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CONTENTS

| ARTICLES

| REVIEW

The Colonial Origins of Territorial Disputes in South Asia

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Abstract

South Asian territorial disputes are intractable at present and this article argues that the most important reason for their intractability is their colonial origins. With the advent of Britain in the region, new notions of territory and boundary were imposed on pre-modern South Asian states. Moreover, to seek total control and more revenue, partitions in the region were done without much consideration for socio-cultural, ethnic, linguistic and religious complexities. This article argues that after decolonization of the region, territorial disputes have become more pronounced, as there is no overarching authority like Britain to suppress them. This paper concludes that without recognizing the salience of colonial origins, it would not be possible to resolve these territorial disputes in South Asia.

Keywords

territorial disputes, South Asian conflicts, colonialism and territorial disputes, border disputes, colonial borders in South Asia

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Territorial disputes in South Asia are as intractable and real as they are in other parts of the world. They are both the cause as well as the result of regional political contests and rivalries. To avoid future conflict or war in the region, a mechanism to peacefully sort out these territorial disputes must be devised (Vasquez 1993, 307). To that end, the origins and nature of these disputes must be studied and understood. Their basic nature, manifestations and trajectories are influenced by the political discourses in the countries of the region. However, these territorial disputes are also 'constructions' both at the ideational level as well as at their physical manifestation level, which has been existed for the last two and a half centuries. There is no intention to say that there were no territorial disputes in South Asia before the advent of British rule. Of course, there have been contestations on the issue of territory from time immemorial. However, the notion of territory and its various modern constituents in its modern use was not there (Kaplan 2010, 9). The transformation in South Asia during the colonial period had important bearing on the origins as well as the course of most of these territorial disputes in South Asia. In this paper, South Asia includes the countries of Afghanistan, Pakistan, India, Bangladesh, Nepal, Bhutan, Sri Lanka and the Maldives. Basically the concept of South Asia is largely inherited from the administrative boundaries of the British Raj (Behera 2008, 129). However, this paper largely deals with three or four territorial disputes between Pakistan-Afghanistan, India-China, India-Pakistan, and India-Bangladesh.

Colonialism, in most of its colonies, had important implications in the homogenization of categories, which were rather heterogeneous in the past. The imposition of neat categorization, which largely evolved in a very different socio-cultural context, on South Asia was quite useful for Britain, but they created a lot of anomalies in the future interstate relations of South Asia. Colonial modernity and its interactions with indigenous traditions became not only a progressive movement but also created a situation in which colonies were forced to adopt something which was never discussed or contemplated before (Scott 2004). When Britain established direct political control in the mid-19th century, the Indian subcontinent was still operating in a pre-modern era and from cultural values to social norms and economic organization to identity discourse, this region was very different from the West.

Thus, advent of a new mode of thinking and colonial expediency drew and demarcated several boundaries in South Asia, both intra-state and inter-state, which were insensitive to the complex realities of the region (Michael 2014, 2). The borders, which were drawn during the colonial period in South Asia, were thus problematic from the very beginning. These new borders and territorial demarcations led to conflicts between the states of the South Asian region and these disputes have remained arguably the most important fault lines on which countries of the regions have had several full-scale and limited wars such as the India-Pakistan War and the Indo-China War. The territorial disputes of South Asia, even today, make the situation ripe for an armed conflict and hence, a nuanced understanding of their colonial origins might be useful in providing recourse to at least some efficient management of the issue, if not their complete resolution.

IDEATIONAL CHANGES IN THE COLONIAL PERIOD

Notions of Territory and Sovereignty

The Indian subcontinent is separated geopolitically from the rest of the world by some natural boundary demarcations such as rivers, oceans and mountains. These natural demarcations loosely define the region of South Asia and the states within it. The territories of different political units in South Asia were contiguous, porous and ever-changing (Phadnis 2001, 354) and the notion that territory is an instrument of 'affect, influence and control' were manifested in a very different manner. Before the arrival of Britain in the political arena of India, the Mughal Empire and a few other kingdoms did exist. However, their territories were less defined and the political equations among them were not organized as per the western notion of sovereignty. Generally, units and kingdoms inside an empire have different degrees of control and the central government enjoyed varied degrees of sovereign control over them. For example the units, which were far removed from the capital city, had generally more autonomy and space than the areas, which were adjacent to the center. Interestingly, contact between two adjoining areas of two different kingdoms was quite frequent and territorialization of kingdoms or empire was not that neat.

With the Battle of Plassey in 1757, the East India Company got involved in the political expedition of India. In the first hundred years, the company as a representative of Britain in India tried to change this prevailing loose notion of territoriality in India. For a westerner, the confusing and complex demarcation of territory was both intellectually backward and administratively challenging. The new notion of neat and well-demarcated territory in South Asia was thus considered to be a pre-condition of modernity (Gellner 1983, 1). In a way, it was also a medium to exert exclusive control on a particular area. Since the goal of control and exclusivity are very central to any colonial project, the new notion of territoriality was very important to be exerted and exercised. After the transfer of control of India from the East India Company to the British government, strict territoriality was further strengthened. The British administration even within India not only divided the political units into one centrally governed one, but also allowed more than five hundred princely states to continue with their existence. In a gradual manner though, most of these princely states were stripped of their distinctiveness.

The effect of this new territoriality led to the creation of various states and intra-state political units which were devoid of cultural and identity connections. Sometimes people from the same socio-cultural and identity adherence were divided into two or more political units and in some other cases, less related socio-cultural groups were put into one political unit (Tohring 2010, 30). Demarcation of the territory clearly led to the emergence of a Pan-India identity because of imposed homogenization; but in a way, it also created territorial disputes, which continue to haunt the South Asia region even today.

The notion of sovereignty was another new element in the political discourse, which was introduced in South Asia by Britain (Michael 2014, 123). In a territory belonging to a particular kingdom, people have several cultural, religious and other connections as well as commonalities with people from another kingdom who reside adjacent to them. Political control over a territory and people was not absolute and thus, the western notion of sovereignty was almost absent in regional politics. The legitimacy of the political rule of a king or emperor was generally derived from traditional or charismatic authority and South Asia was still not aware of the legal-rational authority (Paranjape 2013, 7). Without attributing any value-judgment to the pre-modern or modern ways to demarcate two political units, it would suffice to say that South Asia or for that matter other parts of Asia too, were not aware of the notion of precisely determined borders and the absolute sovereignty of a kingdom over a piece of land. The example of the suzerain relationship of China with its East Asian neighbors is often misunderstood because inter-state relations at that time were not governed by the western notion of sovereignty. It would be incorrect to apply the western notion of sovereignty to East Asia and say that Korea was not an independent country during the *Joseon* dynasty since it paid tribute to China. The China-Korea relationship was a relationship of mutuality and interdependence in which the existing hierarchy was not considered antithetical to the existence of a sovereign country. The change in the principles of inter-state relations by bringing the notion of sovereignty has been a modern phenomenon, which happened in the Northeast Asia around the end of 19th century or early 20th century (Kang 2009, 82). The colonial period in the history of South Asia was also a period when a similar change happened and hence the cross-border connections between the two political units were articulated from the perspective of sovereignty.

From Frontier to Border in South Asia

The arrival of Britain in South Asia is also associated with another important shift in the region from frontier to border demarcation. Before the ascendancy of Britain in the area, the whole region throughout history was 'very much a fluid cultural organism' (Wink 1996). The phenomenon was not limited to South Asia alone and in a way it was changed from a pre-modern organization of political units to a modern articulation. In the first case, generally, political control of one kingdom used to gradually diminish while moving away from the center and there were grey areas of control, which divided one kingdom from another. The demarcation of political units was thus essentially loose and porous.

In fact, foreign intervention, the quest for sharp borders and the search for a 'nation-state' all began at the same time in South Asia. Colonial cartography ventured into a project to draw boundaries in the region to bring in a western legal notion of political units. It was an introduction of a new epistemology for a state and created a modern regime with a definite space and spatial extension. The conceptual and discursive apparatus of international law, modern geography, geopolitics and borders are interwoven in the enabling frame that made the drawing of the conflict-ridden dividing line possible in the region (Mahmud 2010, 7). Actually the drawing and maintaining of these sharp lines was part of the very core of the colonial civilizing project. Through these lines, several layers of sovereignty such as colonies, suzerains, protected states and protectorates could be exercised and justified. It may be called that this was an era of 'boundary making' in the region (Holdich 1899, 466).

It was essential for the imperial powers to rearrange geography both in the philosophical sense and also in practice to chart out their course of actions and create structures of domination. And, geography was the vanguard of this (colonial) enterprise to reach, discover, and make colonized territories (Livingstone 1992, 168). The imperatives of colonialism gave one of the most important roles to geography and geographers, as they helped in territorial acquisitions, economic exploitations, militarism and even race domination (Hudson 1977, 12).

In the case of South Asia too, British cartographers produced the Bengal Atlas in 1779 and the Map of *Hindoostan* (India) in 1782, which had both strategic and administrative imperatives. However, it does not mean that before that the South Asian territory was not mapped or surveyed; but there was a new attempt to create and produce a colonizer's version of 'their India' (Baber 1996, 143-146). In a way, it was also an attempt to create an India which had hardly ever been a single, integrated political entity (Mishra 1990, v). Thus, it is very clear that Britain made an important intervention in the geographical space of the region by creating space and bodies through these lines on a map, which had no substantial consideration for any cultural or economic patterns on the ground. Hence they led to territorial disputes, which has continued to remain intractable and in most cases, has become even exacerbated in the postcolonial period.

The movement from frontiers to borders in South Asia could have been done by the natives as well, had they been allowed to understand, internalize and produce their own borders. In fact, border making would then have been less problematic. In all probability, it would have been accomplished in an incremental manner by becoming informed and corrected by the ground realities and it would have surely been more stable. However, imposition by the imperial power in a sudden manner, with scant regard for local complexities, and by the coercive enforcement, the whole process got distorted. These borders, thus, rather than becoming a source of order and clarity, became a cause of territorial disputes.

Searching for and Making of Nation-states in South Asia

With British colonization, there also arrived in South Asia, another modern notion called, nationalism. Earlier too, there might have been some commonalities of cultural, linguistic and other ideological space, encompassing the vast landmass of the Indian subcontinent; but there was no nation-state in the region before the coming of Britain. The idea of modernity and nationalism which came to India with Britain made the leaders of South Asia do a rethink about their identity and political course by bringing in their own discourses of nationalism. There were at least two broad tendencies in the articulation of nationalism in India during the colonial period. Firstly, there were attempts to articulate a pan-Indian nationalism encompassing all the areas, which was governed by British colonial rule. This type of nationalism had two primary sources of articulation—historical and cultural linkages across the Indian subcontinent from the ancient period, and an anti-colonial common objective across India to come together to fight against a European colonizer (Chatterjee 2012, 216). Secondly, there were also attempts to invent multiple nationalities by strictly following the European model of nationalism, which was based on ethnicity, religion, language, identity and cultural homogeneity. What the first kind of articulation of nationalism propagated and is continuing to do is an 'idea of India' which goes beyond all the diversity of the Indian subcontinent (Khilnani 1998, 197). However, the latter variety of nationalism questions this proposition. Amidst the contest between the two types of ideas of nationalism, Britain favored the second one which would bring a divide in the anti-colonial struggle and thus help in its colonial political goals in the region. The division of the anti-colonial movement in South Asia during the colonial period by subsequently creating various states, such as Afghanistan-India, Pakistan-India, and India-Bangladesh was a culmination of the colonial agenda to divide and rule the Indian subcontinent (Chandra 2008, 277). There may be justifications from the British perspective that these multiple articulations of nationalism in the Indian subcontinent were closer to the European classic course of nationalism, but they were devoid of complex realities of the regional socio-cultural landscape. At present, most of the territorial disputes in South Asia are in essence contests, which originated from the uninformed demarcation along these nationalities.

Notwithstanding these two neat models of articulation of nationalism in the South Asian theatre, the colonial rule could also be attributed to the distortions in their articulation and mutual contests. Whereas the Muslim League in India was demanding a separate country for the Muslims on religious lines and Britain was not averse to this idea, the spread of Muslims in India was not limited to any particular territory (Noman 2009, 4). A Muslim population was found in almost every province in India, and they had a majority in only three states- Jammu and Kashmir, Hyderabad and Lakshadweep. Interestingly, Jammu and Kashmir was ruled by a Hindu king for centuries and the region had a unique Kashmiri variety of Islam. Hyderabad occupied a tiny territory out of the huge landmass of the Indian subcontinent and Lakshadweep is an island in the Arabian Sea separated from mainland India. The Muslim League's articulation of a separate country for Muslims in accordance with its 'flawed' two-nation theory (Bahadur 1998, 53-54) was allowed to prevail by Britain and it has remained a primary contest in South Asia and to this day finds reverberation in the contemporary territorial disputes of the region. For example, the contest over the territory of Jammu and Kashmir, and border disputes between India and Pakistan could largely be taken as a conflict between these two varieties of nationalism. Pakistan claims that since Muslims are the majority in Jammu and Kashmir, it must be a part of Pakistan but India never accepted the logic that the nation-state could be created on the basis of religion and thus the claim by India over Jammu and Kashmir is no less realistic. Actually, the absurdity of the religious basis for creating nation-states was exemplified in the creation of East Pakistan, which has no territorial connection with West Pakistan and the distance between the two parts was more than 2,000 kilometers. Unsurprisingly, East Pakistan got separated from West Pakistan and emerged as a new state, Bangladesh; in 1971 leading India to claim that it was a powerful refutation of the two-nation theory.

There was another discourse of Hindu nationalism in India, similar to the one by the Muslim League about Muslim nationalism, and this aspired for a separate 'Hindu state' in South Asia. In a mythical sense, the backers of Hindu nationalism argued for a *Brihattar Bharat* (Greater India), which was spread from Afghanistan in the west, to the Bay of Bengal in the east (Herb & Kaplan 2008, 1208). They selectively evoked ancient and medieval kingdoms of India, which were spread across this geographical stretch and claimed that India as an heir of that political entity must claim all these territories; otherwise, it would remain an unfinished project for ever. The claims and counter-claims of the discourse have been the cause of various disputes, making any resolution virtually impossible.

Thus, the varieties of nationalism and its discourses in South Asia raising from the time of colonization have been integrally linked with territorial disputes. These discourses and for that matter, any discourse on modern nationalism creates a division between 'self' and 'other.' Unfortunately, divisions of the socio-cultural, religious, linguistic, and ethnic identities which are demanded at the idea level are much more mixed-up and complex to be assigned a particular geographical space or territory; and thus the contest for territory is almost inevitable. The course, correlations and coexistence of various nationalities in the South Asian territory during the pre-colonial period was questioned; however, no satisfactory alternate solution or even sympathy for an alternate political arrangement on the ground could be arrived at.

COLONIAL POLICY AND PRACTICE: STRATEGIC CONSIDERATIONS TO ADMINISTRATIVE CONVENIENCES

Britain not only succeeded in the ideological imposition of modern categories on a pre-modern society like India in a careless manner, also divided or integrated various territories in accordance with her colonial objectives. For example, in 1907, Britain decided to divide an Indian province of Bengal into East and West Bengal on administrative grounds (Fraser 2008; Chatterji 1994). Actually, dividing Bengal had less to do with administrative rationales. It was rather a ploy to divide a powerful centre of the freedom struggle on religious lines. The division later on became the blueprint for the Radcliffe commission, which in 1947 constructed borders of the East Pakistan along these lines. British cartographers had comprehensive land surveys and demarcation projects for India, which was an essential part of their colonization project (Ramachandraiah 1995). Basically, surveying was done to bring more people and areas into the colonial control, as it would generate more revenue. The use of cartography for Lord Curzon was meant for both 'administration and exploitation' purposes (Dixit 1988, 127). Almost all the boundaries, which were created inside India or between India and other countries, had singularly colonial designs in the mind and very little attention was paid to ethnic, linguistic and other socio-cultural factors. The boundaries which were determined during the period and which have become part of the disputes at present are related to Pakistan-Afghanistan, India-Pakistan, India-Bangladesh, India-China, and India-Myanmar. These boundaries were problematic even when they originated, and continue to remain so even after seventy years of the withdrawal of Britain from the region. It would not be possible to deal with all the boundary problems of South Asia in this paper; and hence, the attempt would be to focus on the three most difficult territorial disputes in the South Asian region, with an aim to understand their colonial origins.

Pakistan-Afghanistan Territorial Disputes and Durand Line

The first modern boundary dispute in contemporary South Asia has been the boundary question between Pakistan and Afghanistan, divided by the Durand Line in 1893. It is interesting to note that through the Berlin Conference of 1885, Britain wanted to create an alliance of Egypt, Turkey, Persia, and Afghanistan against czarist Russia. In such a regional political context, Britain tried to reframe its colonial space (Merry 2003). The famous scholar of Geopolitics, Halford J. Mackinder also propounded that in whole of the British Empire this was the frontier which was more prone to any conflict (Mackinder 1968) and Britain was right to recognize this task at an appropriate time. It was basically part of the Great Game in which Britain wanted to expand itself westward (or at least to stop Russian movement eastward) and Czarist Russia wanted to move towards the east (Paul, Wirtz & Fortmann 2004, 309). Thus, Britain decided that to make Afghanistan a buffer and create a border, which was earlier for all practical reasons a frontier having the quality of being porous and mobile. Another important incentive for Britain was that the historic trade routes connecting China, India, Central Asia, Persia and the Arab world passed through this territory. After considering their colonial imperatives, Britain decided to have three fold frontiers- protectorates, neutral zones and a buffer in-between. Actually the western frontier of India was supposedly extended till the Indus River and the territory between the Indus and the Oxus Rivers was a region which was dominated by the Pashtun population. The region was politically volatile till 1747 and it was Ahmad Khan Durrani, a Pashtun military leader who integrated the area into one functional political unit (Barfield 2010). In the 1830s, when there arose certain internal conflicts in Afghanistan for the throne, Britain got involved and tried to become a kingmaker. From then on, Britain continued to take interest in the domestic politics of Afghanistan. In the process of expanding her colonial control westward, in the mid-19th century, Britain won control over Punjab the neighboring territory of Afghanistan. Britain then decided that she should now have a 'close border' policy, which implies that it was not required to move further west. The Pashtun people were willing to have their autonomy and because of the problematic nature of this area, Britain had more than twenty military operations in the area between 1857 and 1881.

In 1876 the Disraeli government changed the British policy of 'close border' to 'forward policy,' which was meant to expand British control beyond the Indus River (Tripodi 2011, 16). Through the Second Afghan war in 1878, Britain made Afghanistan a vassal state of Britain, though they withdrew their soldiers in 1880. However, the king of Afghanistan was in trouble because of constant interventions of Russia and Britain in its domestic affairs and therefore went to London to talk directly with the British government. He was not given a fair hearing and finally he accepted to demarcate Afghanistan's eastern boundary with Britain and thus the Durand line was created in 1893 by the Amir and Henry Mortimer Durand, the Foreign Secretary of British India.

Without any ethnic or historical basis, it was easier to decide a line on paper than on the actual ground. It basically sliced 'through tribes, villages, and clans' and 'cut the Pukhtoon people into two' (Jones 2009, 23). The result was that the Pashtun population was divided into modern day Pakistan and Afghanistan. In the Third Afghan War in 1919, another attempt was made by the Pashtun people to search for their political affiliation. Even in the later years of the British colonialism in South Asia, these people tried to take every advantage to assert their political will and they even supported the Indian freedom struggle, which was going on against British colonial rule. Even in the Cold War days and beyond, the artificial demarcation and absurdity of the Durand line made the region unstable and along with several other factors, the territorial disputes have remained alive and the region unstable.

India-Pakistan and India-Bangladesh Territorial Disputes and Radcliffe Lines

The Radcliffe Lines divide India-Pakistan in the west and India-Bangladesh in the east. The two borders of India have been a source of trouble from their very creation at the junction of Indian independence from Britain in 1947. In a very interesting twist of events, the boundary was decided exclusively by one man, who was a Law Professor at the University of Oxford having insignificant experience in governance, international relations, geopolitics and most importantly the region of South Asia (Chester 2009). Sir Cyril Radcliffe was called up by the British government in India to divide Hindu and Muslim populations of India into two countries and he had to decide about the boundary in five weeks. Basically, the very idea of creating states on the basis of religion was quite problematic. Actually, there were Hindus, Muslims, Buddhists and Sikhs and several other religious denominations in India and it was neither a progressive nor a practical idea to create states on the basis of religion. Moreover, the distribution of these religious groups in the large territory of the Indian subcontinent was so complex that identifying a definite territory for any of them was not an easy task. If Britain was in agreement to provide Muslims a separate state, then by the same logic it might be argued that Sikhs and other religious communities were also equally justified to have their own separate states. Actually, the demand for a separate Muslim state was based on the 'two nation' theory, which propounded that Hindus and Muslims can not coexist in one country (Chakravarty 2003). However, a point to be noted here is that the largest political formation which represented more than 70-80 percent of the Indian national movement and which had leaders from all religious communities never agreed to this proposition. Actually, the Indian National Congress and its leaders such as Mahatma Gandhi even threatened that "the partition of India would be possible only over my dead body" (Gandhi 2003, 247). However, Britain decided to support or at least to agree with the demands of the Muslim League, which was the main political force behind a separate state for Muslims. The British supported this demand because this strategy was useful in weakening the force of the Indian freedom struggle by dividing it on religious lines. The Radcliffe Lines demarcated a stretch in both the western and eastern sides of India as the territory of Pakistan. It is interesting to note here that Muslims from these areas were not great supporters of the Muslim League. Actually, the Muslim League had their strong hold in the central part of India and even after the division of India-Pakistan, most of the supporters of the Muslim League remained in India (McLeod 2008, 73).

Thus the creation of a separate state for Muslims, in a way, helped to further promote the colonial strategy of Britain. When it became clear that the British were going to leave India soon, Lord Mountbatten, the then Viceroy of India invited Radcliffe who was his colleague at Oxford to draw a line of division (Louis 2006, 9, 411-412). It is noteworthy to state here that Radcliffe had never visited India till then. Radcliffe arrived in India on 8 July 1947. He had neither the qualification nor any interest nor even sufficient time (he had just about a month) to perform this daunting task. In such a short time, it was not possible to have any field research or survey done. Thus most of the decisions taken about partition were done on the physical map. The demarcations were done so quickly, and were so far-fetched from reality, that some villages were split into two and there were even cases where, since the line passed directly through some individual houses, it resulted in a situation where a part of the house was in India and the other part in Pakistan. Around 90 million people were directly affected by this division and this catastrophic boundary demarcation forced around 10-12 million people to leave their homes and move to either India or Pakistan (Khan 2007). Border issues and ethnic clashes erupted immediately after the division and according to one estimate, in the very first few months after the division, around one million people lost their lives, and there was terrible human suffering (Wadley 2014, 45). The problem still continues and India and Pakistan have fought at least three full-scale wars and one limited war attributed to the territorial contests. Actually Radcliffe himself realized the failure of his project and so he refused to accept the 40,000 rupees, which he was supposed to receive for this task (Butalia 1998).

It is interesting to note that people from Punjab having the same cultural and linguistic history were divided into Pakistan and India; and similarly Bengal was divided into West Bengal and East Pakistan. The state of Jammu and Kashmir became another bone of contention between India and Pakistan. The state was ruled by a Hindu king but the majority population was Muslim (Bajwa 2003, 21). Furthermore, Jammu and Kashmir was part of three sub-regions in which Jammu was a Hindu majority area. Based on the amount of Muslims in the area, Pakistan claimed and still claims that Jammu and Kashmir should be a part of Pakistan. However, the Hindu king of Jammu and Kashmir got his kingdom integrated into India and thus, New Delhi claims it to be a part of India. At the eastern side also, the division done was so abrupt and absurd that it was next to impossible to arrive at a reasonable solution to the boundary disputes.

India-China Territorial Disputes and the McMahon Line

The McMahon line divides India from Tibet and since Tibet is claimed to be part of China, the line is basically the source of the territorial dispute between India and China. Again, because of this boundary problem, India and China had a brief war in 1962 and there are speculations that in the 21st century a conflict between India and China might erupt on account of this dispute (Fairbank 1987). The line was decided in 1914 at the Shimla Accord and named after then Foreign Secretary of British India, Henry McMahon, who was the chief negotiator from the British Indian side. Earlier Britain negotiated with China regarding Tibet's boundaries with Burma and Sikkim, and when Tibet did not recognize these negotiations, in 1904 Britain invaded Tibet and imposed a treaty on them (Norbu 2001, 288). However, after three years, Britain renounced its position and said that it would only negotiate with China to decide on the matter of Tibet. However, in 1913 Tibet sent back all Chinese officials from Tibet and declared itself independent. It was a strategic opportunity for Britain to force its own boundary line on Tibet and thus, in Shimla, the representatives of Britain, Tibet, and China signed an accord. China claims that it did not give assent to the accord and Chinese representative in the talks just added their initials rather than full signatures to express their disagreement. Furthermore, even though the line was drawn in 1914, on paper it remained unenforceable on the ground and the actual demarcation had to wait for almost two decades. In 1937, the map published by the Survey of India showed that the McMahon Line was to be the official boundary between India and Tibet and the next year, Britain claimed that even though Chinese consent was not clear, the Shimla Agreement was binding in nature. With the decolonization of India and the establishment of the People's Republic of China, the contest over China became more volatile and whereas India accepted the McMahon Line as the international boundary because it brought Arunachal Pradesh and Aksai Chin into Indian territory, China categorically refused the validity of the Line (Neack 2003, 181). The McMahon Line has been an important source of tension between India and China from on.

The colonial origin of the territorial dispute is also very evident in the sense that from the very day of the boundary demarcation, the other two parties had not been committed to it. Actually, it was an act of imposition by Britain on the weaker China and Tibet and at that point in time, Britain, because of its power supremacy, was able to maintain the sanctity of the accord. However, when the British left India, the newly independent India did not have such an advantage; and China and Tibet started questioning the legality of the Shimla Accord. India in response tried to maintain the status quo which was advantageous for India and she still seeks the same (Miller 2013, 30). Actually, the historical variables such as dispute between China and Tibet over their relationship and the territorial claims make the matter quite complicated. It may be said that the 'original sin' in the case of territorial dispute between India, China and Tibet also began with the British intervention, which used its powerful position and imposed a territorial arrangement on weaker countries under duress.

In fact, it could be said that before the ascendancy of the British, South Asia was not acquainted with sharp borders and strict demarcations. When the notion and practice of borders, instead of frontiers was introduced, the region was dominated by the imperial power of Britain who was neither aware of the complexities of socio-cultural, ethnic connections nor wanted to have any say of these factors in drawing the new boundaries (Hewitt 1997, 63). Instead, an external power with very different motives accomplished the task and this was basically imposed on the native population. The immediate aftermath of most of these divisions might have been managed owing to the coercive supremacy of Britain, but once the imperial power left the region, the disputes among the natives became very problematic. Thus, it is interesting to note through the above analyses, that all the territorial disputes of South Asia had their origins in the colonial period; however, owing to the power of the British, the intensity of these disputes which was low then, became much more pronounced and bitter in the vacuum created after the departure of the British from the scene.

IS THERE ANY ESCAPE FROM COLONIAL ORIGINS?

Now after being informed of the ideological and practical variables in the colonial origins of the South Asian territorial disputes, one might investigate whether it is possible to resolve or manage these disputes in the contemporary scenario. In the postcolonial period, these disputes rather than getting less contested have become more complicated, as several other variables such as strategic importance, economic benefits and their use/misuse in domestic politics have given them a new saliency. The above discussion makes it clear that since the notion of sovereignty, nationalism and the splitting of natural cultural spaces into two states was done during the colonial era, which 'constructed' these boundary disputes; it would not be easy to overcome them. In reality, the South Asian region is caught in a situation wherein all national discourse is found a strong attachment to territory (Tuan 1974; Bacherlad 2014). However, at the same time most of these nationalities are randomly divided by these borders and many nationalities are put into one through these borders.

There are two important variables, which are linked to the border disputes phenomenon in our contemporary time: firstly, the unsettled domestic politics of the region and secondly, the increasing economic exchanges (or imperative of increasing economic exchanges) among the countries of the region. The first variable makes it difficult for these countries to realize the colonial origins of their territorial disputes and search for a reasonable solution. The domestic political discourse, which seems to be uncompromising on the issue of territory, makes it impossible to think of any resolution based on quid-pro-quo (Kapur 2011, 62). Yet the domestic discourse on the security in these countries is more influenced by the traditional notion of security in which territory is considered to be the core of their existence. In the last few decades, the notion of human security in which lives and welfare of people is more important than a piece of land has also been discussed but still at the popular level there has been no significant change in the status-quo (Barthwal-Datta 2012). With the rise and existence of rightist political parties in most of these countries, the boundary issues become further problematic, since some sort of sacred meaning and significance gets attached to it. Most of these rightist discourses in South Asian countries hardly look at the historical origins of these disputes and they rather deliberately ignore the colonial phase and go back to a selected era in their history in support of their claim. A discourse of humiliation is also being articulated but instead of pointing to the British as the 'culprit' of the humiliation, they try to blame one another, since this is what serves their political interests. Furthermore, since it is in the interest of the political forces to use the territorial disputes to garner domestic support and popularity, they would rather not attempt to transcend them. Thus, the use and misuse of territory and boundary in domestic politics indicates that it is not easy to understand the colonial origins of these disputes and arrive at any contemporary resolution (Ghosh 1995, 215).

However, in the age of globalization, there are optimists, who feel that the boundary question is being looked at differently in various parts of the world and it is possible for the South Asian region to move in the same direction too. Actually globalization and the consequent dilution of the significance of the boundary could be the variable, which might pave the way for possible future resolutions of these territorial disputes in the South Asia. The basic problem of South Asian borders is that they are artificial and they separated local communities who had a long history of togetherness. More importantly, the search for sharp and watertight borders makes it impossible for people from one side of the border to continue their exchanges beyond these borders. As described in the previous section, in the pre-colonial period, the political entities in South Asia were divided by frontiers and not borders; and they were quite porous. If South Asia too devises regional and intra-regional trade and commerce through land routes and establishes connectivity across the region (Batra 2013, 19), it is possible that the colonial distortions in the cross-region exchanges could be restored. In the last two decades, there have been several proposals and plans such as regular road and rail connectivity between India-Pakistan, opening of more trade routes between India and China, and creating mechanisms such as the Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation (BIMSTEC) or The Bangladesh-China-India-Myanmar Forum for Regional Cooperation (BCIM). Success of these forums may change the course of territorial disputes in a very substantial way (Michael 2014). Actually, the South Asian Association of Regional Cooperation (SAARC), which was established in 1985, though not very effective till date, could play an important role in the process. Thus, it could be said that the territorial disputes which had their origins in the colonial era have been trapped in a vicious cycle of contests and mutual blame games; and only an arrangement of cross-border exchanges and stake in stability and peace of the region could produce a virtuous cycle with its own momentum.

CONCLUDING REMARKS

The South Asian territorial disputes are a product of colonization of the region by the British and imposition of new geographical and political categories for the benefits of the imperial power. The modern and alien ideas of territory, boundary, sovereignty, and nationalism were introduced to the pre-modern society without sufficient care and consideration for the local realities. It might have its administrative logic in the broad colonial project or 'civilizing mission' but it ruptured the long existing connections and exchanges among various local communities spread across the region. The rupture at both physical and intangible levels, created fear and distortions, giving birth to many artificial political entities leading to incessant territorial disputes among them. Basically, the territorial disputes of South Asia, thus understood, are the 'construction' of the imperial power. Even before the advent of the British, there were a few fault lines in the South Asian region based on culture, religion, language, and ethnicity. But it was not possible for these to be articulated in territorial terms as many of these categories were distributed across the vast landmass of South Asia. Thus, even though these diversities had some disagreement with one another, there was a practical modus operandi to make them co-exist. The colonial enterprise rather than recognizing the complexities of these diversities and attempting to understand the same, imposed certain insensitive and instrumental solutions, which far from ameliorating these fault lines, made them further prone to conflict and struggle. Thus, it would not be incorrect to say that colonial origins are the most intractable variable in the contemporary territorial disputes of the South Asia.

In the post-colonial era, there has been a further introduction of new variables in the territorial disputes of the region and by and large, they have complicated them more. The process of nation/state building, which has not been very successful, and the lack of economic and social development, has further made these countries extra-sensitive about their territorial identities. The region has been mired in the primordial identity discourse, which puts highest value on the territorial integrity of a country. Rise of right-wing political parties in these countries also makes them more fixated in their territoriality. Since the level of literacy and education is low in these regions, the institution of democracy has, rather than being helpful to understand the colonial origins of these territorial disputes and work for resolution, become an instrument to invoke narrow nationalism and gain political support.

However, if an intra-regional mechanism of cooperation is devised and implemented, and re-connections of community across the borders becomes possible, it may lead to a transcendence of the distortions that were introduced in the region during the colonial period leading to these territorial disputes. In the contemporary age of globalization and regionalism, which has diverse effects in various regions, it may be expected that South Asia too might realize that a cooperative mechanism in regional politics would be helpful in economic and social development of the region.

Thus, it is important to delineate the existing territorial disputes in the region and recognize their colonial origins. Rather than blaming and contesting one another, it is pertinent to identify the real 'culprit'. Only then would it be possible for a peace mechanism to emanate in the regional politics leading to workable resolutions of these territorial disputes in the region.

References

Baber, Zaheer (1996). *The Science of Empire: Scientific Knowledge, Civilization, and Colonial Rule in India.* New York, USA: State University of New York Press.

Bacherlad, Jaston (2014). *The Poetics of Space*. New York, USA: Penguin Books.

Bahadur, Kalim (1998). *Democracy in Pakistan: Crises and Conflict*. New Delhi, India: Haranand Publications Pvt. Ltd.

Bajwa, Kuldip Singh (2003). *Jammu and Kashmir War, 1947-1948: Political and Military Perspective*. New Delhi, India: Haranand Publications Pvt. Ltd.

Barfield, Thomas (2010). *Afghanistan: A Cultural and Political History*. Princeton NJ, USA: Princeton University Press.

Barthwal-Datta, Monika (2012). *Understanding Security Practices in South Asia: Securitization Theory and the Role of Non-State Actors*. London, UK: Routledge.

Batra, Amita (2013). *Regional Economic Integration in South Asia: Trapped in Conflict?* London, UK: Routledge.

Behera, Navnita Chadha (2008). *International Relations in South Asia: Search for an Alternative Paradigm*. New Delhi, India: Sage Publications.

Butalia, Urvashi (1998). *The Other Side of Silence: Voices from Partition of India*. Delhi, India: Viking.

Chakravarty, Debadutta (2003). *Muslim Separatism and the Partition of India*. New Delhi, India: Atlantic Publishers.

Chandra, Bipan (2008). *Communalism in Modern India*. New Delhi, India: Haranand Publications Pvt. Ltd.

Chatterjee, Partha (2012). Whose imagined community? Gopal Balakrishnan (Ed.), *Mapping the Nation.* London, UK: Verso.

Chatterji, Joya (1994). *Bengal Divided: Hindu Communalism and Partition, 1932-1947*. Cambridge, UK: Cambridge University Press.

Chester, Lucy P. (2009). *Borders and Conflict in South Asia: The Radcliffe Boundary Commission and the Partition of Punjab*. Manchester, UK: Manchester University Press.

Dixit, R. D. (1988). *Political Geography*. New Delhi, India: McGraw Hill.

Fairbank, John King (1987). *China Watch*. Cambridge, USA: Harvard University Press.

Fraser, Bashabi (Ed.). (2008). *Bengal Partition Stories: An Unclosed Chapter*. London, UK: Anthem Press.

Gandhi, Rajmohan (2003). *Understanding the Muslim Mind*. New Delhi, India: Penguin Books.
Gellner, Ernest (1983). *Nation and Nationalism*. Oxford, UK: Basil Blackwell.
Ghosh, Partha Sarathy (1995). *Cooperation and Conflict in South Asia*. New Delhi, India: Manohar Publishers.
Herb, Guntram H. & Kaplan, David H. (Eds.). (2008). *Nations and Nationalism: A Global Historical Overview* 1 *(1770-1880)*. California, USA: ABC-CLIO Inc.
Hewitt, Vernon (1997). *The New International Politics of South Asia*. Manchester, UK: Manchester University Press.
Holdich, Thomas (1899). The use of practical geography illustrated by recent frontier operations. *Geographical Journal* 13.
Hudson, Brian (1977). The new geography and the new imperialism, 1870-1918. *Antipode* 9(12).
Jones, Owen Bennett (2009). *Pakistan: Eye of the Storm*. New Haven, USA: Yale University Press.
Kang, David C. (2009). *China Rising: Peace, Power and Order in East Asia*. New York, USA: Columbia University Press.
Kaplan, Robert D. (2010). *South Asia's Geography of Conflict*. Washington DC, USA: Center for a New American Security (NAS).
Kapur, S. Paul (2011). Peace and conflict in the Indo-Pakistani rivalry: Domestic and strategic causes. Sumit Ganguly & William Thompson (Eds.), *Asian Rivalries: Conflict, Escalation, and Limitations on Two-level Games*, pp. 61-78. Stanford, USA: Stanford University Press.
Khan, Yasmin (2007). *The Great Partition: The Making of India and Pakistan*. New Haven, USA: Yale University Press.
Khilnani, Sunil (1998). *The Idea of India*. New Delhi, India: Penguin Books.
Livingstone, David N. (1992). *The Geographical Tradition: Episodes in the History of a Contested Enterprise*. Oxford, UK: Blackwell.
Louis, William Roger (2006). *Ends of British Imperialism: The Scramble for Empire, Suez, and Decolonization*. London, UK: I. B. Tauris.
Mackinder, Halford J. (1968). *The Sub-continent of India*. In E. J. Rapson (Ed.). *The Cambridge History of India* 1: *Ancient India*. Cambridge, UK: Cambridge University Press.
Mahmud, Tayyab (2010). Colonial cartographies, postcolonial borders, and enduring failures of international law: The unending wars along the Afghanistan-Pakistan frontiers. *Brooklyn Journal of International Law* 36(1).
McLeod, Duncan (2008). *India and Pakistan: Friends, Rivals or Enemies?* Hampshire: Ashgate Publishing.
Merry, Sally Engle (2003). From law and colonialism to law and globalization. *Law and Social Enquiry* 28, 569-571.
Michael, Arndt (2014). *India's Foreign Policy and Regional Multilateralism*. New York, USA: Palgrave Macmillan.
Michael, Bernardo A. (2014). *Statemaking and Territory in South Asia: Lessons from the Anglo-Gorkha War (1814-1816)*. London, UK: Anthem Press.
Miller, Manjari Chatterjee (2013). *Wronged by Empire: Post-imperial Ideology and Foreign Policy in India and China.* Stanford, USA: Stanford University Press.
Mishra, B. B. (1990). *The Unification and Division of India*. Delhi, India: Oxford University Press.
Neack, Laura (2003). *The New Foreign Policy: Complex Interactions, Competing Interests.* Boulder,

USA: Rowman & Littlefield Publishers.

Noman, Omar (2009). *Pakistan: Political and Economic History since 1947*. New York, USA: Routledge.

Norbu, Dawa (2001). *China's Tibet Policy*. London, UK: Curzon Press.

Paranjape, Makarand (2013). *Making of India: Colonialism, National Culture and the Afterlife of Indian English Authority*. New Delhi, India: Springer.

Paul, T. V., James J. Wirtz & Michel Fortmann (Eds.). (2004). *Balance of Power: Theory and Practice in the 21st Century*. Stanford, USA: Stanford University Press.

Phadnis, Urmila & Rajat Ganguly (2001). *Ethnicity and Nation-building in South Asia*. New Delhi, India: Sage Publications.

Ramachandraiah, C. (1995). Colonialism and geography. *Economic and Political Weekly* 7(October), 2523-2524.

Scott, David (2004). *Conscripts of Modernity: The Tragedy of Colonial Enlightenment*. Durham, USA: Duke University Press.

Tohring, S. R. (2010). *Violence and Identity in North-East India: Naga-Kuki Conflict*. New Delhi, India: Mittal Publications.

Tripodi, Christian (2011). *Edge of Empire: The British Political Officer and Tribal Administration on the North-West Frontiers 1877-1947*. Farnham, USA: Ashgate.

Tuan, Yi-Fu (1974). *Topophilia: A Study of Environmental Perception, Attitudes and Values*. New York, USA: Columbia University Press.

Vasquez, J. (1993). *The War Puzzle*. Cambridge MA, USA: Cambridge University Press.

Wadley, Susan (2014). *South Asia in the World: An Introduction*. London, UK: M. E. Sharpe.

Wink, Andre (1996). *Al-hind: The Making of the Indo-Islamic World* 1: *Early Medieval India and the Expansion of Islam 7th-11th Centuries*. Boston, USA: Brill Academic Publishers.

Maritime Features in the Public Order of the Oceans: A Jurisprudential Reflection

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Abstract

The World Public Order of the Oceans is continually clarified through the practice of states and customary and conventional international law including an important text, the United Nations Convention on the Law of the Sea (UNCLOS). UNCLOS serves to stabilize expectations and outcomes as understood by the parties and enshrines dispute settlement procedures as a formal system of claims. A regular object of oceans claims is land often claimed by more than one State—maritime features—which may be characterized as rocky outcroppings, reefs, low tide elevations or islands under UNCLOS. Owing to the dynamic nature of international law, including the international law of the sea, claims to these features can fluctuate between formal and informal arenas and prescriptions may not remain constant. Conflicting demands, expectations and a stream of outcomes spawned by international incidents can cause norms to be terminated. Thus in this highly decentralized and volatile milieu there is a premium on how one understands and uses law and legal theory, that is, jurisprudence.

Keywords

Baselines, China, constitutive process, international law, jurisprudence, islands, Korea, law of the sea, maritime features, World Public Order of the Oceans, United Nations Convention on the Law of the Sea.

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Our world public order of the oceans emerged during the time of early Asian empires and the later advent of Westphalian nation-states. In 1602 the Dutch East India Company seized a Portuguese galleon in retaliation for Portuguese resistance to Dutch trade in the East Indies. The lawyer and early Dutch publicist Hugo Grotius was commissioned to write a legal brief in the ensuing case. The brief, published in 1609 as Mare Liberum, would become the first serious philosophical work on the seas (Grotius 1916). In *Mare Liberum* Grotius set forth reasons why the "high seas," which came to be defined as the open ocean existing beyond national control, must be open for trade and exploration. All property, he wrote, is grounded upon occupation—the sea then, like the air, cannot be appropriated: "Whatever cannot be seized or enclosed is not capable of being a subject of property … meaning that the vagrant waters of the ocean are necessarily free" (Grotius 1916). The alternative view was that the seas and its features were subject to appropriation and occupation. The problem was access versus control and it persists today.

Land, described as coastlines and maritime features, has shaped our public order of the oceans in many ways. These maritime features—rocky outcroppings, reefs, low tide elevations and islands—are often claimed by more than one State. The claims are intense because the features may yield assets from the seas. There are such claims from the Arctic to the Caribbean, from the Persian Gulf to the Indian Ocean and from the Gulf of Maine to the Asian Seas raising critical issues of security, fisheries, the environment, energy, seabed mining and the international law of the sea. The outcomes of these disputes might affect the power and wealth of nations and they are most intense across Asian seas.

"LAW" IN THE LAW OF THE SEA

Since the time of Grotius, elites have claimed control of the seas including maritime features in processes that generates law including the law of the sea. These are not merely formalized procedures put to an authority in a formalized setting. Claims can appear unformulated and the process within informal community settings. Claims are "...made upon participants in the world process to respond...to the extant or probable consequences of acts in [a] particular case[s]" (Reisman 1981). A claim is made whenever an event demands the attention of decision-makers. A claim demands attention and activates a response, which implements and even creates policy. Events cumulatively yield a flow of behavior to which perspectives of authority, as policy, are applied.

Because the international legal system is a highly decentralized milieu there is a high premium on how one understands and uses law, that is, jurisprudence. "The comprehensiveness and realism with which an observer conceives of his major focus of attention—what he regards as law and how he locates it in its larger community context—are important because they determine how he conceives every detailed part of his study: his framing of problems, his choice of tools and procedures, and his recommendation of alternatives" (McDougal & Lasswell 1971). Many jurisprudential methods equate legal systems with legal rules. Rules rest on the surface of the legal system. Equally and often more important dimensions are found in other places. Other processes in cultures and communities possess legal prevalence and these must be appraised to understand law in context, this includes the context of the oceans.

The law is "...not a 'something' impelling obedience; it is a constantly evolving process of decision-making and the way it evolves will depend on the knowledge and insights of the decision-makers" (Dillard 1964). Certain decisions are made and enforced irrespective of community members' preferences. These are decisions made through naked power. Other decisions are made from perspectives of authority. These latter decisions are made by the individuals expected to make them in accordance with the fundamental policies of the community. They are achieved through established procedures and through accepted structures. The individuals who make these decisions have sufficient bases in power to put them into operation. These are the authoritative decisions of the community and therefore the law (McDougal 1960). "Law is not a closed, mechanical system of decision. Certain interacting participants may reach a wide consensus on the policies that should govern them, but a dispute of social significance imports widely differing perspectives about appropriate goals and policies. The resolutions of such disputes will inevitably be based on subjective choices which can be disguised but not discarded" (Reisman 1971). This is especially true of contemporary maritime disputes across Asia.

International law, including the international law of the sea, amounts to stable patterns of authority and control that purport to limit the options of participants in a largely unorganized global arena. Expectations of authority intersect with the power process. Authoritative decision is inseparable from power, which is an indispensable feature of law. The process yields a public order of the world community and many constituent public orders. The constitutive process that yields our world public order of the oceans is a collective outcome of State practice, decisions accepted as authoritative including those emanating from formal tribunals, treaties and an array of national elite communications.

Formal agreements and other textual statements such as treaties and other codifications do not fully capture international law. Habitual behavior must also be appraised. Behavior which in the beginning might be considered unlawful if repeated over time might become regarded as lawful. To make the distinction requires observing a flow of words and a flow of behavior including how a State behaves and how the world reacts. International law is not only found in treaties, agreements and other texts. As Diogenes long ago observed, “There is a written and an unwritten law. The one by which we regulate our constitutions in our cities is the written law; that which arises from custom is the unwritten law” (Diogenes 1925). Unwritten law is an important feature of community decision-making and potentially customary international law. And while a State may obligate itself to an agreement, its post-commitment practice may vary and generate a new norm. This is a law of the sea risk process in Asia.

Consider the critical text in the context of the public order of the oceans. The United Nations Convention on the Law of the Sea (UNCLOS) was ceremonially concluded and opened for State party signature and accession at Montego Bay, Jamaica on 10 December 1982. UNCLOS set the maritime zones, clarified State jurisdiction over zones and activities, preserved freedom of navigation, conservation of fish stocks, environmental protections, procedures for marine scientific research, hydrocarbon extraction, seabed mining and established institutions notably the International Tribunal for the Law of the Sea (ITLOS), the Commission on the Limits of the Continental Shelf (CLCS), The International Seabed Authority (ISA) and the Enterprise. The President of the Third United Nations Conference on the Law of the Sea was Ambassador Tommy T. B. Koh of Singapore who called the final document “A Constitution for the Oceans.”

However, the treaty is not a constitution but it is at the core of a constitutive process of the oceans. Constitutive decisions are those which indicate who are to be the established decision-makers; they result in the allocation of bases of power; create the structures of authority and community; and specify those procedures which must be followed for a legal or lawful decision. The constitutive process evolves via claims to the seas that are critical to the present and future public order of the oceans. “The constitutive process is authoritative power exercised to provide an institutional framework for decision to allocate indispensable functions; the particular decisions emerging from this process, which we call ‘public order’ decisions, may be specialized to the shaping and sharing of wealth, enlightenment, respect and all other values” (McDougal, Lasswell & Reisman 1981). The text must be placed in context and hence jurisprudence is critical. UNCLOS, its antecedents and its post- outcome effects are the flow of words. State practice, opinio juris, and elite reactions to critical incidents are the flow of behavior. To understand the law of the sea as it is obtained today requires understanding both.

MARITIME FEATURES

We use the term maritime features to designate rocky outcroppings, reefs, low tide elevations and islands because a specific geographic term would connote a legal conclusion and many are claimed by more than one State. For example China, Vietnam, Taiwan, the Philippines, Malaysia, Indonesia, and Brunei each claim sovereignty over parts of the South China Sea, including features comprising the Paracel and Spratly Islands chains. The status of maritime features in international law have been clarified in State practice, codified in the 1958 Geneva Convention on the Law of the Sea, the 1982 United Nations Convention on the Law of the Sea (UNCLOS) and confirmed in key decisions of international tribunals.

In customary and codified international law of the sea, the most significant maritime feature is the island which is especially critical in Asian seas claims. UNCLOS defines Islands as naturally formed areas of land surrounded by water which are above water at high tide (UNCLOS art. 121). The maximum breadth of the maritime zones of islands is the same for land areas along the coast: territorial sea not to exceed 12 nautical miles, and Exclusive Economic Zone (EEZ) is not to exceed 200 nautical miles, and a continental shelf of 200 nautical miles. Rocks can be central to maritime and sovereign disputes. These are features which cannot sustain human habitation and have no economic life of their own. They are entitled only to a territorial sea. They are not entitled to an EEZ or continental shelf. Most States with features that might be juridical rocks have claimed EEZs notably Japan's claim to the Okinotorishima. Islands situated on atolls and those possessing fringing reefs for which the baseline is the seaward low-water line of the reef shown on official charts may have a territorial sea breadth as measured from the low-water line (UNCLOS art. 6).

Another feature is the low tide elevation (LTE). LTEs are naturally formed areas of land surrounded by and above water at low tide, but submerged at high tide (UNCLOS art. 13(1)). The low water line on a LTE within the territorial sea of the mainland or an island may be used as the baseline for measuring the breadth of the territorial sea. *i.e.*, it may expand the outer limit of the territorial sea. An LTE situated wholly outside the territorial sea of the mainland or islands has no territorial sea of its own (UNCLOS art. 13). LTEs cannot be appropriated (*Nicaragua v. Colombia*, ICJ 2012). Tribunals have not recognized sovereign claims over features below water at low tide and these are accorded no maritime zones. Artificial islands have emerged as controversial features in Asian seas particularly. Artificial islands, installations and structures do not possess the status of islands under UNCLOS Article 121 and their presence does not affect zonal delimitation (UNCLOS art. 60(8)).

Maritime boundary disputes typically comprise distinct claims: to marine space—the water—and claims to features—sovereign claims. The latter raise issues of territorial acquisition in the context of the seas and which potentially implicates access and control in the public order of the oceans. A feature of the constitutive process that shapes our world public order is competing claims to sovereignty. Thus in *Eastern Greenland* the Permanent Court of International Justice (PCIJ) noted, a "…circumstance which must be taken into account by any tribunal which has to adjudicate upon a claim to sovereignty over a particular territory, is the extent to which the sovereignty is also claimed by some other Power. In most of the cases involving claims to territorial sovereignty which have come before an international tribunal, there have been two competing claims to the sovereignty, and the tribunal has had to decide which of the two is the stronger." Thus international tribunals have articulated methods and rules for resolving sovereign and associated maritime disputes including long-standing principles pertaining to sovereignty over maritime features (Brownlie 2008).

In the 1931 dispute between Mexico and France over the sovereignty of *Clipperton Island*, located in the Pacific Ocean southwest of Acapulco, Mexico, the King of Italy as sole arbitrator stated the following:

> It is beyond doubt that by immemorial usage having the force of law, besides the *animus occupandi*, the actual, and not the nominal, taking of possession is a necessary condition of occupation. This taking of possession consists in the act, or series of acts, by which the occupying state reduces to its possession the territory in question and takes steps to exercise exclusive authority there. Strictly speaking, and in ordinary cases, that only takes place when the state establishes in the territory itself an organization capable of making its laws respected. But this step is, properly speaking, but a means of procedure to the taking of possession, and, therefore, is not identical with the latter. There may also be cases where it is unnecessary to have recourse to this method. Thus, if a territory, by virtue of the fact that it was completely uninhabited, is, from the first moment when the occupying state makes its appearance there, at the absolute and undisputed disposition of that state, from that moment the taking of possession must be considered as accomplished, and the occupation is thereby completed.

In the *Minquiers and Ecrehos Case* (*France/United Kingdom*) Judge Carneiro indicated the following criteria for determining sovereignty:

> …the following rules which were laid down by the Permanent Court of Inter-

national Justice in the case concerning the *Legal Status of Eastern Greenland*:

(a) The elements necessary to establish a valid title to sovereignty are "the intention and will to exercise such sovereignty and the manifestation of State activity."
(b) In many cases international jurisprudence "has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries."
(c) It is the criterion of the Court in each individual case which decides whether sovereign rights have been displayed and exercised "to an extent sufficient to constitute a valid title to sovereignty."

And the tribunal in the first *Eritrea/Yemen* Arbitration Award stated:

> The modern international law of the acquisition (or attribution) of territory generally requires that there be: an intentional display of power and authority over the territory, by the exercise of jurisdiction and state functions, on a continuous and peaceful basis. The latter two criteria are tempered to suit the nature of the territory and size of its population, if any.

In cases where resolution of a dispute depends on legally significant facts that occurred, or a treaty concluded, centuries ago, the doctrine of *inter-temporal law* is applied: "in such cases the situation in question must be appraised, and the treaty interpreted, in the light of the rules of international law as they existed at that time, and not as they exist today" (Fitzmaurice 1953). And tribunals grapple with identifying the "critical date or dates." The ICJ stated in *Nicaragua v. Colombia*:

> The Court recalls that, in the context of a dispute related to sovereignty over land, such as the present one, the date upon which the dispute crystallized is of significance. Its significance lies in distinguishing between those acts *à titre de souverain* occurring prior to the date when the dispute crystallized, which should be taken into consideration for the purpose of establishing or ascertaining sovereignty, and those acts occurring after that date…which are in general meaningless for that purpose, having been carried out by a State which, already having claims to assert in a legal dispute, could have taken those actions strictly with the aim of buttressing those claims.

Concerning the effective exercise of sovereignty the Tribunal in the case of Eritrea/Yemen, addressed what in international law are termed "*effectivités*."

> The modern international law of the acquisition (or attribution) of territory generally requires that there be: an intentional display of power and authority over the territory, by the exercise of jurisdiction and state functions, on a continuous and peaceful basis. The latter two criteria are tempered to suit the nature of the territory and the size of its population, if any.

The tribunal then turned to any analysis of the evidence, applying the following principles:

> Evidence of intention to claim the Islands *à titre de souverain* is an essential element of the process of consolidation of title. That intention can be evidenced by showing a public claim of right or assertion of sovereignty to the Islands as well as legislative acts openly seeking to regulate activity on the Islands.

In *Nicaragua v. Colombia*, the ICJ articulated:

> The Court recalls that acts and activities considered to be performed *à titre de souverain* are in particular, but not limited to, legislative acts or acts of administrative control, acts relating to the application and enforcement of criminal or civil law, acts regulating immigration, acts regulating fishing and other economic activities, naval patrols as well as search and rescue operations. It further recalls that "sovereignty over minor maritime features…may be established on the basis of a relatively modest display of State powers in terms of quality and quantity." Finally, a significant element to be taken into account is the extent to which any acts *à titre de souverain* in relation to disputed islands have been carried out by another State with a competing claim to sovereignty.

Claimants often seek to rely on maps. What is the evidentiary value of a map? The tribunal in the *Frontier Dispute* (*Burkina Faso/Republic of Mali*) case indicated:

> Maps merely constitute information which varies in accuracy from case to case; of themselves, and by virtue solely of their existence, they cannot constitute a territorial title, that is, a document endowed by international law with intrinsic legal force for the purpose of establishing territorial rights. Of course, in some cases maps may acquire such legal force, but where this is so

> the legal force does not arise solely from their intrinsic merits: it is because such maps fall into the category of physical expressions of the will of the State or States concerned. This is the case, for example, when maps are annexed to an official text of which they form an integral part. Except in this clearly defined case, maps are only extrinsic evidence of varying reliability or unreliability which may be used, along with other evidence of a circumstantial kind, to establish or constitute the real facts.

Further, the ICJ in its 2012 judgment in *Nicaragua v. Colombia* stated: "Moreover, according to the Court's constant jurisprudence, maps generally have a limited scope as evidence of sovereign title." Claims over maritime features can unfold in what are presumptively non-adjudicative arenas that may be construed as possessing legal valence. For example, in 2009 China and South Korea protested Japan's claim to an extended continental shelf from Okinotorishima. China asserted:

> Available scientific evidence data fully reveal that the rock of Oki-no-Tori, on its natural conditions, obviously cannot sustain human habitation or economic life of its own, and therefore shall have no economic zone or continental shelf (PRC *note verbale* 2009).

Korea responded that it:

> has consistently held the view that Oki-no-Tori Shima, considered as a rock under Article 121, paragraph 3, of the Convention, is not entitled to any continental shelf… (Korea *note verbale* 2009).

On the heels of this disagreement China proposed that the 19th Meetings of States Parties to the UNCLOS consider:

> the issue of claiming extended continental shelf with a rock as base point and its legal implication under Article 121 of the Convention, and to discuss how to strengthen the protection of the Area as the common heritage of mankind (SPLOS/196, May 22, 2009).

The issue was discussed at the meeting without resolution. During that debate the United States expressed the following view:

> While this is an important issue, we do not believe it is an instance of an unresolved land or maritime dispute. We note that the Commission [on the

> Limits of the Continental Shelf] has stated that it has no role on matters relating to the legal interpretation of Article 121 of the Convention. Given that, our view is that the Commission should proceed with its work on such a submission, while acknowledging in its recommendations that there is an unresolved question regarding the interpretation of Article 121. We do not take this position because we have an opinion on the substantive issue; we have not expressed an opinion on that matter. Rather, we believe it would be most efficient and cost-effective for the Commission to consider all the technical and scientific aspects of all parts of the submission, so that it does not have to revisit the submission at a later date (Digest of Untied States Practice 2009).

Thereafter China (China *note verbale* 2011) and Korea (Korea *note verbale* 2011)reiterated their positions while noting that the Chairman of the Commission on the Limits of the Continental Shelf (CLCS) had stated that it had no role in matters relating to the legal interpretation of Article 121 (CLCS Statement 2009) and the Commission's decision not to take action on the part of the recommendations prepared by the Sub commission in relation to the rock of Oki-no-Tori, until the Commission decides to do so. The Chinese note added:

> …the above-mentioned statement and decision of the Commission are justifiable. As a body consisting of experts in the fields of geology, geophysics and hydrography, the Commission should avoid the situation in which its work influences the interpretation and application of relevant provisions of the Convention, including Article 121. The application of Article 121(3) of the Convention related to the extent of the International Seabed Area as the common heritage of mankind, related to the overall interests of the international community, and is an important legal issue of general nature. To claim continental shelf from the rock of Oki-no-Tori will seriously encroach upon the Area as the common heritage of mankind. If the Commission makes recommendations on the part of Japan's Submission in relation to the rock of Oki-no-Tori before its legal status has been made clear, and recognizes the claim of extended continental shelf measured from the rock of Oki-no-Tori, it would have an adverse impact on the maintenance of an equal and reasonable order for oceans.

THE ASIAN SEAS CONTEXT

The context of Asian seas includes newly empowered participants, conflicting claims, demands to exploit resources, environmental risks, access and control of littoral waters, and new ideas about international law as applied to the oceans that are as Eastphalian inspired as are the European Westphalian ideas upon which the law of the sea was founded. The context also includes difficult history. In Asia "the past is never dead, it is not even past" (Faulkner 1951). Myths settle in the collective memory of a community. They are an accumulation of national experiences and events, as well as society's efforts to revise and redefine those events and experiences. What is important for international law and geopolitics is that a collective memory can shape the ways by which a society responds to events.

The People's Republic of China (PRC) is reshaping the Asian seas context and PRC claims have generated intense counter-claims. The PRC issued a statement setting forth the coordinates of straight baselines in the East China Sea on September 10, 2012 (PRC Baselines Statement 2012). The baseline coordinates enclose two groups of maritime features that are claimed by China, Japan, and Taiwan. They are known variously as the Senkaku (by Japan), Diaoyu (by China), Tiaoyutai (by Taiwan), or Pinnacle (by the United Kingdom) Islands. Japan protested the Chinese straight baseline claim (Japan Diplomatic Note 2012). Japan formally claimed the islands in 1895 and continues to administer the islands and did not draw straight baselines around these features when it promulgated its Territorial Sea Law (Limits in the Seas 1998).

The PRC asserted that the baselines were "in accordance with the 'Law of the People's Republic of China on Territorial Sea and Its Contiguous Zone' of 25 February 1992." Article 2 of that law claims Diaoyu Island (and associated islands) as part of China's land territory. Article 3 of the same law provides that "the method of straight baselines composed of all the straight lines joining the adjacent basepoints shall be employed in drawing the baselines of the territorial sea of the People's Republic of China" (PRC legislation 1992). The government of China stated that these baselines were "consistent with relevant provisions of the UN Convention on the Law of the Sea ("UNCLOS")" (Le Yucheng Statement 2012). Subsequently the United States protested the Chinese baselines.

During May 2009 in response to a joint submission by Malaysia and Viet Nam to the Commission on the Limits of the Continental Shelf (CLCS) (CLCS Malaysia/Viet Nam joint submission 2009) China stated in a diplomatic note to the UN Secretary-General:

> China has indisputable sovereignty over the islands in the South China Sea

> and adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof (PRC diplomatic note 2009).

In 2011 responding to a Philippines diplomatic note to the UN Secretary General claiming sovereignty over the Kalayan Island Group (KIG) the PRC issued a diplomatic note indicating:

> China has indisputable sovereignty over the islands of the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof....
>
> ...under the relevant provisions of the *1982 United Nations Convention on the Law of the Sea*, as well as the *Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone (1992)* and the *Law on the Exclusive Economic Zone and the Continental Shelf of the People's Republic of China (1998)*, China's Nansha Islands is fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ) and Continental Shelf (China diplomatic note to UN Secretary-General 2011).

Claims to maritime features across Asian seas are complex and have intensified. While international tribunals—the International Court of Justice (ICJ), the International Tribunal Law of the Sea (ITLOS) and arbitral institutions—are critical for potentially resolving maritime claims, tribunal proceedings are one phase in the assertion of state competence over the authority and control of ocean zones and territory. The delimitation process begins with events, incidents and coastal state demands. The preferred outcome is a marine boundary that carries the expectation of authority of the world community. Thus every delimitation is a culmination of a complex process of authoritative decision whose outcomes implicate the power, wealth and well-being of coastal states.

And yet some claims are not fully settled, they are managed for the public order of the oceans and in the common interest of States. In *The Gulf of Maine* case the Special Agreement annexed to the Treaty submitting the boundary question to the Chamber of the ICJ requested the Chamber to decide '…in accordance with the principles and rules of international law…the course of the single maritime boundary that divides the continental shelf and fisheries zones of the United States and Canada' (*Gulf of Maine* case 1984). The parties fixed the starting point of the delimitation at 44° 11' 12" north, 67° 16' 46" west which are seaward of Machias Seal Island and North Rock. Hence *seaward* of Machias Seal Island, the

Chamber was asked to describe the course of the maritime boundary in terms of geodetic lines and to depict the course of the boundary on hydrographic charts. Thus the sovereignty over the island remains unresolved and managed in the greater common interest.

A SOUTH CHINA SEA ARBITRATION

The South China Sea has long been an object of demands and claims communicated via diplomatic notes, official media statements, positioning of national symbols and personnel, warship deployments, fishing vessels and positioning of drilling platforms have formally and informally communicated South China Sea claims. The littorals of China, Brunei, Indonesia, Malaysia, the Philippines and Vietnam assert claims to this nearly 3.5 million square kilometer (1.4 million square miles) marine space that is so critical for maritime traffic and resources from fisheries to hydrocarbons. Yet no claim involved a tribunal constituted under widely accepted principles of international law until 22 January 2013 when the Philippines instituted arbitration proceedings against China "with respect to the dispute with China over the maritime jurisdiction of the Philippines in the West Philippine Sea."

UNCLOS urges provisional agreement prior to seeking formal dispute settlement:

> [p]ending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation (Government of the Philippines *note verbale* 2013).

In addition, the Convention requires States Parties to

> fulfill in good faith the obligations assumed under this Convention and [to] exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right (Government of the Philippines *note verbale* 2013).

UNCLOS also enables State parties to submit disputes concerning interpretation or application of the Convention to specified means of dispute settlement: (i) the International Tribunal for the Law of the Sea (ITLOS); (ii) The International Court of Justice; (iii) an arbitral tribunal constituted in accordance with UNCLOS Annex VII; or (iv) a special arbitral tribunal constituted in accordance with UNCLOS Annex VIII. If States have not selected a means of dispute settlement, or, if States have not chosen identical means of dispute settlement, the dispute is to be submitted to an Annex VII Arbitral Tribunal. The Philippines claim is pursuant to Annex VII Arbitral Tribunal and the first South China Sea claim in a formal arena—dispute settlement via UNCLOS-authorized bilateral arbitration.

For parties to UNCLOS, Article 286 provides that any dispute concerning the interpretation or application of the Convention shall, where no settlement has been reached…, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under section 2, Compulsory Procedures Entailing Binding Decisions. There can be an exception to this provision pertaining to maritime boundary and sovereignty disputes. Article 298(1)(a)(i) permits a State, when signing, ratifying or acceding to the Convention or at any time thereafter to declare that it does not accept one or more of the procedures in section 2 with respect to relating to sea boundary delimitations. Article 298(1)(a)(i) further provides that "any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from" submission to conciliation under Annex V, section 2. As of August 2013, the following 26 States have exercised this right under article 298(1)(a): Angola, Argentina, Australia, Canada, Chile, China, Ecuador, Equatorial Guinea, France, Gabon, Ghana, Italy, Mexico, Montenegro, Nicaragua, Norway, Palau, Portugal, Republic of Korea, Russia, Slovenia, Spain, Thailand, Trinidad and Tobago, Tunisia and Ukraine (United Nations, Multilateral Treaties Deposited 2013).

The Philippines initiated arbitral proceedings against China under UNCLOS Annex VII to "clearly establish the sovereign rights and jurisdiction of the Philippines over its maritime entitlements in the West Philippine Sea" on January 22, 2013. Its diplomatic note to China informing of the initiation of these proceedings was "in furtherance of the friendly relations with China, mindful of its obligation under Article 79 of UNCLOS to seek a peaceful and durable resolution of the dispute in the West Philippine Sea by the means indicated in Article 33(1) of the Charter of the United Nations" (Philippine diplomatic note 2013). The Philippine Notification and Statement of Claim expressly disclaimed a determination of which Party has sovereignty of the islands claimed by both of them and delimitation of any maritime boundaries. Rather, the Philippines sought an Award that:

(1) Declares that the Parties' respective rights and obligations in regard to the

waters, seabed and maritime features of the South China Sea are governed by UNCLOS, and that China's claims based on its "nine dash line" are inconsistent with the Convention and therefore invalid;

(2) Determines whether, under Article 121 of UNCLOS, certain of the maritime features claimed by both China and the Philippines are islands, low tide elevations or submerged banks, and whether they are capable of generating entitlement to maritime zones greater than 12 M; and

(3) Enables the Philippines to exercise and enjoy the rights within and beyond its exclusive economic zone and continental shelf that are established in the Convention (Philippine Notification and Statement of Claim 2013).

The Chinese Ministry of Foreign Affairs on 26 April 2013 stated that the arbitration would involve territorial sovereignty claims pertaining to islands and reefs which place the matter beyond the application or interpretation of UNCLOS. Thus China's default of appearance at this writing is likely. Critically, "the absence of a State cannot be taken as an admission of the facts or the legal views of the applicant, or as showing that the absent party has no, or no convincing counter arguments to the applicant's case"…and hence there is "a sovereign 'right' not to appear" (Talman 2014). Thus China rejects arbitration for the following reasons: First, the dispute involves questions of territorial sovereignty over certain islands and reefs, Second, pursuant to ASEAN-China DOC 2002 the Philippines is bound by a commitment to resolve territorial and jurisdictional disputes with China through friendly negotiations, and Third, China alleges the Philippines *Note Verbale* and the Notification and Statement of Claims "contains serious errors in fact and law as well as false accusations against China." Hence the PRC's preliminary objections to the Philippines claim included lack of jurisdiction of the Arbitral Tribunal, Inadmissibility of the Claims and objections of a Preliminary Character such as indispensable third parties. China continues to refuse to accept The Philippine Notification and Statement of Claim, declining to participate. Five arbitrators were appointed.

On 29 October 2015 the Tribunal issued a unanimous Award on Jurisdiction and Admissibility. It treated the official Government of China Position Paper as constituting a plea concerning the Tribunal's jurisdiction. It held that the Philippines' Submissions reflect disputes between the two States concerning the interpretation or application of the Convention and that no other States would be indispensable to the proceedings.

The Tribunal concluded that it has jurisdiction with respect to the matters raised in seven of the Philippines' Submissions. It concluded that jurisdiction with respect to seven other Submissions by the Philippines must be considered in conjunction with the merits. The Tribunal requested the Philippines to clarify and narrow one Submission. Predicting how the Tribunal will decide is beyond the purpose and scope of this paper. However a practical jurisprudence compels appraising multiple paths to decision outcomes.

China may have valid objections to jurisdiction under UNCLOS Article 297 regarding fisheries and/or the exercise of sovereign rights and jurisdiction in its exclusive economic zone. Whether the Tribunal will assert jurisdiction to address China's claims to historic rights in the South China Sea would depend upon the Tribunal's appraisal of the character of China's claimed rights. Whether the Tribunal might have jurisdiction to address Chinese activities in the South China Sea may depend upon the Tribunal's decision on whether any of the maritime features claimed by China are islands capable of generating maritime zones overlapping those of the Philippines.

The Tribunal will likely address maritime zone entitlements to the following features: Scarborough Shoal, Mischief Reef, Second Thomas Shoal, Subi Reef, Gaven Reef, McKenan Reef, Hughes Reef, Johnson Reef, Cuarteron Reef, and Fiery Cross Reef. It will adhere to UNCLOS standards notably Article 121, determining whether these features might generate a territorial sea, EEZ, and a continental shelf. The Philippines did not request a ruling on questions of territorial sovereignty and the Tribunal has confirmed that such matters are beyond its jurisdiction.

Will the Tribunal's decision on the merits recognize that the small reefs and islands at issue are entitled to no or minimal maritime zones? Previous international cases minimized entitlements to isolated mid-ocean features thus reducing their zonal impact. For example in the 2009 *Maritime Delimitation in the Black Sea* (*Romania v. Ukraine*) the International Court of Justice was presented with an opportunity to define and give meaning to the phrase in UNCLOS Article 121(3)—"[r]ocks which cannot sustain human habitation or economic life of their own." The court declined to provide a definitive clarification in its opinion however by determining that Ukraine's tiny Serpents' Island should have no impact on the maritime boundary, the Court reconfirmed that small uninhabited islands will generally have limited or no impact on delimitations and that such features should not generate extended maritime zones (Van Dyke 2007). The court held that: "to count [Snake] Island as a relevant part of the coast would amount to grafting an extraneous element onto Ukraine's coastline; the consequence would be a judicial refashioning of Geography." The Tribunal in the Philippines/China Arbitration would be hard pressed to side-step that conclusion.

If the Tribunal finds that a maritime feature claimed by China is an island within the meaning of UNCLOS Article 121 and that its EEZ or continental shelf overlaps with those generated by the Philippines would jurisdiction be thwarted? Would the Tribunal decline jurisdiction if it determines that China's activities in the South China Sea concern "military activities" or "law enforcement activities." The Tribunal's jurisdiction over certain claims may be affected by UNCLOS exception for military activities. And should the Tribunal find that China's claims to historic rights are permitted by the Convention within the scope of Article 298 of UNCLOS, jurisdiction would be imperiled.

The Tribunal will also consider whether China's island reclamation activities are consistent with its obligations to protect and preserve the marine environment under article 92 of UNCLOS. It may conclude that China should have conducted an environmental impact assessment of its activities. The decisional outcome will depend on the interpretation of UNCLOS provisions and the facts established during the proceedings on the merits. As of this writing a subsequent hearing is scheduled at the headquarters of the Permanent Court of Arbitration in the Peace Palace in The Hague. The point to underscore is that resort to arbitration is but one strategic arena where Asia seas claims may be advanced. Adjudication is but one of many modalities in securing the Public Order of the Oceans.

The process of State interactions that crystallize in formal arbitral claims can generate authoritative decisions that become accepted as international law. The calculus by which a State decides to assert a formal claim and the attendant choice of arena, is strategic. The benefits and costs of that choice will have been carefully considered as will the cost and benefit of a default of appearance by the other party. In the South China Sea, the opening strategic choices have been made and the arbitration has now been inserted into the constitutive process of the World Public Order of the Oceans.

AN AMERICAN POSITION ON ASIAN MARITIME FEATURES

On August 3, 2012, the U.S. Department of State issued a press statement on the U.S. position on territorial and maritime disputes in the South China Sea, as follows:

> As a Pacific nation and resident power, the United States has a national interest in the maintenance of peace and stability, respect for international law, freedom of navigation, and unimpeded lawful commerce in the South China

Sea. We do not take a position on competing territorial claims over land features and have no territorial ambitions in the South China Sea; however, we believe the nations of the region should work collaboratively and diplomatically to resolve disputes without coercion, without intimidation, without threats, and without the use of force.

We are concerned by the increase in tensions in the South China Sea and are monitoring the situation closely. Recent developments include an uptick in confrontational rhetoric, disagreements over resource exploitation, coercive economic actions, and the incidents around the Scarborough Reef, including the use of barriers to deny access. In particular, China's upgrading of the administrative level of Sansha City and establishment of a new military garrison there covering disputed areas of the South China Sea run counter to collaborative diplomatic efforts to resolve differences and risk further escalating tensions in the region.

The United States urges all parties to take steps to lower tensions in keeping with the spirit of the 1992 ASEAN Declaration on the South China Sea and the 2002 ASEAN-China Declaration on the Conduct of Parties in the South China Sea. We strongly support ASEAN's efforts to build consensus on a principles-based mechanism for managing and preventing disputes. We encourage ASEAN and China to make meaningful progress toward finalizing a comprehensive Code of Conduct in order to establish rules of the road and clear procedures for peacefully addressing disagreements. In this context, the United States endorses the recent ASEAN Six-Point Principles on the South China Sea.

We continue to urge all parties to clarify and pursue their territorial and maritime claims in accordance with international law, including the Law of the Sea Convention. We believe that claimants should explore every diplomatic or other peaceful avenue for resolution, including the use of arbitration or other international legal mechanisms as needed. We also encourage relevant parties to explore new cooperative arrangements for managing the responsible exploitation of resources in the South China Sea (US Department of State 2012).

THE PUBLIC ORDER OF THE OCEANS: A COMMON INTEREST?

UNCLOS was intended to stabilize expectations, that is, to ensure a stream of prescribed outcomes as understood by the parties. The process of agreement flows from and is undertaken in, a factual content, and formalizes reciprocally beneficial commitment to collaborative behavior. The moment of formulation of a treaty between parties represents a comparatively high level of consensus that may later shift owing to performance or non-performance of original terms. This is a risk the world community faces in Asian Seas.

It is in the dynamic nature of international law, including the international law of the sea, that prescriptions do not remain constant. Conflicting demands, expectations and a stream of outcomes spawned by international incidents can cause norms to be terminated. This is why flows of behavior in the international system must be appraised against clarified world public order goals. Elite responses to claims and incidents can have a corroding effect upon prescriptions. At the very least, norms can erode over time. Daniel Bell wrote, "[T]he future is not an overarching leap into the distance; it begins in the present" (Bell 1967). Anyone seriously concerned with contemporary Asian seas events should ask about the present with a view to the future, "Who says what, in which channel to whom, with what effect?" (Lasswell 1964) The extent to which particular laws advance the common interest of the community, or discriminate in favor of a particular group in large measure depends on the distribution of power in the community. Asian sea actors seek to enhance power through a variety of means including the establishment of policy as law. A cautionary tale is that of Thrasymachus in Plato's *Republic* who declared "I say that justice, or right, is simply what is in the interest of the stronger party" (Plato 338c).

When community expectation is such that a decision is authoritative, the decision-maker has license to create and maintain practices and institutions. Authority joined with control or power, can establish and maintain processes of authoritative decision which amount to public order (McDougal, Reisman & Willard 1985). A cumulative pattern of authority develops a logic of its own. That process is unfolding in Asian Seas today. Law is a "process of human beings making choices" (Reisman & Schreiber 1987). The laws of the community are decision outcomes consistent with community members' expectations about what is right and effective. It is through that process that disputes over marine space and maritime features might be resolved in the greater common interest. The capacity to contribute to, and advance that outcome, will turn on how the observer or participant understands and uses law and legal theory that pertain to the oceans, that is, jurisprudence.

References

Brownlie, Ian (2008). *Principles of Public International Law*. London, UK: Oxford University Press.

Bell, Daniel (1967). The year 2000—the trajectory of an idea. *Daedalus* 96(3), 639-51.

Commission on the Limits of the Continental Shelf (2009, April 20) Statement by the chairman of the commission on the limits of the continental shelf on the progress of work in the commission. Retrieved from http://www.un.org/Depts/los/clcs_new/commission_documents.htm.

Commission on the Limits of the Continental Shelf (2009, May 6). Joint submission to the CLCS by Malaysia and Viet Nam in the southern portion of the South China Sea. Retrieved from http://www.un.org/Depts/los/clcs_new/submissions_files/submission_mysvnm_33_2009.htm.

Dillard, H. (1964). The policy-oriented approach to law. *Virginia Law Review* 40(4).

Diogenes, Laertius (1925). *Lives of Eminent Philosophers*. New York, USA: Loeb Classic Library.

Eritrea/Yemen Arbitration (1998) Retrieved from http://untreaty.un.org/cod/riaa/cases/vol_XXII.

Faulkner, William (1951) *Requiem for a Nun*. New York, USA: Knopf Doubleday.

Fitzmaurice, Sir Gerald (1953). The law and procedure of the International Court of Justice. *British Yearbook of International Law* 30.

Grotius, Hugo (1916). *The Freedom of the Seas*. New York, USA: Oxford University Press.

International Court of Justice Report (1953). The Minquiers and Ecrehos Case (France v. United Kingdom). Retrieved from http://www.icj-cij.org/docket/files/17/2023.pdf.

International Court of Justice Report (1984). Delimitation of the maritime boundary in the Gulf of Maine area, Judgment, p. 24. Retrieved from http://www.icj-cij.org/docket/files/67/6369.pdf.

International Court of Justice Report (1986). Frontier dispute, Judgment, p. 554. Retrieved from http://www.icj-cij.org/docket/files/69/6447.pdf.

International Court of Justice Report (2007). Territorial and maritime dispute in the Caribbean Sea (Nicaragua v. Honduras), Judgement.

International Court of Justice Report (2009). Maritime delimitation in the Black Sea (Romania v. Ukraine), Judgment, p. 61. Retrieved from http://www.icj-cij.org/docket/files/132/14987.pdf.

International Court of Justice Report (2012). Territorial and maritime dispute (Nicaragua v. Colombia), Judgement. Retrieved from http://www.icj-cij.org/docket/files/124/17164.pdf.

Lasswell, Harold (1964). The structure and function of communication in society. Lyman Bryson. (Ed.), *The Communication of Ideas.* New York, USA: Knopf.

McDougal, Myres S. & William T. Burke (1987). *The Public Order of the Oceans: A Contemporary International Law of the Sea*. New Haven, USA: Yale University Press.

McDougal, Myres S. & Harold Lasswell. (1971) Criteria for a theory about law. *Southern California Law Review* 2, 362.

McDougal, Myres S. & W. Michael Reisman (1981). The world constitutive process of authoritative decision. Myres S. McDougal & W. Michael Reisman (Eds.), *International Law Essays*. Mineola, USA: Foundation Press.

McDougal, Myres S., W. Michael Reisman & Andrew Willard (1985). The world process of effective power: The global war system. Myres S. McDougal & W. Michael Reisman (Eds.), *Power and Policy in Quest of Law.* Dordrecht, Netherlands: Martinus Nijhoff Publishers.

Office of the Legal Adviser United States Department of State (2009). *Digest of United States Practice in International Law 2009*. Elizabeth R. Wilcox (Ed.). London, UK: Oxford University

Press. Retrieved from http://www.state.gov/documents/organization/155452.pdf.
People's Republic of China (2009, May 7). Diplomatic note to the Un Secretary-General, Doc. CML/17/2009. Retrieved from http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/ chn_2009re_mys_vnm_e.pdf.
People's Republic of China (2011, April 14). Diplomatic note to the Un Secretary-General, Doc. CML/8/2011. Retrieved from http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2011_re_phl_e.pdf.
People's Republic of China (2011, August 3). Note verbale to the UN Secretary-General, Doc. CML/59/2011. Retrieved from http://www.un.org/Depts/los/clcs_new/submissions_files/jpn08/chn_3aug 11_e.pdf.
People's Republic of China, Assistant Foreign Minister Le Yucheng (2012, September 14). Remarks at the China Institute of International Studies, Beijing Youth Federation and Xinhuanet Symposium on the issue of Diaoyu Dao [Diaoyutai]. Retrieved from http://www.chinese-embassy.org.za/eng/zt/topic1/t971220.htm.
People's Republic of China Maritime Legislation. Retrieved from http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN_1992_Law.pdf.
People's Republic of China's baseline statement. Retrieved from http://www.un.org/Depts/los/.
Permanent Court of Arbitration (2015, October 29). Award on jurisdiction and admissibility, Republic of Philippines v. The People's Republic of China, Case No. 2013-19. Retrieved from http://www.pcacases.com/web/sendAttach/1506.
Permanent Court of International Justice (1933). *Legal Status of Eastern Greenland*. Leiden, Netherlands: A. W. Sijthoff's Publishing Company. Retrieved from http://www.icj-cij.org/pcij/serie_AB/AB_48/01_Groenland_ordonnance_1932080.pdf.
Philippine (2013, January 22). Diplomatic note to the Chinese Embassy in Manila Doc. 13-0211. Retrieved from https://www.dfa.gov.ph/index.php/2013-06-27-21-50-36/unclos.
Philippine (2013, January 22). Notification and statement of claims, paras. 6 & 7. Retrieved from https://www.dfa.gov.ph/index.php/2013-06-27-21-50-36/unclos.
Plato. *The Republic*, 338c.
Reisman, W. Michael (1971). *Nullity and Revision, The Review and Enforcement of International Judgments and Awards*. New Haven, USA: Yale University Press.
Reisman, W. Michael (1981). Private armies in a global war system: Prologue to decision. Myres S McDougal & W. Michael Reisman (Eds.), *International Law Essays*. Mineola, USA: Foundation Press.
Reisman, W. Michael & Aaron Schreiber (1987). *Jurisprudence: Understanding and Shaping Law.* New Haven, USA: New Haven Press.
Republic of Korea (2011, August 11). Note verbale to the UN Secretary-General. Retrieved from http://www.un.org/Depts/los/clcs_new/submissions_files/jpn08/kor11aug11.pdf.
Roach, Ashley (2013). China's straight baseline claim: Senkaku (Diaoyu) Islands. *ASIL Insights* 17(7). Retrieved from http://www.asil.org/pdfs/insights/insight130213.pdf.
Talmon, Stefan & Bing Bing Jia (Eds.) (2014). *The South China Sea Arbitration: A Chinese Perspective*. Oxford, UK: Hart Publishing.
United Nations Office of Legal Affairs (1982). United Nations Convention on the Law of the Sea.
United States Dpartment of State Bureau of Oceans and International Environmental and Sci-

entific Affairs (1996, July 9). Straight baseline claim: China. *Limits in the Seas*, No. 117. Retrieved from http://www.state.gov/documents/organization/57692.pdf.

United States Dpartment of State Bureau of Oceans and International Environmental and Scientific Affairs (1998, April 30). Straight baseline and territorial sea claims: Japan. *Limits in the Seas*, No. 120. Retrieved from http://www.state.gov/documents/organization/57684.pdf.

Van Dyke, Jon (2007). Legal issues related to sovereignty over Dokdo and its maritime boundary. *Ocean Development and International Law* 38, 157.

Shinzo Abe's Scheme of Staking Territorial Claims to Korea's Dokdo

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Abstract

This paper analyzes how current Japanese Prime Minister Shinzo Abe is promoting revisionist policies on education and security with the view toward staking a Japanese territorial claim to Korea's Dokdo. Abe's revisionism and rightwing nationalism can be seen in his artificial plan to solidify Japan's territorial claim to Dokdo. Abe's scheme, which follows a step-by-step pattern, is to politicize the Dokdo issue domestically and to bring global attention to Dokdo as a territorial dispute between South Korea and Japan. In the interim, Abe hopes to construct an artificial logic to explain the Japanese territorial claim to Dokdo, a rationalization that would fend off any Korean government objections, and that would accumulate evidence for a review by the International Court of Justice. Abe's longer-term goal is to use his education policy to whitewash Japan's imperial wartime history from textbooks and to socialize the Japanese people into a misguided sense of nationalism and erroneous ideas about Dokdo.

Keywords

Dokdo, Shinzo Abe, territorial claim, Korea, Japan

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INTRODUCTION

As many scholars had predicted and the general public had early on expected, Japanese Prime Minister Shinzo Abe has been pushing an ultra-nationalist policy agenda designed to boost a spirit of domestic cohesion in Japan. He has promulgated a revisionist perspective of Japanese wartime history that has unwittingly served to remind neighboring countries of the brutality of Japan's imperialistic past. The most serious aspect of Abe's revisionist historical viewpoint is his questioning the 1993 Kono Statement (Ministry of Foreign Affairs of Japan 1993) on the use of comfort women and the 1995 Murayama Statement (Ministry of Foreign Affairs of Japan 1995) on the need for Japan to apologize to the victims of its colonial past. Abe's revisionist view has been met by fierce global criticism and pressure from neighboring Asian countries and from the United States, which see Abe's denial of these two statements as undermining the Japanese peoples' sincere and deep remorse for Imperial Japan's past misdeeds during colonial rule. A number of widely-known historians and scholars have demanded that Abe and his cabinet correctly address Japan's colonial rule and wartime aggression (Hyashi 2015). In addition, when Abe addressed the joint session of the United States Congress on April 29, 2015, a number of protesters called upon him to apologize for Japan's wartime atrocities.

Although Abe has professed a commitment to improving relations with the Republic of Korea, certain of his behaviors have consistently provoked the Korean people. Abe reversed a precedent set by former Japanese Emperor Hirohito and current Emperor Akihito to refrain from visiting the Yasukuni Shrine after the remains of 14 Class-A war criminals were moved there in 1978. Instead, Abe visited the Shrine on December 26, 2013, on the occasion of the first anniversary of the second premiership. Abe's revisionist education and security policies manipulate the Japanese people into a false belief of Japanese wartime history and mislead them into supporting Japan's claim to Korea's territory of Dokdo. As sovereign territory of Korea, Dokdo is located in the East Sea, 87.4 km (47.2 nautical miles) east of Ulleungdo, Korea. As part of its imperialist agenda, Japan illegally incorporated Dokdo into its territory in 1905. After Japan was defeated in World War II, Dokdo was returned to Korea. However, several rightwing Japanese politicians, as well as Abe recently, have stretched the bounds of logic to question Korean sovereignty over Dokdo.

Abe deliberately promotes this territorial claim as a way to increase his

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popularity at home by appealing to Japanese nationalism. Since he became prime minister in 2012, Abe and his cabinet have insisted that Dokdo belong to Japan, vowing to use international law to make their case. Abe, for the first time in Japanese history, established the Office of Policy Planning and Coordination on Territory and Sovereignty (OPPCTS), elevating management of the Dokdo issue to the level of a governmental organization. He also for the first time sent a central government representative to the 2013 Takeshima Day ceremony. The Abe cabinet forced textbook publishers to include untrue information supporting Japan's territorial claim over Dokdo. The Abe cabinet repeated this wrongful claim in the 2013, 2014, and 2015 Diplomatic Bluebook (Yonhap News, April 7, 2015). Abe's territorial claim to Dokdo severely undermines any expectation of comity between Korea and Japan. Furthermore, as with most right-wing Japanese politicians, Abe cabinet members tout Dokdo as a cohesive symbol of nationalism. Abe's dangerous revisionism and right-wing nationalist position have increased tensions between Korea and Japan. Abe's scheme to stake a territorial claim over Korean sovereignty of Dokdo has been a thorny issue between Korea and Japan.

Why does the current Abe cabinet continue to push such a fictitious and incorrect territorial claim, ignoring solid historical foundation and legal evidence supporting Korean sovereignty over Dokdo? (see H Lee 1998; Choi 2005; Van Dyke 2007; S Kim 2010; S Lee & Van Dyke 2010; Bae 2012). To what end does Abe push revisionist education and security policies relative to Japan's territorial claim to Korea's Dokdo? Can we probe the mindset behind such a murky territorial claim? This paper purports to investigate these research questions. Section II examines Abe's political background and political ideology behind his revisionist policies on education and security regarding the Japanese territorial claim to Dokdo. Section III analyzes the kind of measures that Abe has implemented in order to increase awareness of Dokdo as a territorial dispute and Abe's scheme to stake territorial claims over Korea's Dokdo in three broad levels. The conclusion suggests a brief policy proposal as a response to Abe's revision policy on Dokdo.

THE POLITICAL BACKGROUND OF SHINZO ABE'S LEADERSHIP AND REVISIONIST POLICIES

In order to understand how Shinzo Abe defines his political ideology and establishes his revisionist policy, we need to examine his family background and his first tenure as Japanese prime minister. Shinzo Abe's elite family background heavily influences his political ideology. His father, Shintaro Abe, occupied several ministerial positions during the 1970s and 1980s. Abe's grandfather Nobusuke

Kishi, his role model, was prime minister from 1956 to 1960. Kishi was an imperialist who built the State of Manchuria, a puppet state of Japan in Northeast China, into a labor and natural resource base for Japan. As one of the founding members of the Ministry of International Trade and Industry (MITI), Kishi sought to industrialize Japan. He also sought to revise the peace constitution that the United States had constructed as a way for post-World War II Japan to renounce militarism and build a democracy. Following in the footsteps of his grandfather who wished to elevate Japan to global power and glory, Abe tried, by amending Article 9 of the Japanese constitution (Hayashi 2014; Mishima 2007, 32), to transform the country into a normal state with a military that could wage war with other nations.

Shinzo Abe began his political career in 1993 when he was elected to the House of Representatives. His first stint as prime minister was for one year, from September 2006 until August 2007. Although Abe, as a young promising leader, enjoyed a high approval rating upon first assuming office, he was not an effective leader. Contrary to Abe's policy priorities of using the education system to promote patriotism and to transform Japan into a normal state, the Japanese people wanted him to solve the problem of stagnant economic conditions at the time. However, Abe did not meet this basic demand and failed to manage the pension crisis. In addition, several of his cabinet members were involved in a series of political and financial scandals. In the end, Abe lost the confidence of the Japanese people and stepped down within a year (Envall 2011, 158-162). Abe's failure motivated him to pursue new policy priorities. He reflected on the failures of his first term and contemplated how to pursue his policy agenda in his second term. The House of Representatives elected him prime minister again in December 2012 and to a third term in 2014 by a two-thirds majority. In his second and third terms, Abe focused on reviving the Japanese economy with ongoing policy reforms.

During Abe's formative years from the mid-1950s to the 1980s, Japan's postwar economy outstripped that of other advanced countries, becoming the world's second largest economy after the United States. Basking in the glow of this economic miracle, Abe's pride in his country carried with it questions of why Japan should depend on the United States for national security under the Treaty of Mutual Cooperation and Security between the United States and Japan. He might have been frustrated by the fact that the world's second largest economy was unable to pursue its own independent security policy. As did his grandfather Kishi in trying to revise the Japanese constitution, Abe sought to revise Article 9 of the Japanese constitution. Abe is also of a generation of politicians that saw first-hand more than two decades of economic stagnation (Lost Decade) beginning in the 1990s. As a way of coping with economic stagflation, Abe advocates very aggressive economic management using a three pillars approach; boosting government spending, increasing monetary supply, and reforming the economic structure (Abenomics). His book, *Utukushii Kuni e* (Toward a Beautiful Country 2004), revealed his political ideology. Abe preaches that Japan deserves appreciation for its achievements in economy, technology, and for its peace-loving nature. He believes that in order to defend Japanese honor, territory, and property, the country should maintain a strong Self-Defense Forces (SDF) (Inoguchi 2014, 105). Abe's political ideology is based on three characteristics: 1) breaking with the old legacy of World War II through reinterpretation of history, 2) a fair appreciation of Japan's economic success, and 3) a pro-business and non-interventionist government (Mishima 2007, 32).

Born in 1954, Abe is the youngest prime minister in Japan's modern political history (see Profile of the Prime Minister 2015). He did not live through the disasters of World War II. Unlike most older Japanese who are remorseful about the militarism that inflicted suffering on neighboring countries and led to the U.S. atomic bombing of Hiroshima and Nagasaki, Abe might not understand the wartime history of Japan and empathize with the older generation's trauma. Lacking this genuine introspective view of history, he may attempt to suppress the memory of brutal Japanese imperialism. Following the ideology of Nippon Kaigi, a right-wing revisionist organization, Abe alleges that Japanese troops were never involved in the 1937 Nanjing massacre and were not directly engaged in forcing innocent women into sex slavery during World War II (Kato 2014). Abe has been reluctant to fully accept Kono's statement that the "Japanese military was, directly or indirectly, involved in the establishment and management of the comfort stations and the transfer of comfort women…in many cases they were recruited against their own will, through coaxing, coercion…" (Ministry of Foreign Affairs of Japan 1993). Abe has partially recanted the Japanese government's apology for the brutal acts of colonial rule and aggression, which had been officially stated by former Prime Minister Murayama Tomiichi in 1995 (Ministry of Foreign Affairs of Japan 1995).

> ...we tend to overlook the pricelessness and blessings of peace. Our task is to convey to younger generations the horrors of war, so that we never repeat the errors in our history…we should bear in mind that we must look into the past to learn from the lessons of history, and ensure that we do not stray from the path to the peace and prosperity of human society in the future. … Japan, following a mistaken national policy, advanced along the road to war, only to ensnare the Japanese people in a fateful crisis, and, through its colonial rule and aggression, caused tremendous damage and suffering to the people of

> many countries, particularly to those of Asian nations. In the hope that no such mistake be made in the future, I regard, in a spirit of humility, these irrefutable facts of history, and express here once again my feelings of deep remorse and state my heartfelt apology. Allow me also to express my feelings of profound mourning for all victims, both at home and abroad, of that history. … Building from our deep remorse on this occasion of the 50th anniversary of the end of the war, Japan must eliminate self-righteous nationalism, promote international coordination as a responsible member of the international community and, thereby, advance the principles of peace and democracy. At the same time, as the only country to have experienced the devastation of atomic bombing, Japan, with a view to the ultimate elimination of nuclear weapons, must actively strive to further global disarmament in areas such as the strengthening of the nuclear non-proliferation regime. It is my conviction that in this way alone can Japan atone for its past and lay to rest the spirits of those who perished (Ministry of Foreign Affairs of Japan 1995).

Abe's revisionist view of history helps to explain his rationalization of the Yasukuni Shrine as similar to Arlington National Cemetery in the United States (Tepperman 2013, 2-8). He thus switches from the role of an aggressor to that of a defender in World War II. After frequently expressing regret about not visiting Yasukuni during his term, Abe ultimately followed up on this intention. Even though current Emperor Akihito and former Emperor Hirohito refused to visit Yasukuni, Abe went to the Shrine on December 26, 2013 (The New York Times, December 27, 2013; March 3, 2014). He further argued that the visit was an anti-war gesture expressing hope that people would not suffer war again (BBC, December 26, 2013). This revisionist wartime history has brought Abe strong support from right-wing factions, but such a dangerous and abnormal nationalism exacerbates an already strained relationship with Korea and China.

His revisionism and political ideology are an operational code for implementing or redesigning education and security policies. His ultra-nationalism and revisionist historical viewpoint pushed him forward in his quest to change the foundation of traditional civic education. The traditional Japanese education system, which provided imperialist and Confucianist thought during the pre-WWII period, was replaced by the *Fundamental Law of Education* (教育基本法, kyoiku kihonho) in 1947 (Horio 1994, 25-26) under the guidance of the Supreme Commander for the Allied Power (SCAP). The purpose of post-World War II law was to eliminate the legacy of Japanese imperialism and to provide the foundation of a democratic culture for Japanese students. Abe, however, sees the educational system as a way to promote Japanese patriotism. During his first term in 2006, Abe amended the law and inserted a new education goal of "love of country and homeland." In keeping with this guideline, the Abe cabinet strictly screened textbook content beginning in 2006. For example, the sentence "Imperialist Japanese Army was responsible for the abducting and enslaving" was changed from active to passive voice—"women being abducted and turned into sex slaves" in order to minimize the responsibility of Japan. Although Abe vehemently objects to the prevailing narrative, it is an undeniable historical fact that the Japanese government forced and even kidnapped Asian females to serve as sex slaves for Japanese soldiers until the end of World War II in 1945. Under pressure from the Education Ministry, textbook publishers had to delete the word "massacre" from the "Nanjing massacre" and were forced to describe as uncertain the number of victims. In addition, the publishers had to describe the Korean territory of Dokdo as Japanese territory (Yoshifumi 2015; McCormack 2014, 79-80).

Under Abe's current term, the Education Ministry applied new rules for textbook editions and authorized school textbooks on April 6, 2015. Textbook publishers must adopt the government's official viewpoint in certain topics. Ignoring facts, Japanese textbooks must contain incorrect historical events and the distorted historical viewpoints of right-wingers. Nowadays, most of the textbooks have to use such expressions as "South Korea illegally occupies the Takeshima islands" and "territory that is an inherent part of Japan" (Asahi Shimbun, April 7, 2015). Given that junior-high school students tend to accept instruction from their textbooks or teachers unquestioningly, these screened textbooks might imbue the young generation with blind Japanese chauvinism.

Abe's plan to amend Article 9 of the Japanese Constitution is another move that creates severe anxiety among Asian neighbors concerned about the imminent emergence of a neo-imperial Japan. Article 9 has stood for Japan's strong commitment and desire for peace and prosperity with other nations. The clause stipulates that:

> Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes. In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized (See Article 9 of the Constitution of Japan).

Abe's plan to amend Article 9 was revealed in a 2013 interview with *Foreign Affairs* Managing Editor Jonathan Tepperman. Responding to Tepperman's question, "…

why you're interested in revising Japan's constitution?" Abe answered as follows:

> With regard to the issue of the right to collective self-defense, imagine that U.S. vessels on the high seas were being attacked and an armed ship, say an Aegis-type destroyer, from Japan, America's treaty ally, was just passing by. The arrangement we currently have in Japan does not allow the destroyer to make any response whatsoever. That is insane (Tepperman 2013).

Abe continued to pressure his cabinet to approve a reinterpretation of Article 9 relaxing the prohibition on Japan's use of force. Abe wished to circumvent the democratic revision process of the Constitution, which requires a vote of two-thirds of each Diet and then another simple majority vote by the people, through cabinet decision. Abe's first goal was achieved when his cabinet allowed the SDF to exercise "the right to collective self-defense." On May 15, 2014, Abe announced that Japan is now able to dispatch the SDF to defend U.S. vessels which "are evacuating Japanese citizens from a conflict area" (Asahi Shimbun, May 15, 2014). Abe's intention also coincided with U.S interest in curbing China's rising naval power in the Southeast China Sea. On April 27, 2015, the United States and Japan revised *the Guidelines for U.S.-Japan Defense Cooperation* (2015), in which SDF can exercise the use of forces for self-defense and collective-defense.

> The Self-Defense Forces will have primary responsibility for the protection of major ports and straits in Japan and of ships and vessels in waters surrounding Japan and for other associated operations. For this purpose, the Self-Defense Forces will take necessary actions, including, but not limited to, coastal defense, anti-surface warfare, anti-submarine warfare, mine warfare, anti-air warfare, and air interdiction (See the Guidelines for U.S.-Japan Defense Cooperation 2015, 13).

Article 9 of the Constitution bans SDF's participation in collective self-defense as well as the use of armed forces in overseas operations, but Abe's revisionist policy undermines this spirit of peace. The most serious problem is that Abe himself and his cabinet members may not clearly understand the limitation of use of force by the SDF under the revised Guidelines. On May 25, 2015, a day before the effective date of the Japanese national security bill, Chief Cabinet Secretary Yoshihide Suga addressed a possible pre-emptive strike on other countries' military bases, apparently having in mind North Korea's missile bases and nuclear facilities. Suga said "[h]itting missile bases falls within legal limits for self-defense, and there have been Diet responses to that effect" (Miwa 2015). What would happen if the SDF launched preemptive attacks on North Korea's military facilities under the Japanese estimated range of security threat without consulting South Korea? If the SDF, like a runaway horse, were to use military means against the South Korean navy near Dokdo, which side does the United States take? Thus, there is a fair chance that Abe's revisionist policy could bring serious legal issues in domestic as well as international law in the near future. In early June 2015, a phalanx of critics emerged in Japan, energizing opposition to the security reforms. The bills remove geographic restriction on where the SDF could operate and allow Japan to defend its allies even when Japan itself is not under attack, under the principle of collective security. Critics fear Japan will be drawn into a United States-led war (Reuters, July 15, 2015). The bills also lack public support, with citizens wondering why it is needed. More than 200 constitutional scholars in Japan have joined a statement calling the legislation unconstitutional and demanding it be dropped, with the Japanese Bar Association issuing a similar statement (The Associated Press, June 10, 2015). In spite of mass oppositions, Abe's LDP and his allies approved the 11 security-related bills in the lower house on July 15, 2015 (Sobel 2015) and in the upper house on September 19, 2015 (Asahi Simbun), paving the way for the SDF to be involved in war mission overseas for the first time since World War II.

SHINZO ABE'S SCHEME TO STAKE TERRITORIAL CLAIM OVER KOREA'S DOKDO

During his second term, Abe has taken various measures regarding Dokdo. Those measures include an official announcement of his intention to file the Dokdo issue to the ICJ, inserting Dokdo as a Japanese territory in school textbooks, installing the Office of Policy Planning and Coordination on Territory and Sovereignty (OPPCTS) to manage the Dokdo issue at the government level, sending central government representatives to the ceremony of Takeshima Day in Shimane Prefecture, conducting a public opinion survey on Dokdo, and continually making wrongful territorial claim over Dokdo in the Diplomatic Bluebook and the Defense White Paper. These Dokdo related measures may appear to be utterly disconnected, but are, in fact, an elaborately planned operation by Abe's cabinet. As examined in the previous section, Abe's revisionist policies on education and security are serving as a framework for his erroneous territorial claim over Dokdo. In other words, one major hidden goal of Abe's revisionist policies is to mislead the Japanese people into supporting an erroneous Japanese territorial claim over Korea's Dokdo. In order to solidify Japanese claims over Dokdo, Abe has constructed an artificial rationalization.

Abe's transparent scheme can be disaggregated into three broad levels. In the short-term, Japan intends to politicize the Dokdo issue domestically and to increase international awareness on the issue as a territorial dispute between South Korea and Japan by using various step-by-step approaches. Domestically, Abe believes that a series of nationalist gestures on the Dokdo issue can appeal to his conservative right-wingers in order to gain firm political support. Abe also wishes to take advantage of the Dokdo territorial claim to divert criticism from stagnated economic conditions. The Abe cabinet is devising various strategies of propagandizing the Dokdo issue. Regrettably, Abe is the first prime minster to send a central government representative to the ceremony of Takeshima Day in Shimane Prefecture (Asahi Simbun, February 23, 2013). Moreover, Abe continued to send government officials to the ceremony in 2014 and 2015 (Asahi Simbun, February 23, 2015). All previous Japanese prime ministers had refrained from sending a central government official to the ceremony since the day was designated on March 16, 2005, in a diplomatic consideration to avoid a provocation of the South Korean government (Choe 2014). As such, Abe's action did not match his words in proposing a summit meeting as a conciliatory gesture to Korea. Because Dokdo is "an integral part of Korean territory historically, geographically and by international law," the Korean government consistently and firmly resists against any measure to impinge upon its sovereignty over the island (see Ministry of Foreign Affairs of the Republic of Korea, February 22, 2013). Abe's cabinet also produced, and circulated over YouTube and various other Internet sources, video clips asserting its ownership over Dokdo. The Korean Ministry of Foreign Affairs summoned a Japanese diplomatic official and demanded Japan take down the video clips (Inocencio 2013). The Abe cabinet conducted an official survey regarding territorial claim over Dokdo and released the results on August 2, 2013. As the purpose of survey was not to measure public opinion on Dokdo issue but to increase public awareness of the issue, the Abe cabinet deliberately asked loaded questions, which led respondents to wrongly support Japanese ownership of the island (Sekiguchi 2013). Korea's Park Geun-hye government vigorously protested against the Abe cabinet that the survey is a provocative measure to challenge Korean sovereignty (Ministry of Foreign Affairs of the Republic of Korea, August 2, 2013). Regardless of such stern protests from Korean government, the Abe cabinet continued to supply erroneous information on Dokdo through the Diplomatic Blue Book (Yonhap News, April 7, 2015), the Defense White Paper (The Hankyoreh, January 22, 2015), and various Japanese governments' official websites and advertising pamphlets.

In a middle term plan, Abe hopes to develop an artificial logic supporting Japanese territorial claims over Dokdo and to systematically cope with any Korean government response. In the end, Japan wishes to compile various pieces of false evidence to support its territorial claim over Dokdo in order to prepare for a possible ICJ review. Like former Prime Minister Yoshihiko Noda, Abe declared in the Diet on January 30, 2014 that his cabinet was reviewing and preparing to submit the Dokdo issue unilaterally to the ICJ at the Plenary session of the House of Councillors (参議院) (see Japanese National Diet Record Search System). Abe's intention was not realized because both Korea and Japan must agree to submit the Dokdo case to the ICJ. The Korean government's official view is firm that Dokdo is an integral part of Korean territory by virtue of history, geography, and under international law. Therefore, Seoul's position is that no territorial dispute exists regarding Dokdo. The United States also pressured the Abe cabinet to maintain close cooperation with the Korean government to deter a North Korean nuclear threat and the rise of China in the Northeast Asian region. As a way to manage territorial issues and to promulgate the artificial logic of a Japanese territorial claim to Dokdo, Abe created the OPPCTS. OPPCTS deals with territorial issues, such as the Dokdo/Takeshima island, the Senkaku/Diaoyutai islands, and the Southern Kuril islands/Northern territories, at the level of a governmental agency. The "Advisory Panel on Communication Concerning Territorial Integrity," organized under OPPCTS in April 2003, serves as a forum within which Japanese experts in international relations, international law, and history can efficiently communicate with each other as they develop a series of arguments to counter any territorial claims made by foreign governments. After working from July 2013 to June 2015, the Advisory Panel submitted a summary report of its findings, which also included recommendations for how the Japanese government should deal with the international and domestic context of Japanese territorial claims (see the homepage of the OPPCTS). Furthermore, the OPPCTS enlisted the aid of college professors to conduct research on how to solidify its territorial claim (see FY2014 Cabinet Secretariat Commissioned Research Project 2015). This research is to be utilized in education material for Japanese students and citizens.

Lastly, in the longer-term perspective, Abe hopes to use textbook screening to whitewash Japan's imperial wartime history and to brainwash the people into a misguided sense of nationalism and erroneous ideas about Dokdo. As a way of imbuing young Japanese students with erroneous belief about Korea's Dokdo, the Education Ministry approved teaching manuals for junior high school textbooks that present Dokdo as Japanese territory (Oka 2014). Under instruction from Abe's cabinet, Japanese middle school textbooks introduced a significant revision of the earlier description of Dokdo. The textbooks describe Dokdo as Japan's sovereign territory that has been illegally occupied by Korea. The Korean Ministry of Foreign Affairs protested that "for the Japanese government to continue to inculcate young minds with a view of territory that is based on distortions is tantamount to a threat to repeat the mistakes of the past" (The Hankyoreh, April 7, 2015). However, Japan's repetitious references to territorial claim over Dokdo will mislead the Japanese people into a belief that Korea illegally occupies Dokdo. If Japan's younger generation does not learn the historical truths about how their past government invaded neighboring countries and attacked Pearl Harbor, their ancestors' brutal occupation of Asian nations, and how the military regime forced tens of thousands of innocent women into sex slaves, they are vulnerable to have blind faith in Japanese nationalism. Japan's rightwing forces and Abe are predisposed to believe that Japan was unfairly and incorrectly slandered by the United States after WWII. They assert that Japan has been sufficiently punished by the United States to compensate for any past atrocity against its Asian neighbors. They insist erroneously that the Asian Women's Fund is enough to atone for their ancestors' brutal treatment of these women. Their large financial contribution to the Official Development Assistance would be a strong foundation to demonstrate that the country is a responsible middle power in the world. Furthermore, Abe hopes to establish Japan as a 21st century leader, able to support the United States to counter a rising China (The New York Times, April 20, 2015). If Abe is unable to dispel his revisionist views of wartime history, his plan to make Japan a proactive contributor to peace would be nothing more than a daydream.

CONCLUSION

Abe's revisionist policy is partially aligned with Japan's conservative Liberal Democratic Party's wish to increase global awareness on the Dokdo issue as a territorial dispute between Korea and Japan in order to boost domestic popularity by appealing to Japanese nationalist sentiment. Under an elaborate scheme to implant the misguided belief of Japan's territorial claim on Korea's Dokdo, Abe has pursued a three-phase plan. In the short-term, Abe's dispatch of government officials to the ceremony of Takeshima Day, the wrongful territorial claim over Dokdo in the Diplomatic Blue Book and the Defense White Paper, and conducting a public opinion survey were designed to publicize the Japanese territorial claim over Dokdo. In the mid-term, Abe installed the OPPCTS as a government organization and began several research projects on Dokdo in order to develop an artificial logic to counter the reality of Korean sovereignty of the island. In the longer-term, Abe hopes to indoctrinate students with his revisionist wartime history and erroneous territorial claim of Dokdo using a system of textbook screening.

Abe's electoral victory in December 2014, which secured a new two-thirds majority of the ruling coalition (the Liberal Democratic Party and the Komeito) in the House of Representative, paved the way for his ambition to turn Japan into a normal state by amending Article 9 of the Japanese constitution. The recently passed national security bills and the revised U.S.-Japan defense guidelines heightened the Korean government's fears of the possibility of the SDF's deployment of military forces. Japan's minister of defense stated that the SDF would not launch military forces in another country's territory without consent of the concerned country. Consequently, Korea has a growing unease that Japanese ultranationalist right-wingers might risk using naval forces against the Korean navy near Dokdo or against the Chinese navy near the Senkaku/Diaoyutai islands as hawkish Japanese factions carried out aggressive wars in the past. In order to prevent such a disastrous territorial conflict, the Korean government must maintain close diplomatic communication channels with the United States and Japan.

If Abe is a rational leader, he definitely recognizes that his wrongful territorial claim over Dokdo severely undermines cooperative international relations between Korea and Japan. However, Abe will not retreat from his position. Furthermore, the Korean government had been avoiding a summit meeting with Abe unless he sincerely apologized for Japan's colonial rule and acknowledged the Japanese military's role in forcing women into sex slavery. Recently, Abe reluctantly complied with a U.S. demand that Japan and South Korea maintain close cooperation to deal with a rising China and with North Korea's nuclear threats. The reality is that both South Korea and Japan must cooperate closely with the United States in the face of security threats from North Korea's ambition of developing long-range missile and nuclear weapons. On November 2, 2015, President Park and Abe had a summit meeting at the Blue House in Seoul, Korea. Both leaders agreed that the issue of Japan's wartime sex slavery should not be an obstacle for future relations between the two countries and the issue should be resolved through negotiations in a way that is acceptable to the wounded parties (Kim 2015).

Because Abe hopes to negotiate with South Korea in order to resolve the wartime sex slavery issue in the near future, he might be hesitant to provoke the South Korean government by staking a territorial claim over Dokdo in these days. However, Abe might use the Dokdo issue again as a scapegoat when confronted with severe domestic political unrest. From August 2015 until now, a number of Japanese intellectuals and tens of thousands of Japanese citizens have protested against Abe's security bills and revisionist policy. If Japanese opposition parties manage to unite with widespread public support, Abe might definitely use the Dokdo issue to divert public mistrust from his cabinet. In the end, South Korea has to confront Abe again.

How to deal with Abe's revisionist view and his scheme to stake a territorial claim over Korea's Dokdo is not an easy task. It might be painful for the Korean people to ignore Abe's continuous provocative territorial claim to Dokdo, but, for now, ignoring him would be a practical way to deal with this provocation. When Korea's conservative media reported every measure of Abe's territorial claim to Dokdo, Koreans became emotional and overreacted to the actions of the Abe cabinet. However, the Korean peoples' reaction is precisely what the Abe cabinet and Japanese right-wingers wanted. They would never miss an opportunity to publicize these occurrences and exploit such Korean sentiment to encourage Japanese nationalism. Thus, imprudent reactions that appeal to national sentiment intuitively will backfire against the Koreans. Such a vicious cycle of action and reaction has driven Korea-Japan relations into a disastrous situation. For South Korea, responding to Abe's revisionism and erroneous territorial claim on Dokdo through diverse official diplomatic channels and international organizations is a time-consuming job, but likely to be most effective in the end.

References

The Asahi Shimbun (2015). Abe dispatches envoy to Takeshima Day Ceremony, drawing backlash from Seoul. Retrieved February 23, from http://ajw.asahi.com/article/behind_news/politics/AJ201502230047.

The Asahi Shimbun (2015). Abe pushes collective self-defense, vows to defend pacifist ideals in constitution. Retrieved May 15, from http://ajw.asahi.com/article/behind_news/politics/AJ201405150060.

The Asahi Shimbun (2015). Japan, S. Korea both show tough-soft approach to Takeshima Day Ceremony. Retrieved February 23, from http://ajw.asahi.com/article/behind_news/politics/AJ201302230061.

The Asahi Shimbun (2015). Raucous diet battle ends as upper house passes security bills. Retrieved September 19, from http://ajw.asahi.com/article/behind_news/politics/AJ201509190014.

The Asahi Shimbun (2015). Textbooks should make children think, not memorize government stance. Retrieved April 7, from http://ajw.asahi.com/article/views/editorial/AJ201504070038.

The Associated Press (2015). Constitutional questions grow over Japan PM's military plans. *The New York Times*. Retrieved June 10, from http://www.nytimes.com/aponline/2015/06/10/world/asia/ap-as-japan-military.html?_r=0.

Bae, Chinsoo (2012). Territorial issue in the context of colonial history and international politics: the Dokdo issue between Korean and Japan. *The Journal of East Asian Affairs* 26(1), 19-51.

The BBC (2013). Japan PM Shinzo Abe visits Yasukuni WW2 shrine. Retrieved December 26, from http://www.bbc.com/news/world-asia-25517205.

Choe, Sang-Hun (2014). Japan's premier seeks summit meeting with South Korean president. *The New York Times*. Retrieved September 19, from http://www.nytimes.com/2014/09/20/world/asia/japans-premier-seeks-summit-meeting-with-south-korean-president.html?_r=0.

Choi, Sung-jae (2005). The politics of the Dokdo issue. *Journal of East Asian Studies* 5.

Envall, H.D.P (2011). Abe's fall: Leadership and expectations in Japanese politics. *Asian Journal of Political Science* 19(2).

FY2014 Cabinet Secretariat Commissioned Research Project (2015). Commissioned research report on Takeshima-related documents in Shimane Prefecture. Retrieved from http://www.cas.go.jp/jp/ryodo_eg/img/data/archives-takeshima.pdf.

The Hankyoreh (2015). Korean translation of Japan's defense white paper claims ownership of Dokdo. Retrieved January 22, from http://www.hani.co.kr/arti/english_edition/e_international/674894.html.

The Hankyoreh (2015). More Japanese textbooks to refer to Dokdo as Japanese territory. Retrieved April 7, from http://english.hani.co.kr/arti/english_edition/e_international/685809.html.

Hayashi, Yuka (2014). For Japan's Shinzo Abe, unfinished family business: Grandfather's wartime legacy in China is a backdrop to sunday's election. *The Wall Street Journal*. Retrieved December 11, from http://www.wsj.com/articles/for-japans-shinzo-abe-unfinished-family-business-141835447.

Hayashi, Yuka (2015). Historians urge Japan to set war record straight: Strong rebuke of Shinzo Abe, debate over history of 'comfort women'. *The Wall Street Journal*. Retrieved May 7, from http://www.wsj.com/articles/historians-urge-japan-to-set-war-record-straight-1430999038.

Horio, Teruhisa (1994). *Education, Legislation and Economic Performance: the Case of Japan in Education and the Law: International Perspective*. Witold Tulasiewicz & Gerald Stowbridge (Eds.). New York, USA: Routledge.

Inocencio, Ramy (2013). How Japan is deploying YouTube as new weapon in dispute over island Chain. *CNN*. Retrieved October 25, from http://www.cnn.com/2013/10/25/world/asia/japan-youtube-video-weapon-disputed-islands/.

Inoguchi, Takashi (2014). Japan in 2013: Abenomics and Abegeopolitics. *Asian Survey* 54(1).

Japanese National Diet Record Search System (2014). 国会会議録検索システム. Retrieved January 30, from http://kokkai.ndl.go.jp.

Kato, Norihiro (2014). Tea party politics in Japan: Japan's rising nationalism. *The New York Times*. Retrieved September 13, from http://www.nytimes.com/2014/09/13/opinion/tea-party-politics-in-japan.html?_r=0.

Kim, Hong Nack (2014). Japanese-South Korean relations under the second Abe government, 2012-2014. *International Journal of Korean Studies* 18(1).

Kim, Hyung-Jin (2015). Leaders of South Korea, Japan put aside spat, agree to tackle resolution on wartime sex slaves. *Associated Press*. Retrieved November 2, from http://www.usnews.com/news/world/articles/2015/11/01/leaders-of-s-korea-japan-and-china-meet-in-rare-summit.

Kim, Sungbae (2010). Understanding the Dokdo issue: A critical review of the liberalist approach. *The Journal of East Asian Affairs* 24(2).

Lee, Han Key (1998). Korea's territorial rights to Tokdo in history and international law. *Korea Observer* 29(1).

Lee, Seokwoo & Jon M. Van Dyke (2010). The 1951 San Francisco Peace Treaty and its relevance to the sovereignty over Dokdo. *Chinese Journal of International Law*.

McCormack, Gavan (2014). Japan's 'positive pacifism:' Issues of historical memory in contemporary foreign policy. *The Brown Journal of World Affairs* 20(2).

Ministry of Foreign Affairs of Japan (1993). *Statement by the Chief Cabinet Secretary Yohei Kono on the Result of the Study on the Issue of "Comfort Women."* Retrieved August 4, from http://www.mofa.go.jp/policy/women/fund/state9308.html.

Ministry of Foreign Affairs of Japan (1995). *Statement by Prime Minister Tomiichi Murayama On the Occasion of the 50th Anniversary of the War's End.* Retrieved August 15, from http://www.mofa.go.jp/announce/press/pm/murayama/9508.html.

Ministry of Foreign Affairs of Japan (2015). *Diplomatic Bluebook 2014 Summary*. Retrieved from http://www.mofa.go.jp/fp/pp/page22e_000566.html.

Ministry of Foreign Affairs of the Republic of Korea (2013). MOFA spokesperson's commentary on the Japanese cabinet office's release of public opinion survey results on Dokdo. Retrieved August 2, from http://dokdo.mofa.go.kr/eng/dokdo/government_announce_list.jsp?pagenumber=2&sn=1&st=&sn02=&st02=&sc=&sdate=&edate=&orderby=&sort=&status=&at=view&idx=2049&category=us.

Ministry of Foreign Affairs of the Republic of Korea (2013). MOFAT spokesperson's statement on the 8th Dokdo Day Event held by Japan's Shimane Prefecture. Retrieved February 22, from http://dokdo.mofa.go.kr/eng/dokdo/government_announce_list.jsp?pagenumber=3&sn=1&st=&sn02=&st02=&sc=&sdate=&edate=&orderby=&sort=&status=&at=view&idx=2041&category=us.

Mishima, Ko (2007). The Ordeal of Japan's New-Generation Leader: An Assessment of Prime Minister Shinzo Abe. *Harvard Asia Pacific Review* 9(1).

Miwa, Sachiko (2015). Diet debate on security bills starts with confusion over limits on collective self-defense. *The Asahi Shimbun.* Retrieved May 26, from http://ajw.asahi.com/article/behind_news/politics/AJ201505260061.

The New York Times (2013). Risky nationalism in Japan. Retrieved December 26, from http://www.nytimes.com/2013/12/27/opinion/risky-nationalism-in-japan.html.

The New York Times (2014). Mr. Abe's dangerous revisionism. Retrieved March 2, from http://www.nytimes.com/2014/03/03/opinion/mr-abes-dangerous-revisionism.html?_r=0.

The New York Times (2015). Shinzo Abe and Japan's history. Retrieved April 20, from http://www.nytimes.com/2015/04/20/opinion/shinzo-abe-and-japans-history.html.

Oka, Yuichiro (2014). Teaching manuals to describe Takeshima, Senkakus as Japan's territory. *The Asahi Shimbun*. Retrieved January 11, from http://ajw.asahi.com/article/behind_news/social_affairs/AJ201401110046.

Profile of the Prime Minister (2015). http://japan.kantei.go.jp/96_abe/meibo/daijin/abe_e.html.

Reuters (2015). Japanese PM Shinzo Abe takes bolder security stance in a summer of discontent. Retrieved July 15, from http://www.ndtv.com/world-news/japanese-pm-shinzo-abe-takes-bolder-security-stance-in-a-summer-of-discontent-781604.

Sekiguchi, Toko (2013). Japan survey on disputed islands irks Seoul. *The Wall Street Journal*.

Retrieved August 2, from http://blogs.wsj.com/japanrealtime/2013/08/02/japan-survey-on-disputed-islands-irks-seoul/.

Smith, Sheila (2008). The politics of leaving the "postwar" behind: Nationalism, pragmatism and Japan's foreign policy. *Harvard Asia Quarterly* 11(23).

Soble, Jonathan (2015). Japan moves to allow military combat for first time in 70 years. *The New York Times*. Retrieved July 16, from http://www.nytimes.com/2015/07/17/world/asia/japans-lower-house-passes-bills-giving-military-freer- hand-to-fight.html?_r=0.

Tepperman, Jonathan (2013). Japan is back: A conversation with Shinzo Abe. *Foreign Affairs* 92(4).

Van Dyke, Jon M. (2007). Legal issues related to sovereignty over Dokdo and its maritime boundary. *Ocean Development & International Law* 38.

Yonhap News (2015). Japan claims sovereignty over Dokdo in diplomatic document. Retrieved April 7, from http://english.yonhapnews.co.kr/national/2015/04/07/47/0301000000AEN20150407001951315F.html.

Yoshifumi, Tawara (2015). The Abe government and the 2014 screening of Japanese junior high school history textbooks. *The Asia-Pacific Journal* 13(2).

Making Peace over a Disputed Territory in Southeast Asia: Lessons from the Batu Puteh / Pedra Branca Case

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Abstract

The dispute between Malaysia and Singapore over Batu Puteh or Pedra Branca was settled in 2008 by the International Court of Justice (ICJ). The decision was to give Singapore ownership over Pedra Branca, while Malaysia was given control of Middle Rocks, a small rock formation to the south of Pedra Branca. The ICJ ruling also decided that a third piece of contentious area, the Southern Ledge should be jointly managed by the two countries. This paper focuses on two aspects of the case: the decision to send the case to the ICJ, instead of utilizing regional mechanisms for dispute settlement; and the post-decision reactions of both countries. Sending the case to the ICJ shows confidence in one's ability to win, while at the same time showing a lack of confidence in regional mechanisms for dispute settlement available to the parties regionally. Some of the lessons learnt from this process include the need to be fully prepared for the legal process; not relying solely on historical evidences; making sure that one is in effective control of the territories in dispute; and that regional mechanisms do have limitations due to perceived (un)trustworthiness of third parties, and the need to improve them further.

Keywords

Batu Puteh, Pedra Branca, Malaysia, Singapore, dispute settlement, territorial dispute, regional mechanism, ICJ

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INTRODUCTION

There is an old Malay saying that translates simply as "the house is finished but you can still hear the sound of work being done on it." While this saying has a somewhat negative connotation to it, it also presents a realistic view of the difficulty of building a structure that lasts. The same can be said about peacemaking efforts as well—that work continues after the signing of an agreement or after a decision has been made about the contentious issues. In many cases, this phase is one of the most important parts of the process as it determines whether the process has been properly done and is thus durable, and the peace sustainable. It also gives us an idea on how the parties will approach future issues and contests that they might have.

Over the last 15 years, Malaysia went through this process as an interested party in two cases. In 2002, an International Court of Justice (ICJ) decision over the Islands of Sipadan and Ligitan which were contested by Malaysia and Indonesia went Malaysia's way. However, the Court did not make a decision on maritime boundaries between Malaysia and Indonesia in the areas around the two islands, resulting in arguments saying that the dispute has not been completely settled. Observers noted that the reason for this was that the ICJ was not requested to resolve that particular issue by the parties (Strachan 2009).

In 2003, Malaysia, and this time Singapore, jointly submitted a request to the ICJ to decide on the sovereignty of three pieces of contested land/areas between the two countries—Pedra Branca/Batu Puteh Island, Middle Rocks and South Ledge. Analysts said that the case was submitted to the ICJ even if the then Prime Minister of Malaysia was not totally convinced that they should do so (Asri et.al. 2009). In May 2008, the ICJ decision was split between the two countries. Singapore was awarded Pedra Branca, while Malaysia was given ownership of Middle Rock. South Ledge which is only visible during low tide was split between both countries according to their territorial waters. This 'win-win' decision, however, is not without controversies as the two countries have yet to decide on how the territorial waters around Pedra Branca and Middle Rocks will be delimited. A joint technical committee involving both countries will be set up to look at this as well as the issue of South Ledge (Strachan 2009).

In this sense, it can be argued that even if a decision has been made in both of these cases, they remain as still contentious issues between the parties. The aftermath raises questions about the usefulness of the arbitration process for the parties, and alternative venues and bodies of peacemaking—especially regional ones that should and could have been utilized, and lessons that can be learnt from this process. This paper will try to look at the reasons behind the use of the

ICJ as a mediating body for countries like Malaysia and Singapore, and what lessons can be learnt along the way. It will start by discussing the peacemaking process before going on to investigate the background of the case and the decision made by the Court. The paper will then look at the responses on both side and will conclude with some lessons learnt from this case.

THE PEACEMAKING PROCESS AND THE VIABILITY OF AN "EXTERNAL" PROCESS AS OPPOSED TO A REGIONAL ONE

The peacemaking process is technically the same regardless of the level and types of conflict being addressed. The actors involved will evaluate whether it is something that needs to be and should be resolved and whether settling the conflict can bring them more benefits than allowing the status quo to remain. The next step is usually to determine whether both sides are interested in settling the case. Feelers are sent and efforts are made to determine the viability of the process. This is part of the confidence building step done before direct negotiations between the sides are conducted. Some conflicts are lucky enough to be settled in this bilateral mode, but many need guidance and facilitation by a third party in order to move on. This third party intervention presents a lifeline for many difficult cases and comes in many forms. This part will look at this third party intervention exercise of the peacemaking process, highlighting the issue of an "external" process as opposed to a "regional" one and the implications that it might have on the result on this case.

Third party involvement in the peacemaking process in the region is not the standard norm, especially up to the pre-mid 1990s period. Southeast Asian countries are well known for their hesitancy in allowing others to come in and mediate their problems, and if they do so, it probably means that they are at the end of their ropes having tried to address the issues themselves unsuccessfully. Since the mid-1990s there have been cases of international involvement in intra-state conflict issues in the region, i.e. the OIC (led by Indonesia) in the GPH-MNLF peace process; Malaysia in the GPH-MILF process (involving also a number of other countries and international organizations); the HDC and then the CMI (and subsequently the EU and others) in the Aceh conflict; the UN in East Timor; and Malaysia in Patani/Southern Thailand. For inter-state conflicts, there have been even lesser cases of third party involvement, mostly because there have not been many serious or high profile inter-state cases. Or more likely that the parties are unwilling to seriously look at settling the issues for a variety of reasons including the need to avoid confrontations, to contain them and to prevent them from disrupting peaceful relations between the countries (Amer 2000; Bercovitch et al. 2002). Or even that the parties are not sure about the possible outcome and have chosen instead to simply avoid addressing the issues altogether. Strachan observed that, "Regional mediation is also preferable to international involvement but is not always viable due to fears that regional actors may have vested interests in certain cases. Moreover, ASEAN's current stance on intervention in regional disputes renders a greater regional role in the resolution of territorial disputes unlikely in the impending future" (Strachan 2009, 5).

We will go first into a discussion of what third party involvement in the form of mediation in a peacemaking process means, especially in an inter-state setting.

Mediation is generally known as the continuation of negotiations by other means. Chris Mitchell defines mediation as any "intermediary activity… undertaken by a third party with the primary intention of achieving some compromise settlement of the issues at stake between the parties, or at least ending disruptive bahaviour" (Mitchell 1981, 287).

Spencer and Yang (2003) in Bercovitch (2003) see mediation as the "assistance of a third party not involved in the dispute, who may be of a unique status that gives him or her certain authority with the disputants; or perhaps an outsider who may be regarded by them as a suitably go-between."

Bercovitch further defines mediation "…as a process of conflict management, related to but distinct from the parties' own negotiations, where those in conflict seek the assistance of, or accept an offer of help from, an outsider (whether an individual, an organization, a group, or a state) to change their perceptions and behavior, and to do so without resorting to physical force or invoking the authority of the law" (Bercovitch 2003, 130). He went on to elaborate that the motives for mediation include the following:

> "…mediation is particularly appropriate when (a) a conflict is long, drawn out, or complex; (b) the parties' own conflict management efforts have reached an impasse; (c) neither party is prepared to countenance further costs or loss of life; and (d) both parties are prepared to cooperate, tacitly or openly, to break their stalemate" (Bercovitch 2003, 133).

While mediation looks at the bigger picture of third party involvement in peacemaking, there are also other legal and formal forms of mediation such as adjudication and arbitration. "International adjudication is a method of international dispute settlement that involves the referral of the dispute to an impartial third-party tribunal—normally either an arbitral tribunal or an international court—for binding decision, usually on the basis of international law" (Bilder 2003, 155).

The fundamental principle of this practice is consent, as a state need not submit its disputes unless it wishes to do so; and an international arbitrator or court has no jurisdiction to decide on the dispute unless all the states involved have given their consent. This is only one of many ways of dealing with disputes at the international level. The UN Charter in Article 33 lists a number of acceptable methods of peaceful settlement including:

> "…negotiation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, and resort to UN or other international organization dispute-settlement procedures. In essence, a full list of methods reflect a spectrum of techniques that range from so-called diplomatic means, such as negotiation, consultations, good offices, mediation and conciliation, which give control of the outcome primarily to the parties themselves, to so-called legal means, such as arbitration or judicial settlement, which give control of the outcome primarily to a third party (or parties)" (Bilder 2003, 156).

States will usually weigh carefully the possible advantages and disadvantages of using the available methods before deciding on the most appropriate one for them.

There are essentially two methods of international adjudication: arbitration and judicial settlement by an international court. Differences lie in the "permanence of the tribunal to which the dispute is referred, the scope of its jurisdiction or authority, and the extent to which the parties to the dispute can control the selection of the third parties—arbitrators or judges—who will rule on their dispute and the tribunal's jurisdiction and procedures" (Bilder 2003, 159).

The ICJ was established in 1945 by the UN Charter as the principal judicial organ of the UN and is governed by a special treaty called 'the Statute of the Court.' It is annexed to the UN Charter, where all members of the UN are parties to. It acts as a world court and has a dual jurisdiction, deciding disputes that are brought to it by states and giving advisory opinions on legal questions at the request of organizations like the UN. The 15 judges of the ICJ are elected by the UN General Assembly and the Security Council for a period of nine years. The court's most important job is to deliver legally binding judgments in so-called contentious cases involving disputes between states. Only states can bring contentious cases before the court and not intergovernmental organizations, nongovernmental organizations, or individuals.

The alternative to the Court would be regional mechanisms for dispute settlement. However, "…regional arrangements differ in terms of how they respond to conflicts and disputes among members. At one level, they differ over whether member-versus-member disputes make it onto the formal or informal agenda of the regional arrangement" (Haacke & Williams 2009, 9).

The list of potential instruments of conflict management is considerable and regional arrangements will naturally seek to draw on different techniques as appropriate to the specific conflict in question. The list of instruments includes the use of force and coercion, the imposition of economic sanctions, as well as diplomacy and other confidence-building measures (Crocker et al. 2007).

Arguably the most common conflict-management technique used by regional arrangements is peacemaking through mediation, although they differ over the extent to which this is best carried out bilaterally by individual members or collectively by representatives of the arrangement (Haacke & Williams 2009).

In Southeast Asia, the Association of Southeast Asian Nations (ASEAN) has been an important stabilizer among its member states. ASEAN is generally considered the most successful regional organisation in the developing world, but it has faced questions over its relevance as a security actor in a rapidly changing environment (Emmerson 2008).

As a principle it should not be necessary for Southeast Asian nations to turn to an external international legal body to resolve regional disputes. There is widespread feeling that the Association of Southeast Asian Nations (ASEAN) should be playing a greater role in settling intra- regional disputes. However, ASEAN member states continue to support a policy of non-interference and this has hampered efforts to make it a reliable body for dispute settlement.

As a grouping, ASEAN has generally avoided dealing with bilateral disputes or territorial conflict between members. Instead, there has been a distinct preference for the parties concerned to enter bilateral negotiations to address the issue at stake or to allow for the involvement of third parties from within or even outside the region (Caballero-Anthony 2005). The 1976 Treaty of Amity and Co-operation (TAC), provides a code of conduct governing intramural relations that retains validity to this day. This include the following:

1. Mutual respect for the independence, sovereignty, equality, territorial integrity and national identity of all nations;
2. The right of every State to lead its national existence free from external interference, subversion and coercion;
3. Non-interference in the internal affairs of one another;
4. Settlement of difference or disputes by peaceful means

5. Renunciation of the threat or use of force; and
6. Effective co-operation among themselves (TAC 1976)

Scholars have commented that a "distinctive characteristic of the ASEAN conflict management approach is its ability to combine these principles with the more tacit and passive approach of avoiding conflict, dampening it, or postponing dealing with it for an indefinite period. It is in this regards that ASEAN differs from other regional organisations" (Kamarulzaman, Bercovitch & Oishi 2002). This spirit of the "ASEAN Way" has gone a long way towards managing conflict in the region and attempts have been made to elevate this to a higher level where it can contribute to settlement of actual disputes and conflicts in the region (Thambipillai 2001; Kamarulzaman 2001). The TAC also allows for the constitution of an ASEAN High Council to take cognizance of disputes or situations likely to disturb regional peace and harmony when negotiations of parties concerned fail. However, the High Council has never been convened to address any disputes between ASEAN members. Even the introduction of rules of procedure for the High Council in 2001 has not provided a new impetus for its invocation. Instead, members have repeatedly reaffirmed, for instance, their commitment to desist from using or threatening to use force. Notably, when ASEAN countries have felt sufficiently comfortable, they have submitted territorial disputes to the ICJ. Relevant cases include the one covered by this paper—Pedra Branca/Pulau Batu Puteh (Singapore and Malaysia), as well as Pulau Ligitan and Pulau Sipadan (Malaysia and Indonesia).

Agreement by members on the establishment of the ASEAN Security Community (ASC, now ASEAN Political-Security Community, APSC) has also not translated into new initiatives as regards strengthening ASEAN's conflict management capacity. The 2003 Bali Concord II vaguely states that the High Council shall be an "important component in the ASEAN Security Community since it reflects ASEAN's commitment to resolve all differences, disputes and conflicts peacefully" (ASEAN 2003). The ASEAN Charter, ratified by all member states in 2008, reinforces traditional principles of dispute settlement wherein member states "endeavour to resolve peacefully all disputes in a timely manner through dialogue, consultation and negotiation" (ASEAN 2008, Chapt. 8). An entire chapter deals with issues pertaining to the settlement of disputes. Article 22 of the Charter states that a dispute settlement mechanism will be established and maintained and Article 23 states that parties to a dispute may request "the Chairman or Secretary-General of ASEAN, acting in an ex-officio capacity, to provide good offices, conciliation or mediation." Unresolved disputes are in future ultimately to be referred to the ASEAN Summit, but it remains to be seen to what extent this will happen. The ASEAN Political-Security Community Blueprint issued in 2009 formulates an action plan to develop measures in the areas of conflict prevention, confidence-building measures, conflict resolution, the pacific settlement of disputes, as well as post-conflict peace building (ASEAN 2009). It declares that "more efforts are needed in strengthening the existing modes of pacific settlement of disputes to avoid or settle future disputes." This is undoubtedly a step in the right direction but nothing concrete has been settled, suggesting that a change in ASEAN's stance on the issue of intervention remains a long way off (Strachan 2009, 4).

It is no surprise then that Malaysia and Singapore decided that the best way to resolve the issue of Batu Puteh/Pedra Branca after bilateral negotiations failed is by judicial settlement at the ICJ. Malaysia was anxious about sending the case to the ICJ but as remarked by a former high ranking diplomat, "There are, of course, risks to be run in bringing the matter before the ICJ. But the question is was there any other practical alternative?" (Deva 2008) It can be concluded then that despite all the innovations made to implement a regional dispute settlement and peacemaking mechanism within ASEAN, the members still find it highly impractical to send their disputes there when bilateral negotiations break down. At the same time, the parties are confident with the external Court and with their own cases. Malaysia, for example, was confident that they had a good case. The same senior diplomat said that, "…refusing to let our case be heard at the World Court is to suggest Malaysia is not confident in its claims" (Deva 2008). This, in the end resulted in the case of Batu Puteh/Pedra Branca being sent to the ICJ for deliberation. The background of the case and the decision made by the Court is the subject of the next part of this paper.

BACKGROUND OF THE CASE

The background of the case goes back to 21 December 1979 when Malaysia published a map entitled "Territorial Waters and Continental Shelf Boundaries of Malaysia" (the 1979 map). In that map, Pulau Batu Puteh/Pedra Branca is depicted as lying within the territorial waters of Malaysia. Singapore responded through a diplomatic note dated 14 February 1980 which stated that "[t]he Government of the Republic of Singapore is gravely concerned at what is set out in the said map. This map purports to claim the island of Pedra Branca as belonging to Malaysia. The Government of the Republic of Singapore rejects this claim…" (Memorial of Singapore 2004, 24). This particular note led to an exchange of correspondence and subsequently to a series of bilateral talks—the first round which started in

February 1993 in Kuala Lumpur. On this particular occasion, Singapore revealed that it is not only claiming sovereignty over Pulau Batu Puteh/Pedra Branca but also over Middle Rocks and South Ledge. These two are other maritime features lying in the vicinity south of Pulau Batu Puteh/Pedra Branca.

The second round of talks took place in 1994 in Singapore which also did not bring any resolution of the matter. According to Kadir Mohamad, "…[t]he inclusion by Singapore of two additional claims erased any possibility of arriving at a bilaterally negotiated solution" and that "…the possibility of regaining such control by peaceful negotiations had become non-existent in view of Singapore's uncompromising attitude" (Kadir 2015). In this regard, both parties considered that the best option is to seek a third-party judicial settlement by way of adjudication at the International Court of Justice (ICJ).

The decision to take the dispute to the ICJ for adjudication was agreed on between Prime Ministers Mahathir Mohamad and Goh Chok Tong in 1994. However, Malaysia and Singapore are not signatory states to the Statutes of the ICJ. In this regard, a Special Agreement between the two parties was required to bring the case to the Court. Bilateral negotiations then was conducted to agree and to sign the Special Agreement. Between 1997 and 2002, both parties mutually agreed to hold the negotiations to enable Malaysia to focus on a separate case in the same Court. It was the case concerning the sovereignty over the islands of Sipadan and Ligitan between Malaysia and Indonesia. In that case, the Court on 7 December 2002 ruled that the sovereignty over Pulau Sipadan and Pulau Ligitan belongs to Malaysia. After that, the negotiation between Malaysia and Singapore was resumed and eventually concluded with the signing of the Special Agreement by the Foreign Ministers of Malaysia and Singapore on 6 February 2003. In Article 2 of the Special Agreement, the parties requested the Court "to determine whether sovereignty over: (a) Pedra Branca/Pulau Batu Puteh; (b) Middle Rocks; (c) South Ledge, belongs to Malaysia or the Republic of Singapore." The parties presented to the Court their written pleadings in three stages i.e. the Memorial, Counter-Memorial and Reply over a period of two years in 2004 and 2005. The Public Hearings were held from 6 to 23 November 2007.

For its part, Malaysia "believed that it had a sound case and had at least 50 percent probability of regaining control over Batu Puteh, Middle Rocks and South Ledge via the international legal process" (Kadir 2015). Not only that, Malaysia was also "confident that it could prove that Johor had original title to Batu Puteh, Middle Rocks and South Ledge" and that "nothing had happened later to cause Johor or Malaysia to lose that title" (Kadir 2015, 113). Malaysia also argued that Singapore's presence on Batu Puteh/Pedra Branca for the sole purpose of constructing and maintaining the lighthouse there (with the permission of the territorial sovereign) is not sufficient to vest sovereignty in it. Malaysia further says that Pulau Batu Puteh/Pedra Branca was not a *terra nullius* (literal translation means 'nobody's land') at any relevant time and was therefore, not susceptible to acquisition through occupation. For Malaysia, the three maritime features in question are distinct with each other and "do not constitute one identifiable group of islands in historical or geomorphological terms, and that they have always been considered as features falling within Johor/Malaysian jurisdiction."

On the other hand, Singapore claims that "the selection of Pedra Branca as the site for building the lighthouse with the authorization of the British Crown constituted a classic taking of possession *a titre de souverain* (with the title of sovereign). Singapore argued that the title to the island was acquired by the British Crown in accordance with the legal principles of that time and has since "been maintained by the British Crown and its lawful successor, the Republic of Singapore" (Memorial of Singapore 2004, 79). Singapore's position is that sovereignty over Middle Rocks and South Ledge goes together with sovereignty over Pulau Batu Puteh/Pedra Branca. In this sense, according to Singapore, whoever owns Pulau Batu Puteh/Pedra Branca owns Middle Rocks and South Ledge. In Singapore's view, Middle Rocks and South Ledge are dependencies of Pulau Batu Puteh/Pedra Branca and that these three are a single group of maritime feature.

THE ICJ DECISION

The ICJ delivered its decision for the case during a special sitting of the Court on 23 May 2008. The Court ruled, by twelve votes to four, that sovereignty over Pulau Batu Puteh/Pedra Branca belongs to Singapore. By fifteen votes to one, the Court ruled that the sovereignty over Middle Rocks belongs to Malaysia. On South Ledge, the Court ruled by fifteen votes to one that sovereignty over this maritime feature belongs to the State in the territorial waters of which it is located. It is worth discussing the process by which the Court reached its decision.

In determining whether the sovereignty over Pulau Batu Puteh/Pedra Branca, Middle Rocks and South Ledge belongs to Malaysia or Singapore, the Court first described the geographical context of the dispute. The Court then gave an overview of the complex historical background of the dispute between Malaysia and Singapore beginning from the establishment of the Sultanate of Johor until the separation of Singapore from the Federation of Malaysia in 1965. The Court examined the question regarding the original title of the Pulau Batu Puteh/Pedra Branca before 1840. In this regard, the Court concluded that "as of the time when the British started their preparations for the construction of the lighthouse on Pedra Branca/Pulau Batu Puteh in 1844, (the) island was under the sovereignty of the Sultan of Johor" (Summary of the Judgement 2008, 7).

The Court then examined the legal status of Pulau Batu Puteh/Pedra Branca after the 1840s to determine whether Malaysia has retained sovereignty over Pulau Batu Puteh/Pedra Branca or whether sovereignty has passed to Singapore. In doing so, the Court observed that "it needs to assess the relevant facts" consisting mainly of the conduct of Malaysia and Singapore from after the 1840s until the crystallization of the dispute in 1980. An important fact of the case was a letter written in 1953 by the acting Secretary of the State of Johor to the British Adviser of colonial government in Singapore that admitted that Johor does not claim ownership of the island. This important episode, based on the documents submitted to the Court was analysed and reported by Lathrop (2008) as follows:

> "Apparently the British adviser passed this letter to the state secretary of Johor. Three months later, in September 1953, the acting state secretary of Johor responded that "the Johore Government does not claim ownership of Pedra Branca" (para. 196). In its review of this brief and indirect exchange, the Court concluded that the acting state secretary had the authority and capacity to write the response quoted above and that the word "ownership" referred, not to private property interests with respect to the lighthouse, but to sovereignty over the entire island of Pedra Branca/Pulau Batu Puteh (paras. 220, 223).
>
> Instead, the Court concluded that "as of 1953 Johor *understood* that it did not have sovereignty over Pedra Branca/ Pulau Batu Puteh and that in light of Johor's reply, the authorities in Singapore *had no reason to doubt* that the United Kingdom had sovereignty over the island" (para. 230, emphasis added).
>
> Having found most of the pre-1953 conduct irrelevant, the Court completed its analysis with a review of the conduct of the parties after 1953, focusing on both Singapore's conduct taken *a` titre de souverain* and not solely as operator of the lighthouse, and Malaysia's conduct (or lack thereof) indicating that it did not claim sovereignty over the island and instead acknowledged Singapore's sovereignty there" (Lathrop 2008, 5).

This was a very important point raised by the Court and from there it was obvious that Singapore now had the upper hand in the case. The Court's decision on Pulau Batu Puteh/Pedra Branca case then read as follows:

"The court is of the opinion that the relevant facts, including the conduct of the Parties, reflect a convergent evolution of the positions of the Parties regarding title to Pedra Branca/Pulau Batu Puteh. The Court concludes, especially by reference to the conduct of Singapore and its predecessors a titre de souverain, taken together with the conduct of Malaysia and its predecessors including their failure to respond to the conduct of Singapore and its predecessors that by 1980 sovereignty over Pedra Brance/Pulau Batu Puteh had passed to Singapore.

For the forgoing reasons, the Court concludes that sovereignty over Pedra Branca/Pulau Batu Puteh belongs to Singapore" (Summary of the Judgement 2008).

On the legal status of Middle Rocks, the Court's decision read as follows:

"The Court first observes that the issue of the legal status of Middle Rocks is to be assessed in the context of its reasoning on the principal issue in the case. It recalls that it has reached the conclusion that sovereignty over Pedra Branca/Pulau Batu Puteh rests with Singapore under the particular circumstances surrounding the case. However these circumstances clearly do not apply to other maritime features in the vicinity of Pedra Branca/Pulau Batu Puteh, i.e., Middle Rocks and South Ledge. None of the conduct of the Parties reviewed in the previous part of the Judgement has any application to the case of Middle Rocks.

The Court therefore finds that original title to Middle Rocks should remain with Malaysia as the successor to the Sultan of Johor" (Summary of the Judgement 2008).

With regard to the South Ledge, the Court noted "that there are special problems to be considered, inasmuch as South Ledge presents a special geographical feature as a low-tide elevation" and concluded that sovereignty over South Ledge, as a low-tide elevation, belongs to the State in the territorial waters of which it is located (Summary of the Judgement 2008).

PICKING UP THE PIECES FOR MALAYSIA (WHILE THE OTHER SIDE IS CEMENTING THE WALL IN THE POST-SETTLEMENT PERIOD)

The decision of the ICJ immediately created ripples in both Malaysia and Singapore. It was reported in the Singaporean media that the leaders of both countries accepted the decision, albeit with some reservations (Zuraidah 2008). The same Singapore Straits Times reported that the decision was accepted in Johor, the Malaysian state closest to Singapore, and that "…Foreign Minister Rais Yatim and PM Abdullah Badawi have also spoken, repeatedly, in the same vein" (Zuraidah 2008). However, the view was somewhat less favourable from the Malaysian side. Many in the Malaysian diplomatic circle disagreed. One senior diplomat said that, "…all told, the ICJ judgment went beyond a winner/loser scenario, or even, a winner-take-all verdict. It was a mid-way judgment of sorts" (Deva 2008). The feeling is that the ICJ only resolved half the issue and that it will take considerable time and effort by the two parties to settle unfinished issues left by the court.

The decision also came with cautionary statements about things to come. For example, in Johor the politician that said that he accepted the decision also said that "…Malaysia should consider taking over from Singapore the management of the lighthouse on Pulau Pisang, an island owned by Malaysia. Why? The Pedra Branca issue 'has taught us a lesson on territorial claims'" (Zuraidah 2008). This clearly shows that although the decision was generally accepted by both, it was by no means a victory to either and that both parties are looking at ways to either avoid a repeat of the unsatisfactory decision (to their side) or cement the decision for their future advantage. For Malaysia, it's a matter of picking up the pieces. It involves finding holes in the decision before moving on. A respected law scholar at a local Malaysian university highlighted that: "The judgment was not unanimous but a majority one. Four judges dissented from the majority ruling of the main operative paragraph of the judgment. They disagreed with the majority ruling on the evaluation of the facts as well as the law" (Hamid 2011). This, however, was of little use because the most important thing is the court follows the majority ruling, regardless of what the minority says.

Those in diplomatic circles commented that Malaysia could have done better with their case. A former Malaysian ambassador to the EU, Belgium, Luxembourg, and Cambodia even lamented that Singapore had actually got Pedra Branca on the "flimsiest of evidence." He went on to say that Singapore had built up a case out of nothing, but then again, it had nothing to lose. Malaysia on the other hand,

"…failed to assert our claim through any manifestation of effective control. That would have meant our moving ahead in areas such as navigation aids, marine conservation, tide and current surveys, hydrography, etc. which we did not. That is what sovereignty is all about—developing the means to effectively control what is rightfully ours—and establishing the reality that others who use our territory do so on our terms. In other word, sovereignty claims undefended will gradually and eventually disappear. That is what happened to our ownership or original title to Pedra Branca…" (Deva 2008).

Soon after the judgement the Malaysian government instructed the media to cease using the Malay word *Pulau* or Island for Pedra Branca. This is connected with the claims made in the Singaporean Parliament on 21 July 2008 by "Senior Minister of State for Foreign Affairs, Balaji Sadasivan that the maritime territory around the island included a territorial sea of up to 12 nautical miles and an exclusive economic zone" (Hamid 2011).

This was criticized by Malaysia as going against the ASEAN way and that the claim was unreasonable and not acceptable. A further response by the Singaporeans however indicated that "…if the limits of Singapore's territorial sea or exclusive economic zone overlapped with the claims of neighbouring countries, Singapore would negotiate with those countries to arrive at agreed delimitations in accordance with international law" (Hamid 2011).

This issue of whether Singapore can claim an exclusive economic zone from Pedra Branca or not has become a sensitive issue between the two countries in the aftermath of the decision. Malaysia took the view that Singapore was not entitled to claim an exclusive economic zone around Pedra Branca as it considered that the maritime feature did not meet internationally recognised criteria for an island, that is, land inhabited by humans that had economic activity. The answer will depend on whether Pedra Branca "…is a full-fledged island or if it is merely a 'rock' which cannot sustain human habitation or economic life of its own" (Hamid 2011, 12). The same scholar made the following observation:

"The most crucial question between Malaysia and Singapore nevertheless is delimitation of maritime boundary (in particular the territorial sea limit). Singapore cannot claim EEZ from PBP not merely because PBP is a granite rock incapable of human habitation or economic life of its own but all the more because PBP is within the territorial sea 12 nautical miles of the Mainland Malaysia and even up to 5 nautical miles to the east of PBP is still within the radius of the Malaysian territorial sea limit. The two countries, therefore, seriously need to sit down and negotiate to determine the territorial sea limits in accordance with relevant rules of international law" (Hamid

2011, 15-16).

On the Malaysian side too, an immediate reaction was to locate other disputed territories and defend them from being taken over by other countries. It was mentioned earlier that this was made in reference to Pulau Pisang which also has a Singaporean structure on it. In regards to Pedra Branca, the reaction on the ground was immediate. Malaysian fishermen working in the vicinity of the areas were immediately asked to leave by the Singaporean coast guard. This resulted in unhappy comments from the Malaysian side. A senior diplomat commented:

> "Malaysia, however, chose not to 'militarily' confront Singapore when it blockaded the area, preventing, among others, our fishermen in these waters or seek shelter on the three features. Here again, this was not because we doubted our sovereignty over the features. Rather it was, on our part, an act of self-restraint and wisdom—something done in the letter and spirit of ASEAN. What is even more important now is that Malaysia should from now on be extremely careful about the way we do things with Singapore" (Deva 2008).

Comments were also made in regards to the existing practice in the region and the implications of the action by Singapore:

> "While Malaysia took the moral high ground by abiding with the principles of the ASEAN Treaty of Amity and Cooperation (TAC), Singapore ignored them by taking a hostile stance with its naval blockade. Singapore certainly lost some credibility as a result" (Deva 2008).

This points to the necessity of coming back to the spirit of ASEAN regionalism and the usage of local avenues for dispute settlement. Taking unilateral action on either side is not conducive to maintaining good relations:

> "Since the three maritime features are too close to each other, unilateral action is out of the question and negotiation and full cooperation is required in whatever measure taken by either party. This is the main reason why a Joint Technical Committee has been established by Malaysia and Singapore, consisting of senior officials of the two countries. The delimitation of the territorial sea is of course the major and the most challenging issue for Malaysia and Singapore. The other outstanding issues, however, include the rights of fishermen, naval patrols, security matters, prevention of marine

pollution, and traffic separation of thousands of vessels entering the Strait of Singapore" (Hamid 2011, 17).

To be fair, the Singaporeans are also quite anxious on how the ICJ decision is going to be received in Malaysia and how it is going to affect the relations between the two countries. Singaporean media reports in the aftermath of the decision warned against insensitivities towards Malaysia, and the implications it might have on ongoing relations:

> "More worryingly for Singapore, detractors in Malaysia could whip up feelings against Singapore's gaining another inch of what they regard as Malaysia territory. They may be less willing to deal with Singapore, for fear that its small neighbor will once again gain the upper hand. The insecurities over bilateral cooperation in the Iskandar Development Region, for example, could grow once again. At a time when bilateral relations have moved on to show a certain maturity, it would be a pity if backsliding occurs" (Zuraidah 2008).

In conclusion, it can be observed that the ICJ decision actually falls short of what either country ideally wanted. It did make the decision on the ownership of the contentious areas, but failed to resolve the question of boundaries between the two parties. While reactions have been swift on both sides to assert their positions, deliberations on unfinished issues have been somewhat slower as the parties realized the necessity of going back to diplomatic solutions and regional mechanisms for continuing their peacemaking efforts. Strachan sums it up nicely as follows:

> "The ICJ only resolved half the issue. This is certainly a step in the right direction, but years of negotiation remain to fully resolve the disputes, even after the outcome of the lengthy ICJ hearings. It is however important to note that the ICJ fulfilled its remit in both the aforementioned cases as it was not asked to determine maritime boundaries in either case. The time-consuming process of starting fresh negotiations after the ICJ has presented its ruling does however suggest that alternative means of conflict resolution, preferably in the form of bilateral negotiations, may be more effective in resolving territorial disputes than referring cases to the ICJ" (Strachan 2009, 2).

CONCLUSIONS: LESSONS TO BE LEARNED

Finally, several conclusions can be made from the lessons learned in this case. They involve lessons from the outcome of the case for future reference of both countries as well as other countries interested in taking up their cause to the international court. There are also lessons from the process as well and the advantages and disadvantages of both the ICJ experience and the regional mechanisms.

The first conclusion that can be made is that a third party process can resolve long-standing and seemingly intractable disputes, but only with political commitment from both sides. In this case, both parties wanted to resolve the issues. They started out negotiating bilaterally but when they got stuck there was consent to have the case presented at the ICJ. There was agreement too to abide by whatever ruling that the Court might come up with. This shows that long term disputes between states can be settled amicably using the third party mechanism especially when the parties are sincere in finding the solution.

However, the use of an external procedure also points out the weakness of regionally set up mechanisms for dispute settlement. Regional arrangements have limitations due to the perceived (un)trustworthiness of regionally based third parties; especially when it involves neighbours who might have issues with the conflicting parties and possibly using the platform in a way that might strengthen its own position vis-à-vis the parties or to its own advantage. As argued in the paper, choosing a judicial process by the ICJ shows confidence in one's ability to win, while at the same time showing a lack of confidence in regional mechanisms for dispute settlement available to the parties regionally.

Another lesson in regards to the process is that the decision in itself does not guarantee the resolution of the problem. In this case the result is seen as a halfway solution and further efforts need to be made to resolve outstanding issues. Any unilateral efforts at implementing the decision by the parties will only create additional issues and problems. Joint effort at implementing the decision is the only viable conduct of post-settlement peacebuilding in cases of territorial disputes. However, because of the sensitivities involved and possibe unhappiness with the decision made, this joint effort might take considerable time to get going and parties might even delay their commitments to the effort.

Further lessons in regard to the process include the need to improve the understanding of what a regional dispute settlement can do. This can be done by first taking into account regional sensitivities that might have an effect on the process and finding ways to overcome them. An improved peace support structure built upon the ASEAN spirit and elaborating on the present procedures and mechanisms provided under the various agreements such as the TAC, the ASEAN

Concord, the ASEAN Charter, the APSC and others can help strengthen the regional mechanism. This can also help in supporting the implementation process of disputes settled elsewhere such as this Pedra Branca / Batu Puteh case. Finally, whatever mechanism instituted will be of no use if the affected parties are unwilling to trust and use it. There is no shortage of cases that can be addressed by the regional mechanism and parties should be brave enough to experiment with them. However, they might still think that the stake is too high to experiment with a still unproven method of dispute settlement. Part of the challenge then is to persuade them to overcome this hesitation and to give it a try.

The second set of lessons are in regards to the outcome of this judicial process. One lesson is that the historical claim loses its value if it is not regularly upheld. The Sultan of Johor (now part of Malaysia) has original claim to Pedra Branca, but Malaysia failed to object to various Singaporean exercises of sovereignty over the years. Malaysia even failed to do this after she won the decision in the Sipadan and Ligitan case, which basically came up with a similar judgment in regards to the control, upkeep and maintenance of the disputed territory. Singapore was even prepared to act aggressively to protect her interests in Pedra Branca while Malaysia's unconvincing approach to the issue has not helped her cause at the Court. The process also taught us that parties have to be fully prepared for the legal process and secure all necessary information and supporting documents that can help in the case. But at the end of the day, we found out that the most important criteria that affected the decision is the extent of effective control of the territories in dispute, which Singapore had and Malaysia did not.

The third lesson also shows that decisions will be based on technical arguments and that parties have to be ready to argue technically. For example, the ICJ decision was that low-tide elevations cannot be independently claimed as territory. The Court ruled that South Ledge is submerged at high tide and belongs to whichever state has sovereignty over the seabed, to be determined by a later delimitation of territorial waters.

Finally, we repeat again the conclusion that the case shows that protracted conflict issues between states need not be so. There are ways to address them as long as there is sincerity to settle the issues and commitment to the maintenance of peace despite existing problems between the parties. The challenge is to overcome the initial hesitancy to settle and to choose the proper platform for the resolution of the problem. Once this hurdle has been overcome, the momentum for peaceful settlement should be well underway.

References

Abdul Ghafur Hamid @ Khin Maung Sein (2011). Case concerning sovereignty over Pulau Batu Puteh: A critical analysis of its legal implications. *The Malayan Law Journal Articles* 3.

Arsana, I Made Andi, Farid Yuniar & Sumaryo (2010). Geospatial aspects of maritime boundary delimitation in the Singapore strait involving Indonesia, Malaysia and Singapore. Paper presented at the FIG Congress 2010: Facing the Challenges—Building the Capacity, Sydney, Australia, 11-16 April.

Asri Salleh, Che Hamdan Che Mohd. Razali & Kamaruzaman Jusoff (2009). Malaysia's foreign policy towards its 1963-2008 territorial disputes. *Journal of Law and Conflict Resolution* 1(5), 107-116.

ASEAN (2008). *ASEAN Charter*. Jakarta: ASEAN.

ASEAN (2009). *ASEAN Political-Security Community Blueprint*. Jakarta: ASEAN.

Asia Maritime Transparency Initiative. Retrived from http://amti.csis.org/maritime-disputes/.

Bercovitch, Jacob (2003). Mediation in international conflict: An overview. In Zartman, I. William & Rasmussen J. Lewis (Eds.), *Peacemaking in International Conflict, Methods and Techniques.* Washington DC, USA: USIP.

Bilder, Richard (2003). Adjudication: International arbitral tribunals and courts. In Zartman, I. William & Rasmussen J. Lewis (Eds.), *Peacemaking in International Conflict, Methods and Techniques.* Washington DC, USA: USIP.

Caballero-Anthony, Mely (2005). *Regional Security in Southeast Asia: Beyond the ASEAN Way.* Singapore: ISEAS.

Deva M. Ridzam (2008). ICJ on PBP: Sovereign claims must be defended. *The Edge.* Forum, June 2.

Emmerson, Donald K. (Ed.) (2008). *Hard Choices: Security, Democracy and Regionalism in Southeast Asia.* Stanford: Shorenstein Asia-Pacific Research Center.

International Court of Justice (2008). Memorial of Singapore, 24. Retrieved from http://www.icj.cij.org/docket/index.php?p1=3&p2=3&k=2b&case=130&code=masi&p3=1.

International Court of Justice (2008). Summary of the judgement, p. 7. Retrieved from http://www.icj.cij.org/docket/index.php?p1=3&p2=3&k=2b&case=130&code=masi&p3=5.

Haacke, Jurge & Williams, Paul D. (2009). Regional arrangements and security challenges: A comparative analysis. Working Paper no. 52, Regional and Global Axes of Conflict. Crisis States Research Centre and George Washington University, July.

Kadir Mohamad (2015). *Malaysia-Singapore: Fifty Years of Contentions 1965-2015.* Kuala Lumpur, Malaysia: The Other Press.

Kamarulzaman Askandar (2000). Conflict and conflict management in Southeast Asia: Trends and patterns. In Kamarulzaman Askandar (Ed.), *Conflict and Conflict Management in Southeast Asia, Special Issue of Kajian Malaysia, Journal of Malaysian Studies* XVIII(1/2).

Kamarulzaman Askandar, Bercovitch, Jacob & Oisho Mikio (2002). The ASEAN way of conflict management: Old patterns and new trends. *Asian Journal of Political Science* 10(2).

Lathrop, Coulter G. (2008). Sovereignty over Pedra Branca / Pulau Batu Puteh, Middle Rocks, and South Ledge. *The American Journal of International Law* 102, 1-7.

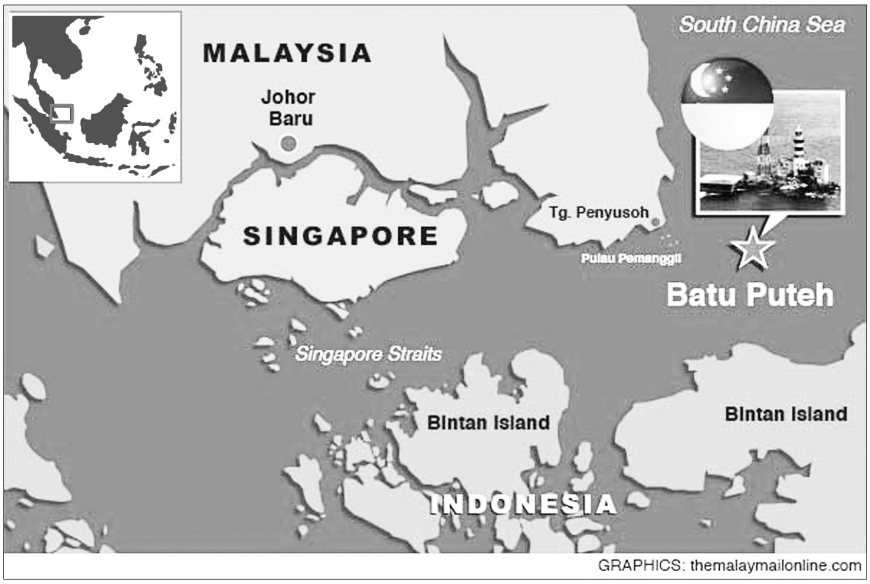
Mitchell, C. R. (1981). *The Structure of International Conflict.* London, UK: Macmillan.

Strachan, Anna Louise (2009). Resolving Southeast Asian territorial dispute: A role for the ICJ. *IPCS Issue Brief* 133, October.

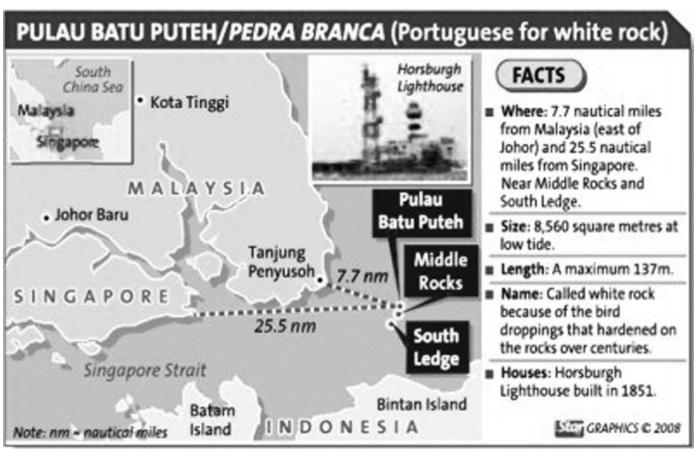
Thambipillai, Pushpa. (2001). Challenges to the ASEAN way: Musyawarah and Non-Interference. In Kamarulzaman Askandar (Ed.), *Conflict and Conflict Management in Southeast Asia, Special Issue of Kajian Malaysia, Journal of Malaysian Studies* XVIII(1/2).

Zuraidah Ibrahim (2008, May 25). The historical baggage between the two countries will require more that brief spurts of discipline to unload. *Strait Times*. Singapore.

Appendix: Location of Pedra Branca / Batu Puteh, Middle Rocks, and South Ledge



From: Malay Mail Online, 2008



From: Star Online, 2008

Irredentism in Disputed Territories and Its Influence on the Border Conflicts and Wars

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Abstract

One of the fundamental issues in the ethnogenesis is a common territory with the specific geographical and climatic conditions which define economic and cultural types of a civilization, reflected in its mentality, customs, traditions, etc. The importance of the territory explains the fact that it represents one of the main reasons for interethnic or interstate conflicts in which all sides claim their own rights to this territory. Territorial disputes and conflicts remain one of the most acute and complicated problems in the contemporary international relations. Millions of people live in the areas that are claimed by two or more sovereign countries which recognize each other. The number of such people dramatically increases in cases of the territorial claims between sides without mutual recognition. A region under the political jurisdiction of one nation but related to another through cultural, historical, or ethnic ties is sometimes called an *irredenta*. There exists another meaning of *irredenta*—an ethnic minority living compactly and for a long historical period in the border area of the neighboring homeland state with the maternal ethnic core. Therefore *irredenta* and *diaspora* have different attitudes to the residing area, the former pretending to be aboriginal and the latter having a mother land i.e., a kin state from where their ancestors migrated to the host country. This paper is an attempt to understand different interpretations of irredentism and its influence upon territorial conflicts of the neighboring countries with the aim of analyzing the paradigm in the existing literature.

Keywords

Diaspora, Irredenta, irredentism, territory, separatism, secessionism, border conflict

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After the disintegration of the Soviet Union and the end of the socialist block, territorial conflicts became large scale in the vast areas of Eurasia. Ethnic cleansing, armed clashes, civil and interstate wars led to the explosion of studies on separatism for practical and academic purposes. However, most of the scholars prefer not to use the concepts of *irredentism* and *irredenta* and use the notions of secessionism and Diaspora instead.

Most of the so-called irredentist disputes, including Albanian claims to Kosovo, or China's claims to Taiwan, over Hong Kong and Macau, Pakistani claims to Jammu and Kashmir, Kurds over parts of Turkey, Syria and Iran, Uyghurs over Xinjiang etc. are examples of the old irredentism still threatening the regional and world security. The collapse of communism at the end of the 1980s and the disintegration the Soviet Union and Yugoslavia led to the creation of new irredentist trends in Europe.

The concept of irredentism, which is derived from the Italian *irredenta* ("unredeemed") originated in the 19th century in connection with the Italian movement which after the unification of Italy aimed at the annexation of Italian-speaking regions under Austrian or Swiss rule, such as Trent, Dalmatia, Istria, Trieste and Fiume. The concept, however, has become detached from its concrete and specific connotation and has come to denote any movement which aims to unite politically or by arms with its co-national mother state a region under foreign rule" (Encyclopedia 1950, VIII, 325).

The aim of this paper is manifold and attempts to find answers to the following questions: Why is it necessary to study irredentism? What is Irredenta and how is it different from Diaspora? How are Irredentism and territorial conflicts interconnected in post Soviet Central Asia?

This paper traces irredentism[1] (Saideman 1998, 53) of the border region and its influence in civil conflicts and military clashes for the disputed territories. It will be shown how different historical circumstances have contributed to the development of irredentist views of the irredenta's leaders and elite. These irredentist views are likely to lead to conflicts and they are important for explaining the relations between bordering countries with territorial claims based on the ethnic origin of population (irredenta). Shedding some more light on the puzzle of irredentism means making a significant contribution to the studies of border conflicts and territorial disputes. Last but not least, the paper is focused on the territorial disputes of Kazakhstan with neighboring countries in the border areas paying special

1 I rely on a definition from Saideman, who has defined irredentism as "state support for annexing neighboring territories inhabited by ethnic kin." Stephen M. Saideman. "Inconsistent Irredentism? Political Competition, Ethnic Ties, and the Foreign Policies of Somalia and Serbia," Security Studies, Vol.7, No.3, 1998. p.53.

attention to the ethnic origin of the residing population.

WHY THE STUDY OF IRREDENTISM IS NECESSARY?

Markus Kornprobst in the Introduction to his monograph asking: *Why study irredentism?* gave his response, stating that there are two principal reasons—one theoretical and the other empirical—that make studying irredentism a very important research enterprise (Kornprobst 2008, 10-12).

One of the reasons why irredentism is not actively explored by social scholars may be the way it has been defined. Its most common definitions are rather limited, but there is a consensus in the studies that irredentism is a particular kind of a territorial dispute. Many scholars understand *irredentism as* the attempt by a sovereign state to incorporate the territories of ethnically related populations in neighboring countries (Saideman & Ayres 1991, 161). Yet there are disagreements on how exactly to define irredentism. In the case of ethno-territorial cross-border conflicts, irredentist and secessionist movements often coincide.

Gigi Gokcek argues that irredentist conflicts are often instigated by sovereign states, whereas, secessionist conflicts are usually initiated by ethnic minority groups. Since sovereign states have military capability to fight full-scale wars, irredentist conflicts tend to be more violent and/or turn international. Given that minority groups lack military resources to fight for their causes, secessionist conflicts, on the other hand, normally do not escalate to interstate wars (Gokcek 2011, 276).

One study in particular revealed that secessionist ethnic conflicts were militarily weaker and thereby less likely to turn international as compared to irredentist conflicts. As it has already been noted, secessionism refers to a decision by an ethnic group to separate the territory in which the group is concentrated from the sovereign authority of the country in which it resides. Secessionist conflicts ensue when a group's claims are rejected by the sovereign state to avert any territorial loss, creation of Diaspora populations, complications over shared natural resources, etc. Since sovereign states are unlikely to grant secessionism to minority populations within their borders, these movements almost always lead to violence. However, the international community recognizes a sovereign state's right to preserve its territorial integrity and such conflicts rarely turn global. This is not the case for irredentist movements (Gokcek G. 2011, 279-280).

Irredentism refers to political efforts to unite ethnically related parts of a particular population living in two or more different neighboring states. Irredentist claims are normally made by ethnic groups that happen to be the dominant majority inside a sovereign-state and wish to incorporate the land and territory of their ethnic-kin living as minorities inside a neighboring country or countries. Similar to secessionist claims, irredentism also challenges the territorial integrity of sovereign states. However, the clear difference is that in most cases the claim is being made by a sovereign state with a well-organized and capable military. When the request to incorporate the territory and/or its people is denied, the claimant does not immediately nor easily give up. The situation intensifies as the claimant pushes to have its objectives met by any means possible. This reluctance to back-down creates an environment of hostility and violence, which ultimately leads to a war (Saideman S. & Ayres R. 2000, 1136).

In irredentist clashes there are two (or more) confronting sides but all countries of the region and great powers will be involved in the conflict. As Stefan Wollf noted, international support for or against a secession/irredenta will depend upon a variety of different factors, such as the danger of armed conflict arising from the secession or its denial, the human rights records of both states involved and their international influence, strategic interests of regional and world powers in the area, the potential creation of a new minority problem in the seceding territory and its consequences for regional and global stability, the strength of support and enthusiasm which the kin-state lends to the secessionist aspirations of the co-ethnic group, and the means with which secession and its prevention are being sought (Wollf 2002, 28).

WHAT IS IRREDENTA AND HOW IT IS DIFFERENT FROM DIASPORA?

George Fredrickson a prominent American scholar offered the following observations: "…There are two ways you can gain territory from another country. One is by conquest…the other way you can regain territory is by population infiltration and demographic dominance…" (Fredrickson 1988, 135).

During the resettlement of an ethnic group to a new place, it is up to not only the first generation of immigrants, but also their descendants, to preserve its former distinctiveness and its ethnic characteristics in one way or another. Long-term residence in another country transforms the generation of immigrants into a sub ethnos, a Diaspora, a splinter broken away from the main ethnic core, with a culture, lifestyle and language that differs from the original. The representatives of this kind of sub-ethnos (Diaspora) usually have dual ethnic identity, with a consciousness of belonging to the larger ethnos, and a consciousness of belonging to the Diaspora.

Descendants of immigrants, having lived a long time outside of their historic homeland (ethnic grounds), are usually subject to assimilation, or rather, dissolution into the dominant alien ethnic environment. They gradually forget their native language, customs and ethnic culture, which ultimately leads to the loss of a sense of the old sub-ethnos ethnicity. This process usually ends with the shift of several generations. The Diaspora, however, will not disappear as long as its members perceive themselves as opposed to the "we-they" binary, and the "they" refers to all others, including even the ethnic-core from which their ancestors once broke free (Semenov 2000).

At times radical changes in the national identity (citizenship) occur within short timeframes, as was the case after the collapse of federative states in Eastern Europe and the disintegration of the Soviet Union. Here, it is not so much a question of evolution, but of radical change in the habitual self-consciousness on both the individual and group levels. Diasporas, much like all other social structures, are mobile, as S. Arutyunov so convincingly states: *"Diasporas are not only and not so much a condition is represented, diasporas are a development from 'yet to be Diaspora' to 'actually a Diaspora' to 'not so much a Diaspora'*" (Arutyunov 2000, 77).

Contemporary Diasporas are predominantly urbanized, characterized by higher rates of assimilation and a forced transformation from the traditional way of life to the modern. The transition from one stage of Diaspora genesis to another, which took centuries in the past, now occurs rapidly and in an accelerated mode. The shift of many ethno cultural markers, such as traditions, customs, native language, and the religion of ancestors, will take place in urban and unified environments for the duration of two or three generations.

The analysis of Diaspora consciousness requires a differentiated approach to its bearers. The Diaspora is divided into two main groups: 1. first generation immigrants who have existing national and ethnic consciousness; 2. subsequent generations born and raised in the host country. In adult immigrants, the restructuring of national (ethnic) consciousness in the Diaspora is a long and sometimes painful process. Diaspora consciousness of those born in the host country is a primordially native one, though not without various layers of stratification in national (ethnic) consciousness (Kalust′yants 2007, 288-294).

Immigrants living in the alien-ethnic, alien-cultural environment are subject to the process of diasporization. This is influenced by complex internal and external factors that differ in amplitude and intensity. It is believed that the rate of transition from immigrant communities to the Diaspora depends on the following key factors: compact resettlement in another country; age, gender and family structure; linguistic, cultural and confessional similarities or differences with the dominant alien ethnic populations; the national cultural policy of the state which has accepted immigrants; intensity of the ties with historical homeland; presence of strong Diaspora network organizations (Semenov 2000).

One of the keys to understanding the essence of Diaspora consciousness lies in fact that it is not the Diaspora that generates Diaspora consciousness, but on the contrary, Diaspora Identity creates the Diaspora. The genesis of the Diaspora, on the whole, is objective, but to argue that the processes of Diaspora formation have ended is possible only with the formation of Diaspora consciousness.

The most important factor in the formation of Diaspora consciousness is the knowledge of the native language by parents and senior members of the family, which then stirs interest in the national language and traditional culture in children, and shapes diasporic perceptions of the world.

The importance and role of ethnic identity characteristics in Diasporas vary depending on the particular historical-political situation, the level of Diaspora consolidation, and the specifics of ethnic environment. The assertion that for Diasporas with a long history, the ethnicity shifted to the old traditional ethnic rituals, customs and traditions seems to be true. In fact, Diaspora members feel completely different and distinct, especially during the days of ancient folk holidays and eating traditional food.

In the self-consciousness of the Diaspora, the idea of the Diaspora plays a key-role; much like pioneering immigrants serve as the glue for future generations to come. Within this idea lies the understanding of the Diaspora's unique historical fate, the similarities and differences with the mother ethnic group, the members of the Diaspora in other countries, the recognition of the indispensability and the conservation of liaison channels with the historical homeland, and the aspiration for inter-diaspora consolidations and inter-ethnic integration into the country of residence. Unlike immigrant ethnic groups, uncertain as to whether or not they will take root in the host country, Diasporas are aware that their lives and the lives of future generations are directly related to the new homeland (German Kim 2012, 81-105).

Historically, few scholars have investigated the specific topic of diasporic political influence, but the last decade has seen an upsurge in new research. Diasporas have become remarkably more involved in the political processes in recent years.

A region under the political jurisdiction of one nation but related to another through cultural, historical, or ethnic ties is sometimes called an *irredenta*[2] (*Italia irredenta)* But there is another meaning of *irredenta* as an ethnic minority living compactly and for a long historical period in the border area of the neighboring

2 The word was coined in Italy from the phrase *Italia irredenta* ("unredeemed Italy"). This originally referred to Austro-Hungarian rule over territories mostly or partly inhabited by ethnic Italians, such as Trentino, Trieste, Dalmatia, Istria, Gorizia, Ticino, Nice (Nizza), Corsica and Malta.

homeland state with the maternal ethnic core and pretending to be aborigine in the living region (Mendiculova 2003).

A significant characteristic of many conflicts is what is called ‘external involvement:’ another state, usually a neighboring state, gets involved in the conflict, declaring that it aims to support and protect the rights and interests of its irredentic or diasporic minority. In many cases, the neighboring country’s goal is more radical than just protecting the rights of the minority: its objective is to ‘liberate,’ or to ‘redeem’ that minority and the territory in which it lives. This goal and the set of policies to achieve it constitute the core of “irredentism.” Irredentism invariably has an aggravating effect on minority-majority conflicts. By enhancing mutual suspicion and enmity, it frequently engenders violence, and, sometimes, even war (Yagcioglu 1996).

Ethnic Diaspora can be only in the case when the members of a particular ethnic group live in the host country populated by a different native peoples. Irredenta has different than Diaspora attitude to its inhabited territory, arguing that the border area in which they are the aboriginal population, should be attached to the territory of it’s ethnic core living in neighboring country.

Collapse of USSR and Territorial Disputes in Central Asia

The territorial conflicts can be divided into two types depending on the nature of conflicting sides. The first type is the conflict between the ethnoses (tribes, clans) within one country (inter ethnic) or between two or more states (international). Another type of conflicts is related to a section of the territory of a country and is defined as *separatism*. Separatism depending on its goals can be of the two types: *secessionism* which aims at separation of a part of the country’s area for establishment of a new sovereign state and *irredentism*—claiming annexation of a territorial part of one country for its Anschluss to the other neighboring state on the grounds of common ethnicity or prior historical possession (Horowitz 1992, 118-130).

The central issue in many irredentist movements is territory and not population, despite the irredentist state’s assertions to the contrary. There are several cases of irredentism that involve territories without even the existence of an ethnic minority related to the irredentist nation (Mayall & James 1990, 57) Therefore, it is the minorities that suffer the brunt of irredentism’s negative consequences. That is why ethnic minorities are often not very enthusiastic about irredentism. According to Horowitz they are even more likely to develop secessionist movements than support irredentist ones originating from the ‘mother-countries’ (Horowitz 1992, 118-130).

With the collapse of the Soviet Union, Russia, China, and all five Central Asian states—Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan, accepted the old Soviet borders. However, currently there are tensions among all former Soviet republics regarding the issue of border delimitation. Ongoing border disputes—involving Kazakhstan, Kyrgyzstan, Tajikistan, and Uzbekistan has been a significant source of inter-state tension in the Central Asia since independence from the Soviet Union in 1991.

The institutionalization of borders in Central Asia has a long history which can be divided into several stages: the first one going back to the time of the Russian colonization of the region in the second half of the 19th century. The victory of the October revolution, establishment of the Union of Soviet Socialist Republics led to the second wave of delimitation of the borders between Kazakhstan and other Republics of Central Asia. Nikita Khrushchev initiated the changes of the borders within the Soviet Union. The transfer of the Crimean Oblast from the Russian Federation of Socialist Republics to the Ukrainian SSR was the greatest of them and led to high scale conflict between the two countries escalated to the international level. Through instructions by the Kremlin, areas of Kazakhstan and Uzbekistan, by decision of Nikita Khrushchev, were exchanged causing today's border and territory disputes. The final ongoing stage began with the collapse of the Soviet Union and establishment of the five sovereign countries in the post Soviet Central Asia.

The Republic of Kazakhstan being territorially the largest and economically the most advanced country of the region managed to solve most of its border problems in the post Soviet era. Its opponent is Uzbekistan—the second largest in size but first in the number of population and soldiers. Both Kazakhstan and Uzbekistan have been rivals to become the regional leader in the Central Asia.

In the early 2000s, Uzbekistan's border guards undertook a unilateral demarcation of the border, by building outposts with neighboring Kazakhstan; Kazakhstan in turn reacted with unease. On November 16, 2001, an agreement was signed by presidents Nazarbayev and Karimov delineating 96 percent of the over 1,200 mile Kazakhstani-Uzbekistani border. Both leaders indicated that the remaining border issues could be resolved diplomatically. The final agreement on border delimitation between the two states was reached in July 2003. The case of the village Bagys situated in the border area of the current Uzbekistan soil close to Tashkent but inhabited mostly by ethnic Kazakhs preferring Kazakhstan because of the higher living standards is a classical example of the importance of territory. After the collapse of the Soviet Union, the residents of Bagys hoped they would become a part of Kazakhstan. Nevertheless, Uzbekistan was unwilling to cede the land; Kazakhstan did not press the issue because Astana did not want to worsen its relations with Tashkent. As a result, the status of the residents of Bagys remains uncertain. Approximately half of the population still holds Kazakhstani passports, another half Uzbekistani (International Crisis Group 2002).

In an attempt to show their frustration, the residents of Bagys took to the streets on December 31, 2000, and proclaimed the Independent Kazakhstan Republic of Bagys and elected a president and a legislature (Rongxing Guo 2006, 59). The government of Kazakhstan refrained from pressuring Tashkent, both to prevent negative reactions from Uzbekistan and to avoid setting any precedent for Slavic separatist movements in the north of Kazakhstan.

After the 2003 border demarcation and delimitation between Kazakhstan and Uzbekistan the situation in some border areas remains tense. Since independence, there have been nineteen incidents recorded including one where four Kazakhstani and two Uzbekistani citizens were killed. Without resolving border disputes on a parity basis, the potential for armed conflicts will be high. Given tightening border controls, it is hardly surprising that both ethnic Uzbeks and Kazakh minorities continue to migrate out of Kazakhstan and Uzbekistan respectively. Even if the demarcation is completed, both countries will still be facing the daunting challenge of how to ensure freedom of movement across the border (Border issues between Kazakhstan and Uzbekistan 2003).

Another hot spot for Kazakhstan was in the northern border areas with Russia where ethnic Russians formed majorities, while Kazakhs predominated in the south and west. The policy of resettling Kazakhs into the northern regions of Kazakhstan began since the 1990s when Astana relocated Kazakhs from the South of the country to the northern part with the aim of changing the ethnic composition of the local population in the North.

In order to change the balance of population in favor of the titular nation the government of Kazakhstan promoted the resettlement of Kazakhs returning from abroad in the north. As is known, some four to five million ethnic Kazakhs lived outside of Kazakhstan in the 1990s: 1.3 million in China, 870,000 in Uzbekistan, 660,000 in the Russian Federation, and 157,000 in Mongolia. Between 1991 and 2011, approximately 860,000 so called *oralmans*[3] mostly from Uzbekistan returned back to their kin state. Then, in April 2012, Astana stopped the repatriation program, apparently concerned about the skills, values, and adaptability of those who had returned.

The Kazakhstan government's program of changing the ethnic composition of the northern regions of the country has worked. By the beginning of 2010, Russians exceeded ethnic Kazakhs only in the North-Kazakhstan oblast where the

3 *Oralman* - this term derives from the Kazakh verb *oralu* (to return) and was coined in Kazakh and Russian languages (*оралман*) in the middle of 1990s when the Kazakhstan governmental started the program of support to 'returning' Kazakhs from abroad. Oralman is repatriated to Kazakhstan according the quota system established in 1993.

former constituted 48.2 percent of the population.

The most tragic conflicts between two ethnic groups in the border area in the post Soviet Central Asia were Osh riots. The massacre took place in June 1990 in the cities of Osh and Uzgen, part of the Kyrgyz Soviet Socialist Republic (Kyrgyz SSR). The immediate cause for the riots was a dispute over the land of a former collective farm. While official estimates of the death toll range from over 300 to more than 600, unofficial figures range up to more than one thousand (Tishkov 1995, 133-149).

Ten years later in June 2010 Kyrgyz President Roza Otunbayeva declared a state of emergency in the southern Kyrgyzstan after admitting that ethnic pogroms carried out between June 10 and June 14 had claimed 2,000 victims -10 times the previous official death toll. These deaths largely took place when ethnic Kyrgyz mobs attacked minority Uzbek communities in some parts of the southern Kyrgyzstan, including the cities of Osh and Jalalabad. Many ethnic Uzbeks fled to makeshift camps along the Kyrgyzstan-Uzbekistan border, sections of which were sealed off by a barrier fence built by the Uzbek government. Red Cross officials said there were major shortages of food, water, shelter, and medicine (International Crisis Group 2010).

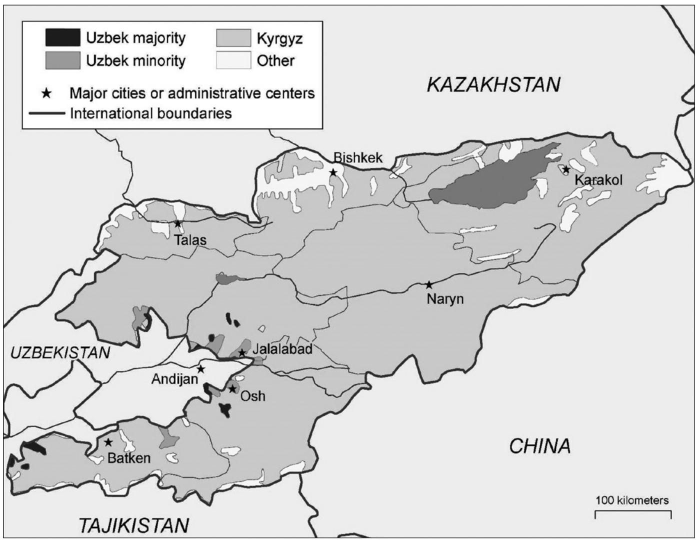
Some Kyrgyz and international experts state that the riots in 2010 were not just merely a repeat of those of 20 years before, but a continuation of the conflict (Suinaly kyzy 2012, 80).

The international aid for solving the conflict was quite passive and confined to the humanitarian assistance. The U.S. focused on the security of its own base, Manas, which was of key importance for the Afghan operation. Russia, Kazakhstan, China, and international organizations like Shanghai Cooperation Organization or the Kazakhstan-led OSCE remained passive and seemingly expected that the clashes would calm down on their own. But in the longer perspective the return of violence is very probable.

Irredenta vs. Diaspora in Territorial Claims

The stated goal of irredentism is, in its radical form, to 'redeem' the territory where a kin ethnic minority (irredenta) lives and in its moderate form, and to defend that minority's rights. Thus irredentism, as a set of policies and actions, purports to help that minority. However, an irredentist approach to a minority, as a rule, does not improve but worsens its status and conditions (Yagcioglu 1996).

Territorial disputes and irredentist disputes are very prone to escalation and very difficult to resolve. According to Chazan, there are four main outcomes of irredentist conflicts: Successful readjustment of boundaries and territories to satisfy irredentist interests; The redefinition of the minority group struggle, usually high-



Map showing the distribution of Kyrgyz, Uzbeks, and "other" nationalities of the population of Kyrgyzstan in 2009. "Other" includes Russians, Dungans, Uyghurs, Tajiks, and Koreans etc.
Source: Bond & Koch. 2010, 533

lighting separatism at the expense of irredentism; The (temporary) withdrawal of irredentist demands (frequently as a result of a defeat of the irredentist state and/or minority), but with the prospect of them reappearing again sometime in the future, when conditions change; and accommodation and compromise through negotiation. Such an accommodation often involves some type of autonomy (cultural or territorial, or both) for the ethnic minority, as well as the recognition of some special relationship between that minority and the state that had made the irredentist demands (Chazan 1991, 1-8).

The list of irredentist claims or disputes in *Wikipedia* contains several dozens of cases, both historical and continuing to the modern day in all continents from Europe to Africa, from America to the Middle East (List of irredentist claims or disputes 2015). This list is a clear demonstration, on the one hand, of the large role of irredentism in contemporary international relations but on the other hand, of the lack of Irredenta and Irredentism's studies.

Markus Kornprobst explains how irredentist disputes between European states have been resolved peacefully since the end of the Second World War by two case studies: the Federal Republic of Germany (FRG) and the Republic of Ireland.

The main question posed by Kornprobst is: why have European states given up their irredentist claims. A comprehensive survey covering irredentist disputes throughout the world from 1946 to 2000 provides a picture of how European states have largely solved their disagreements through peaceful recognition of the *territorial status quo* since the end of the Second World War. Expanding on more traditional understandings of irredentism that focus largely on the retrieval of ethnic kin and the land they inhabit from other states, Kornprobst starts by defining the phenomenon as "*a territorial claim by a sovereign state against another sovereign state, aimed at reaching congruence between the boundaries of the nation and the borders of the state*" (Kornprobst 2008, 10-12).

Numerous situations in which displaced ethnic groups kindred to those of neighboring nation-states but outnumbered in the nation-states which they inhabit, have been prevented for centuries from achieving reunion with their homelands. Although the Germans, for example, have long been in the majority in France's provinces of Alsace and Lorraine and Italy's South Tyrol, they have been prevented from achieving self-determination by French and Italian majorities in the rest of those nations. Similarly, Slovenians are predominant in the Austrian province of Carinthia, which borders on their homeland of Yugoslavia, but the German-speaking majority in Austria has long prevented their secession. Other examples of the failure of irredentist movements in Europe are those of the Albanians of Yugoslavia's Kosovo province and the Greeks of Cyprus. A closer examination of those nation-states compounded of more than one nationality will reveal, however, that, in most instances, citizens of one culture, language or nationality are overwhelmingly dominant in either their numbers or their ability to employ the force of law. Thus, although the Germans are more numerous than any other nationality in Alsace-Lorraine or South Tyrol, they are themselves minuscule minorities within France or Italy as a whole. The Slovenians in Carinthia, also, are overwhelmingly outnumbered within the whole of Austria by their German-speaking fellow citizens. Even if the Yugoslav masses did not wish to retain control over the Albanians of Kosovo, their government is willing to resort to the force needed to suppress any Albanian dissidents. Similarly, Turkey met Greece's call for *enosis* with the overwhelmingly Greek population of Cyprus by threatening to wage war against Greece.

It would moreover, be a serious error to denigrate the significance of irredentist movements simply because they often are unsuccessful. Even a minuscule national minority within a larger nation-state has often, when unable to win either its independence or reunion with its homeland, demonstrated a potential for generating chronic civil disorder and political extremism (Heubaum 2009, 79-84).

There is a crucial difference between Diaspora and Irredenta, the latter being an ethnic minority living compactly and for a long historical period in the border area of a neighboring homeland state with the maternal ethnic core and pretending to be aborigine in the living area. *Diaspora* has a mother land from where its ancestors migrated to the host country which, over time, became native. An area that may be subjected to a potential claim is sometimes called an irredenta. Not all irredentas are involved in irredentism (Ambrosio & Thomas 2001, 1-30).

A traditional understanding of irredentism as the actions of one state to annex the bordering territories administered by another state on the grounds of common ethnicity of the populations of both countries or prior historical possession is still predominant in the contemporary discourse of political and international relations studies.

The collapse of the Soviet Union and the crash of the East European block led to a boom in the scholarly interest in irredentism, separatism and secessionism initially in America and Western Europe. Recent historiography of irredentism includes the studies of the scholars in all parts of the planet and especially in the countries involved in the territorial claims, conflicts and wars.

References

Aksana Ismailbekova & Sophie Roche. The glimmer of hope in bloody Kyrgyzstan. Retrieved from http://enews.fergananews.com/articles/2654.

Ambrosio, Thomas (2001). *Irredentism: Ethnic Conflict and International Politics*. Chapters 1-2, pp. 1-30. Westport, USA: Praeger Publishers.

Andrew R. Bond & Natalie R. Koch (2010). Interethnic tensions in Kyrgyzstan: A political geographic perspective. *Eurasian Geography and Economics* 51(4), 531-562.

Arutyunov S. A. (2000). Diaspora—eto protsess. *Etnograficheskoe Obozrenie*, No. 2.

Asel Suinaly kyzy (2012). Kyrgyzstan's tragedy in the south: political provocation or ethnic confrontation. Master of art dissertation, Budapest, Hungary: Central European University.

Border issues between Kazakhstan and Uzbekistan. Retrieved from https://www.neweurasia.net/politics-and-society/border-issues-between-kazakhstan-and-uzbekistan/.

Chazan N. (1991). *Approaches to the Study of Irredentism* (*Introduction*). In N. Chazan (Ed.), *Irredentism and International Politics*, 1-8. Boulder, CO: Lynne Rienner Publ.

Encyclopedia of the Social Sciences, 1st ed. (1937; rpt). New York: Macmillan, 1950.

Fredrickson George M. (1988). *The Arrogance of Race: Historical Perspectives on Slavery, Racism and Social Inequality*. New Hampshire, USA: University Press of New England.

Gokcek G. (2011). Irredentism versus secessionism: The potential for international conflict. *Nationalism and Ethnic Politics* 17(3), 276-296.

Gokcek G. (2012). Ethnic groups in conflict, neighboring governments, and interstate war. Prepared for presentation at the Western Political Science Association Annual Conference, Portland, March 23-24, 2012. Retrieved from http://wpsa.research.pdx.edu/meet/2012/gokceck.pdf.

Horowitz D. L. (1992). Irredentas and secessions: Adjacent phenomena, neglected connections. *International Journal of Comparative Sociology* 23(1-2), 118-130.

International Crisis Group (2002). *Central Asia: Border Disputes and Conflict Potential*. Report No. 33, Osh-Brussel. Retrieved from http://www.crisisgroup.org/~/media/.

International Crisis Group (2010). *Pogroms in Kyrgyzstan*. Retrieved from http://www.crisisgroup.org/en/regions/asia/central-asia/kyrgyzstan.

Kalust'yants Zh. S. (2007). Diaspornoe soznanie v sovremennom obshchestve. *Vestnik Tomskogo gosudarstvennogo universiteta. Biologiâ* 50, 288-294.

Kemal Kirisci & Gareth M. Winrow (1997). *The Kurdish Question and Turkey: An Example of a Trans-state Ethnic Conflict*. Portland: Frank Cass Publishers.

Kim, German (2012). Nation, Ethnie, the Self-Consciousness of Diaspora. [Герман Ким. Национальное, этническое и диаспорное самосознание]. *Journal of Siberian Studies* XVI-1, 81-105. Pai Chai University, Korea.

Князев А. А. Диаспора или ирредента?—"Единство в разнообразии." Retrieved from http://www.yaik.ru/forum/showthread.php?1393.

The Kurdish Conflict in Turkey: Obstacles and Chances for Peace and Democracy (2000). New York: St. Martin's Press.

List of irredentist claims or disputes. Retrieved from http://en.wikipedia.org.

Mayall, James (1990). *Nationalism and International Society*. Cambridge, UK: Cambridge University Press.

Markus Kornprobst (2008). *Irredentism in European Politics*. New York, USA: Cambridge University Press.

McKiernan K. (1999). Turkey's war on the Kurds. *The Bulletin of the Atomic Scientists*, March/April.

Mendiculova G. M. Казахская диаспора и ирредента: история и современность. Retrieved from http://www.kazakh.ru/news/articles/?a=8.

Naomi Chazan (Ed.). (1991). *Irredentism and International Politics (Studies in International Politics)*. Boulder, USA: Lynne Rienner Pub.

Olson R. (1997). Turkish and Syrian relations since the Gulf War: The Kurdish question and the water problem. *Middle East Policy* 5(2).

Report of the independent International Commission of Inquiry into the events in Southern Kyrgyzstan (June 2010). Retrieved from http://reliefweb.int/sites/reliefweb.

Rongxing Guo (2006). *Territorial Disputes and Resource Management: A Global Handbook*. New York, USA: Nova Science Pub Inc.

Saideman, Stephen M. & Ayres R. (2000). Determining the causes of irredentism: Logit analyses of minorities of risk data from the 1980s and 1990s. *The Journal of Politics* 62(4), 1126-1144.

Semenov Yu. I. (2000). Etnos, natsiya, diaspora. *Etnograficheskoe Obozrenie* (2); Tekst odnoimennoĭ lektsii na saĭte elektronnogo zhurnala—Skepsis. Retrieved from http://scepsis.ru/library/id_75.html.

Tishkov, Valery (1995). 'Don't kill me, I'm a Kyrgyz!': An anthropological analysis of violence in the Osh Ethnic conflict. *Journal of Peace Research*, 32(2), 133-149. Retrieved from 193-the-pogroms-in-kyrgyzstan.aspx.

Ward, John William (1982). *Tocqueville's America*. Washington DC, USA: LTV Corp.

Wollff St. (2002). *Disputed Territories: The Transnational Dynamics of Ethnic Conflict Settlement*. New York, USA & Oxford, UK: Berghahn.

Yagcioglu D. (1996). Irredentism: an inevitable tendency of ethnic nationalism (Some initial thoughts, some tentative conclusions). Retrieved from www.academia.edu.

Why is the North Sea West of Us?: Principles behind the Naming of Seas*

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Abstract

This article focuses on the motivations behind sea-naming, by means of examples from Europe but also elsewhere. Why do certain sea names become dominant while others retract into local forms or simply die out? The article takes us back in time to the early days of map-making and, indeed, earlier. Occurrences of sea names such as the North Sea are examined and analysed to see how they spread from an original one-language form to exist in multiple languages, and analyses them from a linguistic, geographic and nautical perspective.

It is found that Seas or bodies of water in stretches of sea are named according to six main principles. Many sea-names are formally secondary names whose specific element is the name of: a) a nearby settlement name; b) a nearby island or c) a nearby country or region. In addition, a sea-name may be a formally primary name named from: d) a directional perspective, e) its appearance or f) containing the name of an explorer or a commemorated person as its specific

Keywords

sea-names, onomastics, place-names, historical cartography, map-making, international standards

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INTRODUCTION

Growing up on the west coast of Jutland, this author always found it puzzling that the *North Sea* (Nordsøen) lay straight west of where I lived. Locally, we never used the term either. We always used a term which translates as: *The West Sea* (Vesterhavet, pronounced [*æ ˈvæsdəˌhau*]) or—more often—simply *The Sea* ([*æ ˈhau*]). Both *Nordsøen* and *Vesterhavet* are authorised place-name forms in Danish—the latter designating only part of Nordsøen, according to a ruling of the Danish Place-Name Commission (Stednavneudvalget) from 1968.[1] Before then, the name *Vesterhavet* actually had prominence over *Nordsøen*.[2] The ruling of 1968 was an effort to synchronise the Danish authorisation with international standards, it seems.

NAMING OF WATERS[3]

How did the *North Sea* (*Nordsøen)* ever become the established form for this sea, and what are the general motives behind naming in this way—as in the naming of oceans, seas and parts of seas? As far as this author can see, there are at least six ways of naming bodies of water. In the following pages, the author shall outline what they are and how they are motivated.

A large number of names of waters are formally secondary names whose specifics contain another geographical name, be it the name of a settlement, island, region or country. Others are formally primary names named from how they look or feel or how they are located in relation to another locality/area. A final group could tentatively be called 'exploration names,' i.e. formally primary name constructions with a specific containing the name of the explorer known to have discovered or first navigated the body of water in question. Variations on this theme include commemorative names, where persons (regents, sponsors, scientists, etc.) or places of importance to the discoverer or navigator are reflected in the specific of the name.

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* This is a revised article based on a paper given at the The 21st International Seminar on Sea Names in Helsinki, August 23rd-26th 2015.

1 Stednavneudvalget (= Danish Place-Name Commission) 1969, Journal no.: 53/69.

2 Cf. the authorisation list for the westernmost county of Denmark: *Fortegnelse over stednavne i Ribe Amt*. Udgivet af Stednavneudvalget. 1967, p. 33 & 48.

3 When I use the term *waters* in this article, it is in the strict sense of 'bodies of salt water.'

NAME DERIVED FROM A SETTLEMENT NAME

A very common naming motive is where a body of water—usually a bay, fjord, sound or strait—close to land is named after a settlement on the adjacent land. Examples abound, from Denmark *Køge Bugt*, *Faxe Bugt* (see Figure 1) and *Vejle Fjord* (Figure 2) are fine examples of bays which take their name from the main settlement in the bay or fjord area. Internationally, we have the *Sea of Azov* (Figure 3) between Crimea and the Southern Russian Rostov Oblast and *Loch Eriboll* in Northern Scotland (Figure 4).[4]

Although it would be natural to assume that the settlement is used to name the water feature would be situated on the waterfront, this is often far from the case. In the examples stated above, only the towns of *Køge* and *Vejle* are situated by the body of water named from them. In the case of Sea of Azov, Loch Eriboll and Faxe Bugt, the geographical names they take their name from are situated

Figure 1. Køge Bugt and Faxe Bugt
Map data © 2015 Google

4 Of other name in this category may be mentioned: *Adriatic Sea, Bristol Channel, Gulf of Aden, Gulf of Aqaba, Gulf of Riga, Gulf of Suez, Makassar Strait, Sea of Azov, Sea of Okhotsk* and the *Singapore Strait*—all from the publication *Limits of Oceans and Seas* (1953) of the International Hydrographic Organization (IHO).

Figure 2. Vejle Fjord Map data © 2015 Google

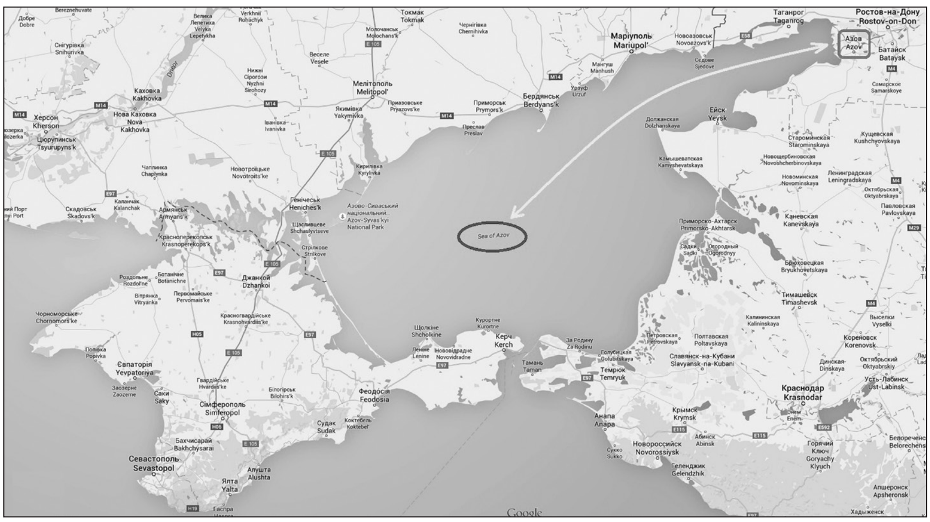

Figure 3. Sea of Azov Map data © 2015 Google

Figure 4. Loch Eriboll Map data © 2015 Google

some distance inland, albeit with *Azov* placed on the Don running via the Taganrog Bay into the Sea of Azov.

The naming motive thus does not seem to be owing to the situation of the geographical name in direct relation to the named body of water, but rather the most important place in the vicinity of the body of water.

NAME DERIVED FROM AN ISLAND-NAME

Another rather common naming motive is to name bays or seas after the name of the island which delimits (part of) the extent of the water feature. Such an example can be seen in the Danish *Sejerø Bugt* (Figure 5), where the island of *Sejerø* comprises a nice delimitation for the bay itself. Even more visible is this naming motive if the naming focus is a group of islands, such as the *Balearic Islands* and the *Andaman Islands*—almost enclosing the *Balearic Sea* and *Andaman Sea*[5] (Figures 6 and 7) on the sea side in the same way as terrain does it on the land side.[6]

The named island does not always act as a delimiter. Sometimes the naming motive seems to be a direct relation to the water feature only, as in the case of the island of *Hanö* being the naming motive for *Hanöbukten* (Figure 8) in southern

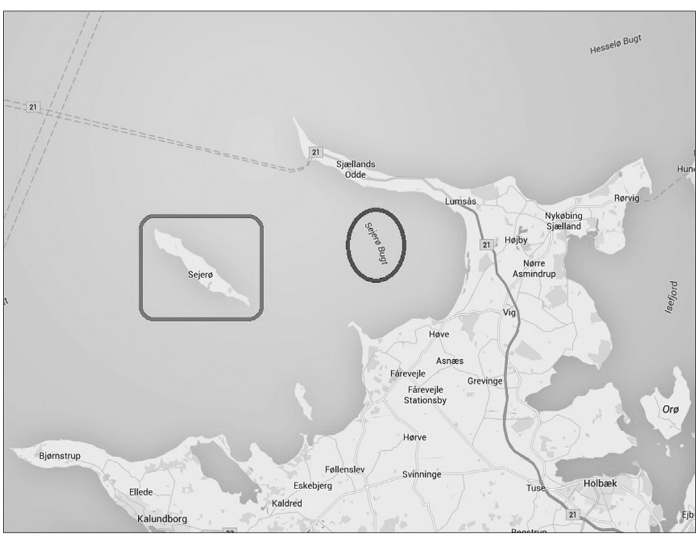

Figure 5. Sejerø Bugt Map data © 2015 Google

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5 According to the *Limits of Oceans and Seas* (1953), The Andaman Sea is termed *Andaman or Burma Sea*.

6 Other examples from this naming category from *Limits of Oceans and Seas* (1953): The *Balearic Sea*, *Bali Sea*, *Banda Sea*, *Celebes Sea*, *Ceram Sea*, *Flores Sea*, *Halamahera Sea*, *Java Sea*, *Laccadive Sea*, *Savu Sea*, *Solomon Sea* and the *Timor Sea*.

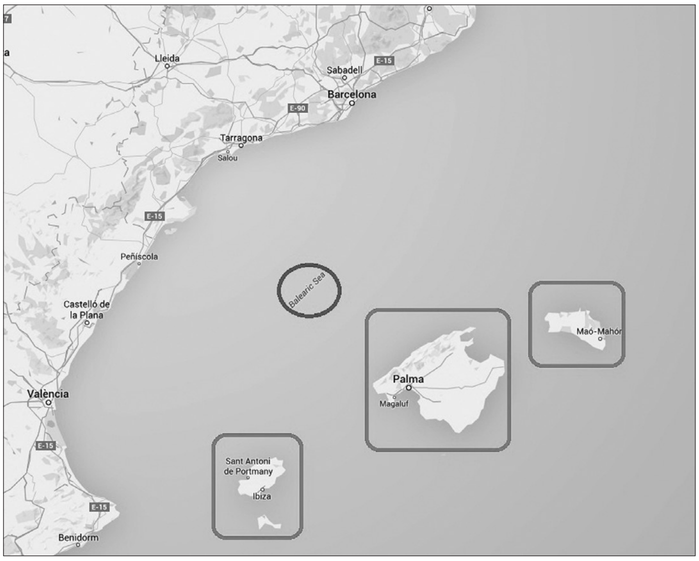

Figure 6. The Balearic Sea Map data © 2015 Google

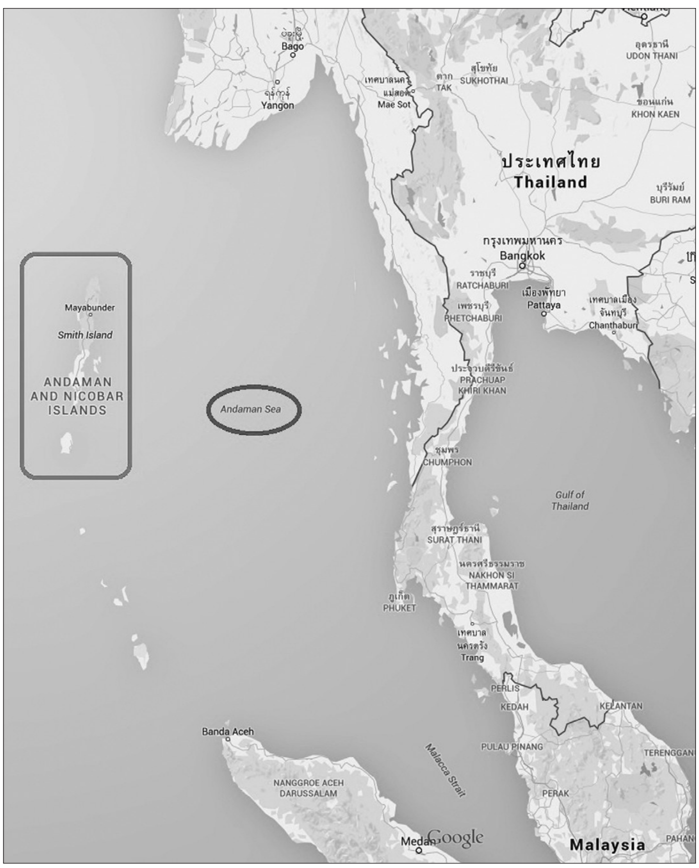

Figure 7. The Andaman Sea Map data © 2015 Google

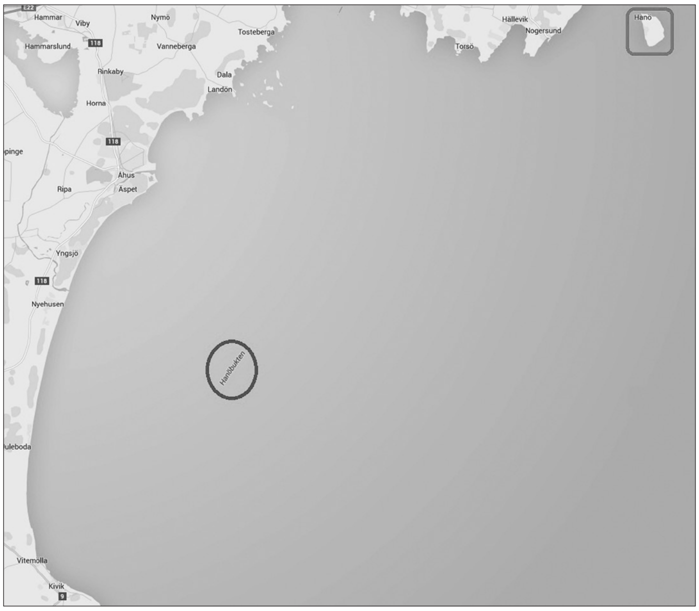

Figure 8. Hanöbukten Map data © 2015 Google

Sweden. Here the island giving the bay its name is situated right off to one side of the bay, leaving most of the bay open to the Baltic Sea.

NAME DERIVED FROM A COUNTRY OR REGION

Where a body of water divides two countries or regions, it is normal to see a naming of the water after one of the countries/regions in question. The motivation may either be viewpoint oriented (see also below under *Name derived from a directional perspective*), i.e. the view from one side of the water to the other, or it may be named after the best known part at the time of naming. A local example of this is the *Baltic Sea* (Figure 9), probably named from a directional perspective, as it seems to share its naming viewpoint from west towards east with the Swedish name for the water: *Østersøen* (East Sea).

Other examples include the *Greenland Sea* between *Greenland* and Svalbard (Figure 10), the *Norwegian Sea* between *Norway* and Iceland/Greenland (Figure 10) and the *Gulf of Thailand* (Figure 11), shared between Singapore, Malaysia, *Thailand*, Cambodia and Vietnam.[7] In a case like the *Arabian Sea*, the naming

7 Examples from this category in the *Limits of Oceans and Seas* (1953) include: The *Alboran Sea, Arabian Sea, Arafura Sea, Arctic Ocean, Baltic Sea, Bay of Bengal, Bay of Biscay, Caribbean Sea, Celtic Sea, Chukchi Sea, East Siberian Sea, English Channel, Greenland Sea, Gulf of Alaska, Gulf of Boni, Gulf of Bothnia, Gulf of California, Gulf of Finland, Gulf of Guinea, Gulf of Mexico, Gulf of Oman, Gulf of St-Lawrence, Gulf of Thai-*

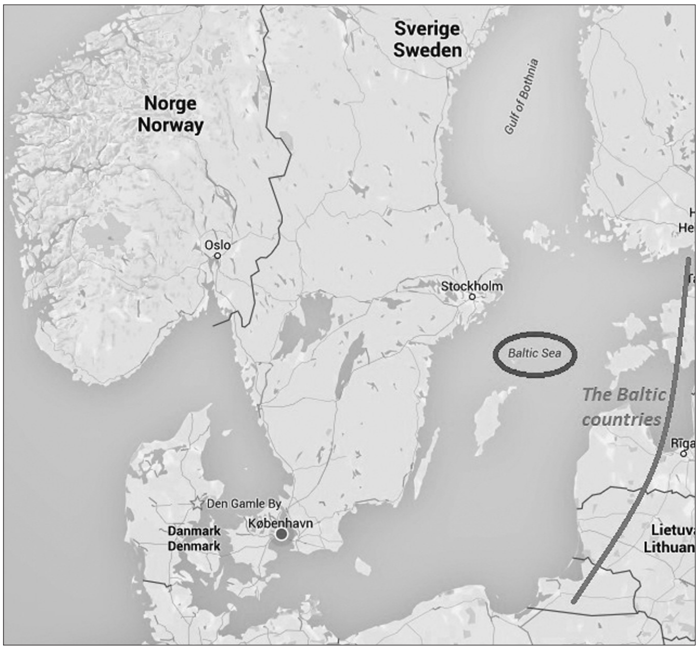

Figure 9. The Baltic Sea Map data © 2015 Google

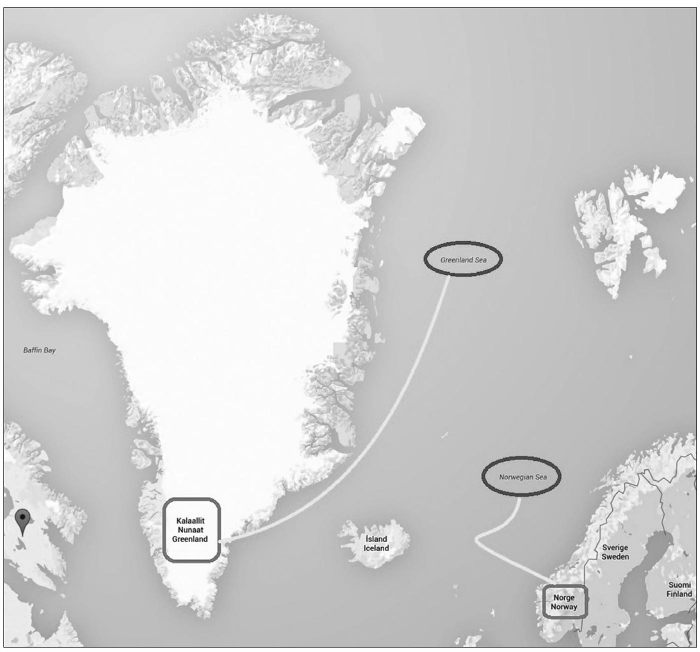

Figure 10. The Greenland Sea and the Norwegian Sea
Map data © 2015 Google

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land, Gulf of Tomini, Indian Ocean, Ionian Sea, Japan Sea, Kara Sea, Labrador Sea, Ligurian Sea, Malacca Strait, Molukka Sea, Mozambique Channel, Norwegian Sea, Persian Gulf, Philippine Sea, Rio de La Plata, Sea of Marmara, Strait of Gibraltar, Sulu Sea and the *Tyrrhenian Sea*.

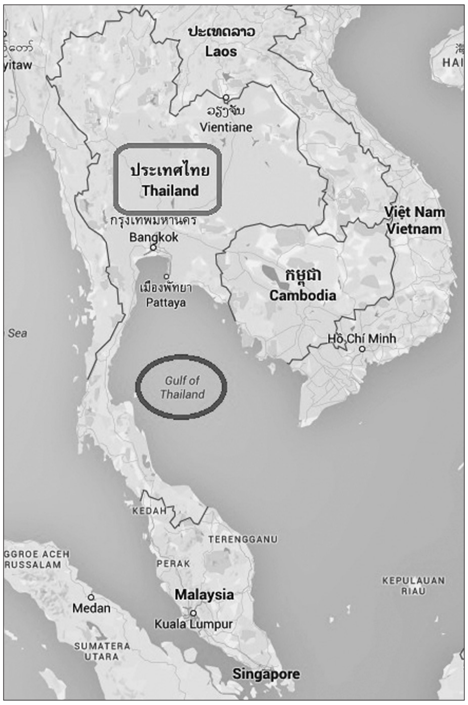

Figure 11. Gulf of Thailand
Map data © 2015 Google

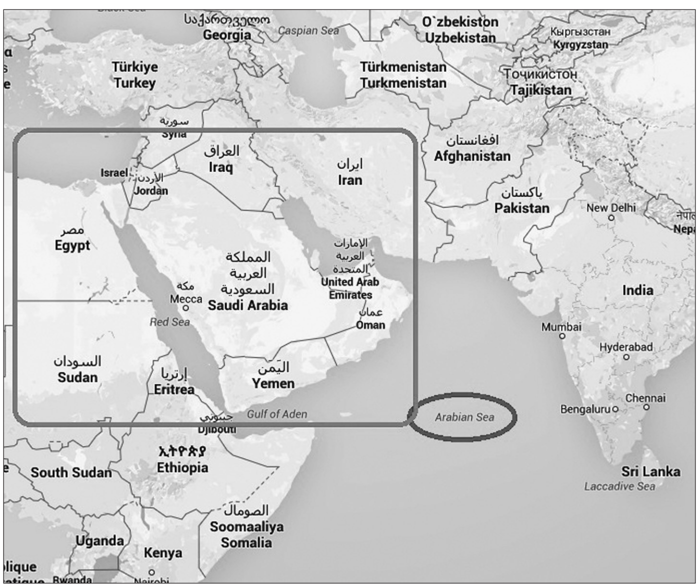

Figure 12. The Arabian Sea
Map data © 2015 Google

motive is not a single country but rather a language or cultural region, usually referred to as 'the *Arabic Countries*' (Figure 12), in spite of the fact that e.g. India and Pakistan (Hindi and Urdu, Indoeuropean languages) border this sea also.

NAME DERIVED FROM A DIRECTIONAL PERSPECTIVE

In some respects seemingly related to the above naming motive, but not quite so popular, is naming from a directional perspective. This is where we find names like the *North Sea*, at the outset of this article (Figure 13).[8] The majority of names of water features which share this naming motive are of the reciprocating type, such as the *North Atlantic* vs. the *South Atlantic* (Figure 14).[9]

Only in very few cases is the naming cause truly directional, i.e. where a fixed location or delimited area (on land) forms the directional basis from which naming has been undertaken. Such an example is the *North Sea*. Seeing the area on the map, it is clear that the only area truly to the south of the North Sea is the Netherlands (Figure 13). Being world leaders for centuries in map making and —not least—seafaring, this relatively small country has exerted immense influence on the sailing vocabulary and sea nomenclature. And it is in this capacity the capability to determine the name of the North Sea—and other names (see below)

Figure 13. The North Sea Map data © 2015 Google

8 Apart from the *North Sea*, there are just the *Northwestern Passages* and *Southern Ocean* of this category in the *Limits of Oceans and Seas* (1953).

9 The examples in this category from the *Limits of Oceans and Seas* (1953) are: *Eastern China Sea, North Atlantic Ocean, North Pacific Ocean, South Atlantic Ocean, South China Sea* and the *South Pacific Ocean*.

Figure 14. The North Atlantic and the South Atlantic
Map data © 2015 Google

—has arisen. It is true that there were a number of national efforts for countries to obtain their own map making industries but both the inspiration and in many cases the map makers themselves were Dutch, which only caused the Dutch influence to deepen even more in maritime cartography.

NAME DERIVED FROM APPEARANCE

The Dutch influence in Danish waters extend to more than just the name of the North Sea, the neighbouring waters leading into the Baltic are called *Skagerrak* and *Kattegat* (Figure 15). Both these names are Dutch formations describing the appearance of these waters.

The first name, *Skagerrak*, is a formally secondary name, utilising a Dutch declension of the name of *Skagen*, the northern most point of Jutland, as its first ele-

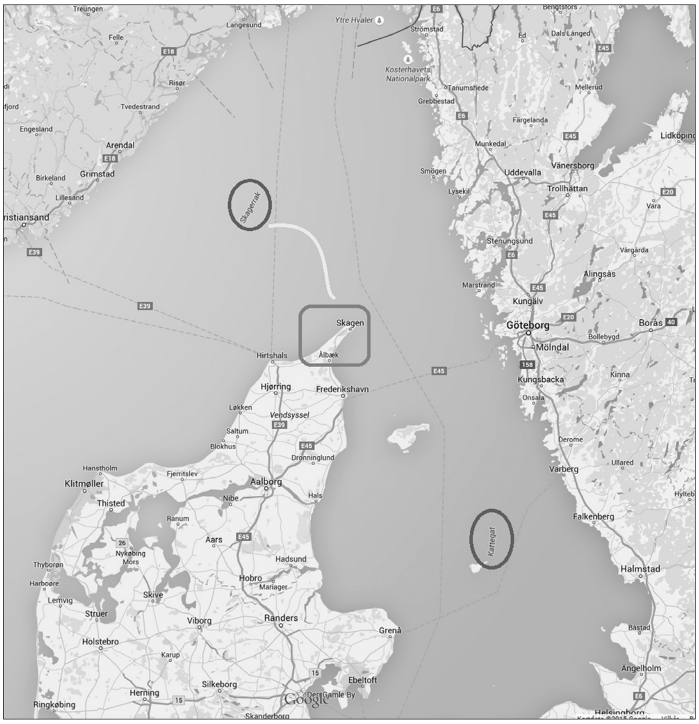

Figure 15. Skagerrak and Kattegat — Map data © 2015 Google

ment and the Dutch *rak* 'straight (line)' as its second element. The meaning of the name is thus something like "The way straight past Skagen." The second name, Kattegat, is no less picturesque in its name, being a compound of the Dutch words *kat* 'cat' and *gat* 'hole,' yielding a meaning of "Cat-hole," signifying that it is a water which is difficult to navigate, so narrow that only a cat can squeeze through it.

It is clear from these two examples that appearance is not the same as appearance on land. Here, naming is concerned with navigability and accessibility, and less how something looks, which colors it has or shape, as is a common naming motive for land-features.[10]

EXPLORATION NAMES AND COMMEMORATIVE NAMES

A common naming motive—particularly throughout the New World—is naming after explorers or people and places important to the naming explorers.[11] This

10 Examples from this category in the *Limits of Oceans and Seas* (1953) are: *The Bay of Fundy, the Black Sea, the Coral Sea, the Great Australian Bight, Kattegat, the Red Sea, Skagerrak, the White Sea* and *the Yellow Sea*.

11 The examples within this category from the *Limits of Oceans and Seas* (1953) are: *The Aegean Sea, Baffin Bay, Barentsz Sea, Bass Strait, Beaufort Sea, Bering Sea, Bismarck Sea, Davis Strait, Hudson Bay, Hudson Strait, Laptev Sea, Lincoln Sea, Tasman Sea*, as well as the last part of the IHO name the *Irish Sea and St.*

Figure 16. Hudson Bay and Hudson Strait Map data © 2015 Google

Figure 17. The Tasman Sea Map data © 2015 Google

naming motive is particularly common with names of islands or regions (Gammeltoft [under publication]), but can also be found in names of waters, such as *Hudson Strait* and *Hudson Bay* (Figure 16) in North America and the *Tasman Sea* (Figure 17) between Australia and New Zealand. The first two names have been named after Sir Henry Hudson, who explored the area in 1610, whereas the Tasman Sea was named after the Dutch explorer Abel Tasman, who navigated in Australian waters in 1644. To understand the naming motives for these names, it is necessary for some historical knowledge in order for the name to give any meaning. The general aspect with this type of name is that the name says nothing about the named locality in question, or of its environs—in this respect it is a neutral name, although from a socio-historical perspective the name may well

George's Channel.

Figure 18. Jan Janssonius. 1647. *Toitus Iutiæ*

Source: Bruun Rasmussen Kunstauktioner

be heavily laden—both positively and negatively—with a bias towards a single user group.

Both *Hudson Bay* and the *Tasman Sea* have different names in local indigenous languages, the latter is called *Te Tai-o-Rehua* in Māori—and informally *The Ditch* by Australians and New Zealanders (Taonui [webpage]). The local name for Hudson Bay in Inuktitut is *Kangiqsualuk ilua*,[12] which has no relation to the English or French (*baie d'Hudson*) names for the Bay.

HOW DID TODAY'S SEA NAMES COME ABOUT?

The majority of our international names of oceans, seas, bays, straits, sounds and other water features derive from a distinct period, namely the 17th and 18th centuries, when Dutch seafaring, exploration and cartography was at its highest (Bramsen 1952, 68-90). Virtually all of the names on maps of the period prior to 1600 do not exist today. This is mainly due to the fact that these names were Latin derived place-names or Latinised forms of local names. The first Dutch atlases from c. 1570-1610 do still feature Latin or Laitinised forms. But the later Dutch mapmakers started to introduce vernacular name forms for water localities. 'Ver-

12 *Weltkarte mit Originalschriften*. Planet Poster Editions, 2006.

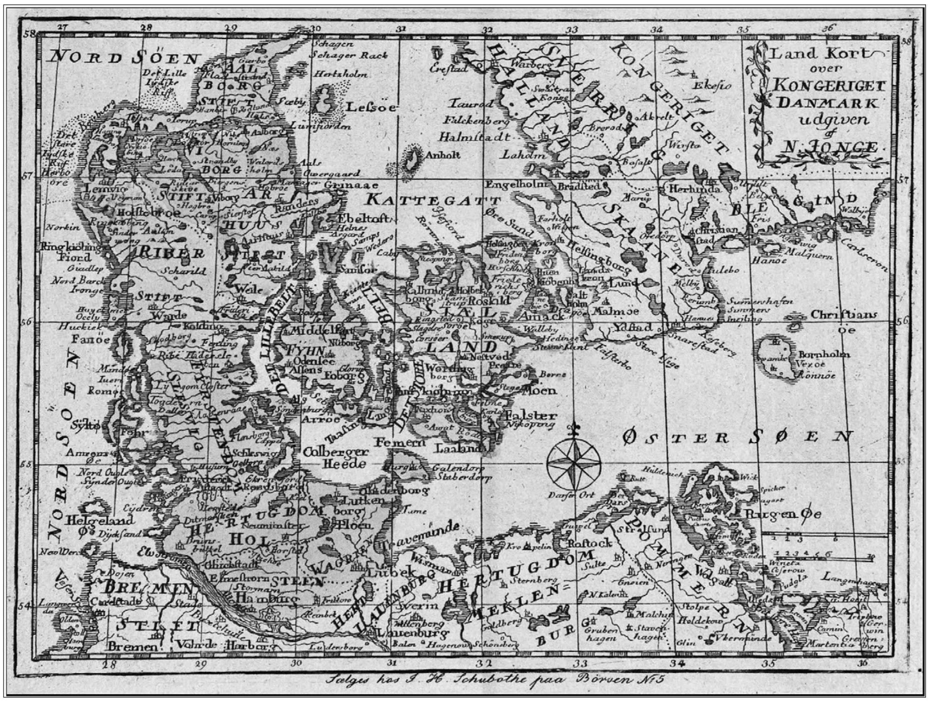

Figure 19. Nicolai Jonge. 1759. *Landkort over Kongeriget Danmark*

Source: Royal Danish Library

nacular' should not be seen in its modern sense as names given by local peoples—in most cases, they are original Dutch coinages.

A fine example of the transition from Latin to vernacular forms is seen in the 1647 Jan Janssonius' map *Toitus Iutiæ. Generalis Accurata delineatico* (Figure 18), where the current names of the *North Sea* and *Skagerrak* are termed "MARE GERMANICUM, *vulgo* De Noord zee" and "SINUS CODANUS, *vulgo* t'Schager Rack," respectively. It is quite clear that the mapmakers are hedging their bets by stating both the, at the time, established forms as well as the forms used in daily (Dutch) usage would suffice.

In the latter part of the 17th century and into the 18th century, the Dutch influence diminishes, but the power of Dutch cartography is so strong that most cartographical names are transferred into the various national cartographic publications. Two examples are the maps by the Danish publisher Nicolai Jonge from 1759 (Figure 19) and the German publisher Weiland from 1825 (Figure 20), where the Dutch names, *de Noort Zee*, *t'Schagerrack*, *Kattegat* and *de Oost Zee* have been transferred into Danish *Nordsøen*, *Schager rak*, *Kattegat* and *Østersøen* and German *Die Nord See*, *Skager Rack*, *Cattegat* and *Die Ost See*, respectively.

In the New World, the Dutch influence is also great, albeit with a greater British and French nomenclature. This is mainly due to the weaning influence of

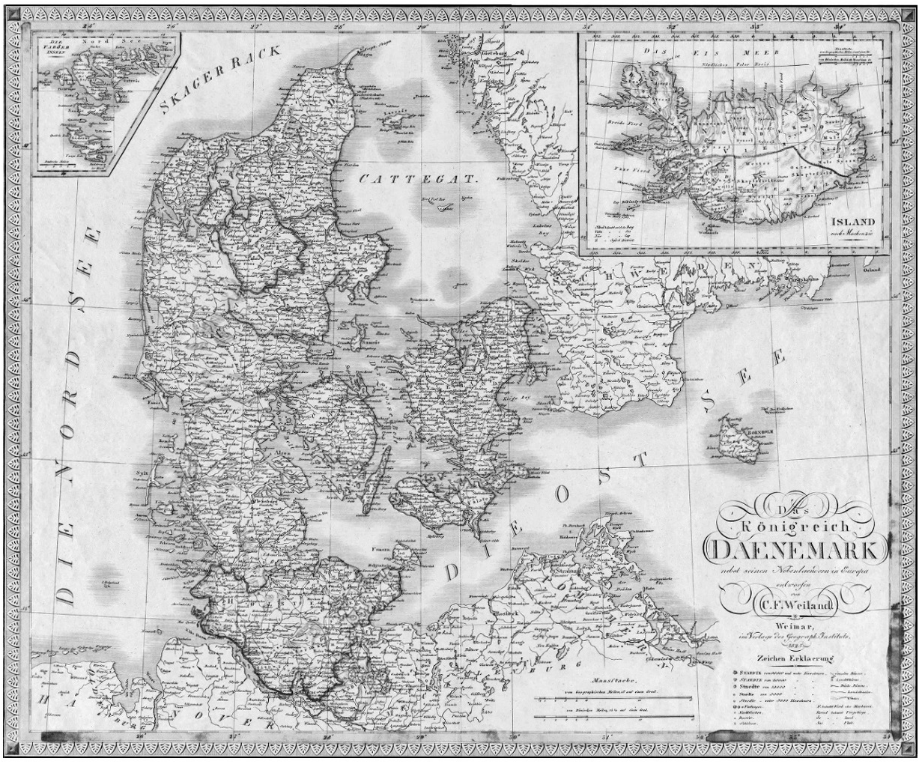

Figure 20. C.F. Weiland. 1824. *Das Könichreich Daenemark*

Source: Royal Danish Library

Dutch cartography at the time of exploration and Western European settlement in these regions.

DO TODAY'S WATER FEATURE NAMES GIVE RISE TO DISPUTES?

Fortunately, most countries agree on the international terms for waters. The reason for this must mainly be sought in the fact that the majority of water feature names do not give rise to strife. However, it is possible to envisage possible controversy where the water feature contains another geographical name, particularly a settlement name or a country name, as the named feature would always be situated in one of the two (or more) countries concerned. An example of a disputed water feature name with a settlement name is the *Bay of Piran*, bordering Croatia and Slovenia. This small body of water—depending on one's point of view—lies either wholly within Slovenian territory or is divided between Slovenia and Croatia. In short, Slovenia believes the entire bay to be within its national jurisdiction, whereas Croatia believes that there is an international border between the two countries running along the bay's median line. As with other maritime features, the *Bay of Piran* was named after the nearby town of *Piran*, which lies within Slovenia. The name of the bay was common to both the Slovenian *Piranski zaliv* and the Croatian *Piranski zaljev* languages when both countries were joined in the state of Yugoslavia. But being possibly shared between two countries, Croatia has stated that the bay should also have a separate Croatian name, *Savudrijska vala* (Savudrija Bay), a name taken from the small village of *Savudrija*, located on the Croatian side of the bay (Woodman 2015). This is one of the few examples of a disputed water feature name of this kind. Why is this so? It is difficult to envisage why, but one possible explanation could be that the country where the named feature belongs would always be content with the name. The other involved parties, on the other hand, would always be looking towards or facing the named feature—thus having a natural view-point perspective to the named feature. This would give the other part a natural sense of ownership to the name also—as it is, literally, in their sight. There may of course be other socio-historical factors as to why this line of thought is not accepted by some.

There has also been controversy about the appropriateness of the name *Persian Gulf*, which, after the rise of Pan-Arabianism in the 20th century became disputed. In short, the Arabic Countries insist on calling the gulf the *Arabian Gulf*, whereas Iran persists on the form *Persian Gulf*. Cartographically, the last form holds a clear precedent over the first, and the United Nations Group of Experts on Geographical Names (UNGEGN) dealt with the naming issue during its 23rd session, held in Vienna from 28 March to 4 April 2006, following the submittal by Iran of a paper on the naming issue.[13] According to the report of the meeting, the Convenor "noted that countries could not be prohibited from using or creating exonyms."[14] Thus, this naming dispute remains unresolved.

It is also possible to see the view-point orientation, i.e. the *North Sea* type, as a possible name type of contention. This is also rarely the case, and in this case the reason for accepting the international name forms of this kind seems to be historical rather than anything else.

One great exception to this seems to be the international name for the body of water which is bordered by Japan, North Korea, Russia, and South Korea. In 1992, objections to the name *Sea of Japan* were first raised by South Korea and North Korea at the Sixth United Nations Conference on the Standardization of Geographical Names. The Japanese government supports the use of the name *Sea*

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13 UNGEGN 23.14, W.P. 61: *Historical, Geographical and Legal Validity of the Name: Persian Gulf*.

14 Report of the United Nations Group of Experts on Geographical Names on the work of its twenty-third session. Document E/2006/57, Economic and Social Council, United Nations. New York, 2006, p. 21.

of Japan, while the Republic of Korea (South Korea) supports the name *East Sea*, and Democratic People's Republic of Korea (North Korea) supports the name *East Sea of Korea*. Currently, most international maps and documents use either the name *Sea of Japan* (or equivalent translation) by itself, or include both the name *Sea of Japan* and *East Sea*, cf. e.g. Google Maps.

In 1974, International Hydrographic Organization (IHO) released Technical Resolution A.4.2.6. This resolution stated that:

> It is recommended that where two or more countries share a given geographical feature (such as a bay, a strait, channel or archipelago) under different names, they should endeavour to reach agreement on a single name for the feature concerned. If they have different official languages and cannot agree on a common name form, it is recommended that the name forms of each of the languages in question should be accepted for charts and publications unless technical reasons prevent this practice on small scale charts.

The Republic of Korea has argued that this resolution is relevant to the debate about the Sea of Japan and implies that both names should be used. On the other hand, Japan has argued that the resolution does not apply to the Sea of Japan. At the 18th International Hydrographic Conference held in April 2012, regarding the revision of *The Limits of Oceans and Seas* from the single use of *Japan Sea* to dual names of *East Sea* and *Sea of Japan* for the above-mentioned sea, member states were unable to reach an agreement. On 6 August 2012, representatives from North and South Korea addressed an assembly at the United Nations Conference on the Standardization of Geographical Names, asking that the names "East Sea" and "Sea of Japan" be used concurrently for the sea.[15] The chairman of the conference responded that the organization had no authority to decide the issue and requested that the involved countries resolve the differences over the name amongst themselves.[16] The naming issue thus still remains unresolved.

Appearance should rarely give rise to dispute, but one recorded case which does exist is the case of the Scandinavian *Skagerrak*. The dispute, however, is not about the name as such but rather of its spelling. There was a brief war of words between the Danish, Norwegian and Swedish place-name commissions in 1968 and 1969 as to authorise the form *Skagerrak* or *Skagerak*. Norway was very much in favour of the latter, and although both Denmark and Sweden declared themselves ready to accept the Norwegian demands in order to keep the inter-Scandinavian peace, it was decided that the form *Skagerrak* would be the national name

15 UNCSGN E/CONF.101/144, Report of the 8th Conference. New York, p. 22.

16 Genba stands firm on Senkakus; Koreas in 'East Sea' push, *Japan Times*, 8 August 2012, p. 2.

form in Norway, Sweden, Denmark as well as internationally.[17] The main reason for this seems to be the fact that this form was already the most used internationally.

'Exploration names' may also be seen as possibly contentious, and even if local indigenous forms exist side by side of internationally established ones, they seem to retain their strength internationally. However, I would envisage that this is where we could see the greatest number of changes in the future.

References

Bramsen, Bo. (1952). *Gamle Danmarkskort: En Historisk Oversigt med bibliografiske Noter for Perioden 1570-1770*. Copenhagen, Denmark: Politikens Forlag.

Economic and Social Council (2006, April). *Report of the United Nations Group of Experts on Geographical Names on the Work of Its Twenty-third Session.* Retrieved from http://unstats.un.org/unsd/geoinfo/UNGEGN/docs/23-gegn/gegn-23-english.pdf.

Gammeltoft, Peder (Forthcoming). Island names. Hough, Carole (Ed.), *The Oxford Handbook of Names and Naming.* Oxford, UK: Oxford University Press.

Google; Google Maps. Retrieved from https://maps.google.com/

International Hydrological Organization (1953). *Limits of Oceans and Seas.* Retrieved from http://www.iho.int/iho_pubs/standard/S-23/S-23_Ed3_1953_EN.pdf.

Janssonius, Jan. (1647). *Toitus Iutiæ. Generalis Accurata delineatico*. Amsterdam.

Japan Times (2012, August 8). Genba stands firm on Senkakus.

Japan Times (2012, August 8). Koreas in 'East Sea' push.

Jonge, Nicolai (1759). *Land Kort over Kongeriget Danmark, udgiven af N. Jonge*. Copenhagen.

Stednavneudvalgets arkiv [Danish Place-Name Commission's archive].

Taonui, Rāwiri (updated 2012, September). Tapa whenua—naming places—events, maps and european influences. *Te Ara-the Encyclopedia of New Zealand*. Retrieved from http://www.teara.govt.nz/en/tapa-whenua-naming-places/4.

United Nations (2012). *Tenth United Nations Conference on the Standardization of Geographical Names*. New York: United Nations publication. Presented at Tenth United Nations Conference, New York, July 31-August 9. Retrieved from http://unstats.un.org/unsd/geoinfo/UNGEGN/docs/10th-uncsgn-docs/econf/E_CONF.101_144_Report%20of%20the%2010th%20UNCSGN_e.pdf.

United Nations Group of Experts on Geographical Names (2006, April). *Historical, Geographical and Legal Validity of the Name: Persian Gulf.* Retrieved from http://unstats.un.org/unsd/geo-

17 Stednavneudvalget (= Danish Place-Name Commission) 1968 and 1969, Journal nos.: 2/68, 5/68, 56/68, 16/69 and 103/69.

info/UNGEGN/docs/23-gegn/wp/gegn23wp61.pdf.

Weiland, C. F. (1825). *Das Königreich Daenemark, nebst seinen Nebenländern in Europa*. Weimar.

Welter-Schultes, F. W. (2006). *Weltkarte mit Originalschriften: Map of the World with Original Scripts*. Goettingen, Germany: Planet Poster Editions.

Woodman, Paul (2015). Maritime naming practice for shared and divided features: Common perceptions and harmonious coexistence. Paper presented at 21st International Seminar on Sea Names—Heritage, Perception and International Relations, Helsinki, Finland, August 23-26.

REVIEW

Is There a Best Practice for a Peaceful Resolution of the South China Sea Disputes?

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Dolven, Ben, Jennifer K. Elsea, Susan V. Lawrence, Ronald O'Bourke & Ian E. Rinehart (2015, June 16). *Chinese Land Reclamation in the South China Sea: Implications and Policy Options.* Washington DC, USA: Congressional Research Service.

Ji, You (2013, October). *Policy Brief: Deciphering Beijing's Maritime Security Policy and Strategy in Managing Sovereignty Disputes in the South China Sea.* Singapore: S. Rajaratnam School of International Studies.

Lee, Kun-Chin & Andres Villar Gertner (2015, July). Maritime security in the Asia-Pacific China and the emerging order in the East and South China Sea. Research paper, The Royal Institute of International Affairs, London.

Li, Mingjiang (2013, October). Chinese debates of South China Sea policy: Implications for future developments. RSIS working paper, S. Rajaratnam School of International Studies, Singapore.

Permanent Court of Arbitration (2015, October 29). Award on jurisdiction and admissibility, Republic of Philippines v. The People's Republic of China, Case No 2013-19. The Hague, Netherlands: PCA.

Till, Geoffrey & Jane Chan (2014). *Naval Modernisation in South-East Asia: Nature, Causes and Consequences.* Oxford, UK: Routledge.

I.

These six very important recent publications pertaining to the South China Sea (SCS) include institutional policy briefs, research papers and a legal judgment. They analyze the arguments about how to find peaceful and legitimate solutions to the ongoing problems, and represent a variety of hardline and moderate stances. They are mostly concerned with regional maritime security and take a generally pessimistic tone. The main issues addressed are Chinese claims in the SCS where bitter historical legacies still linger; incompatible ideas about how international law and legal principles should be interpreted; mistrust between countries about neighbors' intentions; China's reluctance to accept the Westphalian notion of statehood or to exercise constructive statesmanship; and the impact of great power politics on the region.

They concentrate on the worst what-if scenarios, with China becoming a major maritime power and seeking to dominate rival territorial claimants through military force (Ben Dolven et al., p. 5; Kun-Chin Lee, pp. 5-8), thus igniting a full-blown naval arms race from the naval modernizations in progress throughout the region, which would have serious ramifications for the 'Rise of Asia' and 'Maritime Asia' (Till & Chan, chapter 4). Ultimately, China's claims need to be scrutinized by the international legal system, as addressed by the Permanent Court of Arbitration (PCA).

The SCS disputes are a popular topic for armchair political scientists and legal experts on regional security affairs, who are engaged in arguments on day-to-day developments. The four main questions are: Will China conquer the East Asian seas by force? What can the US do to deter Chinese maritime expansionism and to promote the rule of law? What should the regional nations do? Can the international legal system offer any protection for weak and vulnerable parties? There has been some development on the last question, with the PCA deciding that it does have jurisdiction under Part VII of the United Nations Convention on the Law of the Sea (UNCLOS) in the SCS dispute between China and the Philippines (PCA, p. 256). However, China's brusque rejection of the judgment suggests that the judgment may, rather than present promising resolution, actually add further layers of complexity to an already intractable problem. Of course, legal options should be a last resort, but unfortunately there are diverse interpretations possible for the UNCLOS, with important ambiguities on the issues of maritime sovereignty and the national jurisdiction rights over the disputed waters.

II.

At numerous conferences, seminars and other forums, there have been robust discussions on how the region should respond to China's assertive unilateral actions and bellicose attitude in the SCS, as China's obsessive focus on its national sovereignty is disrupting the regional maritime balance of power (Kun-Chin Lee, pp. 19-21). Such debates have sought to find a way to engage China within systems and protocols based on the rule of law, and encourage China to become a more responsible party committed to international law and legal standards rather than continue to rely on military options to pursue its maritime sovereignty disputes in the SCS. Some scholars and maritime security experts more sympathetic to the Chinese position have emphasized that regional maritime security has been seriously contaminated and compromised by the regional maritime rivalry between China and the US. Certainly it is time for maritime order and stability to be established in the region by following through with rules-based approaches such as the UNCLOS, rather than by tit-for-tat games of maritime chicken (Kun-Chin Lee, p. 28).

Given China's recent land reclamation work on disputed reefs and shoals in the SCS, and the assertive US response in sending a warship to insist on freedom of navigation, the arguments of Prof. You Ji and Dr. Li are not very convincing. These authors consider that China has been restrained in its use of force to implement unilateral measures against rival claimants from ASEAN and to deter third-party involvements in SCS issues. Prof. You emphasizes his notion of a 1+half counter-response (You Ji, p. 16.) and Dr. Li argues that China is only copying similar projects by Taiwan, Malaysia, Vietnam and the Philippines, which have also been used to station ships and troops. Thus any third party involvement (US involvement) would constitute unwarranted interference and likely cause a needless increase in tension (Li Mingjiang, pp. 5-13). These analyses imply that China is not the only party responsible for escalating the situation, and points a finger at other countries as well. They also insist that the two great regional powers, the US and China, should restrict their maritime interests in the SCS to avoid causing a strategic burden for their allies and partners.

Now that China's vast construction project to build artificial islands in the SCS is apparently nearing completion, a US Congress Research Service report on this issue has been published, one which takes a very hardline and hawkish posture (Ben Dolven et al., p. 23). It roundly criticizes China's unilateralism, accusing China of converting the disputed reefs and shoals into artificial islands in order to establish military bases from which it can project its superior naval power to intimidate the navies of its weak and vulnerable neighbors. The authors make some bold and provocative recommendations, including arms sales to Taiwan and the establishment of a Southeast Asia Maritime Partnership and Cooperation Scheme to bolster the ASEAN navies (Ben Dolven et al., pp. 12-13).

Kun-Chin Lee, of the Centre for Rising Powers at Cambridge University, UK, has argued that the SCS standoff is an emerging risk to global maritime security, and should be managed through dispute management and policy coordination, rather than through Westphalian preconceptions of maritime sovereignty (Kun-Chin Lee, p. 28). Although China is arguably claiming historical and legal maritime jurisdiction, rights and interests in opposition to the legal claims of others in the SCS, the Chinese approach is also delivering a thinly veiled warning to all the other claimants in the SCS that China insists on restoring its historical dominance in the East Asian seas, come what may. For the time being, the hottest issue in the Asia-Pacific region is China's attempt to claim 12 nautical miles of territorial sea around its newly-constructed artificial islands (despite the fact that submerged features do not qualify for such territory, and their disputed sovereignty notwithstanding), and the US military's decision to respond by sending an Arleigh Burke-class destroyer (the USS Lassen) to conduct so-called "freedom of navigation operations" within 12 nautical miles of one of the artificial islands. This confrontation was anticipated in 2014 in Naval Modernisation in South-East Asia (Till & Chan, chapter 1).

III.

Unfortunately, it remains unclear whether a legalistic approach can contribute toward a peaceful resolution of the SCS disputes. On October 29, 2015, PCA based in The Hague released a unanimous ruling confirming that it is competent to decide on some aspects of the dispute between China and the Philippines. In what would seem to be a victory for the Philippines, the court ruled that it does have jurisdiction over seven of the 15 claims made by the Philippines, deferred judgment on a further seven claims, and asked for clarification on the fifteenth claim. However, despite being a party to the UNCLOS, China has declared the ruling "null and void," insisting that it will not be bound by any judgment the PCA subsequently makes. Thus, at present, it is hard to see how the legal process can further the long-term interests of China or the Philippines.

The PCA's decision, however, is useful in clarifying the legal situation. It establishes that China's infamous "Nine-dashed line," originating in 1940s maps, and the basis of SCS claims China has made explicitly, though supposedly unofficially, since 2008, do in fact constitute a legal assertion. This is despite China's insistence that the line indicates national sovereignty rather than maritime jurisdictional rights and interests, so that it should not be considered as part of the arbitrational proceedings. Furthermore, the PCA's ultimate decision will surely impact ASEAN's effort to establish multilateral political agreements, such as the 2002 Declaration on the Conduct (DOC) of Parties in the SCS, and their hopes to set up a binding and mandatory Code of Conduct (COC) on the SCS between China and ASEAN members.

Understandably, ASEAN members feel they need to pursue legal as well as political options. But the existing legal framework seems unlikely to offer any ultimate resolution of their SCS disputes with China, and should certainly not be regarded as the exclusive or even the preferred approach. Although the PCA's decision that it does have jurisdiction in this case is a blow for China, it does not mean that the Philippines has won, since China has sought to have the case dismissed. But at least China's SCS claims and activities will now be carefully scrutinized by the court.

IV.

Only by establishing greater policy coordination and improved maritime governance is there any prospect that regional maritime stability can be achieved. Several policy recommendations follow:

First, China clearly has a long-term geostrategic plan that relies on a kind of salami-slicing approach to ultimately restore its historical dominance in the SCS and present it as a fait accompli. China needs to cease this provocative strategy. China is going against the spirit of the DOC agreed with ASEAN in 2002, and naturally this has produced huge distrust about China's intentions, even though there is supposed to be an ongoing process to make the DOC binding through implementing the COC. China's neighbors feel China is negotiating in bad faith. Furthermore, the recent large-scale construction of artificial islands in disputed areas where sovereignty has not been unequivocally established appears to directly contravene the UNCLOS. Specifically, China is violating UNCLOS by using living coral reefs as building materials, which is causing severe environmental damage. In this respect, at least, China is clearly in the wrong. As I argued in an RSIS commentary in May, China will not be able to obtain any practical military benefit from operating such facilities on the artificial islands because of the impact of bad weather and the lack of logistical and maintenance capacities for the ships and aircraft deployed there. This would seem, then, to be an unnecessarily provocative act on the part of China.

Second, the US should stop provoking China with its intrusive military presence, which threatens to drive China even further from abiding by the UNCLOS. It is surely preventing its adaptation for effective application to the confined waters of Northeast Asia, as the PCA observed in its judgment. Many commentators are concerned about the militarization of the SCS disputes, and feel the US is exacerbating the situation by unilaterally dispatching warships so close to Chinese military bases on the new islands in the SCS, with their radar installations, anti-aircraft artillery, airstrips and port facilities.

Third, given the profound distrust among the claimants, and the interwoven issues of national identity and traumatic historical antagonisms, any negotiated resolution based on the rule of law needs to be flexible, which means there must be greater policy coordination. There is no best legal practice in maritime governance, only a diverse set of references drawing on common challenges and on the options that have been tried so far. In particular, the ASEAN experience with the DOC and the proposed COC, together with other pragmatic cooperative mechanisms, provide a rich resource for consideration. When exploring such policy options, the importance of harmonization should be kept in mind from the outset, thus joint development agreements will be helpful. Also, there should be stronger incentives to encourage countries to make use of the UNCLOS International Tribunal Law of the Sea and the International Court of Justice to manage their disputes. This will mean recognizing the problems of the current maritime law regime, and trying to fix them, rather than simply insisting on its universality. All the regional nations, especially China, need to be brought into a rules-based framework based on the evolution of the UNCLOS principles.

In conclusion, the rule of law is ultimately the only route to the peaceful resolution of the SCS disputes, and all parties need to be involved in negotiating the legal structures necessary to secure regional maritime stability. The immediate issue is China's land reclamation activities in the SCS, which are of dubious legality, and it is hard to see how they truly represent China's broader long-term interests. All the nations of the region, no matter how different their individual perspective is, need to come together to agree on a more coherent and decisive response to China's actions.