as prime minister; and that for two years from his last day in office, he should not become personally involved in lobbying the UK government on behalf of the UK-China Fund or its partners or investors or make use, directly or indirectly, of his contacts in government and/or crown service to influence policy or secure business on their behalf.<sup>50</sup>
- Australia has offered up to \$2.8 billion dollars to fund infrastructure construction among South Pacific states to help counter expanding Chinese influence there.<sup>51</sup>

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<sup>47</sup> Phil Muncaster, "Patriotic hackers face off in South China Sea," *The Register*, April 27, 2012, [https://www.theregister.co.uk/2012/04/27/philippine\\_china\\_hack\\_stand\\_off/](https://www.theregister.co.uk/2012/04/27/philippine_china_hack_stand_off/).

<sup>48</sup> Jamie Smyth, "Australia to tighten foreign investment rules amid China concerns," *Financial Times*, February 1, 2018, <https://www.ft.com/content/308ca8d6-06f6-11e8-9650-9c0ad2d7c5b5>.

<sup>49</sup> Stephan Scheuer, Sha Hua and Klaus Stratmann, "Germany may block tech takeover amid security and trade concerns," *Handelsblatt*, May 25, 2018, <https://www.handelsblatt.com/today/politics/chinese-checkers-germany-may-block-tech-takeover-amid-security-and-trade-concerns/23582248.html?ticket=ST-249302-VTZbrA7uhZKG1RfYj46s-ap4>.

<sup>50</sup> Appointment Advice by the Advisory Committee on Business Appointments dated 6 December 2017, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/668702/171206\\_Letter\\_DC\\_UK-China\\_final\\_\\_2\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/668702/171206_Letter_DC_UK-China_final__2_.pdf).

<sup>51</sup> Philip Wen and Colin Packham, "China shuns rivalry in Pacific as Australia says 'this is our patch'," *Reuters*, November 8, 2018, <https://www.reuters.com/article/us-australia-china-pacific/australia-launches-1-5-billion-pacific-fund-to-counter-chinas-influence-idUSKCN1NC333>.

- It successfully outbid China to fund a base on Fiji<sup>52</sup> and, after rumors circulated that the PRC was seeking to fund a port on Papua New Guinea's Manus Island, has pledged<sup>53</sup> to help Papua New Guinea develop a naval base there. The U.S. and Japan subsequently agreed to render assistance as well.
- According to Reuters, Canberra, citing security considerations, will also underwrite the costs of an undersea internet cable aimed at shutting out Chinese telecom giant Huawei.<sup>54</sup>
- There has been increased surveillance of persons suspected of carrying out united front activities, albeit against resistance by civil liberties groups and ethnic Chinese who fear having their loyalty suspected because of their ethnicity.
- Some efforts have been taken toward defense cooperation. Japan, Australia, India, and the United States participate in an as yet rather amorphous quad aimed at resisting Chinese expansion.
- The U.S. and Japan are drafting plans for a combined response to the Chinese threat to the Diaoyu/Senkaku Islands, which is expected to be finalized in March 2019.<sup>55</sup>
- The largest ever Operation Keen Sword exercises began, with Canadian ships taking part with U.S. and Japanese forces for the first time in line with its desire to have a military presence in Asia, alongside British and French navies.<sup>56</sup> Japan and France have agreed to cooperate on defense against the expanding Chinese military presence.<sup>57</sup>
- Hunter Stires, a strategist affiliated with the U.S. Naval War College has suggested a collective maritime counterinsurgency effort to protect local civilian mariners against Chinese harassment.<sup>58</sup>
- Pakistan is now looking to Saudi Arabia to help balance China's inroads and has asked Riyadh to join the CPEC as the third "strategic partner."<sup>59</sup>
- French President Emmanuel Macron applauded New Caledonia for rejecting a referendum on independence that would have abetted the PRC's expanding influence in the strategically located and nickel-rich territory.<sup>60</sup>
- In 2018, Japan's Maritime Self Defense Force sent its largest ship, the Kaga helicopter

<sup>52</sup> Christopher Mudaliar, "Australia outbids China to fund Fiji military base," *The Interpreter*, October 4, 2018, <https://www.lowyinstitute.org/the-interpreter/australia-outbids-china-fund-fiji-military-base>.

<sup>53</sup> "Australia plans to help PNG build a navy base," *Taipei Times*, November 2, 2018, <http://www.taipeitimes.com/News/world/archives/2018/11/02/2003703492>.

<sup>54</sup> Ibid.

<sup>55</sup> "Japan and U.S. to formulate armed response to China threat to Senkakus: sources," *The Japan Times*, November 4, 2018, <https://www.japantimes.co.jp/news/2018/11/04/national/japan-u-s-plan-armed-forces-response-china-threat-senkakus/#.W98uGOJ0lc8>.

<sup>56</sup> "U.S. carrier leads warships in biggest Japan defense war game," *The Asahi Shimbun*, November 4, 2018, <http://www.asahi.com/ajw/articles/AJ201811040018.html>.

<sup>57</sup> "Abe and Macron agree to boost cooperation for Indo-Pacific stability," *Kyodo*, October 18, 2018, <https://www.japantimes.co.jp/news/2018/10/18/national/politics-diplomacy/abe-macron-agree-boost-cooperation-indo-pacific-stability/#.XH3m5Yj7SUK>.

<sup>58</sup> Hunter Stires, "Understanding and Defeating China's Maritime Insurgency in the South China Sea," *The National Interest*, November 1, 2018, <https://nationalinterest.org/feature/understanding-and-defeating-china%E2%80%99s-maritime-insurgency-south-china-sea-34637>.

<sup>59</sup> Harsh V. Pant, "Why China could lose its 'all weather friend' Pakistan," October 2, 2018, <https://www.dailyo.in/politics/china-pakistan-debt-trap-diplomacy-xi-jinping/story/1/27009.html>.

<sup>60</sup> Christian Edwards, "French President Emmanuel Macron holds on to New Caledonia, but with another referendum in just 2 years, Paris is further from paradise than ever," *Business Insider*, November 5, 2018, <https://www.businessinsider.com/new-caledonia-rejects-independence-from-france-in-referendum-vote-2018-11>.

carrier, on an unprecedented two-month tour of the Indo Pacific, including stops in the Philippines, Indonesia, Sri Lanka, India and Singapore.<sup>61</sup> The Kaga and its two destroyer escorts also conducted drills with a Japanese submarine in the South China Sea.

- In the same year, the Ground Self Defense Force has established<sup>62</sup> an Amphibious Rapid Deployment Force (ARDF) whose mission includes retaking islands that have been seized, and has finalized<sup>63</sup> plans to establish a base at Ishigaki which would be on the front line if war were to break out between China and Japan.
- The US Department of Justice announced a China initiative aimed at increasing efforts to protect critical infrastructure against external threats including foreign direct investment, supply chain threats and foreign agents seeking to influence the American public and policymakers without proper registration.<sup>64</sup>
- The U.S. Congress passed the 2018 Countering Foreign Propaganda Act, which requires a U.S.-based foreign media outlet that produces or distributes any video programming for a foreign principal that is or intended to be transmitted by a multichannel video programming distributor (such as cable operators and direct satellite services) to U.S. consumers to include a conspicuous statement that the programming is produced or distributed by the outlet on behalf of its foreign principal.<sup>65</sup> It empowers the Federal Communication Commission to define what constitutes a conspicuous statement.
- Section 1042 of the 2019 U.S. Defense Authorization Act explicitly tasks the National Security Council coordinate the full U.S. government response to malign foreign influence operations and campaigns, particularly those that are cyber-enabled.<sup>66</sup>

Whether these will be able to successfully halt an apparently determined China from imposing a Sinocentric, unfree and closed sea in which non-Chinese vessels sail only at Beijing's pleasure remains to be seen.

Concerns about the Belt and Road aside, countries continue to sign on. Some may hope to learn from the mistakes earlier participants have made. Several of the earlier participants, notably Malaysia and Pakistan, are insisting on renegotiating better terms, and many can benefit from balancing the funds and expertise being offered by the U.S., Japan, and Australia with those available from China. Even so, dangers lurk, with the verbal barbs exchanged between Chinese President Xi Jinping and U.S. Vice President Pence at the November 2018 APEC meeting arousing concerns of war between the world's largest and second largest powers with other countries caught in the cross fire. Xi accused the United States of unilateralism and the imposition of punitive unilateral tariffs and urged it to make good on supporting regional infrastructures, while Pence countered by accusing the PRC of drowning its BRI partners in a sea of debt and

<sup>61</sup> "U.S. carrier leads warships in biggest Japan defense war game," *The Asahi Shimbun*, November 4, 2018, <http://www.asahi.com/ajw/articles/AJ201811040018.html>.

<sup>62</sup> Grant Newsham, "Japan Activates Amphibious Rapid Deployment Brigade: What Now?," *Japan Forward*, April 9, 2018, <http://japan-forward.com/japan-activates-amphibious-rapid-deployment-brigade-what-now/>.

<sup>63</sup> Kim Sengupta, "China Sea crisis: Japan to bolster military base on island idyll that could become front line in event of war," February 13, 2018, <https://www.independent.co.uk/news/world/asia/china-military-aggression-island-missiles-troops-south-china-sea-ishigaki-japan-winter-olympics-a8208586.html>.

<sup>64</sup> The United States Department of Justice, "Attorney General Jeff Session's China Initiative Fact Sheet," November 1, 2018, <https://www.justice.gov/opa/speech/file/1107256/download>.

<sup>65</sup> The United States Congress, "H.R.5354 - Countering Foreign Propaganda Act of 2018," last modified January 29, 2019, <https://www.congress.gov/bill/115th-congress/house-bill/5354>.

<sup>66</sup> The United States Congress, "National Defense Authorization Act for Fiscal Year 2019" last modified January 29, 2019, <https://www.congress.gov/115/crpt/hrpt676/CRPT-115hrpt676.pdf>.



transforming harbors and highways into military conduits. To date, no one has been charged with the crimes against New Zealand scholar Anne-Marie Brady, and Sam Dastyari and Yang Jian remain respected figures in their countries.

There is a consensus that war would be disastrous for all, winners as well as losers. And that cooperation with China on shared national interests such as curbing North Korea nuclear capabilities, resolving unexpected encounters in the air and in the ocean, anti-piracy operations, disaster relief, humanitarian assistance, and environmental sustainability is both possible and desirable. But these are unlikely to be sufficient to outweigh territorial issues. At present, robust defense and resolute commitment to resist while agreeing to cooperate when the mutual benefits are clear appear to be the best hope for countering Chinese aggression.

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