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Why Now Is the Time to Resolve the Dokdo/Takeshima Dispute

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WHY NOW IS THE TIME TO RESOLVE
THE DOKDO/TAKESHIMA DISPUTE

Garret Bowman

WHY NOW IS THE TIME TO RESOLVE THE DOKDO/TAKESHIMA DISPUTE

Garret Bowman*

Since the second half of the twentieth century, the Republic of Korea and Japan have been feuding over the Dokdo/Takeshima islets, a pair of small rocky landmasses located in the East Sea/Sea of Japan. Resulting from a rise of nationalism and the influence of historical identity politics, tension over the Dokdo/Takeshima islets is undermining an otherwise prosperous relationship between Korea and Japan. Given Korea's de facto control over the Dokdo/Takeshima islets and Japan's questionable claim to sovereignty under international law, this Note advocates Japan's acknowledgment of Korean sovereignty. Korean politicians must also acknowledge the danger posed by pandering to nationalist populism and seek to create arbitration mechanisms for a peaceful resolution between the countries. This Note will conclude that resolving the Dokdo/Takeshima controversy presents a unique opportunity to begin unwinding the political tensions that threaten Northeast Asia's productive economic interdependence.

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I. INTRODUCTION

“[T]o the Korean people Dokdo is not merely [a] tiny island off the eastern sea. It is indeed the symbol of Korean sovereignty vis-à-vis Japan and the test case of Korean sovereignty.”¹

In 2005, outside the Japanese embassy in Seoul, an elderly Korean woman sliced off her finger in protest of Japan’s continued claims to a rocky pair of islets roughly halfway between Korea and Japan in the East Sea/Sea of Japan. Dokdo/Takeshima’s East and West Islands have a circumference of 1.9 kilometers and 2.8 kilometers respectively.² They are historically uninhabited, but efforts by the Korean government to assert ownership have resulted in a coast guard presence and seasonal occupation by two civilians.³ Western explorers and colonial writers referred to the islets as the “Liancourt rocks,” while they are known as the “Dokdo Islands” in Korea and the “Takeshima Islands” in Japan. The islets are the subject of an ongoing dispute that has existed since the removal of Japanese occupation from Korea at the end of World War II and has long been a sticking point in Korean and Japanese diplomacy. Most recently, the dispute was the subject of an ad campaign from both countries outlining their positions on the issue.⁴

Korea has been in practical control of the islets since the 1950s.⁵ Japan has consistently contested Korea’s claim and has been urging International Court of Justice (ICJ) jurisdiction over the sovereignty issue. However, Japan’s strategy of challenging sovereignty misses an opportunity to implement an arbitration system that would set a stabilizing precedent for a tense region. Even if Japan were to win

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1. KOREAN MINISTRY OF FOREIGN AFFAIRS & TRADE, DOKDO, KOREA’S BEAUTIFUL ISLAND 29 (2012), *available at* <http://www.korea.net/Resources/Publications/Others/view?articleId=3111#>.
 2. Jon M. Van Dyke, *Legal Issues Related to Sovereignty over Dokdo and Its Maritime Boundary*, 38 OCEAN DEV. & INT’L L. 157, 157 (2007) [hereinafter Van Dyke, *Legal Issues*].
 3. Jon M. Van Dyke, *The Republic of Korea’s Maritime Boundaries*, 18 INT’L J. MARINE & COSTAL L. 509, 524 (2003) [hereinafter Van Dyke, *Korea’s Maritime Boundaries*]; Shin Hyon-hee, *Asia’s Territorial Disputes – South Korea: Perpetual Flashpoint*, ASIA NEWS NETWORK (Dec. 13, 2013), <http://www.asianewsnet.net/ASIAS-TERRITORIAL-DISPUTES--SOUTH-KOREA-Perpetual--55449.html>.
 4. James Simpson, *Have the Dokdo Ad Wars Begun?*, ASIA SECURITY WATCH (Sept. 12, 2012, 3:40PM), <http://asw.newpacificinstitute.org/?p=11481>; KOREAN MINISTRY OF FOREIGN AFFAIRS & TRADE, *supra* note 1, at 4 (outlining Korea’s arguments claiming national sovereignty over Dokdo/Takeshima).
 5. *See* Van Dyke, *Korea’s Maritime Boundaries*, *supra* note 3, at 526.

before the ICJ, the ruling would create a serious backlash from the Korean public that would harm Japanese interests. Further, Japan has claims over other islands that are aggressively challenged by China and Russia.⁶ Thus, using the Dokdo/Takeshima dispute to develop a regional arbitration mechanism to resolve these various island claims would more effectively serve Japanese interests than a continued insistence on what amounts to a lost cause.⁷ Moreover, in addition to the main sovereignty claim, there is also an issue over resource rights and economic boundaries. Creating a dispute mechanism would provide a forum to negotiate these claims as well.

Korea, for its part, has resisted Japan's suggestions to submit the Dokdo/Takeshima issue to the ICJ. Despite having a stronger legal position,⁸ Korea does not wish to potentially legitimize Japan's claims to an island that Korea already controls. Further, domestic politics may make it politically infeasible for the Korean government to allow ICJ adjudication regardless of a likely favorable outcome.⁹ Instead, if Japan formally acknowledged Korean sovereignty over Dokdo/Takeshima, Korea would be more likely to settle on issues of resource rights and economic boundaries. Moreover, Korea shares an

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6. Seima Oki & Kyoko Yamaguchi, *China, Russia Team Up on Territorial Claims*, DAILY YOMIURI (Sept. 29, 2010), <http://www.yomiuri.co.jp/dy/national/T100928004811.htm> (referencing China and Russia's joint declaration asserting their island claims against Japan over the Senkaku and Kuril islands respectively); *see also Kuril Islands Dispute Between Russia and Japan*, BBC (Apr. 28, 2013), <http://www.bbc.com/news/world-asia-pacific-11664434>.
 7. *See* Van Dyke, *Legal Issues*, *supra* note 2, at 204 (arguing that from a legal standpoint "Korea's claim to the islets seems overwhelmingly stronger"); *see also* Benjamin K. Sibbett, Note, *Tokdo or Takeshima? The Territorial Dispute Between Japan and the Republic of Korea*, 21 FORDHAM INT'L L.J. 1606, 1640 (1998) (noting that Korea has a stronger claim because it has "manifested greater affirmative acts of sovereignty"); *see generally* Michael J. Mazarr, *The Angry Pacific*, FOREIGN POLICY (Nov. 2, 2012), http://www.foreignpolicy.com/articles/2012/11/02/angry_pacific (advocating for the U.S. to develop loose multilateral networks designed to build cooperation around areas of shared interests in the region).
 8. *See* Van Dyke, *Legal Issues*, *supra* note 2, at 204; Sibbett, *supra* note 7, at 1640.
 9. Takashi Yokota, *Why Japan and South Korea Are Feuding over a Cluster of Rocks*, NEWSWEEK (Sept. 3, 2012), <http://www.newsweek.com/why-japan-and-south-korea-are-feuding-over-cluster-rocks-64765> (describing Korean public outrage over Japan's claims to Dokdo, and particularly after former Korean President Lee Myung-bak's visit to Dokdo in fall 2012: "In the face of such nationalistic fervor, the South Korean government can scarcely back down. In fact, Lee's visit to the rocks has raised the ante for any future South Korean presidents who may seek to prove their conservative credentials.").

interest with Japan in obtaining a peaceful mechanism that can be used to resolve China's territorial claims off Korea's coast.

This Note argues that there are three basic approaches for dealing with the island controversy between Korea and Japan: (1) the two countries can continue to leave the issue of sovereignty over the islands unresolved; (2) Korea could accept Japan's offer to submit the issue of sovereignty to the ICJ or propose arbitration; or (3) the countries could adopt a novel solution where Japan recognizes Korean sovereignty in exchange for arbitration over the accompanying issues of resource and boundary rights. Of these choices, only the third is likely to succeed in providing a means for resolving the issue and promoting increased stability within the region.

By recognizing Korea's sovereignty over the islets, Japan can remove the strain from its relationship with Korea and lessen tensions in the region as a whole. Submission to the ICJ is not advisable because Japan has a weaker legal position, and Dokdo/Takeshima is an issue of vital national importance for Korea; thus, a ruling against Korea would be politically unenforceable. Moreover, while Japan is currently a party to ICJ compulsory jurisdiction, Korea is not.¹⁰ Agreeing to arbitration or settlement of boundary issues would not only avoid these obstacles, but would also promote stability, as both Korea and Japan would have the ability to present a united front against Chinese territorial ambitions in the region.

Part II of this Note provides a background of the dispute focusing on the historical context and legal framework. Part III explains why neither of the first two options listed above is feasible in the current Asian legal and political climate. Part IV makes the case for the adoption of the third option where Japan acknowledges Korean sovereignty in exchange for arbitration over unresolved maritime boundary issues and fishing rights.

10. *Declarations Recognizing the Jurisdiction of the Court as Compulsory*, INT'L COURT OF JUSTICE, <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3> (last visited Mar. 8, 2014) (listing Japan as a country that made a declaration accepting compulsory jurisdiction on July 9, 2007).

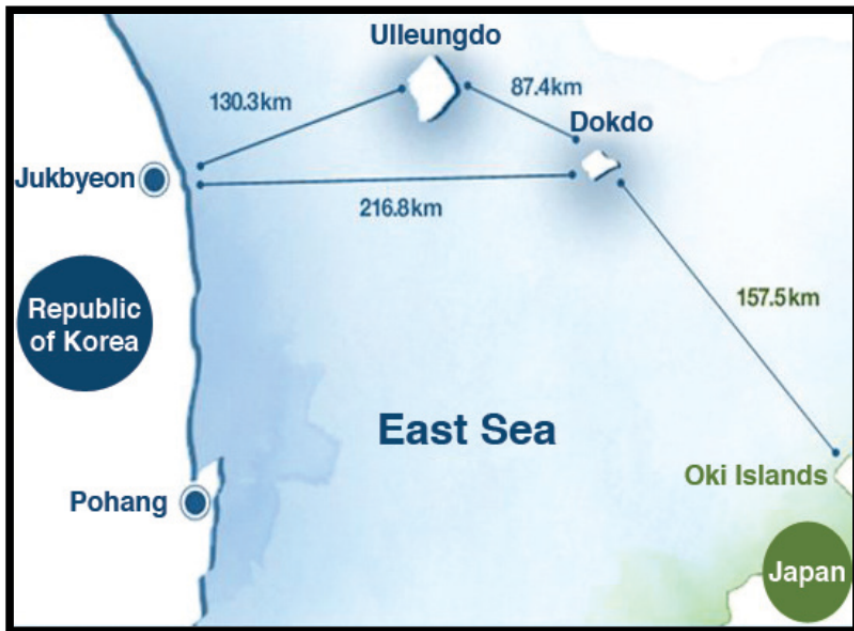


Figure 1: Dokdo/Takeshima's relative distance between Korean and Japanese territory.¹¹

11. KOREAN MINISTRY OF FOREIGN AFFAIRS & TRADE, *supra* note 1, at 5. The islets can be seen from Korea's Ulleungdo Island on a clear day. Arguably this proximity is a factor that supports Korea's claim to sovereignty. See Van Dyke, *Legal Issues*, *supra* note 2, at 194 (making the argument that contiguity with other territory should be a factor in resolving the Dokdo/Takeshima dispute).



Figure 2: South Korean controlled Dokdo/Takeshima islets¹²

II. BACKGROUND

A. Historical Context

The controversy between Japan and Korea over the Dokdo/Takeshima islets illustrates the intractable difficulties that seemingly insignificant territorial disputes can pose due to their historical and political context.¹³ The Dokdo/Takeshima dispute in particular is complicated by a regrettable past that has yet to be

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12. Choe Sang-Hun, *South Korean's Visit to Disputed Islets Angers Japan*, N.Y. TIMES (Aug. 10, 2012), <http://www.nytimes.com/2012/08/11/world/asia/south-koreans-visit-to-disputed-islets-angers-japan.html>.
 13. The summer of 2012 has seen a series of maritime disputes involving China, Japan, South Korea, Vietnam, Taiwan, and the Philippines. Most notably, the recent flare up between China and Japan over the Senkakus/Diaoyus islands shows the danger of an approach that allows the disputes to continue without resolution. The risk of escalation into a larger conflict has become more plausible with Japan strengthening its coast guard in order to respond to China's nautical incursions. China too has been increasing its fleet of maritime security craft armed with machine guns. Although this type of island squabble is not new, each time a skirmish flares up, trust between China and Japan erodes. The stakes are only going to get higher as China's military rise takes place in a region still preoccupied with Japan's former imperialism. *See* Todd Crowell, *Japan's Stealth Buildup of Its Coast Guard*, REAL CLEAR WORLD (Oct. 12, 2012), http://www.realclearworld.com/articles/2012/10/10/japans_stealth_buildup_of_its_coast_guard_100273.html; *Could Asia Really Go to War over These?*, THE ECONOMIST (Sep. 22, 2012), <http://www.economist.com/node/21563316> [hereinafter THE ECONOMIST, *Could Asia Really Go to War Over These?*].

resolved. Japan's claims to the Korean controlled Dokdo/Takeshima islets and Korea's response to these assertions are saturated with the historical context of Japan's colonial past. For Koreans in particular, Dokdo/Takeshima cannot be understood without the perspective of its experience as a colonial subject of Japan.

Japan formally annexed the Dokdo/Takeshima islets in February of 1905, five years before Korea was forced to effectively surrender its entire territorial sovereignty to Japanese colonial control.¹⁴ The period of Japanese rule lasted from 1910 to 1945, when Japan surrendered after World War II.¹⁵ The Treaty of San Francisco's final draft in 1951 outlined the relinquishment of Japanese colonial territory, but made no explicit reference to the islets.¹⁶ In the late 1950s, Korea reasserted its claims to the islets, eventually building a few structures and stationing guards on them.¹⁷ Japan opposed these actions and has issued regular protests over the islets while continuing to claim sovereignty.¹⁸

Japan's occupation of Korea during the first half of the twentieth century caused enormous hardship and suffering for Koreans.¹⁹ Japan's refusal to adequately recognize government-sponsored sexual slavery of Korean women is one issue of the notable imperialist legacy that continues to inflame relations between the two countries.²⁰ Although over the past 20 years Japan has periodically issued apologies for both the use of "comfort women" and the annexation of Korea, without material compensation to the victims or a formal

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14. See MIN GYO KOO, ISLAND DISPUTES AND MARITIME REGIME BUILDING IN EAST ASIA: BETWEEN A ROCK AND A HARD PLACE 63 (2009) (detailing the origin of Japan's claims to the Dokdo islets).
 15. *Id.* at 66; Van Dyke, *Legal Issues*, *supra* note 2, at 158.
 16. KOO, *supra* note 14, at 69 (describing how after World War II, the U.S. provided a hegemonic balance between Korea and Japan and largely defined their postwar defense strategies, particularly by leading the drafting of the peace treaty).
 17. Van Dyke, *Legal Issues*, *supra* note 2, at 158.
 18. See *id.* at 189–92 (detailing Japan's efforts to contest Korean control over the islands in the latter part of the twentieth century).
 19. See Jennifer Lind, *The Perils of Apology: What Japan Shouldn't Learn from Germany*, 88 FOREIGN AFF. 132, 134 (2009) (outlining atrocities committed by Japan in East Asia during the twentieth century, such as recruiting or abducting women in order to provide "comfort" to Japanese soldiers, and mistreating prisoners of war).
 20. Kirk Semple, *In New Jersey, Memorial for 'Comfort Women' Deepens Old Animosity*, N.Y. TIMES (May 18, 2012), http://www.nytimes.com/2012/05/19/nyregion/monument-in-palisades-park-nj-irritates-japanese-officials.html?_r=0 (detailing the Japanese government's protest over a New Jersey monument to 'comfort women' who were victims of Japan's imperial policies).

investigation and accounting, some have seen these statements as empty gestures.²¹ To the Korean people, Dokdo/Takeshima symbolizes the brutal thirty-six-year Japanese occupation,²² and Japan's claims to the islets are seen as proof of an unapologetic attitude.²³ The 180,000 Korean tourists who have visited the islets since Seoul began allowing tourists in 2005 represent the public's investment in Dokdo/Takeshima as a symbol of Korea.²⁴ Television stations give weather reports of the islets, and some stations end their daily broadcasts with pictures of Dokdo/Takeshima as the national anthem plays.²⁵ One commentator stated that from a Korean perspective, the dispute is about "deep emotional trauma that occurred as a result of Imperial Japan's brutal occupation that has since been internalized into Korea's cultural narrative and represents an unhealed psychic scar that has become an article of faith with an almost religious significance."²⁶

The Japanese public appears less engaged with the island issue, but is politically shifting, at least temporarily, to a more nationalistic foreign policy. This shift is evidenced by the recent election of Prime Minister Shinzo Abe, who has made more patriotic overtures.²⁷ Nationalist Japanese political elements reject Japan's "apology diplomacy" for wartime atrocities and seek to revise history textbooks and present Japan's militaristic era in a more positive light.²⁸

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21. Jon M. Van Dyke, *Reconciliation Between Korea and Japan*, 5 CHINESE J. INT'L L. 215, 229, 231, 234 (2006) [hereinafter Van Dyke, *Reconciliation*] (calling for the establishment of a Japanese Truth Commission to account for and aid in the reconciliation of war-time atrocities).
 22. See *id.* at 235 (discussing the need for Japan to give up its claim to the islands of Dokdo/Takeshima as a step toward reconciliation); Yokota, *supra* note 9.
 23. Yokota, *supra* note 9 (quoting former Korean foreign minister Song Min-soon).
 24. *Id.*
 25. *Id.*
 26. Mazarr, *supra* note 7 (explaining that the island dispute is about national identity and can be difficult for outside observers to comprehend).
 27. See *id.* (quoting former Prime Minister Shinzo Abe, "Japan's beautiful seas and its territory are under threat," and "young people are having trouble finding hope in the future amid economic slump. I promise to protect Japan's land and sea, and the lives of the Japanese people, no matter what.").
 28. *Back to the Future*, THE ECONOMIST (Jan. 5, 2013), <http://www.economist.com/news/asia/21569046-shinzo-abes-appointment-scarily-right-wing-cabinet-bodes-ill-region-back-future> (lamenting the right-wing appointments in Japan's new cabinet).

Officially, the Japanese government argues that Japanese activities established sovereignty over Dokdo/Takeshima by the mid-seventeenth century at the latest.²⁹ Japan's dependence on island territory for establishing broad national boundaries and its concern about other island disputes involving Russia and China underlie Japan's position.³⁰ The government frames the Dokdo/Takeshima issue as separate from the historical narrative on which Koreans tend to focus. Japan's official position is that resolution of the issue should be accomplished through submission to the ICJ.³¹ However, as referenced above and demonstrated later in this Note, Korean public sentiment and Korea's control of the islets make mutual submission for a binding ICJ resolution unlikely.³²

B. UNCLOS: The Law of the Sea

Regardless of the political and historical complexities of the issue, Dokdo/Takeshima's sovereignty is relevant to the issue of resources and fishing rights. Both countries are parties to the U.N. Convention on the Law of the Sea (UNCLOS).³³ Under that agreement, "[r]ocks

29. *Outline of Takeshima Issue*, MINISTRY OF FOREIGN AFFAIRS OF JAPAN, <http://www.mofa.go.jp/region/asia-paci/takeshima/position.html> (last visited Mar. 8, 2014) [hereinafter JAPANESE MINISTRY OF FOREIGN AFFAIRS] ("Japan established the sovereignty of Takeshima by the beginning of the Edo Period, in the mid 17th century at the very latest.").

30. See Clyde Haberman, *Japanese Fight Invading Sea for Priceless Speck of Land*, N.Y. TIMES (Jan. 4, 1988), <http://www.nytimes.com/1988/01/04/world/japanese-fight-invading-sea-for-priceless-speck-of-land.html> (discussing the perceived importance of an eroding rock 1,300 miles southwest of Tokyo, "[w]ithout Okinotorishima, Japan's exclusive economic zone . . . would be pushed back – to . . . an island nearly 400 miles to the northwest.").

31. JAPANESE MINISTRY OF FOREIGN AFFAIRS, *supra* note 29. It is interesting to note the contrast in tone that the Korean and Japanese governments use in describing their position on the dispute. Korean government publications highlight the historical context of the dispute and emphasize Korea's emotional ties to the territory. Japan, by contrast, frames the issue from a more detached perspective and asserts resolution through the ICJ. Compare *id.*, with KOREAN MINISTRY OF FOREIGN AFFAIRS, *supra* note 1, at 4.

32. Demonstrating Korea's intense public attitude toward this issue, smartphone users can participate in their own unsettling version of the Dokdo dispute by downloading a Korean developed game that requires the player to defend Dokdo by gunning down swarms of hostile primates. See *Dokdo Defense*, ANDROID GAMES ROOM, <http://www.androidgamesroom.com/stand-alone-games/84944.htm> (last visited Mar. 12, 2014).

33. *Chronological Lists of Ratifications of, Accessions and Successions to the Convention and the Related Agreements as at 29 October 2013*, U.N. DIV. FOR OCEAN AFFAIRS AND THE LAW OF THE SEA,

which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.”³⁴ Japan claims that Dokdo/Takeshima’s outcroppings are islands and generate an exclusive economic zone (EEZ) under UNCLOS.³⁵ Korea’s position is that the islets should be classified as rocks having no impact on an EEZ.³⁶ Ultimately, Korea and Japan may negotiate Dokdo/Takeshima’s impact on territorial boundaries and resource rights, as they have shown willingness to compromise on territorial resource issues in the past when they entered a provisional fisheries agreement in 1998.³⁷ Further, there are few restrictions on such negotiations, as “[s]tates are free to agree among themselves on a delimitation line that may even be inconsistent with general or conventional international law, unless third states are adversely affected.”³⁸

http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm (last updated Oct. 29, 2013).

34. U.N. Convention on the Law of the Sea art. 121(3), *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994) [hereinafter UNCLOS].
35. Van Dyke, *Korea’s Maritime Boundaries*, *supra* note 3, at 527.
36. *Id.* at 526–27 (stating that Dokdo’s history as an uninhabited island and the U.K.’s renunciation of an EEZ surrounding Rockall northwest of Scotland indicate that the Dokdo islets constitute rocks and not islands).
37. *Id.* at 527–28 (noting that the agreement allowed fishing by Japan and Korea around Dokdo at the exclusion of other countries).
38. Jonathan I. Charney, *Rocks that Cannot Sustain Human Habitation*, 93 AM. J. INT’L L. 863, 873 (1999) (“While international maritime boundary agreements can be considered to be state practice that may contribute to the creation of general international law, the use of an Article 121(3) rock in an agreement to delimit the maritime boundary between states is not violative of international law because Article 121(3) is not *jus cogens*.”).



Figure 3: Contested islands and islets in East Asia³⁹

III. PROBLEMS WITH THE STATUS QUO AND ICJ ADJUDICATION

It is notable that Korea and Japan have managed the contentious island dispute without catastrophic consequences for over sixty years. Some have argued that there is no reason to doubt the countries' abilities to shelve the issue for the foreseeable future.⁴⁰ However, this management approach is becoming less tenable because of two relatively recent developments: (1) regional uncertainty over the rise of China and the U.S. role as a deterrent to Chinese aggression; and (2) an increasingly assertive populism in Korea that government policymakers can no longer effectively control.

39. *Asia's Disputed Islands—Who Claims What?*, CNN, <http://www.cnn.com/interactive/2012/09/world/asia.island.disputes/index.html> (last visited Mar. 12, 2014). A number of island disputes in Asia have contributed to instability in the region. Dokdo/Takeshima is only one of a number of hotly contested claims between multiple countries. *See id.*

40. *See* J.R.V. Prescott, *Maritime Jurisdiction in East Asian Seas* 48 (East-West Env't & Policy Inst., Occasional Paper No. 4, 1987) (stating that because the two countries have a record of solving maritime disputes, Dokdo/Takeshima is unlikely to become a flashpoint in the future); *see also* Yokota, *supra* note 9 ("Tokyo and Seoul could conceivably decide to shelve the issue and muddle through, as they did after they normalized relations some 50 years ago. It wouldn't really solve the problem, but at least it seems doable.").

A. The Rise of China and a Changing U.S. Role in the Region

Given the rapid growth and industrialization of China, it is unsurprising that its growing regional assertiveness is a significant concern for all Asian countries. Should Japan and Korea reach a peaceful resolution to their own territorial dispute, these two countries could establish a precedent that could be applied to their respective island disputes with China. This is especially true for Japan in its conflict with China over the Senkaku Islands. Japan's de facto control over the Senkaku Islands puts it in a comparable position to that of Korea in Dokdo/Takeshima.⁴¹ China claims the Senkaku Islands and has made intrusions into territory that Japan controls. Risk of escalation has become more plausible with Japan strengthening and repositioning its coast guard to deal with China's nautical incursions.⁴² In direct response, China has also been increasing its fleet of machine gun-equipped maritime security craft.⁴³ Although this type of island dispute is not new, with every skirmish trust between China and Japan erodes.⁴⁴

Because Japan holds a similar legal position in the Senkaku Islands as Korea does with Dokdo/Takeshima, Japan's concessions in the Dokdo/Takeshima dispute would be advantageous in the Senkakus dispute. Japan has an interest in establishing a precedent that de facto control of island territories is recognized and legally protects them from foreign incursions. By agreeing with Korea on Dokdo/Takeshima that the controlling factors in establishing sovereignty are use and development of the islets, Japan could theoretically bolster its position over the Senkakus.⁴⁵ However, this strategy of asserting the status quo would not benefit Japan's claims to the contested Kuril chain that Russia has controlled since the end of World War II.⁴⁶ Nonetheless, the need for Japan to focus on

41. The islands are known as Diaoyu in China. *See supra* Figure 3.

42. *See* Crowell, *supra* note 13.

43. *Id.* (explaining that China has increased its ocean research and fishery vessels, and has armed these vessels with machine guns).

44. THE ECONOMIST, *Could Asia Really Go to War over These?*, *supra* note 13 (giving an example from 2010 when Japan detected retaliation from China in the form of blocking the sales of rare earths that were essential to Japan's industry in response to Japan arresting the skipper of a Chinese fishing boat).

45. *See* Ayako Mie, *No Quick Senkakus Fix, but Return to Status Quo Likely*, THE JAPAN TIMES (Oct. 12, 2012), http://info.japantimes.co.jp/rss/nn20121012f1.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+japantimes_news+%28The+Japan+Times+-+News+%26+Business%29 (detailing the history and political situation surrounding the dispute over the Senkakus islands).

46. *See generally* *Kuril Islands Dispute Between Russia and Japan*, *supra* note 6. The Kurils are four islands that stretch out from the northern

China's threat is more important than other territorial disputes. With regard to the Kuril Islands, one commentator has echoed the considerations in this Note and has argued for Japan to make realist concessions in order to focus attention on Chinese encroachments.⁴⁷ It would thus be prudent for Japan to refrain from asserting all potential island claims and instead focus on the feasibility of a successful outcome to each territorial dispute. A triage approach would allow Japan to set priorities in a region where assertive states are beginning to aggressively flex their nationalist territorial claims. Additionally, explicitly supporting the status quo concerning islands is an approach that more consistently supports Japan's broader interest of regional stability.

Korea also has a territorial dispute with China that could benefit from establishing a precedent of peaceful resolution with Japan. Beijing has recently challenged Korea's claim to Ieodo Reef.⁴⁸ The reef, which is seen as strategic militarily, lies 149 kilometers from Korean territory and 247 kilometers from China.⁴⁹ The area has been home to several violent clashes, including the stabbing death of a Korean Coast Guard Officer by a Chinese fisherman in December 2011.⁵⁰ A comprehensive solution to the Dokdo/Takeshima sovereignty issue would allow policymakers in Seoul to focus their energy on other issues like Ieodo, while reaffirming the territorial status quo. Further, Beijing's aggressive strategy of using economic penalties such as suspending imports, halting tourism, and

end of Japanese territory. The southernmost islet lies a few kilometers from Japanese territory. Because of the disagreement, Russia and Japan have yet to sign a peace treaty ending the Second World War. The dispute emerged from conflicting interpretations of the results of the San Francisco Peace Treaty in 1951, in many ways similar to the Dokdo/Takeshima controversy. *See id.*

47. *See* Richard Weitz, *Why Russia is Challenging Japan over Kurils*, WORLD POLITICS REVIEW (Mar. 1, 2011), <http://www.worldpoliticsreview.com/articles/8038/global-insights-why-russia-is-challenging-japan-over-kurils> ("In the long term, one would expect the Japanese to make the most concessions, since China's continuing rise presents a greater threat to Tokyo's interests. . . . The resulting improvement in Russian-Japanese relations would allow the Japanese to concentrate their efforts on matching China's growing economic and military power, while possibly also inducing the Chinese to moderate their policies toward Japan.").
48. Steven Borowiec, *China's Next Flashpoint?*, THE DIPLOMAT (Mar. 22, 2012), <http://thediplomat.com/2012/03/22/china's-next-flashpoint/?all=true>. Korea's position on the reef echoes its stance on Dokdo that the rocks obviously belong to Korea and there is no debate to be had on the issue. *See id.*
49. *Id.*
50. *Id.*

encouraging boycotts would have a smaller impact against a unified Korean and Japanese position on island sovereignty and control.⁵¹

Underlying both countries' considerations is a shifting regional balance of power. In a post-Cold War security environment, the U.S. role as an ultimate pacifier of tension between Korea and Japan has diminished due to the rising nationalism in those countries.⁵² Although the U.S. has begun to focus on a much publicized "pivot" towards Asia, China has emerged as a significant rival to the U.S. in the region.⁵³ In a worst-case scenario, China could theoretically resort to small-scale military engagements to enforce its island claims.⁵⁴ While force against Korea or Japan is unlikely in the foreseeable future, Russia's war with neighboring Georgia over South Ossetia has shown how superpowers are still able to carry out small-scale wars

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51. See Stephanie Kleine-Ahlbrandt, *Why China Won't Turn the Other Cheek over Foreign Policy*, CNN (Nov. 15, 2012), <http://edition.cnn.com/2012/11/13/opinion/china-naval-disputes/> ("China is now increasingly using its economic might to advance political ends—even when this hurts China itself. According to one Chinese analyst, 'These measures will hurt China. But they hurt Japan more'"). See also Frank Ching, *ASEAN, Be Careful of China's Tactics*, THE CHINA POST (Aug. 11, 2010), <http://chinapost.com.tw/commentary/the-china-post/frank-ching/2010/08/11/268169/ASEAN-be.htm>. China has applied a "divide and conquer" strategy when asserting claims in the South China Sea. Thus, "ASEAN members should know that individually they have little strength but, if they stay united, they can be a formidable political force." *Id.* Although Korea and Japan arguably have greater individual influence than the ASEAN countries, retaining and strengthening their alliance would serve well in resisting China's territorial ambitions.
 52. Jean-Pierre Lehmann, *Nationalism Rises in Northeast Asia*, REAL CLEAR WORLD (Jan. 7, 2013), http://www.realclearworld.com/articles/2013/01/07/nationalism_rises_in_northeast_asia_100455.html (asserting that despite economic cooperation, rising nationalism threatens to undo the gains of global interdependence in the region); Mazarr, *supra* note 7 ("The conventional wisdom says that the main test of American strategy in Asia is the 'rise of China.' In fact, a far bigger challenge may be the growing dominance of these emotional identity issues, because traditional U.S. instruments of statecraft are simply not well suited to dealing with them.").
 53. *On the Rocks, Again*, THE ECONOMIST (Nov. 24, 2012), <http://www.economist.com/news/asia/21567108-barack-obama-courts-region-odds-over-south-china-sea-rocks-again> [hereinafter THE ECONOMIST, *On the Rocks, Again*] (noting that anxiety over China's new assertiveness is a significant motivation for America's deepening engagement in Asia).
 54. See Jens Kastner, *Small Wars Loom Large on China's Horizon*, ASIA TIMES (Apr. 6, 2012), <http://atimes.com/atimes/China/ND06Ad02.html>; see also Mie, *supra* note 45 ("A military confrontation is the last thing we want," Endo at the University of Tsukuba said, "but we have to brace for every possibility.").

with relatively little international or economic consequences.⁵⁵ At the very least, Japan and Korea are interested in protecting their territorial claims in light of China's growing assertiveness. To the extent that Dokdo/Takeshima is a distraction from this interest, a decisive resolution is advisable. Both countries have the opportunity to assume leadership in a lasting regional stability. Within the context of their other island claims, a Dokdo/Takeshima solution is within Korea and Japan's national interests.

B. The Adverse Effect of Korean Populism on Compromise and De-Escalation

Nationalism is on the rise in Asia.⁵⁶ This is particularly true in Korea, where a transition to democracy was not finalized until the late 1990s.⁵⁷ With the rise of democracy has come the power of populism to influence Korean leaders' decisions over foreign policy. This has had a particular impact on Japanese and Korean relations that are still influenced by a regrettable history that left its mark on both nations' consciousness.⁵⁸

In the past, some commentators expressed confidence that Japan and Korea could continue to peaceably manage the Dokdo/Takeshima dispute.⁵⁹ However, recent history has called this certainty into question. Political and foreign policy elites no longer exclusively influence and set policy on the Dokdo/Takeshima issue.⁶⁰ Sagging poll

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55. *Id.* (commenting that after the war with Russia, there were no major economic effects in countries other than Georgia).
 56. Lehmann, *supra* note 52; Mazarr, *supra* note 7 ("Globalization and interdependence are making people nostalgic for a more secure grasp on local cultures and traditions. The result is likely to be a period whose major risks of conflict will derive less from intentional calculations of national advantage than from a boiling clash of identity, pride, prestige, nationalism, and honor.").
 57. See Peter M. Beck, *Can Mubarak Follow South Korea's Path?*, COUNCIL ON FOREIGN RELATIONS (Feb. 3, 2011), <http://www.cfr.org/middle-east/can-mubarak-follow-south-koreas-path/p24006> (outlining Korea's transition from dictatorship to democracy).
 58. See Mazarr, *supra* note 7 ("In Seoul, a perfect storm of . . . emotion-laden historical legacies, rising national pride and assertiveness, and the political calculations of current leadership generated a willingness to provoke a crisis.").
 59. See, e.g., Prescott, *supra* note 40, at 48 ("Fortunately, ownership of these islands does not appear to be a source of current friction. These two countries already have a record of solving maritime disputes, so it is safe to conclude that Take Shima [sic] will not prove to be a flashpoint in the East Asian Seas.").
 60. See Mazarr, *supra* note 7 (describing a university sponsored "I Love Dokdo" contest with goals "to express our love for Dokdo" and showcase "the people who have protected Dokdo throughout history").

numbers and a need to showcase his nationalist credentials spurred then-President Lee Myung-bak's 2012 controversial visit to Dokdo/Takeshima.⁶¹ Indeed, the visit resulted in a ten-point rise in his approval rating.⁶² Rumors about Korean politicians compromising or capitulating over the Dokdo/Takeshima issue carry political consequences.⁶³ In this environment, populist sentiment may very well thwart realist concerns about seeking a cool-headed resolution to a potential flare-up.⁶⁴ Both Korea and Japan have an interest in removing this element from what is otherwise a very productive economic relationship.

In light of historical animosity between the two countries, the appropriate question may not be what factors provoked the past conflicts but instead what factors have prevented the conflicts from escalating further. One factor is the level of economic interdependence between the two countries. In 2004, when Korea's GDP was less than \$700 billion, Korea imported over \$46 billion from Japan while exporting \$21 billion.⁶⁵ These numbers have increased nearly every year since the 1960s.⁶⁶ While there is confidence that this relationship will continue, even a small amount of pessimism about future economic interdependence may "spin the island dispute out of control."⁶⁷ The danger is that either country may develop a willingness to forsake the economic relationship for political goals as China has done in its relationship with Japan.⁶⁸

61. See Yokota, *supra* note 9.

62. *Id.*

63. See KOO, *supra* note 14, at 91 ("South Korea and Japan . . . signed a new fishery agreement in winter 1998–99, bringing a quick, if not quiet, end to the third round of dispute. The new fishery agreement shelved the sovereignty question by following a complicated formula long advocated by Japan, but heretofore rejected by South Korea. The signing of the new fishery accord and shelving of the territorial question exacted political costs for [Korean President] Kim, but he had few alternatives in the wake of South Korea's near economic collapse and the dire need for emergency loans from Japan.").

64. See Mazarr, *supra* note 7 (cautioning that America's strategic policies in Northeast Asia overlook the power of pride and national identity, particularly in South Korea).

65. KOO, *supra* note 14, at 68.

66. *Id.* at 67–68.

67. *Id.* at 98.

68. Kleine-Ahlbrandt, *supra* note 51 ("China is now increasingly using its economic might to advance political ends—even when it hurts China itself. According to one Chinese analyst, 'These measures will hurt China. But they hurt Japan more.'").

Even if full-scale confrontation can continue to be avoided, public ill will fueled by the islets may have economic consequences on both Korea and Japan.⁶⁹ Resolving the sovereignty issue would pave the way for decisive boundary agreements and possible collaborations over future resource discoveries in the area.⁷⁰

C. Neither ICJ Jurisdiction nor Arbitration over the Sovereignty Issue Is Feasible

A submission to the ICJ to determine which country's historical and legal claims are stronger is considered by some to be a reasonable means for resolving the Dokdo/Takeshima issue.⁷¹ However, at least for Korea, the issue is not about rational resolution; rather, it hinges on pride, history, and national identity.⁷² Moreover, Korea has little incentive to submit the issue to the ICJ since it already controls the islets. Japan has proposed submission to the ICJ in 1954, 1962, and 2012.⁷³ There is little reason to believe that Korea will reverse its position after 60 years of refusing binding adjudication.⁷⁴ If anything,

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69. See Daniel McGroarty, *The Scramble for Asia's Resources*, REAL CLEAR WORLD (Nov. 23, 2012), http://www.realclearworld.com/articles/2012/11/23/rare_earths_asia_pivot_and_the_pacific_reset_100365.html (mentioning that Japanese discomfort with China's regional aspirations has led to a policy of seeking to cut Japan's dependence on Chinese rare earth minerals 50 percent by mid-2013).
 70. See Jan Paulsson, *Boundary Disputes into Twenty-First Century: Why, How . . . and Who?*, 95 AM. SOC'Y INT'L L. PROC. 122, 122 (2001) ("It has become accepted that stable boundaries, even if seemingly arbitrary, contribute to international peace and security by removing one possible source of friction between neighboring states.").
 71. See, e.g., Phil Haas, *Status and Sovereignty of the Liancourt Rocks: The Dispute Between Japan and Korea*, 15 GONZ. J. INT'L L. 2, 26 (concluding Korea has a stronger claim under international law and should accept international arbitration).
 72. Mazarr, *supra* note 7 (asserting that for Koreans, Dokdo is a matter of pride, not logic or reason); see also Van Dyke, *Korea's Maritime Boundaries*, *supra* note 3, at 535 ("Korea will never abandon its claim to Tok-Do.").
 73. *Proposal of Referral to the International Court of Justice*, MINISTRY OF FOREIGN AFFAIRS OF JAPAN, <http://www.mofa.go.jp/region/asia-paci/takeshima/proposal.html> (last visited Mar. 12, 2014); see Park Kigab, *Japan's Dokdo Claim Debases Dignity of ICJ*, THE KOREA TIMES (Nov. 1, 2012), http://www.koreatimes.co.kr/www/news/nation/2013/01/251_123693.html (suggesting that Japan's failure to submit its other island disputes (Senkaku and the Kurils) to the ICJ indicates the deliberately provocative nature of Japan's suggestion that it could unilaterally request ICJ arbitration over Dokdo/Takeshima).
 74. See KOREAN MINISTRY OF FOREIGN AFFAIRS & TRADE, *supra* note 1, at 29 ("Korea has the territorial rights *ab initio* over Dokdo and sees no reason why she should seek the verification of her rights before any international court of justice.").

Korea's political leaders have an incentive to use the issue as a political rallying cry while Korea's continued control over the territory solidifies over time. Even if Japan were able to succeed in gaining submission to the ICJ and a favorable decision, it is not clear that it would be politically feasible for the Korean government to comply with an adverse ruling. Rumors of Korean leaders relinquishing sovereignty in exchange for economic aid led to violent protests and political opposition in the 1960s and 1990s.⁷⁵ Recent Japanese pronouncements related to the island have spurred Korean protests involving self-mutilation and, in one case, the symbolic beheading of Japan's national bird.⁷⁶ With fears of an adverse public response, coupled with the fact that Korea already controls the island, it is hard to see how dismantling this infrastructure would work practically if the ICJ ruled against Korea.

Submitting the sovereignty issue to an ad hoc tribunal for arbitration would also require that both parties be willing to abide by a potentially unfavorable decision. As one commentator stated, "the use of arbitration to solve territorial disputes can be successful only where the parties are committed to resolving the dispute peacefully through arbitration and . . . such a commitment is unlikely if the dispute involves an issue considered to be of vital national importance."⁷⁷

The question of sovereignty is too intertwined with Korean identity to be resolved by a tribunal.⁷⁸ A Korean government advertisement captures the reality of the situation: "[T]o the Korean people Dokdo is not merely [a] tiny island off the eastern sea. It is indeed the symbol of Korean sovereignty vis-à-vis Japan and the test case of the integrity of Korean sovereignty."⁷⁹ Although nationalist fever accompanies most territorial disputes, a legal victory for Japan

75. See KOO, *supra* note 14, at 74, 92.

76. See Charles Scanlon, *S. Korean Fury over Island Dispute*, BBC (Mar. 14, 2005), <http://news.bbc.co.uk/2/hi/asia-pacific/4347851.stm> (describing an elderly woman slicing off her finger with shears and a middle-aged man cutting off his finger with a meat cleaver outside the Japanese embassy in Seoul); see also *S. Korea Reportedly Plans to Build Hotel on Disputed Islets*, JAPAN TODAY (Jul. 21, 2008), <http://www.japantoday.com/category/politics/view/south-korean-pm-accuses-japan-of-jeopardizing-peace-over-isles> (describing Korean protestors beheading pheasants in 2005).

77. Carla S. Copeland, *The Use of Arbitration to Settle Territorial Disputes*, 67 FORDHAM L. REV. 3073, 3074 (1999).

78. See KOREAN MINISTRY OF FOREIGN AFFAIRS & TRADE, *supra* note 1, at 29 (describing Dokdo as the symbol of Korean sovereignty); also see Van Dyke, *Korea's Maritime Boundaries*, *supra* note 3, at 535.

79. KOREAN MINISTRY OF FOREIGN AFFAIRS & TRADE, *supra* note 1, at 29.

would lead to a change from the sixty-year status quo.⁸⁰ Within the current tense political climate, such a change appears far from likely.

IV. A COMPREHENSIVE APPROACH TOWARDS A TENABLE SOLUTION

Japan should acknowledge Korean sovereignty over Dokdo/Takeshima in exchange for a stipulation that the islets will not impact territorial rights under UNCLOS and an agreement to arbitrate unresolved boundary issues and joint economic development rights.⁸¹ This proposal admittedly amounts to a Japanese concession and compromise from its current stance that the issue should be submitted to the ICJ. However, by adopting a conciliatory approach, Japan can gain more than it is relinquishing. Due to a tenuous position under international law, Japan's concessions will be limited to losing the leverage of Dokdo/Takeshima as a bargaining tool. As outlined previously and argued in this section, the downside of having this bargaining tool can be measured by a rift between the two countries that in the future may not close as readily as it has in the past.⁸² Japan still has the opportunity to use Dokdo/Takeshima as a bargaining chip, but it should cash the chip in now while it has the most to gain and the least to lose.

A. *International Law Favors Korean Sovereignty*

Japan has little to gain by submitting the issue of Dokdo/Takeshima's sovereignty to the ICJ. Under the accepted norms of international law, Japan's historical and legal claims over Dokdo/Takeshima are substantially weaker than Korea's.⁸³

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80. See Van Dyke, *Korea's Maritime Boundaries*, *supra* note 3, at 526 (stating that as soon as Korea regained its independence it asserted control over the Dokdo/Takeshima islets).
81. See *id.* at 526–27 (stating that classifying Dokdo as an island is not supported by Article 121(3), and that classifying it as a rock is a better approach); see also Charney, *supra* note 38, at 873 (“States are free to agree among themselves on a delimitation line that may even be inconsistent with general or conventional international law, unless third states are adversely affected.”).
82. See Van Dyke, *Reconciliation*, *supra* note 21, at 238 (“Japan's renunciation of its claim over Dokdo/Takeshima could prove to be a very useful gesture to promote genuine reconciliation between the countries.”). A shift in America's role as a Cold War mediator and increasingly populist influences in Japan and Korea are trends that will make future compromise more difficult. See Lehmann, *supra* note 52 (describing how rising nationalism can stymie reconciliation); see also Mazarr, *supra* note 7.
83. See Van Dyke, *Korea's Maritime Boundaries*, *supra* note 3, at 524 (“Korea's claim to sovereignty over the islets is stronger than that of Japan, based on the historical evidence of the exercise of sovereignty

Article 38 of the ICJ Statute defines the sources of international law to include international customs, general principles of law, and judicial decisions.⁸⁴ Under modern customary international law, territory belongs to the country that can make a showing of effective control.⁸⁵ In other words, “[T]erritory is awarded on the basis of the preponderance of administrative, social, geographical, historical and cultural factors linked with the territory.”⁸⁶ For example, in another territorial dispute, the tribunal deciding the Eritrea-Yemen arbitration stated, “[t]he modern international law of acquisition (or attribution) of territory generally requires that there be: an intentional display of power and authority over the territory, by the

and the principle of contiguity (because the islets are closer to Korea’s Ullong-do than to Japan’s Oki Islands), but most importantly because of Korea’s actual physical control of the islets during the past half century.”); *see also* Sibbett, *supra* note 7, at 1646 (concluding that Korea’s claims to Dokdo are stronger than Japan’s).

84. Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 1060, 33 U.N.T.S. 993, states:
 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
 - a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
 - b. international custom, as evidence of a general practice accepted as law;
 - c. the general principles of law recognized by civilized nations;
 - d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
 2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.
85. JEFFERY L. DUNOFF, STEVEN R. RATNER & DAVID WIPPMAN, INTERNATIONAL LAW NORMS, ACTORS, PROCESS 9 (2002) (“[A]rbitral tribunals recognized by the end of the century that effective control over the territory—in terms of constant, peaceful, and acknowledged use—more than the original form of acquisition, was the key to title.”).
86. *See* SURYA P. SHARMA, TERRITORIAL ACQUISITION, DISPUTES AND INTERNATIONAL LAW 191 (1997); *see also* Van Dyke, *Legal Issues*, *supra* note 2, at 167 (suggesting that Japan’s previously held contention that Dokdo was “terra nullius” in 1905 may prohibit Japan from now exerting sovereignty).

exercise of jurisdiction and state functions, on a continuous and peaceful display.”⁸⁷

Japan’s occupation during the first part of the twentieth century is not likely a relevant factor because Korea was unable to contest sovereignty after military occupation by Japan starting in 1904.⁸⁸ Japan instead argues that annual bamboo harvesting and sea lion hunting during the mid-seventeenth century were sufficient to constitute effective control until Dokdo/Takeshima’s incorporation into the Shimane Prefecture during the occupation of Korea in 1905.⁸⁹ Japan also argues that Dokdo/Takeshima’s omission from the 1951 San Francisco Peace Treaty returning Korean territory from Japan is evidence that the Allies recognized that Japan’s sovereignty was established before 1905.⁹⁰ However, the omission was more likely the result of the Allies recognizing that not enough information was known at that time to establish sovereignty for either Japan or Korea.⁹¹ In response to Japan’s arguments, Korea has produced evidence of written histories, Japanese-created maps, and Korean government publications dating back to 1454 that question Japan’s interpretation of the historical record.⁹² The contested and inconsistent use of Dokdo/Takeshima before the twentieth century means that an international tribunal is more likely to focus on Korea’s use and control since the 1950s. Moreover, the fact that Dokdo/Takeshima is closer to other Korean territory complements Korean arguments based on effective control. Therefore, because the

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87. Van Dyke, *Reconciliation*, *supra* note 21, at 237 (citing Territorial Sovereignty and Scope of the Dispute (Eri. v. Yemen), Arbitral Award, ¶ 239 (Perm. Ct. Arb. 1998), http://www.pca-cpa.org/showpage.asp?pag_id=1160).
 88. Van Dyke, *Legal Issues*, *supra* note 2, at 173 (referencing the 1904 protocol that marked the moment when Korea no longer had the ability to act independently on international affairs); JAPANESE MINISTRY OF FOREIGN AFFAIRS, *supra* note 29 (focusing arguments for effective control on the eighteenth and nineteenth centuries while omitting references to colonial control in the twentieth century).
 89. JAPANESE MINISTRY OF FOREIGN AFFAIRS, *supra* note 29 (supporting Japanese claims based on actions occurring pre-twentieth century).
 90. *Id.* (arguing that Dokdo/Takeshima’s omission from the requirement that Japan relinquish specified territory implies a de facto recognition of Japanese sovereignty).
 91. Van Dyke, *Legal Issues*, *supra* note 2, at 184 (referring to the Treaty’s omission of references to Dokdo, “varying positions taken during the deliberation process indicate that the decision was made either because not enough information had been provided regarding the historical events surrounding Japan’s incorporation of Dokdo/Takeshima, or because the Allied powers felt themselves to be incapable, or inadequate, adjudicators”).
 92. KOREAN MINISTRY OF FOREIGN AFFAIRS & TRADE, *supra* note 1, at 5–8.

preponderance of factors supports Korea's effective control, it is unlikely that the ICJ would render a ruling in Japan's favor.

The international community tends to agree that Korea's claims are stronger under contemporary international law.⁹³ Korea's recent control of Dokdo/Takeshima includes the construction of a pier, the presence of a coast guard post, and the maintenance of a lighthouse.⁹⁴ Because these actions signal a visible and continued presence on the islets, they are likely determinative of effective control.⁹⁵ Given the inherent harm in disrupting a sixty-year status quo, arbitration over the sovereignty issue would likely be found in Korea's favor. Thus, Japan has little to gain by its continued insistence on adjudication.

B. Korea and Japan's Strategic Considerations

From Japan's perspective, the major downside for unilaterally accepting Korean sovereignty over Dokdo/Takeshima is the loss of a bargaining chip. In the 1990s, Japan strategically pressed the Dokdo/Takeshima issue to gain concessions from Seoul over fishing rights around the islands.⁹⁶ However, the utility of continuing this strategy must be weighed against the adverse effect of deteriorating trust between the countries. Nationalistic tensions have created a "powder keg" in Northeast Asia with Japan at the center.⁹⁷ Adopting a pragmatic Dokdo/Takeshima policy could remove at least one potential spark from a rapidly changing and tense region.

If Japan waits to resolve the issue, its position may weaken as time passes. As island sovereignty often hinges on Realpolitik as opposed to international legal principles, a small compromise now might prevent larger concessions in the future.⁹⁸ An illustrative

93. See, e.g., Van Dyke, *Reconciliation*, *supra* note 21, at 238; Sibbett, *supra* note 7, at 1646.

94. KOREAN MINISTRY OF FOREIGN AFFAIRS & TRADE, *supra* note 1, at 30; *New Ulleung Quay to Help Defend Dokdo*, CHOSUN (Sept. 28, 2011), http://english.chosun.com/site/data/html_dir/2011/09/28/2011092800685.html.

95. See Sibbett, *supra* note 7, at 1643 (explaining that displays of sovereignty are sufficient to establish territorial title).

96. See KOO, *supra* note 14, at 86 (describing provocative Japanese claims to Dokdo/Takeshima as an attempt to maximize Japan's bargaining position over fishing rights).

97. Lehmann, *supra* note 52 (referring to tension between China, Japan, and Korea, "[i]f the fuse goes off on the Northeast Asia powder keg, the consequences will be immediate, global and dramatic. If, on the other hand, global governance would improve, so might governance in Northeast Asia.").

98. Cf. Glen W. Price, Comment, *Legal Analysis of the Kurile Island Dispute*, 7 TEMP. INT'L & COMP. L.J. 395, 420 (1993) (advising that a concession from Japan in the Kuril Island dispute would be prudent, otherwise Japan may lose even more leverage in the future). Written in

example is the Kuril Islands dispute with Russia in which Japan's hardline approach has not been effective.⁹⁹ Japan continues to contest all four islets instead of just the two where its historical claims are the strongest.¹⁰⁰ Although Russia's desire for economic investment from Japan opened an opportunity for compromise in 1992, Japanese leaders were unable to muster the political capital to broker a deal.¹⁰¹ As a result, in 2011 a newly resilient Russia showed less interest in compromise regardless of Japan's legal or historical claims.¹⁰² If Japan's power continues to recede relative to other countries in the region, the opportunity to achieve more obtainable goals will

1993, this article accurately predicted the consequences of Japan's hardline stance on the Kuril Islands: "If Japan does not take advantage of this situation by softening its current position and giving the Russian Government the leverage necessary to reach a compromise, Japan may lose the initiative and any chance to resolve the territorial issue. This would be a tragedy not only for Japan and Russia, but for the world community as a whole." *Id.*; cf. Weitz, *supra* note 47 (concluding that Japan's interests are best served by improving relations with Russia through compromise on the Kuril issue).

99. Compare Price, *supra* note 98, at 396–97 (describing Japan's past opportunities to make a compromise on the Kuril island dispute after the fall of the Soviet Union), with Oki & Yamaguchi, *supra* note 6 (outlining the contemporary situation where compromise is very unlikely because Russia now uses the Kuril issue in conjunction with China to exert joint pressure on Japan).
100. See Price, *supra* note 98, at 420 (writing about the Kuril dispute in 1993: "To reach an agreement. . . . A good start would be for the Japanese to categorically renounce all claims to southern Sakhalin Island, claims for which Japan has little or no legal foundation.").
101. See *id.* at 420 ("Japan has . . . an abundant supply of investment capital and expertise that Russia desperately needs. If Japan does not take advantage of this situation by softening its current position and giving the Russian Government the leverage necessary to reach a compromise, Japan may lose the initiative and any chance to resolve the territorial issue."); see also DMITRI TRENIN & YUVAL WEBER, CARNEGIE ENDOWMENT FOR INT'L PEACE, RUSSIA'S PACIFIC FUTURE: SOLVING THE SOUTH KURIL ISLANDS DISPUTE 1 (2012), available at <http://carnegieendowment.org/2012/12/11/russia-s-pacific-future-solving-south-kuril-islands-dispute/esoi> (describing the current problem and offering a potential solution for compromise).
102. See Jonathan Eyal, *Russia Sees Japan as an Easy Target*, THE CHINA POST (Nov. 4, 2010), <http://www.chinapost.com.tw/commentary/the-china-post/special-to-the-china-post/2010/11/04/278624/Russia-sees.htm> ("Moscow remains interested in ending its lingering territorial spat with Tokyo. But having seen how the recent Chinese-Japanese dispute over the Diaoyutai or Senkaku islands unfolded, Russia has concluded that Japan is an easy target. 'Japan's foreign policy is in complete disarray,' says Alexander Panov, who heads Russia's diplomatic academy.").

diminish.¹⁰³ Maintaining control over the Senkaku islands and strengthening the existing Japanese alliance with Korea should trump the nationalistic but increasingly unlikely goal of reclaiming lost territory.

With respect to the Dokdo/Takeshima dispute, a conservative backlash in Japan is likely to accompany any significant move towards conciliation.¹⁰⁴ However, Japanese leaders do not have to completely renounce national pride in order to resolve the issue and focus on the future.¹⁰⁵ Japan has much to be proud of following World War II, and a pragmatic compromise does not necessarily undermine national identity and patriotism.¹⁰⁶ If anything, the compromise proposed in this Note lacks the moral force of a total accounting for past atrocities.¹⁰⁷ But more than sixty years after the war, acknowledging the past while focusing on the future may be the only politically viable option.¹⁰⁸

Strategically, Japan's provocative stance may also be motivated by a concern that showing weakness on the Dokdo/Takeshima issue could hinder Japanese claims against China over the Senkaku Islands.¹⁰⁹ However, the greatest beneficiary of the Korean and

103. *See China Overtakes Japan as World's Second-Biggest Economy*, BBC (Feb. 14, 2011), <http://www.bbc.co.uk/news/business-12427321>.

104. *See Lind, supra* note 19, at 143–44 (“Tokyo should avoid gestures that risk polarizing the Japanese public, such as official apologies or resolutions by the Diet.”).

105. *See id.*

106. *See id.* at 144.

107. *See generally* Van Dyke, *Reconciliation, supra* note 21, at 239 (outlining suggestions for a more comprehensive reconciliation approach by Japan including an accounting of Japan's annexation and occupation, recognition of the wrongfulness of comfort women and reparations, and a commitment to continue a joint development zone near Korea's Cheju Island).

108. *See Lind, supra* note 19, at 146 (“Ideally, countries would offer their victims the contrition they deserve. Through public apologies, reparations, and trials, victims of terrible suffering receive some measure of justice. But in the real world, the backlash that such contrition engenders is counterproductive to reconciliation. A better approach is to acknowledge the harms done while looking forward.”).

109. *See Dangerous Shoals*, THE ECONOMIST (Jan. 19, 2013), <http://www.economist.com/news/leaders/21569740-risks-clash-between-china-and-japan-are-rising-and-consequences-could-be> (highlighting the dangerous extent of China's uncompromising ambitions over the Senkakus, “short of simply handing the islands over, nothing that the Japanese government could do could satisfy China. This week an editorial in the *China Daily* acknowledged that Japan is working to build bridges with China, but immediately dismissed the efforts as part of a ‘two-faced strategy.’”).

Japanese dispute is China, which can use tensions to level pressure against Japan toward its own territorial dispute over the Senkaku Islands.¹¹⁰ Furthermore, U.S. efforts to strengthen trilateral ties relative to China are undermined by inflamed tensions over Dokdo/Takeshima.¹¹¹ To the extent that Japan's security relies on America's power, strengthening this Japanese-American alliance by resolving Dokdo/Takeshima is essential.¹¹²

From a practical standpoint, a firm territorial boundary would allow Japan to peacefully cooperate in exploiting potential gas reserves in cooperation with Korea.¹¹³ Further, a good faith gesture could strengthen its relationship with Korea and avoid potential trade disruptions from future territorial disputes.¹¹⁴ Most importantly however, Japan can take a big step in promoting regional stability. Rather than showing weakness that undermines its other island claims, Japan will set a precedent by endorsing recent territorial control as the decisive factor in island disputes. This will allow Japan to better legally and politically protect islands it already controls in any disputes against China.

China would prefer to use its power bilaterally to influence smaller regional nations.¹¹⁵ By strengthening political ties with Korea,

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110. David C. Kang, *US Should Side with Korea on Dokdo*, THE KOREA TIMES (Oct. 5, 2012), http://www.koreatimes.co.kr/www/news/nation/2013/01/251_121590.html; see also Lehmann, *supra* note 52 (describing that while China, Japan, and Korea are economically interdependent, past history and rising nationalism in each country continue to plague their relationships with mistrust).
 111. Kang, *supra* note 110; see also Yokota, *supra* note 9 (noting that Korea and Japan are America's most important allies in Asia, and that cooperation between Korea and Japan is essential for maintaining America's stance against North Korea).
 112. See THE ECONOMIST, *On the Rocks, Again*, *supra* note 53 ("America says it is neutral in the sovereignty dispute between Japan and China over the Senkaku or Diaoyu islands in the East China Sea. But it has confirmed the islands are covered by its security treaty with Japan.").
 113. See Van Dyke, *Korea's Maritime Boundaries*, *supra* note 3, at 538–40 (recommending a series of boundary delineations to encourage exploitation of fish and natural resources).
 114. Cf. *Japan and China: Ghosts of the Past*, THE GUARDIAN (Sep. 17, 2012), <http://www.theguardian.com/global/2012/sep/17/japan-china-ghosts-of-the-past-editorial> (discussing how a flare-up over the Senkaku Islands caused trade problems between Japan and China because massive amounts of Japanese property were destroyed, which forced Japanese companies to suspend operations).
 115. THE ECONOMIST, *On the Rocks, Again*, *supra* note 53 (mentioning disputes in the South China Sea where Vietnam and the Philippines are urging for multilateral negotiations involving ASEAN as opposed to China's bilateral approach).

Japan may have a better chance of maintaining its territorial position in the face of China's claims. Korea and Japan are currently at odds over the Dokdo/Takeshima issue, but they share a common interest in protecting other territories against Chinese claims.¹¹⁶ In Korea's case, China claims the Ieodo Reef, and in Japan's case, it lays claim to the Senkaku Islands.¹¹⁷ If Japan allows its dispute with Korea to escalate, some commentators have suggested that Japan might face a united Korea and China as regional rivals.¹¹⁸ If Japan and Korea can begin to resolve their historical past, then they may recognize their joint strategic and economic interests.¹¹⁹

As long as Dokdo/Takeshima is an issue, it will continue to evoke the bitter memories of the past. Although there are other issues that divide the two countries, including the issues of "comfort women" and wartime atrocities, Dokdo/Takeshima stands out in the minds of many Koreans as evidence that little has changed since the tragedy of colonial rule.¹²⁰ For Japan, the benefits of resolving the Dokdo/Takeshima issue now outweigh the risks.

C. Beyond Sovereignty: Resolving Boundary and Resource Issues

Once Japan and Korea have resolved the issue of Dokdo/Takeshima's sovereignty, they can begin to move forward in establishing territorial boundaries between the countries. Rich fishing resources and potential opportunities for exploiting hydrocarbons exist

116. See Borowiec, *supra* note 48 (explaining that Korea's decision to build a naval base close to the disputed Ieodo Reef is to defend against China and potentially demonstrate control over the reef); *Dangerous Shoals*, *supra* note 109 (describing the ongoing conflict between China and Japan over the Senkakus).

117. See Borowiec, *supra* note 48; *Dangerous Shoals*, *supra* note 109.

118. KOO, *supra* note 14, at 98 ("If South Korea-Japan relations become strained, an unintended consequence could be to bring South Korea and China together against Japan."); see Kang, *supra* note 110 (arguing that China is the real beneficiary of the dispute between Japan and Korea and that Korean occupation is the decisive element for determining sovereignty).

119. Cf. McGroarty, *supra* note 69 (stating that Vietnam and the Philippines have common economic interests and are also looking for buffers against Chinese power, including a stronger relationship with the U.S.).

120. See Dong-Joon Park & Danielle Chubb, *Why Dokdo Matters to Korea*, THE DIPLOMAT (Aug. 17, 2011), <http://thediplomat.com/new-leaders-forum/2011/08/17/why-dokdo-matters-to-korea/> ("[T]o try to understand South Korea-Japan relations by focusing on the dynamics of the contemporary relationship is to get things upside-down. Add in an entanglement of historical regional resentments and a very important truth emerges: from the South Korean perspective, the dispute over these rocky outcrops is the big picture.").

in the sea surrounding Dokdo/Takeshima.¹²¹ Although pragmatic agreements concerning fishing rights are already in place, both countries recognize that a permanent solution to territorial boundaries would be desirable.¹²² Due to Dokdo/Takeshima's limited habitability, it is unlikely to be classified as an island entitled to an EEZ under UNCLOS.¹²³ Even if it is classified as an island, international courts have often minimized the impact of islands when determining the demarcation of boundaries.¹²⁴

Both Japan and Korea are parties to UNCLOS, and both are interested in its principles being applied to regional disputes. An example of successful resolution resulted from the dispute between Romania and Ukraine concerning maritime delineation related to Serpents' Island in the Black Sea.¹²⁵ In that case, Romania was in a similar situation to Japan as Romania was contesting sovereignty of an islet over which Ukraine had effective control. In 1997, Romania signed a treaty similar to the agreement proposed in this Note, finally acknowledging Ukrainian sovereignty over the islet.¹²⁶ In 2009, the ICJ resolved the countries' contested maritime boundaries by determining that regardless of the islets' status as an island under Article 121(3), the overall territory of the islets was too small and uninhabited to impact territorial delineations.¹²⁷

121. Van Dyke, *Legal Issues*, *supra* note 2, at 198.

122. *Id.* ("Japan and Korea have reached pragmatic agreements to regulate fishing but both recognize that a longer-term or permanent solution would be desirable.").

123. *See id.* at 196 (referencing Judge Budislav Vukas' explanation, "The reason for giving exclusive rights to the coastal states was to protect the economic interests of the coastal communities that depended on the resources of the sea, and thus to promote their economic development and enable them to feed themselves. This rationale does not apply to uninhabited islands because they have no coastal fishing communities that require such assistance.").

124. *See id.* at 198 ("[E]ven if Dokdo were a true 'island' entitled to generate an EEZ and continental shelf, it would not necessarily have a full effect on the maritime boundary of the East Sea/Sea of Japan.").

125. *See* Press Release, Int'l Court of Justice, Maritime Delimitation in the Black Sea (Romania v. Ukraine): The Court Establishes the Single Maritime Boundary Delimiting the Continental Shelf and Exclusive Economic Zones of Romania and Ukraine (Feb. 3, 1999), *available at* <http://www.icj-cij.org/docket/files/132/14985.pdf>.

126. Jon M. Van Dyke, *The Romania v. Ukraine Decision and Its Effect on East Asian Maritime Delimitations*, 15 OCEAN & COASTAL L.J., 261, 265–66 (2010) [hereinafter Van Dyke, *The Romania v. Ukraine Decision*].

127. *Id.* at 261–62 ("[T]he Court reconfirmed that small uninhabited islands will generally have limited or no impacts on delimitations and that such features should not generate extended maritime zones.").

Serpents' Island is comparable to Dokdo/Takeshima in that both islets are nearly the same size, have a few structures, and have government-sponsored coast guard personnel on the outcroppings.¹²⁸ The South Korean government has previously argued that small, uninhabited islets should not be entitled to an EEZ under the Law of the Sea.¹²⁹ Regardless of whether an international court would agree, in light of the Serpents' Island decision, a tribunal would probably discount Dokdo/Takeshima's impact on the territorial boundary.¹³⁰

As asserted above, the successful use of international arbitration could set a stabilizing precedent for the region.¹³¹ Using a neutral tribunal would allow the parties a face-saving mechanism if the decision goes against their interests. Japanese policymakers could achieve their proposed goal of a neutral legal resolution even if arbitration was not applied to the sovereignty issue. On the other hand, Japan's interests in other outcroppings such as Okinotorishima may make it reluctant to participate in a decision that would likely invalidate its claims to a large EEZ base on small isolated outcroppings.¹³² For this reason, Japan may wish to negotiate a stipulation that a resolution of Dokdo/Takeshima will have no impact on other boundaries and leave the broader island territory issue for

128. See *id.* at 262, 274–75. Serpents' Island has 0.17 square kilometers of land area and lacks freshwater, but has structures, a lighthouse, and a pier. Dokdo has 0.18 square kilometers of land area and is uninhabited except for military personnel, seasonal fishermen and the structures associated with them. See *id.*

129. See Van Dyke, *Legal Issues*, *supra* note 2, at 197 (“The Republic of Korea has tended to argue that small uninhabited islets should not be able to generate EEZs and continental shelves, following the language of Article 121(3) of the 1982 United Nations Law of the Sea Convention.”).

130. See Van Dyke, *The Romania v. Ukraine Decision*, *supra* note 126, at 276 (“Dokdo should be considered to be a ‘rock’ that ‘cannot sustain human habitation or economic life of [its] own’ under Article 121(3). . . . Even if Dokdo were somehow to be considered to be an ‘island’ rather than a ‘rock’ under Article 121, it would not be given much importance by a tribunal asked to delimit the maritime boundary between Korea and Japan because of its tiny size and relative insignificance . . . tribunals have repeatedly ignored or slighted islands in maritime delimitations, even ones that have substantial populations residing on them.”).

131. See Van Dyke, *Legal Issues*, *supra* note 2, at 197 (“[I]f Japan and Korea could agree that Dokdo would not be entitled to generate a continental shelf or EEZ, that agreement might go a long way toward reducing the tension over sovereignty of the islets.”).

132. The Japanese Government has spent tens of millions of dollars to prevent sea erosion from consuming a rock over 1,000 miles off its coast. Although the rock is small, Japanese officials hope it will entitle Japan to fishing rights and possible deposits of manganese and cobalt. Haberman, *supra* note 30.

another day.¹³³ There is reason for optimism in the case of a negotiated stipulation and settlement since both countries have successfully reached previous agreements on fishing rights in the area surrounding Dokdo/Takeshima.¹³⁴

V. CONCLUSION

Korea and Japan are natural strategic allies when it comes to preserving their territorial claims against Chinese ambitions. China's claims to Japan's Senkaku Islands and Korea's Jeodo Reef, and China's willingness to use economic penalties to further political goals threaten both Korea and Japan. A resolution of the Dokdo/Takeshima sovereignty issue would clear the way for decisive boundary agreements and possible collaboration between Korea and Japan over future discoveries of resources in the area. Japan should take the initiative because its sovereignty claims are unlikely to gain legal recognition, and there is no practical way to challenge Korea's de facto control of the islets. This deal requires that Japanese leaders be willing to compromise on sovereignty in order to reach a settlement with Korea.¹³⁵ Additionally, Korean leaders should strive to dial down the nationalistic rhetoric and recognize the two countries' interdependence.¹³⁶

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133. Cf. Carlos Ramos-Mrosovsky, *International Law's Unhelpful Role in the Senkaku Islands*, 29 U. PA. J. INT'L L. 903, 931–32 (2008) (questioning the effectiveness of UNCLOS for providing peaceable outcomes in Asian island disputes because small territories have a big impact on EEZs and sovereignty is absolute).
 134. Cf. *id.* at 906–07 (suggesting that the vagueness of customary international law allows parties to invoke international legal norms that can be construed to fit national interests, which is why formal legal processes of adjudication or arbitration are not advisable in the island dispute context).
 135. See Van Dyke, *Reconciliation*, *supra* note 21, at 238 (“Since the Japanese claim is weak in any event, and because this dispute prevents other matters from being addressed and resolved, Japan’s renunciation of its claim over Dokdo/Takeshima could prove to be a very useful gesture to promote a genuine reconciliation between the countries. This renunciation would allow Japan and Korea to delimit their EEZ boundary utilizing the equidistance line between Korea’s Ullungdo and Japan’s Oki Islands, which would also allow the two countries to resolve their fishing disputes.”).
 136. See Park & Chubb, *supra* note 120 (“The South Korean government must for its part be able to demonstrate to its citizens that Japan isn’t ignoring the link between their claims to the islands and the 20th century colonization of the country. Only then can the leadership in Seoul stop the reactive decision making and make bold efforts to shift the domestic conversation about how to move forward with the Japan-South Korea relationship. After all, cooperation between these two countries is in the interests of the entire region.”).

Whether future Japanese and Korean political leaders can meet this task and embrace the realism necessary to resolve the Dokdo/Takeshima issue remains to be seen.¹³⁷ The island disputes in Asia are numerous and complex and have no easy solutions. In the context of nationalism and historical prejudice, these territorial disputes create dangerous opportunities for conflict. Thus, it may be time for a discussion on whether the principles of UNCLOS are best formulated for a peaceful resolution of these issues.¹³⁸ Regardless, under the existing political and legal framework, compromise must start somewhere.

The dispute between Japan and Korea over the Dokdo/Takeshima islets presents a unique opportunity for reconciliation. Though divided by history, the two countries are economically intertwined and are in similar positions confronting the regional realities of China's rise. The symbolic influence of physical territory and the power of historically motivated nationalism cannot be discounted, but compromise will be more productive than confrontation. Settling the Dokdo/Takeshima issue is unlikely to resolve all historical animosity between Korea and Japan, but it will allow both countries to better manage their futures with China by setting aside past disputes.

137. See generally Van Dyke, *Reconciliation*, *supra* note 21, at 239 (advocating a more comprehensive alternative approach to reconciliation by Japan including an accounting of Japan's annexation and occupation, recognition of the wrongfulness of comfort women and reparations, and a commitment to continue a joint development zone near Korea's Cheju Island).

138. See generally Ramos-Mrosovsky, *supra* note 133, at 906–07 (arguing that current global legal regimes, including UNCLOS, have enmeshed East Asia's sea resources in emotional disagreements over sovereign territory while neither encouraging nor enabling the parties to resolve their problems by applying international law).



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