# Territorial and Maritime Issues in East Asia and International Law*

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**Abstract**

International law legally governs territorial and maritime issues, and contributes to the peaceful settlement of such disputes. Those involving Japan in East Asia are no exceptions. In territorial issues, State parties to the disputes usually claim sovereignty over territories based on territorial title and the interpretation and application of the relevant treaties under international law. The mechanisms such as international adjudication, as well as the procedures to operate them, have been established so as to obtain legal solutions to territorial disputes. For maritime issues, the United Nations Convention on the Law of the Sea (UNCLOS), or other bilateral and multinational treaties, including those signed by Japan, China and South Korea, set out legal principles on the delimitation of maritime boundaries and rules on the development and management of fishing resources and mineral resources. International law provides codes of conduct and legal standards for dispute resolution among sovereign States, and contributes to the prevention and the peaceful settlement of disputes. Nevertheless, the roles of international law in the settlement of disputes are limited to the legal realm, thus having perspectives other than international law is important for a holistic resolution to disputes.

## Introduction

In this article, I will identify the relevant rules of international law to territorial and maritime issues in East Asia, and discuss the roles of international law in the peaceful settlement of the disputes.

First, it is to be assured that the rules of international law for territorial issues are different from those for maritime issues. While in the territorial issues, sovereignty over territories and the delimitation of borders are typically the main areas of concern, and the rules of international law which governs such issues are required, the freedom of navigation, the preservation and development of biological and mineral resources, and the delimitation of maritime boundaries are some of the typical subjects in the maritime issues. Treaties and customary international law give further clarity to and confirm the contents of the relevant rules through the decisions by international courts and tribunals as well as state practice.

International law has substantive rules that regulate territorial and maritime issues, and also provides mechanisms and procedures for resolving disputes between States concerned. It is to be also paid attention to the procedural aspects of international law.

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## I. Territorial issues and international law

### 1. Territorial title

International law on territorial issues traditionally has been considered to be the standards that determine which country has sovereignty over certain territories. The concept of territorial title is important to claim the sovereignty over the territory in question and to resolve territorial disputes. Title refers to the facts that are reasons or grounds for effective sovereignty over territories, and is generally considered to be obtained through the following means: occupation, accretion, cession, and prescription. Discovery and subjugation also used to be means of gaining title to land.

States involved in disputes sometimes claim historical title based on historical facts. In the South China Sea arbitration case between the Philippines and China, China's claims were based on historical facts and not historical title. China uses different terms carefully, dependent upon the context.

What is known as "effective occupation"—which technically does not serve as title—is particularly emphasized in international judicial and arbitral cases. The concept has originated in the arbitral award of the Island of Palmas case in 1928, a dispute between the Netherlands and the United States about the sovereignty over the Island of Palmas off the coast of the Philippines. The Tribunal also pointed out "the continuous and peaceful display of territorial sovereignty" as significant. The international courts and tribunals have attached importance to these concepts in territorial disputes.

In a territorial dispute, the parties to the dispute claim sovereignty based on titles, but quite often neither of party has full title to the territory. If a party has full title to territory, a dispute should not occur in the first place. If a dispute does occur, the territorial titles of the parties will be compared to determine which of the titles is more convincing. If none of them are convincing, what is ultimately emphasized in international adjudication is which party has demonstrated "the continuous and peaceful display of territorial sovereignty" mentioned above. *Effectivité*, a modern-day terms of this "continuous and peaceful display of territorial sovereignty," becomes paramount in international adjudication.

### 2. Territorial disputes and international law

(1) Characteristics of international adjudication

If a territorial dispute arises, there will be negotiations between the States involved. Those States also may make use of third-party bodies, such as the International Court of Justice (ICJ) and international arbitral tribunals. Referring a dispute to international adjudication requires agreement among the States involved. The States have the freedom to choose the procedures for resolving disputes, and international courts and tribunals have jurisdiction only if they obtain the consent to their jurisdiction from all of the States that are involved. Moreover, the international community has no means to enforce judicial decisions or arbitral awards. Ultimately, the final settlement of disputes depends on agreement among the States involved.

(2) Procedural rules for territorial disputes

For the procedural aspects of the judicial or arbitral process, the principle of intertemporal law and the concept of critical date may play a major role to resolve disputes in international law.

Intertemporal law is a principle that a judicial fact must be appreciated in the light of law contemporary with it. The Award in the Island of Palmas case made a distinction between the creation of rights from the existence of rights, so that the act creative of a right might be subject to the law in force at the time the rights arise, and that the right and its continued manifestation shall follow the conditions required by the evolution of law.

The critical date refers to the time when a dispute occurred or when sovereignty over a territory appeared to be definitively determined. In the Minquiers and Ecrehos case, in which sovereignty over the islands was claimed by the United Kingdom and France, the ICJ decided in its 1953 judgment that in principle, only facts before the critical date were taken into consideration. Nevertheless, it is also pointed out in other judicial judgments that facts and actions after the critical date might be considered, depending on the peculiarities of the case.

## 3. Territorial issues in East Asia

Let us now outline territorial issues in East Asia, focusing on the ones Japan is involved in.

(1) Takeshima

The dispute over Takeshima between Japan and South Korea arose in 1952 when South Korea issued a declaration concerning maritime sovereignty, by which it announced the establishment of the Syngman Rhee Line delimiting its territorial waters, and Japan protested the declaration. If the critical date is defined as the date when a dispute occurred, or when sovereignty over a territory appeared to be determined, 1952 is the critical date for the Takeshima dispute.

What are the arguments put forward by Japan and South Korea? Japan says it has possessed Takeshima since before Japan's encounter with the West in the 19th century. Japan further argues that in 1905, it took steps to incorporate the islands into its territory and gave notice of the measures officially. Contrary to the claims by Japan, South Korea maintains that there is no dispute between the two countries. It argues that it had sovereignty over the Dokdo Islands (the name of the islands in Korea) before 1905, when Japan says it made the islands a part of its territory. South Korea further argues that Dokdo is included in the territories over which Japan abandoned its sovereignty under the San Francisco Peace Treaty.

If it is proved that the establishment of the Syngman Rhee Line was a challenge to Japan's sovereignty over Takeshima, no subsequent actions will affect the legal assessment of Takeshima by strictly applying the critical date to the legal situation, and a decision favorable to Japan may be handed down by arbitrating bodies.

(2) The Senkaku Islands

Japan argues that it incorporated the Senkaku Islands into its territory through an order of its cabinet in 1895. However, in 1971, Taiwan and the People's Republic of China officially and respectively claimed sovereignty over the Senkaku Islands. China drew up its law on territorial waters in 1992, by which it defined its territorial waters to include the Diaoyu Islands (the Chinese name for the islands) so as to make the islands Chinese territory.

Japan has consistently maintained its stance that there is no dispute over the Senkaku Islands. The legal grounds for Japan's claim of sovereignty over the Senkakus are that the islands were uninhabited and were incorporated into Japanese territory by way of occupation because they were previously *terra nullius,* and that it has effectively exerted control over the islands since then. China claims that the Diaoyu Islands have historically been part of China, and that the islands are Chinese territory because they are part of Taiwan, which Japan abandoned under the terms of the San Francisco Peace Treaty.

The Senkaku Islands are currently under effective control of Japan. If we consider that the critical date for the Senkakus is 1971, when China lodged its protest, Japan's effective occupation of the Senkaku Islands will be admitted as evidence that confirms the legal situation of the islands before the critical date. Japan's territorial rights over the Senkakus are likely to be confirmed by third-party organizations. The Senkaku Islands issue is actually about the resources in nearby waters, and is related to the maritime issues in East Asia that will be discussed later.

(3) Japan's Northern Territories

Japan and Russia have signed numerous agreements on the territorial issues between the two States, including those in the eras of Russian Empire and the Soviet Union. The interpretations of those treaties play a significant role to solve the territorial issues between them.

Article 2 (c) of the San Francisco Peace Treaty stipulates that Japan "renounces all right, title and claim" to the Kuril Islands. Japan argues that the geographical scope of the Kuril Islands that it has renounced consists of Urup Island and the islands to the north of Urup. Under this interpretation, Etorofu Island and the islands to the south of Etorofu are Japan's inherent territory under the 1855 Treaty of Commerce, Navigation and Delimitation signed by Japan and Russia. Japan claims territorial rights to Etorofu Island and the islands to the south of Etorofu. In this argument, the geographical scope of the Kuril Islands becomes an issue. Russia argues that the Soviet Union acquired sovereignty over the Four Northern Islands following Japan's unconditional surrender after the Second World War and the Soviet Union's occupation of the Kuril Islands. The 1956 Japan-Soviet Joint Declaration calls for the Habomai and Shikotan Islands to be handed over to Japan after a peace treaty is concluded. We await progress in negotiations between Japan and Russia.

## II. Maritime issues and international law

### 1. Development of the law of the sea

(1) Post–World War II treaties and agreements

The law of the sea has a long history, and in particular, following World War II, it saw remarkable development. In 1945, U.S. President Harry S. Truman claimed the right to develop mineral resources in the coastal waters of the United States, and advocated the conservation of fisheries resources in its coastal waters. Truman's actions triggered the adoption of the 1958 Geneva Conventions on the Law of the Sea. Subsequently, an attempt was made to expand the 1958 Geneva Conventions on the Law of the Sea to create a new treaty appropriate for the times. In 1982, the United Nations Convention on the Law of the Sea (UNCLOS), often referred to as the "Constitution of the Sea," was adopted after negotiations that ran for ten years. UNCLOS covers all areas that are governed by the law of the sea. It provides the basis for the present legal order in the oceans, and has provisions on the expansion of the jurisdiction of coastal States, including the establishment of continental shelves and exclusive economic zones (EEZs). UNCLOS further establishes a new regime for the seabed that considers the interests of the international community. In exchange for the expansion of the rights of coastal States and the creation of international systems of control, systems that are favorable to maritime powers, including a regime for regulating transit passage through international straits, have been introduced.

The important thing is that a diverse range of treaties of a universal character, as well as regional agreements, have been created under the auspices of UNCLOS in response to specific issues such as fisheries and the marine environment. A network of those treaties constitutes the present legal order in the oceans.

(2) Characteristics of the current regimes on the Law of the Sea

It is safe to say that in the development of the current regimes on the Law of the Sea, the focus has been placed on managing marine resources. There are three characteristics of the present legal order in the oceans. First, the sea is divided into multiple zones, and each zone is subject to the provisions of international law. In the past, the legal order in the oceans was divided into two spatial categories: territorial waters that are regarded as belonging to a coastal State, and the high seas, which do not belong to any particular country. At present, the legal order in the oceans is multi-pronged: EEZs, continental shelves, and the deep seabed, in addition to territorial waters

and the high seas.

Second, the jurisdiction of a coastal State has functionally differentiated in degree, depending upon the type of maritime zone. In territorial waters, the jurisdiction of a coastal State is all-encompassing. In EEZs and on continental shelves, the jurisdiction of a coastal State is limited to fisheries and mineral resources issues respectively.

Third, the present legal order in the oceans and the rules of the Law of the Sea are considered to be the result of the reconciliation of the interests of coastal States and the ones of sea power States. Thus, U.S. warships attempt freely to navigate the South China Sea and other areas to reaffirm the interests of sea power States with respect to coastal States.

(3) The delimitation of maritime boundaries and the evolution of case law

Resource management and allocation issues have given rise to questions of maritime delimitation, on which international law has established certain relevant rules through state practice and case law.

The 1958 Convention on the Continental Shelf stipulated that in cases where the same continental shelf is adjacent to the territories of two or more adjacent States, the boundary shall be determined by applying the principle of equidistance. Meanwhile, the ICJ's judgment on the North Sea Continental Shelf cases in 1969 took into consideration the arguments of West Germany, which would have been adversely affected by the strict application of the principle of equidistance. This decision emphasized the natural prolongation of the continental shelf and affirmed the application of equitable principles, under which the continental shelf should be divided equitably among the States concerned.

In 1982, it was provided under UNCLOS that agreement among States should be sought to achieve equitable solutions on questions of maritime delimitation. Subsequent cases saw clashes between two competing rules; the "equidistance-special circumstances rule" based on equidistance and median lines, with adjustments to be made for special circumstances, and the "equitable principles-relevant circumstances rule" to take into account relevant circumstances so as to bring about an equitable result. Ultimately, the two rules were combined, and in the ICJ judgment on the Maritime Delimitation in the Black Sea case in 2009, a three-stage approach was adopted. In this approach, first, a tentative equidistance line is drawn. Second, the line is then adjusted so that it will lead to an equitable result. Finally, the proposed solution is examined to determine if there is any marked disproportionality between the length of the parties' relevant coasts and the maritime zones that will belong to them. The three-stage approach is used in maritime delimitation cases handled by the International Tribunal on the Law of the Sea and in cases that are referred to arbitration since then.

## 2. Maritime issues in East Asia

(1) Fisheries issues

After a period of worsening relations following the establishment of the Syngman Rhee Line, Japan and South Korea signed a fisheries agreement in 1965, which allows each country to create an exclusive fishery zone up to 12 nautical miles from its shores. In accordance with the new legal order in the oceans following the adoption of UNCLOS, a new Japan-South Korea Fisheries Agreement was signed in 1998, which is valid up to the present.

Japan and China signed a fisheries agreement in 1975 following the normalization of diplomatic relations in 1972. An updated Japan-China Fisheries Agreement that complied with UNCLOS was signed in 1997. Under the agreement, the two countries established provisional maritime zones and have been taking steps to conserve and manage living marine resources.

The relationship between Japan and Taiwan is interesting. Since they have no diplomatic relations, they cannot enter into any treaties. In 2013, the Japan-Taiwan Fisheries Agreement was

concluded between private entities close to each government, under which maritime zones have been established off their coasts.

(2) Continental shelf

The mineral resources of continental shelves are also developed and managed under agreements between States concerned. Japan and South Korea signed an agreement on the continental shelf in 1974 and established a joint development zone to the south of the Korean peninsula. The continental shelf in the East China Sea between Japan and China is problematic. The parts claimed by Japan and China overlap. Japan argues that an equidistance line should be drawn, while China claims that its sovereignty extends to the Okinawa Trough, based on the principle of the natural prolongation of the continental shelf. As discussed earlier, a three-stage approach has been adopted in recent maritime delimitation cases, and going by this approach, the continental shelf that China claims may be too large.

(3) Extended continental shelves

According to the definition of the continental shelf in UNCLOS, a coastal State can extend its sovereign continental shelf beyond 200 nautical miles from the baseline if certain conditions are met. To establish an extended continental shelf beyond 200 nautical miles, the coastal State needs to submit an application with the required data to the Commission on the Limits of the Continental Shelf (CLCS)—an organ provided for in UNCLOS.

Japan submitted in 2008 its claim of an extended continental shelf spanning seven maritime zones, including around Okinotorishima. China and South Korea objected to the claim, saying that Okinotorishima is not an island and should not have any continental shelf and nor EEZ. In 2012, the CLCS made a recommendation to Japan that admitted the nation's claim of an extended continental shelf, except for a zone to the south of Okinotorishima. The issue of an extended continental shelf is closely related to the legal status of Okinotorishima.

(4) The definition of an island: Is Okinotorishima an island or a rock?

Okinotorishima is an island at the southernmost tip of Japan. It is about 1,700 kilometers south of Tokyo and is made up of coral reefs. Its circumference is 10 kilometers. It is 4.5 kilometers long from east to west and as much as 1.7 kilometers long from north to south. Two tracts of land appear above sea level at full tide.

Japan argues that Okinotorishima is internationally recognized as an island, and that it is an island according to the definition in UNCLOS. China and South Korea argue that Okinotorishima does not fall into the category of islands according to the UNCLOS definition.

This issue is related to the interpretation of Article 121 of UNCLOS, which is also one of the subjects in the South China Sea arbitration case between the Philippines and China. The salient feature of the interpretation of Article 121 in the arbitral award is the following: the tribunal did not attempt to define what was a rock, and its award considered the purpose of EEZs when interpreting Article 121, while omitting considerations about state practice. The effects of the arbitral award on future state practice may become an issue. The award may also affect whether Okinotorishima should be considered an island or a rock.

## Conclusions

There are four conclusions we can draw from this discussion. First, international law regulates both territorial and maritime issues. Second, the roles of international law in territorial and maritime issues are to provide codes of conduct to sovereign States and other entities so as to encourage them to behave according to rules, and to provide standards for resolving disputes that may arise. Third, tasked with such roles, international law brings stability to the

international community and to regional communities, which will in turn be reflected in the further development of international law. Fourth, international law touches only on the legal aspects of disputes. Thus, for a holistic resolution to disputes, we need various other standards and perspectives in addition to international law.