

## The Senkaku Islands as Viewed through Chinese Law

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1. Introduction: China's Maritime Ambitions
2. Law Concerning the Territorial Sea and the Contiguous Zone (February 25, 1992)
3. Administrative Regulation on Protection and Use of Uninhabited Islands (July 1, 2003)
4. Law on Island Protection (December 26, 2009)
5. Law on the Exclusive Economic Zone and the Continental Shelf (June 26, 1998)
6. Conclusion

### 1. Introduction: China's Maritime Ambitions

China has over 18,000 kilometers of coastline running north-south along the Yellow Sea, East China Sea, and South China Sea and possesses some 6,900 islands. Its jurisdictional waters span over more than 3 million square kilometers, and of its neighbors, eight are linked by the sea: North Korea, South Korea, Japan, the Philippines, Malaysia, Brunei, Indonesia, and Vietnam.

China has a dispute with South Korea on the delimitation of their exclusive economic zones and the continental shelf in the Yellow Sea. Beijing bases its claims on the natural extension of the continental shelf and on the equitable principle, while Seoul insists its claims on the equidistance principle. The two States also have conflicting claims over the submerged Socotra Rock (Ch. Suyanjiao, Kr. Jeodo), which—along with the Senkaku Islands—was included in the air defense identification zone that Beijing established over the East China Sea on November 23, 2013, leading to heightened tensions in East Asia. An *Asahi Shimbun* article notes that China's ADIZ originally proposed by the People's Liberation Army was smaller and that it was expanded toward Kyushu by the Xi Jinping administration.<sup>1</sup>

Xi headed the task force created to respond to the September 2012 decision by Japan's Noda Yoshihiko cabinet to "nationalize" the Senkaku Islands, so Chinese decisions regarding the Senkakus are clearly being spearheaded by the party leadership.

China also has a dispute with Japan over the delimitation of the continental shelf in the East China Sea. In a joint press statement of June 18, 2008, Japan and China announced a common understanding on the joint development of oil and gas fields in the East China Sea, but

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<sup>1</sup> *Asahi Shimbun*, January 12, 2014, morning edition, p. 1.

## REVIEW OF ISLAND STUDIES

working-level talks on the implementation of this agreement have been suspended. Beijing maintains that domestic “public opinion” sees the accord as being too favorable toward Japan and tantamount to a “second Treaty of Shimonoseki.”<sup>2</sup> The agreement is now in a state of dormancy, and talks will no doubt remain suspended so long as the Senkaku issue is unresolved.

Beijing claims sovereignty over the Senkakus, and it has been dispatching paramilitary ships to waters around the islands in a deliberate effort to force Tokyo to admit the existence of a territorial dispute over the islands. As a result, the two countries’ law enforcement vessels in the area are constantly facing off against one another. The ADIZ announced by China in 2013 overlaps the airspace that had been established by Japan, moreover, and this has further escalated tensions; an accident could well occur between scrambled Japanese and Chinese fighter jets in the East China Sea. Beijing is highly unlikely to retract its ADIZ, which reflects the will of the highest levels of the political leadership, so Japan has no choice but to respond with the overlapping airspace as a given. Beijing is doing all it can to undermine Tokyo’s position—that the Senkakus are the inherent territory of Japan and that there is no territorial dispute to resolve—by heightening tensions so that the international community will see the Senkakus as a center of a bilateral dispute. The real source of the “dispute,” though, lies in Beijing’s attempts to force other nations to recognize its unilateral territorial claims. This is something that Japan must do a better job of communicating to the world.

The East China Sea is not the only region where Beijing is flexing its muscles in order to get its own way. China has competing claims with several Southeast Asian countries over the Spratly and Paracel Islands in the South China Sea. China asserts historical rights over the islands based on the so-called nine-dash line, whose legitimacy has yet to be validated under international law. These islands collectively have a land area of just 10 square kilometers, but they confer jurisdiction over some 160,000 square kilometers of ocean area. Surveys by the South China Sea Institute of Oceanology of the Chinese Academy of Sciences suggest that the Spratly region holds substantial reserves of oil and natural gas; one estimate points to deposits of 35 billion tons of oil and 10 trillion cubic meters of natural gas. The real dispute over the Spratlys, then, is about undersea fossil fuel deposits considered to be as substantial as the oil fields of Kuwait. The second paragraph of China’s 2009 Note Verbale to the UN Secretary-General reads, “China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof. The above position is consistently held by the Chinese Government, and is widely known by the international community.” And in the ensuing paragraph, the note proclaims, “The continental shelf beyond 200 nautical miles as contained in the Joint Submission

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<sup>2</sup> The Treaty of Shimonoseki was an agreement that concluded the first Sino-Japanese War (1894-1895), which ended in China’s defeat.

## REVIEW OF ISLAND STUDIES

by Malaysia and the Socialist Republic of Viet Nam [as well as a separate submission by Vietnam alone] has seriously infringed China's sovereignty, sovereign rights and jurisdiction in the South China Sea."<sup>3</sup>

The Philippines, meanwhile, initiated arbitral proceedings on January 22, 2013, against China's nine-dash line claims in accordance with Annex VII of the UN Convention on the Law of the Sea. Article 298 (1)(a)(i) of the convention provides that a State may declare that it does not accept compulsory jurisdiction over certain specified categories of disputes—including those relating to sea boundary delimitations or involving historic bays or titles—and this is precisely what China did. To sidestep such moves, though, the Philippines' Memorial was carefully worded to show that it was not about boundary delimitations. While China has shown no signs to nominate arbitrator, by April 24, 2013, then President Yanai Shunji of the International Tribunal for the Law of the Sea assigned the five members of the arbitration under Annex VII that will hear the case: Thomas A. Mensah (president), Jean-Pierre Cot, Stanislaw Pawlak, Alfred Soons, and Rudiger Wolfrum.

It goes without saying that heightened tensions with coastal neighbors since the turn of the century is due to China's expansionist policy under a national goal to become a global maritime power. In 2005, speaking at a ceremony in Beijing marking the 600th anniversary of Zheng He's voyages to the western seas, Huang Ju, then a member of the Politburo Standing Committee, stated that China is both a land power and sea power. Efforts aimed at the development of maritime activities have great strategic significance, he said, for the country's national security, guaranteeing of sovereign interests, protection of resources and the environment, and the development of society and economy. China must have a greater sense of responsibility and mission, he added, in advancing projects that will help turn it into a navigation and maritime power. The goal of becoming a "maritime power" refers not only to building up naval capacity but to securing economic interests. Now that it has become the world's number two economy, it needs ocean resources—as sources of both food and energy—to drive further growth. And China hopes to acquire those resources from the South and East China Seas.

China's defense budget is deemed to be the world's second largest after the United States. As demonstrated by the construction of aircraft carriers, Beijing aims to turn its "Brown-Water Navy" force into a "Blue-Water Navy" force capable of operating in the open sea. The *PLA Daily* reported that the PLA Navy will thus gradually shift its focus from "offshore waters defense" to "open seas protection" so as to meet the strategic demands of coastal defense. Forays into the open sea, according to Xinhuanet (January 16, 2013), are being made to reinforce security along

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<sup>3</sup> CML/17/2009 and CML/18/2009.

the coast.<sup>4</sup>

The waters in which naval power is to be exercised are the South China Sea and the East China Sea. China sees the PLA as buttressing its efforts to acquire maritime resources, the Navy being deployed to safeguard its interests inside the self-demarcated first and second island chains.<sup>5</sup> Beijing uses the phrase “core interest” to describe both regions, and as long it maintains this position, relations with coastal states that have competing claims will continue to be strained. A recent *Yomiuri Shimbun* report notes that China is transforming its ground-oriented defense force into a mobile, coordinated military that is capable of responding quickly to any contingency and is reorganizing its seven “military regions” into five “military areas.” Over the next five years, it will convert the coastal Jinan, Nanjing, and Guangzhou regions into three military areas, each with a joint operations command, for projecting power into the Yellow Sea, East China Sea, and South China Sea, respectively.<sup>6</sup> This policy is in line with a speech made by Hu Jintao in 2012.

In his November 8, 2012, political report to the Eighteenth National Congress of the Communist Party of China, Hu asserted that China should resolutely safeguard its maritime rights and interests and implement a military strategy of active defense, expanding and intensifying military preparedness and enhancing the capability to accomplish a wide range of military tasks, “the most important of which,” he pointedly noted, “is to win local war in an information age.” This can be interpreted as a call for the establishment of a joint operations command under conditions of informationization, a move now being debated in China. It is also in line with a September 13, 2012, statement by 10 active and retired PLA generals advocating a firm approach in resolving the issue of the Diaoyu (Senkaku) Islands, even if this escalates tensions, saying that

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<sup>4</sup> Asano Ryo, “‘Gure zon’ no naka no Nit-Chu kankei: Ikaku to yokushi no naka no antei tsuikyu” (The “Gray Zone” of Japan-China Relations: In Pursuit of Stability in the Context of Intimidation and Deterrence) in ed. Watanabe Akio, *2010-nendai no kokusai kankyo to Nihon no anzen hoshō: Pawa-shifuto-ka ni okeru Nihon* (The International Environment and Japan’s National Security in the 2010s: Japan’s Position within the Power Shift), National Institute for Defense Studies (2013), p. 74.

<sup>5</sup> PLA Navy Commander Liu Huaqing, pointing to the need for a powerful navy, outlined a strategy in the 1980s under which China would expand its naval reach from “coastal defense” to “offshore defense,” safeguarding “Chinese waters” inside the first island chain comprising mainland Japan, the Amami Islands, Okinawa, the Yaeyama Islands, Taiwan, and the Philippines, as well as the South China Sea. China would also control and disable enemy activities inside the second island chain extending from the Ogasawara Islands, Guam, Micronesia, Palau, and Papua New Guinea and encircling the Philippine Sea. The doctrine served to define the limits of the PLA Navy’s activities. Since the turn of the century, moreover, arguments have been made for China to make forays beyond the second island chain and to operate in more distant seas in an attempt to reinforce its anti-access, area-denial capabilities. For details, see Akiyama Masahiro, “Kaiyo no anzen hoshō to Nihon” (Maritime Security and Japan) in ed. Watanabe, *2010-nendai no kokusai kankyo*, *ibid.*, pp. 121 and 125.

<sup>6</sup> *Yomiuri Shimbun*, January 1, 2014, morning edition, p. 1.

## REVIEW OF ISLAND STUDIES

a clash along a narrow road shall be won by those who are wise and brave.<sup>7</sup> Japan must brace itself for the fact that Chinese provocations in the East China Sea—which could potentially touch off an armed conflict—are likely to continue and remain calm in seeking out a strategic compromise with China on approaches to the peaceful management of the Senkaku issue.

China will no doubt continue to assert the legitimacy of its claims over the Senkaku Islands, nuancing its arguments with ungrounded charges that Japan is bent on undermining the postwar international order; it may even be willing to fight a “local war” to achieve its aims. Japan must keep its cool in the face of Chinese provocations to prevent public opinion in both countries from bubbling over and triggering unforeseen military skirmishes. The two governments might consider concluding an accord similar to the US-China Military Maritime Consultative Agreement of January 19, 1998, between the US Department of Defense and the Chinese Ministry of National Defense. This was not, unfortunately, enough to prevent the 2001 collision over the South China Sea between a US Navy EP-3 reconnaissance plane and a PLA naval fighter, for it only calls for informal consultation mechanisms between the two countries’ maritime and air forces—without establishing any legally binding procedures.<sup>8</sup> But an agreement of this sort may be effective in easing bilateral tensions and preventing a trigger-happy response, and it could ensure a line of communication in case an emergency does occur. It goes without saying that the biggest factor enabling Xi Jinping to keep the PLA in check under the “new type of major power relations”—proposed during his US visit in 2012, whereby China and the United States work as equals to prevent a war between them—is the Japan-US security alliance and the presence of US forces in the Asia-Pacific.

In his 2012 speech, Hu Jintao emphasized the need to “enhance our capacity for exploiting marine resources, . . . resolutely safeguard China’s maritime rights and interests, and build China into a maritime power.” China has placed some 2 million square kilometers of the 3.5-million-square-kilometer South China Sea under the jurisdiction of Hainan Province. On November 27, 2012, the Standing Committee of the provincial People’s Congress ratified a revised charter on coastal border management and security that (1) outlaws ships from making unauthorized stops while crossing territorial waters, (2) disallows illegal landings on islands, and (3) bans public relations activities that threaten national sovereignty or safety. Vessels violating these provisions may be searched and seized. China currently effectively controls all of the Paracels, has built military installations on Mischief Reef and runways on Subi Reef and Fiery Cross Reef in the Spratlys, and has taken control of the surrounding waters.

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<sup>7</sup> Asano, “‘Gure zon’ no naka no Nit-Chu kankei,” *supra* note 4, pp. 75–76.

<sup>8</sup> David Griffiths, “US-China Maritime Confidence Building: Paradigms, Precedents, and Prospects,” Naval War College China Maritime Studies Institute, No. 6 (2010), p. 2.

China thus has numerous maritime disputes with its neighbors along the Yellow Sea, East China Sea, and South China Sea. Japan's priority should be to promote closer coordination with these states so as to create a political situation in which China is unable to forcibly push any individual country out of its way.

### **2. Law Concerning the Territorial Sea and the Contiguous Zone (February 25, 1992)**

The first mention of "maritime rights and interests" in Chinese civil law was the 1992 Law Concerning the Territorial Sea and the Contiguous Zone. Article 1 states: "This Law is formulated in order to exercise the sovereignty of the People's Republic of China within its territorial sea and its jurisdiction within its contiguous zone and to safeguard the state security and maritime rights and interests."<sup>9</sup> This law, clearly aimed at ensuring China's security and maritime interests,<sup>10</sup> consists of 17 articles and is generally in line with Part II (Territorial Sea and Contiguous Zone) of UNCLOS, the UN Convention on the Law of the Sea.

Article 3, for example, defines the "breadth of the territorial sea of the People's Republic of China" as being "twelve sea miles, measured from the baseline of the territorial sea" (Paragraph 1), which is delimited "utilizing the straight baseline system" (Paragraph 2). Whether China's baseline has been drawn in conformity with UNCLOS Article 7.1 (Part II)—which states, "In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured"—can only be verified, though, by referring to "the baseline of the territorial sea of the People's Republic of China" published by Beijing, as noted in Article 15.<sup>11</sup> In its March 2001 judgment on the Maritime Delimitation and Territorial Questions between Qatar and Bahrain, the International Court of Justice observed that "the method of straight baselines, which is an exception to the normal rules for the determination of baselines, may only be applied if a number

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<sup>9</sup> Lehman, Lee & Xu, "Law of the People's Republic of China Concerning the Territorial Sea and the Contiguous Zone," 1992, <http://www.lehmanlaw.com/resource-centre/laws-and-regulations/general/law-of-the-peoples-republic-of-china-concerning-the-territorial-sea-and-the-contiguous-zone-1992.html>.

<sup>10</sup> Xue Guifang, "Chugoku ni okeru kaiyo seisaku no gainen to hatten no katei" (China's Maritime Policy: Concepts and Process of Development), in Ocean Policy Research Foundation, *Heisei 17-nendo Chugoku no kaiyo seisaku to hosei ni kansuru kenkyu* (Study of China's Maritime Policy and Legal Administration), March 2006, p. 11.

<sup>11</sup> Jin Yongming notes that Beijing on February 25, 1992, published a partial list of territorial sea baselines for China's continental coast and the Paracel Islands, adding that it will henceforth announce additional baselines. "Chugoku ni okeru kaiyo seisaku to hosei no gaiyo" (Overview of China's Maritime Policy and Legislation), OPRF, *Chugoku no kaiyo seisaku, ibid.*, p. 20.

## REVIEW OF ISLAND STUDIES

of conditions are met. This method must be applied restrictively.”<sup>12</sup> China’s September 10, 2012, attempt to draw straight baselines around the Senkaku Islands has pointedly been criticized by a leading expert of the law of the sea J. Ashley Roach for failing to meet the UNCLOS criteria for such claims.<sup>13</sup>

Article 4 stipulates, “The contiguous zone of the People’s Republic of China is a zone of sea beyond the territorial sea and contiguous to the territorial sea. The breadth of the contiguous zone is twelve sea miles” (Paragraph 1).<sup>14</sup> Of particular note here is China’s claim, in Article 13, of jurisdictional rights within the contiguous zone: “In order to prevent and punish the violations of the laws or regulations concerning security, the customs, finance, sanitation or entry and exit control within its land territory, internal waters or territorial sea, the People’s Republic of China has power to exercise jurisdiction within the contiguous zone.”<sup>15</sup> Article 33 of UNCLOS gives states the right to exercise control over infringements of “customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea,” so China has added “security” to this list. And just as China seeks security control over the exclusive economic zone, it aims to exert similar control over the contiguous zone as well. These domestic regulations clearly conflict with UNCLOS, as do the provisions of Article 6 regarding innocent passage.

UNCLOS Subsection 3A (Articles 17 to 26) details Rules Applicable to All Ships regarding innocent passage, with Subsection 3B (Articles 27 and 28) outlining Rules Applicable to Merchant Ships and Government Ships Operated for Commercial Purposes and Subsection 3C (Articles 29 to 32) detailing Rules Applicable to Warships and Other Government Ships Operated for Non-commercial Purposes. Given the categories of the ships cited, Japan and other industrial countries interpret these articles as providing for the innocent passage of military vessels as well.

But Article 6 of China’s Territorial Sea and the Contiguous Zone Law, while giving “Foreign non-military ships . . . the right of innocent passage through the territorial sea of the People’s Republic of China” in the first paragraph, stipulates, in the following paragraph, “The entry of a foreign military ship into the territorial sea of the People’s Republic of China must be subject to

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<sup>12</sup> *ICJ Reports 2001*, p. 67, para. 212.

<sup>13</sup> J. Ashley Roach, “China’s Straight Baseline Claim: Senkaku (Diaoyu) Islands,” *American Society of International Law, Insights* 17, issue 7 (February 2013), <http://www.asil.org/insights/volume/17/issue/7/china%E2%80%99s-straight-baseline-claim-senkaku-diaoyu-islands>.

<sup>14</sup> Chugoku Sogo Kenkyujo Editorial Board, *Genko Chuka Jinmin Kyowakoku roppo* (Digest of Chinese Laws) (Tokyo: Gyosei Corp., 2013), p. 124. Incidentally, the jurisdictional rights that Japan may exercise in its contiguous zone, as stipulated in Article 4, Paragraph 1, of the Act on Territorial Waters and Contiguous Water Area, are to prevent and punish infringements of customs, fiscal, immigration, or sanitary laws and regulations.

<sup>15</sup> *Ibid.*

the approval of the Government of the People's Republic of China."<sup>16</sup> Military vessels thus need to first gain Beijing's approval to navigate through China's territorial sea. Jin Yongming, a researcher at the Shanghai Academy of Social Sciences, argues that foreign military vessels, like aircraft, are subject to the "navigation management" of coastal states,<sup>17</sup> but this interpretation is at odds with international law, which recognizes the innocent passage of foreign ships, including military vessels, while denying aircraft such passage through territorial airspace. Article 6 positivizes the fourth paragraph of the statement China made at the time of its ratification of UNCLOS on June 7, 1996, which is seen as being in conflict with the conclusions of the Third UN Conference on the Law of the Sea.<sup>18</sup> Indeed, in its March 7, 1983, written statement, Italy expressed the view that, "None of the provisions of the Convention, which corresponds on this matter to customary International Law, can be regarded as entitling the Coastal State to make innocent passage of particular categories of foreign ships dependent on prior consent or notification." Similar statements were made by Germany upon its accession in October 14, 1994, and by the Netherlands upon its ratification in June 28, 1996.<sup>19</sup>

As for the passage of submarines, Article 7 of China's law essentially reiterates Article 20 of UNCLOS, saying that submarines and other underwater vehicles must navigate on the sea surface and fly their flags when passing through China's territorial sea. With regard to foreign nuclear-powered ships and ships carrying nuclear, noxious, or other dangerous substances, Article 8, paragraph 2, stipulates precautionary measures in line with Article 23 of UNCLOS.

Even prior to the enactment of the Territorial Sea and Contiguous Zone Law in 1992, China adopted a resolution on September 4, 1958, declaring the breadth of its territorial sea to be 12 nautical miles. Interestingly, the biggest difference between this declaration and China's Territorial Sea and Contiguous Zone Law in 1992 is that it makes no explicit reference whatsoever to the Senkaku Islands. It states: "The Government of the People's Republic of China declares: 1. The breadth of the territorial sea of the People's Republic of China shall be twelve

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<sup>16</sup> *Ibid.*

<sup>17</sup> Jin, "Chugoku ni okeru kaiyo seisaku," *supra* note, p. 17.

<sup>18</sup> The declaration by China upon ratification on June 7, 1996 reads: "The People's Republic of China reaffirms that the provisions of the United Nations Convention on the Law of the Sea concerning innocent passage through the territorial sea shall not prejudice the right of a coastal State to request, in accordance with its laws and regulations, a foreign State to obtain advance approval from or give prior notification to the coastal State for the passage of its warships through the territorial sea of the coastal State." Cf.

[http://www.un.org/depts/los/convention\\_agreements/convention\\_declarations.htm#China](http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#China) Upon ratification. This declaration was confirmed when the decision on ratification was made on May 15, 1996, at the nineteenth meeting of the Standing Committee of the Eighth National People's Congress. See Jin, "Chugoku ni okeru kaiyo seisaku," *supra* note 11, p. 26.

<sup>19</sup> [http://www.un.org/depts/los/convention\\_agreements/convention\\_declarations.htm#Italy](http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#Italy) Declarations made upon signature (7 December 1984) and confirmed upon ratification

nautical miles. This provision applies to all territories of the People's Republic of China including the Chinese mainland and its coastal islands, as well as Taiwan and its surrounding islands, the Penghu Islands, the Dongsha Islands, the Xisha Islands, the Zhongsha Islands, the Nansha Islands and all other islands belonging to China which are separated from the mainland and its coastal islands by the high seas." The only islands mentioned in the East China Sea are "Taiwan and its surrounding islands," even while making specific references to all islands in the South China Sea over which it claims indisputable sovereignty.

Indeed, China's claims over the Senkakus were not made not until after 1971, when reports suggested deposits of crude oil and other maritime resources around the islands. At least in the 1958 declaration on China's territorial sea, there is no mention of the Senkakus as belonging to China. Their first explicit mention, alongside the Penghu Islands, the Dongsha Islands, the Xisha Islands, the Zhongsha Islands, the Nansha Islands as the island territories of China, was in Article 2, Paragraph 2, of the 1992 Law Concerning the Territorial Sea and the Contiguous Zone, which noted: "The land territory of the People's Republic of China includes the mainland of the People's Republic of China and its offshore islands, Taiwan and all islands appertaining thereto including the Diaoyu Islands; the Penghu Islands; the Dongsha Islands; the Xisha Islands; the Zhongsha Islands and the Nansha Islands; as well as all the other islands that belong to the People's Republic of China."<sup>20</sup>

This, given the discrepancy with the treatment of the islands in the South China Sea, points to the possibility that China did not consider the Senkakus to be part of its land territory as of 1958. Indeed, a story carried by the *Renmin Ribao* (*People's Daily*) on January 8, 1953, described the Ryukyu Islands as consisting of seven island groups, including the Senkaku Islands, and a world atlas published in China in 1960 used the Japanese names for the Senkaku Islands and Uotsuri Island and indicated that they were part of Okinawa.

These territorial issues became the focus of China's Administrative Regulation on Protection and Use of Uninhabited Islands, an ordinance adopted in 2003.

### **3. Administrative Regulation on Protection and Use of Uninhabited Islands (July 1, 2003)**

Article 1 defines the aims of the Administrative Regulation on Protection and Use of Uninhabited Islands as being, on the basis of relevant laws, to (1) strengthen management of uninhabited islands, (2) protect their ecosystems, (3) maintain the state's maritime interests and national

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<sup>20</sup> Chugoku Sogo Kenkyujo Editorial Board, *Genko Chuka Jinmin Kyowakoku roppo*, *supra* note 14, p. 124.

## REVIEW OF ISLAND STUDIES

defense and security, and (4) promote the islands' rational utilization.<sup>21</sup> Among the functions of uninhabited islands, as cited in Article 8, Paragraph 4, are to maintain the rights and interests of national sovereignty, ensure national defense and security, and protect military installations.

The scope of the regulation, as defined in Article 2, applies to the protection and utilization of uninhabited islands in China's internal waters, territorial sea, exclusive economic zone, continental shelf, and other sea areas under state supervision. Given that China exercised legislative jurisdiction to establish territorial waters around the Senkaku Islands in the 1992 Law Concerning the Territorial Sea and the Contiguous Zone, the protection and use regulation is no doubt meant to apply to the uninhabited Senkakus as well.<sup>22</sup> It further declares, in Article 3, that uninhabited islands belong to the state, and it calls on the State Oceanic Administration to work with relevant sections of the State Council and the People's Liberation Army General Staff Department to establish a functional classification of uninhabited islands in China and to promulgate and implement those decisions (Article 7).

One factor behind the enactment of the Uninhabited Islands Regulation was the fact that of the 78 territorial sea basepoints published by China, 67 are uninhabited islands. Article 24 stipulates that in cases where the territorial sea basepoints or the areas inside and outside the baselines are valuable to China's maritime rights and interests, or if the uninhabited islands lay along provincial maritime boundaries, or if they are relevant to China's national defense or foreign policy, the provincial governments shall forward proposals for the naming, renaming, or unnamings of uninhabited islands for review and approval by the State Council. The 36-article regulation contains detailed provisions for the protection and use of uninhabited islands. This was upgraded in 2009 from an internal government document to a state law called the Law on Island Protection.

Then State Oceanic Administration Director Wang Shuguang suggested in 2003 that the Uninhabited Islands Regulation was an ad hoc measure designed to fill the legal vacuum on such matters as the ownership of uninhabited islands and the management of their protection and use before the Island Protection Law was enacted. It helped to speed up the process of establishing detailed provisions on the management of China's islands, as there was a need to enact a state law, given that provincial governments were not allowed to implement their own, non-state-approved rules.<sup>23</sup>

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<sup>21</sup> Gong Yingchun, "Mujinto ni kansuru Chugoku no tachiba: Kokunaiho-jo no taio to kokuwaiteki na tachiba" (China's Position on Uninhabited Islands: Response in the Light of Domestic Laws and International Position, OPRF, *Chugoku no kaiyo seisaku*, *supra* note 10, p. 68.

<sup>22</sup> *Ibid.*

<sup>23</sup> Remarks by Wang Shuguang at a bureau-director-level meeting on the National Program for Marine Economic Development in OPRF, *Chugoku no kaiyo seisaku*, *supra* note 10, pp. 67–68.

Professor Gong Yingchun of China Foreign Affairs University, meanwhile, noting that the concept of uninhabited islands under Chinese law includes not only islands but also rocks and low-tide elevations, pointed out that the enactment of laws and regulations on the protection and use of uninhabited islands was spurred by the fear that China could be seen as neglecting the long-term management of disputed uninhabited islands—notably, Uotsuri Island in the Senkakus—and find itself at a disadvantage in asserting its territorial claims.<sup>24</sup>

#### **4. Law on Island Protection (December 26, 2009)**

China claims some 6,900 islands that are larger than 500 square meters (over 1,400 of which are either unnamed or have overlapping names) spanning an oceanic area of 3 million square kilometers. It also claims nearly 10,000 other islands that are smaller than 500 square meters, most of which are unnamed and whose number, coordinates, and distribution are not fully documented. Only 433 islands are inhabited; the remaining 94% are uninhabited and are without a resident population.<sup>25</sup>

The Law of the People's Republic of China on Island Protection was adopted at the twelfth session of the Standing Committee of the Eleventh National People's Congress on December 26, 2009. The aim of the law, as stated in Article 1, is "to protect the ecosystems of islands and their surrounding waters, rationally develop and exploit the natural resources of islands, protect the maritime rights and interests of the state, and promote sustainable economic and social development." The law consists of 58 articles, with Chapter II focusing on "Island Protection Planning," Chapter III on "Island Protection" (Section 1 "General Rules"; Section 2 "Protection of Ecosystems of Inhabited Islands"; Section 3 "Protection of Uninhabited Islands"; and Section 4 "Protection of Special Purpose Islands"), Chapter IV on "Supervisory Inspection," Chapter V on "Legal Liabilities," and Chapter VI on "Supplementary Provisions." While the law aims, firstly, to protect the ecosystems of islands and surrounding waters, it also seeks to strengthen the protection of China's maritime rights and interests and the administration of island names. Because the law is premised on China having sovereignty over the islands in question, it can also be seen as identifying China's state ownership of the currently uninhabited Senkaku Islands, over which it claims sovereignty.<sup>26</sup>

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<sup>24</sup> *Ibid.*, p. 67.

<sup>25</sup> *Ibid.*.

<sup>26</sup> House of Councillors member Yamatani Eriko explained in a memorandum on questions in the Diet, that the purport of the law was to (1) assert respect for national sovereignty by assigning names to unnamed islands, (2) strengthen the jurisdiction of ocean areas so as to maintain and protect China's maritime rights and interests, and (3) build a strong front for maritime defense. "Memorandum on Questions about China's Island Protection Law by House

## REVIEW OF ISLAND STUDIES

Article 4 stipulates, "Uninhabited islands belong to the state, and the State Council shall exercise the ownership of uninhabited islands on behalf of the state." This reiterates the provisions for the protection, utilization, and administration of islands in Article 3 and grants the State Council the right to exercise ownership of uninhabited islands. When read together with the 1992 Territorial Sea and the Contiguous Zone Law, which, in Article 2, confirmed sovereignty over "Taiwan and all islands appertaining thereto including the Diaoyu Islands," the Island Protection Law can be viewed as part of a set of legal measures to claim sovereignty over Uotsuri Island. Article 6 states, moreover, "The names of islands shall be determined and released by the national geographical names authority and the oceanic administration department of the State Council according to the relevant provisions of the State Council." In fact, the naming of islands became a row of contention between Japan and China following the enactment of this law. On March 2, 2013, Japan named 39 islands, including Hokuseikojima, Kitakojima, and Hokutokojima around Kuba Island and Kitakojima near Taisho Island. China responded by naming 71 uninhabited islands around the Senkaku Islands and listed them on the website of the State Oceanic Administration.

Article 36 states, "The state shall apply special protection to the islands where the territorial sea base points are located, islands for the purpose of national defense, islands within the marine natural reserves and other islands for special purposes or with special conservation value." And Article 37 calls on local governments to proactively fulfill their responsibilities by stipulating, "For an island where the territorial sea base point is located, the people's government of the province, autonomous region or municipality directly under the Central Government where the island is located shall delimit the scope of protection and file a report on it with the oceanic administration department of the State Council. Obvious signs shall be set up on the territorial sea base point and the periphery of its scope of protection." Given that the second paragraph of Article 6 reads, "The coastal local people's governments at and above the county level shall, according to the relevant provisions of the state, set up signs of island names on the islands where such signs need to be set up," there is a possibility that China will take the bold step of setting up such signs on the Senkakus.

At the same time, Article 38 prohibits damaging "the natural terrain or landform of uninhabited islands for the purpose of national defense and the terrain or landform of the areas for the purpose of national defense of inhabited islands and their surrounding areas." This is designed to give China a legal pretext to intervene in case Japan shifts its Senkaku policy from social control to physical one, such as by building a harbor or other facilities on the islands. The legality of any Chinese intervention, though, will be judged not on the basis of domestic law but with

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of Councillors Member Yamatani Eriko," February 3, 2011 (Question 45).

reference to international law. Should China invoke a domestic law to justify its actions, Japan—which has effective control of the islands—will need to assert that Chinese actions violate Japan’s territorial sovereignty and are illegal under international law.

Now, I would like to turn to the 1998 Law on the Exclusive Economic Zone and the Continental Shelf, which has raised issues not only with Japan over the delimitation of the EEZ and the continental shelf but also with the United States and members of the Association of Southeast Asian Nations over Beijing’s assertions of historical rights, giving rise to “Freedom of Navigation” operations and territorial disputes in the South China Sea.

### **5. Law on the Exclusive Economic Zone and the Continental Shelf (June 26, 1998)**

UNCLOS, to which both Japan and China are parties, is the legal standard for determining maritime boundaries. Articles 74 and 83 of the convention include the following provision on the delimitation of the EEZ and the continental shelf.

“The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.”<sup>27</sup>

With regard to implementation of these articles, Article 76, Paragraph 1, of the convention stipulates where the outer edge of the continental margin extends less than 200 nautical miles, the continental shelf of a coastal state “comprises . . . a distance of 200 nautical miles from the baseline from which the breadth of the territorial sea is measured.” Article 57 also utilizes these parameters in determining the EEZ. Formerly, conventional views on defining the boundaries of the continental shelf and EEZ were divided between “equidistance/special circumstances” and “equity/relevant circumstances.”<sup>28</sup> Japan, in a revised draft article for the Third UN Conference on the Law of the Sea (A/CONF.62/C.2/L.31/Rev.1[1974]), supported the principle of equidistance, specifying that states shall determine the delimitation of the continental boundary “by agreement between them, taking into account the principle of equidistance,” and that “failing such agreement, no State is entitled to extend its sovereign rights over the continental shelf (the

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<sup>27</sup> Reference to Article 38 of the Statute of the ICJ provides no clear guideline for solving specific issues. For more on this point, see Cf. Tullio Scovazzi, “The Evolution of International Law of the Sea: New Issues, New Challenges,” *Recueil des Cours*, Vol. 286, 2000, p. 195.

<sup>28</sup> Kuribayashi Tadao, “Haitateki keizaisuiiki, tairikudana no kyokai kakutei ni kansuru kokusai hori: Higashishinakai ni okeru Nit-Chu-kan no tairitsu o megutte” (International Law Issues on the Delimitation of an Exclusive Economic Zone and Continental Shelf: Conflicts on the Maritime Boundary between Japan and China in the East China Sea), *Toyoeiwajogakuindaigaku daigakuinkyō* (Bulletin of the Graduate School of Toyo Eiwa University), Vol. 2 (March 2006), p. 3.

coastal sea-bed area) beyond the median line.”<sup>29</sup> However, neither of the two UNCLOS articles cited above refer to the principles of equidistance or equity. To borrow the expression of Churchill and Lowe, they merely speak to the demarcation of boundaries that have been agreed on.<sup>30</sup> Precedence, however, has shown that circumstances vary in cases determining maritime boundaries, making it difficult to arrive at a universal standard. In other words, there is currently no international legal standard addressing issues over demarcating maritime boundaries of the continental shelf or EEZ. The result is that states have no recourse but to cite precedence conforming to their own legal claims, build a case for these claims under international law, and negotiate a compromise with their counterparts.

In 1998 China adopted the 16-article Law of the People’s Republic of China on the Exclusive Economic Zone and the Continental Shelf. Article 1 of the Law specifically proscribes the security and preservation of China’s maritime interests by stating that it is “enacted with a view to ensuring the exercise of the sovereign rights and jurisdiction over the exclusive economic zone and the continental shelf by the People’s Republic of China and safeguarding maritime rights and interests of the State.” Article 2 employs the principle of equity with regard to the demarcation of boundaries, saying that “where the claim of the People’s Republic of China for the exclusive economic zone and the continental shelf overlaps with that of other country adjacent or opposite in their coasts, a boundary shall be determined in accordance with the principle of equity and on the basis of international law.” In marked contrast, Japan’s 1996 Act on the Exclusive Economic Zone and the Continental Shelf adopts the median line in Article 1 (EEZ), section 2, and Article 2 (continental shelf), section 1.

China, in the second paragraph of Article 2 of its legislation, adopts the concept of natural prolongation to delineate the continental shelf, using it to back the argument that its sovereign rights extend as far as the Okinawa Trough. Japan’s stance, on the other hand, is that the trough represents a depression in the continental shelf and not a physical boundary. It emphasizes the use of a median line as the basis for determining boundaries between the two nations in the East China Sea, which in the area spans less than 400 nautical miles. Japan also contends the disputed area is the area of overlapping claims by both countries on the assertion of 200 nautical miles. It argues that setting the boundary along a median line would be no more than a provisional measure and that until an agreement on an established boundary is reached, it will continue to assert under international law the EEZ and continental shelf extending 200 nautical miles from its coastline.<sup>31</sup> This stance casts a shadow over the significance of the equidistance argument put

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<sup>29</sup> Satya N. Nandan and Shabtai Rosenne, *United Nations Convention on the Law of the Sea 1982 A Commentary*, Martinus Nijhoff, 1993, pp. 956–957.

<sup>30</sup> R. R. Churchill and A. V. Lowe, *The Law of the Sea*, 3rd ed., Manchester University Press, 1999, p. 191.

<sup>31</sup> In reality, Japan’s protest of China’s construction of a new offshore natural gas rig called

forward in Japan's 1996 legislation. But Japan has taken the stance that this represents a limit for exercising its enforcement jurisdiction under domestic law and does not a limit its sovereign rights.

The 1969 ICJ judgment in the *North Sea Continental Shelf Cases* rejected the principle of equidistance set out in Article 6, Paragraph 2, of the Geneva Convention on the Continental Shelf, adhering instead to the equitable principle. The judgment states that the continental shelf of any State must be the natural prolongation of its land territory and must not encroach upon what is the natural prolongation of the territory of another State.<sup>32</sup> ICJ precedence has changed dramatically, however, following the adoption of 200 nautical miles as the benchmark for delineating EEZ.

In its 1982 judgment in the *Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, the court ruled that "the idea of the natural prolongation of the land territory . . . would not necessarily be sufficient, or even appropriate, in itself to determine the precise extent of the rights of one State in relation to those of a neighboring State" and that "the principle that the natural prolongation of the coastal State is a basis of its legal title to continental shelf rights does not in the present case . . . necessarily provide criteria applicable to the delimitation of the areas appertaining to adjacent States."<sup>33</sup> In essence, even if natural prolongation is used to determine the range of the continental plate, it does not serve to demarcate a boundary.<sup>34</sup>

The ICJ ruled in the 1985 *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)* that "for juridical and practical reasons, the distance criterion must now apply to the continental shelf as well as to the exclusive economic zone"; "This is especially clear where verification of the validity of title is concerned, since, at least in so far as those areas are situated at a distance of under 200 miles from the coasts in question, title depends solely on the distance from the coasts

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Bajiaoting in Chinese territorial waters can be seen as an outward assertion of the disputed maritime areas extending to 200 nautical miles. Nishimura Yumi, "Nit-Chu tairikudana no kyokai kakutei mondai to sono shori hosaku" (Japanese and Chinese Issues of Continental Plate Delineation and Methods for Resolution), *Juristo*, No.1321 (October 2006), p. 54.

<sup>32</sup> *ICJ Reports 1969*, pp.46-47, para.85. According to Professor Miyoshi Masahiro, while the 1969 judgment hinted at natural prolongation being directly applied in delineating boundaries, a revision of this view took place as early as 1977 with the award in a case concerning the delimitation of the continental shelf between the United Kingdom and France, which showed the principle could not serve as a determining criterion (18 RIAA 91, para. 191). Miyoshi Masahiro, "Kaiyo no kyokai kakutei" (Delineation of Maritime Boundaries), in Japanese Society of International Law, ed., *Nihon to kokusaiho no 100 nen, dai 3 kan, umi* (Japan's Century of International Law, Vol. 3, Maritime), (Tokyo: Sanseido, 2001), p. 167.

<sup>33</sup> *ICJ Reports 1982*, pp. 46-49, paras. 43-48.

<sup>34</sup> The ICJ ruled that an equidistance method is "appropriate in principle" to a case to be decided *ex aequo et bono*.

## REVIEW OF ISLAND STUDIES

of the claimant States of any areas of sea-bed claimed by way of continental shelf, and the geological or geomorphological characteristics of those areas are completely immaterial"; and "The court for its part has no doubt about the importance of State practice in this matter. Yet that practice, however interpreted, falls short of proving the existence of a rule prescribing the use of equidistance, or indeed of any method, as obligatory . . . though it is impressive evidence that the equidistance method can in many different situations yield an equitable result."<sup>35</sup> In this case, boundaries between the two countries were redrawn on an equidistance basis taking into account equitable considerations, including the existence of uninhabited islands and the length of coastlines.

The Court ruled in the 1993 *Case Concerning Maritime Delimitation in the Area Between Greenland and Jan Mayen* that if the equidistance-special circumstances rule of the 1958 Convention is to be regarded as expressing a general norm based on equitable principles, it must be difficult to find any material difference between the effect of Article 6 and the effect of the customary rule which also requires a delimitation based on equitable principles<sup>36</sup>. In reality, the Judgment points out that the median line as a provisional line may be adjusted or shifted in order to ensure an equitable result, taking into account such relevant factors as the length of coastlines and access to fishery resources.<sup>37</sup>

The ICJ ruled in the 2001 *Case Concerning Maritime Delimitations and Territorial Question Between Qatar and Bahrain* for taking into consideration special circumstances in adjusting the provisional

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<sup>35</sup> *ICJ Reports 1985*, pp. 33–38, paras. 34–44.

<sup>36</sup> *ICJ Reports 1993*, p.58, para.46.

<sup>37</sup> For a detailed look at this judgment see Kokusaishiho Saibansho Hanrei Kenkyukai (International Court of Justice Judicial Precedent Research Society) "Maritime Delimitation in the Area Between Greenland and Jan Mayen" (Sakai Hironobu), *Journal of Japanese Society of International Law*, Vol. 95, 5 (1996), pp. 41–69; and Tomioka Masashi, "The Case Concerning Maritime Delimitation in the Area Between Greenland and Jan Mayen," *Meikei hogaku* (Meikei Law Review), Vol. 7 (1999), pp. 291–300. In regard to the judgement, Professor Sakai gives a pointed criticism of the judgment, saying it is "extremely difficult to consider that an agreement on the delimitation of the boundary between both states would take into consideration each divisional factor," and that while "the court analyzed the boundaries of both areas separately, the reason for its decision is insufficient, allowing for the view that delimitation from the beginning was perceived as a single line" (Sakai, "Maritime Delimitation in the Area Between Greenland and Jan Mayen," pp. 59–60). An argument in favor of the view that the decision realistically provides along opposite coastlines a single boundary for all maritime areas can be found in Cf. J. I. Charney, "Progress in International Maritime Boundary Delimitation Law," *American Journal of International Law*, Vol. 88 (1994), pp. 246–247.

## REVIEW OF ISLAND STUDIES

equidistance line.<sup>38</sup> In its 2007 judgement in the *Case Concerning Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea*, although the ICJ stated that “the equidistance method does not automatically have priority over other methods of delimitation,” it noted that “there may be factors which make the application of the equidistance method inappropriate,” thus rejecting the argument for special circumstances.<sup>39</sup> In the latter case, the court pointed to a number of inherently unstable factors were pointed to when reaching its judgement, including the geomorphology of Cape Gracias a Dios and the River Coco delta.

Lastly, the ICJ’s February 3, 2009, judgement in *Maritime Delineation in the Black Sea (Romania v. Ukraine)* is of particular importance. It is seen as a compilation of the court’s decisions on the delimitation of maritime boundaries and garnered attention for its unanimous decision that included judges from both states involved in the dispute. The ICJ began by determining relevant coastline and maritime areas, drawing on accumulated legal precedence by using the provisional equidistance line as a starting point in constructing the boundary. In this case the court took a three-stage approach: in the first stage, it established the provisional equidistance line strictly along geometrical criteria; in the second stage, it considered factors calling for the adjustment or shifting of the provisional equidistance line; and finally, in the third stage, it adopted the method of verifying whether either party faced significant inequity through the concept of proportionality before determining the final boundary.<sup>40</sup>

Looking at the court’s use of its own judicial precedence in applying the provisional equidistance line to consistently achieve an equitable solution, it must then be said that the court interprets the equidistance line as a specific baseline as belonging to the regulations in Articles 74, Paragraph 1, and 83, Paragraph 1, of UNCLOS.

International judicial precedence shows there to be no single specific baseline for delimitating the

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<sup>38</sup> Tanaka Norio, “Kokusaiho kara mita Shungyo gasuden kaihatsu mondai” (International Law and Issues Surrounding the Chunxiao Gas Fields), *Sekai* (August 2005), pp. 23–24. In its *Case Concerning the Delimitation of Continental Shelf Between the United Kingdom and the French Republic* award, the arbitral tribunal interpreted the “equidistance principle” and “special circumstances” contained in the convention on the continental shelf neither as separate principles nor as providing an advantage to previous parties, but as constituting a single method binding both parties. Special circumstances limit the application of the equidistance principle and are necessary to ensure an equitable delimitation of boundaries. If one recalls, however, that the combination of both principles produces the same result as the demarcation of boundaries in accordance with the principle of equity under international customary law, then the ICJ in its decision is in essence nearing the concept of settlement by arbitration. For an assessment of the Great Britain–France award, see Yamamoto Soji, *Kaiyoho* (Law of the Sea), (Tokyo: Sanseido, 1992), pp. 206.

<sup>39</sup> *ICJ Reports* 2007, para. 272.

<sup>40</sup> *ICJ Reports* 2009.

continental shelf, and as such, the median line is one standard neighboring states rely on. In other words, the concept of natural prolongation has ceased being a definitive criterion in defining the extent of the continental shelf, as seen by its declining importance in international judgements. In addition, as the notion of the EEZ has taken hold it has absorbed the baseline of 200 nautical miles included in the concept of the continental shelf.<sup>41</sup> This suggests that when working to reach an equitable result in drawing maritime boundaries between states with coasts less than 400 nautical miles apart, which excludes application of the rule of natural prolongation, the trend is to draw a provisional median line and adjust it by taking into consideration each relevant circumstance.<sup>42</sup> China, however, has continued to assert natural prolongation as the baseline for delimitating the continental shelf — regardless of whether it intends to define the EEZ with a single line— preventing consensus with Japan on the issue.

On November 19, 2013 the Chinese Academy of Social Sciences' Institute of Japanese Studies and the Tokyo Foundation cohosted a meeting of the Higashi Shina Kai Mondai Kenkyukai (Research Project on Issues of the East China Sea). During the event an attending Chinese scholar stated that China was currently translating continental shelf agreements from around the world and that none of them utilized the concept of the median line similar to that which Japan asserts in the maritime dispute with China.<sup>43</sup> In response, the author argued that agreements on the continental shelf were generally reliant on mutual consents by both parties, and as such, it would be exceedingly difficult to find among analysis of cases reliance on a single general principle. The Chinese scholar retorted that Japan's assertion of a median line with China is inconsistent with the 1974 continental shelf agreement between Japan and South Korea, which saw Japan accept South Korea's argument for applying the principle of natural prolongation. The author then pointed out that the agreement preceded Japan signing UNCLOS, which contains distance as a baseline, and that the ICJ had recently set a precedence for natural prolongation with its judgement in the 1969 *North Sea Continental Shelf Cases*. In this light, Japan's current stance on the median line is consistent as it continues to take into account the current leanings of the ICJ.

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<sup>41</sup> The ICJ judgement reads: "This does not mean that the concept of the continental shelf has been absorbed by that of the exclusive economic zone; it does however signify that greater importance must be attributed to elements, such as distance from the Coast, which are common to both concepts." *ICJ Reports* 1985, p. 33, para. 33.

<sup>42</sup> Kuribayashi, "Haitateki keizai suiiki, tairikudana no kyokai kakutei ni kansuru kokusai hori," *supra* note 28, p. 11. Also, J. I. Charney has shown the importance of the rule of equidistance through analyzing 136 agreements on maritime boundaries reached between two countries. J. I. Charney and L. M. Alexander (eds.), *International Maritime Boundaries*, Vol. I (1993), Nijhoff, p. xlii.

<sup>43</sup> The main Chinese attendees included from the Institute of Japanese Studies at the Chinese Academy of Social Sciences Director Li Wei, Deputy-Director Gao Hong, and Japanese Diplomacy Lead Researcher Lu Yaodong, Director of Research and Senior Fellow at the China Foundation for International and Strategic Studies Zhang Tuosheng, and Director of the Research Center for Law of the Sea at the Shanghai Academy of Social Sciences Jin Yongming.

## REVIEW OF ISLAND STUDIES

To return to China's Law on the Exclusive Economic Zone and the Continental Shelf, aside from boundary delimitation, there is Article 3, which is also of importance for establishing China's sovereign rights as a coastal state to and jurisdiction over maritime areas and resources. While the article as a whole stays closely in line with Article 56 of UNCLOS, Paragraph 2 omits the convention's stipulation that "the coastal State shall have due regard to the rights and duties of other States." Here too can be seen China's efforts to reframe its EEZ as "territorial waters."

With regard to coastal fish stocks of the EEZ, Article 6 of the Chinese law states that "the competent authorities of the People's Republic of China shall have the right to conserve and manage the straddling fish stocks, highly migratory fish stocks and marine mammals of the exclusive economic zone, anadromous stocks originating in the rivers of the People's Republic of China and catadromous species that spend the greater part of their life cycle in the waters of the People's Republic of China." In terms of managing and conserving straddling and highly migratory fish stocks, this article ignores the mechanisms in Articles 63 and 64 of UNCLOS, which call for states to seek agreement directly or through appropriate subregional or regional organizations, and, in an obvious attempt to monopolize fishery resources, places the responsibility for the issue solely at China's discretion. The Chinese law, however, risks violating UNCLOS Article 65, which specifically calls for states to cooperate with international organizations in conserving marine mammals. Also of interest is that while UNCLOS talks of methods of conservation for straddling and highly migratory fish stocks and marine mammals, there is no reference to management, making the inclusion of such wording in the Chinese law noteworthy as a way for China to establish managerial rights to these resources.

Of significance to the South China Sea is Article 14 of the Chinese law, which says that "the provisions of this Act shall not affect the historical rights of the People's Republic of China." It is easy to imagine that when drafters included this section as a means of preserving China's historical title with an eye to territorial claims in the South China Sea contained in the "nine-dash line."

On December 1, 1947 the Republic of China published the "Map of South China Sea Islands" featuring a U-shaped, 11-dashed line containing the Pratas, Paracel, Zhongsha, and Spratly Islands and a list showing the previous names paralleled by new Chinese designations that were created by the Ministry of the Interior's territorial administration section. The ROC included the dashed line when it published the "South Sea Islands Location Map" in February 1948. The People's Republic of China also adopted the line for its 1949 map; however, it removed two of the dashes from the Gulf of Tonkin when Bach Long Vi Island conceded to Vietnam in 1953, redrawing the boundary as the current nine-dash line.

## REVIEW OF ISLAND STUDIES

It is interesting to note that Chinese academics are by no means in step on the legal justifications for the line. According to Li Guoqiang there are four main views for China's claim. The first is that the islands and waters contained in the line represent territory "belonging" to China and thereby fall under its jurisdiction and control, although it is unclear what the legal claim is for the latter. The second view is based on so-called historical rights, with the islands, atolls, reefs, and cays seen as belonging to China and waters outside the internal water constituting its EEZ and continental shelf. If China were to assert this view, international law would assure foreign vessels and aircraft free and open passage. The third view is that the line not only represents China's historical claim to the islands, atolls, reefs, and cays, and surrounding maritime area, but also demarcates its "historical waters." Under this view, foreign vessels could not pass without approval, severely hindering the freedom of navigation of Japanese and US vessels in the South China Sea. The fourth and final view is the nine-dash line represents the traditional boundary between China and neighboring countries, with the area within being Chinese territory and external maritime areas belonging to adjacent states or constituting international waters.<sup>44</sup>

Meanwhile, an attendee, who is a Chinese high-ranked officer, asserted that the nine-dash line "is not made retroactively null or void in the face of other important laws concerning territorial claims in the South China Sea" and that "laws introduced afterward cannot determine the legitimacy of earlier actions." UNCLOS was adopted in 1982 and entered into force in 1994, fully 47 years after China made its territorial acquisition with the nine-dash line in 1947. But the Chinese government's insistence that the line predates UNCLOS, and thus falls outside the convention's authority, clearly is out of step with core international law. For example, if a country 50 years earlier claimed territorial waters extending 100 nautical miles from its coastline is allowed to maintain its claim after ratifying UNCLOS, which sets the limit at 12 nautical miles, such a situation would severely infringe the existence value of the convention. It is difficult to envision other countries allowing such an assertion to stand and makes high-ranked officer's argument unpardonable.

On May 2–3, 2013, the University of Virginia's Center for Oceans Law and Policy and Korea Maritime Institute cosponsored the Law of the Sea Conference "Global Challenges and the Freedom of Navigation" in Seoul, South Korea. During the symposium a Chinese professor expressed the view that the issue of the nine-dash line cannot be solved under UNCLOS. He explained that the convention has no provisions regarding historical rights other than Article 10, Paragraph 6, and Article 15, and that these do not apply to the nine-dash line as the former states

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<sup>44</sup> Li Guoqiang, "Chugoku to shuhen kokka no kaijokokkyo mondai" (Maritime Border Disputes Between China and Neighboring States), *Kyokai Kenkyu* (Boundary Study), Vol. 1 (2010), pp. 45–56.

## REVIEW OF ISLAND STUDIES

it does “not extend to so-called ‘historic’ bays” and the latter provision specifies it does not apply “where it is necessary by reason of historic title or other special circumstances.” The author responded by stating that UNCLOS does not provide for a legal vacuum, pointing out that the convention provides for limits to EEZs and cannot be extended to justify claims over maritime areas and islands, such as those made by China.

As I noted earlier, the Philippines has initiated arbitral proceedings as provided for in Annex VII of the UNCLOS against China’s nine-dash line claim. According to Part III and IV of the Philippine Statement of Claim, proceedings are not over historic titles or delimitation of maritime boundaries, but whether China’s claims comply with the provisions of UNCLOS. The Philippine case is over four main issues, as laid out in paragraphs 31 and 41 of the Statement of Claim. The first—and most important—is whether China can lawfully make claims based on the nine-dash line. The Philippines argues in paragraph 11 of its Statement of Claim that China claims sovereignty over the waters, seabed, and maritime features contained within the nine-dash line. It is asking the arbitrators to rule that China can only claim sovereign rights of maritime areas measured from land (including islands). In essence, the Philippines is asking arbitral tribunal to declare China’s claims with respect to the maritime areas of the South China Sea encompassed by the so-called “nine-dash line” are contrary to the Convention.

The second issue centers on “islands” controlled by China. The Philippines claims the Kalayaan Island Group (which includes Johnson Reef, Cuarteron Reef, and Fiery Cross Reef), Scarborough Shoal, and three islands, all of which are under Chinese control and some of which are being built on. It has sought a ruling that these bodies constitute “rocks” under Article 121 (3) of UNCLOS as they “cannot sustain human habitation or economic life of their own” and are thus only entitled to claims of territorial sea extending 12 nautical miles. In addition, it argues that China’s extension of its maritime claims beyond 12 nautical miles is in violation of UNCLOS, as well as that Chinese activities on Scarborough Shoal and Johnson Reef infringe on the rights and freedom of the Philippines.

The third main issue centers on maritime features that fail to meet UNCLOS conditions of being islands. China controls and is building on reefs in the Kalayaan Island Group, including Mischief Reef, McKennan Reef, Gaven Reef, and Subi Reef. The Philippines argues that the reefs do not constitute islands as specified under Article 121 (1) of UNCLOS as they are submerged at high tide, and as such, are not subject to claims of sovereignty by China as they are part of the Philippines’ continental shelf. The Philippines has asked the arbitral tribunal to declare Chinese occupation of these and other submerged maritime features unlawful and to order China to withdraw.

## REVIEW OF ISLAND STUDIES

The fourth issue concerns China's requirement that foreign vessels receive authorization to enter the waters within the nine-dash line. The Philippines asserts that Chinese presence in the waters adjacent to Scarborough Shoal and Johnson Reef has not only hindered the Philippine vessels' access to the living resources contained within its EEZ but has also unlawfully restricted its freedom of navigation in those same waters.

As described above, the Philippines is in arbitration to find the nine-dash line, specifically with regard to the definition of islands, incompatible with UNCLOS; to cause China to end its occupation of reefs and other maritime features; and to ensure that Chinese law conforms to the Convention.

Turning attention to the East China Sea, on August 25, 2006, just prior to its unilateral development of the Kashi (Tianwaitian) and Shirakaba (Chunxiao) natural gas fields, China declared to the UN Secretary-General that because of certain specified categories of disputes in Article 298 (1)(a), (b), and (c) of UNCLOS, it would not recognize Part 15, section 2 (Compulsory Procedures Entailing Binding Decision) of the convention.<sup>45</sup> By excluding category (a)(i), describing "disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles," China in essence shuts the door on arbitration—as provided for in Annex VII of the convention—to resolve issues of delimitation of territorial seas, the EEZ, and the continental shelf. This has forced the Philippines to avoid the jurisdictional limits of the arbitral tribunal in these categories and to challenge China's claim of the nine-dash line and historical territorial claims by appealing to the arbitral tribunal on the principle that maritime entitlements must be measured from land (including islands) and on the interpretation of island under the convention. At the same time, the Philippines has asserted that China's actions infringed on its sovereign rights and freedoms. Using the shoal and reefs as a baseline, it has appealed to the tribunal that the 12 nautical miles of sea surrounding these features are part of its territorial waters and fall within the 200 nautical miles of its EEZ and continental shelf. It has also argued that China's occupation of islands and maritime features as well as waters within the nine-dash line infringe on its right to develop natural resources and freely navigate within its territorial waters.<sup>46</sup>

The direction of the case, however, rests firmly on whether the arbitral tribunal determines it has jurisdiction over the issues raised by the Philippines. Unlike domestic hearings, jurisdiction is

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<sup>45</sup> See [http://www.un.org/Depts/los/convention\\_agreements/convention\\_declarations.htm](http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm).

<sup>46</sup> Robert Beckman, "The Philippines v. China Case and the South China Sea Dispute," Asia Society/LKY SPP Conference Paper (2013).

<http://cil.nus.edu.sg/wp/wp-content/uploads/2013/03/Beckman-Asia-Society-LKY-SPP-March-2013-draft-of-6-March.pdf>.

## REVIEW OF ISLAND STUDIES

not predetermined in international tribunals, so both parties must agree before a tribunal will hear a case. China has not participated in the arbitral proceedings and is expected to remain absent. If this continues, the five arbitrators will be faced with a difficult decision. As noted above, China has declared it does not accept the jurisdiction of the court over certain specified categories of disputes involving historic rights. Faced with this reality, the arbitral tribunal must decide whether it lacks the standing to grant the Philippines its grievances or to consider the arguments of the concerned party. The role of the tribunal is the latter, but as long as China continues to refuse to participate in the proceedings or respond to the Philippines' claims, the arbitrators are placed in a situation where they must decide whether to disregard China's pronouncement removing itself from certain aspects of UNCLOS authority and rule on the case. There is no predicting which way the court will decide.

### 6. Conclusion

In considering recent developments, legal precedence, and other relevant factors the author has illustrated how China is drawing up domestic legislation aimed at bolstering its claim to the Senkaku Islands. As the author touched on in this paper, the consistency with international legislation—in particular UNCLOS—of certain aspects of these laws is doubtful, and in my opinion Japan should continue asserting the illegitimacy of those components it feels are out of step with international law.

At the same time, Japan must review its own domestic legislation. This includes drafting new bills as deemed necessary, including those aimed at such pressing issues as managing the EEZ and other territorial waters and the use of maritime resources, as well as revising existing legislation to reflect the Japanese position.

Specifically, as Chinese vessels now regularly intrude in the territorial waters around the Senkaku Islands, the author feels that while it is not necessary to enact new law as a counter-measure, it is due time to consider whether existing law sufficiently guards Japan's territorial and adjacent waters. It is important to consider timing so as to not inadvertently inflame already tense Sino-Japanese relations, but there is certainly adequate leeway to explore new concrete measures addressing the security of territorial waters. At the same time, Japan needs to propose to China crisis management mechanisms for law enforcement officers in the area to prevent an accidental collision between Japanese and Chinese government ships. A useful reference in this would be previous "incidents at sea" (INCSEA) agreements to avoid collisions between warships. It is essential to consider conflict management in order to keep an inadvertent collision between vessels of both countries' maritime law enforcement agencies, whether during maneuvers or while scrambling aircraft, from escalating into a full-scale skirmish. Realizing the

necessity of having a forum to discuss these matters, both countries have worked urgently to restart the Japan-China high-level consultation on maritime affairs first established in 2011. The second round meeting was held on September 23 and 24, 2014, in Qingdao, Shandong Province, where, in an positive sign, the two sides agreed in principle to resume consultations for an early implementation of a maritime communication mechanism between the defense authorities of both countries.<sup>47</sup>

\* This article was written before the award on jurisdiction and admissibility by the Arbitral Tribunal between the Republic of the Philippines and the People's Republic of China on 29 October 2015.

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<sup>47</sup> Ministry of Foreign Affairs, "The Second Round Meeting of Japan-China High-Level Consultation on Maritime Affairs," September 24, 2014, [http://www.mofa.go.jp/press/release/press1e\\_000016.html](http://www.mofa.go.jp/press/release/press1e_000016.html).