Territorial Issues on the East China Sea *A Japanese Position*

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1. Introduction

This article is intended to introduce the assertion of the Japanese government with regard to the territorial dispute over the Senkaku Islands, and to present an objective and reasoned examination to the problem in terms of international law. Before turning to the main part of the article, some basic points of international law shall be given as an introduction to the legal issues relevant to the dispute.

A. Occupation as a Mode of Acquisition of State Territory

The Japanese government has contended that the Senkaku Islands had been *terra nullius* (a territory without owner) until their incorporation into Japanese territory through the decision at the Japanese Cabinet meeting in 1895; that the Islands effectively became Japanese territory in terms of international law through their incorporation in 1895 and through the effective exercise of state functions over the Islands; and that the legal status of the Islands remains unchanged even after World War II. By contrast, both the Chinese and Taiwanese governments have contended that, historically speaking, the Senkaku Islands (Diao-yu Tai) have been their territory; and that Japan, while forcing the *Qing* government to cede Taiwan in accordance with the Treaty of Shimonoseki (1895), unilaterally incorporated those islands into her territory; and that the Islands should, like Taiwan, be returned to China. In comparing contentions raised by both parties, some critical issues are addressed as follows:

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1. whether the Senkaku Islands were, in the light of international law as it stood in 1895, Chinese territory or *terra nullius* (a territory which was at the time not subject to the sovereignty of any state); and

2. whether Japan legitimately acquired the territorial sovereignty over the Senkaku Islands in accordance with the international law of the day, through the measures of territorial incorporation taken in 1895 and through Japan's effective control over them thereafter.

The Japanese government invokes the principle of 'occupation' as the legal ground for their contention. In general, international law recognizes the following modes of acquisition of territory as creating a title[1] to territorial sovereignty: occupation, prescription, cession, accretion and annexation (subjugation). Occupation is the appropriation of a territory by a state which is not at the time subject to the sovereignty of any state.[2] Occupation is effected through taking possession of, and maintaining the exercise of state functions over, a territory in the name of, and for, the acquiring state.[3] Occupation can only apply to a territory that is *res nullius* (the territory which is at the time not under the sovereignty of any state). Thus, occupation is in all cases lawful in origin, and the mere passage of time has no place in it.[4] Prescription, on the other hand, in international law means the acquisition of title by a continuous and undisturbed possession. Prescription is a concept which encapsulates situations where the original possession is unclear or disputed and unlawful possession. The possession must be continuous, undisturbed and demonstrating an act as a sovereign, while the former sovereign acquiesces to such possession throughout the period. Thus, prescription inherently requires a certain passage of time, although international law does not explicitly define how long the period should be. Today, prescription is normally recognized as one of the modes of acquisition of territorial sovereignty in international law.[5]

However, as a matter of fact, it may often be uncertain whether the area in question has historically been a territory of a particular state, or *terra nullius* in international law in the actual territorial disputes. Such difficult cases have become apparent in territorial disputes, especially after the end of the 19th century when annexation or division of

1 "The primary meaning of 'title' is the vestitive facts which the law recognizes as creating a right." That is to say, every right (in a wide sense including privileges, powers and immunities) involves a title or source (i.e. certain facts) from which it is derived. Jennings made the following explanation. *See* R. Y. JENNINGS, THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW 4 (1963).

2 *Id.* at. 20.

3 ROBERT JENNINGS & ARTHUR WATTS, OPPENHEIM'S INTERNATIONAL LAW 688 (9th ed. 1992).

4 Jennings, *supra* note 1, at 23.

5 *Id.* at 20 & 23.