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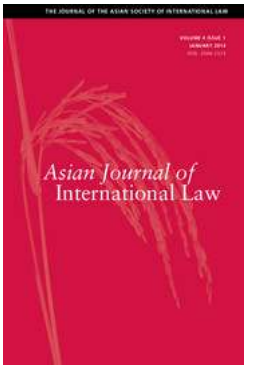

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Re-Evaluating the Role of International Law in Territorial and Maritime Disputes in East Asia

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Abstract
Recently increased tensions across East Asia over territorial and maritime disputes show glimpses of brinkmanship. However, the past experiences of Western colonization and Japan's imperialism within the region add complexity to those disputes challenging our understanding of legal debates surrounding territorial and maritime disputes. This article examines the extent to which the relevant rules of international law are capable of providing "justice" by accommodating the unique historical contexts in the region in settling highly politically sensitive territorial and maritime claims. It finds that the existing rules of international law are more than capable of accommodating the peculiar historical contexts of East Asia in the resolution of territorial and maritime disputes, whilst acknowledging that certain ambiguities in the law are contributing to some of the current tensions that have arisen over these disputes.

There have recently been increased tensions across East Asia over several different territorial and maritime disputes that are yet to be resolved.[1] South Korean President Lee Myung-bak's visit to the Dokdo/Takeshima Islands on 10 August 2012, followed by his remarks demanding that the Japanese Emperor apologize for Japan's past atrocities, caused diplomatic frictions between South Korea and Japan.[2] The dispute between the People's Republic of China (PRC) and Japan over the Diaoyu/Senkaku Islands has also been escalating, following the Japanese government announcing its intention to nationalize three of the islands.[3] Towards the far north, Dimitry

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1. For the purpose of this article, East Asia is defined broadly to include Northeast and Southeast Asia.
2. See e.g. Kee-seok KIM, "Lee Myung Bak's Stunt over Disputed Islands" (19 August 2012), online: East Asia Forum <http://www.eastasiaforum.org/2012/08/19/lee-myung-baks-stunt-over-disputed-islands/>.
3. See e.g. Peter DRYSDALE, "Japan's Territorial Troubles" (20 August 2012), online: East Asia Forum <http://www.eastasiaforum.org/2012/08/20/japans-territorial-troubles/>. There are five islands and

Medvedev's visit to the disputed South Kuril Islands (or Hoppo Ryodo as they are known in Japan) in 2011 as the first by a Russian leader still remains fresh among Japanese sentiment.[4] Towards the south, the dispute over the South China Sea involving multiple states adds further complications to regional territorial disputes, as can be seen in 2012 by ASEAN having failed to adopt a communiqué to address the issue.[5]

Those confrontational statements and behaviours by regional leaders may well simply be due to their political considerations in diverting public attention away from the domestic political turmoil they find themselves in or improving their public approval ratings. But there are also glimpses of brinkmanship as these countries are trying to reinforce the effective control they have already been exercising over the disputed islands and, for those who do not have effective control, imperatives to respond to each sovereign act by the other party to the dispute in relation to disputed islands. In addition, there are significant economic interests at stake because of the associated entitlement to maritime zones each of those disputed islands may generate. These considerations find their basis in the existing rules of international law, particularly the international law of the sea. Nevertheless, the past experiences of Western colonization and Japan's imperialism within the region arguably add complexity to the extent to which those rules of international law are capable of providing "justice" in settling their highly politically sensitive territorial and maritime claims.

This complexity challenges our understanding of legal debates surrounding territorial and maritime disputes in East Asia. For example, do the current principles and rules of international law allow sufficient scope and flexibility to accommodate the unique historical background that exists in the region chiefly characterized by Japan's pre-World War II imperialism in addition to Western colonialism in assessing territorial and maritime claims? Are the current principles and rules of international law capable of facilitating the peaceful resolution of territorial and maritime disputes in East Asia? This article addresses these questions by critically examining the relevant rules of international law in the historical context of East Asia. First, it will review the significance of historical contexts in the application and interpretation of the rules of international law relevant to territorial and maritime claims over the disputed areas in East Asia. Second, an examination will be undertaken as to what extent the existing principles and rules of international law are capable of accommodating East Asia's peculiar historical contexts and actually facilitate peaceful settlement of international disputes concerning territorial title. Third, consideration will be given to the international law of the sea and the basis that it

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islets that are part of the Diaoyu/Senkaku group of which three had been held in private ownership and the other two were controlled by the government of Japan.

4. See e.g. John HEMMINGS, "Kuril Islands Dispute: Russo-Japanese Relations at Their Lowest Ebb Since the Cold War" (15 March 2011), online: East Asia Forum <http://www.eastasiaforum.org/2011/03/15/kuril-islands-dispute-russo-japanese-relations-at-their-lowest-ebb-since-the-cold-war/#more-17979>.

5. See e.g. Aileen S.P. BAVIERA, "South China Sea Disputes: Why ASEAN Must Unite" (26 July 2012), online: East Asia Forum <http://www.eastasiaforum.org/2012/07/26/south-china-sea-disputes-why-asean-must-unite/>.

provides for the assertion of maritime claims and the resolution of maritime boundary disputes with particular reference to East Asian challenges. The article concludes by suggesting that the existing rules of international law are more than capable of accommodating the peculiar historical contexts of East Asia in the resolution of territorial and maritime disputes in the region, whilst acknowledging that certain ambiguities in the law are contributing to some of the current tensions that have arisen over these disputes.

I. THE SIGNIFICANCE OF HISTORICAL CONTEXT

Each of the territorial and maritime disputes in Asia has its own history and factual evidence to support both sides of the dispute. A detailed examination of legal arguments that support each state's territorial title and associated maritime claims goes beyond the scope of this article. Instead, this section provides a brief recount of territorial title and associated maritime claims made by the parties to major East Asian territorial disputes in order to highlight central historic features commonly underlying those disputes. As Seokwoo Lee observes, "[a]lthough the claimants for ownership of the disputed territories often rely on ancient history sources for support, much of the uncertainty surrounding territorial disputes is a by-product of the post-World War II boundary decisions and territorial dispositions".[6] Even though the 1951 San Francisco Peace Treaty was supposed to establish the status quo ante prior to Japan's imperial expansion policy,[7] the legal status of the following disputed islands has been left indeterminate together with questions as to what extent prior historic claims have an enduring effect on contemporary territorial title.

A. *Dokdo/Takeshima Dispute (the Republic of Korea v. Japan)*

The Dokdo/Takeshima dispute concerns territorial title to two rocky islets and thirty-two smaller outcroppings that have a combined land area of 0.18 square kilometres located halfway between the Republic of Korea and Japan—approximately 215 kilometres from mainland Korea and 250 kilometres from the main island of Japan, Honshu. The Republic of Korea bases its claim to territorial title over the islets on geographical proximity and historical official documents.[8] Japan, on the other hand, has argued that Dokdo/Takeshima were *terra nullius* and open to acquisition in 1905 when the territory was incorporated into the Shimane Prefecture.[9] Considering this to be linked with Japan's attempt to annex the Korean Peninsula which eventuated in

6. Seokwoo LEE, "Intertemporal Law, Recent Judgments and Territorial Disputes in Asia" in Seoung Yong HONG and John M. VAN DYKE, eds., *Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea* (Leiden: Martinus Nijhoff, 2009), 119 at 121.

7. *Treaty of Peace with Japan*, 8 September 1951, 136 U.N.T.S. 45 (entered into force 28 April 1952) [*1951 Peace Treaty*].

8. "Why Japan's Call to Bring the Dokdo Issue to the ICJ Is Not Acceptable" (21 September 2012), online: Republic of Korea Ministry of Foreign Affairs and Trade <http://pol.mofat.go.kr/english/eu/pol/main/index.jsp>. For a detailed analysis, see John M. VAN DYKE, "Legal Issues Related to Sovereignty over Dokdo and Its Maritime Boundary" (2007) 38 Ocean Development & International Law 157 at 165–7.

9. "Outline of Takeshima Issue", online: Ministry of Foreign Affairs of Japan <http://www.mofa.go.jp/region/asia-paci/takeshima/position.html>.

1910, the Republic of Korea regards Japan's claim as "the legacy of Japan's imperialism and colonialism".[10]

Under Article 2(a) of the 1951 Peace Treaty, Japan renounced "all right, title and claim to Korea, including the islands Quelpart, Port Hamilton, and Dagelet", but without a reference to Liancourt Rocks, which is the English name of Dokdo/Takeshima that appeared in the earlier Treaty drafts.[11] The absence of any reference to Dokdo/Takeshima indicates that its status remained indeterminate under the Peace Treaty and nothing more,[12] leaving the issue for settlement at a later stage.[13] In 1952, the Republic of Korea, however, decided to take matters into its own hands by the then South Korea President, Lee Seung-man, proclaiming the Peace Line to incorporate the islets within the Korean side of the border.[14]

B. *Diaoyu/Senkaku Islands Dispute (the PRC and Taiwan v. Japan)*

The Diaoyu/Senkaku Islands comprise five small volcanic islands and three outcroppings with a total land area of 7 square kilometres, which are located approximately 170 kilometres northwest of Taiwan and 410 kilometres west of Okinawa, Japan. Commentators observe that the islands were discovered by the Chinese in 1372 and since then have been used by them sporadically for different purposes.[15] On the other hand, Japan claims that the islands were formally incorporated into Okinawa Prefecture through an 1895 Cabinet decision following a decade long survey of the islands that found the islands to be *terra nullius*.[16] The decision was made during the Sino-Japanese War, which ended in April 1895 with the conclusion of the 1895 Shimonoseki Peace Treaty, which did not specifically refer to the Diaoyu/Senkaku Islands as part of the Formosa Islands or Pescadores Group ceded to Japan.[17]

Article 2(b) of the 1951 Peace Treaty provides that Japan renounced Taiwan and the Pescadores, whilst under Article 3 the Nansei Shoto Islands were placed under US administrative authority. However, there is no specific reference to the Diaoyu/Senkaku Islands in either of the provisions, leaving the legal status of the islands under the Peace Treaty indeterminate. The fact that the PRC was not a party to the

10. The Republic of Korea Ministry of Foreign Affairs and Trade, *supra* note 8.
11. For details, see Seokwoo LEE, "Territorial Disputes in East Asia, the San Francisco Peace Treaty of 1951, and the Legacy of U.S. Security Interests in East Asia" in Seokwoo LEE and Hee Eun LEE, eds., *Dokdo: Historical Appraisal and International Justice* (Leiden: Martinus Nijhoff, 2011), 41 at 58–60.
12. *Ibid.*, at 62; van Dyke, *supra* note 8 at 184.
13. See *Territorial Sovereignty and Scope of the Dispute (Eritrea and Yemen)*, Decision of 9 October 1998, [2006] XXII Reports of International Arbitral Awards, 209 at 251–3, paras. 158–65. The Arbitral Tribunal also observed that disposed islands "did not become *res nullius*—that is to say, open to acquisitive prescription—by any state": *ibid.*, at 253, para. 165.
14. "Presidential Declaration of Sovereignty over Adjacent Seas" (18 January 1952), reproduced in part in Chi Young PAK, *The Korean Straits* (Dordrecht: Martinus Nijhoff, 1998) at 126.
15. For legal analysis of the dispute, see e.g. Steven Wei SU, "The Territorial Dispute over the Diaoyu/Senkaku Islands: An Update" (2007) 36 Ocean Development & International Law 45, and the literature cited therein.
16. "The Basic View on the Sovereignty over the Senkaku Islands" (November 2012), online: Ministry of Foreign Affairs of Japan <http://www.mofa.go.jp/region/asia-paci/senkaku/position_paper_en.html>.
17. *Treaty of Shimonoseki*, 17 April 1895, 181 CTS 21 (entered into force 8 May 1895), art. 2(b) and (c).

Peace Treaty raises an additional legal question as to whether the territorial disposition under the Peace Treaty has any legal effect or is opposable by the PRC.[18]

The PRC and Japan have been engaging in bilateral negotiations for the purpose of overall East China Sea maritime boundary delimitation between the two countries, based on the understanding that the Diaoyu/Senkaku Islands issue should not affect the boundary.[19] Nevertheless, in September 2012 the PRC lodged with the United Nations (UN) an official announcement of the base points and baselines for the territorial sea of the Diaoyu Islands.[20] In December 2012, the PRC also submitted a partial submission on its continental shelf claims in the East China Sea to the Commission on the Limits of the Continental Shelf. China's submission asserts that geomorphological and geological features demonstrate that the natural prolongation of its continental shelf in the East China Sea extends to the edge of the Okinawa Trough.[21] This action brought about a response from Japan, which on 28 December 2012 lodged a Note Verbale with the UN Secretariat in New York, indicating that the Senkaku Islands are "an inherent part of Japan" and rejecting the PRC's reliance upon baselines generated adjacent to the islands as a basis for the submission to the Commission.[22]

C. *South Kuril Islands/Hoppo Ryodo Dispute (Russia v. Japan)*

This dispute concerns territorial title over a group of four islands—Etorofu, Kunashiri, Shikotan, and the Habomai islets—located at the southern end of the Kuril Islands chain which runs from Kamuchatka to the northeast of Hokkaido, Japan. The 1855 Treaty of Commerce, Navigation, and Delimitation between Japan and Russia confirmed that those islands fell within Japanese borders.[23] The four islands remained under Japan's control until the Soviet Union took control by military force at and around the end of World War II.[24]

Under the 1951 Peace Treaty, Japan renounced all right, title, and claim to the Kuril Islands.[25] However, the terms of the treaty do not clearly stipulate, first, which islands comprise the Kuril Islands, and second, which country is the territorial

18. Cf. G.G. FITZMAURICE, "The Juridical Clauses of the Peace Treaties" (1948-II) 73 Recueil des Cours 260 at 280–2.

19. JI Guoxing, "Sino-Japanese Jurisdictional Delimitation in East China Sea: Approaches to Dispute Settlement" in Hong and van Dyke, *supra* note 6, 77 at 78.

20. "Diaoyu Dao, an Inherent Territory of China", Section V, online: The Government of the People's Republic of China <http://english.gov.cn/official/2012-09/25/content_2232763_5.htm>.

21. Commission on the Limits of the Continental Shelf (CLCS), "Outer Limits of the Continental Shelf Beyond 200 Nautical Miles from the Baselines: Submissions to the Commission: Submission by the People's Republic of China" (14 December 2012), online: CLCS: <http://www.un.org/Depts/los/clcs_new/submissions_files/submission_chn_63_2012.htm>.

22. Permanent Mission of Japan to the United Nations New York, SC/12/372 (28 December 2012), online <http://www.un.org/Depts/los/clcs_new/submissions_files/chn63_12/jpn_re_chn_28_12_2012.pdf>.

23. *Treaty of Commerce, Navigation and Delimitation between Japan and Russia*, 26 January 1855, 112 C.T.S. 467.

24. For a detailed account of the history, see Tsuyoshi HASEGAWA, *The Northern Territories Dispute and Russo-Japanese* Relations, *Vol. 1 Between War and Peace, 1697–1985* (Berkeley: University of California, 1998) at 75–8.

25. *1951 Peace Treaty*, *supra* note 7, art. 2(c).

sovereign as a result of the legal disposition of those islands.[26] The then Soviet Union's decision not to sign the Peace Treaty added complications to the territorial title to those islands, even if it may have been the intended beneficiary of the Japanese renunciation of the Kuril Islands.[27]

D. *Paracel (Xisha) Islands Disputes (the PRC and Taiwan v. Vietnam)*

The Paracel (Xisha) Islands comprise more than twenty islands, cays, atolls, reefs, banks, and shoals and are located approximately 400 kilometres east of central Vietnam and 350 kilometres southeast of Hainan Island of the PRC. The claim by the PRC and Taiwan over the islands is based on historic title over the entire four island groups including the Paracel Islands in the South China Sea.[28] Vietnam, on the other hand, appears to consider that they discovered and subsequently occupied the islands when they were placed under a French protectorate.[29] During the period of Japan's imperialism, the area was placed under Japan's occupation, but Japan renounced all the claims over the area in the 1951 Peace Treaty.[30] Following the end of World War II, the islands became contested between the PRC and Vietnam until the PRC ultimately seized control of all the islands in 1974.

E. *Spratly (Nansha) Islands Disputes (Brunei, Malaysia, the PRC, Taiwan, Vietnam, and the Philippines)*

The Spratly (Nansha) Islands consist of 150 to 500 maritime features of various types (many of which are low-tide elevations), which spread over some 250,000 square kilometres south of the South China Sea. The PRC, Taiwan, Vietnam, the Philippines, Malaysia, and Brunei claim either all or part of these islands.

Both the PRC and Taiwan base their claims on discovery and historic usage. The PRC's early claim post-World War II in the South China Sea of a "Nine-Dash Line" appears to indicate an assertion of sovereignty over the entire South China Sea. However, the exact legal basis for such a line has remained unclear, as is whether the claim only concerns territorial title over the islands and sovereign rights to the associated maritime zones according to the current rules of international law or extends to all the maritime areas within the Nine-Dash Line.[31] Valencia observes that

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26. For a detailed analysis of those legal issues, see e.g. Seokwoo LEE, "The 1951 San Francisco Peace Treaty with Japan and the Territorial Disputes in East Asia" (2002) 11 Pacific Rim Law & Policy Journal 63 at 107–22; D.P. O'CONNELL, "Legal Aspects of the Peace Treaty with Japan" (1952) 29 British Year Book of International Law 423 at 426–7.
27. Lee, *supra* note 11 at 49–50.
28. For an extensive survey of historical documents, see Jianming SHEN, "China's Sovereignty over the South China Sea Islands: A Historical Perspective" (2002) Chinese Journal of International Law 94; Jianming SHEN, "International Law Rules and Historical Evidence Supporting China's Title to the South China Sea Islands" (1997) 21 Hastings International and Comparative Law Review 1.
29. Nong HONG, *UNCLOS and Ocean Dispute Settlement: Law and Politics in the South China Sea* (London: Routledge, 2012) at 17–18; Rodolfo C. SEVERINO, "ASEAN and the South China Sea" (2010) 6 Security Challenges 37 at 39.
30. *1951 Peace Treaty*, *supra* note 7, art. 2(f).
31. On 20 June 2011, Singapore asked China to clarify its legal claims to the disputed islands in the South China Sea: "Singapore Asks China to Clarify Claims on S. China Sea", Reuters (20 June 2011),

the ambiguity with its claim is a deliberate decision as "China has realised that once it specifies its claim, it will have to defend it in the context of current international law, and that a claim to most of the South China Sea as historic waters will be very difficult to defend".[32]

As with the Paracel Islands, Vietnam bases its claim over most of the Spratly Islands on the discovery and subsequent occupation during the period of French protectorate.[33] The Philippines claims almost the entire region, which they call Kalayaan, on the grounds that it is vital to the state's security and economic survival, that they "re-discovered" the islands after any claims by other states had been abandoned, or alternatively that they have established prescriptive acquisition through effective and continuous control over the islands.[34]

Malaysia's and Brunei's claim to a much smaller number of land outcroppings is closely associated with their maritime entitlements under the law of the sea. Malaysia claims those maritime features by virtue of their location within their exclusive economic zone (EEZ) and continental shelf.[35] Brunei, on the other hand, argues that its entitlement to a 200 nautical mile EEZ cuts across the south of the Spratly Islands.[36]

II. THE LAW CONCERNING TERRITORIAL TITLE

Many of the rules concerning territorial title under international law are considered long settled through the development of jurisprudence by international courts and tribunals. Cardinal to these rules is the principle of inter-temporal law, which determines the relevant rules of international law at successive periods in their application to a particular case.[37] To the extent that territorial disputes in East Asia are all anchored in the entangled history of the region, interwoven by eras of Western colonialism and Japanese imperialism, the principle of inter-temporal law plays a determinative role in identifying the applicable rules of international law to competing historic title claims.

As famously articulated by the Swiss jurist Max Huber in the *Island of Palmas* arbitration, the first branch of inter-temporal law as agreed upon the parties in that case was that "a juridical fact must be appreciated in the light of the law

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online: <http://www.reuters.com/article/2011/06/20/idUSL3E7HK1H520110620>. Cf. ZOU Keyuan, *Law of the Sea in East Asia: Issues and Prospects* (London: Routledge, 2005) at 147–8.

32. Mark J. VALENCIA, *China and the South China Sea Disputes, Adelphi Paper No 298* (London: International Institute for Strategic Studies, 1995) at 13.

33. PARK Hee Kwon, *The Law of the Sea and Northeast Asia: A Challenge for Cooperation* (The Hague: Kluwer Law International, 2000) at 92.

34. Hong, *supra* note 29 at 18; Park, *supra* note 33 at 92–3; Valencia, *supra* note 32 at 8.

35. Hong, *supra* note 29 at 19; Park, *supra* note 33 at 93; Valencia, *supra* note 32 at 8; Severino, *supra* note 29 at 41.

36. Hong, *supra* note 29 at 20; Park, *supra* note 33 at 93; Valencia, *supra* note 32 at 8; Severino, *supra* note 29 at 41.

37. See generally T.O. ELIAS, "The Doctrine of Intertemporal Law" (1980) 74 American Journal of International Law 285; R.Y. JENNINGS, *The Acquisition of Territory in International Law* (Manchester: Manchester University Press, 1963) 28–31; G. SCHWARZENBERGER, *International Law: International Law as Applied by International Courts and Tribunals*, 3rd edn (London: Stevens & Sons, 1957), Vol. 1 at 21–4.

contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled".[38] Based on the idea that "a distinction must be made between the creation of rights and the existence of rights",[39] the second branch of inter-temporal law requires that the right once created must be maintained as "required by the evolution of law".[40] In Huber's view, this second element derived logically from the same principle, although the validity of this argument has been contested.[41] In addition, according to well-established jurisprudence on territorial title, it has to be shown that territorial sovereignty continued to exist and did exist at the "critical date". Generally this is considered to be the date on which the dispute crystallized into a concrete issue, with the effect of excluding from evidence subsequent acts undertaken for the purpose of improving the legal position.

Whether the existing rules of international law are adequate in facilitating the peaceful settlement of territorial disputes in East Asia depends on the extent to which those rules are capable of accommodating Asia's unique historical contexts. To that end, the following sections critically examine each of those temporal requirements with particular reference to potential concerns arising from the application of inter-temporal law to territorial disputes in East Asia.

A. *The First Branch of Inter-temporal Law*

As was shown in Part I, many of the states involved in territorial disputes in the region base their territorial claim, at least partially, on historic title. The fact that states attempt to gather more historical evidence in order to support their claim indicates the significance East Asian states appear to have attached to the first branch of inter-temporal law as the legal basis for territorial title. However, the application of this rule in the historical context of East Asia raises a particular concern that Japan's occupation of Dokdo/Takeshima and the Diaoyu/Senkaku Islands pre-World War II would be considered a valid exercise of sovereign power to acquire territory because forcible annexation or conquest based on aggressive imperialism was lawful at that time,[42] even though it is clearly prohibited under the current rules of international law.[43]

Indeed, in *Cameroon v. Nigeria*, where the contemporary validity of a colonial protectorate under the 1884 Treaty of Protection was discussed, the International Court of Justice (ICJ) observed that "[e]ven if this mode of acquisition does not reflect current international law, the principle of intertemporal law requires that the legal consequences of the treaties concluded at that time in the Niger delta be

38. *Island of Palmas Case (The Netherlands v. USA)*, Decision of 4 April 1928, [1928] II Reports of International Arbitral Awards 831 at 845.

39. *Ibid.*

40. *Ibid.*

41. See e.g. Philip C. JESSUP, "The Palmas Island Arbitration" (1928) 22 American Journal of International Law 735 at 739–40.

42. ZHANG Zuxing, "A Deconstruction of the Notion of Acquisitive Prescription and Its Implications for the Diaoyu Islands Dispute" (2012) 2 Asian Journal of International Law 323 at 326.

43. *UN Charter*, art. 2(4).

given effect today".[44] This observation clearly suggests that international law can be considered pro-colonial to the extent that because of the operation of inter-temporal law, it is incapable of invalidating sovereign acts of colonialism and imperialism in the past. Reflective of this view, Castellino and Allen argue that the first branch of inter-temporal law has been used to legitimize "blind acceptance of past manipulations of a legal system that was created by, dominated by and imposed by imperial states upon the rest of the world".[45]

Even if that is so, before drawing any conclusion, it must first be ascertained what the quality of the juridical act at issue was in the light of the totality of the law that existed at the relevant time. Judge Al-Khasawneh rightly pointed this out in his dissenting judgment in *Cameroon v. Nigeria*, arguing that the law contemporary with the legal act should be read against the background of the concept of protection that existed at that time, not as understood later in the colonial age.[46] Accordingly, it is imperative to ascertain whether, during the period of Japan's imperialism, annexation or conquest was truly considered valid and whether there was any requirement for establishing a valid territorial title thereupon. This is a view supported by Jennings and Watts in the ninth edition of *Oppenheim's International Law*, in which they observed that though conquest or subjugation is now "obsolescent", "it is still necessary to briefly describe its legal limitations, if only because a root of title is to be judged by the law as it was when the relevant facts arose. Were it otherwise, ancient and otherwise stable titles might even be open to question."[47] Even in the nineteenth to early twentieth centuries, when prohibitions on the use of the force in the conduct of international relations had not become widely recognized, mere conquest was generally not considered to render a legal title under international law.[48] For example, in *US v. Hayward*, dealing with the legal status of Castine, Maine, conquered by British forces, the Circuit Court of Massachusetts observed that "[i]t could only be by a renunciation in a treaty of peace, or by possession so long and permanent, as should afford conclusive proof, that the territory was altogether abandoned by its sovereign, or had been irretrievably subdued, that it could be considered as incorporated into the dominions of the British sovereign".[49] Therefore a mere act of conquest pre-World War II was insufficient to render a legal title, necessarily requiring the perfection of title in accordance with the second branch of inter-temporal law, as will be discussed below.

Another decision that illuminated the significance of examining the quality of juridical acts in the light of the totality of the law that existed at the relevant time is

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44. *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria; Equitorial Guinea intervening)*, [2002] I.C.J. Rep. 301 at 405 [*Cameroon v. Nigeria*].
45. Joshua CASTELLINO and Steve ALLEN, *Title to Territory in International Law: A Temporal Analysis* (Aldershot: Ashgate, 2003) at 3.
46. *Cameroon v. Nigeria*, *supra* note 44 at 500–2.
47. Robert JENNINGS and Arthur WATTS, *Oppenheim's International Law*, 9th edn (London: Longman, 1996), Parts 2 to 4 at 699.
48. For a detailed analysis, see Sharon KORMAN, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice* (Oxford: Clarendon Press, 1996) at 94–131.
49. *US v. Hayward*, 2 Gallison 485 (1815). The full text is available online: <https://law.resource.org/pub/us/case/reporter/F.Cas/0026.f.cas/0026.f.cas.0240.2.pdf>.

found in the ICJ's advisory opinion in *Western Sahara*.[50] In examining the question as to whether Western Sahara was *terra nullius* at the time of colonization by Spain, the Court started from the premise that it had to be interpreted "by reference to the law in force at that period".[51] Despite the prevailing view to the contrary,[52] the Court interpreted the notion of *terra nullius* to exclude territories inhabited by tribes or people having a social and political organization, having regard to the practice of states effecting territorial title through agreements concluded with local rulers.[53] Territorial claims by East Asian states are partly based on occupation of *terra nullius*. However, it has to be carefully considered, to begin with, whether the notion of *terra nullius* as discussed in *Western Sahara* indeed applies to remote, uninhabited islands in the East China Sea and South China Sea, and second, even if it does, under what circumstances those remote, uninhabitable islands could have been considered *terra nullius* open to acquisition through the legal process of occupation as existed at the relevant time.

Critical to historic title claims advanced or disputed by East Asian states is the clarification as to what was required to effect occupation of remote, unsettled islands at the relevant time of the original acquisition claimed by regional states. In *Eastern Greenland*, the Permanent Court of International Justice (PCIJ) applied the law of occupation based on continued display of authority by requiring the will to act as sovereign and actual display of such authority, whilst accepting that very little might be needed in the way of the actual exercise of sovereign rights, especially in the case of claims to sovereignty over areas in thinly populated or unsettled areas.[54] Yet, prior to that decision, the law was in the process of evolution led by European states competing against each other for territorial title over new frontiers.[55] In this respect, Crawford has urged "care in applying the rule", observing that the inter-temporal principle does not operate in "a vacuum".[56]

Indeed, from the Chinese perspective, there may not have been a clear-cut notion of territorial title by one sovereign, for they developed their own way of demarcating legitimate political space and marine space in relation to neighbouring states through a Sinocentric world order by networking through their investiture-tributary system.[57] This raises several pivotal issues when assessing this question in the East Asian context. Could there have been such a feudal basis of establishing a territorial claim

50. *Western Sahara (Advisory Opinion)*, [1975] I.C.J. Rep. 12.

51. *Ibid.*, at 38–9, para. 79.

52. See e.g. M.F. LINDLEY, *The Acquisition and Government of Backward Territory in International Law* (New York: Negro Universities Press, 1926) at 10–20; John WESTLAKE, *Collected Papers on Public International Law* (ed. L. OPPENHEIM). (Cambridge: Cambridge University Press, 1914) at 143–5. Cf. Jennings and Watts, *supra* note 47 at 687, ftn 4.

53. *Western Sahara*, *supra* note 50 at 39, para. 80. For a detailed analysis, see e.g. Malcolm SHAW, *Title to Territory in Africa: International Legal Issues* (Oxford: Clarendon Press, 1986) at 32–7.

54. *Legal Status of Eastern Greenland (Denmark v. Norway)*, [1933] P.C.I.J. Series A/B, No. 53 at 45–6.

55. See e.g. James SIMSARIAN, "The Acquisition of Legal Title to Terra Nullius" (1938) 53 Political Science Quarterly 111–28.

56. James CRAWFORD, *Brownlie's Principles of Public International Law*, 8th edn (Oxford: Oxford University Press, 2012) at 218; see also Malcolm N. SHAW, *International Law*, 6th edn (Cambridge: Cambridge University Press, 2008) at 508–9.

57. Lee, *supra* note 6 at 125.

over remote islands in East Asia? Could there have been a rule of "regional customary international law" that was considered effective enough to prevent other states from occupying islands through other than the investiture-tributary system, even where no or little evidence of habitation was found? In answering these questions, it would become necessary to re-evaluate the state of the law of occupation in relation to historic title claims by reference to the practice of regional states during the relevant period of time.[58]

B. *The Second Branch of Inter-temporal Law*

Based on the understanding that the creation of rights must be distinguished from the existence of rights, international courts and tribunals have tended to give greater weight to effective and continuous display of sovereignty (*effectivités*) in the modern era, over tenuous historical evidence.[59] The ICJ certainly did so in two recent territorial dispute cases dealing with islands in East Asia—the islands of Pulau Ligitan and Pulau Sipadan between Malaysia and Indonesia,[60] and the island of Pedra Branca/Pulau Batu Puteh between Malaysia and Singapore.[61] This raises a serious concern on the part of states which do not currently exercise effective control over disputed islands and those which can only rely on historic title.

First of all, it must be understood that the application of this second branch of inter-temporal law is not as straightforward as simply awarding territorial title to those exercising effective control in the modern era. According to Huber in *Island of Palmas*, discovery alone only creates an "inchoate title", which "must be completed within a reasonable period by the effective occupation of the region claimed to be discovered".[62] However, when the original title was established by one of the recognized modes of territorial acquisition, Elias has observed that it would be "impossible for a subsequent possessor of the territory concerned to establish a valid title unless there was sound evidence of abandonment by the original acquirer".[63] When the validity of subsequent prescriptive acquisition through exercising effective

58. Doing so would require consideration of the existence of and role of regional customary law in any such analysis, as discussed in *Asylum Case (Colombia v. Peru) (Judgment)*, [1950] I.C.J. Rep. 266 at 276.

59. See e.g. *Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, [2007] I.C.J. Rep. 659 at 704–22, paras. 146–208 [*Nicaragua v. Honduras*]; *The Frontier Dispute (Benin v. Niger)*, [2005] I.C.J. Rep. 90 at 127, paras. 75–7; *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras: Nicaragua intervening)*, [1992] I.C.J. Rep. 351 at 557–79, paras. 331–68 [*Gulf of Fonseca*]. See also, Kevin Y.L. TAN, "The Role of History in International Territorial Dispute Settlement: The *Pedra Branca Case* (Singapore v. Malaysia)" in Jin-Hyun PAIK, Seokwoo LEE, and Kevin Y.L. TAN, eds., *Asian Approaches to International Law and the Legacy of Colonialism: The Law of the Sea, Territorial Disputes and International Dispute Settlement* (London and New York: Routledge, 2013), 64 at 76–8; Sir Hersch LAUTERPACHT, *The Development of International Law by the International Court* (London: Stevens & Sons, 1958) at 240–2.

60. *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia)*, [2002] I.C.J. Rep. 625 [*Ligitan/Sipadan*].

61. *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v. Singapore)*, [2008] I.C.J. Rep. 12 [*Pedra Branca/Pulau Batu Puteh*].

62. *Island of Palmas*, *supra* note 38 at 846.

63. Elias, *supra* note 37 at 288. See also Jennings, *supra* note 37 at 30–1.

control is disputed, the ICJ has made it clear that preference will be given to a previously established title over *effectivités*.[64] It is more often than not the absence of effective protests by the other party that has influenced the outcome of adjudication in favour of the state in control of the disputed area.[65]

Second, due consideration must be given to the fact that, whilst territorial title cases in the past mainly involved disputes between former colonial powers or between former colonies (and therefore the disputes concerned territorial delimitation rather than acquisition),[66] the Dokdo/Takeshima and Diaoyu/Senkaku Islands disputes have arisen between a former colonial power and its former colony. This different context in which territorial title claims are to be addressed may well itself require revisiting the relevant jurisprudence developed by international courts and tribunals that focuses on the demonstration of *effectivités*, when sovereign control has been exercised as a result of colonialism or imperialism.[67] By operation of the second branch of inter-temporal law, the act of annexation or conquest is not only assessed in the light of the law in force at the time of the act, but has to be assessed again in accordance with the rules of modern international law.[68] In the East Asian context, the 1951 Peace Treaty deprived Japan of all of its territorial title claims as a result of its expansionist policy. Yet, the critical question remains as to how Japan's alleged occupation of disputed islands, which took place during the period of expansionist imperialism, is to be characterized.

Third, international courts and tribunals have recognized the relevance of historic title even in the context of contemporary territorial disputes. In *Eritrea v. Yemen*, the Arbitral Tribunal acknowledged "a problem of the sheer anachronism of attempting to attribute to such a tribal, mountain and Muslim medieval society the modern Western concept of a sovereign title".[69] Although difficulties with the establishment of historical facts prevented the Tribunal from accepting the claim, it indicated its willingness to accept a historic title if its juridical existence was proven.[70] In *Fisheries Case*, although in a different legal context concerning the ability to assert baselines rather than territorial title, the ICJ endorsed the Norwegian claim of a historical consolidation by stating that "it is indeed this [well-defined and

64. *Cameroon v. Nigeria*, *supra* note 44 at 353–5; *Frontier Dispute (Burkina Faso v. Republic of Mali)*, [1986] I.C.J. Rep. 554 at 587 para. 63.

65. See e.g. *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, [2012] I.C.J. Rep. at para. 84; *Pedra Branca/Pulau Batu Puteh*, *supra* note 61, at paras. 274–6; *Ligitan/Sipadan*, *supra* note 60 at 685, para. 148; *Gulf of Fonseca*, *supra* note 59 at 570–9, paras. 356–68; *Island of Palmas*, *supra* note 38 at 868.

66. In the context of territorial disputes over islands, see e.g. *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, [2007] I.C.J. Rep. 659 at 706–7, para. 154; *Kasikili/Sedudu Island (Botswana v. Namibia)*, [1999] I.C.J. Rep. 1045 at 1105, para. 97; *Gulf of Fonseca*, *supra* note 59 at 564–5; *The Minquiers and Ecrehos Case (France v. United Kingdom)*, [1953] I.C.J. Rep. 47 at 53

67. See Lee, *supra* note 6 at 135.

68. For a detailed analysis, see Ulf LINDERFALK, "The Application of International Legal Norms over Time: The Second Branch of Intertemporal Law" (2011) 58 Netherlands International Law Review 147 at 157.

69. *Territorial Sovereignty and Scope of the Dispute (Eritrea and Yemen)*, Decision of 9 October 1998, [2006] XXII Reports of International Arbitral Awards 211 at 311, para. 446.

70. *Ibid.*, at 311, para. 449.

uniform] system itself which would reap the benefit of general toleration, the basis of an historical consolidation which would make it enforceable as against all States".[71] This concept of historical consolidation is arguably applied to show a good root of title to territory.[72]

C. *Re-Evaluating the Role of the Critical Date*

Sovereign acts to display state control and authority can only be taken into account up to the date when the dispute was considered to have "crystallized".[73] This temporal rule was developed as an evidential rule to render, in principle, inadmissible any subsequent action taken with the aim to buttress claims. It is designed "to prevent one of the parties from unilaterally improving its position by means of some step taken after the issue has been definitely joined".[74] Thus, the critical date plays a crucial role in facilitating peaceful settlement of territorial disputes by keeping them separate from military or political confrontation that might otherwise result from the efforts to strengthen respective legal claims.

However, there is some ambiguity in the determination of the critical date in the practice of international courts and tribunals. In *Island of Palmas*, the critical date was found when the cession of the Philippines by Spain took place by the 1898 Treaty of Paris,[75] whereas in *Eastern Greenland* it was the date when Norway proclaimed its sovereignty over the disputed area.[76] In *Minquiers and Ecrehos*, on the other hand, the ICJ did not make any formal determination of a critical date.[77] The Arbitral Tribunal in the *Argentine-Chile Frontier Case* even considered "the notion of the critical date to be of little value", and examined all the evidence submitted to it.[78] Recent adjudications by the ICJ appear to have become more consistent in the finding of the critical date when the parties started asserting conflicting territorial claims,[79] though Crawford has observed that "the facts of the case are dominant … and there may be no necessity for a tribunal to choose any date whatsoever".[80] Such vagueness and arbitrariness in the determination of a critical

71. *Fisheries Case (United Kingdom v. Norway)* [1951] I.C.J. Rep. 116 at 130.
72. See e.g. D.H.N. JOHNSON, "Consolidation as a Root of Title in International Law" (1955) Cambridge Law Journal 214.
73. See generally L.F.E. GOLDIE, "The Critical Date" (1963) 12 International and Comparative Law Quarterly 1251 at 1264–7; Sir Gerald FITZMAURICE, "The Law and Procedure of the International Court of Justice, 1951–4: Points of Substantive Law Part II" (1955–56) 32 British Year Book of International Law 20 at 20–44.
74. In the oral submission by Sir Gerald Fitzmaurice in *Minquiers and Ecrehos (France v. United Kingdom)*, [1953] I.C.J. Pleadings, Vol. 2 at 69.
75. *Island of Palmas*, *supra* note 38 at 866.
76. *Eastern Greenland*, *supra* note 54.
77. *Minquiers and Ecrehos*, *supra* note 66 at 59–60.
78. *Argentine-Chile Frontier Case*, Decision of 9 December 1966, [2006] XVI Reports of International Arbitral Awards 109 at 167.
79. See e.g. *Nicaragua v. Colombia*, *supra* note 65 at para. 71; *Pedra Branca/Pulau Batu Puteh*, *supra* note 61 at paras. 33–4; *Ligitan/Sipadan*, *supra* note 60 at para. 135.
80. Crawford, *supra* note 56 at 219; Jennings and Watts observed in a similar light that "Courts have, nevertheless, been reluctant to accept critical date arguments aimed at hampering their discretion to look at the whole of the evidence before coming to a decision"; Jennings and Watts, *supra* note 47 at 711.

date in the past has led at least one eminent commentator to observe, in relation to the Dokdo/Takeshima dispute, that "[t]he physical occupation of the islets by the Republic of Korea during the past half century is likely to be a significant factor", since "a tribunal would probably decline to identify a specific 'critical date'".[81]

The vagueness or, in some views, arbitrariness, of the criteria for the determination of a critical date means that the doctrine is impracticable in setting an objective "cut-off" date in the absence of a prospect for a third-party adjudication. As a result, the law continues to provide a strong incentive to keep strengthening respective legal positions by resorting to various means of effective and continuous display of sovereignty (because of the emphasis and reliance on *effectivités* in recent judicial settlements), or if the state does not currently exercise effective control over the disputed area, to protest against each sovereign act committed by the other party to the dispute (because omission would otherwise be considered acquiescence).[82] Even though diplomatic protests were found sufficient in *Chamizal*, where more forceful measures would have provoked scenes of violence,[83] no uniform standard has yet to be set by international courts and tribunals with divergent views among commentators.[84] The current rules of international law concerning territorial title, and particularly ambiguities of those rules such as the critical date and effective protests, thus have the effect of fuelling tension between disputing states, as has been illuminated in the recent rise in hostility between regional states in East Asia.

D. *Inter-temporal Law and Imperialism in East Asian History*

The operation of inter-temporal law has been criticized not only for its application to territorial title under international law but more broadly, particularly when it is applied to disputes stemming from past colonial control.[85] The consequences of colonialism cannot be reversed and remain an integral part of and an inherent reflex within contemporary international law.[86] The principle of inter-temporal law, and the rules associated with it concerning territorial title such as the notion of *terra nullius* and the emphasis on the effective and continuous display of sovereignty, is reflective of colonial pasts being projected into the present, with legal consequences such as providing a foundation for contemporary territorial sovereignty under international law. This colonial foundation of international law has arguably resulted, from time

81. van Dyke, *supra* note 8 at 158, 164.

82. See Carlos RAMOS-MROSOVSKY, "International Law's Unhelpful Rule in the Senkaku Islands" (2008) 29 University of Pennsylvania International Law Journal 903 at 906.

83. See e.g. *Chamizal Case (Mexico v. United States of America)*, Decision of 15 June 1911, [2006] XI Reports of International Arbitral Awards 309 at 329.

84. See e.g. I.C. MACGIBBON, "Some Observations on the Part of Protest in International Law" (1953) 30 British Year Book of International Law 293 at 309–10; D.H.N. JOHNSON, "Acquisitive Prescription in International Law" (1950) 27 British Year Book of International Law 332 at 353–4.

85. See e.g. Edward MCWHINNEY, *The International Court of Justice and the Western Tradition of International Law* (Dordrecht: Martinus Nijhoff, 1987) at 1–19; Kurt G. SIEHR, "The Beautiful One Has Come—To Return: The Return of the Bust of Nefertiti from Berlin to Cairo" in John Henry MERRYMAN, ed., *Imperialism, Art and Restitution* (Cambridge: Cambridge University Press, 2006), 114 at 125.

86. Anthony ANGHIE, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004) at 111–12.

to time, in controversial judicial determinations of territorial title and delimitation, as evidenced by the critiques of ICJ Judgments in *Kasikili/Sedudu Island* and *Cameroon v. Nigeria*.[87]

Dakas considers that Japan's claim that Dokdo was *terra nullius* resembles the tactics employed by European states in the colonization of Africa and argues that "Japan is not at liberty to invoke international law norms that predominated in the colonial era and in respect of which the Republic of Korea could not, on account of its colonial status, make any meaningful input in its formation or crystallization".[88] However, there are important differences to be noted from the preceding analysis between territorial issues in Africa and in East Asia. First, African territorial issues predominantly arise between former colonies, whereas in East Asia territorial titles are mainly disputed between a former colonial power and its former colony or, in the case of South China Sea disputes, an Asian regional power and former European colonies. Second, African territorial issues involve the colonization of inhabited territories, whereas contemporary East Asian territorial disputes are over uninhabited islands. Third, unlike European countries, Japan was no more influential than colonized states in terms of the level of contribution to the formation and crystallization of international law.[89] It cannot therefore be concluded that the traditional rules of international law are inherently prejudicial against formerly colonized states and therefore unjust in determining territorial title over disputed islands in East Asia, by simply drawing on the experiences in African territorial disputes.

Nevertheless, the fact that some East Asian territorial disputes uniquely involve competing claims between a former colonial power and its former colonies may legitimately pose the question as to, in the words of Seokwoo Lee, "whether claims of sovereignty in Asia can be judged by norms developed in Europe, particularly since the general understanding of how to establish a valid claim to territory has been established through decisions and awards by international judicial and arbitral bodies many centuries earlier".[90] There is nothing new about the idea that Asia has its own unique approach or approaches to international law. Illustrative is the idea of "Asian values" as the antithesis of universal human rights in the 1990s, which claims that human rights as propounded in European ideologies are founded on individualism and are therefore inappropriate in Asia, where primacy is given to the community and communal action.[91] Although the "Asian values" debate lost its force

87. See e.g. James Thuo GATHII, "Geographical Hegelianism in Territorial Disputes Involving Non-European Land Relations: An Analysis of the Case Concerning *Kasikili/Sedudu Island* (Botswana/Namibia)" (2002) 15 Leiden Journal of International Law 581; Malcolm N. SHAW, "Case Concerning Kasikili/Sedudu Island (Botswana/Namibia)" (2000) 49 International and Comparative Law Quarterly 964; Dakas C.J. DAKAS, "Dokdo, Colonialism, and International Law: Lessons from the Decision of the ICJ in the Land and Maritime Dispute between Cameroon and Nigeria" in Lee and Lee, eds., *supra* note 11 at 91.

88. Dakas, *supra* note 87 at 119–21.

89. For example, Japan failed in its attempt to insert a racial-equality clause to the Covenant of the League of Nations. See e.g. SHIMAZU Naoko, "The Japanese Attempt to Secure Racial Equality in 1919" (1989) 1 Japan Forum 93.

90. Lee, *supra* note 6 at 126.

91. See generally Yash GHAI, "Human Rights and Governance: The Asia Debate" (2000) 1 Asia-Pacific Journal on Human Rights and the Law 9–52; Michael JACOBSEN and Ole BRUUN, eds., *Human*

towards the end of the century, developments initiated during the same period laid the foundation for institution-building for Asian approaches to the promotion and protection of human rights in the region.[92]

As discussed above, however, the principle of inter-temporal law can operate to accommodate historical contexts in an equitable manner so as to ensure that the determination of territorial title by international courts and tribunals is fair and just in the view of judges and arbitrators without being influenced by the view of powerful states of the past or present. The first branch of inter-temporal law allows scope for re-evaluating the law of occupation in relation to historic titles by reference to the practice of regional states that governed territorial relations in the region at the relevant period. The second branch of inter-temporal law has been developed with great care so as not to encroach upon original sovereign title, by rejecting historical claims only when there was an obvious failure to lodge effective protests against the subsequent occupier or when historical documents were insufficient to prove juridical existence of the legal claim, whilst effectively denying any enduring legal effect of colonial occupation. As Anghie observes, "[j]urists and courts attempting to reverse the effects of these laws must do so within the established framework of these [international law] doctrines".[93] Even though it is difficult to challenge the validity of existing principles and doctrines themselves, there is sufficient scope for accommodating the peculiar historical contexts of East Asia within the established legal framework.

III. THE LAW OF THE SEA AND MARITIME CLAIMS

While international law respecting territorial claims has predominantly developed via customary international law and the decisions of international courts and tribunals, the modern law of the sea has been predominantly treaty based. The four 1958 Geneva Conventions on the Law of the Sea provided the framework for the modern law and importantly gave recognition to the foundational maritime zones that are recognized in the twenty-first century.[94] However, it is the 1982 United Nations Convention on the Law of the Sea (LOSC),[95] which is the dominant international instrument regarding the modern law of the sea, and that, importantly for the current discussion, clearly identifies the scope and extent of various maritime

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Rights and Asian Values: Contesting National Identities and Cultural Representations in Asia (Surrey: Curzon Press, 2000); Joanne R. BAUER and Daniel A. BELL, eds., *The East Asian Challenge for Human Rights* (Cambridge: Cambridge University Press, 1999); Michael FREEMAN, "Human Rights: Asia and the West" in James T.H. TANG, ed., *Human Rights and International Relations in the Asia-Pacific Region* (London and New York: Pinter, 1995) at 13–24.

92. Hitoshi NASU, "Introduction: Regional Integration and Human Rights Monitoring Institution" in Hitoshi NASU and Ben SAUL, eds., *Human Rights in the Asia-Pacific Region: Towards Institution Building* (London: Routledge, 2011), 1 at 3–6.

93. Anghie, *supra* note 86 at 112.

94. *Convention on the Territorial Sea and Contiguous Zone*, 29 April 1958, 516 U.N.T.S. 206 (entered into force 10 September 1964); *Convention on the High Seas*, 29 April 1958, 450 U.N.T.S. 11 (entered into force 30 September 1962); *Convention on Fishing and Conservation of the Living Resources of the High Seas*, 29 April 1958, 559 U.N.T.S. 285 (entered into force 20 March 1966); *Convention on the Continental Shelf*, 29 April 1958, 499 U.N.T.S. 311 (entered into force 10 June 1964).

95. *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 U.N.T.S. 397 (entered into force 16 November 1994) [*LOSC*].

zones and also provides mechanisms for the delimitation of maritime boundaries.[96] All of the key East Asian states are parties to the LOSC.

A distinction needs to be made between the delineation of maritime claims, which goes to a basis in international law for such a claim to be asserted and for the outer limits of that claim, and the delimitation of maritime boundaries in instances where neighbouring states have overlapping claims and there is a need to resolve the boundary between two or more states. In this regard, maritime boundaries under the law of the sea can be distinguished from terrestrial boundaries which will always delimit territory between two or more states,[97] while it is common under the law of the sea for unilateral maritime boundaries to exist in which a coastal state has asserted a claim to a maritime zone which does not in whole or in part adjoin or overlap an area claimed by neighbouring states.

The delineation of a maritime claim and the ability of a coastal state to be able to justify the outer limits of that claim based upon law of the sea principles raise different issues from the delimitation of maritime boundaries between two or more neighbouring states. In East Asia this is an important consideration as, in most instances, the assertion of a maritime claim and the delineation of that claim is the first-order issue that will need resolution. Once that matter is resolved then a very extensive body of international law and practice concerning the delimitation of maritime boundaries between neighbouring states comes into play within which well-settled principles can be applied.[98]

A. *Increased Significance of Maritime Claims for East Asian States*

As to which maritime zones are the most relevant in East Asia, it is predominantly the broader zones of the continental shelf and the exclusive economic zone. The territorial sea up to 12 nautical miles in breadth,[99] and the contiguous zone at 24 nautical miles in breadth,[100] while of immense significance for coastal states, are predominantly contested where coastal states share land boundaries that terminate at the coast, or in the case of confined maritime spaces where land territories including islands are closely co-located. In the South China Sea disputes, subject to how the territorial disputes in the Paracel Islands and in the Spratly Islands are settled, there

96. For discussion of the importance of the LOSC to the modern law of the sea, see Donald R. ROTHWELL and Tim STEPHENS, *The International Law of the Sea* (Oxford: Hart, 2010); Alex G. Oude ELFERINK, ed., *Stability and Change in the Law of the Sea: The Role of the LOS Convention* (Leiden: Martinus Nijhoff, 2005); R.R. CHURCHILL and A.V. LOWE, *The Law of the Sea*, 3rd edn (Manchester: Manchester University Press, 1999).

97. One exception to this occurs in the case of Antarctica, where boundaries have been asserted in recognition of a territorial claim in an instance of where there is no adjacent territorial claim. This arises due to the existence of the so-called "unclaimed sector" in Antarctica, which is a portion of the Antarctic continent between 90°W and 150°W which has not been the subject of claim by any state; see generally Donald R. ROTHWELL, *The Polar Regions and the Development of International Law* (Cambridge: Cambridge University Press, 1996) at 51–63.

98. See e.g. Jin-Hyun PAIK, "UNCLOS and Boundary Delimitation in East Asia" in Dalchoong KIM *et al.*, eds., *UN Convention on the Law of the Sea and East Asia* (Seoul: Institute for East and West Studies, Yonsei University, 1996) at 183–203.

99. *LOSC*, *supra* note 95, art. 3.

100. *Ibid.*, art. 33.

could be a need to delimit such boundaries as a result of neighbouring states having overlapping claims to a territorial sea or contiguous zone.[101] Ultimately, however, the continental shelf and EEZ are of greater significance as they provide a coastal state with extensive maritime resource rights beyond the territorial sea to a minimum limit of 200 nautical miles.[102] In this respect the extent of a coastal state's sovereignty and jurisdiction over these maritime zones is pivotal to an appreciation of the potential significance of such claims being asserted and recognized throughout East Asia.

The continental shelf regime gives a coastal state the capacity to exercise sovereign rights over that area of the seabed and the subsoil for the purpose of "exploring and exploiting its natural resources".[103] While the distinction between sovereign rights and sovereignty is important, and is a major distinguishing feature of the continental shelf compared to the territorial sea, these rights are nonetheless very extensive with respect to non-living resources located in the continental shelf, especially oil and gas.[104] The EEZ, which is conterminous with the continental shelf up to 200 nautical miles, also confers rights over natural resources but extends to both living and non-living resources and includes the water column of the area in addition to the seabed and the subsoil.[105] While the EEZ and continental shelf therefore overlap, the EEZ does provide a coastal state with distinctive rights with respect to living resources within that area, which for East Asian states confer important rights with respect to the exploitation, management, and conservation of fish stocks.[106]

A final observation that can be made as to the extent of these maritime zones is that Article 76 of the LOSC creates a juridical definition of the continental shelf which confers upon all coastal states a minimum entitlement of a 200 nautical mile continental shelf irrespective of whether the continental shelf extends that far.[107] In addition, and in recognition that in some instances the continental shelf may extend well beyond a 200 nautical mile limit, Article 76 permits coastal states to assert a continental shelf claim beyond 200 nautical miles providing certain criteria have been met and the claim is one that has been assessed by the Commission on the Limits of the Continental Shelf (CLCS). The Commission, which is a technical body and does not comprise lawyers, reviews data submitted by coastal states in support of their claims to an extended continental shelf. Following recommendations made by the CLCS, the coastal state is able to make a final claim to a continental shelf beyond 200 nautical miles.[108]

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101. This is an issue the ICJ has recently addressed in an East Asian context in *Pedra Branca/Pulau Batu Puteh*, *supra* note 61.

102. *LOSC*, *supra* note 95, arts. 57, 76.

103. *Ibid.*, art. 77(1).

104. Rothwell and Stephens, *supra* note 96 at Chapter 5.

105. *LOSC*, *supra* note 95, art. 56(1).

106. As to the interaction of these two maritime zones and their significance for East Asia, see PARK Hee Kwon, *The Law of the Sea and Northeast Asia* (The Hague: Kluwer Law International, 2000) at 37–43.

107. See generally Suzette V. SUAREZ, *The Outer Limits of the Continental Shelf: Legal Aspects of Their Establishment* (Berlin: Springer, 2008).

108. See *LOSC*, *supra* note 95, art. 76(8) and (9); and *LOSC*, Annex II which provides in more detail for the CLCS and its operation: see discussion in Donald R. ROTHWELL, "The Commission on the Limits of the Continental Shelf: Its Establishment and Subsequent Practices", presented at international seminar *The Thirtieth Anniversary of the UNCLOS from the Perspective of the*

Given the relatively small size of many of the contested maritime features in East Asia, other than the national prestige that is associated with territory and the nationalism associated with confirming title to territory that has been in long-standing dispute, it can be observed that a significant aspect associated with the current East Asian maritime disputes is the perceived maritime resource rights that these islands generate under the LOSC.[109] This has been particularly highlighted by recent submissions to the CLCS which, due to submission deadlines set under the LOSC framework, have in recent years seen a number of East Asian coastal states making their CLCS submissions. These submissions, in turn, have brought about responses from neighbouring states in which territorial disputes have been highlighted. Submissions made up to the end of 2012 which fall into this category include the joint submission by Malaysia and Vietnam (2009),[110] Vietnam's individual submission (2009),[111] and the PRC's submission (2012),[112] each of which has brought about diplomatic communications by way of Note Verbales from states opposing aspects of these submissions as they relate to disputed territory. In that regard, the Rules of Procedure of the CLCS provide that in the case of a territorial dispute coming to the attention of the Commission, it shall set aside its consideration of that aspect of the submission until such time as the dispute has been settled.[113]

B. *Disputes Concerning the Legal Status of Maritime Features*

A central aspect of the LOSC is that is confers entitlements to assert a claim over a maritime zone to a "coastal State".[114] While the term "coastal State" is not defined in the LOSC, it is taken to refer to any state that has a territorial entitlement which encompasses a sea coast.[115] This extends not only to continental states, but also to island states, including those that are properly characterized as archipelagos, such as Japan and the Philippines.[116] Problematic issues arise with respect to maritime

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Commission on the Limits of the Continental Shelf as its Organ, Ocean Policy Research Foundation, Tokyo, Japan, 11 July 2012, online: <http://www.sof.or.jp/en/topics/pdf/02-3.pdf>.

109. See e.g. Sang-Myon RHEE and James MACAULAY, "Ocean Boundary Issues in East Asia: The Need for Practical Solutions" in Douglas M. JOHNSTON and Phillip M. SAUNDERS, eds., *Ocean Boundary Making: Regional Issues and Developments* (London: Croom Helm, 1988), 74 at 86.

110. See "Submissions to the Commission: Joint Submission by Malaysia and the Social Republic of Viet Nam" (6 May 2009), online: CLCS <http://www.un.org/Depts/los/clcs_new/submissions_files/submission_mysvnm_33_2009.htm>.

111. See "Submissions to the Commission: Submission by the Social Republic of Viet Nam" (7 May 2009), online: CLCS <http://www.un.org/Depts/los/clcs_new/submissions_files/submission_ vnm_37_2009.htm>.

112. See "Submissions to the Commission: Submission by the People's Republic of China" (14 December 2012), online: CLCS <http://www.un.org/Depts/los/clcs_new/submissions_files/submission_chn_63_2012.htm>.

113. Commission on the Limits of the Continental Shelf, Rules of Procedure of the Commission on the Limits of the Continental Shelf (CLCS/40/Rev.1) (17 April 2008), Rule 46, and Annex I, online: CLCS <http://www.un.org./Depts/los/clcs_new/commission_documents.htm#Rules of Procedure>.

114. See e.g. *LOSC*, *supra* note 95, arts. 2, 33, 56, 76.

115. To that end the LOSC makes direct reference to a "land-locked State" which is a "State which has no sea-coast": *LOSC*, *supra* note 95, art. 124(1)(a).

116. A distinction needs to be drawn between a state which is a geographic archipelago, such as Japan, and an "archipelagic State" for the purposes of Part IV of the LOSC, which is entitled to draw archipelagic baselines from which maritime claims can be asserted; see discussion in Rothwell and Stephens, *supra* note 96 at Chapter 8.

features claimed by coastal states, including those that have been subject to territorial claim or which are encompassed within territorial claims, and the capacity of those features to generate maritime zones. These features will range in size from islands, as properly defined, through the whole gamut of associated maritime features including atolls, cays, islets, rocks, banks, shoals, and reefs. The status of these features, and their capacity to generate maritime zones, can be contentious, and this is certainly the case with respect to such features in East Asia that are at the centre of land and maritime disputes.

In the case of islands, Part VIII of the LOSC details a so-called "Regime of Islands" which contains provisions of considerable significance in the East Asian context. Article 121 in particular is relevant for a number of reasons. First, Article 121(1) defines an island as "a naturally formed area of land, surrounded by water, which is above water at high tide", which can be referred to as Article 121(1) islands. An artificial island does not therefore meet the criteria, nor does an area of land not above water at high tide, which may in other respects meet the criteria of a low-tide elevation.[117] Rocks, shoals, or reefs which may be visible at low tide are therefore not islands for the purposes of the LOSC. The importance of Article 121(1) islands under the LOSC is that they generate the complete range of maritime zones. A small island is therefore capable of generating a continental shelf or EEZ that may be many times the size of the island's land dimensions and considerably more economically valuable in terms of living and non-living natural resources.[118]

The only exception to this entitlement is the case of islands that may be characterized as rocks, even though they may be above water at high tide. Rocks which "cannot sustain human habitation or an economic life of their own" do not enjoy an entitlement to a continental shelf or an EEZ,[119] but will still nonetheless enjoy a territorial sea and contiguous zone. These maritime features can be referred to as Article 121(3) rocks. Perhaps the most prominent of these features is Rockall, which is a UK claimed rock in the Atlantic Ocean to the north of Scotland, which the UK has conceded does not generate its own continental shelf or EEZ.[120] The status of Japan's claim to an extended continental shelf offshore Okinotori Shima Island, as identified in its 2008 CLCS submission, has highlighted these issues for East Asian states and has been a matter of contention for Japan and its neighbours.[121] Unsurprisingly, these provisions have generated some analysis and consideration amongst commentators and international courts as to the distinction between islands and rocks and the differential entitlements they enjoy to

117. *LOSC*, *supra* note 95, art. 13(1) defines a low-tide elevation as "a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide".

118. This is highlighted by the case of the island state of Nauru which comprises a single land mass of 21 km² but which generates maritime zones consistent with the LOSC of 430,000 km²: *Nauru Country Study Guide* (Washington: International Business Publications, 2011), Vol. 1 at 49.

119. *LOSC*, *supra* note 95, art. 121(3).

120. Clive R. SYMMONS, "Ireland and the Rockall Dispute: An Analysis of Recent Developments" (Spring 1998) IBRU Boundary and Security Bulletin 78–93.

121. The Japanese submission was the subject of Note Verbales from the PRC (CML/2/2009: 6 February 2009) and Republic of Korea (MUN/046/09: 27 February 2009), online: CLCS <http://www.un.org/Depts/los/clcs_new/submissions_files/submission_jpn.htm>.

maritime zones.[122] For example, in *Monte Confurco*[123] and *Volga*[124] before the International Tribunal for the Law of the Sea (ITLOS), Judge Vukas expressed a view that the sub-Antarctic Kerguelan Islands (France) and the Heard and McDonald Islands (Australia) in the Southern Ocean were not islands from which the coastal states were entitled to claim EEZs consistent with the LOSC. In the case of the two Australian islands, Judge Vukas gave particular importance to the fact that the islands were uninhabited. However, such a view regarding sub-Antarctic islands,[125] which considers that the distinction between an Article 121(1) island and an Article 121(3) rock turns on whether the maritime feature is inhabited or is capable of habitation has not found wider support in ITLOS or other international courts. It can therefore be observed that naturally formed islands, properly characterized as such and distinguished from Article 121(3) rocks, and not ones that have been subject to the installation of manmade structures which are built upon low-tide elevations and features so that they sit above water at high tide for human habitation, do generate an entitlement to all LOSC maritime zones. It would appear that whether such islands are inhabited or not would not be determinative as to their capacity to generate an EEZ or continental shelf, though it may highlight issues associated with the island's size and whether it is capable of sustaining human habitation.[126]

A further category of maritime feature referred to in the LOSC is a "low-tide elevation", which is defined as "a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide".[127] Low-tide elevations can be distinguished from Article 121(3) rocks in that they are not subject to appropriation other than when they fall within the territorial sea limits of the coastal state and are otherwise not to be equated with land territory.[128] Therefore, low-tide

122. See e.g. John M. VAN DYKE, "Disputes Over Islands and Maritime Boundaries in East Asia" in Seoung Yong HONG and John M. VAN DYKE, eds., *Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea* (Leiden: Martinus Nijhoff, 2009), 39 at 51–2; Park, *supra* note 106 at 99–101; Jonathan I. CHARNEY, "Rocks that Cannot Sustain Human Habitation" (1999) 93 American Journal of International Law 863–978; Choon-ho PARK, "The South China Sea Disputes: Who Owns the Islands and the Natural Resources" in Choon-ho PARK and Jae Kyu PARK, eds., *The Law of the Sea: Problems from the East Asian Perspective* (Honolulu: Law of the Sea Institute, University of Hawaii, 1987), 482–510. With regard to artificial islands, see Nikos PAPADAKIS, *The International Legal Regime of Artificial Islands* (Leyden: Sijthoff, 1977).

123. *Monte Confurco (Seychelles v. France) (Prompt Release)*, Judgment of 18 December 2000, Declaration of Judge Vukas, [2000] ITLOS Rep. at 122.

124. *Volga (Russian Federation v. Australia) (Prompt Release)*, Judgment of 23 December 2002, Declaration of Vice-President Vukas, [2002] ITLOS Rep. at para. 2.

125. None of the other judges in the *Monte Confurco* and *Volga* cases raised similar issues.

126. An example could be Macquarie Island (Australia) which is 1500 km to the south of Tasmania and sits approximately at halfway between Australia and Antarctica in the Southern Ocean. The island is 128 km² but has no permanent population other than for itinerant scientists of which approximately sixteen over-winter. Nevertheless, Australia has claimed the full set of maritime zones from the island which have not been subject of protest: see Australian Antarctic Division, "Living on Macquarie Island", online: Australian Government <http://www.antarctica.gov.au>.

127. *LOSC*, *supra* note 95, art. 13(1).

128. See *Pedra Branca/Pulau Batu Puteh* where the ICJ made a distinction between Middle Rocks and South Ledge, in which the latter were classified as a low-tide elevation: *Pedra Branca/Pulau Batu Puteh*, *supra* note 61 at paras. 291–9; quoting with approval discussion in *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahrain)*, [2001] I.C.J. Rep. 40 at paras. 205–6.

elevations do not generate a territorial sea when located beyond the breadth of the territorial sea from the mainland or an island. Otherwise low-tide elevations may be used as a basepoint for the baseline in delineating the breadth of the territorial sea and other maritime zones, and to that end may prove useful in determining the outer limits of a maritime zone, or for the purposes of maritime boundary delimitation.

Presently there is no agreement between the parties as to whether the Diaoyu/Senkaku Islands are capable of being a basis for EEZ or continental shelf claims. Commentators have reported that the PRC and Taiwan consider the islands to be uninhabitable and incapable of generating maritime zones, whilst Japan adopts the converse position.[129] A similar disagreement may potentially arise in relation to the Dokdo/Takeshima Islands as, while many commentators consider those islets to be Article 121(3) rocks, Japan has tended to adopt a wider interpretation as to what constitutes a habitable island capable of generating maritime claims.[130] Likewise, these issues also exist in the South China Sea, where distinguishing between Article 121(1) islands, Article 121(3) rocks, and low-tide elevations is of greater significance because of the much greater number of maritime features that are in dispute, and the efforts made by some of the disputing states to build structures such as platforms, lighthouses, and small dwellings on these features in an effort to sustain their territorial claims, and the capacity of those maritime features to be characterized as Article 121(1) islands.[131]

C. *Maritime Boundary Delimitation*

The final law of the sea issue of significance relates to how maritime boundaries may be determined following confirmation of territorial sovereignty over islands and associated maritime features and whether they are capable of generating the full suite of maritime zones. It can first be observed that the law of maritime boundary delimitation is very well developed, with Articles 73 and 84 of the LOSC providing a legal framework within which coastal states can seek to delimit their overlapping boundaries by negotiation, or within which international courts and tribunals can apply developed legal principles to bring about their resolution.[132]

The second observation is that the majority of the East Asian islands currently the subject of dispute are generally small in size, either uninhabited or with very small permanent or itinerant populations, and are at some distance from either continental

129. JI Guoxing, "Similarities and Differences between the Korean-Japanese Dokdo Disputes and the Sino-Japanese Diaoyudao Disputes" in Lee and Lee, eds., *supra* note 11, 189 at 205; Mark J. VALENCIA, "The East China Sea Dispute: Context, Claims, Issues, and Possible Solutions" (2007) 31 Asian Perspective 127 at 154.

130. This has recently been highlighted by the disagreement between Japan and the PRC and South Korea over the status of Okinotori Shima as to whether it is an Article 121(1) island or an Article 121(3) rock for the purposes of Japan's outer continental shelf claim; see e.g. Republic of Korea: Permanent Mission to the United Nations, Note Verbale MUN/230/11 (11 August 2011), online: CLCS <http://www.un.org/Depts/los/clcs_new/submissions_files/submission_jpn.htm>.

131. One of the most prominent of these features in the South China Sea is Mischief Reef, which has been the subject of construction works: see Daniel J. DZUREK, "China Occupies Mischief Reef In Latest Spratly Gambit" (April 1995) IBRU Boundary and Security Bulletin 65–71.

132. See discussion in Rothwell and Stephens, *supra* note 96 at Chapter 16.

Asia or major island systems in the case of Japan, the Philippines, and East Malaysia. International courts and tribunals have traditionally been conscious of the potential distorting effects that islands have on maritime boundaries, especially if those islands are granted their full entitlement to extensive maritime zones such as a continental shelf or EEZ, and a number of judicial techniques have been applied to address this problem. These approaches include giving "half effect" to such islands,[133] creating a territorial sea enclave around the islands, or adjusting a maritime boundary so that the general direction of the boundary line is subject to only minor modification where islands straddle a maritime boundary. In this respect, the size of the island, including its permanent population, and its historical or economic significance, are factors that may be taken into account, though each case will often highlight a unique combination of factors. There are also examples in state practice where small, sparsely inhabited islands which are located very close to the mainland of another state have been given minimal effect in negotiated maritime boundaries settled by way of treaty.[134]

This significance of ensuring that small islands do not have a distorting impact upon a maritime boundary is further reinforced in the LOSC, which makes clear that the delimitation of these maritime zones is to achieve an "equitable outcome",[135] as reflected in recent ICJ decisions.[136] In *Nicaragua v. Colombia*, for example, notwithstanding the Court finding in Colombia's favour with respect to its sovereignty over several small islands and maritime features, many of these features were given diminished or no effect when it came to delimiting the continental shelf/EEZ boundary between Colombia and Nicaragua.[137] Of particular note was the manner in which the Court dealt with low-tide elevations within the territorial sea, or particularly small maritime features that were above water at high tide, disregarding them for the purposes of constructing a provisional and an adjusted equidistance boundary line.[138] Also of significance was the distinction between the coastal fronts of Nicaragua and Colombia, with the relevant coasts being 531 km (Nicaragua) and 65 km (Colombia), with a ratio of approximately 1:8.2.[139] This was despite the fact that the Court took into account the coasts of all the Colombian islands within the relevant part of the Caribbean Sea. This substantial disparity was a factor taken into account by the Court when it adjusted the provisional boundary line that it had drawn, which was to Nicaragua's benefit.[140]

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133. See e.g. *Anglo-French Continental Shelf Arbitration*, (1979) 18 I.L.M. 397 at paras. 245–51 (where the Arbitral Tribunal elected to give the Scilly Isles in the southern portion of the English Channel "half-effect").

134. See e.g. *Treaty between Australia and the Independent State of Papua New Guinea Concerning Sovereignty and Maritime Boundaries in an Area Between the Two Countries, Including the Area Known as the Torres Strait, and Related Matters*, 18 December 1978, [1985] Australian Treaty Series No. 4 (entered into force 15 February 1985); discussed in Stuart B. KAYE, *The Torres Strait* (The Hague: Martinus Nijhoff, 1997) at 93–101.

135. *LOSC*, *supra* note 95, arts. 74(1), 83(1).

136. See e.g. *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, [2009] I.C.J. Rep. 61 at paras. 187–8.

137. *Nicaragua v. Colombia*, *supra* note 65 at para. 203.

138. *Ibid.*, at paras. 202, 203.

139. *Ibid.*, at para. 153.

140. *Ibid.*, at para. 211.

State practice and the jurisprudence of international courts and tribunals in interpreting the LOSC would therefore suggest that even if territorial sovereignty was conclusively settled over islands and associated maritime features in East Asia that are currently the subject of dispute, there is every likelihood that the ability of these features to generate vast maritime claims would be compromised. This would be either because these features are not Article 121(1) islands, and as Article 121 (3) rocks would generate only a territorial sea and contiguous zone, or because they would have a distorting impact upon the maritime boundaries based upon competing maritime claims from continental or island land masses whose status is not in dispute.

IV. CONCLUSION

International law regarding the settlement of territorial and maritime disputes is well developed, and to that end it is interesting to note the number of recent cases brought before the ICJ in which these and related issues have been considered, including two from East Asia. By the operation of inter-temporal law, there is sufficient scope for accommodating the peculiar historical contexts of East Asia in applying the existing principles and rules of international law, even though it is difficult to challenge their validity within the established legal framework. However, notwithstanding the significant development of the law, there do remain certain ambiguities and uncertainties which in an East Asian context are in need of resolution if international law is to act as a confidence-building mechanism to facilitate and assist states in resolving their territorial and maritime disputes.

An important element that has been preventing East Asian states from actively seeking peaceful settlement of territorial disputes is the significance that would be attached to historical contexts, the emphasis on *effectivités* in jurisprudence, and the ambiguity and arbitrariness associated with some of those rules, such as the critical date and effective protest. Unless the notion of critical date is more clearly articulated and strictly imposed by international courts and tribunals, states will continue to see their territorial claim as a present and live issue susceptible to changes by their own conduct and that of the other party, allowing more powerful states to exercise their might in consolidating territorial control over disputed islands, which raises the prospect of military clashes.[141] The existing principles and rules of international law are, in this respect, failing to facilitate peaceful settlement of territorial disputes.

Likewise, the ambiguity that exists under the law of the sea as to the distinction between Article 121(1) islands, Article 121(3) rocks, and low-tide elevations is also unhelpful, and encourages competing states to adopt not only interpretations that are

141. For example, the PRC has been reportedly applying political and economic pressures against neighbouring countries claiming competing territorial title over islands in the South China Sea: see e.g. International Crisis Group (ICG), "Stirring Up the South China Sea (I)" Asia Report No. 223 (23 April 2012), online: ICG <http://www.crisisgroup.org/ ~ /media/Files/asia/north-east-asia/223-stirring-up-the-south-china-sea-i.pdf>; International Crisis Group, "Stirring Up the South China Sea (II): Regional Responses" Asia Report No. 229 (24 July 2012), online: ICG <http://www.crisisgroup.org/ ~ /media/Files/asia/north-east-asia/229-stirring-up-the-south-china-sea-ii-regional-responses>; Carlyle A. THAYER, "China's New Wave of Aggressive Assertiveness in the South China Sea" (30 June 2011), online: Center for Strategic & International Studies <http://csis.org/files/publication/110629_Thayer_South_China_Sea.pdf>.

most favourable to their claims, but also to engage in reclamation and building projects that in effect seek to convert the status of these maritime features. While recent ICJ decisions have assisted in providing some additional clarity to the distinction between these various maritime features, and the often diminished effect they ultimately have upon maritime boundaries, further clarification and additional guidance on these points would enable East Asian states to resolve at least some technical aspects of their disputes, which may form the basis for facilitating peaceful dispute settlement in the region.