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## **Reflections on the Issue of the Senkaku Islands - from the field of practice on international law and politics - \***

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### **Introduction**

The Senkaku Islands debate has been tempestuous. The September 2010 incident, when a Chinese fishing trawler hurl itself at Japan Coast Guard (JCG) patrol vessels in the territorial waters around the Islands, as well as the September 2012 “nationalization” of Uotsuri, Kitakojima, and Minamikojima Islands, prompted a variety of argument both at home and abroad. While the situation has now calmed slightly, the almost daily entry of Chinese official vessels into the contiguous zone, as well as repeated intrusions into the territorial waters, have kept public tension high and placed the Senkaku Islands firmly in the public spotlight.

Postings particularly in the China Division (Asia and Oceanian Affairs Bureau), the Treaties Division (International Legal Affairs Bureau, formerly the Treaties Bureau), and the Consulate-General in Hong Kong at the Ministry of Foreign Affairs (MOFA) have led the author into a long engagement with this issue at the field of professional practice, the juncture of international law and international politics. In this paper, I offer my candid thought on key points in the current debate arising from my daily experience as a working-level government official. My purpose is not to detail the historical background or international legal grounds; I will leave that to the many experts.<sup>1</sup> Rather, I hope to provide some food for thought in relation to a debate that has drawn public attention.

Of course, I have no intention of simply repeating the official view of the Japanese Government. The views expressed below are entirely my own and do not represent the official view of any organization to which I belong nor of the Japanese Government.

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## **1. China pulled the “trigger”**

### **(1) Criticism of “nationalization”**

Some domestic and foreign media reports and commentaries have tended to blame the Japanese Government’s “nationalization” of the above three islands for the recent intensification of confrontation between Japan and China over the Senkaku Islands.<sup>2</sup> The Chinese side too has been vehement that it was Japan that pulled the “trigger” that has escalated the confrontation between them, arguing, for example, that “by taking such unilateral actions as the so-called “island purchase”, the Japanese Government has grossly violated China’s sovereignty. This is also an outright denial of the outcomes of the victory of the world anti-fascist war and poses a grave challenge to the postwar international order and the purposes and principles of the Charter of the United Nations.”<sup>3</sup> Is this actually the case?

### **(2) “Nationalization” is nothing new**

The Senkaku Islands refers collectively to a group of islands—Uotsuri, Kitakojima, Minamikojima, Kuba, Taisho, Okinokitaiwa, Okinominamiwa, and Tobise—located at the western end of the Nansei Shoto Islands. The three recently “nationalized” islands are Uotsuri, Kitakojima and Minamikojima. These three together with Kuba were leased by the central government to a private Japanese citizen free of charge in 1896, and were subsequently bought by another private Japanese citizen in 1932. In September 2012, the three islands were acquired and owned by the Government of Japan.<sup>4</sup> In other words, the state owned these islands up until 1932 when the real property rights were transferred to a private citizen, with the 2012 purchase returning them to government hands. All the other islands apart from these three and Kuba—namely, Taisho, Okinokitaiwa, Okinominamiwa, and Tobise—have always been state-owned.<sup>5</sup>

In other words, “nationalization” in the sense of the Japanese Government acquiring the real property rights is nothing new, but rather a long-standing practice. This raises a question as to why China would so fiercely oppose the 2012 “nationalization” while it has made no objection in the past.

As for the legal nature of the “nationalization”, it has no bearing on the status of the Senkaku Islands under international law,<sup>6</sup> nor are the territorial sovereignty over the Senkaku Islands determined by this action. Under Japanese domestic law, real property rights to these islands (which were already Japanese territory) have simply been transferred from a private citizen to the government. If “nationalization” were to have any significance under international law, it would be if, subsequent to this action, the Japanese Government were to take measures substantiating territorial sovereignty, such as building port facilities or permanently stationing

Japanese citizens there.

Given the facts on the situation as well as its legal nature, it is apparent that the so-called “nationalization” is not something that unilaterally changes the status quo. The argument that “nationalization” is the cause of the recent increased tension is considerably lacking in objectivity.

### **(3) China’s attempts to change the status quo**

#### **(a) China’s Enactment of a Territorial Waters Law**

Conversely, we do need to examine a series of measures taken by China with the aim of changing the status quo over the Senkaku Islands.<sup>7</sup> The first point that should be raised in that regard is China’s 1992 enactment of the Law on the Territorial Sea and the Contiguous Zone of the People’s Republic of China (hereinafter referred to as “Territorial Waters Law”), which regards the Senkaku Islands as Chinese territory and marks out China’s territorial waters accordingly. This is a manifestation of China’s intent to enshrine in domestic law the view that the Senkaku Islands are part of Chinese territory.

It is the Chinese authorities that have advanced the notion that Japan and China have agreed to “shelve” the issue of territorial sovereignty over the Senkaku Islands, arguing that “nationalization” by Japan contravenes this agreement.<sup>8</sup> The Japanese Government, by contrast, takes the position that there is no issue of territorial sovereignty to be resolved between Japan and China, and consequently no issue that might require “shelving”.<sup>9</sup> (Section 6 looks more closely at the “shelving” argument.)

However, if indeed there had been “an agreement between Japan and China to “shelve” the issue”, then why did China dare to take the step in 1992 of establishing a piece of domestic legislation as highly provocative as the Territorial Waters Law? The year 1992 was a special one, not only marking the 20th anniversary of the normalization of Japan-China relations, but also distinguished by a visit to China by the Japanese Emperor in October. Does China’s unilateral action at that particular timing not run entirely counter to China’s claim of a “shelving consensus”? The Chinese side has yet to present any convincing explanation in this regard.

#### **(b) Active advances into the waters around the Senkaku Islands**

The second example of China’s challenge to the status quo that should be noted is the active advancement into the waters around the Senkaku Islands by Chinese official vessels. China’s increasing awareness of maritime interests has been accompanied by the ongoing expansion of the scope of activity and capacity of Chinese maritime institutions. In December 2008, despite it

being just ahead of a summit meeting among Japan, China, and the Republic of Korea,<sup>10</sup> Chinese Marine Surveillance (CMS) patrol boats intruded for the first time into the territorial waters around the Senkaku Islands. The scale and frequency of navigation in waters around the Senkaku Islands by Chinese official vessels has subsequently continued to increase, and in August 2011, two Fisheries Law Enforcement Command (FLEC) vessels intruded into the territorial waters, followed by one CMS patrol vessel in March 2012 and four FLEC vessels in July the same year. Since September 2012, Chinese vessels have constantly entered in the contiguous zone, and between fall 2012 and the time of writing (the end of August 2013), well over 50 intrusions into the territorial waters have occurred.

### **(c) Explosion in military spending**

In addition to these movements in the waters around the Senkaku Islands, another matter that cannot be ignored is the explosion in Chinese military spending. Even just according to publicly announced figures, China's military spending has rocketed up 5.2 times over the last decade. In 2007, far before China's GDP had outstripped Japan's, China's military spending was already greater than Japan's defense spending. By 2012, China's military spending had reached US\$102 billion, approximately 1.7 times as large as US\$59.4 billion which Japan spent on defense.<sup>11</sup> It might of course be argued that an increase in military spending is a natural accompaniment to economic development, but it is astounding to find a country with only around 10 percent of Japan's per capita GDP boosting its military spending quite so rapidly at this stage of its economic development when there is such a strong need for programs to develop infrastructure and improve standards of living.

An even bigger issue than the rapid rise in the amount of expenditure is the lack of transparency in how China's military capacity is being strengthened. Coupled with the many strenuous pronouncements<sup>12</sup> from Chinese side, it is natural that neighboring countries continue to regard this as a threat.

### **(d) Fishing boat collision (ramming) incident**

Amidst this succession of moves by the Chinese side to change the status quo, there also took place the 2010 collision incident involving a Chinese fishing vessel. Audio and visual footage of a Chinese fishing boat which had intruded into Japan's territorial waters ignoring warnings from JCG patrol vessels and repeatedly and persistently ramming these appeared on YouTube and other media, much to the shock and anger of many Japanese and the international community.

The backgrounds to the situation surrounding the Senkaku Islands and the Northern Territories and Takeshima issues obviously differ, but how have the Russian and Korean authorities dealt

with Japanese fishing and patrol vessels entering waters around the Northern Territories or around Takeshima in Shimane Prefecture?<sup>13</sup> Even a simple comparison reveals that the response by the JCG officials to the excessive and provocative behavior of the Chinese fishing vessel was truly calm and moderate.

#### **(4) International public opinion**

Tracing the respective movements of Japan and China in chronological order, it becomes readily apparent that Japan's so-called "nationalization" of the three Islands was a reactive move prompted by the persistent and steady aggression evinced by China in recent years.

Subsequently, in January 2013, a Chinese naval vessel locked their fire-control radar on a Maritime Self-Defense Force escort ship. This unprecedented and quite dangerous incident further heightened criticism of China's unilateral actions of provocation. It should be noted that these developments did increase understanding and support in the international community for Japan's position on the Senkaku Islands.

## **2. Existence or non-existence of dispute?**

### **(1) Criticism of the Japanese Government**

Given the intensifying confrontation between Japan and China in recent years in relation to the Senkaku Islands, the position of the Japanese government—not to recognize the existence of a dispute—has been found peculiar by not only the Chinese Government but also certain businesspeople,<sup>14</sup> international law experts<sup>15</sup> and commentators.<sup>16</sup> Is this actually the case?

### **(2) The difference between a diplomatic concern and a legal dispute**

Within the international community, governments have different views and positions on particular events and cases, and it is quite common for these differences to develop into diplomatic issues. Examples include the comfort women issue between Japan and the Republic of Korea (ROK), and the debate between Japan and the EU on whether the death penalty should be continued or not. However, the existence of a diplomatic concern is not equal to the existence of a legal dispute. The fact that there are differences in views and positions does not automatically mean that there are legal disputes.<sup>17</sup>

University of Tokyo professor Akira Kotera explains this quite clearly by comparing it to the issue of land ownership.<sup>18</sup> Taking a case where B happens to be passing A's house one day when B suddenly marches up to that house and claims it as his own, Professor Kotera argues that B's assertion is a "completely unfounded charge" and that between A and B "there might be

a difference in opinion, but there is no dispute.”<sup>19</sup>

Certainly, as noted in Section 5.(2) below, the Senkaku Islands became Japanese territory through the act of occupation, recognized under international law as a means of acquiring territorial title. Furthermore, even after the Japanese Government incorporated the Islands into Japanese territory in 1895, the fact is that China did not even protest for many years thereafter. It was only after more than 70 years of silence, when the results of a survey undertaken by a United Nations institution in the fall of 1968 indicated that there could be oil reserves in the East China Sea, that China suddenly directed its attention to the Senkaku Islands and, in and after the 1970s, began to assert its unique claim.<sup>20</sup> Under international law, the fact that China did not protest Japan’s manifest valid control over the Islands clearly connotes China’s acquiescence of Japanese sovereignty.

Given the above background and facts, it is apparent that China’s argument is “entirely irrational,”<sup>21</sup> and that the argument that “a legal dispute exists in relation to territorial sovereignty over the Senkaku Islands” is not grounded in the actual background and objective facts.<sup>22</sup> The Chinese side would desperately like to make Japan recognize the existence of a legal dispute.<sup>23</sup>

### **(3) Meaning of recognizing the existence of a territorial dispute**

As a completely hypothetical question, if Japan did recognize that “a legal dispute existed in relation to the territorial sovereignty to the Senkaku Islands”—in other words, that “a territorial dispute existed between Japan and China over the Senkaku Islands”—would the situation improve?

Generally, recognition of “the existence of a territorial dispute” implies recognition that “there is a dispute under international law as to whom the land belongs”. Put another way, it means recognizing that it has not been established that the territory belongs to your country, and that as a result of negotiations between the parties, or the judgment of a third party, your country could lose all or part of its territorial sovereignty.<sup>24</sup> Given the Japanese Government’s position that “[t]here is no doubt that the Senkaku Islands are clearly an inherent part of the territory of Japan, in light of historical facts and based upon international law,”<sup>25</sup> recognizing the existence of “a territorial dispute” in relation to the Senkaku Islands would clearly validate the position of the Chinese side and damage Japan’s legal position.

Even if Japan were to recognize the existence of a territorial dispute, due to circumstances on the Chinese side that will be explored below, China seems unlikely to seek a judicial settlement in an international court. Rather, once Japan had recognized the existence of an issue, instead of

a judicial settlement to the territorial dispute in an international court, China would probably pursue bilateral negotiations with Japan for “joint development” and “joint management”, and Japan would be dragged onto the “negotiating table”. Further, if Japan were to refuse to engage in such “negotiations”, this too could be framed as Japan failing to deal in good faith with an issue that should be resolved through dialogue and used to criticize Japan in the international community.

Looking at China’s behavior to date in relation to territorial and maritime issues, if the other party makes the slightest concession, China tends to seize upon it and mount a relentless aggression.<sup>26</sup> The most probable outcomes, therefore, would be the perpetuation of the issue, “the shelving” of the issue as sought by China, or the beginning of a chain of concessions by the Japanese side to the Chinese side. Japan, on the other hand, would only be conceding a consistently maintained position with no guarantee that China would cease all unilateral actions such as the intrusion into the territorial waters by official vessels. There would be no gain for Japan. Japan accordingly cannot be too cautious about easily yielding even an inch in relation to either its territory or its sovereignty.<sup>27</sup>

#### **(4) The examples of the Northern Territories and Takeshima**

In light of experience of various territorial issues in the international community, it is pointed out that “a clear tendency can be seen for the party exercising effective control over the disputed territory to deny the existence of a dispute”.<sup>28</sup>

The Northern Territories are a typical example. Paragraph 9 of the Joint Declaration of Japan and the USSR, concluded in 1956, explicitly stipulates that (a) continued negotiations for the conclusion of a peace treaty and (b) handover of the Habomai Islands and the island of Shikotan after the conclusion of that peace treaty. Nonetheless, the Soviet Government reacted to the 1960 revision of the Treaty of Mutual Cooperation and Security between Japan and the United States by unilaterally altering the content of Paragraph 9<sup>29</sup> and, up until the early 1990s, basically maintained the position that “no territorial dispute existed”. While there were exception of the verbal acknowledgement of the existence of the territorial issue by USSR General Secretary Leonid Brezhnev during his 1972 summit meeting with Prime Minister Kakuei Tanaka,<sup>30</sup> explicit written recognition had to be waited until the 1991 Japan-Soviet Joint Communiqué.<sup>31</sup> The 1993 Tokyo Declaration<sup>32</sup> again listed the names of the four islands comprising the Northern Territories to which the 1991 Communiqué referred, and also succeeded in clearly defining the territorial issue as being an issue of the attribution of those islands. In other words, this was significant in not only acknowledging the existence of a territorial dispute but also explicitly stating that what should be resolved in the territorial negotiations was the attribution

not of Habomai and Shikotan but of all four islands, including Etorofu and Kunashiri. Behind this result, it is recalled that the enormous and sustained efforts by successive Prime Ministers, Foreign Ministers, and Ministry of Foreign Affairs officials to make even the slightest progress toward resolving the Northern Territories issue.<sup>33</sup>

To touch but briefly on the example of Takeshima, when relationship between Japan and the ROK were normalized in 1965, the two countries concluded an Exchange of Notes concerning Dispute Resolution, but despite it being apparent from the language in the document and the course of the negotiations that Takeshima-related issues are included in the “disputes” to which the document refers, the ROK takes the position that the Takeshima issue is not included.<sup>34</sup>

##### **(5) “Common sense” of the international community**

There has been some criticism that the Japanese Government’s position of not recognizing the existence of a territorial dispute over the Senkaku Islands “lacks any support or understanding in the international community.”<sup>35</sup> With my experience of having engaged in numerous informal exchanges of views with legal experts and diplomats from major countries in the diplomatic world, this is a somewhat one-sided and appalling assessment.

Certainly, international jurisprudence has established the idea of a dispute as “disagreement on a point of law or fact, a conflict of legal views or of interests between two persons,”<sup>36</sup> and seemingly it might well give the impression that a legal dispute exists between Japan and China. However, as described in Section 2.(2), the response of most people once they have correctly understood the “completely irrational nature” of China’s position on the Senkaku Islands is that Japan’s position is absolutely plausible. If anything, there seems to be certain political motive and position behind the persistent quest for recognition of the existence of a dispute.

Of course, international judicial proceedings have the merit of preventing the deterioration of political relations between the parties by entrusting disputes to a third party. From that perspective, thus, it is not impossible to understand in general the view that recognizing the existence of a dispute and referring it to courts might be better for bilateral relations. However, as described earlier, considering the current situation between Japan and China, Japan has nothing to gain by recognizing the existence of a dispute.

The subjective view of a claimant that a legal dispute exists is not sufficient to recognize the existence of said dispute. Even looking at the jurisprudence in the past more broadly than just in relation to territorial issues, it is far from unusual for a party state to contest the existence of a legal dispute as a preliminary objection.<sup>37</sup> As the possibility cannot be ruled out of an international judicial proceedings taking place in relation to the Senkaku Islands in the future,



recognizing the existence of a legal dispute would unmistakably represent a backward step for Japan. If China wants to force Japan to recognize the existence of a legal dispute, China itself needs to seek a fair and objective judicial decision.

## **(6) China's behavior**

What about China?

For example, China has conflicts with countries concerned over territorial sovereignty over the islands in the South China Sea. Nonetheless, whereas China regards disputes as existing over territorial sovereignty in relation to those islands in the Spratly Islands controlled by countries and regions other than China,<sup>38</sup> it takes the position that there is no dispute over territorial sovereignty regarding the Paracel Islands over which it already has de facto control.<sup>39</sup> In addition, China is trying to make Vietnam, the Philippines, and other ASEAN member states with de facto control over those parts of the Spratly Islands lying within the so-called nine-dash line recognize the existence of disputes, which China argues should be settled through negotiations among the relevant parties.<sup>40</sup>

Given what we have seen above of the examples of the Northern Territories and Takeshima, the common sense of the international community, and China's behavior, Japan's position of not recognizing the existence of a territorial dispute over the Senkaku Islands could surely be readily accepted.

## **3. Possibility of a judicial settlement**

### **(1) Routes to an international judicial proceedings**

Concerned at the intensification of the confrontation between Japan and China over the Senkaku Islands issue, some commentators have suggested that a judicial settlement should be sought in the International Court of Justice (ICJ). This is understandable from the position of advancing the rule of law in the international community. However, as is widely known, unlike domestic courts and tribunals, reference of a matter to international courts and tribunals requires the consent of both parties.

When it comes to specific methods how to institute a proceeding before the Court, there are four possible routes: (a) by both parties entering into a special agreement to submit the dispute; (b) under a dispute settlement clause in a treaty to which both are party; (c) by means of a unilateral application in cases whereby both parties accept compulsory jurisdiction of the court; or (d) by means of accepting jurisdiction of the court subsequently in response to a unilateral application (*forum prorogatum*).

As a matter of interest, since the ICJ was established, a total of 15 Judgments have been delivered on cases contesting territorial delimitation or territorial rights over islands, etc. Given that in ten of these cases, submission of the dispute to the Court was made on the basis of the special agreement mentioned in (a) above, this is obviously the most common route. If the parties can agree beforehand to refer the matter to a third party, it would also be easier to implement the Judgment. There have been no cases employing method (d) in these cases.

## **(2) Examining the four routes**

Japan and China have concluded no treaty that has a clause requiring issues such as these to be referred to the ICJ, so the possibility of (b) is ruled out from the start.

In the case of the compulsory jurisdiction noted in (c), while Japan has accepted the compulsory jurisdiction of the ICJ, China regrettably has not accepted it, and the possibility that it will do so in the future also remains very low. China is one of those countries which have the most negative stand to accept the jurisdiction of international courts, including not only the ICJ but also the International Criminal Court (ICC). In the case of compulsory jurisdiction of the ICJ, accepting such jurisdiction means accepting and abiding the rule of law in principle in relation to all disputes rather than resolving them by force. International judicial proceedings only work when both parties are ready to bring their dispute to courts or tribunals. However, it is a harsh fact that when it comes to the rule of law, not all members of the international community are as exemplary as Japan.

With regard to the Senkaku Islands, taking into account that Japan has maintained the position that there is no dispute in relation to territorial sovereignty over the Senkaku Islands, reference to the ICJ by virtue of the special agreement noted in (a) would equate to recognizing the existence of a dispute to be resolved. The strong feeling that Japan should be very careful in weighing the advantages and disadvantages of handing China this kind of “bonus” as a result of seeking too ardently a judicial settlement is therefore quite natural.

It is highly unlikely in any case that China would consent to a reference in this form. When, for example, the Philippine Government initiated arbitration proceedings in relation to the status of the so-called nine-dash line in the South China Sea pursuant to the dispute settlement proceedings laid down in the United Nations Convention on the Law of the Sea, China reacted strongly, declaring that “[t]he Chinese side strongly holds the disputes on the South China Sea should be settled by parties concerned through negotiations. This is also the consensus reached by parties concerned in the DOC (The Declaration on the Conduct of Parties in the South China Sea).”<sup>41</sup> Moreover, because China did not even appoint an arbitrator as it was required, the President of the International Tribunal for the Law of the Sea made the appointment in China’s

stead.<sup>42</sup> Given this record, it would seem unrealistic to expect China to accept judicial settlement by the ICJ.<sup>43</sup>

### **(3) “Japan should submit the dispute to the ICJ”**

The next suggestion is that, given that there is the (d) option, Japan should avail itself of this and bring a case on the assumption that it would not do any harm. In other words, if China chooses to refuse to participate, fine—it will simply be an opportunity for Japan to impress upon the international community the difference between Japan’s attitude to respect the rule of law and China’s intransigence.

Proponents of this view argue that Japan can make a major contribution to the supremacy of international law by making clear to the world its willingness to leave the issues of the Senkaku Islands, the Northern Territories, and Takeshima to the judgment of the ICJ. They suggest that in particular, accepting an institution of a case in relation to the Senkaku Islands over which Japan exerts effective control would place huge pressure on Korea and Russia to do so.<sup>44</sup>

It seems that on the back ground of this view, given that Japan has proposed referring of the Takeshima issue to the ICJ with Korea, Japan should also lead the way to brings it before the ICJ regarding the Senkaku Islands, or Japan should actively announce its willingness to respond to a case if China brings it before the ICJ, in order to maintain the consistency of its position.

### **(4) Current status of the rule of law in the international community**

How useful and persuasive is the above view given how matters currently stand in the international community?

In fact, as of July 2013, only 69 countries including Japan have accepted compulsory jurisdiction of the ICJ, and only the United Kingdom has accepted it among permanent members of the United Nations Security Council. As noted earlier, China does not accept it as well as Russia or Korea.

What, then, would Japan have to gain from declaring that it would yield to an ICJ ruling? Of course, it would serve to advertise Japan’s eagerness to advancing the rule of law in the international community, and Japan might derive some sense of satisfaction from being a model student of the international community in terms of respecting the rule of law, and standing on the moral high ground. However, how effective is such a move likely to be in achieving the imminent priority goal of a state—namely, securing its territory? That is what we need to be asking.

In the case of the Senkaku Islands, in all likelihood Japan would be regarded as having

acknowledged the existence of a territorial dispute that it has consistently denied, handing China just the “bonus” the latter has been hoping for. In the case of the Northern Territories and Takeshima, neither Russia nor Korea is likely to budge an inch. In both cases, would either country feel “huge pressure” from toothless oral offers and leave the solution of the issue to an international judicial proceedings that may invite a result in which they have to acknowledge Japan’s territorial sovereignty? The history of negotiations over these two issues clearly reveals just how overoptimistic that scenario is.

#### **(5) Consistency of position**

Certainly, Japan has proposed three times to the ROK—in 1954, 1962, and 2012—that the two countries enter a special agreement to refer the Takeshima issue to the ICJ (which the ROK has consistently rejected). Some commentators take the position that, given Japan’s call for peaceful dispute settlement and advancing the rule of law in the international community, Japan should also take the lead in bringing a case to the ICJ in relation to the Senkaku Islands as well. In 1972 Japan also proposed the former Soviet Union to refer the Northern Territories issue to the ICJ, but this was flatly turned down by the USSR.<sup>45</sup>

The argument in Section 3.(3) might seem consistent and also appealing in that it uses the ICJ for dispute settlement. However, there is a major problem in the argument that it does not sufficiently take into account the differences in backgrounds and Japan’s situation in relation to the respective three cases, and it fails to recognize clearly the limits of international judicial procedures, as will be explored below. From the perspective of protecting Japan’s territory and securing our national interest, there are many points which should be handled carefully.

What are the differences in Japan’s situation in each case? Specifically, both Takeshima and the Northern Territories have been occupied by the other country without legitimate grounds, whereas Japan, which holds legitimate title in light of both historical facts and based upon international law, has sought negotiations or reference to the ICJ as a way of settling these disputes through peaceful means. With the Senkaku Islands, not only is Japan certain that its title is completely validated in light of both historical facts and based upon international law, but the reality is that the Islands are under the valid control of Japan. Moreover, the objective fact is that while the Chinese Government now considers the Senkaku Islands to be “sacred territory,”<sup>46</sup> as noted above, it remained silent for more than 70 years,<sup>47</sup> and did not even protest the US using Kuba and Taisho Islands as firing/bombing ranges for training US forces stationed in Japan after the Great East Asia War. In other words, from the Japanese side, the situation is above and beyond contesting whether or not a legal dispute exists.

In short, whether or not there is a legal dispute that should be brought before the ICJ for

resolution could be described as a criterion of consistency. Japan's response certainly presents no problem in terms of consistency. The dogmatic wholesale approach of taking everything to the ICJ is even harmful in the sense that it does not take into account differences in individual cases or the limitations of international trials.<sup>48</sup> Japan should hold firmly to its position and explore the best way to realize the national interest. Rather than adhering bureaucratically to a one-sided "consistency", we should perhaps take a more thick-skinned approach.

#### **(6) Onus on China**

If anyone is to take a case to the ICJ in relation to the Senkaku Islands, it should be China. Japan has exercised valid control over the Senkaku Islands ever since incorporating them in 1895. The fact is also that from the Meiji period (1868–1912) through Taisho (1912–26) and up to the prewar Showa period (1926–45), a private Japanese citizen with permission from the Japanese Government sent people to live on the Islands and openly engaged in business operations such as collecting bird feathers and manufacturing dried bonito.<sup>49</sup> With Japan still controlling the Islands today, there is considerable persuasiveness to the argument that if China as the party seeking to challenge and change that status quo wants to find a peaceful solution to the confrontation, it should take the initiative in referring to the ICJ.<sup>50</sup> If China wants to force acknowledgement of the existence of a legal dispute, the burden of proof lies with China, and using the ICJ would surely be an excellent means to that end.

### **4. Points to note with international judicial proceedings**

#### **(1) Utility and limitations of international judicial proceedings**

As someone who has studied international law as well as engaging in the implementation thereof, I am well aware of the utility and importance of international judicial proceedings. They are particularly effective in dealing with political issues such as territorial issues where both parties to the dispute have strong obsessiveness and are easily aggravated. At the same time, we also need to bear in mind their limitations and risks.

In short, in no international judicial proceeding is there ever a 100 percent guarantee of total victory, even if one party has a strong position in light of both historical facts and based upon international law—as they say, "it's never over until it's over." Accordingly, even if an international judicial proceedings in relation to the Senkaku Islands were to become a realistic possibility in the near future, Japan would need to carefully consider the balance of potential costs and benefits—continuing to exercise valid control on the one hand and, on the other, according to the suit, possibly failing to win an outright victory and sustaining some loss. There is much truth in the observation that "while international judicial proceedings are valuable in

resolving disputes, they are only one means of resolution.”<sup>51</sup>

## **(2) Enforceability of the ruling**

It should also be noted that even if an international judicial proceedings does deliver a judgment, while this might be legally binding, there have been cases where the compliance of the parties to the ruling has not been easily achieved.

One example of a territory-related judgment is the border delimitation dispute between Cameroon and Nigeria on which the ICJ delivered a judgment in October 2002. The court recognized Cameroon’s territorial sovereignty over the disputed regions—the Bakassi Peninsula and another area—and delineated the boundary accordingly, instructing Nigeria to withdraw its administration and military and police forces immediately and unconditionally. However, because Nigeria did not comply with that judgment, the United Nations interceded to establish the Cameroon-Nigeria Mixed Commission and consultations took place on ways of peacefully implementing the judgment. Even then, however, no progress continued to be seen, with Nigeria unilaterally postponing its withdrawal. The withdrawal was ultimately completed in 2008, but the Mixed Commission is still at work.

Regarding the case between Cambodia and Thailand concerning the Temple of Preah Vihear, which the ICJ judged in 1962, Cambodia filed a suit for interpretation of the judgment in 2011, and also requested measures such as the withdrawal of Thai troops from Cambodian territory. At the time of writing this article in August 2013, the case is still ongoing.

When the ICJ delivered its judgment in November 2012 on the territory and border delimitation case between Nicaragua and Colombia, Colombian President Juan Manuel Santos dissented from the judgment, describing it as a serious error which Colombia could not accept. Colombia also announced her secession from the Organization of American States’ Pact of Bogotá, which obliges members to accept ICJ compulsory jurisdiction.

All of the cases above were referred to the ICJ without special agreement among the parties to accept a judgment of the ICJ. What these cases indicate is the difficulty of peacefully realizing the law in the absence of cooperation from the losing side.<sup>52</sup>

In addition, Article 94 of the Charter of the United Nations requires member states to comply with the decision of the ICJ, and if any party to a case fails to perform its obligations incumbent upon it under the judgment, the other party may have recourse to the Security Council. However, it should be noted that if, as in the case of the Senkaku Islands, one of the parties is a permanent member of the UN Security Council, the measures which the Security Council can take will be much diminished, because of the power of veto.

### **(3) Interim measures (Provisional measures)**

In the event that an international judicial proceedings were to take place, in addition to the judgment on the merit, it would be needed to be careful of interim (provisional) measures, which the court can order the parties to take measures to ensure that the rights of the parties are not irreparably harmed during the judicial proceedings.<sup>53</sup>

In 1999, Australia, along with New Zealand, filed for arbitration pursuant to the UN Convention on the Law of the Sea on the grounds that Japan's southern bluefin tuna fishing program was endangering the existence of the resources, and also requested that the International Tribunal for the Law of the Sea institute provisional measures such as a fishing ban. While the arbitration tribunal upheld Japan's preliminary objection that the Tribunal had no jurisdiction, the International Tribunal had already recognized the necessity of provisional measures and stipulated them, including banning experimental fishing beyond the total allowable catch for each country.<sup>54</sup>

What would happen if this precedent were applied to the Senkaku Islands issue?

Japan could potentially request that Chinese government vessels be banned from entering Japanese territorial waters until a judgment was delivered on the territorial sovereignty in order to protect the respective rights of the parties, and to prevent the aggravation of the issue. Another possibility that cannot be ruled out is that measures banning all traffic in the waters around the Senkaku Islands not just by Chinese official vessels but also by Japanese official vessels might be sought. In the past, interim measures have been sought by the plaintiff, but nowhere in the statute and rules of the ICJ appear to rule out a request for interim measures from the defendant.<sup>55</sup>

While interim measures look like just a litigation technique and thus attract little notice from the general public, according to the content, they could in fact impact heavily on Japan. If Japan were to decide to move forward with judicial proceedings, it would need to look carefully at the relative pros and cons in this regard.

### **(4) Rule of law**

The rule of law is of course one of the basic values, and Japan has attached importance to peaceful dispute settlement, including the utilization of international judicial proceedings. I also appreciate the utility of the ICJ in general. Japan has indeed proposed to the ROK that we seek an ICJ solution to the Takeshima issue, despite Korea not even engaging in negotiations nor recognizing the existence of a legal dispute. However, in the case of the Senkaku Islands, as has been repeatedly indicated, given that China's claim is completely unreasonable and that the

Chinese side is not looking for a fair and objective judicial solution, the situation is not one which will bring the utility of an international judicial proceedings into play. Accordingly, there is no need for Japan to take the lead in seeking a judicial solution.

## **5. Is the Senkaku a “history issue”?**

### **(1) Playing the history card**

The Chinese Government claims that the Senkaku Islands were stolen by Japan and should therefore be returned pursuant to the Cairo Declaration.<sup>56</sup> This is playing of the “history card.”<sup>57</sup> However, as a result of carefully confirming that no other country, including Qing Dynasty, had extended its control over the Senkaku Islands even before the Sino-Japanese War, Japan incorporated the Islands on January 14, 1895 ahead of the signing of the Treaty of Shimonoseki on April 17 that year. In the first place, with regard to Taiwan and all islands appertaining or belonging to Taiwan which were ceded from Qing Dynasty to Japan under the Treaty of Shimonoseki, the Treaty does not clearly describe the specific areas of these. There is also no ground from the course of the negotiations for interpreting that the Senkaku Islands are included in Taiwan and the appertaining islands referred to in paragraph 2 of Article 2 of the Treaty.

Accordingly, a clear distinction should be drawn between the cession of territory under the postwar peace treaty and the acquisition of territory through occupation of *terra nullius*. What is problematic on China’s claim is that it confuses these.<sup>58</sup>

### **(2) Territorial incorporation by Japan (occupation)**

Since 1885, the Japanese Government conducted careful investigations through the agencies of Okinawa Prefecture and other means, and confirmed that the Senkaku Islands were not only uninhabited but also showed no trace of having been under the control of the Qing Dynasty (the condition of *terra nullius*) before making a Cabinet decision on January 14, 1895 to install National Ground Markers on the Islands (the condition of a state’s intention to acquire territory) and officially incorporating them into Japanese territory.<sup>59</sup> Moreover, following that Cabinet decision, Japan continued to openly exercise its sovereignty over the Senkaku Islands, including the issuance of permits to private citizens for land tenancy and the surveys implemented by the Okinawa Prefecture (the condition of effective occupation). As outlined above, Japan acquired territorial sovereignty over the Senkaku Islands through the act of “occupation”, which is recognized under international law, and in a form which satisfies the above conditions required under international law.

Some pundits apparently take issue with the fact that the above mentioned Cabinet decision was



kept confidential and not publicly announced. However, it is commonly accepted that the prior occupation formula does not require public announcement or notification to neighboring countries, in that if another country were exercising effective control over that land, it would obviously protest the occupation.<sup>60</sup> In fact, if China had been exercising effective control over the Senkaku Islands back in 1895, it would presumably have immediately protested at Japan incorporating the Islands and openly exercising sovereignty over them. However, no such objection was raised at all.

If, as the Chinese side claims, the Senkaku Islands really were part of Taiwan ceded as a result of the Sino-Japanese War, there would obviously have been some reference made to the Senkaku Islands in the course of the Treaty of Shimonoseki negotiations. However, no such record is to be found. The reasonable conclusion is that Japan and the Qing Dynasty shared the recognition that the Senkaku Islands were not included in those islands appertaining to Taiwan which were ceded to Japan in the Treaty of Shimonoseki.<sup>61</sup>

### **(3) San Francisco Peace Treaty**

Above all, what legally defined Japan's territory following World War II was not the Cairo Declaration, in which the Allied Powers laid out their policy on the postwar process, but rather the San Francisco Peace Treaty as a post-WWII peace treaty which included Japan among the parties to its conclusion. Under Article 3 of the latter, the United States was to exercise administrative power to the Senkaku Islands as part of the Nansei Shoto Islands. China was not a party to the San Francisco Peace Treaty, but Taiwan confirmed the Treaty under the 1952 Treaty of Peace between Japan and the Republic of China. (At the time of conclusion of the San Francisco Peace Treaty, Japan recognized the Republic of China (Taiwan) as the government legitimately representing China). In particular, neither Taiwan nor the People's Republic of China raised any objection whatsoever at the time to the disposition of the Senkaku Islands in the San Francisco Peace Treaty.

### **(4) Inappropriate change of the subject**

In conclusion, one could not help but feel that the claim that Japan's incorporation of the Senkaku Islands is "stealing" resulting from a "war of aggression" is intended to inappropriately change the subject in order to supplement the weakness of China's historical and international legal position and recover the ground.

## **6. Existence or non-existence of an agreement to shelve the issue**

### **(1) Non-existence of agreement**

As noted in Section 1.(3), China has taken every opportunity to assert that Japan and China have supposedly agreed to “shelve” the issue. However, there is no evidence that Japan recognized the existence of a dispute to be resolved in relation to territorial sovereignty over the Senkaku Islands, or that an agreement was reached on “shelving”, either at the time of the negotiations over the 1972 Japan-China Joint Communiqué, or when the 1978 Treaty of Peace and Friendship between Japan and the People’s Republic of China was being negotiated. Let us look at the records.

### **(2) Exchange between Prime Minister Tanaka and Premier Zhou Enlai**

Examining diplomatic records<sup>62</sup> of the exchange between Prime Minister Kakuei Tanaka and Premier Zhou Enlai on September 27, 1972, the only reference comes when Prime Minister Tanaka asks Premier Zhou for his thoughts on the Senkaku Islands, whereupon Premier Zhou replies: “I don’t want to talk about the Senkaku Islands issue this time. It’s not good to discuss this now. It became an issue because of the oil out there. If there wasn’t oil, neither Taiwan nor the United States would make this an issue.”<sup>63</sup>

### **(3) Exchange between Prime Minister Fukuda and Vice-Premier Deng Xiaoping**

In the exchange between Prime Minister Takeo Fukuda and Vice-Premier Deng Xiaoping on October 25, 1978 as well, Vice-Premier Deng observes that, “At this time, there’s no need to raise subjects like this [indicating the Senkaku Islands] at a meeting like this. ... [T]here’s probably insufficient wisdom to resolve the issue in our generation, but with the next generation likely to be savvier than us, they will probably be able to find some resolution to the issue. It is essential to look at this issue with a broad perspective.” Prime Minister Fukuda is recorded as making no response.<sup>64</sup>

### **(4) Press conference by Vice-Premier Deng Xiaoping**

Further, at a press conference following the above meeting, Vice-Premier Deng Xiaoping states that, “...I think it is better to avoid the issue when our countries have negotiations. Even if this means the issue is temporarily shelved, I don’t mind. I don’t mind if it’s shelved for ten years. The people of our generation don’t have sufficient wisdom to settle this discussion, but the people of the next generation will probably be wiser than us. At that time, a solution that everyone can agree on will probably be found.”

## **(5) Actual status of the so-called “shelving”**

What emerges from these records is, firstly, how keen China was to “shelve” the issue. Secondly, from a bilateral exchange perspective, China unilaterally expressed its own position and view, but Japan simply “listened” China out without either agreeing or disagreeing. From a diplomatic perspective, it is plainly impossible to argue on this basis that agreement was reached.<sup>65</sup> Why Japan chose to just “listen” China out was doubtless a decision made by those involved at the time, but I would surmise that, while China was suddenly beginning to say something that it hadn’t for the last 70 years, given the fact that it was universally apparent that Japan was exercising valid control, it was probably not judged as appropriate to cause a fuss.

In any case, it is entirely impossible to interpret what was said as comprising agreement to “shelve” the issue in the sense of both Japan and China recognizing that there was a dispute over the territorial sovereignty over the Senkaku Islands and postponing the resolution thereof to a future date. With the normalization of Japan-China relations being the imperative at the time, it may well have been no more than an attempt to keep the focus away from this in order to prevent the difference in the two countries’ respective positions on the Senkaku Islands from jeopardizing that normalization. This seems to be the natural and indeed reasonable interpretation of what transpired.

## **7. Understanding and cooperation of the international community**

### **(1) Opposition to a unilateral change in the status quo by force**

As we have seen above, opposed views in relation to territory should basically be peacefully resolved among the parties concerned. However, when we objectively analyze the way in which the Senkaku Islands situation has developed and also take into consideration the disputes which China has with Vietnam, the Philippines, and other countries in the South China Sea, it becomes clear that the Senkaku Islands are not simply a bilateral concern between Japan and China. With emerging China actively expanding its maritime presence, eyes will be on the extent to which China is prepared to observe international rules and find peaceful solutions rather than coercing other countries.<sup>66</sup>

### **(2) The US position**

In this context, the US Government has clearly and repeatedly stated at the level of former Secretary of State Hillary Clinton, current Secretary of State John Kerry, and current Secretary of Defense Chuck Hagel that the Senkaku Islands are under Japan’s administration, and that, accordingly, Article 5 of the US-Japan Security Treaty applies to the Islands ([Note by author at

the time of translation] Such assurance was later given by President Obama). Under Article 5, in the case of an armed attack against either Japan or the US in the territories under the administration of Japan, both Japan and the US are obliged to act to meet the common danger.<sup>67</sup> To the extent that Japan exercises valid control over the Senkaku Islands, these indisputably fall within those ‘territories under the administration of Japan’ and Article 5 therefore obviously applies. These statements by the US Government therefore make entire sense.<sup>68</sup>

In addition, the US Government has recently gone even further and stated explicitly that the Senkaku Islands are under Japan’s administration and she opposes any unilateral action that would aim to change the status quo.<sup>69</sup> Given the blatant efforts to change the status quo by force and threats noted in Section 1.(3), this represents a US warning against such behavior, making clear that the US Government will not stand idly by in the face of actions that damage regional peace and safety. It was a timely and appropriate comment.

On the other hand, while it is understood that the US in general chooses to take no position on other countries’ territorial sovereignty, there are many Japanese who find it incongruous that while the US clearly supports Japan’s position in relation to issues of territorial sovereignty over the Northern Territories,<sup>70</sup> in the case of the Senkaku Islands, the US simply reiterates its general position.<sup>71</sup> Even an analyst who insists that adherence to the argument that the Northern Territories and Takeshima are an “inherent part of Japanese territory” is “just a face issue for the Ministry of Foreign Affairs” is harshly critical of “the “neutral position” adopted by the US on the attribution of the Senkaku Islands, claiming that it “insults” Japan and provides China with “maximum grounds” for developing its absolutely unwarranted claim.”<sup>72</sup>

Under Article 3 of the San Francisco Peace Treaty, that the US itself took the initiative to write, the Senkaku Islands were placed under US administration as part of the “Nansei Shoto” islands. Furthermore, the 1972 Okinawa Reversion Agreement, explicitly stated both the latitude and longitude of those islands covered by it and returned the Nansei Shoto islands, including the Senkaku Islands, to Japan accordingly. In the case of Kuba and Taisho Islands, when Okinawa was reverted to Japan in 1972, despite China having already begun asserting its own claim at that stage, these two islands were offered by “Japan” to the US as facilities and areas within Japan (firing/bombing zones), and that status has not changed since.

Given the above background and historical facts, the above-mentioned feeling of incongruity arises from the thinking that because the US obtained the Senkaku Islands from Japan and later returned them, just as with Okinawa and other territory, the US premise must obviously have been that Japan (not China) has residual sovereignty over the Islands.<sup>73</sup> The strong expectation is that the position of the US Government too will at some stage become a more faithful

reflection of said background and historical facts.<sup>74</sup>

As an addendum, when US Republican heavyweight Senator John McCain (2008 presidential nominee) came to Japan in August 2013, he repeatedly noted at press conferences and on other occasions<sup>75</sup> that the Senkaku Islands are Japanese territory and that Japan clearly owns the Senkaku Islands, as well as explicitly stating that all parties taking an objective stance recognize that the Senkaku Islands issue is not a dispute but rather that “the Chinese are violating the fundamental rights that Japan has to the Senkaku Islands.” This is a truly insightful and accurate remark.

## 8. Conclusion

The Senkaku Islands are Japanese territory over which Japan has maintained valid control for a long time. Japan has a strong position in light of both historical facts and based upon international law. Accordingly, Japan should not hastily explore a compromise simply because it wishes to escape the unpleasant position it currently finds itself in with China and achieve a temporary amelioration.<sup>76</sup>

The seas around our shores remain unquiet. Obviously, we must do all we can to avoid a contingency. There is a strong need for dialogue between Japan and China for risk management. The constant state of awareness by JCG, police, Self-Defense Forces, and other related personnel, as well as the enormous patience they have showed in not reacting to their counterparts’ provocation, is truly admirable.

Japan should continue to secure valid control<sup>77</sup> and take necessary territorial protection measures, while maintaining firm determination to protect its territory and cool-headed analysis therefor as well as recognizing this as a long-term battle.

<sup>1</sup> Among the many books and papers written about the Senkaku Islands issue, those which lay out the historical background and points of international law particularly succinctly include: Toshio Okuhara, “Senkaku retto no ryodo hennyu keii” [Background of the territorial incorporation of the Senkaku Islands], *Seikei Gakkai Shi* [Journal of Politics and Economics] No. 4 (Kokushikan University, 1975); Shigeyoshi Ozaki, “Senkaku shoto no kizoku ni tsuite: Jo/chu/ge no ichi/ge no ni” [The territorial sovereignty over the Senkaku Islands: Parts I, II and III (a) and (b)], *Refarensu* [The Reference], No. 259, 1972, pp. 261–263 (Ozaki has also recently written a series of articles on territorial sovereignty over the Senkaku Islands that was published in three installments in *Tosho Kenkyu Journal* [Review of Island Studies], Vol. 1, 2012, Vol. 2.1, 2012, and Vol. 2.2, 2013 (Center for Island Studies, Ocean Policy Research Foundation); and Kentaro Serita, *Nihon no ryodo* [Territory of Japan] (Chuokoron-Shinsha, 2010).

<sup>2</sup> On September 19, 2012, NHK newscaster Kensuke Okoshi wrote on his blog that “the reason for the

recent rapid deterioration in Japan-China relations is of course the issue on territorial sovereignty over the Senkaku Islands. ... The Japanese Government purchased the Islands from the landowner on September 11 and nationalized them. China's anger exploded, resulting in the current situation." Kensuke Okoshi, *Okoshi Kensuke no gendai o miru* [Kensuke Okoshi's view of the present] (September 19, 2012),

[<http://www9.nhk.or.jp/nw9-okoshi-blog/2012/09/>] (in Japanese)

In Yoshihiko Yamada and Masato Ushio, *Senkaku gekitotsu: Nihon no ryodo wa zettai ni mamoru* [The Senkaku clash: Protecting Japanese territory at all costs] (Fusosha Publishing, 2012), Yamada notes that "The government misread China's attitude. To the Chinese government and people, the purchase of the Senkaku Islands by a local government body means something entirely different to the same purchase and then treat as national land by the central government" (p.14).

Takashi Okada suggests in *Senkaku shoto mondai: Ryodo nashonarizumu no maryoku* [The Senkaku Islands issue: The appeal of territorial nationalism] (Sososha, 2012) that "the trigger was Tokyo Governor Shintaro Ishihara announcing his intention to buy the Senkaku Islands," which was the "point of departure for the current issue" (p. 16).

<sup>3</sup> United Nations address on September 27, 2012 by Chinese Foreign Minister Yang Jiechi. Ministry of Foreign Affairs of the People's Republic of China (below, PRC Foreign Ministry), [[http://www.fmprc.gov.cn/mfa\\_eng/topics\\_665678/diaodao\\_665718/t975814.shtml](http://www.fmprc.gov.cn/mfa_eng/topics_665678/diaodao_665718/t975814.shtml)]

<sup>4</sup> See Ministry of Foreign Affairs (MOFA), *The Senkaku Islands*, [<http://www.mofa.go.jp/mofaj/area/senkaku/pdfs/senkaku.pdf>] (in Japanese) [[http://www.mofa.go.jp/region/asia-paci/senkaku/pdfs/senkaku\\_en.pdf](http://www.mofa.go.jp/region/asia-paci/senkaku/pdfs/senkaku_en.pdf)] (in English)

<sup>5</sup> Ibid.

<sup>6</sup> Shinya Murase, *The Senkaku Islands and International Law*, Center for Strategic and International Studies, Japan Chair Platform, May 22, 2013.

<sup>7</sup> Takashi Tajima, "Senkaku mondai: Chugoku-gawa wa hanashiai o hikaetai to shi, Nihon-gawa wa kikioku ni todometa" [The Senkaku issue: The Chinese side wanted to refrain from discussion, and the Japanese side just listened] (*Gaiko* [Diplomacy], No. 18, March 2013, pp. 78–79. Tajima also notes that, "Looking at the behavior of the Chinese side, China itself has repeatedly infringed the very 'shelving' of the issue—in other words, maintaining the status quo—it has called for," giving the example of the formulation of China's Territorial Waters Law. He also observes that, "Far from shelving the issue, the Chinese side has launched straight into an attempt to change the status quo through the use of force without even formally requesting a dialogue. You have to wonder if this can really be the road to "peaceful development" that China talks about."

Even Takakazu Kuriyama, who claims that tacit agreement to "shelve" the issue was reached between the Japanese and Chinese leaders, says that "... while seeking to change the situation to one's own benefit through the use of some unilateral means is understandable, it does infringe the standstill rule. The recent tensions between Japan and China have been caused by both sides acting in disregard of this rule, but in my view, this all began with China's formulation of its Territorial Waters Law in 1992." Takakazu Kuriyama, "Senkaku shoto to nitchu kankei: "Tana-age" no imi" [The Senkaku Islands and Japan-China relations: The meaning of "shelving"], *Ajia Jiho*, December 2012, pp. 7–8.

<sup>8</sup> For example, PRC Foreign Ministry Spokesperson Hong Lei's Regular Press Conference on June 4, 2013 [<http://kw.china-embassy.org/eng/fyrth/t1047602.htm>] and the Q&A session with Vice Foreign Minister Zhang Zhijun at a Foreign Ministry regular press briefing on October 26, 2012 [[http://www.fmprc.gov.cn/mfa\\_eng/wjdt\\_665385/zyjh\\_665391/t983015.shtml](http://www.fmprc.gov.cn/mfa_eng/wjdt_665385/zyjh_665391/t983015.shtml)]

<sup>9</sup> In his speech at the House of Councilors plenary session on February 1, 2013, Prime Minister Abe stated that "... there is no doubt that the Senkaku Islands are clearly an inherent territory of Japan, in light of historical facts and based upon international law. Consequently, there exists no issue of territorial sovereignty to be resolved with China concerning the Senkaku Islands, nor does an issue to be shelved exist."

On April 5, 2013, Foreign Minister Fumio Kishida said at a House of Representatives Committee on Foreign Affairs meeting that “Japan’s position on the Senkaku Islands is as I described earlier, namely, that, to begin with no territorial issue exists that requires resolution in relation to the Senkaku Islands. Japan’s position in this regard has been entirely consistent. Accordingly, there are absolutely no facts that Japan has agreed with China in the course of its history to date to shelve regarding the Senkaku Islands or maintain the status quo in that regard, and Japan’s recognition is that there is actually no issue to be shelved.”

<sup>10</sup> The intrusion into the territorial waters occurred on December 8. The Japan-China-ROK Summit was held on December 13.

<sup>11</sup> Based on data from *The Military Balance*, which is put out by the International Institute for Strategic Studies in the UK.

<sup>12</sup> Examples of Chinese statements include:

(a) Former Prime Minister Li Peng’s comment that “Japan will be no more in 30 years.”

When he was head of the Management and Coordination Agency, Kabun Muto explained as follows at the House of Representatives Special Committee on Administrative Reform: “... When I went to Australia, I was asked by then-Australian Prime Minister Paul Keating if Japan wasn’t on the verge of collapse. Apparently, at a recent meeting with Chinese Prime Minister Li Peng [in China], the latter had said to Keating, “You Australians are counting heavily on Japan, but the odds are good that Japan will be no more in 30 years.” Keating was quite shocked by this, and as I happened to be in Australia [after that visit], he asked me about what I thought. I replied that I didn’t know what Li Peng had said, but as a Japanese politician I could hardly say that my country was going to collapse. It was certainly a fact that Japan was currently in a bad way, but it would definitely recover, so there was no need for concern, and then I actually left ...” (May 9, 1997 comment by Management and Coordination Agency Minister Muto to the House of Representatives Special Committee on Administrative Reform).

(b) Suggestion from a Chinese military officer that the US and China split the Pacific between them

On March 11, 2008, then-US Commander of the US Pacific Command Timothy Keating stated as follows to the House Armed Services Committee on US Pacific Command Posture: “If I could, a very brief anecdote, Senator. While in discussions with a senior Chinese naval officer on our first visit, he with a straight face—so apparently seriously—proposed the following deal to me.” He said, “As we develop our aircraft carriers,” an interesting note to begin with, “why don’t we reach an agreement, you and I? You take Hawaii east; we’ll take Hawaii west. We’ll share information and we’ll save you all the trouble of deploying your naval forces west of Hawaii.” US Senate

(c) Comment by Chinese Defense Minister General Chang Wanquan at a joint press conference with Defense Secretary Chuck Hegel

(In response to Hegel’s call for China to find a peaceful solution to disputes over maritime interests in the East China and South China Seas, which include the Senkaku Islands) “No one should fantasize that we will barter away our core interests. And no one should underestimate our determination in defending our territory, sovereignty and maritime rights.” (*Yomiuri Shimbun*, August 20, 2013).

<sup>13</sup> Examples of incidents related to Takeshima and the Northern Territories:

(a) Takeshima-related incidents

In January 1952, ROK President Syngman Rhee issued “the Declaration on Maritime Sovereignty”, contravening international law by unilaterally establishing the so-called “Syngman Rhee Line” and also unilaterally proclaiming fisheries jurisdiction over a large area of water within that line, which encompassed Takeshima. In March 1953, the Japan-US Joint Committee decided to release Takeshima from its designation as a bombing training range for US Forces stationed in Japan. This enabled Japanese boats to resume fishing around Takeshima, but it was

confirmed that Korean boats were also engaging in fishing around the island. In July that year, a Japanese Coast Guard(JCG) patrol vessel demanding that Korean fishermen engaged in illegal fishing leave Takeshima was fired upon by Korean authorities who were protecting the Korean fishermen. In 1954, another JCG vessel on patrol near Takeshima was fired on by ROK security personnel who began to be constantly stationed on Takeshima. See MOFA, *Establishment of “Syngman Rhee Line” and Illegal Occupation of Takeshima by the Republic of Korea* [[http://www.mofa.go.jp/mofaj/area/takeshima/g\\_senkyo.html](http://www.mofa.go.jp/mofaj/area/takeshima/g_senkyo.html)] (in Japanese) [<http://www.mofa.go.jp/region/asia-paci/takeshima/index.html>](in English)

Regarding the Syngman Rhee Line, in the 13 years until the former Agreement on Fisheries between Japan and the Republic of Korea was concluded in 1965, 3,929 Japanese citizens detained, 328 vessels being seized, and 44 injured or killed (Ichiro Komatsu, *Jissen kokusaiho* [International law in practice] , Shinzansha, 2011, p. 109.

(b) Northern Territories-related incidents

In the morning of August 16, 2006, the Japanese fishing boat No. 31 Kisshinmaru was fired upon and then seized by a Russian patrol boat near Kaigarajima island, which is part of the Habomai Islands, with one fisherman killed and three others detained (for details of the incident and the government’s response, see the MOFA web page on the incident of firing on and seizure of a Japanese fishing vessel in the waters around the Northern Territories, [[http://www.mofa.go.jp/mofaj/area/russia/hoppo\\_jiken.html](http://www.mofa.go.jp/mofaj/area/russia/hoppo_jiken.html)] (in Japanese)

- <sup>14</sup> The second page of the September 28, 2012 morning edition of the *Asahi Shimbun* reported then-Keidanren Chair Hiromasa Yonekura as referring “at a press conference on the 27th in Beijing during his visit to China to Prime Minister Noda’s statement that “no territorial issue exists” in relation to the Senkaku Islands and that this stance of the Japanese Government was “hard to understand.” According to the newspaper, “he added that “the (Government’s) stance will not be accepted in private-sector negotiations and that he wished “the Japanese Government would not cling to this stance.” In response, Masato Ushio observed that “Yonekura’s assertion undermines Japan’s national interests, benefiting only China or considering only economic interests, including those of his own company” (Yamada and Ushio, *supra* note 2, p. 174).
- <sup>15</sup> Yoshiro Matsui, “Senkaku shoto ni tsuite kangaeru: Kokusai-ho no kanten kara 1–4” [The Senkaku Islands from the perspective of international law], Vols. 1–4 *Horitsu Jiho* No. 85:1–4, 2013.
- <sup>16</sup> Ukeru Magosaki, *Nihon no kokkyo mondai: Senkaku, Takeshima, Hoppo-ryodo* [Japan’s border issues: The Senkakus, Takeshima and the Northern Territories], Chikuma Shobo (Chikuma Shinsho), 2011, p. 87; Okada, *supra* note 2, p. 114. In addition, the July 2, 2013 edition of the *Tokyo Shimbun* opined in its editorial that questions remain about an attitude as if it would simply shut down debate by claiming that “a issue on territorial sovereignty does not exist”.
- <sup>17</sup> Murase, *supra* note 6. This paper explains the difference between conflicts and disputes.
- <sup>18</sup> Akira Kotera, “Ryodo mondai no shori isogu na” [Don’t rush in dealing with territorial issues] (*The Nikkei*, October 9, 2012).
- <sup>19</sup> Asked whether the Senkaku Islands are Japanese territory, former Taiwanese President Lee Teng-hui was reported as saying “[The Senkaku Islands] are naturally Japanese territory. If not, to whom do they belong? There is no historical record of them belonging to anyone else, and no geographical territorial delimitation. Taiwan cannot say the Senkaku Islands belong to it. Upon seeing a beautiful woman, we can’t just say that she is my wife. Is such behavior valid? We should look at the matter based on history.” (Central News Agency (Taiwan), September 24, 2008).
- <sup>20</sup> Serita, *supra* note 1, p. 159. According to Serita, “It can be more than adequately demonstrated that Japan has continually—for 75 years since 1895—and peacefully—that is, with no protest from China—exercised sovereignty.”
- <sup>21</sup> Comment by Shinsuke Sugiyama, Director-General of MOFA Asian and Oceanian Affairs Bureau, at the Upper House Budget Committee on May 15, 2013.



- <sup>22</sup> Masayasu Hosaka and Kazuhiko Togo, *Nihon no ryodo mondai: Hoppo yonto, Takeshima, Senkaku shoto* [Japan's territorial issues: The four Northern Islands, Takeshima, and the Senkaku Islands], Kadokawa Shoten, 2012, p. 122. The authors note that "The issue of sovereignty is a sacrosanct state right, as well as the state's responsibility. It is unreasonable for a wartime victor to ignore the matter for 23 years and now, when oil is found, make a claim to that territory. Basically, such would appear to have been the sentiment of the government and at least the majority of the people at the time."
- <sup>23</sup> An article on page 1 of the July 2, 2013 edition of the *Yomiuri Shimbun* reported that "It has emerged that the Chinese Government has made (1) the Japanese Government's recognition of the existence of a territorial dispute and (2) both Japan and China "shelving" the issue preconditions for holding a Japan-China Summit."
- <sup>24</sup> MOFA PR material: "*Ryodo mondai no sonzai o mitomeru beki da*" "*Nihon to shite senkaku mondai o ai si jei ni futaku sureba ii de wa nai ka*" *naze ikenai?* [What's wrong with the arguments that "the existence of a territorial dispute should be recognized" and "Japan should take the Senkaku issue to the ICJ"?]
- <sup>25</sup> MOFA, The Basic View on the Sovereignty over the Senkaku Islands, [<http://www.mofa.go.jp/mofaj/area/senkaku/kenkai.html>] (in Japanese) [[http://www.mofa.go.jp/region/asia-paci/senkaku/basic\\_view.html](http://www.mofa.go.jp/region/asia-paci/senkaku/basic_view.html)] (in English)
- <sup>26</sup> Commentary in the May 8, 2013 *People's Daily*. The argument in this article that "The time has come not only for Taiwan and the appertaining islands (including the Diaoyu Islands) to be returned to China but also to revisit the historically unresolved issue of the Ryukyu Islands" is one example.
- <sup>27</sup> MOFA PR material, *supra* note 24.
- <sup>28</sup> Matsui, *supra* note 15, *Horitsu Jiho* 85:1, p. 72
- <sup>29</sup> The Soviet Government Memorandum to the Japanese Government, issued January 27, 1960 after the signing of the Japan-US Security Treaty (January 19, 1960), takes the position that "the Soviet Government finds it necessary to declare that the islands of Habomai and Shikotan will be handed over to Japan, as was stated in the Soviet-Japanese Joint Declaration of October 19, 1956, only if all foreign troops are withdrawn from Japan and a Soviet-Japanese peace treaty is signed." (MOFA, *Warera no hoppo ryodo 2012 nen-ban shiryō-hen* [2012 edition of the joint compendium of documents on the history of territorial issues between Japan and Russia 2012 edition], p. 26).
- <sup>30</sup> The Japan-Soviet Joint Communiqué signed by Prime Minister Kakuei Tanaka and USSR General Secretary Leonid Brezhnev on October 10, 1973 clearly states that "[r]ecognizing that the settlement of unresolved problems left over from WWII and conclusion of a peace treaty would contribute to the establishment of truly good-neighborly and friendly relations between the two countries, both sides held negotiations on issues pertaining to the contents of a peace treaty." It was also verbally confirmed at the summit meeting that the "unresolved problems" in question included the Northern Territories issue (MOFA, *Warera no hoppo ryodo 2012 nen-ban setsumeï-hen* [Explanatory notes to 2012 edition of the joint compendium of documents on the history of territorial issues between Japan and Russia], p. 13).
- <sup>31</sup> The Japanese-Soviet Joint Communiqué signed by Japanese Prime Minister Toshiki Kaifu and USSR President Mikhail Gorbachev on April 18, 1991 (MOFA, *Warera no hoppo ryodo 2012 nen-ban setsumeï-hen* [Explanatory notes to 2012 edition of the joint compendium of documents on the history of territorial issues between Japan and Russia], pp. 41–44). Paragraph 4 explicitly states that "[Prime Minister Toshiki Kaifu of Japan and President M.S. Gorbachev of the Union of Soviet Socialist Republics] held an in-depth and thorough negotiations on a whole range of issues relating to the preparation and conclusion of a peace treaty between Japan and the Union of Soviet Socialist Republics, including the issue of territorial demarcation, taking into consideration the positions of both sides on the attribution of the islands of Habomai, Shikotan, Kunashiri, and Etorofu... [confirming that] ... the peace treaty should be the document marking the final resolution of war-related issues, including the territorial issue ..."

<sup>32</sup> The Tokyo Declaration on Japan-Russia Relations signed by Prime Minister Morihiro Hosokawa and President Boris Yeltsin on October 13, 1993 (MOFA, *Wareira no hoppo ryodo 2012 nen-ban shiryohen* [2012 edition of the joint compendium of documents on the history of territorial issues between Japan and Russia], pp. 46–48). Paragraph 2 clearly states that “[Leaders] ... have undertaken serious negotiations on the issue of where the islands of Etorofu, Kunashiri, Shikotan, and Habomai belong. Both sides agree that negotiations towards an early conclusion of a peace treaty through the solution of this issue on the basis of historical and legal facts and based on the documents produced with the two countries’ agreement as well as on the principles of law and justice should continue, and that the relations between the two countries should thus be fully normalized.”

<sup>33</sup> Kazuhiko Togo, “‘Ryodo mondai nai’ no saiko o” [Japan must acknowledge territorial issue over islands] (*Asahi Shimbun*, October 1, 2010). In that article, Togo notes that the expression “a territorial dispute does not exist” is one which “caused a great sense of humiliation and anger in me [Togo] and my fellow Japanese as that which USSR Foreign Minister Andrei Gromyko continued to direct at Japan during the last days of the Cold War in relation to the Northern Territories issue” and suggests that we must “stop forcing China to experience the same “Gromyko insult”.”

While the “sense of humiliation and anger” noted by Togo is certainly true, the suggestion in relation to China equates the position in which Japan was placed, namely the illegal occupation of the Northern Territories, where as many as 17,000 Japanese citizens resided, with the position of China, which suddenly began claiming territorial sovereignty over the Senkaku Islands after remaining silent for many years over Japan’s continuous exercise of effective control over the Islands, which is hardly an appropriate comparison.

<sup>34</sup> Remarks by Korean Foreign Minister Lee Tong Won at a Korean National Assembly Special Committee meeting on August 10, 1965.

<sup>35</sup> Matsui, *supra* note 15, *Horitsu Jiho* 85:4, p. 70.

<sup>36</sup> The ruling in an international court on the definition of a dispute traces back to as early as the 1924 Permanent Court of International Justice ruling on the Mavrommatis Palestine Concessions Case. The 2011 ICJ judgment on the Application of the International Convention on the Elimination of All Forms of Racial Discrimination Case also quotes that definition: “A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.” (Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., series A, No. 2, p. 11). (Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011, p. 84, para. 30).

<sup>37</sup> In international judicial proceedings to date, there have been many examples of a party arguing the non-existence of a dispute as a preliminary objection—South Africa, for example, in the Southwest Africa Case (1962); Australia in the Case concerning East Timor (1995); the US and the UK in the Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Preliminary Objections) (1998); Germany in the Case Concerning Certain Property (2005); and Russia in the Case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (2011).

<sup>38</sup> Foreign Ministry Spokesperson Hong Lei’s Regular Press Conference, September 4, 2012, PRC Foreign Ministry [<http://www.mfa.gov.cn/ce/cgtrt/eng/fyrthhz/fyrth/t966813.htm>].

<sup>39</sup> Foreign Ministry Spokesperson Hong Lei’s Regular Press Conference, March 1, 2012, PRC Foreign Ministry [<http://az.china-embassy.org/eng/fyrth/t911393.htm>].

<sup>40</sup> Foreign Ministry Spokesperson Hong Lei’s Regular Press Conference, February 29, 2012, PRC Foreign Ministry [[http://www.fmprc.gov.cn/mfa\\_eng/xwfw\\_665399/s2510\\_665401/2511\\_665403/t910855.shtml](http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t910855.shtml)], remarks by Chinese Premier Wen Jiabao at the 2011 East Asia Summit, PRC Foreign Ministry [[http://www.fmprc.gov.cn/mfa\\_eng/wjb\\_663304/zjzg\\_663340/yzs\\_663350/dqzzywt\\_663588/t879898.shtml](http://www.fmprc.gov.cn/mfa_eng/wjb_663304/zjzg_663340/yzs_663350/dqzzywt_663588/t879898.shtml)].

- <sup>41</sup> January 23, 2013 Statement of the Chinese Embassy in the Republic of the Philippines (<http://ph.chineseembassy.org/eng/xwfb/t1007184.htm>).
- <sup>42</sup> April 25, 2013 International Tribunal for the Law of the Sea Press Release [[https://www.itlos.org/fileadmin/itlos/documents/press\\_releases\\_english/PR\\_191\\_E.pdf](https://www.itlos.org/fileadmin/itlos/documents/press_releases_english/PR_191_E.pdf)]
- <sup>43</sup> In fact, China has never been a party to an international judicial proceedings at the ICJ.
- <sup>44</sup> Hosaka and Togo, *supra* note 22, p. 224.
- <sup>45</sup> In 1972, with the USSR continuing to deny the existence of the Northern Territories issue, Foreign Minister Masayoshi Ohira proposed referring to the ICJ, but the Soviet Foreign Minister Andrei Gromyko rejected this. MOFA, *Kokusai shiho saibansho (ICJ) ni tsuite* [About the International Court of Justice] (June 2013) [<http://www.mofa.go.jp/mofaj/files/000103330.pdf>] (in Japanese)
- <sup>46</sup> For example, at Foreign Ministry Spokesperson Hong Lei's Regular Press Conference on November 1, 2012, he said "... the Diaoyu Islands have always been China's sacred territory since ancient times". PRC Foreign Ministry, [<http://pl.china-embassy.org/pol/fyrth/t984876.htm>].
- <sup>47</sup> Yoshiji Nogami, "The Senkakus: The true nature of the issue," *The Boston Globe*, February 19, 2013.
- <sup>48</sup> In Hosaka and Togo, *supra* note 22, the authors note that there is "no immediate need for Japan to refer to the ICJ. Japan is the one exercising effective control, and Japan has an highly advantageous position under international law."
- <sup>49</sup> For example, testimony by parties related to the Koga family which operated on the Islands (*Gendai*, June 1972 issue, pp. 142–47 and Moriteru Arasaki (ed.), "Okinawa gendaishi e no shogen: Ge" [Testimony about modern Okinawan history Vol. 2], *Okinawa Times*, 1982, p. 127).
- <sup>50</sup> Japanese Foreign Minister at the time Koichiro Gamba, "Japan-China Relations at a Crossroads," *International Herald Tribune*, November 21, 2012.
- <sup>51</sup> Kotera, *supra* note 18.
- <sup>52</sup> Naoya Okuwaki, "Takeshima/Senkaku shoto henyu no rekishi: Kokusaiho-jo, tetsuzuki mondai nashi" [History of the incorporation of Takeshima and the Senkaku Islands: No procedural issues under international law], *The Nikkei*, September 14, 2012.
- <sup>53</sup> Komatsu, *supra* note 13, p. 376.
- <sup>54</sup> Provisional measures ordered by the International Tribunal for the Law of the Sea were revoked by the arbitration tribunal when it determined that the International Tribunal did not have jurisdiction over the case. (Award on Jurisdiction and Admissibility (Southern Bluefin Tuna Case: Australia and New Zealand v. Japan), August 4, 2000, p. 111, para. 72.)
- <sup>55</sup> Article 73.1 of the ICJ Rules of Court states that "A written request for the indication of provisional measures may be made by a party at any time during the course of the proceedings in the case in connection with which the request is made."
- <sup>56</sup> People's Republic of China State Council Information Office, *Diaoyu Dao, an Inherent Territory of China: White Paper*, September 25, 2012. (PRC Foreign Ministry, [<http://www.china-embassy.or.jp/jpn/zrgxs/zywj/t973306.htm>] (in Japanese), [<http://www.ebeijing.gov.cn/BeijingInformation/BeijingNewsUpdate/t1242062.htm>] (in English)). Speech given at the United Nations General Assembly on September 27, 2012 by Chinese Foreign Minister Yang Jiechi (PRC Foreign Ministry, [[http://www.fmprc.gov.cn/mfa\\_eng/topics\\_665678/diaodao\\_665718/t975814.shtml](http://www.fmprc.gov.cn/mfa_eng/topics_665678/diaodao_665718/t975814.shtml)]).
- <sup>57</sup> Publications that take the perspective that the Senkaku Islands are an "historical issue" and a "colonial issue" include Narahiko Toyoshita, "*Senkaku mondai*" to wa nani ka [What is the "Senkaku Islands issue"], Iwanami Shoten, 2012.

- <sup>58</sup> Hosaka and Togo, *supra* note 22, p. 118.
- <sup>59</sup> MOFA, *Senkaku shoto ni kan suru Q&A* [Senkaku Islands Q&A], [[http://www.mofa.go.jp/mofaj/area/senkaku/qa\\_1010.html](http://www.mofa.go.jp/mofaj/area/senkaku/qa_1010.html)] (in Japanese) [[http://www.mofa.go.jp/region/asia-paci/senkaku/qa\\_1010.html#q10](http://www.mofa.go.jp/region/asia-paci/senkaku/qa_1010.html#q10)] (in English)
- <sup>60</sup> Okuwaki, *supra* note 52.
- <sup>61</sup> Serita, *supra* note 1, p. 161.
- <sup>62</sup> MOFA, *Senkaku shoto ni tsuite* [The Senkaku Islands], *supra* note 4, [[http://www.mofa.go.jp/mofaj/area/senkaku/qa\\_1010.html](http://www.mofa.go.jp/mofaj/area/senkaku/qa_1010.html)] [[http://www.mofa.go.jp/region/asia-paci/senkaku/pdfs/senkaku\\_en.pdf](http://www.mofa.go.jp/region/asia-paci/senkaku/pdfs/senkaku_en.pdf)]
- <sup>63</sup> Ryuji Hattori, *Nitchu kokko seijoka: Kakukei Tanaka, Masayoshi Ohira, kanryo-tachi no chosen* [Normalizing Japan-China diplomatic relations: The challenge faced by bureaucrats, Kakuei Tanaka and Masayoshi Ohira], Chuokoron-Shinsha, 2011, The author analyzes the response of Premier Chou En-lai, arguing that “Chou probably parried Tanaka’s comment because he made the snap decision that if the Senkaku Islands were discussed, things would get out of hand. Placing greater priority on China’s Soviet strategy, he hurried through the signature of the Japan-China Joint Communiqué.” “In normalizing relations with Japan, China did not make any demands in relation to the Senkaku Islands, and even shut down Japan’s efforts to propose it. ... There is no territorial dispute between Japan and China.”
- <sup>64</sup> Remarks by then-Foreign Minister Seiji Maehara at the House of Representatives Security Committee on October 21, 2010: “That was a proposal made unilaterally by Deng Xiaoping, and the Japanese side did not agree. The conclusion, then, is that Japan did not agree with China to shelve the issue.” At the same meeting, Ambassador Takashi Tajima (Director of the China Division at the time) noted that “In other words, the fact is that China wanted to refrain from discussion, and the Japanese side just listened without comment.” Tajima (*supra* note 7, p. 77). In 1972 too, Tajima said there was no recognition that agreement had been reached on shelving (*Sankei Shimbun* morning edition, June 29, 2013 p. 3).
- <sup>65</sup> For example, Reinhard Drifte, while taking the view that normalization of bilateral relations could not have occurred if there had not been agreement to shelve the issue, says that the shelving agreement was obviously a tacit understanding and clearly not something with legal nature. Reinhard Drifte, *The Senkaku/Diaoyu Islands territorial dispute between Japan and China: Between the materialization of the “China threat” and Japan “Reversing the outcome of World War II”?*, UNISCI Discussion Papers No. 32, May 2013.
- <sup>66</sup> Nogami, *supra* note 46.
- <sup>67</sup> Article 5 of the Treaty of Mutual Cooperation and Security between Japan and the United States of America states that “Each Party recognizes that an armed attack against either Party in the territories under the administration of Japan would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional provisions and processes ...”
- <sup>68</sup> In Yamada and Ushio, *supra* note 2, Ushio argues that “Even if America were to ignore the Senkaku Islands—in other words, Japan—what would America’s allies around the world think? If even Japan, which for better or worse has gone as far as providing a “Host Nation Support”, is forsaken, America would lose its credibility” (pp. 132–33).
- <sup>69</sup> MOFA, Comment by Secretary of State John Kerry at a joint press conference by Japanese and US foreign ministers on April 14, 2013. [[http://www.mofa.go.jp/mofaj/kaidan/page4\\_000032.html](http://www.mofa.go.jp/mofaj/kaidan/page4_000032.html)] (in Japanese) [[http://www.mofa.go.jp/region/page6e\\_000016.html](http://www.mofa.go.jp/region/page6e_000016.html)] (in English)
- <sup>70</sup> A September 7, 1956 aide-mémoire from the US Department of State on the Japan-USSR negotiations notes: “The United States has reached the conclusion after careful examination of the historical facts

that the islands of Etorofu and Kunashiri (along with the Habomai Islands and Shikotan which are a part of Hokkaido) have always been part of Japan proper and should in justice be acknowledged as under Japanese sovereignty.” (MOFA, *Warera no hoppo ryodo 2012 nen-ban shiryō-hen* [2012 edition of the joint compendium of documents on the history of territorial issues between Japan and Russia], pp. 22–23)

<sup>71</sup> At the June 18, 2013 meeting of the House of Councillors Committee on Foreign Affairs and Defense, Diet member Koji Sato remarked: “As is clear from the comment by National Security Adviser to the President Tom Donilon, the US is not in a position to make a final decision on territorial sovereignty over the Senkaku Islands, and has chosen not to take a specific position. This could be thought to mean that the US does not necessarily recognize Japan’s territorial sovereignty, but on the other hand, former Secretary of State Hillary Clinton and current Secretary of Defense Chuck Hegel have both made comments, stating their view that because the Senkaku Islands are under Japanese administrative control, they fall under Article 5 of the Treaty of Mutual Cooperation and Security between Japan and the United States of America, which states that in the case of an armed attack against either Japan or the US, both parties would act to meet the common danger. The US is distinguishing between territorial sovereignty and administrative rights ... and I would like to see these two terms closely defined.” “Issues like these can be difficult to discuss publicly, which conversely means they can end up damaging the national interest. In that sense, I would like the discussion to be moved forward with caution.”

At the November 6, 2013 meeting of the House of Representatives Committee on Foreign Affairs, Diet member Akihisa Nagashima remarked: “I would like a clearer commitment from the US on this issue, so I urge the Foreign Minister too to press hard in that direction.”

<sup>72</sup> Toyoshita, *supra* note 57, p. 172. Toyoshita further argues that “For the 27 postwar years of the US military occupation of Okinawa, the US considered the Senkaku Islands to be part of Okinawa and used them as a bombing range. Even after Okinawa was returned to Japan, the US continued to control Kuba and Taisho Islands. In other words, the US is not a third party, but an actual party to the matter.”

<sup>73</sup> Press conference by State Department spokesman Robert McCloskey on September 10, 1970.

McCloskey stated that “Under the San Francisco Peace Treaty, the U.S. government administers the Senkaku Islands as a part of the Ryukyu Islands, but considers that residual sovereignty over the Ryukyus remains with Japan.”

<sup>74</sup> A CIA report created in 1971 (released from confidentiality in 2007) notes that the Senkakus are commonly considered as part of the large Ryukyu Island chain, and also states that the Japanese claim to sovereignty over the Senkakus is strong, and the burden of proof of ownership would seem to fall on the Chinese.

<sup>75</sup> Remarks at an informal press conference following a courtesy call on Foreign Minister Kishida on August 21, 2013, as well as at a press conference following his speech at the Tokyo American Center the same day (*The Nikkei*, August 22, 2013, p. 4).

<sup>76</sup> Takako Kawasaki, Japanese Association of International Law (ed.), “Nihon no ryodo [Japan’s territory]” in *Nihon to kokusaiho no 100 nen: Dai 2 kan: Riku, sora, uchu* [Japan and international law in the past 100 years Vol. 2: Land, air and space], Sanseido, 2001. The author argues that “If we consider that territorial issues have an almost permanent nature, even if Japan’s relationship with the other country party to the dispute should temporarily deteriorate, or if negotiations become quite protracted, Japan should avoid making any reluctant concessions.”

<sup>77</sup> Okuwaki, *supra* note 52, argues that “In the case of the Senkaku Islands, Japan needs to deal rigorously with incursions by foreigners pursuant to Japanese law, and, according to the situation, take measures such as strengthening maritime patrols, ensuring that Japan’s effective control continues.”

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