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Japan's Territory under International Law

Edited by

Masaharu Yanagihara and Atsuko Kanehara



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Foreword

This book publishes research results from the “Territory and Sovereignty Working Group” for the “Territory, Sovereignty, and History Research Project” launched by the Japan Institute of International Affairs (JIIA) in 2017. This book is the outcome of the joint work undertaken by all of the authors under said research framework.

The situation surrounding the territory of Japan continues to be severe, and in recent years, it seems that the severity of the situation has increased. Since the 1990s, there have been a variety of attempts to find a solution for the Northern Territories (for example, the Kawana Proposal of April 1998). Since the border between Etorofu Island and Urup Island was delimited in Article 2 of the Treaty of Commerce, Navigation and Delimitation between Japan and Russia (also known as the Treaty of Shimoda) in 1855, the Government of Japan has asserted that the four northern islands (Etorofu Island, Kunashiri Island, Shikotan Island, and the Habomai Islands) are the “inherent territory” of Japan, that the islands have never been foreign territory, and that the islands were not included in the Kurile Islands that were renounced under Article 2(c) of the 1951 San Francisco Peace Treaty.

However, a peace treaty, which is a prerequisite for the “handover” of the Habomai Islands and Shikotan Island to Japan as stipulated in Article 9 of the 1956 Japan-Soviet Joint Declaration, has yet to be concluded between Japan and Russia. If anything, in recent years, there have been occasional statements by Russian leaders that seem to indicate a return to the position once held by the former Soviet Union, that “there is no territorial dispute over the Northern Territories in the first place.” In addition, Article 67 of the Russian Constitution, revised in July 2020, clearly states that ceding Russian territory is prohibited. On March 21, 2022, Russia announced the unilateral termination of negotiations on the Japan-Russia Peace Treaty.

As for Takeshima, the Republic of Korea (ROK) consistently takes the position that no territorial dispute exists in the first place. In January 1905, the Government of Japan reaffirmed via a Cabinet decision that Takeshima was Japanese territory, and, in Article 2(a) of the San Francisco Peace Treaty, “Korea, including the islands of Quelpart, Port Hamilton and Dagelet” were renounced, but Takeshima was not included in this renunciation. To date, the Government of Japan has formally proposed to the Government of the ROK three times, in 1954, 1962, and 2012, to settle the dispute at the International Court of Justice. However, the ROK’s basic position is that it will not respond to such proposals and that it will not respond to diplomatic negotiations as long

as there is no dispute over Dokdo/Takeshima. On the other hand, as Takeshima is considered to have been under the effective control of the ROK since 1954 (an “illegal occupation” from Japan’s point of view) it has seemed prudent for the ROK to adopt a “quiet diplomacy” policy, but the ROK has also vociferously asserting the legitimacy of its possession over Takeshima at every opportunity (for example, protesting the map of Japan at the 2021 Tokyo Olympic Games torch relay course).

Furthermore, with regard to the Senkaku Islands, the People’s Republic of China (PRC) began officially to claim sovereignty over the islands in 1971, and, particularly since 2008, it has dispatched official vessels to frequently enter and intrude into the contiguous zone and territorial waters of the Senkaku Islands, and appears to be attempting to change the status quo by force. The Japan Coast Guard website provides daily data on the number of China Coast Guard ships that have entered the contiguous zone around the Senkaku Islands and that are intruding into Japan’s territorial waters, and the number of such ships has rapidly increased, especially since September 2012. With regard to these actions, the Government of Japan has consistently taken the position that the Senkaku Islands are the inherent territory of Japan and that there is no territorial dispute over the islands, as the Government of Japan declared, in January 1895, the islands to be *terra nullius*, and, since their incorporation into Japan under international law, the islands have never been foreign territory. In the November 7, 2014 document titled “Regarding Discussions toward Improving Japan-China Relations,” which indicates an agreement between Japan and the PRC, while confirming that Japan and the PRC have differing views on the recent tensions in the waters of the East China Sea, including those around the Senkaku Islands, the Government of Japan maintained its position that there is no territorial dispute over the Senkaku Islands, because this document refers to the waters, not to the land itself.

Both the ROK and the PRC have mobilized researchers, not only from their own countries but also from other countries, and have ramped up their efforts to communicate their legitimacy to the international community. Moreover, in addition to spreading information through their websites, they are also employing a variety of other methods, such as international symposia, the publication of papers in academic journals, and the publication of specialized books.

This book does not aim to underpin the position of the Government of Japan or any government on the Northern Territories, Takeshima, or the Senkaku Islands, by closely analyzing their various historical backgrounds and legal issues and then presenting concrete and feasible solutions for each from the perspective of international law, or by presenting newly discovered primary materials that would be advantageous to Japan. Rather, this book is focused

on two questions from a historical and theoretical perspective: 1) the historical evolution of the concept of “territory” and 2) methods for resolving territorial disputes.

Under modern international law, a State has citizens who are nationals of that State, and the territory of a State consisting of such citizens is delimited by national borders. “Defined territory” is one of the requirements for statehood, and all States under modern international law are territorial States.

It may be understood that the legal basis for such territories has been shown by the concept of “territorial title” – specifically, the five titles of occupation, accretion, cession, prescription, and conquest. However, while territorial title does indeed refer to the fact that a certain area is claimed as a territory, it is a concept that has only been used when there is a change of territory among Western countries or when a non-Western area is to be incorporated into the territory of a Western country. The legal basis for the existing territory of a Western country or for the territory of a new State itself would have to be explained by something other than these territorial titles.

There is another limitation to the concept of territorial title. Territorial disputes between States often arise when the facts are extremely complex and varied. If one of the territorial titles clearly applies and the facts satisfy the requirements, then there should be no dispute in the first place. In reality, however, it is often extremely difficult to determine the facts, such as whether a territory is truly *terra nullius* or whether it is actually the territory of another State, and which State has been in effective possession of the land, which is a requisite for occupation. That is to say, territorial disputes cannot always be resolved simply by applying one of the territorial titles.

This book’s first question, the historical evolution of the concept of “territory,” is based on the concept of how territory in modern international law, as described above, was established and changed. It then examines East Asian views on the concept of territory and the actual situation of the spatial order in East Asia before the establishment of modern international law relations, and lays out a discussion of the issues in relation to Japan’s contemporary territorial issues.

In the East Asian world, there were a variety of intrinsic territorial concepts such as “*shioki* (control),” “*fuyō* (dependency),” “*hankoku* (domain State),” “*hanpō* (domain territory),” “*zokkoku* (subject State),” “*ryōzoku* (dual client State),” “*kyōiki* (territory),” “*hanto* (territory),” “*hōdo* (domain),” and “*ikokusakai* (the area next to a foreign country).” It is therefore required to analyze how the process of determining territory in the East Asian world was conducted using the concept of territory under modern international law, and, furthermore, what kinds of spaces were considered to be extensions of land that was

regarded as territory, such as “overseas territory” and “leased territory.” This analysis covers various issues that include Japan bringing Ezo (the lands to the north of the main Japanese island of Honshu) under direct control, the delimitation of borders with Russia (the Kurile Islands and Karafuto (also known as Sakhalin)), the status of the Ryūkyū Kingdom (modern-day Okinawa), and the attribution of remote islands such as the Ogasawara islands (uninhabited islands), the Senkaku Islands, and Takeshima.

The four chapters in Part 1 “Defining the Territory of Modern Japan” and in Part 2 “Territorial Extensions in Modern Japan” were written from this point of view.

Part 1, Chapter 1, “Incorporation of Remote Islands into the Territory of Japan: Focusing on Iō-tō and Minami-Tori-shima” (Masaharu YANAGIHARA) presents ten major examples (including the Senkaku Islands and Takeshima) of the incorporation of remote islands into modern Japan, with the case of Iō-tō clearly showing that there are two methods of incorporation: the occupation of *terra nullius* and the reconfirmation of the fact that a certain area of land is Japanese territory (reconfirmation of the intent of possession). It concludes that in the case of Minami-Tori-shima, the method of incorporation was, without any doubt, occupation. Part 1, Chapter 2, “Ryūkyū Attribution Issue and Ernest Satow: Assessment of the Newspapers Debate between Japan and Qing and Its Background” (Tadashi MORI) analyzes Ernest Satow’s February 13, 1880 memorandum on the Ryūkyū attribution issue and makes it clear that Sato supported Japan’s claim to Ryūkyū based on his assessment of the modern international legal order, but without delving too deeply into historical factual disputes, the significance of tribute, or the dual affiliation theory.

Part 2, Chapter 3, “Acquisition of ‘Colony’ and Legal System of Japan” (Tetsuya YAMADA) examines how Japan perceived the concept of territory when it acquired so-called “overseas territory” and how this perception affected the legal system, focusing on the point that, while this was a theoretical issue, there were also political aspects to the issue of constitutional application, such as parliamentary tactics and factional disputes within the government. Part 2, Chapter 4, “The Concept of Leaseholds from the Perspective of Modern Japan” (Yuichi SASAKI) argues that, in contrast to Europe and the United States, where, after World War I, leased territory went from being viewed as a disguised or perverted form of cession to being understood to be not the same as cession, in modern Japan, the non-cession theory prevailed over the disguised cession theory from the beginning. Furthermore, it analyzes the facts and circumstances surrounding Japan’s leased territory that were behind the prevalence of the non-cession theory.

The second question addressed in this book, on methods for resolving territorial disputes, looks at the latest developments in international jurisprudence and other territorial dispute resolution cases as well as at changes in the usage and significance of international law concepts that are related to territory, taking up existing articles and commentaries on judicial precedents and, in particular, examining their points with Japan's territorial issues in mind.

Since the 1980s, there has been an overwhelming increase in the number of cases that deal with territorial disputes, including issues of maritime delimitation, which are being handled not only by the International Court of Justice, but also by the International Tribunal for the Law of the Sea and other courts and tribunals. In these international courts and tribunals, the conclusions are not reached based on any one of the territorial titles; rather the actual territorial disputes are resolved through the use of various legal theories such as the acquiescence, recognition, and protest of the countries involved, "continuous and peaceful display of territorial sovereignty," *effectivités*, and the theory of critical date and intertemporal law. Additionally, the international courts and tribunals are also addressing questions of how to evaluate the connection or disconnection between the traditional concept of "territory" in pre-modern European and non-European regions and the concept of "territory" in modern international law.

With Japan's territorial disputes in mind, the five papers in Part 3 "Intent and Time in Territorial Disputes" and in Part 4 "Territorial Disputes in International Courts and Tribunals" analyze these various attempts by international courts and tribunals.

Part 3, Chapter 5, "The Arguments Based on 'Law' in Territorial Disputes" (Atsuko KANEHARA) looks at law-related assertions and claims, focusing on how laws incorporate those assertions and claims into the legal world, considering, in order, "historic rights" as a claim relating to law, intent and time as the main factors involved in determining the relationship to law, and the factor of "operational intent" in territorial disputes, before finally proposing an integrated position for Japan, as a Sovereign State, on the issue of the Senkaku Islands. Part 3, Chapter 6, "Significance of Silence in Territorial Disputes: Toward Legal Construction on "75 Years of Silence" regarding the Senkaku Islands (Pinnacle Islands)" (Tomofumi KITAMURA) examines, with the goal of exploring the implications for the Senkaku Islands issue, pre-war judicial precedents and theories regarding acquiescence, estoppel, and prescription, etc., along with early judicial precedents from the International Court of Justice and related theories, and then attempts to unravel these entangled concepts and understand their existence and content. Part 3, Chapter 7, "Temporal Elements and Their Regulation in Determining

Territorial Disputes: Practical Application to Territorial Disputes of Japan” (Hironobu SAKAI) first summarizes the respective roles in territorial disputes of the principles of critical date and intertemporal law, then considers how these two principles function in judicial practice, and from there examines their specific application to Japan’s territorial disputes based on the practical role of the two principles that is obtained.

Part 4, Chapter 8, “Application and Evaluation of “Premodern/Non-European Territorial Control” in International Courts and Tribunals” (Tomoko FUKAMACHI) examines ten judicial precedents involving pre-modern European and non-European territorial dominion and ascertains how the courts have dealt with the intents or aims of the parties and the concepts of title that were used, that is, it reviews how pre-modern and non-European territorial dominion and legal evaluations were conducted and considers the factors that guided such treatment. Part 4, Chapter 9, “Recognition of the Existence of Territorial Sovereignty Disputes in International Courts and Tribunals: The Use of the Coastal State Litigation before the Annex VII Arbitration of the UN Convention on the Law of the Sea” (Dai TAMADA) contains a detailed analysis of “Coastal State Litigation” in the UNCLOS Annex VII Arbitration Tribunal – the Chagos Marine Protected Area Arbitration and the Dispute Concerning Coastal State Rights – and, by utilizing the Chagos Method A and the Crimean Method presented therein, shows that it is possible to obtain recognition of the existence of a territorial sovereignty dispute over, for example, Takeshima.

I would also like to briefly explain here the two terms “territory” and “territorial land.” “Territory” is divided into three parts and consists of “territorial land” for terrestrial areas, “territorial waters” for maritime areas (consisting of “inland waters” such as ports and the “territorial seas” outside of “inland waters”) and “territorial airspace” for aerial areas. Among them, territorial land is determined first, followed next by territorial waters of the surrounding maritime areas, and then territorial airspace above the territorial land and territorial waters. Territorial land is positioned at the center of the idea of territory, with territorial waters and territorial airspace are determined by territorial land. As such, the term “territorial land” is also used to refer to the entirety of the territory. This book also uses the two terms “territory” and “territorial land” in that sense.

The main purpose of this book is to shed light on Japan’s territorial situation from a different and unique perspective by analyzing the historical evolution of the concept of “territory” and by analyzing the various legal theories on resolving territorial disputes. Although this book does not have any chapters that directly address the facts and legal issues of the Northern Territories, Takeshima, and the Senkaku Islands in detail, each of the chapters in this book

presents multiple points of view that can provide significant insight into the resolution of these issues, and I am convinced that they will be of useful reference to practitioners, researchers, and even members of the general public who are interested in territorial issues.

This book is an English version of YANAGIHARA Masaharu and KANEHARA Atsuko (eds.), *Kokusaihō kara Mita Ryōdo to Nihon* 国際法からみた領土と日本 [Japan's Territory under International Law] (Tokyo: University of Tokyo Press, 2022) in Japanese. The translation was done by Urban Connections and checked by each author. I would like to express my very deep gratitude for JIIA's strong support for the publication.

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Masaharu YANAGIHARA

Figures

- 1.1 Location of the bilateral demarcation line and Marcus Island according to the 1895 declaration of the delimitation of borders between Japan and Spain. Japan center for Asian historical records (JACAR), Ref. B03041152600 (4th image).
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