
INTERNATIONAL LAW STUDIES

— *Published Since 1895* —

Refining Japan's Integrative Position on the Territorial Sovereignty of the Senkaku Islands

Atsuko Kanehara

97 INT'L L. STUD. 1588 (2021)

Volume 97



2021

Published by the Stockton Center for International Law

ISSN 2375-2831

Refining Japan’s Integrative Position on the Territorial Sovereignty of the Senkaku Islands

*Atsuko Kanehara**

CONTENTS

I.	Introduction: The Meaning of “Conjunction”	1590
II.	The Tense Situation Existing Between China and Japan.....	1594
	A. Chinese Conduct Has Caused the Threat of Force Toward Japan.....	1594
	B. The Coast Guard Law in a Concrete Context	1597
III.	It is a Daunting Task for Japan to Maintain Its Position of No Dispute: Why?.....	1600
	A. Legal Definition of a Dispute.....	1600
	B. Plausibility of Claims of Territorial Sovereignty: The Issue of “Mere Assertion”	1607
IV.	Significance for the Maintenance of Peace in Japan’s Basic Position of No Dispute with China	1612
	A. Obligation of Peaceful Settlement of Disputes: The Negative Side of No Existence of a Dispute	1612
	B. Rule of Law: The Positive Side of a Denial of the Existence of a Dispute	1616
V.	Reformulation and Refinement of Japan’s Basic Position.....	1618
	A. Impasse due to the “Mirror Effect”	1618

* Professor, Sophia University; President of the Japanese Society of International Law. The thoughts and opinions expressed are those of the author and not necessarily those of the U.S. government, the U.S. Department of the Navy, or the U.S. Naval War College.

B.	From the Perspective of the Law of Territorial Acquisition	1620
C.	From the Perspective of the Law of the Sea.....	1623
D.	Impacts of the Coast Guard Law on the Tense Situation Developing Between China and Japan.....	1625
VI.	Conclusion	1630

I. INTRODUCTION: THE MEANING OF “CONJUNCTION”

In the East China Sea, there have been tense situations for a long time among the neighboring countries.¹ The main reason for the tense situation between China and Japan is China’s offensive and aggressive activities in the sea areas² surrounding the Senkaku Islands.³ This situation raises both law of the sea and law of territorial acquisition issues.⁴ In order to cope with the situation appropriately and precisely, Japan needs to thoroughly analyze it from the dual perspectives of the law of the sea and the law of territorial acquisition.

The term “conjunction” has a special meaning in this article as it proposes that Japan should take an integrative position toward the issue of the territorial sovereignty of the Senkaku Islands. By doing so, Japan can contribute to the peace and order in the region, as well as the world.

The integrative position needs to be constructed from the dual perspectives of the law of the sea and the law of territorial acquisition. It does not

1. In the East China Sea, between the neighboring countries, with some exceptions, there are no agreed delimitations regarding exclusive economic zones or the continental shelf. Between Korea and Japan two agreements were concluded in 1974 with respect to the delimitation and joint development of the natural resources on the continental shelf. The lack of delimitation means that tense situations among the countries can easily be caused by activities in the “disputed” sea areas. The term “disputed” sea areas requires clarification, but here it is enough to assume that this refers to the sea areas and seabed where multiple States make claims of their sovereign rights in accordance with Articles 58 and 76 of the United Nations Convention on the Law of the Sea (UNCLOS). As for the determination of disputed sea areas, see Atsuko Kanehara, *Marine Scientific Research Conducted in Disputed Sea Areas Including Seabed Where Delimitation is Not Agreed—An Analysis from General and Particular Perspectives of the East China Sea* in MARINE SCIENTIFIC RESEARCH, NEW MARINE TECHNOLOGIES, AND THE LAW OF THE SEA 206 (Zou Keyuan ed., 2021) (hereinafter Kanehara, *Marine Scientific Research*); BRITISH INSTITUTE OF INTERNATIONAL AND COMPARATIVE LAW, REPORT ON THE OBLIGATIONS OF STATES UNDER ARTICLE 74 (3) AND 83 (3) OF UNCLOS IN RESPECT OF UNDELIMITED MARITIME AREAS para. 102 (2016), https://www.biicl.org/documents/1192_report_on_the_obligations_of_states_under_articles_743_and_833_of_unclos_in_respect_of_undelimited_maritime_areas.pdf?showdocument=1.

2. When appropriate, “the sea areas” are specified as the territorial sea. Otherwise, “the sea areas” mainly designate the contiguous zone and the territorial sea surrounding the Senkaku Islands.

3. In Chinese, the islands are called “Diaoyu Dao.”

4. As will be explained later, the issue of the legal definition of a dispute closely relates to Japan’s basic position on the Senkaku Islands.

mean the simple combination or accumulation of issues under the law of the sea and the law of territorial acquisition. Japan's basic position on the issue of sovereignty of the Senkaku Islands sets forth the reason for the conjunction. Japan has incessantly maintained as a fundamental position that:

There is no doubt that the Senkaku Islands are clearly an inherent part of the territory of Japan, in light of historical facts and based upon international law. Indeed, the Senkaku Islands are under the valid control of Japan. There exists no issue of territorial sovereignty to be resolved concerning the Senkaku Islands.⁵

Thus, Japan denies any existence of a dispute with China over the territorial sovereignty of the islands. Considering Japan's position, this article will refer to the "issue" of the Senkaku Islands, rather than the "dispute" over them. The legal effects of the existence of a "dispute" will be discussed later with confirmation of the definition of a "dispute"⁶ in accordance with international law and long-standing international jurisprudence.

In forming Japan's integrative position, the dual perspectives of the law of the sea and the law of territorial acquisition apply. When Japan considers its response to China's acts from the perspectives of the law of the sea and the law of territorial acquisition, Japan needs to devise its response to China without undermining its position that there is no dispute over territorial sovereignty. Under this condition, Japan needs to carefully consider its acts and responses toward China.⁷

For instance, when Japan, from the perspective of the law of the sea, criticizes and protests China's acts in the territorial sea surrounding the

5. Ministry of Foreign Affairs of Japan, About the Senkaku Islands (Apr. 13, 2016), <https://www.mofa.go.jp/region/asia-paci/senkaku/index.html>.

6. "Dispute," compared to, say, "conflict," "difference," and "disagreement," has a special meaning as the legal parlance of international law. Atsuko Kanehara, *Maritime Security in the East China Sea: Japan's Perspective*, 21 ISSUES & INSIGHTS 16 (2021), <https://pacforum.org/https://pacforum.org/wp-content/uploads/2021/07/Issues-and-Insights-Vol-21-SR2-ver-2.pdf> (hereinafter Kanehara, *Maritime Security*). Based upon this, this article will seek the reformulation and refinement of Japan's basic position.

7. A special connection arises between the legal definition of a dispute and such a way to defeat China's claim of territorial sovereignty. This will be examined later in this article after the confirmation of the definition of a dispute. The point is how Japan can defeat China's claim of territorial sovereignty in order to perfectly convince China and preferably other States in the world that there is no dispute over the issue of territorial sovereignty.

Senkaku Islands, Japan's response should not implicitly recognize the existence of a dispute with China, which would completely contradict Japan's fundamental position.⁸

Japan has responded to China's past conduct, and will devise ways of responding to future acts conducted by China, probably in relation to China's recently enacted Coast Guard Law (CGL).⁹ In doing so, Japan may justify its response primarily by referring to the United Nations Convention on the Law of the Sea (UNCLOS), as both countries are parties to it. In this regard, the substantial contents of UNCLOS explain how Japan is coping with the tense situation. Nonetheless, Japan's task is not only to protest China's conduct according to UNCLOS. Japan will also rely on UNCLOS in maintaining its position that there is no dispute regarding territorial sovereignty. Japan needs to think about how to make such a response from the perspective of the law of the sea in maintaining its position of there being no dispute. Solely under this condition, Japan will consider and depend on the substantial contents of the law of the sea.

The same holds true with the issue of the law of territorial acquisition. From the perspective of the law of territorial acquisition, Japan's primary purpose is not to use its territorial sovereignty to oppose that of China over the Senkaku Islands.¹⁰ Japan's purpose is not to compete with China as a party to the dispute, *arguendo*, on the territorial sovereignty of the islands. Rather, the critical task for Japan is to convince China and other States that the Senkaku Islands are under Japan's territorial sovereignty and that there

8. As will be examined later, the issues of the legal concept of a dispute and the rule of law, which have been main pillars of Japanese diplomacy, are closely related.

9. The CGL will be examined below. An unofficial English translation of the CGL is available at the U.S. Air University web site: https://www.airuniversity.af.edu/Portals/10/CASI/documents/Translations/2021-02-11%20China_Coast_Guard_Law_FINAL_English_Changes%20from%20draft.pdf (last visited Nov. 29, 2021).

10. This does not mean in any sense that Japan has not been prepared for declaring and solidifying its claim of territorial sovereignty. The point is that for Japan, due to its position of there being "no dispute," it has never intended to negotiate with China or use any dispute settlement procedures to resolve the "dispute." In this sense, in coping with the tense situation, Japan does not primarily intend to exchange views with China regarding the islands in accordance with the law of territorial acquisition. Rather, Japan, above all, has to fatally defeat China's claim of the latter's territorial sovereignty over the islands to fully convince China and all other States that there is no room for the existence of a dispute over the territorial sovereignty of the Senkaku Islands.

is no dispute regarding their sovereignty.¹¹ Thus, not only the law of territorial acquisition, but also the definition of a dispute under international law is closely related to the examination.

The focus of this article, namely the conjunction of the dual aspects of the tense situation, does not simply mean the combination or accumulation of the substantial contents of both the law of the sea and the law of territorial acquisition. The essential point to be considered is how Japan can keep its basic position of there being no dispute regarding the territorial sovereignty of the Senkaku Islands in coping with China's acts from both the perspectives of the law of the sea and the law of territorial acquisition.

As a sovereign State, it is critical for Japan to devise an integrative and coherent position in coping with the tense situation with China. Japan should manage the situation by maintaining its position that there is no dispute regarding the territorial sovereignty of the Senkaku Islands. Integrating and maintaining the coherence of its position are the very essence of the conjunction of the dual perspectives of the law of the sea and the law of territorial acquisition. There have been abundant examinations of the issues of the law of the sea and those of the law of territorial acquisition. The examinations thereof have been done separately and individually with respect to each particular issue. This article is unique in that it integrates both kinds of issues, namely those of the law of the sea and the law of territorial acquisition, as well as the legal definition of a dispute, to formulate Japan's integrative and coherent position regarding the tense situation existing between China and Japan over the Senkaku Islands.

In addition, this article will explain that Japan's taking of such an integrative position toward the issue of the territorial sovereignty of the Senkaku Islands can contribute to the peace and order of the region and of the world.

11. Practically speaking, the way to oppose China's claim of territorial sovereignty and win the territorial dispute, *arguendo*, on the Senkaku Islands, on the one hand, and the way to fatally defeat China's claim of territorial sovereignty to fully convince China that there is not any territorial dispute, on the other hand, would overlap with each other, even though the two ways are theoretically different from each other. The point is that Japan's principal task in relation to the territorial issue on the Senkaku Islands is to perfectly convince China and other States that there is not any territorial dispute, not to contest China's territorial sovereignty in order to win the territorial dispute on the Senkaku Islands. Therefore, it can be said that to make its position of there being no dispute fully convincing, Japan, above all, needs to base its position upon the definition of a dispute as legal parlance, in addition to proving its territorial sovereignty over the islands. This article, for this reason, will succinctly examine the definition of a dispute as legal parlance.

Thus, the Introduction confirms Japan's basic position on the issue of the Senkaku Islands. Secondly, the purpose of this article has been clarified with the explanation of the special meaning of the "conjunction" of the issues of the law of the sea and the law of territorial acquisition. Before proposing a reformulated and refined position of Japan, the next Part will succinctly confirm the tense situation existing between China and Japan, and the enactment of the CGL, China's application of which will, with strong probability, aggravate the situation.

II. THE TENSE SITUATION EXISTING BETWEEN CHINA AND JAPAN

A. Chinese Conduct Has Caused the Threat of Force Toward Japan

For more than a decade, Japan has faced law of the sea problems due to offensive and even aggressive Chinese conduct, particularly in Japan's territorial sea surrounding the Senkaku Islands.¹² China has frequently dispatched its coast guard vessels and military ships to the sea area.¹³ China has taken law enforcement measures against Chinese fishing boats and even against Japanese fishing boats.¹⁴ This is based upon its understanding that the sea area surrounding the islands concerned is its territorial sea.¹⁵ In addition, Chinese fishing vessels also come to the sea area. Their number has

12. As for the details of such Chinese conduct, see Kanehara, *Maritime Security*, *supra* note 6, at 16–17; Atsuko Kanehara, *International Law as a Tool to Combat China*, 4 JAPAN REVIEW 1, 2–3 (2020), https://www.jiia-jic.jp/en/japanreview/pdf/04JapanReview_4-1_summer_Kanehara_web.pdf (hereinafter Kanehara, *International Law*).

13. For an overview of the situation, see Ministry of Foreign Affairs of Japan, Status of Activities by Chinese Government Vessels and Chinese Fishing Vessels in Waters Surrounding the Senkaku Islands (Aug. 26, 2016), <https://www.mofa.go.jp/files/000180283.pdf>.

14. Jun Kitamura, *Tracking Japanese Fishing Boats off the Coast of the Senkaku Islands, Making a New Established Fact that China has Struck*, THE ASAHI SHIMBUN GLOBE (June 18, 2020), <https://globe.asahi.com/article/13461863>.

15. China insists that Japanese fishing boats entered the territorial sea of the Diaoyu Islands. See Ministry of Foreign Affairs of the People's Republic of China, Wang Yi Reiterates Stance on Diaoyu Islands (Nov. 25, 2020), https://www.fmprc.gov.cn/_mfa_eng/zxxx_662805/t1836129.shtml ("The fact is that recently some Japanese fishing boats of unknown origin have repeatedly entered the sensitive waters off the Diaoyu Islands, and China has to make necessary response. On this issue, China's position is clear. The Chinese side will continue to firmly safeguard its sovereignty and at the same time proposes three hopes.").

even reached a few hundred.¹⁶ Furthermore, in some cases, it is said these fishing vessels are also militia vessels.¹⁷

These acts by China's coast guard vessels, military ships, and fishermen provoke the following issues of the law of the sea: the violation of Japan's territorial sovereignty of the sea area;¹⁸ the rights of a coastal State in its territorial sea¹⁹ to combat non-innocent passage of foreign vessels,²⁰ the means of responding to the conduct of Chinese public vessels, including military ones, that enjoy immunity from law enforcement measures taken by coastal States;²¹ and illegal fishing by Chinese fishermen in Japan's territorial sea.²²

One point to be carefully considered is that Japan's position is not perfectly clear. It states that the intrusion²³ of Chinese government vessels into Japan's territorial waters surrounding the Senkaku Islands is a violation of Japan's sovereignty.²⁴ It is not clear as to whether the term Japan's "sovereignty" means that under Article 2, Paragraph 1, of UNCLOS, or that under

16. For instance, according to the report issued by the Japan Coast Guard, two hundred to three hundred Chinese fishing boats entered the territorial sea surrounding the Senkaku Islands. Japan Ministry of Defense, Slideshow, China's Activities in the South China Sea (Mar. 2021), https://www.mod.go.jp/en/d_act/sec_env/pdf/ch_d-act_b_e_210421.pdf.

17. Under the law of armed conflict, this fact raises a serious problem as to whether fishermen may become combatants without satisfying the conditions under the law. Here, it is enough to point out the existence of the problem. *See, e.g.*, James Kraska & Michael Monti, *The Law of Naval Warfare and China's Maritime Militia*, 91 INTERNATIONAL LAW STUDIES 450 (2015).

18. United Nations Convention on the Law of the Sea art. 2, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

19. *Id.* art. 25.

20. *Id.* arts. 17, 18, 19.

21. *Id.* art. 32.

22. *Id.* arts. 18, 19(2)(i), 25.

23. As foreign vessels have the right of innocent passage in Japan's territorial sea, a neutral term of "entry" rather than "intrusion" might be appropriate. However, Chinese public vessels enter Japan's territorial sea and conduct offensive and even aggressive acts. Based upon a critical stance against these facts, it is understandable that Japan uses such a word as "intrusion." This point also relates to the interpretation of the innocent passage of foreign vessels in territorial sea. This article will succinctly touch upon it.

24. For instance, the Ministry of Foreign Affairs of Japan issued several such statements. *See, e.g.*, Press Release, Ministry of Foreign Affairs of Japan, Intrusion of Chinese Government Vessels into Japan's Territorial Waters Surrounding the Senkaku Islands (Aug. 21, 2016), https://www.mofa.go.jp/press/release/press4e_001253.html; Ministry of Foreign Affairs of Japan, Trends in China Coast Guard and Other Vessels in the Waters Surrounding the Senkaku Islands, and Japan's Response (Aug. 12, 2021), https://www.mofa.go.jp/region/page23e_000021.html.

the fundamental principle of international law to respect sovereignty, or both.²⁵

In addition, these offensive and even aggressive acts by Chinese vessels would constitute violations of the prohibition on the threat of force under Article 2, Paragraph 4, of the United Nations Charter and customary international law.²⁶ While setting a precise definition of the threat of force, as well as the use of force, is not an easy task, there is unlikely to be any doubt that those acts of China actually have been causing and even enhancing a serious threat to Japan in the East China Sea, and also to the countries in the South China Sea.²⁷ In the South China Sea, China has conducted almost similar acts to those in the East China Sea.²⁸ As will be explored later in this article, judging from the rule of law, China's acts, both in the East China Sea and in the South China Sea, should be criticized as attempts to unilaterally change the status quo by force or by threat of force.²⁹ Thus, an analysis of the East China Sea, particularly an analysis of the tense situation between China and Japan in the East China Sea, may also apply to the South China Sea.³⁰

As explained above, this article will examine the issues of the law of the sea and the law of territorial acquisition, as well as the legal definition of a dispute. The article does not purport to legally evaluate Chinese conduct as constituting the threat of the use of force.³¹ For the purpose of the article, it is enough to recognize that China's acts are offensive and even aggressive so as to actually produce the threat of force toward Japan in the East China Sea

25. This article will take up this point in discussing reformulation or refinement of Japan's basic position by considering what interests of Japan should be protected against China's conduct.

26. It is widely recognized that the prohibition of the use of force and threat of force under Article 2, Paragraph 4, of the UN Charter has been well established as a rule of customary international law. For instance, the International Court of Justice declared this position in the case of *Nicaragua*. See *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, ¶¶ 184, 188 (June 27).

27. Kanehara, *International Law*, *supra* note 12, at 3.

28. In the South China Sea, the prominent aspect of China's conduct is constructing military facilities on the reclaimed land of islands over which two or more States are claiming territorial sovereignty. See Ministry of Defense, *China's Activities in the South China Sea*, *supra* note 16.

29. From the perspective of the rule of law, the Chinese acts, both in the East China Sea and the South China Sea, clearly contradict its main pillars. This point will be further explored below.

30. For a fruitful discussion on this issue, see Pacific Forum, *Maritime Discussion Series #9*, YOUTUBE (July 13, 2021), <https://youtube/IV77TbNNhCk>.

31. Kanehara, *International Law*, *supra* note 12, at 3.

and the coastal States of the South China Sea. Rather, this article will consider these acts from the perspective of Japan's diplomatic policies, namely the rule of law³² and "the free and open Indo-Pacific" vision.³³

The tense situation that has been created by China's conduct will be, with strong probability, aggravated by the enactment and actual application of the CGL by China. Apart from a doctrinal evaluation of the CGL, this article will examine the CGL from its own particular perspective. Here, it would be useful to give the reason for doing so before concretely analyzing the CGL.

B. *The Coast Guard Law in a Concrete Context*

When examining Japan's possible response against China's conduct in the territorial sea surrounding the Senkaku Islands, the CGL will be the focus.³⁴

32. For an important declaration of Japan's diplomatic policy based upon the rule of law, see Shinzo Abe, Keynote Address at the 13th IISS Asian Security Summit "Shangri-La Dialogue" (May 30, 2014), https://www.mofa.go.jp/fp/nsp/page18e_000087.html. On the occasion of the Joint Press Release between the U.S. and Japan, Prime Minister Suga said,

As we respond to COVID-19, climate change, and other unprecedented crises currently facing the international community, our two countries are mutually indispensable partners. I affirmed with President Biden that our two countries have great responsibility for leading multilateral efforts to resolve these issues. Beyond that, we agreed to demonstrate joint leadership towards greater recovery by the international community while upholding the international order based on multilateralism and the rule of law.

Yoshihide Suga, Press Conference by the Prime Minister regarding the Japan-U.S. Summit Meeting and Other Matters (Apr. 16, 2021), https://Japan.kantei.go.jp/99_suga/statement/202104/_00010.html; For the text of the joint statement, see U.S.-Japan Joint Leaders' Statement (Apr. 16, 2021), <https://www.mofa.go.jp/files/100177718.pdf>.

33. Ministry of Foreign Affairs of Japan, Free and Open Indo-Pacific (Apr. 1, 2021), https://www.mofa.go.jp/policy/page25e_00278.html. This author delivered lectures regarding the Free and Open Indo-Pacific vision from a perspective of a close connection between it and recent Japanese ocean policies in 2018 in several Asian countries. *See, e.g.*, Atsuko Kanehara, Keynote Speech on "Japan's Ocean Policy and Free in the context of the Free and Open Indo-Pacific and Open Indo-Pacific Strategy" at Colombo University (Sept. 28, 2018), <https://www.lk.emb-japan.go.jp/files/000416654.pdf>.

34. As for a serious concern from the early stage of the drafting of the CGL due to the tense situation, Toshinari Matsuo, Director of the Operational Law Office at the Maritime Self-Defense Force's Maritime Command and Staff College, stated that China's new law went beyond the norms of UNCLOS. *See* Eric Johnston, *As China Authorizes Use of Force by Coast Guard, Japan Considers Response*, THE JAPAN TIMES (Feb. 10, 2021), <https://www.japan-times.co.jp/news/2021/02/10/national/china-coast-guard-law-japan/>.

To achieve the article's goal of proposing Japan's "integrative" and "coherent" stance with respect to the issue of the Senkaku Islands, it is indispensable to analyze the CGL. Therefore, this article will conduct such an analysis in order to accomplish its goal.

As explained above, the issues of both the law of the sea and the law of territorial acquisition, to which the issue of the legal definition of a dispute indispensably attaches, will work in close conjunction for Japan. This article will examine the CGL solely under this framework of consideration and limitation. It will not purport to analyze the CGL in general. In addition, for the reason set forth below in Part III and Part V, this article will not purport to make some examination of the CGL in an abstract manner, as the real problems of the CGL cannot be perfectly defined without putting it in a concrete context, and without assuming its actual application.

On February 1, 2021, the CGL came into force.³⁵ Particularly from the perspective of international law and UNCLOS, its controversial contents have already provoked harsh criticism.³⁶ However, a precise analysis of the future and even tenser situation between China and Japan requires putting the CGL in the concrete context of where it applies.

For instance, it has been pointed out that the CGL is problematic as it provides terms such as "jurisdictional sea areas" to designate the sea areas under China's rights that are so vague that it is not possible to precisely find where those sea areas are situated.³⁷ In addition, a relatively common criticism against the CGL targets its permission of the use of weapons by the Chinese authorities for the purpose of law enforcement as well as defense activities.³⁸ Closely connected to this point, the CGL seems to assume that

35. The Coast Guard Law of the People's Republic of China was enacted in January 2021 and was put into force on February 1. For a succinct analysis of its background, see Japan Ministry of Defense, *The Coast Guard Law of the People's Republic of China*, https://www.mod.go.jp/en/d_act/sec_env/ch_ocn/index.html (last visited Nov. 16, 2021).

36. Brig Vinod Anand, *Implications of China's New Coast Guard Law*, VIVEKANANDA INTERNATIONAL FOUNDATION (Feb. 26, 2021), <https://www.vifindia.org/2021/february/26/implications-of-chinas-new-coast-guard-law>; Tomohisa Takei, *How Japan Should Deal with China's New Coast Guard Law*, ASIA PACIFIC INITIATIVE (Apr. 8, 2021), <https://apinitiative.org/en/2021/04/08/23360/>.

37. For an unofficial English translation of the CGL, see *supra* note 9. The citation of provisions of the CGL is in accordance with the unofficial translation. Article 3 reads: "This law shall apply to coast guard organizations carrying out maritime rights enforcement activities in and above the sea areas under the jurisdiction of the People's Republic of China."

38. Article 22 of the CGL reads:

China's coast guard vessels will take coercive measures against foreign public vessels³⁹ inconsistent with the sovereign immunity to be granted to public vessels under the law of the sea.⁴⁰

There is no doubt that there is some theoretical value in the doctrinal analysis of the CGL in an abstract manner without putting it into a concrete context. However, in order to really examine the CGL "to the point," the actual application of particular provisions of the CGL should be presupposed. Otherwise, its actual problem in relation to the law of the sea would not be meaningfully identified. In this regard, the following factors should be specified: where the "jurisdictional sea areas" are concretely located; what kind of conduct China's ships engage in in the particular "jurisdictional sea areas"; what kind of Chinese vessels, coast guard vessels, or military ships use weapons against what kind of foreign vessels; and so on. The focus of the examination exists in China's justification, by the CGL, for each of these factors in the concrete contexts.

Especially for Japan, which has been facing China's offensive and even aggressive conduct in the East China Sea, it is above all indispensable and critical to consider concrete scenarios, and even the worst-case scenario, and prepare for them so as to respond to and combat China's acts based upon the CGL in the territorial sea surrounding the Senkaku Islands. An abstract and general evaluation of the CGL solely from a doctrinal or theoretical perspective would not substantially help Japan and would even be useless for most effectively coping with the tense situation that would be, with strong probability, aggravated by the actual application of the CGL by China in the concrete contexts.

As explained above, in order to propose to formulate an integrative stance of Japan this article will focus on the conjunction between the issues of the law of the sea and the law of territorial acquisition as well as the legal

When national sovereignty, sovereign rights, and jurisdiction are being illegally infringed by foreign organizations and individuals at sea, or are facing an imminent danger of illegal infringement, the maritime police agency has the right to take measures including those in accordance with this law and other relevant laws and regulations. Use all necessary measures, including weapons, to stop the infringement and eliminate danger.

See unofficial English translation, *supra* note 9, art. 22.

39. Article 22 uses the term "foreign organizations" and does not appear to distinguish between categories of foreign vessels. *See id.*

40. UNCLOS, *supra* note 18, art. 32.

definition of a dispute. Really, the perspective of conjunction makes a practical analysis of the CGL, in context, completely different from one that aims to be theoretical and abstract.

Thus, Part II succinctly confirmed the fact of the tense situation existing between China and Japan, which will, with strong probability, be aggravated by China's actual application of the CGL. This article will deal with the CGL in such a concrete context, in line with the article's principle with respect to the way of examining the CGL, as provided in Part II, differently from doctrinal or abstract analyses of the CGL.

Next, in Part III, the issue to be considered is how daunting it is for Japan to establish its integrative stance in coping with the tense situation, considering the legal definition of a dispute under international law.

It is an axiom that the key task for Japan, as a sovereign State, is to protect its national interests from Chinese behavior. The critical point is that Japan should accomplish this task without undermining, in any sense, its longstanding position that there is no dispute with China on the sovereignty of the Senkaku Islands. Under this condition, Japan needs to use the law of the sea and the law of territorial acquisition, as well as the legal definition of a dispute, as effectively as possible. Such a requirement comes from the necessity for Japan to take a solid integrative stance as a sovereign State from all the perspectives of the aforementioned laws and legal definition. This is a really daunting task for Japan. Why? And in this regard, the CGL comes under scrutiny. How?

These questions of "why?" and "how?" will be taken up, in this order, in Part III and Part V.

III. IT IS A DAUNTING TASK FOR JAPAN TO MAINTAIN ITS POSITION OF NO DISPUTE: WHY?

A. *Legal Definition of a Dispute*

1. Japan's Coherent Attitude with Respect to the Concept of a Dispute

While Japan has taken the position that there is no dispute with China regarding the territorial sovereignty of the Senkaku Islands, it has recognized the existence of a dispute with Korea regarding the Takeshima Islands, called

“Dokdo” in Korean.⁴¹ It is critically important to fully understand that these Japanese positions are in no way incoherent and are in fact coherent.⁴² The legal definition of a dispute can explain this. Simply put, Japan determined its position on the territorial sovereignty of the Senkaku Islands and the Takeshima Islands coherently and in accordance with the legal definition of a dispute.

Next, succinct analysis of the definition of a dispute will be given. This article does not purport to provide a thorough examination of the definition. It will do so as far as necessary to understand Japan's coherent position as mentioned here, and from the particular perspective of this article to propose Japan's integrative basic position.

2. Legal Definition of a Dispute

The term “dispute” is international legal parlance that is very different from ordinary language and has been established and refined by the World Court's jurisprudence for almost one hundred years.

Initially, almost one hundred years ago, in the *Mavrommatis Palestine Concessions (Greece v. United Kingdom)*,⁴³ the Permanent Court of International Justice (PCIJ), in 1924, declared a legal definition of a dispute. According to the PCIJ, a dispute is “a disagreement on a point of law or fact, a conflict of legal views or interests” between parties.⁴⁴ This definition has been repeatedly confirmed in the jurisprudence of the PCIJ and its successor, the International Court of Justice (ICJ). Quite recently, the arbitral tribunal that was established under Annex VII of UNCLOS, on the occasion of the *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait*

41. Actually, Japan has already proposed to Korea three times that they submit the dispute over the territorial sovereignty of the Takeshima Islands to the International Court of Justice. However, Korea has never accepted the proposals for the reason that Korea admits no existence of such a dispute. Ministry of Foreign Affairs of Japan, Japanese Territory: Takeshima (July 30, 2015), https://www.mofa.go.jp/a_o/na/takeshima/page1we_000065.html; Kanehara, *Marine Scientific Research*, *supra* note 1.

42. Kanehara, *Maritime Security*, *supra* note 6, at 16 n.4.

43. The *Mavrommatis Palestine Concessions (Greece v. Gr. Brit.)*, Judgment, 1924 P.C.I.J. (ser. A) No. 2, at 4 (August 30).

44. *Id.* at 11.

(*Coastal Rights case*),⁴⁵ referred to this definition in its award rendered on February 21, 2020.⁴⁶

However, irrespective of such a longstanding authenticity of the definition, this does not actually function as a definition of a dispute for identifying a certain situation as a dispute and differentiating it from others.⁴⁷

For instance, when State A claims sovereignty over an island with legal and factual justification and State B does the same, there may be a difference of a point of law or fact regarding the sovereignty of the island between State A and State B. By looking at the formal statements of both State A and State B, the difference between them can be easily found. Looking at the official webpages of the ministry of foreign affairs of each country, with respect to the Senkaku Islands, Japan claims that it has sovereignty over them historically and based upon international law on the one hand,⁴⁸ and China does the same, on the other hand.⁴⁹ A third party may recognize a disagreement on a point of a law or fact between China and Japan. In an Internet-based society such as the current one, it is very easy to discern such differences by searching the webpages of the various countries.

Nonetheless, such a difference of positions does not necessarily prove the existence of a dispute. If it did, there would be an exorbitant number of disputes among States in the world and an inflation of disputes. In particular, in the current internet age, with the huge amounts of information on the internet, there may indeed be, here and there, disagreements on a point of law or fact among States. Thus, the definition of a dispute given by the PCIJ in the *Mavrommatis Palestine Concession* case is not useful to appropriately identify the existence of a dispute. Rather, it is evaluated as being useful to describe the legal or factual situation when a dispute exists between States. The

45. Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukr. v. Russ.), Case No. 2017-06, Award Concerning the Preliminary Objections of the Russian Federation (Perm. Ct. Arb. 2020), <https://pcacases.com/web/sendAttach/9272>.

46. *Id.* ¶ 163.

47. Robert Jennings, *Reflections on the Term "Dispute,"* in *ESSAYS IN HONOUR OF WANG TIEYA* 401, 404 (Ronald St. John Macdonald ed., 1993).

48. Ministry of Foreign Affairs of Japan, About the Senkaku Islands, *supra* note 5.

49. *See, e.g.*, State Council Information Office of the People's Republic of China, White Paper, Diaoyu Dao, an Inherent Territory of China (Sept. 25, 2012) ("Diaoyu Dao and its affiliated islands are indispensable part of Chinese territory. Diaoyu Dao is China's inherent territory in all historical, geographical, and legal terms, and China enjoys indisputable sovereignty over Diaoyu Dao.").

aforementioned definition may set forth the necessary, but not sufficient, condition for the existence of a dispute.⁵⁰

Actually, the subsequent jurisprudence to the *Mavrommatis Palestine Concession* case significantly refined the definition of a dispute. In a recent case on nuclear arms and disarmament,⁵¹ the ICJ, based upon precedent, clarified the definition of a dispute.

According to the established case law of the Court, a dispute is “a disagreement on a point of law or fact, a conflict of legal views or of interests” between parties (*Mavrommatis Palestine Concessions*, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 11). In order for a dispute to exist, “[i]t must be shown that the claim of one party is positively opposed by the other” (*South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 328). The two sides must “hold clearly opposite views concerning the question of the performance or non-performance of certain international obligations” (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Preliminary Objections, Judgment, I.C.J. Reports 2016 (I), p. 26, para. 50, citing *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion*, I.C.J. Reports 1950, p. 74).⁵²

Regarding the conditions for the existence of a dispute, in addition to the definition given by the PCIJ in the *Mavrommatis Palestine Concession* case, there are two conditions for the existence of a dispute. The first condition: the two sides must hold clearly opposite views concerning the question of the performance or non-performance of certain international obligations. This does not require examination with respect to the issue of the Senkaku

50. Jennings, *supra* note 47, at 405.

51. *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. U.K.)*, Preliminary Objections, Judgment, 2016 I.C.J. 833 (Oct. 5), <https://www.icj-cij.org/public/files/case-related/160/160-2016-1005-JUD-01-00-EN.pdf>.

52. *Id.* ¶ 37.

Islands.⁵³ Both China and Japan fully recognize that they have different positions regarding the territorial sovereignty of the islands.⁵⁴ The second condition: it must be shown that the claim of one party is positively opposed by the other. According to this condition, the individual or discrete claims of two countries that are contrary to each other do not necessarily form a dispute.

Relating to this condition, in the *South West Africa* cases,⁵⁵ the ICJ gave the following explanation:

It is not sufficient for one party to a contentious case to assert that a dispute exists with the other party. A mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its nonexistence. Nor is it adequate to show that the interests of the two parties of such a case are in conflict. It must be shown that the claim of one party is positively opposed by the other.⁵⁶

The meaning of “positively opposed” is not clear. In this regard, the examination in the case of *Elimination of All Forms of Racial Discrimination (Racial Discrimination case)*⁵⁷ is very useful. In this case, after confirming the definition of a dispute in the precedents,⁵⁸ the ICJ thoroughly examined the statements and documents as evidence of the existence of a dispute.⁵⁹ The points of focus that the ICJ set in its examination are the contexts,⁶⁰ authors of the statement or documents,⁶¹ and direct allegations or claims against the other

53. In the *Coastal Rights* case, the Tribunal said: “This claim of the Russian Federation has been positively and repeatedly opposed by Ukraine, and the Parties therefore hold clearly opposite views on the question of sovereignty over Crimea.” The ICJ accordingly admits the existence of a dispute between parties. *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukr. v. Russ.)*, Case No. 2017-06, Award Concerning the Preliminary Objections of the Russian Federation ¶¶ 165–166 (Perm. Ct. Arb. 2020), <https://pcacases.com/web/sendAttach/9272>.

54. As has been carefully explained, the existence of a difference of positions, per se, does not necessarily produce a dispute.

55. *South West Africa Cases (Eth. v. S. Afr.; Liber. v. S. Afr.)*, Preliminary Objections, Judgment, 1962 I.C.J. 319 (Dec. 21).

56. *Id.* at 328.

57. *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, Judgment, 2011 I.C.J. 70 (Apr. 1).

58. *Id.* ¶ 30.

59. *Id.* ¶¶ 40–113.

60. *Id.* ¶¶ 39, 50, 63, 72.

61. *Id.* ¶ 63.

party.⁶² Finally, the ICJ concluded that there was a dispute between Georgia and the Russian Federation about the latter's compliance with its obligations under the Convention on the Elimination of All Forms of Racial Discrimination.⁶³

Applying these examinations by the ICJ to the issue of the Senkaku Islands, the conclusion is that there is no dispute. Both China and Japan, in a discrete and independent context, issued statements mainly on the webpages of their ministries of foreign affairs. Those statements are not "positively opposed" to each other.

It is true that in a more concrete situation in which China's public vessels enter the sea areas surrounding the Senkaku Islands, both China and Japan issued statements. For instance, in a periodic press conference, Foreign Minister Toshimitsu Motegi said, "I believe it is extremely regrettable that Chinese government vessels have been repeatedly sailing through Japan's contiguous zone and intruding into our territorial waters around the Senkaku Islands. We have been repeatedly issuing severe protests regarding such activities by China through diplomatic channels."⁶⁴

In addition, at sea, Japan Coast Guard vessels have requested Chinese public vessels to leave the sea areas.⁶⁵ Regarding "issuing protests," various levels of Japanese authorities have issued protests addressed to various levels of Chinese authorities.⁶⁶ Typical Japanese protest statements are as follows: "An intrusion into Japan's territorial waters surrounding the Senkaku Islands and any activity in these waters by a Chinese government vessel constitutes an infringement of Japan's sovereignty and is completely unacceptable";⁶⁷ "Despite Japan repeatedly lodging strong protests with the Chinese side, the Chinese side has continued to take unilateral actions that raise tensions on the ground, and this is absolutely unacceptable";⁶⁸ "Japan has issued strong

62. *Id.* ¶¶ 62, 67, 76, 81, 84, 95, 113.

63. *Id.* ¶ 113.

64. Ministry of Foreign Affairs of Japan, Press Conference by Foreign Minister Motegi Toshimitsu (June 23, 2020), https://www.mofa.go.jp/press/kaiken/kaiken4e_000813.html#topic4.

65. As for the measures taken by the Japan Coast Guard, see, for instance, Japan Coast Guard, Situation in the Sea Area Around Japan, 2019 Report, https://www.kaiho.mlit.go.jp/info/books/report2019/html/tokushu/toku19_01.html (last visited Nov. 29, 2021).

66. Ministry of Foreign Affairs of Japan, Status of Activities by Chinese Government Vessels and Chinese Fishing Vessels, *supra* note 13, at 4–7.

67. *Id.* at 4.

68. *Id.*

protests calling to have the relevant vessels immediately leave Japan's territorial waters and also depart from the contiguous zone."⁶⁹

On the Chinese side, relating to the Japanese protests, Foreign Minister Wenbin Wang said, "The Diaoyu Island and its affiliated islands are inherent Chinese territory. The patrol and law enforcement activities by China Coast Guard in these waters are legitimate and lawful measures to safeguard sovereignty."⁷⁰

Both countries have exchanged views in the concrete context in which China's public vessels enter the sea areas around the Senkaku Islands. Their views conflict with each other. These exchanges of views might be regarded as "conflicting views publicly opposed" to each other, indicating that "the claim of one party is positively opposed by the other," as seen in the definition of a dispute given by the jurisprudence.⁷¹ In that case, a dispute would exist between China and Japan regarding the territorial sovereignty of the islands. That would clearly undermine Japan's basic position that there is no such dispute. Is there any possibility for Japan to appropriately integrate its protests against China into its basic position of there being no dispute, without any contradiction?

One possibility can be found in changing the significance of such protests against China. These are not responses to China by Japan as a party to a dispute on the territorial sovereignty of the islands. These are necessary responses by Japan in order to deny any legal effects for the unjustifiable and unilateral activities by China. Why unjustifiable? The main reason for it is that China has no possibility to hold territorial sovereignty over the islands. Japan's response to defeat China's assertion of territorial sovereignty is not for the purpose of winning a dispute with China, but for the purpose of proving that China's assertion of territorial sovereignty does not have any grounds in law or fact. Therefore, those activities are unjustifiable so as to have any legal effects.

69. *Id.*

70. Ministry of Foreign Affairs of the People's Republic of China, Foreign Ministry Spokesperson Wang Wenbin's Regular Press Conference on June 4, 2021, https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1881482.shtml; Ministry of Foreign Affairs of the People's Republic of China, Foreign Ministry Spokesperson Zhao Lijian's Regular Press Conference on July 13, 2021, https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1891749.shtml.

71. South West Africa Cases (Eth. v. S. Afr.; Liber. v. S. Afr.), Preliminary Objections, Judgment, 1962 I.C.J. 319, 328 (Dec. 21).

Japan, by defeating China's assertion of territorial sovereignty, can prove that China does not have a capacity to be a party to a dispute. China is making use of a pseudo-claim of territorial sovereignty to attempt to unilaterally change the status quo, even with the threat of force,⁷² regarding the Senkaku Islands. In the bilateral sphere, through such a response, Japan could fully protect its supreme national interest—territorial sovereignty. In addition, in the international sphere, Japan's response in the East China Sea may contribute to maintaining and protecting the peace and order in the regions⁷³ as well as in international society by combatting such unilateral activities of China with the assertion of territorial sovereignty. This point will be further elaborated in the next Part, in discussing the rule of law.

Here, there is one more condition for the existence of a dispute: the plausibility of the claims of the States concerned. The rule of law also closely relates to this. The issue of the rule of law will be taken up later in the following Part.

B. Plausibility of Claims of Territorial Sovereignty: The Issue of "Mere Assertion"

In the *Coastal Rights* case, the tribunal, after determining the existence of a dispute,⁷⁴ examined the admissibility of the Russian claim of sovereignty.⁷⁵ In the concrete context of the case, Ukraine argued that Russia claims sovereignty in order to defeat the tribunal's jurisdiction. In other words, Russia tries to create the appearance of a dispute on territorial sovereignty which

72. As explained above, irrespective of the difficulty to set the precise definition of the use of force and threat of force, China's offensive and even aggressive activities are no doubt placing the threat of force on Japan as well as States in the South China Sea. See *infra* Part II(A).

73. As described above in Part II(A), China has conducted itself in a similar way both in the East China Sea and in the South China Sea. Thus, in both regions, such a response by Japan could contribute to the maintenance of peace and order. Hereinafter, without additional explanation, the term "regions" will be used to designate the East China Sea and the South China Sea, unless otherwise indicated.

74. Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukr. v. Russ.), Case No. 2017-06, Award Concerning the Preliminary Objections of the Russian Federation ¶ 166 (Perm. Ct. Arb. 2020), <https://pcacases.com/web/sendAttach/9272>.

75. *Id.* ¶ 183. This is in accordance with the request by Ukraine.

does not exist, in principle,⁷⁶ under the tribunal's jurisdiction.⁷⁷ The tribunal gave the following conclusions:

The Arbitral Tribunal further considers that the jurisprudence of international courts or tribunals also shows that the threshold for establishing the existence of a dispute is rather low. Certainly a mere assertion would be insufficient in proving the existence of a dispute. However, it does not follow that the validity or strength of the assertion should be put to a plausibility or other test in order to verify the existence of a dispute.⁷⁸

The Arbitral Tribunal does not consider that the Russian Federation's claim of sovereignty is a mere assertion or one which was fabricated solely to defeat its jurisdiction.⁷⁹

For this reason, the Arbitral Tribunal does not accept Ukraine's argument that the Russian Federation's claim of sovereignty is implausible.⁸⁰

Here, while the tribunal thinks that the threshold for establishing the existence of a dispute is rather low, even in such a narrow way, it admitted the possibility that an implausible claim of sovereignty is inadmissible and should not be considered by the tribunal.⁸¹ Then, what is the meaning of "mere assertion"?

76. Here is not the place to discuss the issue of so-called mixed claims, which mainly deals with the jurisdiction of the courts and tribunals that have jurisdiction under UNCLOS. Depending on some conditions, even a dispute including the issue of sovereignty can fall under the jurisdiction of the courts and tribunals that have jurisdiction solely for disputes concerning the interpretation or application of UNCLOS. Callista Harris, *Claims with an Ulterior Purpose: Characterizing Disputes Concerning the "Interpretation or Application" of a Treaty*, 18 THE LAW & PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS 279 (2019); Peter Tzeng, *Ukraine v. Russia and Philippines v. China: Jurisdiction and Legitimacy*, 46 DENVER JOURNAL OF INTERNATIONAL LAW AND POLICY 1, 3–6 (2017); Wensheng Qu, *The Issue of Jurisdiction over Mixed Disputes in the Chagos Marine Protection Area Arbitration and Beyond*, 47 OCEAN DEVELOPMENT & INTERNATIONAL LAW 40, 47–49 (2016); Atsuko Kanehara, *Interplay Between the United Nations Convention on the Law of the Sea and Other International Law for Building a Comprehensive International Maritime Order*, 63 JAPANESE JOURNAL OF INTERNATIONAL LAW 55 (2020) (particularly Chapter III and the citations thereto).

77. Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukr. v. Russ.), Case No. 2017-06, Award Concerning the Preliminary Objections of the Russian Federation ¶ 183 (Perm. Ct. Arb. 2020), <https://pcacases.com/web/sendAttach/9272>.

78. *Id.* ¶ 188.

79. *Id.* ¶ 189.

80. *Id.* ¶ 190.

81. It does not matter that the definition of a dispute is addressed by tribunals or courts either as an issue of jurisdiction or as that of admissibility.

The tribunal, in this case, only explained that the Russian claim of sovereignty is not for the purpose of defeating its jurisdiction. It seems to focus on the purpose of the claim, not the contents or substance of the claim. Nonetheless, the intent of the tribunal can be interpreted as meaning that a mere assertion does not have grounds in law and fact. A mere assertion, solely for the purpose of defeating the tribunal's jurisdiction, is a claim of sovereignty without being accompanied by legal or factual grounds. In this regard, in the case of the *Dispute Concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean*,⁸² the special chamber of the International Tribunal for the Law of the Sea denied mainly the legal possibility or legal substance in the claim of sovereignty by the United Kingdom. In citing the *South West Africa Case*, the special chamber said:

If, indeed, the ICJ has determined that the Chagos Archipelago is a part of the territory of Mauritius, as Mauritius argues, the continued claim of the United Kingdom to sovereignty over the Chagos Archipelago cannot be considered anything more than "a mere assertion". However, such assertion does not prove the existence of a dispute. As the Special Chamber recalls, "it is not sufficient for one party to a contentious case to assert that a dispute exists with the other party. A mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its non-existence. (South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 319, at p. 328)."⁸³

As long as the advisory opinion rendered by the ICJ determines that the Chagos Archipelago is a part of the territory of Mauritius,⁸⁴ in law, there is no possibility for the United Kingdom to claim sovereignty. It could not have any legal grounds for doing so.

With respect to the issue of the Senkaku Islands, Japan has taken the following position:

82. *Dispute Concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean*, (Mauritius v. Maldives), Case No. 28, Preliminary Objections, Judgment, 2021 ITLOS Rep. __ (Jan. 28), https://www.itlos.org/fileadmin/itlos/documents/cases/28/preliminary_objections/C28_Judgment_prelimobj_28.01.2021_orig.pdf.

83. *Id.* ¶ 243.

84. *Id.*

[T]here is no doubt that the Senkaku Islands are clearly an inherent part of the territory of Japan, in light of historical facts and based upon international law. Indeed, the Senkaku Islands are under the valid control of Japan. There exists no issue of territorial sovereignty to be resolved concerning the Senkaku Islands.⁸⁵

Clearly, Japan denies any grounds in law or fact for China's claim of territorial sovereignty over the islands. Therefore, Japan is insisting that China's claim of sovereignty over the islands is a "mere assertion."

The critical point to be recognized is that, by such an insistence, Japan does not purport to win a dispute with China, which would assume the existence of a dispute with China.⁸⁶ This would be completely contrary to Japan's basic position of there being no dispute. Instead, Japan emphasizes the lack of "a capacity" on the Chinese side to be a party to a dispute on territorial sovereignty, and thus, there is no dispute.

Then, according to the jurisprudence on "mere assertion," Japan has the possibility to solidify its basic position of there being no dispute over the territorial sovereignty of the Senkaku Islands. However, as the tribunal in *Coastal Rights* said, the possibility is small, as the threshold for establishing the existence of a dispute is rather low.⁸⁷ In addition, as a practical matter, it might be difficult to make the distinction in terms of contents or substance between Japan's argument of there being no dispute, on the one hand, and Japan's argument for it winning in a dispute with China, *arguendo*, over territorial sovereignty, on the other hand. Both arguments should defeat China's assertion of territorial sovereignty, and will naturally overlap with each other in terms of contents or substance to a significant degree.

However, the critical point is that even though the contents or substance are similar to each other, the purposes of the arguments are different from each other. One is the denial of any grounds in China's assertion of territorial sovereignty and so the denial of "a capacity" of China to be a party to a

85. Ministry of Foreign Affairs of Japan, About the Senkaku Islands, *supra* note 5.

86. Here, when talking about a dispute with China regarding the territorial sovereignty of the Senkaku Islands, certainly it means "a dispute, *arguendo*." This will also be the case in the following parts of this article, unless otherwise explained.

87. Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukr. v. Russ.), Case No. 2017-06, Award Concerning the Preliminary Objections of the Russian Federation ¶ 188 (Perm. Ct. Arb. 2020), <https://pcacases.com/web/sendAttach/9272>.

dispute; the other is to prevail and defeat China's assertion of territorial sovereignty in order to win the dispute with China.⁸⁸ Thus, Japan's task of maintaining its basic position that there is no dispute is really daunting. It needs to appropriately respond to China in order to protect Japan's territorial sovereignty over the Senkaku Islands, and it should accomplish the task without undermining, in any sense, its basic position of there being no dispute.

Even if Japan has only a narrow possibility to deny "a capacity" of China to be a party to a dispute, and even if the contents or substance of such a Japanese argument is similar to that for the purpose of winning a dispute with China, there is undeniable significance to Japan maintaining its basic position of there being no dispute. To explain this, an understanding of the purpose of international law to legally define a dispute is critical. International law sets a definition of a dispute as legal parlance that is different from ordinary language. In addition, closely connected to this, the rule of law also expects and even requires Japan to keep its basic position of there being no dispute and its response to China for that purpose. In short, Japan is expected to contribute to the realization of the commonly shared value of the rule of law. Therefore, by doing so, Japan could not only protect and maintain its territorial sovereignty in relation to China in the bilateral sphere, but it could also contribute to the maintenance of the peace and order in the regions as well as in the world.

From such a perspective, Part IV will succinctly examine the significance of the definition of a dispute under international law and the rule of law. After that, this article will reformulate and refine Japan's basic position as an integrative one, as was explained in the Introduction. Japan should form an integrative position on the issue of the Senkaku Islands, in accordance with both the law of the sea and the law of territorial acquisition, as well as the legal definition of a dispute.

Thus far, this Part has conducted an examination of Japan's position in relation to the definition of a dispute. One remaining point to be discussed is as follows: As described above, there is a possibility that Japan's response to activities by Chinese public vessels in the sea areas surrounding the Senkaku Islands may be regarded as that of a party to a dispute over the territorial sovereignty of the islands. In other words, such a response by Japan would imply Japan's recognition of the existence of the dispute. There-

88. To clearly demonstrate the purpose of its argument, the reformulation or refinement of Japan's basic position is a very important task for Japan. Later, this article will propose such a possible reformulation or refinement.

fore, in reforming and refining Japan's basic position of there being no dispute, such a response and the justification therefor need to be appropriately integrated into Japan's refined basic position.⁸⁹

Part V will propose some reformulation or refinement of Japan's basic position so as to form its integrative position from the dual perspectives of the law of territorial acquisition and the law of the sea. Before that, Part IV will explain the significance for maintenance of peace in Japan's basic position of there being no dispute.

IV. SIGNIFICANCE FOR THE MAINTENANCE OF PEACE IN JAPAN'S BASIC POSITION OF NO DISPUTE WITH CHINA

A. Obligation of Peaceful Settlement of Disputes: The Negative Side of No Existence of a Dispute

1. For What Purposes Has the Legal Parlance of a Dispute Been Established?

If a State is determined to be a party to a dispute, under international law it has to comply with the obligation of the peaceful settlement of the dispute. Typically, Article 2, Paragraph 3, of the UN Charter provides for this: "All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."⁹⁰ This obligation of peaceful settlement of disputes is not only a treaty obligation under the UN Charter, but also an obligation of customary international law.

In accordance with the obligation, if a State is a party to a dispute, it comes to owe the obligation. The object of the obligation is to maintain peace. The obligation was initially included in the Kellogg-Briand Pact of

89. It might be said that such a response by Japan should be redefined as an element of Japan's claim of there being no dispute, not as evidence of Japan's recognition of a dispute.

90. Article 33, Paragraph 1, of the UN Charter, providing for the dispute settlement measures, reads: "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice." U.N. Charter art. 33, ¶ 1.

1928.⁹¹ Articles I and II provide for renunciation of war and the obligation of the peaceful settlement of disputes in a parallel manner. They read:

Article I

The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another.

Article II

The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.⁹²

The Pact, under Article I, particularly focuses on wars “for the solution of international controversies,” and, at the same time, under Article II, it prescribes the obligation of the peaceful settlement of disputes. Thus, it is clear that the obligation of the peaceful settlement of disputes has the principal purpose of the maintenance of peace.⁹³ When one party to a dispute requests negotiation for the settlement of the dispute, and the other party refuses it, the latter should be blamed for its violation of the peaceful settlement of disputes, which would endanger the peace.

When this idea applies to the issue of the Senkaku Islands—as soon as Japan recognizes the existence of a dispute with China—Japan would owe the obligation of the peaceful settlement of disputes. If Japan refuses an offer of negotiation proposed by China, Japan would be a destroyer of the peace.⁹⁴

91. General Treaty for Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57.

92. *Id.* arts. I, II.

93. As the same idea, Article 33 of the UN Charter refers to disputes as follows: “the continuance of which is likely to endanger the maintenance of international peace and security.” U.N. Charter art. 33.

94. In the *Racial Discrimination* case, the judgment reads:

[T]he existence of a dispute maybe inferred from the failure of a State to respond to a claim in circumstances where a response is called for. While the existence of a dispute and the undertaking of negotiations are distinct as a matter of principle, the negotiations may help demonstrate the existence of the dispute and delineate its subject-matter.

Only if there is actually a dispute between China and Japan might this result be reasonable. However, if China's claim of territorial sovereignty over the islands is a "mere assertion" with the meaning explained before, and it therefore does not have a capacity to be a party to a dispute, such a result of blaming Japan as a destroyer of the peace would be entirely unreasonable and unacceptable.

Let us consider a similar situation among individuals. Imagine that you are living in a beautiful house with your family. You have the certificate of ownership for your land and house. One day, a stranger suddenly comes to you and says "Both the house and the land are mine. If you deny that, there would be a dispute between you and me, and we would have to resolve this dispute peacefully. Let's start the negotiation and, if necessary, go to a court." Could you accept such a request based upon a "mere assertion" without grounds in fact or in law? Definitely not!⁹⁵ Such a groundless "mere assertion" by the stranger cannot make such an apparent difference of opinions between you and the stranger a dispute as legal parlance. Similarly, it cannot produce a dispute under international law. Without a dispute, you do not owe the international law obligation of the peaceful settlement of the dispute.

Herein lies the significance of the denial of the existence of a dispute when solely one party utters a mere assertion without grounds in law or fact. International law does not place at an equal level the two States, when one claims territorial sovereignty with reasonable grounds in law or fact, and the other makes a mere assertion of it.

2. A Negative Side and a Positive Side of a Denial of an Existence of a Dispute

By applying the very legal parlance of a dispute, Japan has been insisting that there is not a dispute with China regarding the territorial sovereignty of the Senkaku Islands.⁹⁶ Japan, in order to avoid an unreasonable imposition of

Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination, Judgment, 2011 I.C.J. 70, ¶ 30 (Apr. 1).

95. An authority introduced a similar case to explain Japan's basic position of there being no dispute with China regarding the issue of the Senkaku Islands. See Akira Kotera, *Ryodo Mondai no Shori Isoguna* [Never Hurry the Solution of the Issue of Territory], RESEARCH INSTITUTE OF ECONOMY, TRADE AND INDUSTRY (Oct. 9, 2012), <https://www.rieti.go.jp/jp/papers/contribution/kotera/09.html>.

96. In accordance with the same legal parlance, Japan has been insisting that there is a dispute with Korea regarding the Takeshima Islands. Therefore, in the sense that Japan

the obligation of the peaceful settlement of disputes on it, has kept its basic position of there being no dispute with China regarding the issue of the Senkaku Islands. If China's mere assertion of territorial sovereignty could form a dispute so as to impose the obligation of the peaceful settlement of disputes on Japan, it would be unreasonable. If Japan refused a request of negotiation by China on territorial sovereignty, Japan should not be blamed as a destroyer of the peace.

This is a sort of negative side of a denial of the existence of a dispute in accordance with the definition of a dispute, in legal parlance, under international law: If there is no dispute under international law, there would be no obligation of the peaceful settlement of disputes. In order to avoid the imposition of the obligation of the peaceful settlement of the dispute, a denial of the existence of a dispute is required.

When discussing the definition of a dispute, "negative" legal effects are assumed. In cases of there being no dispute, the negative legal effect, such as the non-existence of the obligation of the peaceful settlement of a dispute, is mainly focused upon. When the obligation of the peaceful settlement of a dispute is triggered, in some cases through the dispute settlement clauses under treaties, the adjudication of the dispute by courts and tribunals is enabled even by the unilateral submission of the dispute.

Different from this, there is a positive side to be considered in establishing the non-existence of a dispute under international law. Considering a situation where two rival States with different opinions from each other have, in reality, a poor possibility to go to courts or tribunals, or even to engage in negotiation, the result of a denial of the existence of a dispute would have more importance than expected. This positive side and its legal effects have not received so much attention. Nonetheless, they deserve more attention. Let us consider them by assuming the concrete situation existing between China and Japan.

Even if, arguendo, Japan recognized the existence of a dispute, Japan and China do not have the possibility to go to international courts such as the ICJ regarding the issue of the Senkaku Islands. China has not accepted the optional clause under Article 36, Paragraph 2, of the ICJ statute. In the continued tense situation, it cannot be expected that the two States will conclude an agreement for arbitral procedures to resolve the dispute. In the

applies the same logic, Japan's positions on the issue of the Senkaku Islands and the dispute of the Takeshima Islands are perfectly coherent.

worst-case scenario, the tense situation grows and escalates to the use of force between the two States, giving rise even to small-scale armed conflict.

Considering such a reality and the actual risk of armed conflict, the expectation and requirement placed on Japan should be more seriously discussed. Japan is expected and required to maintain its basic position of there being no dispute not only to protect its own national interest but also to contribute to the maintenance of the peace in the regions⁹⁷ as well as in the world. In this regard, the fine combination between the definition of a dispute and the rule of law can elaborate on this.

B. Rule of Law: The Positive Side of a Denial of the Existence of a Dispute

1. Three Main Pillars of the Rule of Law

The rule of law consists of the following three principles that appeared in the Keynote Address by H. E. Shinzo Abe, Prime Minister of Japan, at the International Institute for Strategic Studies' 13th Asian Security Summit, known as the "Shangri-La Dialogue."⁹⁸ The three principles are: 1) Making and clarifying claims based on international law; 2) Not using force or coercion in trying to drive their claims; and 3) Seeking to settle disputes by peaceful means.⁹⁹

Regarding the first principle, China's claim of territorial sovereignty over the Senkaku Islands, meaning a "mere assertion," is contrary to the principle. The second principle prohibits the use of force or coercion in trying to drive their claims. As explained before¹⁰⁰ and as this author elaborates elsewhere,¹⁰¹ China's offensive and even aggressive activities in the sea areas surrounding the Senkaku Islands are really placing the threat of force on Japan. In combining these principles, China's activities can be evaluated as unilateral attempts to change the status quo by the threat of force in the sea areas concerned. In addition, considering the third principle of the rule of law, if there is, *arguendo*, a dispute between China and Japan regarding the territorial sovereignty of the islands, China's activities, which are unilateral attempts

97. *See supra* Part III(B).

98. Shinzo Abe, Keynote Address, *supra* note 32.

99. They were declared as the rule of law at sea.

100. *See supra* Part II(A).

101. Kanehara, *Maritime Security*, *supra* note 6, at 18; Kanehara, *International Law*, *supra* note 12, at 10–13.

by the threat of force to change the status quo, doubtlessly form a violation of the obligation of the peaceful settlement of a dispute.

2. Rule of Law and a Positive Side of a Denial of an Existence of a Dispute

The purpose of international law in defining a dispute is to impose on sovereign States the obligation of the peaceful settlement of disputes so as to maintain world peace. Prime Minister Abe's speech at the Shangri-La Dialogue confirms this, continuing after the declaration of the three principles of the rule of law as follows: "So to reiterate this, it means making claims that are faithful in light of international law, not resorting to force or coercion, and resolving all disputes through peaceful means."¹⁰²

Thus, based upon the obligation of the peaceful settlement of a dispute with its purpose and the three principles of the rule of law which has been a common value of the world, to prevent and combat China's offensive and even aggressive activities is the very maintenance and realization of these interests embodied in the international law obligation and the rule of law. For this purpose, Japan is expected and even required to defeat China's mere assertion of territorial sovereignty over the Senkaku Islands. That is to overtly eradicate any possible justification for China's activities surrounding the islands.

In addition, as explained above,¹⁰³ there is a possibility that Japan's response to activities by Chinese public vessels in the sea areas surrounding the Senkaku Islands, as well as the issuing of statements that are completely contrary to those of China, may be regarded as that of a party to a dispute over the territorial sovereignty of the islands. In other words, such a response by Japan would provide an implication of Japan's recognition of the dispute. This is not true, or this should be redefined in terms of its significance to the peace. Considering such an expectation or requirement on Japan, its response to China's activities is the very maintenance of the peace. The response purports to protect not only Japan's individual interest, Japan's sovereignty, but also to keep the peace, the common interest of the regions and even of the world. Japan is contributing to prohibiting the unilateral change

102. See Shinzo Abe, Keynote Address, *supra* note 32.

103. See *supra* Part III(A).

of the status quo by force or coercion. It goes without saying that, in doing so, Japan should not escalate the situation.¹⁰⁴

This is the positive side of a denial of the existence of a dispute. The negative side of a denial of a dispute purports to avoid the establishment of the obligation of peaceful settlement of the dispute. As the other side of the coin, the positive side of a denial of the existence of a dispute means to eradicate any justification for the unilateral change of the status quo, which would destroy the peace in the regions as well as in the world. Japan should clearly recognize such a contribution that it can provide in appropriately coping with the tense situation mainly in the sea areas surrounding the Senkaku Islands. Japan should combat the tense situation existing between China and itself, not only for the purpose of protecting its own sovereignty, but also for the purpose of realizing the common value of the region, as well as the world, namely peace.

The three principles of the rule of law find themselves in the so-called Free and Open Indo-Pacific vision.¹⁰⁵ This fact endorses the idea that the rule of law reflects the common value of certain regions as well as the world.

Until recently, it seems that Japan has adhered to principally the negative side of a denial of the existence of a dispute. Departing from this, it should take action on the basis of the recognition of the positive side of a denial of the existence of a dispute. This is really the reformulation or refinement of Japan's basic position that this article will propose in the following Part. From such a perspective, issues of the law of territorial acquisition and those of the law of the sea, including the problem of the CGL, will be touched upon.

V. REFORMULATION AND REFINEMENT OF JAPAN'S BASIC POSITION

A. *Impasse due to the "Mirror Effect"*

When two States have different and conflicting views with each other and one of them issues statements or documents concerning those views, it is

104. Japan's principle to combat China is that Japan will act firmly and calmly to maintain its territorial integrity. See Ministry of Foreign Affairs of Japan, About the Senkaku Islands, *supra* note 5. In responding to China, Japan also should adhere to the rule of law. See Kanehara, *International Law*, *supra* note 12, at 4.

105. Ministry of Foreign Affairs of Japan, Free and Open Indo-Pacific, *supra* note 33; Kanehara, *Maritime Security*, *supra* note 6, at 18–20.

entirely understandable that the other State would issue statements or document, as soon as possible, that are contrary to those of the first State. It is as if they were looking in a mirror. For instance, when Japan insists on its territorial sovereignty over the Senkaku Islands, China does the same. The problem is that as long as such a mirror effect continues, it creates an impasse. Without a breakthrough being realized, there would remain an impasse between the two countries. There would be no win, and no solution.

The impasse not only emerges for issues of the law of the sea, but also for those of the law of territorial acquisition. Here, to understand the impasse, let's consider the tense situation existing between China and Japan from the perspective of the law of the sea.

As confirmed in Part III, in concrete situations in which Chinese public vessels enter the sea areas surrounding the Senkaku Islands, the Japanese Coast Guard requires them to leave those sea areas,¹⁰⁶ and various Japanese authorities issue critical statements verbally and in writing.¹⁰⁷ As for the justification for the requirement of leaving the sea areas, Japan coherently says that Japan has sovereignty over those areas.¹⁰⁸ As if looking in a mirror, China responds by saying exactly the same: China has sovereignty over the sea areas concerned.¹⁰⁹ No solution could be expected. To achieve a breakthrough, Japan needs to completely crush China's assertion of sovereignty without leaving any room for argument.

The common and principal merit for Japan to take the positive side position of a denial of the existence of a dispute is to bring a breakthrough to the impasse. By thoroughly defeating China's assertion of territorial sovereignty and completely eradicating any justification for the Chinese activities in the sea areas surrounding the Senkaku Islands, Japan could, at least theoretically, prevent any similar activities by China in the future. China would lose any maneuvering room to utter again its mere assertion of territorial sovereignty in an effort to justify its activities in the sea areas concerned.

106. Ministry of Foreign Affairs of Japan, About the Senkaku Islands, *supra* note 5.

107. Ministry of Foreign Affairs of Japan, Status of Activities by Chinese Government Vessels and Chinese Fishing Vessels, *supra* note 13.

108. Ministry of Foreign Affairs of Japan, About the Senkaku Islands, *supra* note 5; Ministry of Foreign Affairs of Japan, Status of Activities by Chinese Government Vessels and Chinese Fishing Vessels, *supra* note 13.

109. Ministry of Foreign Affairs of the People's Republic of China, Wang Yi Reiterates Stance on Diaoyu Islands, *supra* note 15; State Council Information Office of the People's Republic of China, White Paper, *supra* note 49.

It is true that there would be no guarantee for China's giving up its assertion of territorial sovereignty over the islands and refraining from any offensive or aggressive activities based upon its assertion of territorial sovereignty. Nonetheless, after overtly taking the positive side position of a denial of the existence of a dispute, and having done everything that it could do in order to thoroughly defeat China's assertion of territorial sovereignty and completely eradicate any justification for the Chinese activities in the sea areas surrounding the Senkaku Islands, Japan would go up to a different phase from that of a State being annoyed by the mere assertion of territorial sovereignty over islands to which Japan really holds sovereignty.

What is the "different phase"? From a bilateral perspective between China and Japan, that is the phase of a State that can criticize China as a destroyer of world peace and as an intruder into its territorial waters. From an international perspective, that is the phase of a State that deserves to have international cooperation sought from it by other States in the regions and in the world, as well, for combatting such a destroyer of the peace and the maritime order reflected in UNCLOS.

As long as Japan keeps to the negative side position of a denial of the existence of a dispute, and as long as Japan refrains from overtly forming positive opposition to China regarding the territorial sovereignty of the Senkaku Islands,¹¹⁰ it cannot convincingly create a common understanding among other States with respect to the tense situation existing between China and Japan as a situation in which peace and the maritime order are in serious danger. Departing from this, for the purpose of taking full advantage of the main pillar of its diplomatic policy, namely the rule of law, Japan should reformulate or refine its basic position of there being no dispute into the positive side position of a denial of the existence of a dispute.

The following sections of this Part will propose the reformulation and refinement of Japan's basic position so as to form its integrative position from the perspectives of the law of territorial acquisition and the law of the sea, mainly focusing upon the CGL.

B. From the Perspective of the Law of Territorial Acquisition

Japan's basic position is that the Senkaku Islands are the inherent territory of Japan in accordance with both international law and history. The website

110. As for the negative position of a denial of the existence of a dispute, see *supra* Part IV(A).

of the ministry of foreign affairs of Japan explains this with abundant evidence.¹¹¹ The purpose of this article is to reformulate and refine Japan's stance so as to propose an integrative position from the perspectives of the law of territorial acquisition and the law of the sea, as well as the definition of a dispute. Therefore, it does not purport to scrutinize Japan's claim of territorial sovereignty over the Senkaku Islands in accordance with the law of territorial acquisition.¹¹²

Due to its stance of there being no territorial dispute with China, Japan has prudently avoided positively opposing China's claim. The meaning of "positively oppose" was given in Part III(A)(2), based upon the relevant jurisprudence. Japan has issued such statements on the website of its ministry of foreign affairs, for instance, "individually" or in a discrete manner, without positively opposing China.¹¹³ This is because Japan has been taking "the negative side position" of a denial of the existence of a dispute. Japan has carefully prevented its acts and statement from being regarded as its recognition of the existence of a dispute with China, which would mean that Japan would owe the obligation of the peaceful settlement of the dispute.

However, Japan can push forward its claim of territorial sovereignty even in a manner of positively opposing China. Japan should take the positive side position of a denial of the existence of a dispute. As explained in the previous Part, Japan is expected and even required to prevent China's unilateral attempts to change the status quo by the threat of force or coercion. For that purpose, Japan can utilize its past statements and activities as a means of fatally defeating China's mere assertion of territorial sovereignty so as to eradicate any justification for China's activities in the sea areas surrounding the Senkaku Islands. This is really the reformulation and refinement of Japan's basic position, shifting from the negative side position of a denial of the existence of a dispute to the positive side position.

111. For Japan's claim of its territorial sovereignty over the Senkaku Islands and the grounds therefor, see Ministry of Foreign Affairs of Japan, Situation of the Senkaku Islands (Apr. 4, 2014), https://www.mofa.go.jp/a_o/c_m1/senkaku/page1we_000010.html.

112. Such an examination of Japan's claim has been conducted by many scholars. As works by Japanese, see, e.g., Yuichi Takano, *Nihon No Ryodo* [Japan's Territory] (1962); KANANE TAJJUDO, *RYOIKI KIZOKU NO KOKUSAIHO* [International Law on Territorial Acquisition] (1998); Yanagihara Masaharu, *Significance of the History of the Law of Nations in Europe and East Asia*, 371 RECUEIL DES COURS 283, 350–82 (2015) (chapter III); KENTARO SERITA, *NIHON NO RYODO* [Japan's Territory] (2020).

113. For other documents and materials, etc., see Ministry of Foreign Affairs of Japan, Senkaku Islands: Reference Room (Aug. 23, 2016), https://www.mofa.go.jp/a_o/c_m1/senkaku/page1we_000012.html.

In the bilateral sphere, such a reformulated and refined basic position of Japan may not only strongly protect its national interest—territorial sovereignty—but also serve the function of bringing a breakthrough to the impasse, meaning the repeated exchange of conflicting statements from China and Japan. In addition, in the international sphere Japan should receive the endorsement and support of other States in the regions as well as in the world since it can contribute to the realization of the rule of law, which is a commonly shared value of the regions as well as the world.

Fully understanding the significance of its reformulated and refined basic position, Japan does not need to prudently avoid “positive opposition” to China. Rather, Japan should fully recognize the strong risk that would be created, and already has been created, to peace in the sea areas surrounding the Senkaku Islands as well as the East China Sea. By keeping its negative side position of a denial of the existence of a dispute, Japan would even allow China’s unilateral attempts to change the status quo by the threat of force or coercion.

As confirmed above,¹¹⁴ in the cases of the entry of China’s public vessels into the sea areas surrounding the Senkaku Islands, Japan has responded, in some sense, in a manner of positive opposition to China’s mere assertion of territorial sovereignty.¹¹⁵ Such a response can be refined in terms of its significance as a way of fatally defeating China’s mere assertion of territorial sovereignty so as to completely deny any justification for China’s activities.

The critical point for Japan is not to change its statement and acts¹¹⁶ but to reformulate and refine them into the positive side position of a denial of the existence of a dispute and a way of contributing to the peace in the regions and the world as well. Or, it might be said that Japan should “relocate” the statements and claims which it has made thus far. Here, “relocation” means a shift from the stage of avoidance of the obligation of the peaceful settlement of a dispute unreasonably triggered by China’s mere assertion of territorial sovereignty, to the stage of the prevention of unilateral attempts

114. Part III(A).

115. Therefore, such a response by Japan may be regarded as its recognition of the existence of a dispute with China.

116. As explained in the previous Part, the contents of Japan’s claims for the purpose of defeating China’s mere assertion of territorial sovereignty to deny any dispute, on the one hand, and those for the purpose of winning a dispute with China, overlap with each other to a significant degree. Therefore, the important point for Japan is to clearly recognize that it is claiming and responding for the purpose of eradicating any justification for China’s unilateral attempts to change the status quo by the threat of force or coercion.

to change the status quo by forcible measures for the purpose of the maintenance of the peace and order in the regions and the world.

Thus, a way of reformulating and refining Japan's basic position was examined from the perspective of the law of territorial acquisition. This is for the purpose of forming an integrative position of Japan. The next section will take up the issues of the law of the sea, mainly those raised by the CGL, to propose an integrative position of Japan.

C. *From the Perspective of the Law of the Sea*

As confirmed above, in the concrete cases of the entry of Chinese public vessels, even military ships, into the sea areas surrounding the Senkaku Islands, Japan has taken measures at sea by Japan Coast Guard vessels to require Chinese vessels to leave the sea areas and issued official statements to criticize such activities by the Chinese vessels. In some cases, it issued preemptive warnings to Chinese public vessels not to enter Japan's territorial sea.¹¹⁷ Japan's measures at sea are in accordance with UNCLOS.¹¹⁸ To justify such measures, Japan may emphasize its territorial sovereignty over the islands.¹¹⁹

One point to be considered is whether it is justifiable to issue warnings to Chinese public vessels not to enter Japan's territorial sea before they enter. This is completely dependent on the interpretation of the innocent passage of foreign vessels in territorial seas. If the nature of passage—as innocent or non-innocent—can be determined according to the activities of foreign vessels during their presence in territorial seas, there is no justification for any

117. See Japan Coast Guard, Annual Report 2018, https://www.kaiho.mlit.go.jp/info/books/report2018/html/honpen/1_02_chap1.html (last visited Nov. 29, 2021). Contrary to this, the 2020 edition of the Japan Coast Guard report does not mention such warning. See Japan Coast Guard, Annual Report 2020, Serious Incidents in the Waters Around Japan, https://www.kaiho.mlit.go.jp/info/books/report2020/html/tokushu/toku20_02.html (last visited Nov. 29, 2021).

118. Article 25 provides for the right of protection of the coastal State. As for the special measures to be taken by a coastal State against foreign military ships, Article 30 reads: "[I]f any warship does not comply with the laws and regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance therewith which is made to it, the coastal State may require it to leave the territorial sea immediately." UNCLOS, *supra* note 18, art. 30.

119. In this regard, Japan's statement leaves some uncertainty, as it uses the term "sovereignty." That may mean sovereignty under Article 2, Paragraph 1, of UNCLOS and sovereignty under the fundamental principle of international law to respect sovereignty, and even both. See *supra* Part II(A).

measures to be taken by the coastal State, including warnings, *prior* to their entering territorial seas.¹²⁰ Here is not the place to discuss in detail the interpretation of Article 19 of UNCLOS; it is enough to point out this issue.

Rather, from the perspective of the reformulation and refinement of Japan's basic position, the important point is that Japan may emphasize the violation of its sovereignty under the fundamental rule of international law to respect sovereignty, differently from or in addition to the respect for sovereignty over territorial seas under Article 2, Paragraph 2, of UNCLOS. Japan is protecting its fundamental interest—sovereignty. As a result, departing from the law of the sea, it may take stronger measures than those under the law of the sea and UNCLOS. As explained next, taking the positive position of a denial of the existence of a dispute would enable Japan to take stronger measures at sea against Chinese vessels, including military ships. Here, the CGL becomes the focus of the analysis in context.¹²¹ The possibility of taking stronger measures is also the principal significance of the reformulation and refinement of Japan's basic position.

To avoid the mirror effect and China's similar response to Japan's taking of measures in accordance with the law of the sea, as well as the fundamental norm of international law to respect sovereignty, Japan should take the positive position of a denial of the existence of a dispute. This is indispensable to making a breakthrough from the impasse. This is for the purpose of protecting Japan's national interest—its sovereignty—in the bilateral sphere. In the international sphere, Japan should take such a positive position in order to protect the peace and the maritime order in the regions as well as in the world by preventing China's unilateral attempts to change the status quo by forcible measures.¹²²

Then, by putting the CGL into context, let's consider the reformulation and refinement of Japan's basic position in a concrete manner. The CGL is really what Japan is now facing and needs to cope with.

120. ROBIN R. CHURCHILL & VAUGHAN LOWE, *THE LAW OF THE SEA* 82–87 (3d ed. 1999).

121. Regarding the analysis of the CGL in context, see *supra* Part II(B).

122. Regarding China's intrusion into Japan's territorial sea surrounding the Senkaku Islands, the Ministry of Foreign Affairs of Japan recently issued a statement that reads: "The incident made clear China's new position concerning the Senkaku Islands, one that had never been observed before: Chinese government vessels intrude into Japan's territorial sea with the clear intention of violating the sovereignty of Japan, attempting to change the status quo through force or coercion." Ministry of Foreign Affairs of Japan, Trends in China Coast Guard and Other Vessels in the Waters Surrounding the Senkaku Islands, and Japan's Response (Oct. 6, 2021), https://www.mofa.go.jp/region/page23e_000021.html.

D. *Impacts of the Coast Guard Law on the Tense Situation Developing Between China and Japan*

1. Practical Consideration of the Harmful Impacts Caused by the Coast Guard Law¹²³

Several points of theoretical criticism of the CGL have been raised, such as the unclear definition of China's jurisdictional sea areas,¹²⁴ the unclear status of which Chinese organs will carry out the missions given by the CGL,¹²⁵ the forcible measures to be taken by the organs¹²⁶ against even foreign public vessels and military ships¹²⁷ that enjoy immunity under international law,¹²⁸ "the law enforcement" in "the law enforcement organs" not being clearly identified, the forcible measures that are to be taken under the "pseudo cover of law enforcement" possibly falling under the category of the use of force prohibited by international law,¹²⁹ and so on.¹³⁰

123. As for an integrative analysis of China's maritime laws, see Jing Yongming, *Chugoku no Kiyohoseid ni Kansuru Ichikosatsu* [The Fragmentation of International Law: China's Ocean Policy and the Law of the Sea], HIKAKU HOGAKU, Mar. 1, 2021, at 29, 30–49.

124. For an unofficial translation of Article 3 of the CGL, see *supra* note 37. See also Chisako T. Masuo, *The Coast Guard Law: China's Readiness for a Maritime Military-Civil Fusion Strategy*, AJISS-COMMENTARY (Apr. 30, 2021), https://www.jiia.or.jp/en/ajiss_commentary/the-coast-guard-law-chinas-readiness-for-a-maritime-military-civil-fusion-strategy.html; Shigeki Sakamoto, *China's New Coast Guard Law and Implications for Maritime Security in the East and South China Sea*, LAWFARE (Feb. 16, 2021), <https://www.lawfareblog.com/chinas-new-coast-guard-law-and-implications-maritime-security-east-and-south-china-seas>; Kentaro Furuya, *The China Coast Guard Law and Challenges to the International Order—Implications for CCG Activity around the Senkaku Islands*, THE SASAKAWA PEACE FOUNDATION (Mar. 8, 2021), https://www.spf.org/jiia/en/articles/furuya_03.html.

125. Takei, *supra* note 36; Masuo, *supra* note 124.

126. For an unofficial translation of Article 22 of the CGL, see *supra* note 38; see also Takei, *supra* note 36; Anand, *supra* note 36.

127. Article 22 uses the term "foreign organizations" and does not appear to distinguish between categories of foreign vessels. See *supra* note 38.

128. Article 32 of UNCLOS provides for the immunity of particular public vessels from being targets of law enforcement measures by coastal States with territorial seas, separate from the immunity from judicial jurisdiction. It reads: "With such exceptions as are contained in subsection A [rules applicable to all ships] and in articles 30 and 31, nothing in this Convention affects the immunities of warships and other government ships operated for non-commercial purposes." UNCLOS, *supra* note 18, art. 32.

129. See Part II(A).

130. Regarding the use of force prohibited by international law and other use of arms accompanying law enforcement measures, see Atsuko Kanehara, *The Use of Force in Maritime*

Such criticism is no doubt valuable and important in its theoretical achievement. However, this article will instead analyze the CGL, in context, in a practical and problem-solving manner. In the really tense situation existing between China and Japan, concrete scenarios and even the worst-case scenario need to be described and Japan should prepare for future incidents based upon these scenarios.¹³¹

2. How to Combat China's Violation of Japan's Sovereignty

There is criticism against the CGL for not clearly defining the jurisdictional sea areas of China. It is true that the CGL in this regard is too vague to exactly identify the sea areas. However, in reality, the critical point is what acts Chinese public vessels are conducting in certain sea areas. Based upon the zone system of sea areas, UNCLOS provides for different rights and obligations for both coastal States and flag States, depending on sea zones.¹³² Considering this, rather than querying “the jurisdictional sea areas of China” in an abstract manner, it is far more practical to assume the actual conduct of Chinese public vessels in certain sea areas for devising Japan's way of combating such conduct. In other words, the actual conduct by Chinese public vessels, including its military ships, practically sets forth the context in which the CGL is examined in this article.

First, under the CGL law enforcement and defense functions seem interchangeable.¹³³ Article 83 provides that coast guard organizations perform defense operations and other tasks in accordance with the “National Defense Law of the People's Republic of China,” the “People's Armed Police

Security and the Use of Arms in the Current Wide Understanding of Maritime Security, JAPAN REVIEW, Fall 2019, at 35, 37, 40–41 [hereinafter Kanehara, *The Use of Force*].

131. For a similar position, see Nguyen Thanh Trung, *How China's Coast Guard Law Has Changed the Regional Security Structure*, ASIA MARITIME TRANSPARENCY INITIATIVE (Apr. 12, 2021), https://amti.csis.org/how_chinas_coast_guard_law_has_changed_the_regional_security_structre/.

132. UNCLOS has adopted the so-called zone system of sea areas. It divides seas into zones, such as internal water, territorial sea, contiguous zone, archipelagic water, exclusive economic zone, continental shelf, high sea, and deep sea-bed. This complicated zone system is totally different from the dual regimes of sea areas, namely, the high seas regime and the territorial sea regime. In each sea zone, UNCLOS distributes rights and jurisdiction in a very subtle manner, principally to coastal States and flag States. *See generally* UNCLOS, *supra* note 18.

133. Takei, *supra* note 36; Masuo, *supra* note 124. Various provisions of the CGL are relevant to this point so as to make it difficult to clearly understand the meaning of law enforcement and law enforcement organs.

Law of the People's Republic of China" and other relevant laws, military regulations, and orders of the Central Military Commission. The CGL repeatedly mentions "protection of national interest" and "law enforcement" at the same time. Protection of national interest requires not only law enforcement but also defense operation. The CGL does not set a clear demarcation between them.¹³⁴ For China, both issues come to reality at the same time. This is a matter of fact.¹³⁵

Thus far, Chinese public vessels are not only entering the sea areas surrounding the Senkaku Islands, but also persistently chasing Japanese fishing boats in the sea areas concerned.¹³⁶

Japan criticizes China for the fact that the sea areas are Japan's territorial seas,¹³⁷ and such "law enforcement" measures by China are a grave infringement of Japan's territorial sovereignty.¹³⁸ Here, due to the "mirror effect," China would respond by the same logic as that of Japan and it would claim that they are China's territorial seas. China justifies the activities by Chinese

134. As for the restructuring in 2018 that placed the coast guard under the administration of the People's Armed Police, which is under the unified control of the Central Military Commission, and the relationship between the coast guard and navy under the current legal system of China, see Anguang Zheng, *Integrating the China Coast Guard with the PLA Navy*, in GREY AND WHITE HULLS: AN INTERNATIONAL ANALYSIS OF THE NAVY-COAST GUARD NEXUS 17, 24, 30–35 (Ian Bowers & Swee Lean Collin Koh eds., 2019).

135. Nonetheless, it is a completely different issue for international law to define "law enforcement" and "(self-)defense" by making a distinction between the two situations. It is critically important to legally regulate these situations. In addition, the use of "weapons" should be distinguished between the use of force that is prohibited under Article 2, Paragraph 4, of the UN Charter, and the use of arms accompanying law enforcement measures. See Kanehara, *The Use of Force*, *supra* note 130, at 40–41. In this regard, Takei emphasized the unclear distinction under CGL between law enforcement organs and military organs. Takei, *supra* note 36. This issue closely relates to the issue of legal interests that CGL purports to protect.

136. Jun Hasegawa, *Chugoku Kaikeisen niyoru Nihon Gyosen No Tsuibi—Jun Gunjiryoku taru Chikara No Siyon No Kantenkai* [Chasing of Japanese Fishing Vessels by Chinese Coast Guard Vessels—From a Perspective of Use of Paramilitary Force] SSG COLUMN 175 (Sept. 7, 2020), https://www.mod.go.jp/msdf/navcol/assets/pdf/column175_01.pdf.

137. There may be two reasons for Japan to use the strong term "intrusion" rather than the more neutral term "entry." First, "intrusion" emphasizes Japan's critical position against Chinese public vessels, as they not only enter Japan's territorial sea but they also take law enforcement measures in Japan's territorial sea. Second, regarding the non-innocent nature of passages of foreign vessels, Japan adopts the interpretation that it can be evaluated by the purpose and intent of foreign vessels entering its territorial seas. See *supra* note 23.

138. For a critical analysis of China's law enforcement activities in the South China Sea, see Diane A. Desierto, *China's Maritime Law Enforcement Activities in the South China Sea*, 96 INTERNATIONAL LAW STUDIES 257 (2020).

public vessels as discharging their mission of “law enforcement.”¹³⁹ This is because, according to China, the sea areas are China’s territorial seas surrounding the Diaoyu Islands, which is the Chinese name for the Senkaku Islands.¹⁴⁰ A fierce debate and exchange of retorts would continue without any resolution.

To bring a breakthrough to this impasse, no other method than the perfect defeat of China’s sovereignty would work. This is the positive side position of a denial of the existence of a dispute, as has been previously elaborated.¹⁴¹

Second, the CGL allows designated organs to take forcible measures against foreign vessels, including foreign public vessels that enjoy, according to Article 32 of UNCLOS, immunity from being the targets of such measures in territorial seas.¹⁴² With strong possibility, Chinese public vessels will take forcible measures against vessels of Japan’s Coast Guard and even the Japan Maritime Self-Defense Force. Under Article 30 of UNCLOS, if a foreign warship does not comply with the laws of the coastal State concerning passage through the territorial sea and disregards any request for compliance, the coastal State’s sole remedy is to require it to leave the territorial sea immediately.¹⁴³ It is interpreted that beyond such a request to leave, coastal States are not allowed to take forcible measures against foreign vessels, at least against foreign warships, that enjoy immunity.¹⁴⁴ Immediately after any

139. See official statements of China, *supra* notes 15, 49, 70.

140. Recently, China officially explained the object and purpose of CGL. It said:

Diaoyu Dao and its affiliated islands are China’s inherent territory. By conducting patrol and law enforcement activities in waters off Diaoyu Dao, China is exercising the inherent right of China as prescribed by law. The Coast Guard Law is just a routine piece of domestic legislation. It is not targeted at any specific country. And it is totally in line with international law and international practice. In fact, many countries, including Japan, have enacted similar laws and regulations long before China.

Consulate-General of the People’s Republic of China in Los Angeles, Foreign Ministry Spokesperson Zhao Lijian’s Regular Press Conference on July 13, 2021, http://losangeles.china-consulate.org/eng/confenrence/202107/t20210713_9010232.htm.

141. Part IV(B).

142. UNCLOS, *supra* note 18, art. 32.

143. *Id.* art. 30.

144. Article 32, UNCLOS reads, “With such exceptions as are contained in subsection A and in articles 30 and 31, nothing in this Convention affects the immunities of warships and other government ships operated for non-commercial purposes.” UNCLOS, *supra* note 18, art. 32. This provision has caused confusion on the applicability of the immunity principle. Here, it is enough to confirm this point.

future criticism by Japan against China's violation of immunity given to Japanese vessels, China would, due to the "mirror effect," stage the same protest against Japan's measures targeting Chinese public vessels. Again, there would be endless retorts against each other and the impasse would endlessly continue.

Here also, to bring a breakthrough to the impasse, moving beyond the issue of immunity under the law of the sea, the perfect defeat of China's sovereignty claim is indispensable. Japan needs to prove that China's assertion of its sovereignty over the Senkaku Islands is completely groundless both in fact and in law, and therefore, is a "mere assertion."

3. Stronger Measures that Japan Could Take Departing from the Law of the Sea

Even if Japan were to take the positive position of a denial of the existence of a dispute, and even if Japan, at least theoretically, perfectly crushed China's mere assertion of territorial sovereignty over the Senkaku Islands so as to eradicate any justification for the activities of Chinese public vessels, in reality, there would be no guarantee that China would give up its assertion of territorial sovereignty and stop such conduct by its public vessels.

Nonetheless, by taking such a positive position, Japan could take stronger measures at sea against Chinese public vessels. Here, "stronger measures" means measures that depart from those under the law of the sea and that are not restricted by the limitation set by UNCLOS. Japan is in the legal context of protecting and preserving its territorial sovereignty, not in the legal context of the law of the sea. As explained before,¹⁴⁵ warnings issued against Chinese public vessels not to enter Japan's territorial sea prior to their actual entrance could be understood as such a claim of Japan's sovereignty under the fundamental principle of international law to respect sovereignty.¹⁴⁶ It is different from a claim of sovereignty under Article 2, Paragraph 2, of UNCLOS. This might be the legal context of armed conflicts and self-defense. Thus, concretely speaking, it is really indispensable for Japan, beyond the limitation set by the immunity principle under the law of

145. See Part V(C).

146. While there may be a different interpretation, such warnings can also be based upon an interpretation of Articles 19 and 25 of UNCLOS that coastal States can take preventive measures against non-innocent passages of foreign vessels prior to their entrance into territorial seas.

the sea and UNCLOS, to take forcible measures against Chinese public vessels, including its military ships.

Japan may take measures other than solely requesting Chinese military ships to leave the territorial sea surrounding the Senkaku Islands as Article 30 of UNCLOS provides. This would in no way constitute a violation of the law of the sea and UNCLOS. Otherwise, as a sovereign State, Japan could not protect itself without breaching its international obligations. That would be entirely unreasonable and unacceptable for any sovereign State. Lack of recognition of such a change of legal contexts would be fatal for Japan as a sovereign State.

The fact that Japan may take such stronger measures is really the reflection of the significance of taking the positive position of a denial of the existence of a dispute. By perfectly defeating China's mere assertion of territorial sovereignty, in the bilateral sphere, Japan may combat China as an intruder in Japan's territorial sea that is infringing on Japan's territorial sovereignty. In the international sphere, Japan may treat China as a destroyer of the maritime order and the peace in the regions as well as in the world. This is not just an expectation to be placed on Japan, but also a requirement for the maintenance of the peace and order to be placed on Japan as a responsible member of international society. While the CGL aggravates the tense situation existing between China and Japan,¹⁴⁷ Japan always tries to avoid any unnecessary escalation of such situation.¹⁴⁸

VI. CONCLUSION

This article aimed to propose an integrative position for Japan on the issue of the Senkaku Islands. It tried to integrate the issues of the law of territorial acquisition, the legal definition of a dispute, and the law of the sea. It is true that there are many points to be considered under these laws and the aforementioned definition. However, as a sovereign State, Japan should grasp the issue of the Senkaku Islands as a whole and, without incoherency or contradiction, should set forth its basic position of there being no dispute to cope with that issue from every angle. For this reason, this article proposed Japan's reformulated and refined basic position.

The essence of this position is that by discarding the negative side position of a denial of the existence of a dispute with China, Japan needs to go

147. Anand, *supra* note 36.

148. Kanehara, *International Law*, *supra* note 12, at 19; Takei, *supra* note 36.

beyond the simple avoidance of the international law obligation of the peaceful settlement of a dispute. It should take the positive side position of a denial of the existence of a dispute so as to defeat China's mere assertion of territorial sovereignty over the Senkaku Islands. For that purpose, Japan can claim territorial sovereignty by utilizing the abundant factual evidence and theoretical grounds that it has already prepared.¹⁴⁹ By crushing China's mere assertion of territorial sovereignty over the Senkaku Islands, Japan could move beyond the "mirror effect" that results in the endless continuation of exchanges of conflicting views between China and Japan and it could take stronger measures, without being restricted by the law of the sea and UNCLOS, to protect its national interest, namely sovereignty.

The CGL repeatedly mentions "protection of national interest" and "law enforcement" at the same time without a clear demarcation between them.¹⁵⁰ For China, both issues come to reality at the same time. This is a matter of fact.¹⁵¹ Therefore, the lack of recognition of the following fact is really fatal to Japan. Japan is facing irrecoverable infringements, and even usurpation, on its territorial sovereignty over the Senkaku Islands by China due to the CGL. Fully recognizing such a reality, Japan's reformulation and refinement of its integrative basic position is keenly and urgently required. This is the consideration from the bilateral perspective of the relationship between China and Japan.

In addition, by taking the positive side position of a denial of the existence of a dispute so as to fatally defeat China's mere assertion of territorial sovereignty over the Senkaku Islands, Japan could significantly contribute to the realization of peace and order in the region. This is because, by crushing China's mere assertion, Japan could prevent China's unilateral attempts to change the status quo by forcible means, which is a complete violation of the common values of the world that is reflected in the rule of law and the Free and Open Indo-Pacific vision. Therefore, Japan deserves to be accompanied by strong support and cooperation from the world. In other words, as a responsible member of international society, Japan should fulfil its duty

149. Thus far, Japan has used the evidence and grounds to claim territorial sovereignty in a discrete and an individual manner. That is in order to avoid positively opposing the arguments of China with its own, as it has tried to prevent its arguments from being regarded as its recognition of the existence of a dispute with China.

150. Regarding China's maritime rights and interests with a historical development, see Xu Ping, *Safeguarding Maritime Rights and Interests in the New Era: China's Concept and Practice*, CHINA INTERNATIONAL STUDIES, Jan. 20, 2021, at 50.

151. Takei, *supra* note 36.

to preserve and protect the peace and order in the regions as well as in the world.