

Exercising Enforcement Jurisdiction around the Senkaku Islands

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1. Introduction

News of China Marine Surveillance ships being deployed to waters around the Senkaku Islands, at times entering Japan's territorial sea, are reported on an almost daily basis. Given that the Senkakus are Japanese territory, passing through the territorial sea within 12 nautical miles of the islands—unless innocent passage—is in violation of international law.

Complicating the issue, though, is the fact that China also claims the islands, asserting that it has jurisdiction over the Senkakus and that Chinese ships have a right to patrol the 12-nautical-mile area around the islands. Beijing has recently begun identifying the islands as a “core interest” alongside such other territorial claims as Taiwan, Tibet, and Xinjiang Uyghur.¹ If the Chinese position is legitimate—a point I will come back to later—then, at the least on the surface, Japan and China have overlapping territorial claims, and the Japan Coast Guard's efforts to prevent Chinese ships from entering Japan's territorial sea around the Senkakus and to regulate fishing activities in the exclusive economic zone are, from China's perspective, violations of Chinese waters and an obstruction of China's jurisdictional rights over its EEZ.

¹ Remarks by Chinese Foreign Ministry spokeswoman Hua Chunying during an April 26, 2013, press conference, *Japan Times*, April 27, 2013, p. 2.

One can see the Chinese stance as an attempt to force the Japanese side to admit that there *is* a territorial dispute—which Tokyo refuses to recognize at present—and to agree to “set aside” the issue. My aim here is not to explore Japan’s policy options but to shed light on the situation this has brought about, in which the two countries are making “competing” jurisdictional claims in the territorial sea and EEZ around the Senkakus. The question, though, is whether there is actual “competition” in the truest sense of the word.² Japan currently effectively controls and exercises enforcement jurisdiction around the islands, so the real issue is to what extent noncommercial Chinese government ships can claim immunity from Japanese jurisdiction. In this paper, I will first examine the immunity of foreign ships in the territorial sea and EEZ from a legal perspective and what Japan can do in response before discussing the root causes of the bilateral dispute.

2. Response of Coastal States to Foreign Government Ships in the Territorial Sea

The repeated incursions into the waters around the Senkakus today are problematic because they are being made not by private fishing boats for commercial purposes but by China Marine Surveillance and other government ships. Preventing the entry of private boats into the territorial sea is a simple matter of law enforcement, but this is not the case when dealing with foreign government ships. To avoid confusion, therefore, “foreign ships” in this paper will refer not to private boats but to government vessels.

A. Related International Laws and Regulations

Article 32 of UNCLOS, the UN Convention on the Law of the Sea, stipulates that (with some exceptions) “nothing in this Convention affects the immunities of warships and other government ships operated for non-commercial purposes.” Noncommercial government ships, therefore, enjoy the same immunities in the territorial sea as warships. The clause is similar to Article 22, paragraph 2, of the 1958 Convention on the Territorial Sea and the Contiguous Zone and can be said to be a restatement of the immunities that have been recognized under customary law.³

² It goes without saying that the “competition” over jurisdictional claims here is fundamentally distinct from the legally objective competition over persons with dual citizenship.

³ The Territorial Sea Convention, though, has slightly more specific criteria for immunity, noting, “Nothing in these articles affects the immunities which such ships enjoy under these articles or other rules of international law.” The corresponding UNCLOS clause confers immunity simply to “other government ships operated for non-commercial purposes.”

This would seem to suggest that government ships operated for noncommercial purposes enjoy immunities from law enforcement authorities in the territorial sea of coastal states.

Passage is considered innocent so long as it is “not prejudicial to the peace, good order or security of the coastal State.”⁴ Because this is a clause in the UNCLOS subsection on Rules Applicable to All Ships—including government vessels—a coastal state has the right to take “the necessary steps in its territorial sea to prevent passage which is not innocent.”⁵ There is strong likelihood that the Chinese ships now deployed to the waters around the Senkakus are guilty of engaging in an “activity not having a direct bearing on passage” (Article 19, paragraph 2 [I]), as passage is defined in Article 18, paragraph 1, as navigation through the territorial sea for the purpose of “(a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters” or “(b) proceeding to or from internal waters or a call at such roadstead or port facility.” While the Senkakus have no roadsteads, port facilities, or internal waters to speak of, the Chinese ships cannot be said to be simply “traversing” the territorial sea, since they repeatedly enter, leave, and reenter the waters. Such activities are defined as *haikai* (hovering) under Article 4, paragraph 1, of Japan’s Act on Navigation of Foreign Ships Through the Territorial Sea and Internal Waters and are clearly intended to be demonstrative. Inasmuch as such conduct is “prejudicial to the peace, good order or security of the coastal State,” it cannot be regarded as innocent passage. Legally, therefore, there are no obstacles to treating such incursions as passage that is not innocent, although policy considerations may dictate a different response. Japan Coast Guard patrol boats have no choice at present but to order the Chinese ships to leave—which is indeed what they have been doing—but there may be legal room for a more resolute response to ships that continue to “hover” in the area. The Japan Coast Guard Act, for instance, stipulates that Coast Guard patrol boats may use water cannons or come alongside of a ship that seriously threatens the public maritime order when other appropriate courses of action are unavailable (Article 18,

⁴ UNCLOS, Article 19, paragraph 1.

⁵ UNCLOS, Article 25, paragraph 1. Some argue that even government ships operated for noncommercial purposes and thus enjoying immunities must, in principle, adhere to the domestic laws of the coastal state, particularly with regard to passage. See Gil Carlos Rodriguez Iglesias, “State Ships,” in the *Encyclopedia of Public International Law*, vol. 4 (Amsterdam, etc.: Elsevier, 2000), p. 640. Iglesias notes in the article, though, that coercive measures—such as capture, internment, or the arrest of the captain—cannot be taken against government ships enjoying immunities.

paragraph 2), with the aim to “alter the course” (Article 18, paragraph 1, clause 2) of said ship.⁶

B. Related Domestic Laws and Regulations

The Law on the Territorial Sea and the Contiguous Zone simply specifies the extent of the territorial sea and other waters claimed by Japan and has no provisions regarding jurisdictional rights as a coastal state or the exercise thereof, in effect, leaving such matters for international customary law.⁷ The Act on Navigation of Foreign Ships Through the Territorial Seas and Internal Waters, meanwhile, provides that navigation in the territorial sea and internal waters by foreign ships shall be continuous and expeditious and must be for the purpose of passage (if through internal waters, then only in the “new internal waters” on the seaward side of the coast) or to call on a Japanese port or other facilities (Article 3). The captain is prohibited from “hovering” (navigation along paths and at speeds not normally recognized as being necessary for continuous and expeditious passage in the light of climatic, hydrographic, and sea traffic conditions, the presence or absence of obstructions in the fore path, and other peripheral circumstances) (Article 4, paragraph 1). These clauses are consistent with the rules of international law, but the law as it currently stands is short on specifics, leaving open the potential for confusion in the interpretation of international rules among Japan Coast Guard officers exercising jurisdiction at sea. Thought should thus be given either to revising the Act on the Territorial Sea to include clauses regarding law enforcement activities in the territorial sea or to creating new legislation stipulating such activities in the policing of the territorial sea.

Of perhaps interest in this regard is the Law of the People’s Republic of China on the Territorial Sea and the Contiguous Zone, adopted in 1992. Article 10 of this law notes,

⁶ A presentation made on December 2, 2012, by a member of Nihon Kaiyoho Kenkyukai (Japan Institute for the Law of the Sea).

⁷ Japan issued the following statement when it joined the Convention on the Territorial Sea and the Contiguous Zone in 1968. “As Japan is a major shipping and fishing nation, it has great interest in keeping the ocean free to the fullest extent for use by all nations. Regarding the enforcement of passage through the territorial sea that is not innocent, it has a major interest in preventing the abuse of international customs, and it has no intension of establishing domestic laws to prohibit passage in general.” “Atarashii ryokai keibi hosei to no kochiku no tame no kento ni tsuite” (Regarding the Discussions on Establishing New Laws for the Policing of the Territorial Sea), *Kaiyoho Joyaku ni kakawaru kaijo hoanhosei dai 2 go* (Japan Coast Guard Foundation, 1995), p. 50.

“In the case of violation of the laws or regulations of the People’s Republic of China by a foreign ship for military purposes or a foreign government ship for noncommercial purposes when passing through the territorial sea of the People’s Republic of China, the competent authorities of the People’s Republic of China shall have the right to order it to leave the territorial sea immediately and the flag State shall bear international responsibility for any loss or damage thus caused.”⁸ The law explicitly gives authorities the right to order a foreign ship to leave the territorial sea immediately when in violation of Chinese laws or regulations, rather than when its passage is deemed not innocent. Should China take control of the Senkakus, it will no doubt apply this clause in the waters around the islands.⁹ Indeed, even before the reorganization of China’s maritime law enforcement agencies into the State Oceanic Administration was announced in March 2013 at the Fifth Conference of the Eleventh National People’s Congress, three Chinese government ships chased a Japanese fishing boat (the *Zenko-maru No. 11*) on February 18 for an hour and a half in Japan’s territorial sea around the Senkakus.¹⁰ There have been other cases of coercive action by Chinese ships since then.¹¹ And on July 22, the former China Coast Guard, China Fisheries Law Enforcement Command, China Marine Surveillance, and General Administration of Customs were reorganized into the

⁸ Law of the People’s Republic of China on the Territorial Sea and the Contiguous Zone, translated by the Legislative Affairs Committee of the Standing Committee of the National People’s Congress of the People’s Republic of China, 1992. The original text is contained in *Renmin Ribao (People’s Daily)*, February 26, 1992, page 4.

⁹ A hint of how the clause would be applied was contained in an interview conducted by China’s CCTV in late July 2013 with Li Li, professor at the People’s Liberation Army National Defense University. She noted that China Coast Guard patrol boats are fitted with machine guns and cannons and that when they discover a ship operating illegally in China-administered waters, they may arrest the crew or otherwise take forceful action. The interview was reported on People’s Daily Online on July 26. Previously, Li noted, patrol boats were only able to collect evidence of illegal activities or issue warnings. The article was quoted in an article by Kyodo News on July 27, 2013.

¹⁰ Reported in the *Yaeyama Nippo*, February 20, 2013.

¹¹ In April, nine boats chartered by a private group to fish in these waters were chased and harassed by eight China Marine Surveillance vessels that violated Japan’s territorial sea. And in May, the *Koshu-maru* of Yaeyama Islands was fishing some 2 kilometers southeast of Minami-kojima Island when the *Haijian-66*, *Haijian-50*, and *Haijian-15* violated Japan’s territorial sea to come as close as several dozen meters to the fishing boat for “enforcement.” Nakashinjo Makoto, “Chugoku ryokai shinpan to kyokasho saitaku jiken no fukai kankei: Tai-Chu saizensen, kokkyo no shima kara no hokoku 1” (Deep Ties between China’s Territorial Sea Violations and the Textbook Incident: Report from an Island at Japan’s Outer Limits 1), *Seiron*, July 2013, pp. 68–69; *ibid.*, “Senkaku ryokai de Chugoku kosen ni hoi sareta kinpaku no 6 jikan” (Six Tense Hours of Being Encircled by Chinese Government Ships in the Territorial Sea around the Senkakus), pp. 64–65.

State Oceanic Administration.¹² SOA ships may be armed, unlike previously, and experts note that law enforcement activities are likely to be reinforced.¹³

Japan's Act on Navigation of Foreign Ships was revised by a cabinet decision on February 28, 2012, to enable Japan Coast Guard officers to instruct and then order a hovering foreign ship to leave the territorial sea without an onboard inspection when the ship was clearly not forced by circumstance to hover. Previously, under Article 7, such an order by the Coast Guard commandant first required the confirmation of hovering activities with an onboard inspection.¹⁴ This revision was intended to expedite the enforcement of laws by abolishing the need to conduct onboard inspections in the light of the recent changes in the situation surrounding Japan's coastal waters.

How should Coast Guard officers deal with a foreign ship that refuses to comply with an order to leave? To perform their duties, officers are permitted to carry arms,¹⁵ whose use is stipulated, *mutatis mutandis*, by Article 7 of the Police Duties Execution Act.¹⁶ This article provides that: "In the event that there are reasonable grounds to deem it necessary for . . . suppression of resistance to the execution of his or her official duty, a police official may use a weapon within the limits judged reasonably necessary in the situation." Article 20, paragraph 2, of the Japan Coast Guard Act specifies four criteria, all of which must be met, for officers to use weapons, the first being that the ship in question be foreign. The paragraph, though, explicitly excludes warships and ships owned or operated by a foreign government solely for noncommercial purposes, so should a Chinese government ship overseeing fishing activities refuse an order to leave, the Japan Coast Guard would normally be unable to use weapons. A natural exception is in the case of self-defense, when the foreign ship shoots first. This also applies to Article 7 of the Police Duties Execution Act, which provides that an officer not use his weapon unless "there are reasonable grounds on the part of the police official to believe that there are no other means but to do so . . . for the prevention of such resistance." Should Coast Guard officers, too, be allowed to use weapons in the face of resistance against their duties,

¹² See the July 23, 2013, entry of the "Kyokuto [Far East] Blog by finalvent" at <http://finalvent.cocolog-nifty.com/fareastblog/2013/07/post-7b78.html>.

¹³ *Japan Times*, July 24, 2013, p. 6.

¹⁴ Japan Coast Guard press release on the partial revision of the Japan Coast Guard Act and the Act on Navigation of Foreign Ships, February 28, 2012.

¹⁵ Japan Coast Guard Act, Article 19.

¹⁶ Japan Coast Guard Act, Article 20, paragraph 1.

even when not in self-defense? There will need to be “reasonable grounds . . . to believe that there are no other means” but to engage in actions that inflict injury upon the other party,¹⁷ so judgments regarding what constitutes “reasonable grounds” will need to be made with great caution.

In this connection, mention should be made of a historical incident in which a Japanese patrol boat was shot at by South Korean police officers. On July 12, 1953, the patrol ship *Hekura* of the Japan Coast Guard (then called the Maritime Safety Agency) spotted three Korean fishing boats in the waters near Takeshima, guarded by seven or eight policemen with automatic rifles. When the crew of the *Hekura* lowered a landing boat and approached the island, three Korean police officers with an interpreter rowed up and instructed them to leave, claiming that the area was Korea’s territorial sea. Just as the crew members returned to the *Hekura*, the Korean officers fired a few dozen shots, of which two struck the patrol ship; the Japanese officers were uninjured.¹⁸ This was an example of physical intimidation that, in effect, resulted in Korea taking control of Japanese territory. There is little information available on Korean domestic laws at the time, but even if Korea claimed enforcement jurisdiction around Takeshima, *Hekura*, being a government ship, could claim immunity, and the firing of shots can be said to have been both unnecessary and in violation of international law.

3. Response of Coastal States to Foreign Government Ships in the EEZ

A. Related International Laws and Regulations

In the exclusive economic zone, according to UNCLOS, a coastal state has “sovereign rights for the purpose of exploring and exploiting, conserving, and managing the natural resources, whether living or nonliving.”¹⁹ In exercising these rights in the EEZ, the coastal state may “take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention.”²⁰ The main point of contention in the EEZ around the Senkakus is fishing rights, and problems arise when Chinese fishing boats enter the EEZ under the protection of Chinese

¹⁷ Police Duties Execution Act, Article 7 (1) and (2).

¹⁸ “Coast Guard Patrol Boat Shot At near Takeshima by South Koreans,” reported in the *Asahi Shimbun*, July 13, 1953, evening edition, page 1.

¹⁹ UNCLOS, Article 56, paragraph 1.

²⁰ UNCLOS, Article 73, paragraph 1.

surveillance vessels.²¹

The Japan-China agreement on cooperative fisheries management signed in 1997 provides that the nationals and fishing boats of the two states may operate in each other's EEZ (Article 2, paragraph 1), and stipulates reciprocal implementation and enforcement procedures (Articles 3–5). The reciprocal measures do not apply, however, to the (a) “provisional measures zone” and (b) the area south of 27 degrees North latitude and west of 125 degrees 30 minutes East longitude south of the East China Sea (Article 6 [a] and [b]). An exchange of notes confirmed that domestic laws and regulations would not be applied in enforcing fisheries jurisdiction against the other party. The area delimited by (b) includes the waters around the Senkaku Islands.

B. Related Domestic Laws and Regulations

A foreign fishing boat wishing to operate in Japan's EEZ is required to obtain a certificate of permission or authorization from the minister of agriculture, forestry, and fisheries, in accordance with the Act on the Exercise of the Sovereign Right for Fishery, etc. in the Exclusive Economic Zone.²² Boats that violate or do not adhere to these regulations are subject to enforcement action by Japan Coast Guard officers, who may, when necessary, direct the foreign fishing boat to stop, visit, and inspect the vessel.²³ In the EEZ around the Senkaku Islands, however, the exchange of notes under the Japan-China fisheries agreement confirms that domestic laws and regulations will not be applied in enforcing fisheries jurisdiction against the ships of the flag state. The Japan Coast Guard, therefore, cannot enforce Japanese laws and regulations against Chinese fishing boats in the EEZ. As long as the boats stay clear of Japan's territorial sea, therefore, they will not be subject to enforcement action.

C. Response to Illegal Operations

A conflict in the exercise of jurisdiction would result if Japan Coast Guard officers were to take enforcement action, say, against Chinese fishing boats operating in Japan's EEZ without a permit, as required in Article 5 of the EEZ Sovereign Rights

²¹ China would no doubt assert that it has jurisdiction over the EEZ, so Japanese fishing boats should obey Chinese instructions and that Japanese patrol boats monitoring and enforcing jurisdiction in these waters are in violation of Chinese rights. Specific cases are described below.

²² Article 5, paragraph 1.

²³ Japan Coast Guard Act, Article 17, paragraph 1.

Act, and if there were also Chinese government vessels in the vicinity seeking to enforce their jurisdictional rights as a flag state in the high seas. In this case, Japan's sovereign rights over fishery resources as a coastal state would naturally supersede China's jurisdictional rights in the high seas.²⁴

After all, a coastal state enjoys more rights in its EEZ than other states in the high seas. But if China, too, happens to claim the waters as its own EEZ, Japanese and Chinese assertions would clash, and there would be no easy way to resolve this issue.

Indeed, at around 10:50 a.m. on September 20, 2012, in the contiguous zone 43 kilometers north-northwest of Kuba Island, three crewmembers of the *Yuzheng-204*, belonging to the China Fisheries Law Enforcement Command, made an onboard inspection of a Chinese fishing boat. The same surveillance ship inspected three other boats at around 12:40 p.m. in Japan's EEZ 63 kilometers north of the island, and the *Yuzheng-201* took similar action against three additional fishing boats at 1:30 p.m. in the EEZ 64 kilometers north-northwest of Kuba Island. These inspections were also reportedly conducted on July 13. Japanese patrol boats issued a radio transmission warning to the Chinese vessels, saying that the waters are part of Japan's EEZ and that Chinese vessels may not enforce fisheries jurisdiction there. The Chinese side retorted that they were operating in China's own EEZ and that their activities were legitimate, adding that they would not abide by the Japanese instructions.²⁵ The Japanese Ministry of Foreign Affairs lodged a protest against the Chinese embassy in Tokyo, but the Chinese side refused to comply. These incidents occurred in waters covered by the Japan-China fisheries agreement, under which the parties confirmed that domestic laws and regulations would not be applied in enforcing fisheries jurisdiction against nationals and fishing boats of the other party. Were the Japan Coast Guard officers asserting Japan's jurisdictional rights despite the fisheries agreement in reproaching China's actions against unauthorized operations by Chinese fishermen in Japan's EEZ?

I would note that there have been reports of Chinese activities that have clearly been in breach of the bilateral fisheries agreement not to enforce domestic laws on the other party. Japanese fishermen operating in the EEZ around the Senkakus have been repeatedly harassed by Chinese surveillance ships, compelling fishermen in

²⁴ See note 6.

²⁵ *Asahi Shimbun*, September 21, 2012, page 2.

Okinawa to avoid these waters. Some weekly magazines have even alleged that Chinese maritime authorities are able to clamp down on Okinawan fishing activities because they have been tipped off by spies.²⁶

Another factor to consider is the timing of jurisdictional activities. Should China try to intervene when Japan Coast Guard officers are already enforcing jurisdiction, the Japanese side can be said to take precedence in the light of international comity.²⁷ But in the case where China claims sovereign rights over its own EEZ—rather than rights of the flag state in the high seas—would the timing factor be of much legal significance? Around the Senkaku Islands, the exchange of notes supplemental to the bilateral fisheries agreement would have a large bearing.

An incident between Japan and South Korea offers an instructive precedent. Late at night on May 31, 2005, the South Korean fishing boat *Sinpung-ho* was spotted hovering in Japan's EEZ off the coast of Tsushima Island by the Japan Coast Guard patrol vessel *Tatsugumo*. Coast Guard officers approached the *Sinpung-ho* to investigate, but the boat ignored orders to stop and fled. After a pursuit, the *Tatsugumo* pulled alongside, enabling officers to board, but the boat continued to flee with the officers onboard—reminiscent of the 1961 incident in which the Scottish fishing boat *Red Crusader*, arrested by a Danish frigate for fishing illegally, fled with the Danish officers who were onboard to guide the trawler to a port. The *Sinpung-ho* was seized two hours later by the Japan Coast Guard and vessels of the South Korean National Maritime Police Agency, which had been informed of the incident. In the afternoon of June 1, Japan Coast Guard officers boarded the Korean Maritime Police vessel on which the fishing boat's skipper was also aboard and negotiated with Korean officials. By 5:30 p.m. on June 2, the skipper admitted to fishing illegally, signed papers promising to pay a ¥500,000 bond, and was released. The incident came to a close when Coast Guard vessels left the waters after 6 p.m.²⁸ Leaving aside the question of whether or not this was a satisfactory resolution, the very fact that it could be settled at all was due to the exchange that had regularly been carried out between the maritime law enforcement authorities of the two countries and the fact that the incident took place in waters that were not disputed.

²⁶ One example is the October 4, 2013, issue of *Shukan Post*.

²⁷ See note 6.

²⁸ *Asahi Shimbun*, June 3, 2005, pp. 1 and 39. The article notes that the resolution of the incident was welcomed by South Korean diplomatic sources for avoiding an open clash and resulting in an amicable solution, while Japanese fishing interests and the Seventh Regional Coast Guard Headquarters in Kitakyushu expressed dissatisfaction.

On the question of whether weapons can be used against an illegally operating private boat that refuses to obey orders to stop, international commentary on such “classic” incidents as those involving the *I’m Alone* (report issued in 1935), *Red Crusader* (1962), and *Saiga* (No. 2) (1999) has not endorsed their use and, rather, has called for caution.²⁹ If, as implied by such reports, the use of weapons is to be avoided against private boats, then even greater caution is required for foreign government ships, which enjoy immunities. The use of weapons would be justified for self-defense purposes if the foreign ship fires first, of course, and there may be other cases when the use of weapons is required to perform one’s duties.³⁰ It goes without saying, though, that weapons must be used in accordance with Article 20 of the Japan Coast Guard Act, which, as stipulated in Article 7 of the Police Duties Execution Act, prohibits their use in ways that “inflict injury upon any person” unless there is no other means but to do so. International law calls for similar caution, so judgments must be made with great care.³¹

4. Root Causes of the Problem

What are the root causes of the seemingly overlapping claims to jurisdictional rights in the East China Sea, which I have briefly described above? Japan’s official position is that the Senkaku Islands are Japanese territory and that the territorial sea and EEZ around the islands, consequently, belong to Japan. China, meanwhile, asserts that the islands have historically been part of China and that the surrounding waters have been under Chinese jurisdiction. These conflicting claims are the source of the “competing” jurisdictions today. How can this situation of two overlapping claims be addressed in legal terms?³²

²⁹ See the *Reports of International Arbitral Awards*, vol. 3, p. 1609, for the *I’m Alone* incident, 35 ILR 485 for the *Red Crusader* incident, and ITLOS Reports 1999 for the *Saiga* incident.

³⁰ See note 17 and corresponding body text.

³¹ International rulings on and deliberations of these incidents criticized the use of weapons that paid inadequate attention to human lives. A good summary of these points are contained in Murakami Rekizo, “Ryokai keibi to kaiyoho” (Policing the Territorial Sea and the Law of the Sea), in Mizukami Chiyuki, ed., *Gendai no kaiyoho* (Contemporary Law of the Sea) (Tokyo: Yushindo, 2003), p. 165.

³² Territorial issues regarding the Senkaku Islands require a much fuller analysis. Fortunately, Professor Ozaki Shigeyoshi has made an extensive and detailed examination. Among his recent publications are his three-part “Senkaku shoto to Nihon no ryoyuken (shoron)” in *Tosho Kenkyu Janaru*, inaugural issue (Part 1), vol. 2, no. 1 (Part 2), and vol. 2, no. 2 (Part 3) (available in English on the *Review of Island Studies* website as “The Senkaku Islands and Japan’s Territorial Rights”). The issue is also examined in a paper outlining the “Peaceful Use of the Sea and the Rule of Law”

A. The Basis of Each Country's Territorial Claims

To summarize each country's claims, Japan incorporated the Senkaku Islands into Okinawa Prefecture by a cabinet decision on January 14, 1895, following a 10-year study to confirm that the islands were unclaimed by any other country. The decision was prompted by the activities of Koga Tatsushiro and several other Japanese entrepreneurs, who began dispatching fishermen from Kumamoto, Kagoshima, and Okinawa to the islands in the late nineteenth century to collect feathers and marine products. No country at the time—and none since then—has challenged the cabinet decision, and the islands have been administered as part of Japan since then.³³ The decision was made very cautiously, as demonstrated by the great consideration shown to Qing leaders in China in the letters sent by minister of internal affairs and foreign affairs.³⁴

Chinese claims, meanwhile, are largely based on references to the island of “Diaoyu” (Uotsuri) in historical documents, from which conclusions were drawn that the island had been discovered by the Chinese.³⁵ China claims that Japan “stole” the

(forthcoming), which the author presented at the June 2013 symposium on the Peaceful Use of the Sea and Maritime Co-operation in the Chinese city of Hangzhou, sponsored by Zhejiang University's Ocean Law and Governance Research Center. The arguments presented here are largely based on this paper.

³³ The first to launch business operations in the Senkakus was Koga Tatsushiro, who sent fishermen to Uotsuri and other islands in 1884. The following year, he had the fishermen land on the islands to collect feathers and marine products on an experimental basis, and these operations were continued from 1886 onward. In 1891, Isawa Yakitaro of Kumamoto Prefecture visited Uotsuri and Kuba Islands with fishermen from Okinawa to collect marine products and feathers. In 1893 men from Kagoshima visited Kuba Island, and others from Kumamoto sailed to Uotsuri and Kuba Islands. Koga applied to the governor of Okinawa Prefecture for a permit to develop the islands in 1894, but this was rejected on the grounds that jurisdiction of the islands at that time was unclear. This prompted the cabinet decision to incorporate the islands into Okinawa Prefecture in 1895. Koga himself landed on Uotsuri later that year to inspect the premises and reapplied for a permit following annexation. The application was again rejected for procedural reasons, but in April 1896, a decision was made to rent the islands to Koga for a period of 30 years without a fee. These historical facts are documented in Okuhara Toshio, “Senkaku Retto to Nihon no ryoyuken: Ryodo hennyu no shiteki kosatsu” (The Senkaku Islands and Japan's Territorial Rights: Analysis of Historical Documents concerning Annexation), *Junkan Sekai to Nippon*, no. 234 (published by Naigai News, April 15, 1979), pp. 21–37.

³⁴ *Ibid.*, Okuhara, pp. 12–21. There is a need to clearly point out China's faulty rhetoric that the Senkakus are included in the Cairo Declaration and were “stolen” by Japan. They are not covered by the declaration, nor did Japan “steal” them.

³⁵ See, for example, Wu Tianying, *Kogo senzen Chogyo Ressho kizokuko: Okuhara Toshio shoshi e no*

Senkakus—along with Taiwan and the Pescadores (Penghu Islands)—in 1895, following its victory in the Sino-Japanese War of 1894–95.

It should also be noted that China began making territorial claims to the Senkaku Islands only after the Committee for Coordination of Joint Prospecting for Mineral Resources in Asian Offshore Areas (CCOP, now called the Coordinating Committee for Geoscience Programs in East and Southeast Asia), a subordinate agency of the United Nations, conducted seismic research of the East China Sea in 1968 and issued a report the following year showing that its seabed was likely to contain rich deposits of oil.³⁶ The claim is believed to have been first expressed internationally in a December 4, 1970, article in the *People's Daily*³⁷—75 years after the cabinet decision that annexed the islands into Japanese territory. The fact that China did not make a single protest for three quarters of a century is not something that can be overlooked. Before discussing China's long silence, I will examine the legal impact of Japan's 1895 decision.

B. Entitlement of Territorial Acquisition

China bases its territorial entitlement claims on having been the first to discover the Senkaku Islands. This may have been a persuasive argument in the Middle Ages, but by the Age of Discovery and the Modern period, marked by clashes between initial and subsequent discoverers, control of new territories generally passed into the hands of the more powerful of the disputants. This is legally clarified in the 1928 ruling by the Permanent Court of Arbitration on the Island of Palmas Case,³⁸ which

hansho (*Jia wu zhan qian Diaoyu lie yu gui shu kao*; Research on the Ownership of the Diaoyu Islands before the Jiawu War), trans. Mizuno Akira (supervision) and Aoyama Harutoshi (Beijing: Foreign Language Press, 1998), pp. 31–48.

³⁶ The CCOP, an intergovernmental organization created under the auspices of the UN Economic and Social Commission for Asia and the Pacific, conducted seismic research of the East China Sea in the fall of 1968 and issued a report the following May. It pointed to a strong possibility that the continental shelf between Taiwan and Japan could contain one of the world's richest deposits of oil. K.O. Emery, et al., "Geological Structure and Some Water Characteristics of the East China Sea and the Yellow Sea", *CCOP Technical Bulletin*, vol. 2 (1969), p. 41.

³⁷ "Dui Zhongguo he Chaoxian de you yi xin de qinlue zuixing Meiri fandongpai yinmou lueduo Zhongchao haidi ziyuan," *Renmin Ribao* (*People's Daily*), December 4, 1970, page 5.

³⁸ The 1928 arbitration on the Island of Palmas case is held in high regard among international law specialists as commentary on title to territorial sovereignty, with some singling it out as the most outstanding contribution ever to international law. See Hazel Fox, "Arbitration," *International Disputes: The Legal Aspects* (Issued by A Study Group of the David Davies Memorial Institute of International Studies, Professor Sir Humphrey Waldock, Chairman) (London: Europa

notes: “It is admitted by both sides [that is, the United States and the Netherlands] that international law underwent profound modifications between the end of the Middle-Ages and the end of the 19th century, as regards the rights of discovery and acquisition of uninhabited regions or regions inhabited by savages or semi-civilised peoples.”³⁹

C. Doctrine of Intertemporal Law

The ruling can be said to be premised on the doctrine of intertemporal law, as it refers to the “profound modifications” in international law since the Middle Ages regarding the rights of territorial discovery and acquisition. This observation is included not as a comment by the arbitrator but as having been “admitted by both sides” of the dispute to confirm the state practice in this matter. The ruling further notes: “Both Parties are also agreed that a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled.”⁴⁰ The principle of intertemporal law assumes that laws evolve over time and demonstrates that past legal acts should not be judged with contemporary legal yardsticks.

D. Legal Effect of Discovery

Having confirmed the above, the ruling then comments on the legal effect of discovery: “However, according to the view that has prevailed at any rate since the 19th century, an inchoate title of discovery must be completed within a reasonable period by the effective occupation of the region claimed to be discovered.”⁴¹ And further, “an inchoate title could not prevail over the continuous and peaceful display of authority by another State; for such display may prevail even over a prior, definitive title put forward by another State.”⁴² “For these reasons,” the ruling adds, “discovery alone, without any subsequent act, cannot at the present time suffice to prove sovereignty over the Island of Palmas.”⁴³ This verdict has, without doubt, since become the key legal benchmark for resolving entitlement questions in

Publications, 1972), p. 109.

³⁹ “The Island of Palmas Award,” April 4, 1928, *Reports of International Arbitral Awards*, vol. 2, p. 845.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*, 846.

⁴² *Ibid.*

⁴³ *Ibid.*

territorial acquisition.⁴⁴

Applied to the Senkaku issue, then, the Island of Palmas case amply demonstrates that claims of historical “discovery” do nothing to undermine the appropriateness of Japan’s 1895 annexation, which was approved after a thorough check to confirm that the islands were not under the effective control of any country. The Senkakus were *not* acquired along with Taiwan and the Penghu Islands in the Treaty of Shimonoseki following the Sino-Japanese War of 1894–95. Thus the Chinese argument that the Senkakus were included in the 1943 Cairo Declaration—which states, “All the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and The Pescadores, shall be restored to the Republic of China”⁴⁵—is an illogical and false accusation. Even if (just for the sake of argument) Japan *had* “stolen” the Senkakus, the acquisition of new territories by victors of war was quite a common practice at the time and was tolerated under international law. Forcing a weaker state to accept asymmetrical terms in a treaty would be unacceptable today,⁴⁶ but such was the norm then, and this in itself would not invalidate such a treaty. This is another illustration of the doctrine of intertemporal law.⁴⁷ Chinese and South Korean arguments about the invalidity of treaties signed at the time totally disregard the Island of Palmas decision, which, as show above, observes: “A juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled.”

E. Protest and Acquiescence

There are some additional issues that must be addressed, including the meaning of

⁴⁴ See, for example, Robert Yewdall Jennings, *The Acquisition of Territory in International Law* (Manchester: Manchester University Press, 1963).

⁴⁵ Although Japan is not a party to the Cairo Declaration, China maintains that Japan is bound by its provisions, since Japan accepted the subsequent Potsdam Declaration, which cites the earlier statement. Aside from the formal and procedural problems in such leaps of logic, the Cairo and Potsdam statements are essentially two different documents.

⁴⁶ See Article 52 of the 1969 Vienna Convention on the Law of Treaties: “A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.”

⁴⁷ Incidentally, the South Korean claim that the Japan-Korea Protectorate Treaty of 1905 and the Japan-Korea Annexation Treaty of 1910 are invalid is also based on today’s legal standards, and both treaties, under the rules of international law at the time, were fully valid. Of course, by “valid” I do not mean that the treaties themselves are still in force. That I need to raise such obvious points is a reflection of the extent to which Chinese and South Korean criticism of Japan willfully neglects and bends legal facts.

protest under international law. Silence, in the context of international relations, is often construed as implying acquiescence, or tacit consent,⁴⁸ especially regarding measures that could be disadvantageous for one's country. Under such circumstances, one only needs to voice one's objections in order to avoid being misconstrued. Exceptions may be made, though, in cases where a disadvantaged country was not aware or informed of the measures taken. A "discovery" of new territory that is not announced internationally would be an example of other states not being given a chance to lodge a protest. A territorial claim is usually expressed through such means as a display expressing a territorial claim, the placement of a flag, or the settlement of citizens, which are unlikely to be overlooked by other, interested states. Such acts would be enough to demonstrate one's intentions to make a claim to that territory, and if another interested state maintained its silence on the matter, this would be an indication of acquiescence. Japan's control of the Senkaku Islands was clearly expressed through the issuance of business permits to Koga Tatsushiro and other entrepreneurs, who continued to ply their trade in the islands for decades. Any country with an interest in these islands would certainly have noticed the presence of business activity there and could no doubt have expressed its objections; China, though, said nothing about the islands for over three quarters of a century.

F. The Estoppel Principle

Not only does such extended silence have the legal effect of acquiescence but could also prohibit the assertion of new claims. The doctrine of estoppel, found in US and British law, might also be applied in international law. In the 1994 judgment of the International Court of Justice on the territorial dispute between Libya and Chad, Judge Bola Ajibola, in a separate opinion, cited the Alaskan Boundary case of 1903;⁴⁹ the Delagoa Bay Arbitration of 1875;⁵⁰ the Guatemala/Honduras Boundary Arbitration of 1933;⁵¹ the Grisbadarna Arbitration of 1909;⁵² and the Island of

⁴⁸ Silence can also be an expression of opposition. If a state does not particularly endorse a proposal made to a group of countries and yet feels that an objection is unnecessary, it can choose to remain silent. Such cases are seen when the proposal in question would not affect the state in an adverse way, even if left unaddressed.

⁴⁹ *Reports of International Arbitral Awards*, vol. 15, pp. 481ff.

⁵⁰ Henri La Fontaine, *Pacificisme internationale 1794–1900: Histoire documentaire des Arbitrages internationaux* (Berne: Stämpfli, 1902; The Hague/Boston/London: Martinus Nijhoff Publishers, 1997), pp. 170ff.; *British and Foreign State Papers*, vol. 66, pp. 554ff.

⁵¹ *Reports of International Arbitral Awards*, vol. 2, pp. 1307ff.

⁵² *Reports of International Arbitral Awards*, vol. 11, pp. 147ff.

Palmas Arbitration in noting, “There are many awards of international tribunals also supporting the principles of estoppel or acquiescence in the sense of silence or absence of protest.”⁵³ China’s Senkaku claims are moot in the light of its former acquiescence, expressed through silence, as they violate the principle of estoppel.

From the viewpoint of international law, then, China has forfeited any claims to the Senkakus by not raising any objections for three quarters of a century. The only plausible explanation for its subsequent territorial assertions is the publication of the CCOP report that pointed to large oil reserves under the East China Sea. Identifying the islands as a “core interest”⁵⁴ is a self-serving policy statement that has no basis in law, and in fact is a blatant challenge to the rule of law of international society.

5. Conclusion

As shown above, Japanese and Chinese enforcement jurisdiction around the Senkaku Islands only appears to overlap, since Chinese claims of jurisdictional rights are legally ungrounded. Rather, the real question raised by recent Chinese activity is the extent to which Chinese government ships can claim immunity from Japanese enforcement. Enforcement jurisdiction around an island is conferred in the territorial sea, EEZ, and surrounding continental shelf,⁵⁵ so clarifying the jurisdictional issue is a simple matter of demonstrating sovereignty.

To do otherwise would be to fall prey to Chinese rhetoric, which seeks to establish the existence of a territorial dispute by first creating the illusion of a jurisdictional conflict. Sadly, rhetoric appears to speak louder than law in international relations. Unabashed publicity campaigns undertaken in the international arena can succeed in manipulating global opinion. That Japan has repeatedly been forced to play defense on this issue is a sure sign that it has been losing a public diplomacy battle. Japan needs to turn the tables and go on the offensive by fully asserting the legal propriety of its actions. Japan must do much more to communicate the correctness of its position to the global community, meeting its each groundless Chinese accusation

⁵³ *ICJ Reports 1994*, p. 81.

⁵⁴ See note 1 and corresponding body text.

⁵⁵ The International Court of Justice’s Judgment on the North Sea Continental Shelf Cases of February, 20, 1969, states, “[T]he land dominates the sea.” *ICJ Reports 1969*, p. 51. This concept had already been pointed out in the Grisbadarna Arbitration of 1909, which notes: “[M]aritime territory is an essential appurtenance of land territory.” *Reports of International Arbitral Awards*, vol. 11, p. 159.

with legally convincing counterarguments.

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