

The Senkaku Islands and Japan's Territorial Rights (Part 1)

Ozaki Shigeyoshi

This paper will be presented in multiple installments.

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1. Introduction: Legal Theory of Occupation in International Law

With the strengthening of China's naval power, the East China Sea has been entangled in complicated issues involving regional security (including the historical issue of protecting Taiwan's status), the Law of the Sea (including the right of free passage for ships on the high seas and demarcation of exclusive economic zones and the continental shelf), and marine resource development. Today the East China Sea is becoming an extremely sensitive international body of water. Underlying these issues and closely linked to them is the question of sovereignty over the group of uninhabited islets called the Senkaku Islands in Japanese and the Diaoyu Islands in Chinese, which have become the focus of a territorial dispute between Japan and China.

These islands are now a hot topic in the political relations between Japan and China, but inherently they constitute an issue of international law, one that

should have been suited to objective resolution using the norms of international law applying to the acquisition or loss of territory. For this reason, if a legally reasonable way out of the dispute can be opened up through a process of rational and objective discussion based on law, surely we should be able to expect an improvement in the prospects for resolving the other issues that have arisen in the East China Sea. For the sake of settling the Senkaku dispute, accordingly, I believe we first need to see the establishment of an informal forum in which concerned parties from Japan, China, and Taiwan can devote themselves to debate, limiting their discussion to territorial jurisdiction over the islands as determined by international law. What is needed before anything else is the formation of a consensus on the legal status of the islands, with diplomats and scholars of the three parties engaging in an exhaustive debate conducted from the vantage points of international law and history.

Probably only upon the completion of such work will Japan, China, and Taiwan be able to enter into meaningful discussion of the Senkakus in the diplomatic arena. (Indeed, in the absence of a process to establish a legal basis of agreement, diplomatic negotiations or, as some scholars have advocated, assignment of the matter to the International Court of Justice would run the danger of complicating the dispute.) When Deng Xiaoping came to Japan in 1978 as China's vice premier, he proposed shelving the issue, stating, "Our generation is not wise enough to find common language on this question. Our next generation will certainly be wiser. They will surely find a solution acceptable to all."¹ The discussion process I have recommended should be entirely in consonance with the thrust of Deng's remark.

¹ Deng made this statement at a joint press conference in Tokyo on October 25, 1978 (*Peking Review* no. 44, November 3, 1978, p. 16).

In the pages I have been allotted for this article, my intention is to examine the issue of territorial rights to the Senkakus from the perspective of international law.

The stance the Japanese government has adopted is that the issue has already been settled by international law. It argues that during the Meiji era (1868–1912), the government confirmed through a careful investigation toward the end of the nineteenth century that the Senkaku Islands were *terra nullius*, “land without an owner.” They became Japanese territory under international law, it states, through their incorporation by a cabinet resolution adopted on January 14, 1895, and through Japan’s effective control over them ever since that time. It further states that there was no change in the legal status of the islands even after World War II and that over a period of 75 years, neither China nor any other state objected to Japan’s sovereignty over them.

On the other side of the dispute, China and Taiwan in 1971 suddenly unveiled an official stance of declaring that the Diaoyus, as they call the Senkakus, are part of Chinese territory. Their position is that the Diaoyus have belonged to China since the distant past and that Japan, recognizing in January 1895 that it would soon be victorious in the Sino-Japanese War (August 1894 to April 1895), unilaterally grabbed them. They say that this places the islands in the same position as that of Taiwan, which China ceded to Japan in the April 1895 Treaty of Shimonoseki. That is, they are territory that Japan stole from China and that ought to be restored to China. (This position can be described as one of historical right or territorial right based on historical title.)

One simple question this claim has provoked is why, if China recognized that the Senkakus were from long ago part of its territory, it did not protest Japan’s occupation of them at an earlier date. (Later I will return to this point.) In any event, we may say that here we have a very unusual case among the territorial disputes involving international law, with one side acting first to

establish ownership based on a title deriving from occupation of *terra nullius* and the other side, after a considerable delay during which it remained silent, raising the proposition of ownership by historical right or by territorial right based on a historical title. In such a case, there can be no doubt that the party acting later to claim historical right (or title) bears burden of proof to substantiate its position using historical facts.

Be that as it may, when we compare the assertions of both Japan and China, the following three questions can clarify the key points at dispute. First, is it legally valid for Japan to claim that the series of measures instituted by the Japanese government toward the Senkaku Islands since January 1895 fulfilled the requirements of occupation under international law and that through them, Japan effectively acquired a territorial right to the islands? Second, from the viewpoint of international law, were the Senkakus in 1895 Chinese territory or were they territory belonging to no state? And third, should China's presentation of a claim to ownership 76 years later based on historical right (or title) be viewed as an effective rebuttal to Japan's earlier claim based on occupation of *terra nullius*?

In the following, I will address these key points of the dispute in turn. (I expect, however, I will not have sufficient space for giving adequate consideration to each point. As I plan to publish a full-fledged treatment of the territorial dispute in the near future, I must ask you to bear with me for the time being.)

2. Japan's Possession of the Senkakus by Title of Occupation: Actions in and after 1895

In this section I examine whether the measures implemented by the Japanese government since January 1895 sufficiently satisfy the requirements of

occupation. In this context, *occupation* is one of the modes of acquiring territory under international law. When a certain territory is not in the possession of any state (called *terra nullius* in international law, a concept that does not imply the land is uninhabited), a state can acquire title to it, making it part of its own territory, by being the first to take control of it (the act of occupation). Here, a *title* is a fact that creates a legal right to ownership.² (The other modes of acquiring territory conventionally recognized in international law are accretion, annexation, cession, prescription, and subjugation.)

For occupation of *terra nullius* to be legally valid, the state must have the intention of possessing the territory and effectively take control of it. That is, the first requirement of occupation is that the state must clearly demonstrate by some means that it intends to take possession of the territory. An *explicit* expression of this intent can be made in a number of ways, as by informing other countries or in other ways demonstrating the intention externally, making an official announcement to the domestic public, planting a national flag on the site, or posting signs in the state's own territory. It is also possible to make an *implicit* expression of intent, as by exercising acts that clearly constitute acts of sovereignty in an exclusionary manner on the territory.³ In this way, while a state must make its intention to possess the territory clear externally by one means or another, there is no requirement that the intent be expressed in the form of an external declaration. Even in positive international law, the delivery of notification to other countries is not required for occupation. In short, as long as the country intending to occupy the territory has made an obvious explicit or

² Robert Y. Jennings, *The Acquisition of Territory in International Law* (Manchester: Manchester University Press, 1963), p. 4.

³ Tachi Sakutaro, "Mushu no tosho no sensen no hori to senrei" (Legal Principles and Precedents of Occupation of *Terra Nullius*), *Kokusaiho gaiko zasshi* 32, no. 8 (1933), p. 9.

implicit expression of its intention and other countries are able to learn of it, the conditions for occupation are sufficient.⁴

The second requirement of occupation is that the state must effectively occupy the territory. Here, the concept of *effective occupation* means that the sovereignty of the occupying country must extend into the occupied territory. Effective occupation became a requirement of occupation in the second half of the nineteenth century. Formerly countries had been able to occupy a territory merely by having citizens use the land, colonize it, and live permanently on it, but now the content of occupation was broadened to include the establishment of a local authority to uphold order and administer the territory in question. These additional qualifications are seen as necessary conditions for effective occupation (or effective rule).⁵

The new conditions were in keeping with an age in which, in colonies or other territory a country sought to occupy, there was a need to assure to other states or peoples “the minimum of protection of which international law is the guardian.”⁶ It was an age requiring that sovereign power sufficient for providing protection extend into the territory in question. In order to meet this need, it ordinarily would have been necessary to establish local administrative organs or maintain police and military power. But the establishment of a local authority was not a requirement in each and every case. In places where permanent residence was difficult or islands were uninhabited, it should have been sufficient for protection to take other forms, such as conducting regular patrolling activity and dispatching state agents whenever the occasion

⁴ Ozaki Shigeyoshi, “Senkaku Shoto no kizoku ni tsuite” (Territorial Sovereignty over the Senkaku Islands), pt. 3-2, *Reference* no. 263 (1972), p. 168.

⁵ Taijudo Kanae, *Ryodo kizoku no kokusaiho* (International Law of Territorial Sovereignty) (Tokyo: Toshindo, 1998), pp. 98–100.

⁶ The idea of minimum protection appears in the arbitration award on the 1928 *Island of Palmas* case. It is mentioned by Jennings in an appendix to his *Acquisition of Territory* on page 93.

demand. In this way, no sweeping statement can be made about the extent of the necessary effective occupation, which would have depended on such factors as the geographical features of the territory, the presence or absence of inhabitants, and the density of the local population.⁷

Further development of the content of effective occupation occurred during the twentieth century. While there was no change in the requirement that the occupying country undertake state functions in the concerned territory, recent international rulings have interpreted it as being a “peaceful and continuous display of state authority,” in the words of Max Huber, the arbitrator in the 1928 *Island of Palmas* case.⁸ That is, if the state has peacefully and continuously exercised or displayed state functions in a territory, that state will be recognized as having acquired sovereignty by reason of that fact. (In content, this is close to the concept of acquiring territory by prescription, because there is no need for the concerned territory to have been *terra nullius* and, furthermore, because there *is* a need for continuity, for the passage of a certain period of time before the title becomes valid.)

The “peaceful” part of this concept means that the concerned territory was not already occupied by another state and also that, from the start, its sovereignty was not contested by competing acts of sovereignty.⁹ The “continuous” part means that state authority needs to have been exercised or displayed in a continuous manner in the territory. But when it comes to specific criteria, such as how long the continuity needs to have lasted or to what extent interruptions in the occupation can be accepted, these are relative matters that vary according to the circumstances of each case. The answer will depend, for instance, on whether or not people were living in the territory or rival countries

⁷ Taijudo, *Ryodo kizoku no kokusaiho*, p. 11, p. 140.

⁸ Jennings, *Acquisition of Territory*, 92.

⁹ Ozaki, “Senkaku Shoto no kizoku,” pt. 3-1, no. 262 (1972), pp. 59–60. See also Waldock, *sub* note 10, p. 335.

were also engaged in sovereign activities. Finally, the exercise or display of state authority needs to be effective. As already explained, the specific expression of state authority can take a variety of forms, but particularly important are expressions using the exercise of regional administrative, judicial, and legislative power. This also is a relative requirement, with the degree of effectiveness depending on, for instance, the attributes of the concerned land, the presence or absence of inhabitants, the density of the population, and the existence of sovereign activities by a rival country.¹⁰

Thus far I have reviewed the requirements of occupation laid down by current international law. Can it be said that the series of measures instituted by the Japanese government toward the Senkaku Islands in and after 1895 satisfied these requirements? (Later, in section 4, I will reexamine the requirement that the territory to be occupied be *terra nullius*. This is because in 1971 China and Taiwan, based on a historical right [title], presented the claim that the islands belong to China. Until then no objection had been raised to the Japanese assertion that it had acquired the Senkakus by satisfying the requirements of occupation for land belonging to no one.)

The first point to note is the requirement of the intention to occupy. In its cabinet resolution of January 14, 1895, the Japanese government placed the Senkakus under the jurisdiction of Okinawa Prefecture and gave permission for wooden markers to be planted on them. With authorization from Okinawa, Koga Tatsushiro, an entrepreneur, led the pioneering of the islands, and he evidently had markers put into place at that time. (It has been confirmed through historical materials that markers were erected on at least two of the main islets, Kuba Island [Huangwei Yu in Chinese] and Kumeakashima Island

¹⁰ C. H. M. Waldock, "Disputed Sovereignty in the Falkland Islands Dependencies," *British Yearbook of International Law* 25 (1948), pp. 335–36.

[later renamed Taisho Island in Japanese, Chiwei Yu in Chinese.])¹¹ In addition, Koga regularly flew Japan's national flag on the islands.

Previously, in 1885, Okinawa had dispatched the steamship *Izumo-maru* to survey the islands, and its report was submitted to the prefectural authorities. In and after 1895, implicit expression of Japan's occupation intention was displayed through acts of sovereignty of the central and prefectural governments, including carrying out on-site surveys, conducting scholarly studies, noting the islands on maps and nautical charts, and entering information in public documents. Even when the intent to occupy is not plainly stated, it is possible to infer it from the undertaking of peaceful and continuous state functions in the territory.¹² We may thus conclude that with the cabinet resolution of January 1895 leading the list, the various actions of the government and Okinawa constituted a sufficiently clear external expression of Japan's intention of occupying the Senkaku Islands.

In this context, questions are sometimes asked about why Japan opted to use a cabinet resolution for the domestic measure by which it incorporated the Senkakus into its territory. (It has been suggested, for instance, that the decision should have been based instead on an imperial decree.) In the case of occupation, however, international law does not spell out any specifications for the procedures used to incorporate a territory under domestic law. It is true that the January 1895 resolution was not made public at the time, but this was not a case of special treatment; it was a rule applied to cabinet resolutions in general during that era. (It was also not publicly announced that as a result of the resolution, Okinawa Prefecture would be assuming jurisdiction over the Senkakus. Under the resolution, a directive was sent to the governor of Okinawa, but this as well was not announced. Apparently no record remains of

¹¹ Ozaki, "Senkaku Shoto no kizoku," pt. 2, no. 261 (1972), pp. 47–48.

¹² Taijudo, *Ryodo kizoku no kokusaiho*, p. 144.

the directive itself. It may have been lost in the destruction caused by World War II, although there is reason to believe that either Okinawa Prefecture or the town office on Ishigaki Island, which was in charge of the Senkakus, was somewhat remiss in its efforts to preserve records.) In any event, one cannot say that international law in those days necessarily required a country that had decided to occupy a territory to express its intention externally by means of declaration, notification, or document.¹³

As already explained, what is important is that the occupying country express with adequate clarity its intention of possession through either explicit or implicit acts. As long as other countries are able to learn of the occupation, its actions are sufficient. In the present case, Japan's exercise of sovereignty over the Senkakus took on concrete and clear form after the January 1895 resolution, as can be confirmed using numerous examples including the approval issued to Koga Tatsushiro when he applied to lease public land and the on-site surveys carried out several times by the state and Okinawa Prefecture. Japan's intention to take possession was externally obvious.

In relation to this point, other countries were not notified on the occasion of the incorporation of the islands, but that has no bearing on the legal effect of the incorporation measure. It cannot be said that positive international law makes notifying other countries of incorporation a requirement of occupation. The majority opinion in legal theory also does not recognize any such requirement. In terms of international precedents as well, it has been ruled that notifying other countries is not necessary (in the 1928 *Island of Palmas* case and the 1931 *Clipperton Island* case). I might add that when Japan took possession of

¹³ Jennings, *Acquisition of Territory*, pp. 38–39. Another source is a work by L. F. L. Oppenheim cited by Jennings. As Jennings puts it, occupation differs from prescription in that neither recognition nor acquiescence on the part of other countries is a condition for the acquisition of title. It is generally agreed, he adds, that publicity, or publication of the intent to acquire territory through occupation, is not a requirement of international law.

other islands, such as the Ogasawara Islands, Ioto Island (Iwo Jima), and Minamitorishima Island, it also took no steps to notify other countries of the occupation itself.¹⁴

What about the requirement of effective occupation? Japan's exercise of sovereignty over the Senkaku Islands ever since 1895 adequately satisfies the requirement of effective occupation and of its evolution into a "peaceful and continuous display of state authority." At the time, numerous facts attested to the extension of Japan's sovereignty over the Senkakus.

After the islands were incorporated into Okinawa and designated as state-owned land in 1895, Koga submitted a request as a private resident of Okinawa to lease the islands in June of the same year, and the government gave its approval in August 1896. Based on this authorization from the government, Koga embarked on full-fledged development of the islands. Every year he sent settlers to the islands, where they erected housing and workplaces. In addition to collecting albatross feathers and harvesting guano, the settlers engaged in such work as canning shark fins and seabirds, collecting shellfish and turtles, gathering coral, and producing dried bonito.¹⁵ In this way the Meiji government authorized a private individual to use the Senkakus, which were state-owned land, and the individual was able to initiate exclusive utilization of the islands with the state's approval. This is a reality that, in short, demonstrates Japan's effective control over the islands.

Second, from 1895 on Japan engaged in a variety of other sovereign acts concerning the Senkaku Islands. It designated the territory as state-owned land and entered it into the national land registry, divided it into numbered lots,

¹⁴ Taijudo, *Ryodo kizoku no kokusaiho*, pp. 144–45. With respect to Ioto Island and Minamitorishima Island, see also Momose Takashi, *Shiryō kenshō: Nihon no ryōdo* (Investigation of Documents: Japan's Territory), edited by Ito Takashi (Tokyo: Kawade Shobo Shinsha, 2010), pp. 61–65, pp. 87–89.

¹⁵ Senkaku Retto Kenkyukai, "Senkaku Retto to Nihon no ryōyūken" (The Senkaku Islands and Japan's Territorial Sovereignty), *Kikan Okinawa* 63 (1972), pp. 9–12.

leased the land and later sold some of it to private individuals, and collected land taxes. Meanwhile, Okinawa Prefecture, the navy's hydrographic department, and the local forestry office carried out on-site surveys and produced maps drawn to scale. Both the central government and the prefecture dispatched personnel to the islands to accomplish a variety of tasks, and both authorized or encouraged on-site resource surveys and academic studies and dispatched police officers and military personnel to rescue survivors of accidents.¹⁶

The foregoing facts are more than sufficient to prove that Japan effectively controlled the Senkaku Islands over the years until World War II, especially when we consider that they are distant and isolated islets poorly suited to habitation. To be sure, when Koga's pioneering activities went into decline early in the Showa era (1926–89), there was a corresponding decrease in Japan's exercise of sovereignty. At the time, however, Japan's display of sovereignty was by no means interrupted, and competitive acts of sovereignty by other countries did not occur.¹⁷

Even after World War II, the status of the Senkakus did not change. When the war was concluded, the United States occupied and governed Okinawa. It took over the full scope of the prefecture's prewar territory, which put the Senkakus under US administration. This is fully demonstrated by a variety of US legislative measures adopted for Okinawa. In addition, the United States and the local organ under it, the Government of the Ryukyu Islands, consistently although not always actively exercised sovereignty over the islands. These postwar actions by the United States, a third party, provide confirmation that the Senkakus before the war had been under Japanese rule as a part of Okinawa. Furthermore, until 1971 neither China nor any other country objected

¹⁶ Ibid. See also Ozaki, "Senkaku Shoto no kizoku," pt. 2, no. 261 (1972), pp. 51–55.

¹⁷ Ozaki, "Senkaku Shoto no kizoku," pt. 3–2, no. 263 (1972), p. 170.

to the inclusion of the Senkakus within the boundaries of the Okinawan territory placed under the administration of the United States. This fact is thought to have great evidentiary value for Japan's possession of the islands.¹⁸

If China had truly recognized that the Senkakus were historically an integral part of its land, it naturally could have and should have protested Japan's occupation of them under international law. (Not instituting legal countermeasures of any kind to Japan's occupation amounted to tacit consent, one of the requirements for acquiring territory by prescription.) Strong objections ought to have been raised when Japan incorporated the islands into Okinawa (1895), when Taiwan, Okinawa, and other territories were in effect separated from Japan at the end of World War II (1945), and when Taiwan was legally detached from Japan with the enforcement of the Treaty of Peace with Japan and the Sino-Japanese Peace Treaty (1952). Indeed, there was nothing preventing China from lodging a protest at any other point in time. In the 1902–32 period China reacted sternly and almost instantaneously to moves by France to occupy the Paracel Islands (called the Xisha Islands in Chinese). This behavior contrasts sharply with China's complete silence about Japan's exercise of sovereignty over the Senkakus during the same period.¹⁹

To conclude this section, let me address the legal implications for Japan's claim of occupation arising from the timing of the islands' incorporation. Japan incorporated the Senkaku Islands during the 1894–95 Sino-Japanese War by a cabinet resolution on January 14, 1895. The timing poses the question of whether the move constituted a violation of one of the requirements when a country acquires territory by means of occupation, which is that there be a "peaceful and continuous display of state authority." The British jurist C. H. M.

¹⁸ Ibid., pp. 170–71.

¹⁹ Greg Austin, *China's Ocean Frontier: International Law, Military Force, and National Development* (Sydney: Allen & Unwin, 1998), pp. 168–69.

Waldock has maintained that in order for occupation to be “peaceful,” it must not have been contested by competing acts of sovereignty from the start (from the time when the occupation begins). My conclusion is that from the viewpoint of international law, the timing presents no problem.

Three points should be considered. First, Japanese action to occupy the Senkakus actually began around 1885, and from then until 1895, the Chinese government made no reaction of any kind to the Japanese activities. (Evidence of the intention to occupy the islands in fact dates further back to around 1879, when official Japanese maps began to include the Senkaku Islands.)²⁰ Looking deeper into history, we should note that the inhabitants of Ishigakijima Island and Yonagunijima Island — the Ryukyu islands lying closest to Uotsuri Island, the largest of the Senkaku islets—had been visiting it from the distant past. In addition, the Ryukyu Kingdom sent one or more tribute vessels to China each year over a period of some 500 years, and these ships passed through the Senkakus while sailing to Fuzhou, until the tributary relationship ended in 1874. In other words, the Senkakus were part of a regular route used exclusively by the Ryukyu government.

Japan annexed the Ryukyu Kingdom in 1872 and incorporated it as Okinawa Prefecture in 1879. Then in 1885, a point in the Meiji era (1868–1912) virtually continuously connected to the kingdom’s end, Okinawa undertook an official survey of the Senkakus at the request of the Meiji government. This was part of the moves by the Meiji authorities to demarcate Japan’s borders. By means of its survey, Okinawa confirmed that incorporating the islands into Japanese territory would cause no problems in terms of international law. The

²⁰ For further information on this and the next two points, see Ozaki Shigeyoshi, “Senkaku Shoto no kizoku ni tsuite” (On Ownership of the Senkaku Islands), pt. 2, *Refarensu* no. 261 (1972), pp. 39–49. See also Okuhara Toshio, “Senkaku Retto no ryodo hennyu keii” (The Circumstances of the Incorporation of the Senkaku Chain), Kokushikan University *Seikei Gakkaishi* no. 4 (1975), pp. 8–16.

government decided to postpone incorporation, however, on the advice of the foreign minister. At the time it had many diplomatic issues on its agenda, including a disagreement with China about sovereignty over the Ryukyus, and the foreign minister was concerned that hasty action on the Senkakus might only engender a new problem.

Second, Ishigaki inhabitants soon began crossing over to the Senkakus in increasing numbers to fish, collect feathers, and engage in other activities. This prompted the officials on Ishigaki to present a number of requests for a quick decision on placing the Senkakus under Okinawa's jurisdiction for the smooth functioning of fishery regulation.

Third, the Japanese government finally decided to act in January 1895. Believing that the Sino-Japanese War would soon be successfully concluded and that it no longer needed to worry about relations with China, it agreed to recognize Okinawa's jurisdiction over the nearby islets known as Kuba Island and Uotsuri Island and gave approval for the erection of markers on them. The cabinet resolution to that effect is the measure by which Japan, under domestic administrative law, directly incorporated the Senkakus, a group of uninhabited islets whose ownership had not been settled until that time. In short, the Meiji government apparently believed that Japan's act of occupation after a display of the intention to occupy over more than 10 years, coupled with the absence of competing acts of sovereignty by any other country, satisfied the requirements of international law for making the Senkakus part of Japan's territory. (And no foreign country protested even after that either.)

In this way, although the cabinet resolution that placed the islands under the jurisdiction of Okinawa was made during the Sino-Japanese War, the occupation proceeded peacefully from the first. No violation of the requirements for occupation is to be found.

(Continued in Part 2.)

Recommended citation: Ozaki Shigeyoshi, "The Senkaku Islands and Japan's Territorial Rights," *Review of Island Studies*, June 10, 2013, <http://islandstudies.oprf-info.org/research/a00001/>. Translated from "Senkaku Shoto to Nihon no ryoyuken," *Tosho Kenkyu Journal*, Vol. 1 (June 2012), pp. 8–17; published by the OPRF Center for Island Studies.

OZAKI Shigeyoshi

Professor emeritus at the University of Tsukuba. Specializes in international law. Born in 1936. Graduated from the University of Tokyo, where he majored in law. Received his doctorate from the Division of Law and Politics, University of Tokyo Graduate School. Worked in the Research and Legislative Reference Bureau of the National Diet Library. Has served as a professor in the Faculty of Law, Niigata University; the Institute of Social Sciences, University of Tsukuba; and the Faculty of International Political Science and Economics, Nishogakusha University. The following are his main works on the Senkaku territorial issue:

1. "Senkaku Shoto no kizoku ni tsuite" (Territorial Sovereignty over the Senkaku Islands), pts. 1, 2, 3-1, and 3-2, *Reference nos. 259 and 261–63* (1972).
2. "Senkaku Shoto no kokusaihojo no chii: Shu to shite sono rekishiteki sokumen ni tsuite" (The Status of the Senkaku Islands in International Law: Concerning Mainly Their Historical Aspect), *Tsukuba Hosei* 18, no. 1 (1995).
3. "Territorial Issues on the East China Sea: A Japanese Position," *Journal of East Asia and International Law* 3, no. 1 (2010).