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OKINAWA TROUGH AND THE SENKAKU ISLANDS
SOVEREIGNTY DISPUTE IN THE EAST CHINA SEA
DELIMITATION OF THE CONTINENTAL SHELF.

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 26/02/2018

An analysis of the importance of the Okinawa Trough and the Senkaku Islands sovereignty debate in the East China Sea continental shelf delimitation.

by

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Submitted in partial fulfilment of the requirements for the degree Magister Legum International Law (Coursework)

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Abstract

In the East China Sea a tiny group of islands, referred to as the Diaoyu Islands by China and the Senkaku Islands by Japan (the Senkaku Islands), is the subject of a territorial dispute between China and Japan. The sovereignty debate over the Senkaku Islands was ignited in recent years when China identified the islands as ‘baselines’ for its continental shelf claim in the East China Sea. Specific issues discussed herein include *inter alia* the importance of the Okinawa Trough in the delimitation dispute, both scientifically and legally, furthermore, the questions whether the Senkaku Islands were *terra nullius* when Japan annexed them in 1985 and whether Japan acquired title through acquisitive prescription. The dissertation identifies and analyses these issues and others involved in the delimitation and sovereignty disputes with reference to current international law, as interpreted and applied by international judicial authorities.

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Chapter 1:

Introduction

Background

International law does not provide an easy solution to boundary delimitation on the continental shelf of the East China Sea and in fact can be used to support several competing positions. The present desire of the countries bordering on the East China Sea to extend their sovereignty over as much of the shelf as possible probably is due to recent reports of large oil deposits beneath the sea floor. In 1969 a committee of the Economic Commission for Asia and the Far East stated that the continental shelf of the East China Sea "might contain one of the most prolific oil and gas reservoirs of the world, possibly comparing favorably with the Persian Gulf.", The probability of oil under the East China Sea necessitates solving the complicated problem of sovereignty over the shelf.¹

a. Physical features of the continental shelf in the East China Sea

Comprising a total area of approximately 480 000 squares miles, the East China Sea is bounded on the west by the Peoples' Republic of China (China), on the north by the southern tip of the Republic of Korea (South Korea), on the east by the Ryuku Island chain and the major Japanese island of Kyushu, and on the south by Taiwan.² Other than the Ryuku Islands along its eastern edge and fringe islands along the coasts of bordering states, the East China

¹ Allan DR and Mitchell H 'The Legal Status of the Continental Shelf of the East China Sea' (1972) *Oregon Law Review* 51 at 790.

² *Supra* n 1.

Sea is free of islands with the important exception of a small group of drying rocks, islets, and islands commonly referred to as the Senkaku Gunto (Senkaku Islands).³

The seabed beneath the East China Sea has three distinct features: (i) a broad continental shelf area ranging from 150 to 360 nautical miles which stretches eastward from the coast of China; (ii) the Okinawa Trough to the east of this shelf area which reaches a depth of 1 270 fathoms and which shoals north-eastward from Taiwan toward Japan; and (iii) the Ryukyu Ridge, an elongated island-studded arc which falls away on its eastern edge to the Ryuku Trench. The sediment of the seabed strongly suggests potential petroleum deposits.⁴

b. The legal context of the continental shelf in the East China Sea

Before 1945 international law took little interest in the continental shelf.⁵ Dugard explains that the situation changed dramatically when technological advances made it possible to drill for oil and natural gas on the continental shelf.⁶ These advances first prompted legal recognition in the Truman Proclamation of 1945 in which the US government declared that ‘since the continental shelf may be regarded as an extension of the land-mass of the coastal nation and thus naturally appurtenant to it’, the US government ‘regards the natural resources of the subsoil and sea-bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control’. It added, however, that ‘the character as high seas of the waters above the

³ The Senkaku Islands, in the general vicinity of 25°45'N, 123°30'E, also are referred to variously as Senkaku Gunto, Sento Shosho, Senkaku Shoto, Senkaku Retto, Islands of Tiao-yu-t'ai, the Daito Islands, and the Diaw Islets. Lying approximately one hundred miles northeast of the Island of Formosa and in less than one hundred fathoms of water, the Senkakus include Uotsuri Shima, Tobi Se, Kitako Shima, Minamiko Shima, Okino Minami Iwa, Okino Kita Iwa, Kobi Sho, and, forty-seven miles to the east, Sekibi Sho or Raleigh Rock. Each island has several other names depending upon the state claiming sovereignty. Reference to these islands hereinafter as the ‘Senkaku Islands’ is made for convenience only and is not intended to suggest the superiority of any national claim; *ibid.*

⁴ *Ibid.*

⁵ Dugard (2011) 386.

⁶ *Ibid.*

continental shelf and the right to their free and unimpeded navigation are in no way thus affected'. A number of states⁷ followed the example of the United States and soon there was a substantial body of state practice in support of a rule granting exclusive rights of exploration and exploitation on the continental shelf to the coastal state, in turn which led to the 1958 Geneva Convention on the Continental Shelf (CSC).⁸

The CSC defines the continental shelf as 'the sea-bed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas'.⁹

Shaw provides that the CSC defined the shelf in terms of its exploitability rather than relying upon the accepted geological definition and this caused problems.¹⁰ As developing technology rapidly reached a position to extract resources to a much greater depth than 200 metres, the outer limits of the shelf were consequently very unclear.¹¹ Article 1 of the CSC was, however, regarded as reflecting customary law by the ICJ in the *North Sea Continental Shelf*¹² case.¹³

This approach has been modified by article 76(1) of the 1982 UN Convention on the Law of the Sea (UNCLOS), which provides:

the continental shelf of a coastal state comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or a distance of 200 nautical miles from the baselines from which the

⁷ Eg Argentina and El Salvador claimed not only the shelf but also the waters above and the airspace; Chile and Peru, having no continental shelf to speak of, claimed sovereignty over the seabed, subsoil and waters around their coast to a limit of 200 miles; Shaw (2003) 522.

⁸ Dugard (2011) 386.

⁹ Art 1.

¹⁰ Shaw (2003) 523.

¹¹ *Ibid.*

¹² *North Sea Continental Shelf (Germany v. Denmark/Germany v. Netherlands)* (1969) ICJ Reports pp. 29, 51.

¹³ Shaw (2003) 523.

breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.¹⁴

Where the continental margin actually extends beyond 200 miles, geographical factors are to be taken into account in establishing the limit, which in any event shall not exceed either 350 miles from the baselines or 100 miles from the 2,500-metre isobath.¹⁵ Where the shelf does not extend as far as 200 miles from the coast, natural prolongation is complemented as a guiding principle by that of distance.¹⁶ According to Shaw it is not surprising that this complex formulation has provided difficulty and, in an attempt to provide a mechanism to resolve problems, the Convention established a Commission on the Limits of the Continental Shelf.¹⁷ Article 4 of Annex II to UNCLOS provides that a coastal state intending to establish the outer limits to its continental shelf beyond 200 nautical miles is obliged to submit particulars of such limits to the Commission along with supporting scientific and technical data as soon as possible but in any case within ten years of entry into force of UNCLOS for that state.¹⁸

c. Submissions to the Commission on the continental shelf delimitation in the East China Sea and the subsequent amplification of the sovereignty dispute over the Senkaku Islands

On 11 May 2009, China and the Republic of Korea (Korea) each submitted to the Secretary-General of the United Nations (Secretary-General) preliminary information indicative of the

¹⁴ Dugard provides that the new outer limit of the continental shelf contained in the UNCLOS probably reflects customary law; Dugard (2011) 387.

¹⁵ Art 76(4), (5), (6), (7), (8) and (9).

¹⁶ Shaw (2003) 524.

¹⁷ *Ibid.*

¹⁸ *Id.* at 525.

outer limits of the continental shelf beyond 200 nautical miles in the East China Sea, in order to satisfy the ten-year time period¹⁹ referred to in Article 4 of Annex II to UNCLOS.²⁰

China's submission referred to the Senkaku Islands as "baselines". This ignited the sovereignty dispute between China and Japan over these Islands, as Japan responded to the Commission stating that it is unacceptable as 'there is no doubt that the Senkaku Islands are an inherent part of the territory of Japan in light of historical facts and based upon international law'.²¹

2 Research problem

Paragraph 5(a) of Annex 1 of the Rules of Procedure of the Commission on the Limits of the Continental Shelf provides that 'in cases where land or maritime disputes exist, the Commission shall not consider and qualify a submission made by any of the States concerned in the dispute. However, the Commission may consider one or more submissions in the areas under dispute with prior consent given by all States that are parties to such a dispute'.

In the area of the East China Sea, which is the subject to the submissions as provided in the background, the delimitation of the continental shelf is yet to be determined and Japan has

¹⁹ Pursuant to the decision of the Eleventh Meeting of States Parties to UNCLOS, for those States parties for which the LOSC entered into force prior to 13 May 1999, including China and Korea, the deadline for submission was 13 May 2009. In 2008, the Eighteenth Meeting of States Parties to the LOSC adopted the document SPLOS/183, deciding that the ten-year time period may be satisfied by submitting preliminary information indicative of the outer limits of the continental shelf beyond 200 nautical miles, and a description of the status of preparation and intended date of making a submission. It was pursuant to these three documents that China and Korea submitted their respective preliminary information.

²⁰ Jianjun G 'The Okinawa Trough Issue in the Continental Shelf Delimitation Disputes within the East China Sea' (2010) 9 *Chinese Journal of International Law* at 143.

²¹ *Note verbale* by Japan dated 28 December 2012 http://www.un.org/Depts/los/clcs_nv_jpn_2012.htm (accessed online 18 March 2017).

expressly stated in Note Verbale dated 28 December 2012 to the Commission, that it does not give the Commission consent for consideration of any such submission.

The legal problem is presented in twofold: (1) the outer limits of the continental shelf beyond 200 nautical miles in the East China Sea submitted by China and Korea are located in the same submarine feature i.e. the Okinawa Trough, and herein itself lies the question of the consideration to be given under the principle of natural prolongation in this dispute; (2) whilst submissions were made to the Commission a secondary dispute came afloat i.e. the sovereignty debate over the Senkaku Islands.

3 Research theme

This dissertation examines the territorial dispute between China, Japan and South Korea in the East China Sea and includes an analysis of the aforementioned states' claims regarding (i) the Continental Shelf Boundary, with specific focus on the importance of the Okinawa Trough, (ii) the sovereignty debate over the Senkaku Islands, which was ignited in the submissions to the Commission regarding the delimitation of the continental shelf, is analyzed. Furthermore, the implications of the South China Sea Arbitration Award for the Senkaku Islands and the legality of China's proclamation of an ADIZ in the East China Sea are also examined.

4 Limitations

The mini-dissertation is limited to the claims of China, Japan and Korea regarding the delimitation of the continental shelf in the East China Sea. Furthermore, the sovereignty debate over the Senkaku Islands is limited to mainly the claims by Japan and China.

5 Methodology

The method of research will be the desk-top literature study. The literature study consists of:

- a. Scholarly texts on international law regarding the basic applicable principles of territory and law of the sea;
- b. Journal articles specifically focused on the dispute in the East China Sea;
- c. Submissions by states (*notes verbale*) to the Commission on the Continental Shelf;
- d. UNCLOS, The Convention on the Continental Shelf, other treaties that have been concluded in the past concerning the disputed territory and The Chicago Convention.
- e. ICJ case law and relevant decisions by other judicial bodies concerning territorial disputes and related principles; and
- f. The websites of several international law societies' blogs.

6 Research questions

This dissertation examines the legal problems presented by the territorial dispute over the Senkakus and the continental shelf of the East China Sea and includes the following research questions:

- i. What is the basis of the claims by the states concerned to the continental shelf boundary and what are the applicable principles of international law?
- ii. Were the islands unoccupied territory when Japan annexed them in 1895 and did Japan ever acquire title under the doctrine of acquisitive prescription?
- iii. Did the Allies make a lawful determination in favour of Japanese title after World War II in accordance with the Potsdam Declaration and Instrument of Surrender and is the US obligated to support Japan by defending the Senkaku Islands against China?

- iv. What are the implications of the South China Sea Arbitration Award for the Senkaku Islands and did China breach international law with its proclamation of an ADIZ in the East China Sea?

7 Chapter outline

Chapter 2 addresses continental shelf claim which moved the sovereignty dispute to the forefront and examines two main aspects to the controversy over the Okinawa Trough between the States bordering the East China Sea: (i) the scientific aspect i.e. whether the Okinawa Trough disrupts the unity of the continental shelf in the East China Sea, and (ii) the legal aspect i.e. whether geophysical factors should be considered in the delimitation between opposite states where the distance between their coasts is less than 400 nautical miles. Chapter 3 further aims to establish why the Okinawa Trough issue is so important and critical to the Senkaku Islands debate.

Chapter 3 addresses two fundamental legal questions in the sovereignty debate: i.e. (i) whether the islands were *terra nullius* when Japan annexed them in 1895; and (ii) if Japan could have acquired title under the doctrine of acquisitive prescription if the islands in fact prove not be *terra nullius* in 1895. Furthermore, chapter 3 examines China's proclamation of an ADIZ (air defence identification zone) in the East China Sea which closely follows the eastern edge of China's continental shelf claim and includes the airspace over the Senkaku Islands. Chapter 4 asks if China's proclamation of an ADIZ in the East China Sea is legal.

Chapter 4 seeks to determine what the possible implications of the recent *South China Sea Arbitration Award* are for the Senkaku Islands.

Chapter 5 concludes the dissertation and finds that the sovereignty dispute over the Senkaku Islands hinges on the doctrines of occupation and acquisitive prescription and that Japan seemingly has a more persuasive claim because Japan has more doctrinal options in presenting its case. Furthermore, as long as the sovereignty dispute continues, the continental shelf claim will not be finalised. It is also concluded that China's proclamation of an ADIZ, although controversial, is found to be legal. Finally, the implications of the *South China Sea Arbitration Award* is found to be of fundamental value as it takes the debate to a more preliminary question i.e whether the Senkaku Islands are islands or rocks?

Chapter 2:

The Okinawa Trough

1 Introduction

China and Japan dispute the maritime delimitation of the continental shelf surrounding the disputed Senkaku Islets. The outer limits of the continental shelf beyond 200 nautical miles in the East China Sea submitted by China and Korea are located in the same submarine feature i.e. the Okinawa Trough.²² This chapter analyses importance of the Okinawa Trough within the maritime delimitation dispute..

2 Submissions to the Commission on the continental shelf delimitation in the East China Sea and the importance of the Okinawa Trough

The Okinawa Trough, lying in the east of the East China Sea, runs south from the Japanese island of Kyushu along the Japanese chain of Ryukyu Islands.²³ The distance between the axis of the Okinawa Trough and the coasts of China and Korea is more than 200 nautical miles, while the Trough is well within the 200 nautical mile distance from the coast of Japan.²⁴ The Okinawa Trough is regarded as one of the most contentious issues in the continental shelf delimitation among the three northeast Asian countries.²⁵ Jianjun provides that there are two aspects to the controversy over the Okinawa Trough between the states bordering the East China Sea: (i) the scientific aspect concerns whether the Okinawa Trough

²² The Trough is the most striking geophysical feature of the seabed of the East China Sea in terms of its size and depth. It is about 900 kilometres in length and 36-150 kilometres in width and a maximum depth of 2322 metres, while the average depth in the East China Sea is only about 370 metres. Geologically speaking, the Okinawa Trough is a back-arc basin formed by extension of the continental lithosphere behind the Ryukyu trench-arc system; *id.* at 146.

²³ *Id.* at 145.

²⁴ *Ibid.*

²⁵ *Ibid.*

disrupts the unity of the continental shelf in the East China Sea, and (ii) the legal aspect concerns whether geophysical factors should be considered in the delimitation between opposite states where the distance between their coasts is less than 400 nautical miles.²⁶ The two aspects of the debate concerning the Okinawa Trough are related to each other in the sense that only if the Okinawa Trough scientifically disrupts the unity of the continental shelf in the East China Sea can it be considered in the maritime delimitation, for ‘the rule of natural prolongation can be effectively invoked for purposes of delimitation only where there is a separation of continental shelves’, and ‘if the continental shelf is assumed to be continuous, in the present state of international law no characteristic could validly be invoked to support an argument based on the rule of natural prolongation and designed to justify a delimitation establishing a natural separation’.²⁷

3 The scientific question

The first question in Jianjun’s formulation regarding the Okinawa Trough is scientific, that is whether the Okinawa Trough disrupts the unity of the continental shelf in the East China Sea, and therefore constitutes the natural boundary between the continental shelves of China and Korea on the one hand and the continental shelf of Japan on the other.²⁸

According to Article 76 of UNCLOS, wherever the continental margin extends beyond 200 nautical miles from the baselines of the territorial sea, the coastal State shall delineate the outer limits of its continental shelf pursuant to the following procedure.²⁹ Firstly, the foot of the continental slope (FOS) should be determined. In the absence of evidence to the contrary,

²⁶ *Ibid.*

²⁷ *Guinea/Guinea-Bissau Maritime Delimitation Case* (Decision of 14 February 1985) 25 ILM 252, par 116-117.

²⁸ Jianjun (n 20) at 148.

²⁹ UNCLOS art 76.

the FOS ‘shall be determined as the point of maximum change in the gradient at its base’.³⁰ Secondly, the fixed points comprising the outer limits of the continental shelf should be established by the application of the two formulas provided in paragraph 4(a) of Article 76: the 1 percent sediment formula (the Gardiner or Irish Formula) and/or the FOS + 60 nautical miles formula (Hedberg Formula).³¹ Third, two constraint lines should be established to ensure that the outer limits of the continental shelf do not exceed 350 nautical miles from the baselines or 100 nautical miles from the 2500 metre isobath.³² Fourth, the outer limits of the continental shelf should be delineated by straight lines not exceeding 60 nautical miles in length, connecting the fixed points defined above.³³

In the 2012 submission to the Commission, China claims that the geomorphologic and geological features show that the continental shelf in the East China Sea is the natural prolongation of China’s land territory, and ‘the Okinawa Trough is an important geomorphologic unit with prominent cut-off characteristics, which is the termination to where the continental shelf of the East China Sea extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea of China is measured’.³⁴ China invoked the provisions of article 76(4)(a)(ii)³⁵, article 76(5)³⁶ and article 76(7)³⁷ of the Convention in

³⁰ UNCLOS art 76(4)(b).

³¹ Art 76(4)(a) of UNCLOS provides that ‘for the purposes of this Convention, the coastal State shall establish the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by either: (i) a line delineated in accordance with paragraph 7 by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope; or (ii) a line delineated in accordance with paragraph 7 by reference to fixed points not more than 60 nautical miles from the foot of the continental slope’.

³² UNCLOS art 76(5).

³³ UNCLOS art 76(7).

³⁴ Submissions to the Commission on the Limits of the Continental Shelf (CLCS): Submission by the People's Republic of China dated 14 December 2012.

³⁵ Art 76(4)(a)(ii): ‘a line delineated by reference to fixed points: not more than 60 nautical miles from the foot of the continental slope’.

³⁶ Art 76(5): ‘the fixed points comprising the line of the outer limits of the continental shelf on the seabed... shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured’.

³⁷ Art 76(7): ‘the coastal State delineate the outer limits of its continental shelf, where that shelf extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by straight lines

support of its submission to delineate the outer limits of the continental shelf beyond 200 nautical miles.³⁸ China claims that the shelf of the East China Sea, together with the eastern part of the mainland of China, is tectonically viewed as a whole, because both of them hold 'the same ancient continental core'.³⁹ China provides that the interaction between the Pacific Plate and the Eurasian Plate had since the Mezoic era, gradually resulted in the formation of the tectonic framework of the East China Sea.⁴⁰ The Okinawa Trough was gradually formed by the breakup and rifting at the edge of the continental shelf of the East China Sea and China asserts that the Okinawa Trough is 'the natural termination of the continental shelf of the East China Sea'. China submits the foot of the continental slope in terms of article 76(4)(b) of the Convention is the area of sudden topographical change between the base of the steep slope of the East China Sea and the smooth upper rise of the Okinawa Trough.⁴¹ China holds that the outer limits of its continental shelf beyond 200 nautical miles does not exceed 60 nautical miles from the foot of the slope or 350 nautical miles from the baselines from which the breadth of the territorial sea is measured and draws the outer limits of the its continental shelf by connecting 10 fixed points which are the maximum water depth points of the Okinawa Trough.⁴²

According to Korea, the outer limits of the continental shelf beyond 200 nautical miles 'are located in the Okinawa Trough, where the seabed and subsoil of the East China Sea comprises a continuous continental landmass extending from Korea's coast to the limits

not exceeding 60 nautical miles in length, connecting fixed points, defined by coordinates of latitude and longitude'.

³⁸ *Supra* n 34 at 3.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ China provided a series of multi-beam bathymetric field data profiles selected from the slope of the East China Sea to the Okinawa Trough together with 12 points of maximum change of gradient on the slope in support of its definition of the foot of the slope; *id.* at 7.

⁴² *Id.* at 9.

specified in the Convention'.⁴³ Korea determined the outer edge of the continental margin by using the formula line provided in paragraph 4(a)(ii) (the Hedberg Formula) of article 76 of the Convention.⁴⁴ Korea submits the location of the FOS has been determined in accordance with paragraph 4(b) of article 76 of the Convention, using 6 points of maximum change of gradient at the base of the slope.⁴⁵ Korea further defines the final outer limits of the continental shelf beyond 200 nautical miles from the baselines of Korea with a line composed of 85 fixed points derived from the outer envelopes of 60 nautical miles from the FOS, but adjusted so as not to impinge on the territorial sea of Japan in the East China Sea.⁴⁶

Japan did not submit any scientific data in its response to neither China nor Korea's submissions to the Commission. Instead, Japan raised the provisions contained in paragraph 5 (a) of the Annex 1 of the Rules of Procedure of the Commission which provides that 'in cases where a land or maritime dispute exists, the Commission shall not consider and qualify a submission made by any of the states concerned in the dispute. However the Commission may consider ... submissions in the areas under dispute with prior consent given by all State parties to such dispute'. Japan firmly stated that since it is clear such a dispute exists and it did not render its consent for consideration by the Commission, the Commission may not consider the submissions made by China and South Korea.⁴⁷

4 The legal question

The second part of Jianjun's formulation, is the legal question: whether the Okinawa Trough should be considered in the maritime delimitation between China and Japan, or Korea and Japan, given that delimitation is to be effected between opposite states where the distance between their coasts is less than 400 nautical miles.

⁴³ Preliminary Information submitted to the CLCS by the Republic of Korea 2009.

⁴⁴ Partial Submission to the CLCS by the Republic of Korea dated 26 December 2012.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ *Note verbale* to the CLCS by Japan dated 28 December 2012 at 2.

Jianjun explains that the role of geological and geomorphological factors in continental shelf delimitation has experienced a dramatic change in the jurisprudence of the International Court of Justice (ICJ) on this subject.⁴⁸ In the 1969 *North Sea Continental Shelf* cases, the ICJ said that ‘it can be useful to consider the geology of that shelf in order to find out whether the direction taken by certain configurational features should influence delimitation because, in certain localities, they point-up the whole notion of the appurtenance of the continental shelf to the State whose territory it does in fact prolong’.⁴⁹ Furthermore, the ICJ ruled that ‘delimitation is to be effected by agreement in accordance with equitable principles ... in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other’.⁵⁰ Thus, non-encroachment on the natural prolongation principle was taken as one important criterion for the equitableness of the delimitation.⁵¹ In the 1982 *Tunisia/Libya* case, the ICJ retreated from its position in the 1969 case and emphasized that ‘the two considerations - the satisfying of equitable principles and the identification of the natural prolongation - are not to be placed on a plane of equality’.⁵² On the other hand, the ICJ still held that ‘identification of natural prolongation may, where the geographical circumstances are appropriate, have an important role to play in defining an equitable delimitation, in view of its significance as the justification of continental shelf rights in some cases’.⁵³ Later in the judgment, the ICJ continued that ‘certain geomorphological configurations of the sea-bed, which do not amount to such an interruption of the natural prolongation of one Party with regard to that of the

⁴⁸ Jianjun (n 20) at 161.

⁴⁹ *Supra* n 12 at par 95.

⁵⁰ *Supra* n 12 at par 110.

⁵¹ Jianjun (n 20) at 162.

⁵² *Continental Shelf (Tunisia v Libya)* (1982) ICJ Reports 18, par 44.

⁵³ *Supra* n 180.

other, may be taken into account for the delimitation, as relevant circumstances characterizing the area'.⁵⁴

However, in the 1985 *Libya/Malta* case, the ICJ seemingly overrode its jurisprudence that had recognized the relevance of geophysical characteristics of the area of delimitation in the continental shelf delimitation.⁵⁵ According to the Court, 'to rely on this jurisprudence would be to overlook the fact that where such jurisprudence appears to ascribe a role to geophysical or geological factors in delimitation, it finds warrant for doing so in a regime of the title itself which used to allot those factors a place which now belongs to the past, in so far as sea-bed areas less than 200 miles from the coast are concerned'.⁵⁶ In the view of the ICJ, 'since the development of the law enables a State to claim that the continental shelf appertaining to it extends up to as far as 200 miles from its coast, whatever the geological characteristics of the corresponding sea-bed and subsoil, there is no reason to ascribe any role to geological or geophysical factors within that distance either in verifying the legal title of the states concerned or in proceeding to a delimitation as between their claims'.⁵⁷ In the 2009 *Romania/Ukraine* case the ICJ held that when called upon to delimit the continental shelf or exclusive economic zones, or to draw a single delimitation line the Court proceeds in defined stages: first, the Court will establish a provisional delimitation line, where delimitation between adjacent coasts is concerned, an equidistance line will be drawn unless there are compelling reasons that make this unfeasible in the particular case and as far as opposite coasts are concerned, the provisional delimitation line will consist of a median line between

⁵⁴ *Supra* n 62 at par 68.

⁵⁵ *Jianjun* (n 20) at 162.

⁵⁶ *Continental Shelf (Libya v. Malta)* (1985) ICJ Reports 13 par 39.

⁵⁷ *Supra* n 56 at par 40.

the two coasts.⁵⁸ Jianjun provides that this implies that the ICJ will not consider the characteristics of the seabed in the continental shelf delimitation between opposite coasts.⁵⁹

The ICJ noted in the *Tunisia / Libya* case that the definition of the continental shelf in Article 76⁶⁰ consists of two parts, employing different criteria: according to the first part the natural prolongation of the land territory is the main criterion; in the second part of the paragraph, the distance of 200 nautical miles is in certain circumstances the basis of the title of a coastal State.⁶¹ The ICJ however, changed its attitude on this issue dramatically in the *Libya/Malta* case, where the Court held that ‘greater importance must be attributed to elements, such as distance from the coast’, and ‘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 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’.⁶² Although the ICJ declared that this is not to suggest that the idea of natural prolongation is now superseded by that of distance, but rather, in the words of Judge Oda, ‘the distance criterion has replaced that of geomorphology in all respects save in regard to the outer continental shelf between the 200-mile and 350-mile limits’.⁶³

However, Jianjun provides that such an interpretation is incorrect, because it is not consistent with the plain words in paragraph 1 of Article 76.⁶⁴ According to paragraph 1, the application

⁵⁸ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)* (Judgment of 3 February 2009) par 115-116 .

⁵⁹ Jianjun (n 20) at 163.

⁶⁰ Art 76(1) ‘the continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance’.

⁶¹ *Supra* n 62 at par 48.

⁶² *Supra* n 56 at par 33.

⁶³ *Supra* n 56 at par 61.

⁶⁴ Jianjun (n 20) at 165.

of the distance criterion is not to all ‘those areas ... situated at a distance of under 200 miles from the coasts in question’,⁶⁵ but limited to the areas ‘where the outer edge of the continental margin does not extend up to the 200 nautical mile distance’ from the baselines.⁶⁶ Jianjun points out that there exists substantial difference between these two situations. While the latter refers to the narrow-margin states, the former includes narrow-margin states as well as the areas within the 200 nautical mile distance of wide-margin states.⁶⁷ As far as the narrow-margin states are concerned, the only legal basis for them to claim a 200 nautical mile continental shelf is the distance criterion, and the natural prolongation concept seems of no use to their claims.⁶⁸ In such a case, according to Jianjun, the position held in the *Libya/Malta* case that ‘title depends solely on the distance from the coasts of the claimant states’, and ‘the geological or geomorphological characteristics of those areas are completely immaterial’⁶⁹ is correct.⁷⁰ However, he continues to state that to apply this argument to those areas situated at a distance of under 200 miles from the coasts of a wide margin State may be to confront some serious challenges.⁷¹ Firstly, according to this argument, where the continental margin extends beyond 200 nautical miles from the shore, the coastal State concerned has to divide its title to the continental shelf into two parts: distance criterion for the continental shelf within the 200 nautical mile distance and the natural prolongation principle for the outer continental shelf.⁷² Jianjun raises the question why such a State cannot, according to the first part of paragraph 1 of Article 76, depend solely on the natural prolongation principle to claim the whole continental shelf up to the outer edge of the continental margin,⁷³ just as a narrow-margin State depends solely on the distance criterion to justify its claim to a 200 nautical mile

⁶⁵ *Supra* n 56 at par 39.

⁶⁶ UNCLOS art 76(1).

⁶⁷ Jianjun (n 20) at 165.

⁶⁸ *Ibid.*

⁶⁹ *Supra* n 56 at par 39.

⁷⁰ Jianjun (n 20) at 165

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ Having regard to the rule that the outer limits of the continental shelf cannot exceed 350 nautical miles from the baselines or 100 nautical miles from the 2500 metre isobaths; UNCLOS art 76(5).

continental shelf?⁷⁴ The practice of states until now with respect to establishment of the outer limits of the continental shelf beyond 200 nautical miles does not support such a division approach.⁷⁵ All of these states rely solely on the natural prolongation principle to prove their rights to the continental shelf from their shores up to the outer edge of the continental margin.⁷⁶ Secondly, such a division approach is not permissible by the definition of natural prolongation either, which requires the continuous, unbroken extension of the landmass of the coastal states from the land to the outer edge of the continental margin.⁷⁷ Thus, according to Jianjun, where the continental margin extends beyond 200 nautical miles from the shore, entitlement to the whole continental shelf, including the part within the 200 nautical mile distance and the part beyond that distance, is solely the natural prolongation principle, and the distance criterion has no role to play in such a situation.⁷⁸

Jianjun argues that the natural prolongation and distance criteria are two bases for entitlement provided by UNCLOS for the wide-margin states and narrow-margin coastal states, separately.⁷⁹ It follows that whether the distance criterion confers title to a given area of continental shelf depends not on the distance between the area and the coast in question, but on the character of the continental margin in question.⁸⁰ For the narrow-margin states, the title to a 200 nautical mile continental shelf depends solely on the distance criterion, while for the wide-margin states, the title depends solely on the natural prolongation principle.⁸¹ In this sense, as the arbitral tribunal in the *Guinea/ Guinea-Bissau* case put it, the rule of distance reduced the scope of the rule of natural prolongation ‘by substituting it in certain

⁷⁴ Jianjun (n 20) at 165.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ *Id.* at 166.

⁸¹ *Ibid.*

circumstances specified in' paragraph 1 of Article 76⁸² and 'there is neither priority nor precedence' between them.⁸³ However, they are not 'complementary', as the ICJ said,⁸⁴ but, as per Judge Oda, 'radically alternative' to each other,⁸⁵ because a State will not apply both of them to claim the same area of continental shelf from the same coast.⁸⁶

At last, it will be the primary scientific question that will dictate the final legal outcome because only if the Okinawa Trough scientifically disrupts the unity of the continental shelf in the East China Sea can it be considered in the maritime delimitation, for 'the rule of natural prolongation can be effectively invoked for purposes of delimitation only where there is a separation of continental shelves', and 'if the continental shelf is assumed to be continuous, in the present state of international law no characteristic could validly be invoked to support an argument based on the rule of natural prolongation and designed to justify a delimitation establishing a natural separation'.⁸⁷ However, the difficulty is that the disputant states cannot reach an agreement on the exact scientific character of the Okinawa Trough.⁸⁸ *Ipsa facto* it seems a determination by the Commission on the scientific nature of the Okinawa Trough will bring clarity on the matter, although these recommendations will be restricted to the scientific matters and without prejudice the legal positions of the disputant states to the maritime delimitation, it is clear that the science of the matter will be of substantial value for the disputant states when considering the merits of the case.⁸⁹

5 Implications of the Okinawa Trough in the delimitation dispute

⁸² *Supra* n 27 at par 115.

⁸³ *Supra* n 27 at par 116.

⁸⁴ The ICJ observed that 'the concepts of natural prolongation and distance are therefore not opposed but complementary' *supra* n 56 at par 343.

⁸⁵ Par 61.

⁸⁶ Jianjun (n 20) at 147.

⁸⁷ *Id.* at 167; *supra* n 27 at par 116-117.

⁸⁸ Jianjun (n 20) at 147.

⁸⁹ *Ibid.*

If the Okinawa Trough is proved to constitute a fundamental discontinuity between the natural prolongation of China and Korea on the one hand, and that of Japan on other hand, China and Korea can rely upon the natural prolongation principle in paragraph 1 of Article 76 of UNCLOS to claim the continental shelf as far as to the axis of the Okinawa Trough, parts of which are beyond 200 nautical miles from their respective baselines, while Japan can claim a 200 nautical mile continental shelf on the basis of the distance criterion.⁹⁰ Jianjun provides the median line between the opposite coasts concerned is not going to achieve an equitable solution, because it not only fails to divide the area of overlapping entitlements equally, but also essentially denies the right of China and Korea to claim outer continental shelf beyond 200 nautical miles, which is recognized by international law.⁹¹ However, unless the parties reach an agreement on the exact scientific nature of the Okinawa Trough, the legal relevance of this feature in the continental shelf delimitation is subject to debate. The submission of preliminary information by China and Korea to the Commission shall not be prejudicial to the delimitation matters in this area, or to the legal positions of the parties. The role of the Commission in the determination of the scientific nature of the Okinawa Trough is limited by the non-prejudice clause.⁹² The nucleus of this chapter is captured by the ICJ in the *Gulf of Maine* case, noting that ‘no maritime delimitation between states with opposite or adjacent states may be effected unilaterally by one of those states. Such delimitation must be sought and effected by means of an agreement, following negotiations conducted in good faith and with the genuine intention of achieving a positive result. Where, however, such agreement cannot be achieved, delimitation should be effected by recourse to a third party possessing the necessary competence’.⁹³

⁹⁰ *Id.* at 177.

⁹¹ *Ibid.*

⁹² *Id.* at 165.

⁹³ *Gulf of Maine case (Canada v US)* (1984) ICJ Reports, 1984, pp 246, 77 ILR.

Chapter 3: Senkaku Islands

1 Introduction

The submission prepared by China on the Limits of the Continental Shelf involves the continental shelf surrounding the Senkaku Islands. Jianjun provides that the line connecting base points A and B on the map included in the said submission, marks the location of the Senkaku Islands.⁹⁴

Allen and Mitchell explain that a state claiming the Senkaku Islands as base points for delimitation purposes gains vast new areas of continental shelf founded upon an insignificant geologic protrusion of the ocean floor.⁹⁵ The existence of islands, that are in some way related to the land mass of the primary coastal state, may place a state at an advantage *vis-a-vis* other states in continental shelf claims. However, the Senkaku Islands are subject to a territorial dispute.

This chapter addresses three key questions concerning the sovereignty debate: (i) were the Islands *terra nullius* when Japan annexed them in 1895; (ii) did Japan ever acquire title under the doctrine of acquisitive prescription; and (iii) did the Allies make a lawful determination in favour of Japanese title after World War II in accordance with the Potsdam Declaration and Instrument of Surrender? Furthermore, the question whether the United States of America (US) is obliged to support Japan in defending the Senkaku Islands against China is evaluated in paragraph 5. This chapter concludes by attempting to ascertain if the Senkaku Islands can

⁹⁴ Jianjun (n 20) at 156.

⁹⁵ Allan and Mitchell (n 1) at 812.

be utilised in the delimitation dispute and if there is a link between the Senkaku Island sovereignty dispute and the maritime delimitation dispute.

2 Were the Islands *terra nullius* when Japan annexed them in 1895?

A critical part of the sovereignty debate concerns the status of the Islands at the time of Japanese annexation in 1895. Relying on a variety of historical evidence, China contends that the Islands were Chinese territory in 1895 and had been so for centuries.⁹⁶ Japan responds to this by stating that the Islands were unoccupied territory, or *terra nullius*, as revealed by official surveys prior to annexation.⁹⁷ Scoville explains that for China, title in 1895 is a prerequisite to a valid claim today; if the Islands had been *terra nullius*, there is no plausible theory under which the Islands can now belong to China.⁹⁸ If the Islands were Chinese in 1895, however, Scoville argues that Japan might still have a valid title today if China subsequently acquiesced to Japan's effective control in accordance with the doctrine of acquisitive prescription (discussed below in paragraph 3).

Whether the Islands were *terra nullius* depends upon the doctrines of occupation and intertemporality.⁹⁹ The former holds that a state can appropriate unclaimed territory by occupying and possessing it.¹⁰⁰ The latter holds that one must judge the legality of events in light of the contemporary law at the time of their occurrence, rather than with the law in force at the time the dispute ultimately is resolved.¹⁰¹ In other words, lawful annexation by Japan requires that

⁹⁶ Scoville RM 'A Defense of Japanese Sovereignty over the Senkaku Islands' (2014) 46 *The Geo International Law Review* 586.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ *Island of Palmas Case (Netherlands v USA)* (1928) 2 R.I.A.A. at 867.

China had not already engaged in acts sufficient to appropriate the Islands under the law of occupation that existed up to 1895.¹⁰²

Previously, international law held that discovery could form the basis for occupation, but since the nineteenth century discovery alone has been an inadequate basis for sovereignty.¹⁰³ The earliest historical records appear to point exclusively to discovery by China.¹⁰⁴ From 1372 to the mid-1800s, Chinese emperors sent over twenty investiture missions to Okinawa to confer titles of authority onto successive rulers of the Ryukyu Islands, and notes from some of those missions reportedly suggest a Chinese understanding that the Senkakus were Chinese territory.¹⁰⁵ Moreover, there appears to be an absence of competing evidence of earlier discovery by Japan.¹⁰⁶ In addition, even if it is a geographical misplacement of historical context to apply European legal doctrines to conduct in East Asia during this period, Scoville explains that East Asia's *Sinocentric Order*¹⁰⁷ likely favoured Chinese authority over proximate lands not claimed by other regimes.¹⁰⁸

A more complex question, however, is whether China lost sovereignty in the nineteenth century, once the law evolved from supporting occupation by discovery to supporting occupation only upon effective possession and administration.¹⁰⁹

¹⁰² Scoville (n 97) at 587

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ *Sinocentric order*: a hierarchical model of international relations, dominated by China, which prevailed in East Asia until the weakening of the Qing Dynasty and the encroachment of European and Japanese imperialists in the second half of the nineteenth century. China stood at the centre of the system and regarded itself as the only civilization in the world; the emperor of China was regarded as the only legitimate emperor of the entire world. Surrounding countries—including Japan, Korea, Vietnam, Annam, Cambodia, Siam, Malacca and Sri Lanka— were regarded as vassals of China (definition from *New World Encyclopedia* <http://www.newworldencyclopedia.org/entry/Sinocentrism>) (accessed online on 10 May 2017).

¹⁰⁸ Scoville (n 97) at 587.

¹⁰⁹ The new doctrine prioritized the quality and volume of sovereign acts undertaken with respect to a territory and posited that the holder of original title could lose sovereignty by failing to maintain effective control. As an example of this law, one nineteenth century treatise noted that while the Dutch were the first Europeans to

Scoville suggests the best argument for Japan seems to be that China lost its original title by failing to update its conduct to occupy the Islands within the meaning of the new doctrine.¹¹⁰

An apparent insufficiency of China failing to maintain effective control over the Islands in the nineteenth century is supported by an official People's Republic of China White Paper on the dispute which mentions only an investiture mission that sailed by the Islands *en route* to Okinawa in 1866, and an official gazette from 1871 that referenced the Islands.¹¹¹

However, Scoville does acknowledge that it is difficult to predict how a court would resolve Japan's argument. First, a scarcity of authority renders the precise contours of the doctrine of occupation *circa* 1895 unclear.¹¹² Second, even if the nineteenth century doctrine of occupation is identical to its twentieth and twenty-first century counterparts, it can be risky to draw lessons from precedent because *stare decisis* does not apply to ICJ decisions.¹¹³ Finally, even insofar as it is safe to seek guidance from precedent, some international tribunals have suggested that very little may be necessary to establish sovereignty over small, uninhabited islands. Perhaps the most robust illustration of this point comes from *The Clipperton Island* case,¹¹⁴ where the arbitrator held that France had effectively occupied an otherwise unclaimed island merely by sending a French naval officer who landed there and publicly

discover and name New Zealand, Tasmania, and eastern Australia, they also 'allowed long years to pass away without forming settlements or making any effective occupation' of those lands, which enabled England to acquire title later through effective occupation. Similarly, in the famous *Island of Palmas* case, the arbitrator held that while Spain may have acquired original title through discovery in the sixteenth century, Spain failed to develop an effective occupation once the law evolved to require more than discovery and thus lost its claim. This failure enabled the Netherlands to acquire sovereignty later through effective occupation; *ibid.*

¹¹⁰ *Id.* at 588.

¹¹¹ *Ibid.*

¹¹² Prominent treatises of the time offered only general descriptions of its requirements, and there were no international tribunals to offer further guidance. While modern international courts have applied the doctrine in a number of cases, such precedent is unhelpful to the extent that it reflects understandings that had not yet developed by 1895. Without knowing the specific contours of the doctrine, it is hard to know whether the Chinese acts were sufficient; *id.* at 589.

¹¹³ *Ibid.*

¹¹⁴ *Clipperton Island Case (France v. Mexico)* (1931) 2 R.I.A.A. 1105.

proclaimed French sovereignty.¹¹⁵ Based on this precedent, Scoville states China probably did enough to establish occupation, even in the nineteenth century. Moreover, given the size of the Senkaku Islands, the argument that China could not have done much more carries some appeal.¹¹⁶ Scoville concludes that these sources of uncertainty, altogether, suggest that neither side's position on the status of the Islands in 1895 is *ipso facto* implausible.¹¹⁷

3 Did Japan ever acquire title under the doctrine of acquisitive prescription?

If the Islands were not *terra nullius* in 1895 but Chinese instead, Japan can only have valid title today if China subsequently acquiesced to Japan's effective control in accordance with the doctrine of acquisitive prescription.¹¹⁸ This paragraph focuses on the debate whether Japan acquired title to the Senkaku Islands by exercising effective control over them.¹¹⁹

The doctrine of acquisitive prescription enables one state to obtain title over part of the territory of another by asserting effective control in a peaceful and public manner, without interruption, for a sufficient period.¹²⁰ In the case of the Senkakus, it seems there cannot be a single period of control spanning from 1895 to 1970.¹²¹ Instead, Scoville suggests there appears to be two distinct periods during which Japan may have acquired sovereignty under the doctrine: from 1895 to 1937, and from 1951 to 1970.¹²² The gap between the two periods reflects two historical facts.¹²³ First, Japan was at war with China from 1937 to 1945.¹²⁴

¹¹⁵ Scoville (n 97) at 589.

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ *Id.* at 590.

¹²⁰ *Id.* at 591.

¹²¹ *Id.* at 592.

¹²² *Id.* at 592.

¹²³ *Ibid.*

¹²⁴ The state of war makes it difficult to conclude that Japan's control was peaceful—even though the parties did not fight a battle specifically over the Senkakus, aggression toward China during the period facilitated Japan's effective control matters and virtually eliminating the possibility of a Chinese challenge; *id.* at 591.

Therefore, Scoville makes the assumption that Japan's *effectivitas*¹²⁵ during the war years cannot count toward Japanese title.¹²⁶ Second, as discussed below in paragraph 2.3, Japan's acceptance of the Potsdam Declaration in the 1945 Instrument of Surrender dictates that there was a gap in the continuity of the ruling of Japan, during which Japanese sovereignty, if it existed, depended upon a supporting, post-war determination from the Allies.¹²⁷ The years from 1945 to 1951 were a period of uncertainty, during which Japan had agreed that its sovereignty over the Senkakus would depend upon Allied support, but no Allied decision had been made.¹²⁸

Despite these uncertainties, Scoville holds that Japan has a good argument for prescriptive title, both from 1895 to 1937 and from 1951 to 1970.¹²⁹ According to Scoville, the periods of Japan's effective control meets multiple variants of the durational requirement.¹³⁰ If, as the *Island of Palmas* case¹³¹ suggests, effective control is sufficient where it lasts long enough simply to provide the opposing party with an adequate opportunity to recognise it, then the periods of 1895 to 1937 and 1951 to 1970 were both sufficient.¹³² Indeed, China not only had ample opportunity to identify Japan's effective control, China was in fact aware of Japan's control of the Islands for decades.¹³³ If, on the other hand, the law requires that the control

³⁴ Sovereign activities.

¹²⁶ *Id.* at 592.

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

¹²⁹ *Id.* at 593.

¹³⁰ *Ibid.*

¹³¹ *Island of Palmas Case (Netherlands v USA)* (1928) 2 R.I.A.A. 829 at 867: 'The acts of indirect or direct display of Netherlands sovereignty at Palmas (or Miangas), especially in the 18th and early 19th centuries are not numerous, and there are considerable gaps in the evidence of continuous display. But apart from the consideration that the manifestations of sovereignty over a small and distant island, inhabited only by natives, cannot be expected to be frequent, it is not necessary that the display of sovereignty should go back to a very far distant period. It may suffice that such display existed in 1898, and had already existed as continuous and peaceful before that date long enough to enable any Power who might have considered herself as possessing sovereignty over the island, or having a claim to sovereignty, to have, according to local conditions, a reasonable possibility for ascertaining the existence of a state of things contrary to her real or alleged rights'.

¹³² Scoville (n 97) at 593.

¹³³ It was not until the discovery of oil around the Senkaku Islands in 1969 did both the Nationalist Chinese regime in Taiwan and the Communist Chinese Regime on the mainland officially claim ownership of the

exceeds a certain minimum number of years, then there is still reason to believe that the duration of Japanese control was sufficient.¹³⁴ Spanning over forty years, Japan's control from 1895 to 1937 lasted longer than Singapore's control over the disputed rocks in the *Case Concerning Sovereignty over Pedra Branca*¹³⁵ by more than a decade.¹³⁶ And there does not seem to be a meaningful difference between the period found sufficient in the *Pedra Branca* case¹³⁷ and the approximately nineteen years of Japan's control from 1951 to 1970. On balance, it seems international case law suggests that the duration of Japan's control was enough for each period.¹³⁸

There is also a good argument that Japan's *effectivités* were sufficient in both quality and volume during each period. Between 1895 and 1937, the Japanese government officially claimed several of the Islands; conducted detailed surveys and entered the Islands into official land registries; leased most of the Islands to Koga Tatsushiro, a Japanese citizen, for thirty years; granted an official award to Mr Koga for developing the Islands; and then sold most of the Islands to the Koga family.¹³⁹ Later, between 1951 and 1970, Japan required Taiwanese workers to leave the Senkaku Islands on two occasions upon finding that they did not have passports or immigration permits, placed on the Islands a marker that identified them as Japanese territory, and authorized payments of compensation to families of victims attacked by two unidentified vessels in the surrounding waters.¹⁴⁰ Additionally, acting on the

Senkaku Islands, the Chinese conducted no activities in the East China Sea, including the Senkaku Islands, after the Ryukyu Kingdom was annexed by the Japanese in 1879, except with regard to Taiwan, which was ceded to Japan after 1895; *id.*

¹³⁴ *Ibid.*

¹³⁵ *Sovereignty Over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v Singapore)* (23 May 2008) I.C.J. GL No 130 ICGJ 9.

⁴⁵ Period less than thirty years, see n 43 below.

¹³⁷ The ICJ held that Singapore acquired title from Malaysia over certain disputed rocks largely because of a combination of Singaporean effective control and Malaysian acquiescence over a period of slightly less than thirty years (*supra* n 136 at 96).

¹³⁸ Scoville (n 97) at 593.

¹³⁹ *Id.* at 594.

¹⁴⁰ *Ibid.*

premise of Japan's residual sovereignty, the US used the Islands for military purposes starting in the 1950s.¹⁴¹ These acts appear more similar in quality and volume to those that supported Singapore's successful claim to prescriptive title in the *Pedra Branca* case,¹⁴² than to those that failed to establish title with Namibia in the *Kasikili/Sedudu Island* case.¹⁴³

Equally significant is that China apparently did nothing to exert effective control over the Islands or even protest Japanese control during the periods in question.¹⁴⁴ In fact, China affirmatively endorsed Japanese sovereignty on multiple occasions. In 1920, the Chinese consul in Nagasaki issued a letter expressing appreciation to a Japanese citizen for rescuing a number of Chinese fishermen who had been stranded on the Islands after a storm and in doing so, referred to the Senkakus as part of *Yaeyama District, Okinawa Prefecture, Empire of Japan*.¹⁴⁵ Later, in 1953, the *People's Daily*, the official newspaper of the Communist Party of China, published an article defining the Senkakus as part of the Ryukyu Islands and urging the US to return them to Japan.¹⁴⁶ China also acknowledged Japanese sovereignty in official maps and textbooks for decades¹⁴⁷ and did not enact a law including the Islands in

¹⁴¹ *Ibid.*

¹⁴²The Court first found that the territorial domain of the Sultanate of Johor (Malaysia) did cover in principle all the islands and islets within the Straits of Singapore including Pedra Branca/Pulau Batu Puteh. It found that no development affected this original title until 1953. After 1953 however, the Court found that the conduct of the Parties could be seen as conduct *à titre souverain*. This included the investigation of shipwrecks by Singapore within the island's territorial waters and the granting or not granting of permission by Singapore to Malaysian officials to survey the waters surrounding the island. Additionally, the Court considered that weight could also be given in support of Singapore's claim by way of Malaysia's absence of reaction to the flying of the Singapore ensign on the island and Singapore's installation of military equipment on the island. The Court accordingly found that sovereignty over Pedra Branca/Pulau Batu Puteh belonged to Singapore (*supra* n 44 at 82–88).

¹⁴³ *Kasikili/Sedudu Island (Botswana v Namibia)* (13 Dec 1999) I.C.J. 1045, 1103–1106; ICJ held that one military patrol in a disputed territory, publication of certain maps, and conduct of private individuals were insufficient to create prescriptive title for Namibia.

¹⁴⁴ Scoville (n 97) at 593.

¹⁴⁵ Scoville (n 97) at 595 with reference to Han-yi Shaw 'The Diaoyutai/Senkaku Islands Dispute: Its History and an Analysis of the Ownership Claims of the P.R.C., R.O.C., and Japan' (1999) 3 *Series in contemporary Asian studies* at 33.

¹⁴⁶ Scoville (n 97) at 594 with reference to Nishi T 'The Diaoyu/Senkaku Islands: A Japanese Scholar Responds' (4 October 2012) *New York Times*.

¹⁴⁷ Scoville (n 97) at 595 with reference to Murase S, 'Japan Chair Platform: The Senkaku Islands and International Law' (22 May 2013) *CSIS* <http://csis.org/publication/japan-chair-platform-senkaku-islandsand-international-law> (accessed online 11 June 2017).

Chinese territory until 1992.¹⁴⁸ Cumulatively, these acts demonstrate Chinese acquiescence to Japanese sovereignty at least as clearly as others that international courts have found sufficient to support prescriptive title in comparable cases.¹⁴⁹ Acquisitive prescription, thus, provides a basis for resolving the case in favour of Japan.

4 Did the Allies make a lawful determination in favour of Japanese title after World War II in accordance with the Potsdam Declaration and Instrument of Surrender?

A further critical element of the debate concerns whether the Allies ever made a determination in favour of Japanese title over the Senkaku Islands in accordance with the 1945 Potsdam Declaration¹⁵⁰ and Instrument of Surrender.¹⁵¹ At Potsdam, the US, China, and the United Kingdom (UK) proclaimed ‘The terms of the Cairo Declaration¹⁵² shall be carried out and Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku and such minor islands as we determine’.¹⁵³ Japan accepted the terms of the

¹⁴⁸ Scoville (n 97) at 595 with reference to Shimbun A ‘Until Now: Tensions Start to Rise When China Enacts Law Claiming Islands’ (26 December 2012) *Asia and Japan watch* http://ajw.asahi.com/article/special/senkaku_history/AJ201212260105 (accessed online 11 June 2017).

¹⁴⁹ *Supra* n 136 at 82-88.

¹⁵⁰ An ultimatum of the Allied governments to Japan, with which Britain and the US were still at war, drawn up at the Potsdam Conference. Britain and the USA demanded unconditional Japanese surrender. Japan was to be stripped of its empire, and occupied until a peaceful policy had been established. Failure of the Japanese to comply would result in complete destruction. Finally, the Declaration left the position of the Emperor, whom the Japanese revered as a *demi god*, ambiguous. These demands increased the mood of defiance among the more radical military circles in Japan. At the same time, they undermined the moderate peace faction among policy makers, which only asked for the preservation of the Emperor's status. As Japan failed to respond, President Truman authorized the dropping of the atomic bomb on Hiroshima and Nagasaki, thus fulfilling his threat.

¹⁵¹ Scoville (n 97) at 595.

¹⁵² 1943 Cairo Declaration was the outcome of the Cairo Conference in Cairo, Egypt, on November 27, President Franklin Roosevelt of the United States, Prime Minister Winston Churchill of the United Kingdom, and Generalissimo Chiang Kai-shek of the Republic of China were present, the declaration developed ideas from the 1941 Atlantic Charter, which was issued by the Allies of World War II to set goals for the post-war order, the *Cairo Communiqué* was broadcast through radio on December 1, 1943; the Cairo Declaration is cited in clause 8 of the Potsdam Declaration, which is referred to by the Japanese Instrument of Surrender <https://2001-2009.state.gov/r/pa/ho/time/wwii/107184.htm> (accessed online 20 June 2017).

¹⁵³ 1945 Postdam Declaration, par 8.

Postdam Declaration in the Instrument of Surrender¹⁵⁴ and ‘undert[ook]...to carry [them]out ...in good faith’.¹⁵⁵

China argues that the Allies never made the necessary determination in favour of Japan and instead favoured Chinese sovereignty by issuing the 1943 Cairo Declaration¹⁵⁶ and the 1945 Potsdam Declaration.¹⁵⁷ China argues the Cairo Declaration proclaimed that ‘Japan, shall be stripped of all the islands in the Pacific which she has seized or occupied since the beginning of the first World War in 1914, and that all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and the Pescadores, shall be restored to the Republic of China’.¹⁵⁸ While the Postdam Declaration provided that the Cairo Declaration shall be carried out.¹⁵⁹ Japan’s response is that the Cairo Declaration does not apply since the Islands were unoccupied *terra nullius* at the time of annexation and thus never *stolen* from China.¹⁶⁰ Further, Japan contends that the Allies made the necessary determination in favour of Japanese sovereignty in the 1951 San Francisco Peace Treaty.¹⁶¹ The San Francisco Peace

¹⁵⁴ Instrument of Surrender signed at Tokyo Bay, 2 September 1945 and entered into force on even date. The Japanese Instrument of Surrender was the written agreement that formalized the surrender of the Empire of Japan, marking the end of World War II. It was signed by representatives from the Empire of Japan, the United States of America, the Republic of China, the United Kingdom of Great Britain and Northern Ireland, the Union of Soviet Socialist Republics, the Commonwealth of Australia, the Dominion of Canada, the Provisional Government of the French Republic, the Kingdom of the Netherlands, and the Dominion of New Zealand, the signing took place on the deck of *USS Missouri* in Tokyo Bay on September 2, 1945.

¹⁵⁵ *Supra* n63 at par 1: ‘We, acting by command of and in behalf of the Emperor of Japan, the Japanese Government and the Japanese Imperial General Headquarters, hereby accept the provisions set forth in the declaration issued by the heads of the Governments of the United States, China and Great Brittan on 26 July 1945, at Postdam...’ and also par 6: ‘We hereby undertake... to carry out the provisions of the Postdam Declaration in good faith’.

¹⁵⁶ *Supra* n 153.

¹⁵⁷ Scoville (n 97) at 595 with reference to ‘State Council Info. Office of China, Diaoyu Dao, an Inherent Territory of China’ (23 October 2012) *Ambassade de la r’epublique populaire de chine au Maroc* <http://ma.china-embassy.org/fra/xwtd/t981801.htm> (accessed online 15 June 2017).

¹⁵⁸ *Supra* n 153 at par 2.

¹⁵⁹ *Supra* n 154 at par 8.

¹⁶⁰ Scoville (n 97) at 596.

¹⁶¹ A conference held to agree a formal peace treaty between Japan and the nations against which she had fought in World War II. When the treaty came into force in April 1952, the period of occupation of Japan was formally ended and Japanese sovereignty restored. Japan recognized the independence of Korea and renounced its rights to Taiwan, the Pescadores, the Kuriles, southern Sakhalin, and the Pacific islands mandated to it before the war by the League of Nations. The country was allowed the right of self-defence with the proviso that the US would maintain its own forces in Japan until the Japanese were able to shoulder their own defensive responsibilities. The Soviet Union did not sign the treaty, but diplomatic relations were restored in 1956, while peace treaties

Treaty provided that ‘Japan will concur in any proposal of the United States to the United Nations to place under its trusteeship system. . . Nansei Shoto south of 29 deg. north latitude (including the Ryukyu Islands)’¹⁶² and required Japan to renounce sovereignty over islands such as Formosa, the Spratly Islands, and the Paracel Islands.¹⁶³ Japan asserts that the Treaty embodied the necessary Allied determination because the Senkakus are part of ‘Nansei Shoto south of 29 deg. north latitude (including the Ryukyu Islands)’.¹⁶⁴ China replies that the San Francisco Treaty did not place the Islands under US trusteeship and therefore did not favour Japanese sovereignty and that the Treaty is illegal even if it purported to grant the Islands to Japan, given that China did not participate in its negotiation or adoption.¹⁶⁵

Scoville provides that the most important point about these texts is that their relevance is conditional.¹⁶⁶ The purpose of the Cairo Declaration was to announce the Allies’ intention to simply undo Japan’s military conquests by ordering the return of territories stolen from China rather than to punish Japan by taking away territories that rightfully belonged to it.¹⁶⁷ The Allies stated explicitly that they ‘covet[ed] no gain for themselves and ha[d] not thought of

with Asian nations conquered by the Japanese in the war were signed through the 1950s as individual problems with reparations were resolved; *ibid.*

¹⁶² Treaty of Peace with Japan, article 3, signed on September 8, 1951.

¹⁶³ *Supra* n 163 art 2: ‘(a) Japan, recognizing the independence of Korea, renounces all right, title and claim to Korea, including the islands of Quelpart, Port Hamilton and Dagelet. (b) Japan renounces all right, title and claim to Formosa and the Pescadores. (c) Japan renounces all right, title and claim to the Kurile Islands, and to that portion of Sakhalin and the islands adjacent to it over which Japan acquired sovereignty as a consequence of the Treaty of Portsmouth of September 5, 1905. (d) Japan renounces all right, title and claim in connection with the League of Nations Mandate System, and accepts the action of the United Nations Security Council of April 2, 1947, extending the trusteeship system to the Pacific Islands formerly under mandate to Japan. (e) Japan renounces all claim to any right or title to or interest in connection with any part of the Antarctic area, whether deriving from the activities of Japanese nationals or otherwise. (f) Japan renounces all right, title and claim to the Spratly Islands and to the Paracel Islands’.

⁷⁰ Whether the Senkaku Islands are part of ‘Nansei Shoto south of 29 deg. north latitude’ hinges on natural geography.

¹⁶⁴ Because the Islands are at twenty-five degrees North latitude, they satisfy the text’s latitudinal requirement and it seems *prima facie* indisputable that the San Francisco Treaty at least purported to allocate sovereignty to Japan. Further, under the widely utilized *expressio unius* canon, the provisions requiring Japan to renounce sovereignty only over islands such as Formosa, the Spratly Islands, and the Paracel Islands imply that Japan did not have to renounce sovereignty over islands not mentioned, such as the Senkaku Islands; Scoville (n 5) at 596.

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*

territorial expansion'.¹⁶⁸ Scoville explains as follows: to say that the Cairo Declaration supports the Chinese claim is to presuppose that the Senkakus belonged to China up until the time of Japanese annexation in 1895, that Japan's annexation was therefore illegal, and that Japan did not acquire title under the doctrine of acquisitive prescription from 1895 to 1937.¹⁶⁹ Alternatively, if China did not have title in 1895, or if China acquiesced to Japanese control before World War II, then Japan did not 'steal' the Islands within the meaning of the Cairo Declaration and it simply does not apply.¹⁷⁰ The Potsdam Declaration did not affirmatively support Chinese sovereignty over any territory other than by calling for the enforcement of the Cairo Declaration.¹⁷¹ Scoville argues to treat Potsdam as affirmative evidence of Chinese title is again to presuppose that the Senkaku Islands belonged to China in 1895, that Japan's annexation was unlawful, and that Japan did not acquire prescriptive title prior to Cairo.¹⁷² Therefore, the Cairo and Postdam Declarations cannot operate as a freestanding basis for Chinese sovereignty.¹⁷³

China also contends, however, that the Allies violated the fundamental principles of sovereign equality and independence by granting Japanese sovereignty over the Islands in the San Francisco Treaty without Chinese approval.¹⁷⁴ However, the UN Charter¹⁷⁵ codified

¹⁶⁸ *Supra* n 153 at par 2: 'The three great Allies are fighting this war to restrain and punish the aggression of Japan. They covet no gain for themselves and have no thought of territorial expansion. It is their purpose that Japan, shall be stripped of all the islands in the Pacific which she has seized or occupied since the beginning of the first World War in 1914, and that all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and the Pescadores, shall be restored to the Republic of China. Japan will also be expelled from all other territories which she has taken by violence and greed. The aforesaid three great powers, mindful of the enslavement of the people of Korea, are determined that in due course Korea shall become free and independent'.

¹⁶⁹ Scoville (n 97) at 596.

¹⁷⁰ In the latter scenario, a Chinese claim to the Islands in 1943 would have contradicted the Allies' express disavowal of territorial expansion in the Cairo Declaration, *ibid*.

¹⁷¹ *Supra* n 154 at par 8: 'The terms of the Cairo Declaration shall be carried out'.

¹⁷² Scoville (n 97) at 596.

¹⁷³ *Ibid*.

¹⁷⁴ 'Diaoyu Dao, an Inherent Territory of China' State Council Info, Office of China [http:// ma.china-embassy.org/fra/xwdt/t981801.htm](http://ma.china-embassy.org/fra/xwdt/t981801.htm) (accessed online 13 June 2017).

¹⁷⁵ UN Charter article 2(1): 'The Organization is based on the principle of the sovereign equality of all its Members'.

these principles several years before San Francisco and, in doing so, barred states from taking territory away from a third-party state without that party's consent.¹⁷⁶ Because of these principles, the legality of the Treaty's treatment of the Senkakus must assume either that China consented to Japanese title over the Islands or that Chinese consent was unnecessary because the Islands were not Chinese territory in 1951.¹⁷⁷

The answer to the question whether the absence of Chinese consent matters depends on the laws of occupation and acquisitive prescription. If China updated its control over the Islands in the nineteenth century to satisfy the new and more demanding requirements for effective occupation, and if Japan failed to acquire title through acquisitive prescription prior to 1951, then the Islands belonged to China at the time of San Francisco, and the Treaty is unlawful for purporting to grant title to Japan without Chinese consent.¹⁷⁸ If China did not update its control over the Islands to satisfy the new requirements for occupation, or if Japan acquired title through prescription before 1951, then Chinese consent was unnecessary and San Francisco embodies a valid Allied determination in favour of Japanese sovereignty in accordance with the Potsdam Declaration and Instrument of Surrender.¹⁷⁹ Just as the Cairo and Potsdam Declarations favour Chinese sovereignty only if we assume that China prevails on the questions of early occupation and pre-war acquisitive prescription, the San Francisco Treaty favours Japanese sovereignty only if we assume that Japan prevails on those same questions. According to Scoville, the only difference is that Japan does not need to prevail on both questions in order for the Treaty to favour the Japanese claim—either will suffice.¹⁸⁰

¹⁷⁶Vienna Convention on the Law of Treaties article 35: 'An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing'.

¹⁷⁷ Scoville (n 97) at 600.

¹⁷⁸ *Ibid.*

¹⁷⁹ *Id.* at 601.

¹⁸⁰ *Ibid.*

In summary, it is evident from the Instrument of Surrender that Japan agreed that its sovereignty over the Senkaku Islands would depend upon the occurrence of a supporting determination by the Allies after World War II.¹⁸¹ However, whether a valid determination (i.e the San Francisco Treaty) was made hinges on the law on occupation and acquisitive prescription.¹⁸² Following the preceding conclusions on acquisitive prescription in paragraph 3, China acquiesced to Japan's effective control over the Islands from 1895 to 1937 and title shifted to Japan prior to San Francisco, therefore the San Francisco Treaty is not *contra* Article 2(1) of the UN Charter nor *contra* Article 35 of the VCLT and subsequently lawful because Chinese consent to the Treaty was unnecessary.¹⁸³

5 Is the US obligated to support Japan by defending the Senkaku Islands against China?

The question raised in this section: whether the US is obligated to support Japan by defending the Senkaku Islands against China, is mandated by a research article with the same title by the author Julian Ku.¹⁸⁴ Ku reaches the conclusion that the US is basically 'on the hook' for a defence of the Senkaku Islands and that Japan does not have to help the US at all in defending its own territory.¹⁸⁵ The following paragraphs aim to analyse Ku's argument by reverting to the original text of the US-Japan Treaty of Mutual Cooperation and Security.¹⁸⁶

Article 5 of the US-Japan Treaty of Mutual Cooperation and Security provides:

¹⁸¹ *Ibid.*

¹⁸² *Ibid.*

¹⁸³ *Ibid.*

¹⁸⁴ Ku J 'Is the US Obligated to Defend Japan's Senkaku Islands Against China?' *Opinio Juris* 21 August 2012 <http://opiniojuris.org/2012/09/21/is-the-us-obligated-to-defend-japans-senkaku-islands> (accessed online 2 May 2017).

¹⁸⁵ *Ibid.*

¹⁸⁶ The Treaty of Mutual Cooperation and Security between the US and Japan was signed between the United States and Japan in Washington on January 19, 1960, it strengthened Japan's ties to the 'West' during the Cold War era, the treaty also included general provisions on the further development of international cooperation and on improved future economic cooperation.

Each Party recognizes that an armed attack against either Party in the territories under the administration of Japan would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional provisions and processes. Any such armed attack and all measures taken as a result thereof shall be immediately reported to the Security Council of the United Nations in accordance with the provisions of Article 51 of the Charter. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.

It is clear from the provisions of the treaty in article 5 that the US is indeed obliged to support Japan in defending the Senkaku Islands. However, the statement by Ku that Japan does not have to help the US in defending its own territory is not provided for in the treaty, the treaty states ‘either Party...will act to meet the danger’, therefore this dissertation accepts that Japan is included within the ambit of the obligation to take action.

6 China’s proclamation of an Air Defence Identification Zone in the East China Sea

During November 2013 China identified an Air Defence Identification Zone (ADIZ) in the East China Sea, covering the airspace over the Senkaku Islands. This chapter analyses China’s ADIZ in the the East China Sea and aims to determine whether the said proclamation is legal and how it relates to the Senkaku Islands sovereignty dispute.

Dutton explains that it is accepted practice for a coastal state to establish an ADIZ in the international airspace off its coastlines to enhance and protect its national security.¹⁸⁷ Such zones are legitimate as a matter of international customary and treaty law related to airspace and national security. But according to Dutton, China’s ADIZ announcement uses the language of international law while disregarding the actual constraints of the law. Dutton identifies three legal problems with China’s ADIZ.

¹⁸⁷ Dutton P ‘Testimony before the House Foreign Affairs Committee’ *Hearing on China’s Maritime Disputes in the East and South China Seas* (14 January 2014) 6.

The first problem is that it covers the Senkaku Islands, which are administered by Japan. Even though China disputes Japanese sovereignty over the Senkaku Islands, as the islands' administrator, Japan has a duty to exercise its sovereign authority over the islands, including in the national airspace above the islands and the territorial sea around them.¹⁸⁸ Since the ADIZ announcement asserts China's right to operate within the entire ADIZ, to control the activities of others within it, and to take unspecified emergency measures and also covers the airspace over and around the Senkaku Islands, the Chinese ADIZ poses a direct affront to Japanese administration of the Senkaku Islands. Dutton holds, if the Chinese choose to operate in the national airspace above the Senkaku Islands, as their announcement implies the right to do, in addition to being a seriously provocative act, it would be an illegal violation of Japan's current administrative authority over the Senkaku Islands.¹⁸⁹

The second problem is that the terms of the ADIZ announcement purport to regulate the activities of *all* aircraft in the zone.¹⁹⁰ As a practical matter, an ADIZ is a sorting out mechanism to determine which aircraft in the international airspace off the coastal state's shores might potentially threaten its national security.¹⁹¹ As a legal matter, an ADIZ declaration confers almost no additional jurisdictional authority to the coastal state since the airspace beyond twelve nautical miles from the coastline is international in character by the terms of the Chicago Convention and as such all states possess the right to operate civil or military aircraft there without the coastal state's permission.¹⁹² The only legitimate exercise of coastal state jurisdiction in an offshore ADIZ is over aircraft intending to leave international airspace and enter the coastal state's fully sovereign national airspace. The

¹⁸⁸ *Id.* at 7.

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*

¹⁹¹ *Id.* at 8.

¹⁹² *Ibid.*

coastal state can specify ADIZ procedures for aircraft to obtain permission before entering their national airspace. However, the terms of China's ADIZ purport to bring the activities of *all* aircraft operating in or through the ADIZ under Chinese control, not just those desiring to enter China's national airspace, and therefore, according to Dutton, is an unlawful extension of Chinese jurisdiction into airspace that is international in character.¹⁹³

The third legal problem identified by Dutton stems from China's overbroad claim to regulate the activities of *all* aircraft in its ADIZ.¹⁹⁴ Dutton provides that China aims to apply legal protection for their security interests beyond the EEZ to a broader category of what it calls 'Chinese jurisdictional waters' and the airspace above them. Such waters appear to include China's claimed continental shelf any additional waters over which China claims historic rights. In this sense it is important to note that the eastern edge of China's ADIZ closely follows the eastern edge of China's expansive extended East China Sea continental shelf claim. When lined up together, China's overbroad claim to regulate the activities of *all* aircraft in its ADIZ, China's assertion that UNCLOS protects its security interests in and above its jurisdictional waters, and China's decision to align the limits of its ADIZ with the limits of its continental shelf claim, suggest that China's ADIZ is part of a coordinated legal campaign to extend maximal security jurisdiction over the East China Sea and the international airspace above it, beyond those authorities currently allowed by international law, in support of its objectives related to security, resource control, and regional order.¹⁹⁵

¹⁹³ *Ibid.*

¹⁹⁴ *Id.* at 9.

¹⁹⁵ *Id.* at 11.

Ku provides that the Chinese have wielded international law as a rhetorical weapon (or rather *lawfare*¹⁹⁶) on their side, by citing the U.N. Charter from the outset.¹⁹⁷ But as Dutton states, to use the language of international law and compliance with international are not the same.¹⁹⁸

Establishing an ADIZ is not in itself a violation of international law and, although there are legal problems with the extent of China's proclamation of an ADIZ, it is in fact legal. It is worth noting that US has not condemned China's ADIZ as a violation of international law, instead, the US has called it 'unacceptable' and a change in the 'status quo'.

Keck suggests China is using the ADIZ to subtly build its legal claim to sovereignty over the Senkaku Islands and is part of China's 'lawfare'¹⁹⁹ strategy toward its maritime disputes.²⁰⁰ The eastern edge of China's ADIZ closely follows the eastern edge of China's expansive extended East China Sea continental shelf claim and includes the Senkaku Islands.

By administering the airspace over the Senkaku Islands and having other nations recognize this administration by their airliners identifying themselves to Chinese authorities, China is bolstering its claims to sovereignty over the Senkaku Islands. Since China is regulating air traffic in the area — including dictating the rules airplanes must follow — it is exercising a certain degree of sovereignty.²⁰¹

¹⁹⁶ 'Lawfare' as used in the context of international warfare, is often attributed to retired Air Force General Charles Dunlap, who defined it in 2001 as 'the use of law as a weapon of war'.

¹⁹⁷ Ku J 'Meanwhile, China Draws a Provocative, Dangerous, But Perfectly Legal Air Defense Identification Zone in the East China Sea' *Opinio Juris* <http://opiniojuris.org/2013/12/08/china-correct-adiz-necessarily-violate-international-law-doesnt-make-right/> (accessed online 15 August 2017).

¹⁹⁸ Dutton (n 188) at 6.

¹⁹⁹ *Supra* n 197.

²⁰⁰ Keck Z 'With ADIZ China is waging Lawfare' *The Diplomat* <http://thediplomat.com/2013/11/with-air-defense-zone-china-is-waging-lawfare/> (accessed online 06 May 2017).

²⁰¹ *Ibid.*

7 Role of the Senkaku Islands in the delimitation dispute

The Senkakus are in the same approximate relation to the land masses of all states with East China Sea shelf claims, except South Korea. Allen and Mitchell provide that the kind of dilemma posed by the Senkaku Islands has been dealt with successfully in the Persian Gulf, with many similarly-placed islands. In the Persian Gulf each island is recognized as an enclave of sovereignty on the shelf and delimitation is based on conventional standards. A conventional line of delimitation never transects an enclave, but must follow around it to take up again in areas not affected by the enclave. The main boundary line follows a twelve-mile arc drawn around each island so as not to transect the island's territorial sea. The breadth of the enclave in the Persian Gulf is usually identical to the territorial sea of the island—generally twelve miles. According to Allan and Mitchell, this enclave approach offers an acceptable solution to the problem of the Senkakus since it avoids exaggerating the continental shelf claim of any one state due to its geographic phenomena while preserving the territorial sovereignty of seas surrounding the Senkaku Islands.²⁰²

²⁰² Allan and Mitchell (n 1) at 809.

Chapter 4:

Implications of the *South China Sea Arbitration Award*²⁰³ for the Senkaku Islands?

1 Introduction

This chapter provides an overview of the possible implications of the *South China Sea Arbitration Award*²⁰⁴ for the Senkaku Islands dispute.

2 Rocks vs Islands

An important finding in the *South China Sea Arbitration Award*²⁰⁵ is that the high-tide features in the Spratly Islands are mere ‘rocks’ under Article 121(3)²⁰⁶ of UNCLOS because they ‘cannot sustain human habitation or economic life of their own’.²⁰⁷ This means even the

²⁰⁴ *South China Sea Arbitration (The Republic of the Phillipines v The People’s Republic of China)* (12 July 2016) PCA Case No. 2013-19.

²⁰⁵ *Supra* n 234.

²⁰⁶ Article 121 establishes a regime of islands as follows: (1) An island is a naturally formed area of land, surrounded by water, which is above water at high tide. (2) Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory. (3) Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.

²⁰⁷ The Tribunal reached the following conclusions (par 540 – 550 of the ruling) on the interpretation of Article 121(3) after considering the the text, context, object and purpose, and drafting history of art 121(3):

1. The use of the word ‘rock’ does not limit the provision to features composed of solid rock. The geological and geomorphological characteristics of a high-tide feature are not relevant to its classification pursuant to art 121(3).
2. The status of a feature is to be determined on the basis of its natural capacity, without external additions or modifications intended to increase its capacity to sustain human habitation or an economic life of its own.
3. With respect to ‘human habitation’, the critical factor is the non-transient character of the inhabitation, such that the inhabitants can fairly be said to constitute the natural population of the feature, for whose benefit the resources of the exclusive economic zone were seen to merit protection. The term ‘human habitation’ should be understood to involve the inhabitation of the feature by a stable community of people for whom the feature constitutes a home and on which they can remain. Such a community need not necessarily be large, and in remote atolls a few individuals or family groups could well suffice. Periodic or habitual residence on a feature by a nomadic people could also constitute habitation, and the records of the Third UN Conference record a great deal of sensitivity to the livelihoods of the populations of small island nations. An indigenous population would obviously suffice, but also non-indigenous inhabitation could meet this criterion if the intent of the population was truly to reside in and make their lives on the islands in question.
4. The term ‘economic life of their own’ is linked to the requirement of human habitation, and the two will in most instances go hand in hand. Art121(3) does not refer to a feature having economic value,

but to sustaining 'economic life'. The Tribunal considers that the 'economic life' in question will ordinarily be the life and livelihoods of the human population inhabiting and making its home on a maritime feature or group of features. Additionally, art 121(3) makes clear that the economic life in question must pertain to the feature as 'of its own'. Economic life, therefore, must be oriented around the feature itself and not focused solely on the waters or seabed of the surrounding territorial sea. Economic activity that is entirely dependent on external resources or devoted to using a feature as an object for extractive activities without the involvement of a local population would also fall inherently short with respect to this necessary link to the feature itself. Extractive economic activity to harvest the natural resources of a feature for the benefit of a population elsewhere certainly constitutes the exploitation of resources for economic gain, but it cannot reasonably be considered to constitute the economic life of an island as its own.

5. The text of art 121(3) is disjunctive, such that the ability to sustain either human habitation or an economic life of its own would suffice to entitle a high-tide feature to an exclusive economic zone and continental shelf. However, as a practical matter, the Tribunal considers that a maritime feature will ordinarily only possess an economic life of its own if it is also inhabited by a stable human community. One exception to that view should be noted for the case of populations sustaining themselves through a network of related maritime features. The Tribunal does not believe that maritime features can or should be considered in an atomised fashion. A population that is able to inhabit an area only by making use of multiple maritime features does not fail to inhabit the feature on the grounds that its habitation is not sustained by a single feature individually. Likewise, a population whose livelihood and economic life extends across a constellation of maritime features is not disabled from recognising that such features possess an economic life of their own merely because not all of the features are directly inhabited.
6. Art 121(3) is concerned with the capacity of a maritime feature to sustain human habitation or an economic life of its own, not with whether the feature is presently, or has been, inhabited or home to economic life. The capacity of a feature is necessarily an objective criterion. It has no relation to the question of sovereignty over the feature. For this reason, the determination of the objective capacity of a feature is not dependent on any prior decision on sovereignty, and the Tribunal is not prevented from assessing the status of features by the fact that it has not and will not decide the matter of sovereignty over them.
7. The capacity of a feature to sustain human habitation or an economic life of its own must be assessed on a case-by-case basis. The drafters of the Convention considered proposals with any number of specific tests and rejected them in favour of the general formula set out in art 121(3). The Tribunal considers that the principal factors that contribute to the natural capacity of a feature can be identified. These would include the presence of water, food, and shelter in sufficient quantities to enable a group of persons to live on the feature for an indeterminate period of time. Such factors would also include considerations that would bear on the conditions for inhabiting and developing an economic life on a feature, including the prevailing climate, the proximity of the feature to other inhabited areas and populations, and the potential for livelihoods on and around the feature. The relative contribution and importance of these factors to the capacity to sustain human habitation and economic life, however, will vary from one feature to another. While minute, barren features may be obviously uninhabitable (and large, heavily populated features obviously capable of sustaining habitation), the Tribunal does not consider that an abstract test of the objective requirements to sustain human habitation or economic life can or should be formulated. This is particularly the case in light of the Tribunal's conclusion that human habitation entails more than the mere survival of humans on a feature and that economic life entails more than the presence of resources.
8. The Tribunal considers that the capacity of a feature should be assessed with due regard to the potential for a group of small island features to collectively sustain human habitation and economic life. On the one hand, the requirement in art 121(3) that the feature itself sustain human habitation or economic life clearly excludes a dependence on external supply. A feature that is only capable of sustaining habitation through the continued delivery of supplies from outside does not meet the requirements of art 121(3). Nor does economic activity that remains entirely dependent on external resources or that is devoted to using a feature as an object for extractive activities, without the involvement of a local population, constitute a feature's "own" economic life. At the same time, the Tribunal is conscious that remote island populations often make use of a number of islands, sometimes spread over significant distances, for sustenance and livelihoods. An interpretation of art 121(3) that sought to evaluate each feature individually would be in keeping neither with the realities of life on remote islands nor with the sensitivity to the lifestyles of small island peoples that was apparent at the Third UN Conference. Accordingly, provided that such islands collectively form part of a network that sustains human

largest islands within the group lack an exclusive economic zone and a continental shelf.²⁰⁸ It also means that the separate question of sovereignty over the islands themselves is suddenly much less consequential than it might have been: whoever has title over the land now enjoys a diminished package of maritime rights that spatially extend no farther than a 12-nautical-mile territorial sea and an additional 12-nautical-mile contiguous zone.²⁰⁹

What does this outcome suggest about the status the Senkaku Islands? Scoville argues that the UNCLOS Tribunal's exposition and application of 121(3) strongly suggest that the

habitation in keeping with the traditional lifestyle of the peoples in question, the Tribunal would not equate the role of multiple islands in this manner with external supply. Nor would the local use of nearby resources as part of the livelihood of the community equate to the arrival of distant economic interests aimed at extracting natural resources.

9. In light of the Tribunal's conclusions on the interpretation of art 121(3), evidence of the objective, physical conditions on a particular feature can only take the Tribunal so far in its task. In the Tribunal's view, evidence of physical conditions will ordinarily suffice only to classify features that clearly fall within one category or the other. If a feature is entirely barren of vegetation and lacks drinkable water and the foodstuffs necessary even for basic survival, it will be apparent that it also lacks the capacity to sustain human habitation. The opposite conclusion could likewise be reached where the physical characteristics of a large feature make it definitively habitable. The Tribunal considers, however, that evidence of physical conditions is insufficient for features that fall close to the line. It will be difficult, if not impossible, to determine from the physical characteristics of a feature alone where the capacity merely to keep people alive ends and the capacity to sustain settled habitation by a human community begins. This will particularly be the case as the relevant threshold may differ from one feature to another. The Tribunal considers that the most reliable evidence of the capacity of a feature will usually be the historical use to which it has been put. Humans have shown no shortage of ingenuity in establishing communities in the far reaches of the world, often in extremely difficult conditions. If the historical record of a feature indicates that nothing resembling a stable community has ever developed there, the most reasonable conclusion would be that the natural conditions are simply too difficult for such a community to form and that the feature is not capable of sustaining such habitation. In such circumstances, the Tribunal should consider whether there is evidence that human habitation has been prevented or ended by forces that are separate from the intrinsic capacity of the feature. War, pollution, and environmental harm could all lead to the depopulation, for a prolonged period, of a feature that, in its natural state, was capable of sustaining human habitation. In the absence of such intervening forces, however, the Tribunal can reasonably conclude that a feature that has never historically sustained a human community lacks the capacity to sustain human habitation.
10. If a feature is presently inhabited or has historically been inhabited, the Tribunal should consider whether there is evidence to indicate that habitation was only possible through outside support. Trade and links with the outside world do not disqualify a feature to the extent that they go to improving the quality of life of its inhabitants. Where outside support is so significant that it constitutes a necessary condition for the inhabitation of a feature, however, it is no longer the feature itself that sustains human habitation. In this respect, the Tribunal notes that a purely official or military population, serviced from the outside, does not constitute evidence that a feature is capable of sustaining human habitation.

²⁰⁸ Scoville R 'The South China Sea Arbitration: Implications for the Senkaku Islands' *Lawfare* 18 July 2016 <https://www.lawfareblog.com/south-china-sea-arbitration-implications-senkaku-islands> (accessed online 12 March 2017).

²⁰⁹ *Ibid.*

Senkaku Islands are rocks.²¹⁰ If the aforementioned scholar is correct and the Senkaku Islands are classified as rocks under article 121(3), the effect would be that the islands have no exclusive economic zone or continental shelf and therefore substantially nullify the sovereignty debate over the Senkaku's.

Scoville substantiates his argument with reference to the tribunal's application of 121(3) to Itu Aba / Taiping Island—the largest and least rock-like of Spratlys.²¹¹ According to evidence cited in the ruling, Itu Aba has had fresh-water wells of sufficient quality and volume to support small groups of people; its vegetation has included, at one point or another, coconut, banana, plantain, and papaya trees, along with fields of palm, pineapple, cabbage, radish, and sugarcane; and workers there have at times operated small animal farms.²¹² The soil, moreover, contains sizable quantities of phosphate, and the surrounding waters have supported an abundance of sea life.²¹³ Such conditions made it possible for fishermen to inhabit the island on a temporary basis for 'comparatively long periods of time'.²¹⁴ In addition, Japanese companies extracted economic benefits from Itu Aba for over twenty years starting in 1917.²¹⁵ One company employed 600 workers to mine nearly 30 000 tons of guano, and built dorms, warehouses, a clinic, an analysis room, a weather station, a jetty, and mining tracks on the island to support its activities.²¹⁶ Another hired roughly 40 workers to use the island as a base of operations for fishing in the surrounding waters.²¹⁷ A publication from 1941 reported that still two other companies had a combined total of 130 personnel residing there 'continuously'.²¹⁸

²¹⁰ *Ibid.*

²¹¹ *Ibid.*

²¹² *Supra* n 234 at par 590.

²¹³ *Supra* n 234 at par 590.

²¹⁴ *Supra* n 234 at par 597.

²¹⁵ *Supra* n 234 at par 602.

²¹⁶ *Supra* n 234 at par 602.

²¹⁷ *Supra* n 234 at par 602.

²¹⁸ *Supra* n 234 at par 602.

This evidence clearly suggests a capacity to sustain certain forms of human presence and economic activity.²¹⁹ The tribunal, however, designated Itu Aba as a rock by narrowly interpreting 121(3)'s key terms.²²⁰ The following paragraphs will analyse how these two key terms were interpreted by the tribunal and then commented on by Scoville.

First was the term 'human habitation'. According to the tribunal, this entails the 'non-transient presence of persons who have chosen to stay and reside on the feature in a settled manner' and requires 'conditions sufficiently conducive to human life and livelihood for people to inhabit, rather than merely survive'.²²¹ In other words, habitation refers to presence for 'an extended period of time 'by a settled group or community for whom the feature is a home'.²²² Applying this standard, the tribunal concluded that Itu Aba is not 'obviously inhabitable' in light of its physical characteristics.²²³ There has been potable water and vegetation 'capable of providing shelter and the possibility of at least limited agriculture to supplement the food resources of the surrounding waters'.²²⁴ Fishermen, moreover, have survived there 'principally on the basis of the resources at hand'.²²⁵ Yet the island's 'capacity even to enable human survival' is 'distinctly limited'. Historical use confirmed as much.²²⁶ The island served as 'a temporary refuge and base of operations for fishermen and a transient residence for labourers engaged in mining and fishing' but nothing resembling a stable community ever formed. The temporary presence of migrant workers for a 'few short years' failed to suffice because the purpose of their presence was not to 'make a new life for themselves on the island'.²²⁷

²¹⁹ *Supra* n 234 at par 489.

²²⁰ *Supra* n 234 at par 491.

²²¹ *Supra* n 234 at par 489.

²²² *Supra* n 234 at par 520.

²²³ *Supra* n 234 at par 580.

²²⁴ *Supra* n 234 at par 580.

²²⁵ *Supra* n 234 at par 618.

²²⁶ *Supra* n 234 at par 618.

²²⁷ *Supra* n 234 at par 618.

Second was the phrase 'economic life of their own'. The tribunal explained that 'economic life' means 'more than the mere presence of resources' and that 'some level of local human activity to exploit, develop, and distribute those resources would be required'.²²⁸ 'Of their own' in turn means that the feature(s) 'must have the ability to support an independent economic life, without relying predominantly on the infusion of outside resources or serving purely as an object for extraction activities, without the involvement of a local population'.²²⁹ Itu Aba failed to meet these standards, too. Although the island supported certain kinds of economic activity, all of it was 'essentially extractive in nature (i.e., mining for guano, collecting shells, and fishing)' in the sense that it 'aimed to a greater or lesser degree at utilizing the resources [present] for the benefit of populations elsewhere'.²³⁰ This was found inadequate by the tribunal.²³¹

A number of commentators, including Scoville, have characterized the Senkaku Islands as fully entitled islands rather than rocks.²³² But that position now appears untenable. According to Scoville, there are now several ways in which the Senkakus, even as a group, present a similar or even easier case for rock status than Itu Aba. Scoville provides the following analogue:: prior to the late 1800s, there was essentially no human presence of any kind on the Senkaku Islands; in 1890, a Japanese company placed roughly 80 fishermen on the largest of the islands (Uotsuri) to build huts and collect shells and other marine resources, but these individuals were present at most for seasonal periods.²³³ Other groups of fishermen also stayed on the islands intermittently, but only for two to three months at a time, or at the longest half a year because the environment wasn't suitable for longer stays.²³⁴ In 1893, a

²²⁸ *Supra* n 234 at par 499.

²²⁹ *Supra* n 234 at par 499.

²³⁰ *Supra* n 234 at par 500.

²³¹ *Supra* n 234 at par 623.

²³² Scoville (n 139).

²³³ *Ibid.*

²³⁴ *Ibid.*

group of workers stranded on Uotsuri managed to survive for an unspecified period. The food they consumed, however, was non-native, and they were ‘almost at the end of their endurance’ when they were finally ‘rescued’.²³⁵ In 1896, the Japanese government leased some of the Senkakus to an Okinawan entrepreneur who used them and the surrounding waters as a source of albatross feathers, terns, bonito, and guano, all of which he sold in Japan or exported for profit. At the peak of these operations around 1912, there were 248 people present, but these individuals were ‘hired—not so much as pioneers to develop new territory than as migrant labour employed to do a certain job’ and they ‘received payment in return for agreeing to live and work on the islands’ only ‘for a certain period of time, normally a year or six months’.²³⁶ And although the entrepreneur constructed dorms, warehouses, work huts, and a boat-building dock to support his operations, there were ‘no personally owned houses’ present.²³⁷ Scoville writes that since the expiration of the lease, no one has lived on the islands even temporarily, and they are uninhabited today.²³⁸

Much of this sounds similar to Itu Aba. Neither appears to have a naturally occurring supply of food, water, or shelter in quantities sufficient to enable a group of persons to live for an indeterminate period of time. Neither has ever had a stable community of residents who considered the island their home. Neither has sustained economic activities that are anything other than extractive. Scoville states that although Uotsuri is slightly larger than Itu Aba, the tribunal emphasized that size is irrelevant. There appears to be an abundance of resources around the Senkaku Islands, but the same could be said of Itu Aba. Scoville reached the conclusion that given Itu Aba is a rock, it is highly likely that the Senkakus are as well.

3 Final observations

²³⁵ *Ibid.*

²³⁶ *Ibid.*

²³⁷ *Ibid.*

²³⁸ *Ibid.*

However convincing Scoville's argument may seem by drawing a parallel between Itu Taba and the Senkaku Islands, such a deduction by comparison should be approached with caution since the Tribunal held that the capacity of a feature to sustain human habitation or an economic life of its own must be assessed on a case-by-case basis.²³⁹ The Tribunal provides that the drafters of UNCLOS considered proposals with any number of specific tests and rejected them in favour of the general formula set out in Article 121(3).²⁴⁰ The Tribunal further held that it does not consider that an abstract test of the objective requirements to sustain human habitation or economic life can or should be formulated.²⁴¹

Chapter 5:

Conclusion

1 Introduction

²³⁹ *Supra* n 234 at par 546.

²⁴⁰ *Supra* n 234 at par 546.

²⁴¹ *Supra* n 234 at par 546.

According to Article 5 of UNCLOS, the normal baseline for measuring the breadth of the territorial sea (and hence the EEZ and, in most situations, the continental shelf) is ‘the low-water line’ along the coast as marked on large-scale charts officially recognised by the coastal State’. The baseline can also be drawn with reference to islands, rocks and low-tide elevations.²⁴² The area claimed by China in its 2012 submission to the CLCS effectively uses the the Senkaku Islands as ‘baselines’ for the maritime delimitation of China’s continental shelf beyond 200 nautical miles. Japan objected to the China’s submission by responding that the Senkaku Islands are part of the territory of Japan and cannot be used as ‘baselines’ by China for purposes of maritime delimitation of China’s continental shelf beyond 200 nautical miles, consequently the sovereignty dispute over the Senkakus was ignited.

2 Sovereignty debate

Fundamentally, the sovereignty dispute over the Senkaku Islands hinges on the doctrines of occupation and acquisitive prescription. It seems Japan has a more persuasive claim because Japan has greater doctrinal options in presenting its case - the argument for acquisitive prescription is at least as powerful as the argument for original Chinese occupation, and acquisitive prescription trumps occupation as a later-in-time source of title.

3 Maritime delimitation dispute

As the Commission intends to accomplish its task without involvement in territorial or maritime disputes between or among states, it seems the maritime delimitation will have to be

²⁴² Fietta and Cleverly (2016) 33.

kept at bay until the Senkaku Islands sovereignty dispute has been resolved, unless the parties agree to an enclave approach as suggested by Mitchell and Voon in chapter 3.

4 ADIZ

It is evident from China's proclamation of an ADIZ that China is seeking to strengthen its claim by exercising a certain degree of sovereignty over the airspace of the disputed territory, as the eastern edge of China's ADIZ closely follows the eastern edge of China's East China Sea continental shelf claim and covers the airspace over the Senkaku Islands.

5 Final observation

A number of commentators, including Scoville, have previously characterized the Senkaku Islands as fully entitled islands rather than rocks. But that position now appears untenable after the outcome of the South China Sea arbitration.²⁴³ According to Scoville, there are presently several ways in which the Senkakus, even as a group, present a similar or even easier case for rock status than Itu Aba.

In the event the Senkaku Islands are 'rocks' and any of the States should construct artificial islands (as provided for in Article 56, para 1(b)(i) of UNCLOS), these artificial islands will not possess the status of islands. Consequently, artificial islands have no territorial sea or other maritime zones of their own and their presence does not affect the delimitation of either the territorial sea or the EEZ or continental shelf.²⁴⁴

²⁴³ *Supra* n 234.

²⁴⁴ Kwiatkowska (1989) 103.

The separate question of sovereignty over the islands themselves is suddenly much less consequential than it might have been: whoever has title over the land now possibly enjoys a diminished package of maritime rights that spatially extend no farther than a 12-nautical-mile territorial sea and an additional 12-nautical-mile contiguous zone.²⁴⁵

It seems sensible for China and Japan to first submit the dispute for a preliminary determination on the status of the Senkaku Islands as rocks or islands, and thereafter for adjudication over the sovereignty of the Senkakus.

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²⁴⁵ *Supra* n 140.

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