

Do Not Rush the Territorial Issue*

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Hold fast to the “no dispute” position, beware of excessive expectations toward international adjudication

Key points:

- Acknowledging the existence of a dispute means accepting the other’s claim
- International adjudication will not function without the common intention of both parties to settle the dispute
- The issue of territorial attribution should be put on hold until bilateral relations are stabilized

Japan and China are engaged in an ongoing battle of words over the attribution of the Senkaku Islands. The controversy between Japan and South Korea over the island of Takeshima has somewhat calmed down compared to August, but it is as yet far from settled.

In recent weeks Hiromasa Yonekura, chairman of Keidanren (Japan Federation of Economic Organizations) (at the time when this paper was written), remarked that Japan should acknowledge the existence of a “territorial dispute” with China over the Senkaku Islands, while Mayor Toru Hashimoto of Osaka City (at the time when this paper was written) made the case for a legal settlement by the International Court of Justice (ICJ). Moving beyond the question of the legitimacy of Japan’s title over the Senkaku Islands and Takeshima, arguments are emerging about how Japan should cope with the current locked-horns situation with China and South Korea. It is somewhat doubtful, however, whether the proponents of these arguments fully understand the implications of acknowledging the existence of a territorial dispute or what a dispute settlement presented by the ICJ in accordance with international law entails.

South Korea denies that a territorial dispute exists over Takeshima, while Japan takes the same position toward the Senkaku Islands. The question of the existence or absence of a territorial dispute bears on whether one party finds a certain level of legitimacy in the other’s territorial claim.

A good analogy can be found in land ownership rights. We will compare two cases: In case 1, passerby B shows up unannounced at the front door of homeowner A and claims ownership of the house. Case 2 is an instance of double sales of land, in which owner X first sells the plot to Y, then secretly sells the same plot to Z, throwing into doubt whether the land now belongs to Y or Z. The right to a particular property is at stake in both cases, but the circumstances dramatically differ between the two. B’s claim in case 1 is utterly groundless; in case 2, Y and Z are both justified in making a claim for the property. A dispute exists in case 2, whereas there are opposing claims but no dispute in case 1.

Japan sees the Senkaku issue as a case 1 situation, while China considers it analogous to case

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2. The positions are reversed when it comes to Takeshima, with South Korea taking the case 1 view and Japan siding with case 2. It is by no means inconsistent for Japan to believe that a territorial dispute exists over Takeshima but not over the Senkaku Islands.

Acknowledging the existence of a dispute amounts to recognizing a degree of legitimacy in the other party's territorial claim. Once this comes to pass, the opposing countries are expected to enter into talks aimed at settling the dispute. This point is clearly demonstrated in the history between Japan and the Soviet Union (now Russia) regarding the Northern Territories. The Japan-Soviet Joint Declaration of 1956 stipulated that both parties would continue to hold consultations on the Northern Territories. But the Soviet Union later came to claim that the issue of the territorial attribution of the Northern Territories had already been settled, and it took patient negotiations on Japan's part to overturn this claim. In the 1991 Japan-Soviet Joint Communiqué the Soviet Union admitted the existence of a territorial dispute over the Northern Territories, and bilateral negotiations began on the territorial attribution.

The Soviet Union's acknowledgment of the existence of a territorial dispute was no less than an recognition that all or part of the territory may belong to Japan. Should Japan be approaching the Senkaku issue in the same manner? For Japan and China to have opposing views about the attribution of the Senkaku Islands, with China insisting that they are not a Japanese territory, is very different from there being a territorial dispute.

Disputes, or *funso* in Japanese, in this sense are also called *kokusai funso*—literally “international dispute.” For this reason, international conflicts are sometimes confused with disputes. “International conflict” refers to a state involving armed confrontation, whereas “dispute” is a state that isps short of one. While a dispute can lead to conflict and armed confrontation, both can occur with or without a dispute.

The Japan-US Security Treaty applies to armed confrontations but not to disputes. US forces are bound to go into action if an armed confrontation should break out over the Senkaku Islands. It would be hasty to assume, however, that the United States will take Japan's side regarding the attribution of the islands. In fact, the US government has repeatedly remarked that it takes a neutral position with respect to territorial sovereignty of the Senkaku Islands.

International dispute and conflicts between states are of international concern, as they affect peace in the international society. The question of territorial attribution, by contrast, like land ownership disputes on domestic field, is essentially a bilateral issue.

When considering the judicial settlement of a dispute, we must bear in mind the difference between international adjudication and trial in a national court. In domestic disputes, the court has the final say in a case referred to it by one of the parties, regardless of the other party's intentions. International adjudication, on the other hand, cannot take place without the agreement of both parties. Although members of the international society are obliged to peacefully settle disputes between them, going to the ICJ or other international courts for a dispute settlement in accordance with international law is not part of the obligation.

A claimant in a domestic dispute can settle the question of ownership by appealing to court, whether it is a case 1 or case 2 instance, but the same cannot be said of international disputes.

Judicial settlement by international adjudication is merely one of the options for seeking a peaceful dispute settlement.

The government of Japan has proposed to South Korea that they refer the Takeshima issue to the ICJ. But notifying South Korea that Japan aspires to settle the issue in accordance with international law is nothing more than a “response” against the former’s actions; South Korea is neither legally nor morally obligatory to accept the propose. For a time, media reports asserted that South Korean failure to accept the propose would put the burden of accountability on that country. This is incorrect, as international adjudication is just one of the possible means of settling a dispute, if a significant one.

Recent years have seen an increase in territorial issues being brought to the ICJ (see table). This is not to say, however, that the way international courts get involved in such issues are changing. Let us consider under what conditions an international court would be able to settle a territorial issue. The first and foremost condition is the awareness that settling the issue is more important than leaving it unsettled, even if all or part of the territory were to fall in the hands of the other party. An example would be a situation where there is a prevailing sentiment that the attribution of the territory is of little consequence and that it would not be good to let an outstanding territorial issue jeopardize bilateral relations.

Territorial Dispute Cases Submitted to the International Court of Justice in Recent Years

Year submitted	Claimants	Case description
2002	Benin Niger	Frontier dispute (judgment in 2005)
	El Salvador Honduras	Application for revision of 1992 judgment on land, island, and maritime frontier dispute (judgment in 2003)
2003	Malaysia Singapore	Sovereignty over Pedra Branca and other territories (judgment in 2008)
2010	Burkina Faso Niger	Frontier dispute (judgment in 2010)
2011	Cambodia Thailand	Request for interpretation of judgment on case concerning the Temple of Preah Vihear (judgment in 2013)

Marine and mineral resources are often brought into conversation in relation to territorial issues. But although Japan and South Korea are at odds over Takeshima, they have concluded bilateral agreements regarding fisheries and the development of the continental shelf between them. Likewise, Japan and China have concluded an agreement on fisheries in the East China Sea, even as the Senkaku issue lingers on. These instances indicate that addressing the issue of natural resources in the surrounding areas is possible without resolving the territorial issue.

Once a judgment is made that it is preferable to peacefully settle the territorial issue by whatever means, the focus will shift to the question of how to bring this about. Negotiating through to a settlement may be one approach. At times, meanwhile, having an independent judge make a final decision in accordance with international law may seem less time-consuming and more conducive to gaining the support of the public and other concerned parties—in short, more cost effective.

A country that comes to this awareness will opt for a judicial handling of the case by international adjudication. But if the odds of winning are overwhelmingly in the favor of one party, the other party will have little incentive to refer the case to court.

To achieve a settlement of the Senkaku and Takeshima issues by ICJ, Japan, China, and South Korea must believe that stabilizing bilateral relations is more important than the attribution of the territory and that the best way to settle the attribution issue is by judicial settlement. In China, however, the tug-of-war over the Senkaku Islands has been conflated with anti-Japanese sentiment, and sovereignty over the islands is regarded as one of China's core interests. Under the circumstances, there is little momentum to deal with the issue by international adjudication.

As long as attribution of the islands remains a major political issue linked to nationalism, and unless we are willing to seek a forceful settlement, we must resign ourselves to the understanding that it will be impossible to completely undo the animosity over the attribution issue before the countries and peoples involved cool their heads and bilateral relations become stable. The only way forward is to refrain from seeking conclusions about the legitimacy of both parties' claims, put a freeze on it for the time being, and put off dealing with the issue until a positive atmosphere is fostered toward resolving the differences. Regarding the peaceful settlement of international issues as a national policy is tantamount to not pursuing sweeping solutions.

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