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SECURITY FLASHPOINT:
INTERNATIONAL LAW AND THE ISLANDS DISPUTE
IN THE FAR EAST

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ABSTRACT: Since the normalisation of relations in 1972, the year 2005 marks the worst year yet for Sino-Japanese relations. In April 2005, anti-Japanese protests were staged in at least ten cities across China. It is in this political climate that China rebuked Japan's announcement to allocate rights for test-drilling of a natural gas field in a disputed area of the East China Sea. The Diaoyutai Islands are located in this disputed area. They consist of five islets and three rocks of seemingly insignificant economic value. However, recent studies suggest that the surrounding seabed might be rich with oil deposits. It became apparent that the acquisition of territorial sovereignty over these islets might legitimise a claim to the adjacent territorial sea -- including the valuable mineral rights. This article examines the competing claims of China and Japan in light of general principles that govern the acquisition of territory and sovereignty in international law.

I INTRODUCTION

Approximately eight years ago, the Japanese built a lighthouse and raised their flag on alleged Chinese territory, an island called Diaoyu Tai.¹ A wave of protests swept across Hong Kong, Taiwan, and China. In September 1996, a group of protesters and journalists sailed from Hong Kong vowing to place a Chinese flag on the islands and tear down the lighthouse. Their ship was blocked by Japanese vessels about five kilometres from the main island. Among the few who jumped into the water intending to carry out their mission, a Hong Kong politician drowned.² To this day the incident remains vivid in the memories of many. It is this incident that spurred

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¹ Protests against this and other similar Japanese activities were organised by various overseas Chinese communities around the Globe.

² *Hong Kong Politician Dies In Islands Protest: Territorial Dispute Strains Japan-China relations* (1996) CNN <http://www.cnn.com/WORLD/9609/26/disputed.islands/> (at 29 September 2004). See also *In Death, Island Protestor Became Martyr: China Blames Japan for Death of Hong Kong Activist* (1996) CNN <http://www.cnn.com/WORLD/9609/27/island.dispute/> (at 29 September 2004).

the study of this paper.³

The Diaoyu Tai (in Chinese) or Senkaku Gunto (in Japanese) consist of five islets and three rocks in the East China Sea (hereafter “the islands”).⁴ Historically, the islands are of insignificant economic value. However, a 1968 study by the United Nations Economic Commission for Asia and the Far East (UNECAFE)⁵ suggested that the seabed of the East China Sea could be one of the richest oil-deposit areas in the region. It became apparent that the acquisition of territorial sovereignty over these islands might legitimise future claims to the adjacent territorial sea, and possibly justify the creation of an exclusive economic zone under the United Nations Convention on the Law of the Sea (UNCLOS).

The islands dispute has been a recurring issue and remains one of the many impediments in Sino-Japanese relations. In the context of international relations, it is an obvious reality that states place priority on securing limited natural resources. The reasons for this may be for domestic consumption or other developmental purposes. Regardless, states demonstrate their power and capacity to survive through their ability to secure limited natural resources. The islands dispute is clearly a matter of national economic interest not only to China and Japan but also to other countries in the Asia Pacific region. At the same time, claims of sovereignty over the islands raised the spirit of nationalism within both China and Japan -- be that deliberately or as an unintentional effect.

Chinese nationalists used the dispute to rekindle resentment of Japanese militarism and the 1937 Nanjing Massacre and to refresh the memory of historical injustice done against millions of Chinese. This is evident in Chinese nationalist literature such as *The China that Can Say No*⁶ and its sequel *The China that Can Still Say*

³ The title for this article is borrowed from MH Nordquist and JN Moore (eds) *Security Flashpoints – Oil, Islands, Sea Access and Military Confrontation* (Kluwer Law, Hague, 1998). The book draws on islands disputes and maritime delimitation cases around the world, outlining the numerous areas of potential military confrontation between states. Some better-known and high-profile cases include the Paracels and the Spratlys in the South China Sea. Other islands disputes in the Far East include the Kuril Islands (between Russia and Japan) and the Liancourt Rocks (between Korea and Japan). See Map A in Appendix I for more detail.

⁴ See Map B and C in Appendix I for the names in both Chinese and Japanese for these features. For the exact geographic coordinates of the islets and rocks, see Daniel Dzurek *The Senkaku/Diaoyu Islands Dispute* (1996) International Boundaries Research Unit, Durham University <http://www-ibru.dur.ac.uk.ezproxy.auckland.ac.nz/docs/senkaku.html> (at 15 August 2004).

⁵ Currently known as the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP).

⁶ Song Qiang, Zhang Zangzang and Qian Bian *Zhonggui Kuyi Shuo Bu [The China That Can Say No]*

*No.*⁷ This literature contains an extremely strong anti-Japanese element and both pieces attempt to link arguments regarding sovereignty over the islands to anti-Japanese sentiment. In this respect, it is widely agreed that the dispute over ownership of the islands is driven by both the material economic interests of the parties concerned as well as the symbolic significance of national pride.⁸

With respect to international law, the issues may be classified into two major categories: (1) the dispute over the sovereignty of the islands themselves and; (2) the implications of this dispute on maritime jurisdiction. While the former deals with the question of how sovereignty may be obtained over the islands, the latter deals with issues such as the possibility of generating extended maritime zones under UNCLOS.⁹ Furthermore, a third legal issue arises even after the ownership problem and the extended maritime zones are settled. This issue focuses on the potential dispute over the effect the islands may have on the maritime delimitation between neighbouring states.¹⁰

Although it would be fascinating to address all three legal issues related to the islands dispute, this article is only aimed at answering the first question — namely, which country has sovereignty over the disputed islands. The key objective of this article is to provide a thorough examination of the competing claims made by China and Japan in light of the general principles that govern the acquisition of territory in international law.

As discussed above, in the area of island disputes, one has to bear in mind that the issues are not merely matters of international law. The dispute is rich in history and politics, as well as law. As such, this article will also give significant attention to the

(Mingbao, Hong Kong, 1996).

⁷ Song Qiang, Zhang Zangzang and Qian Bian *Zhonggui Haishi Neng Shuo Bu [The China That Can Still Say No]* (Mingbao, Hong Kong, 1997) 80-83.

⁸ Phil Deans “Contending Nationalism and the Diayutai/Senkaku Dispute” (2000) 31 *Security Dialogue* 120, 124.

⁹ Jon M Van Dyke *Legal Status of Islands – With Reference to Article 121(3) of the UN Convention of the Law of the Sea* (1999) University of Hawaii Faculty of Law <http://www.hawaii.edu/law/faculty/publications/KoreanPaper-Islands12999.htm>

(at 23 August 2005). See also Robert W Smith and Bradford Thomas “Island Disputes and the Law of the Sea: An Examination of Sovereignty and Delimitation Disputes” in M Nordquist and J Moore (eds) *Security Flashpoints – Oil, Islands, Sea Access and Military Confrontation* (Kluwer Law, Hague, 1998) 55-59.

¹⁰ See, eg, Prosper Weil *The Law of Maritime Delimitation – Reflections* (Grotius, Cambridge, 1989). See also Douglas M Johnston *The Theory and History of Ocean Boundary-Making* (Queen’s University Press, Montreal, 1988).

political history of the region as one of the crucial factors for analysis.¹¹

This article is divided into three subsequent parts. Part II outlines the law of territorial acquisition. Derived from state practice and case law, this area of law codifies customs, traditions and different modes of acquisition into general rules and principles that govern territorial sovereignty disputes. Part III discusses the relevant historical background of the region. This is necessary in order to engage in the debate and appreciate the merits of the arguments in the subsequent section. Part IV applies the law outlined in Part II to assess the competing claims of sovereignty over the disputed islands.¹²

II THE LAW OF TERRITORIAL ACQUISITION

A *The concept of State, Sovereignty and Territory*

Before proceeding, a few concepts within the study of international relations and international law must be defined. Of Particular importance are the related concepts of state, sovereignty and territory. In public international law, the state is the primary type of legal person. A legal person is a subject of the law -- that is, 'an entity capable of possessing international rights and duties and having the capacity to maintain its rights by bringing international claims.'¹³ Sovereignty, on the other hand, can be described as the competence of states in respect of their territory. Internally, sovereignty may be expressed as the 'supremacy of the governmental institutions' and, externally, the 'supremacy of the state as a legal person.'¹⁴ Brownlie simply refers to sovereignty as 'legal shorthand for [the] legal personality' of statehood.¹⁵

The modern concept of state sovereignty dates back to the Peace of Westphalia 1648.

¹¹ While international norms and standards are shaped by a consensus among states which eventually become customary law, political ideology shapes state behaviour. History and politics has long played an influential part in the formation and evolution of international law. To understand and correctly interpret international law, one must apply the law in the correct political and historical context.

¹² Because the Chinese (PRC) and Taiwanese (ROC) claims are effectively based on the same facts, this article combines the two claims together. Also, since 1972 when the PRC regained its seat on the United Nations Security Council, international recognition of Beijing and not Taipei as the sovereign government of China implies that Taiwan is no longer in a capacity to conduct independent negotiations.

¹³ Ian Brownlie *Principles of Public International Law* (6th ed, Oxford Press, Oxford, 2003) 57.

¹⁴ Malcolm N Shaw *International Law* (5th ed, Cambridge Press, Cambridge, 2003) 409.

¹⁵ Brownlie, above n 13, 106.

Though the exact definition has changed over time, the core concept remains essentially the same. As articulated by Papp, ‘sovereignty meant that no higher authority than the state existed’.¹⁶ Likewise, a state is a ‘geographically bounded entity governed by a central authority that has the ability to make laws, rules, and decisions, and to enforce them within its boundaries’.¹⁷ Because possession of territory is one of the main criteria for establishing statehood¹⁸ and the state is the foundation of international law, the concepts of sovereignty, state and territory are inseparable. It is meaningless to talk about a state without a specific territory nor a state that is not a sovereign entity. Likewise, sovereignty in relations between states signifies independence.¹⁹

B The Concept of Territorial Sovereignty

The concept of territorial sovereignty is a mixture of the concepts discussed above. Shaw notes that territorial sovereignty is a general principle and is regarded as the fundamental axiom of classical international law, whereby a state is deemed to exercise full and exclusive authority over its territory.²⁰ This covers land territory, the territorial sea appurtenant to the land, the seabed and subsoil of the territorial sea, islands, islets, rocks and reefs.²¹

When a state claims sovereignty over a territory, it is asserting ownership and possession over it. It is therefore not surprising that the classification of the different methods of acquiring territory are rooted in Roman patrimonial law and the mediaeval theory of eminent domain -- each dealing with the idea of property’.²² Furthermore, Shaw claims that the essence of territorial sovereignty is contained in the notion of title. It is therefore important to understand both the factual and legal conditions required to obtain title under international law.²³

¹⁶ Daniel S Papp *Contemporary International Relations* (6th ed, Addison Wesley, New York, 2002) 36.

¹⁷ *Ibid* 38.

¹⁸ Brownlie, above n 13, 71.

¹⁹ Christos L Rozakis “Territorial Sovereignty” in R Berhardt (ed) *Encyclopedia of Public International Law* (North Holland, New York, 2000) volume 4, 827.

²⁰ Shaw, above n 14, 409.

²¹ Brownlie, above n 13, 105.

²² Santiago Torres Bernardez “Territory, Acquisition” in R Berhardt (ed) *Encyclopedia of Public International Law* (North Holland, New York, 2000) volume 4, 832. See also Shaw, above n 14, 412.

²³ Shaw, above n 14, 412.

C Distinguishing Between How a State Acquires its Own Territory and How a State Acquires Additional Territory

When dealing with the question of how a state acquires territory, one should distinguish between the acquisition of title to territorial sovereignty by an existing state and the birth of a new state.²⁴ According to Shaw, ‘under classical international law, until a new state is created, there is no legal person in existence competent to hold title.’²⁵ The acquisition of title to territory by newly emerged states in this context is problematic. This is because ‘acquisition’ by definition ‘assumes the existence of an entity capable of acquiring’.²⁶ However, the focus of this article is on acquisition of title to *additional* territorial sovereignty by *existing* states. It is to this issue that the article now turns.

D Modes of Acquiring Title

In general, the issue of acquiring title is quite complex. It is seldom the situation that any single principle alone will determine a case. It has been noted that various principles of law must be applied to the facts of each case to determine whether title to territory has actually been acquired. These principles may be categorised into five ‘modes’ of acquisition of additional territory by existing states: accretion, cession, subjugation, prescription and occupation. Brownlie correctly points out that these are in fact categories of convenience and are not without shortcomings.²⁷ But, for the purposes of this article, they provide a useful starting point.

1 Accretion

This form of acquisition relates to geographical changes resulting from natural causes, whereby new land is formed and becomes attached to existing land. It usually involves river deltas. The concept is straightforward. In essence, the new land is incorporated into the territory of the state where it lies.²⁸

²⁴ Bernardez, above n 22, 832.

²⁵ Shaw, above n 14, 414.

²⁶ Bernardez, above n 22, 832.

²⁷ Brownlie, above n 13, 127. See also Bernardez, above n 22, 832.

²⁸ See Shaw, above n 14, 419-420. See also Bernardez, above n 22, 836-837. This mode of acquisition is not applicable to the instant dispute and therefore discussion of this topic is limited.

2 *Cession*

This form of acquisition was quite common during the era of colonialism. It involves a ‘transfer of territory from one sovereign to another’ by agreement.²⁹ Such a transfer will automatically assume a transfer of territorial sovereignty. The treaty of cession -- or the so-called “peace treaty” following a war -- provides the legal basis for the transfer. Some writers note the similarities between this form of acquisition of title and certain modes of transfer of ownership in private law. Shaw further notes that cessions may be carried out for value, by exchange, or as a gift of gratitude.³⁰

It is worthy to note that apart from a treaty of cession, other types of treaties may also create title. For example, a boundary treaty which ends a disputed demarcation creates title. However, it differs from cession in that rather than creating title, it transfers title.³¹

Furthermore, Brownlie contends that consent is a necessary component when dealing with the transfer of territory. It is noted that consent by the interested parties is more important than the treaty itself. A treaty of cession may be invalid if the appropriate legislation is not endorsed by one of the parties. Conversely, if the actual transfer of sovereignty has taken place and been accepted by the parties involved, the validity of the treaty is irrelevant.³²

3 *Subjugation*

Subjugation, or conquest, is outlawed by contemporary international law. Article 2(4) of the United Nations Charter states that all member states must refrain from the threat or use of force against the territorial integrity or political independence of any state.³³

The concept of conquest is articulated well by Shaw:³⁴

²⁹ Shaw, above n 14, 420.

³⁰ Ibid 420-422. See also Bernardez, above n 22, 837-838 and Brownlie, above n 13, 128.

³¹ Brownlie, above n 13, 129.

³² Ibid.

³³ Charter of the United Nations, opened for signature 26 June 1945, Article 2(4) (entered into force 24 October 1945) (“UN Charter”).

³⁴ Shaw, above n 14, 422.

Conquest, the act of defeating an opponent and occupying all or part of its territory, does not of itself constitute a basis of title to the land. It does give the victor certain rights under international law as regards the territory, the rights of belligerent occupation, but the territory remains the legal possession of the ousted sovereign.

However, classical rules did allow title to pass by annexation of territory following an act of conquest. It was nonetheless ‘a legal fiction employed by the victor to mask the conquest and transform it into a valid method of obtaining land under international law’. In short, it is victor’s justice and is now classified as an illegal mode of territorial acquisition.³⁵ Thus, it has been highlighted in various Security Council Resolutions and declarations adopted by the United Nations General Assembly that: ‘The territory of a state shall not be the object of acquisition by another state resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognised as legal.’³⁶

4 Occupation

It is noted by various writers that although occupation and prescription are categorised as different modes of acquisition, they are nonetheless based on the same principle of effective control. Perhaps the major distinction between the two is the concept of *terra nullius*, a Latin term meaning ‘no man’s land’. According to Brownlie, *terra nullius* can be ‘new land, for example a volcanic island, territory abandoned by the former sovereign, or territory not possessed by a community having a social and political organisation.’³⁷ This allows a state, but not a private individual, to acquire territory which belongs to no one -- excluding areas constituting *res communis* (common heritage of mankind).³⁸ This mode of acquisition primarily relates to ‘uninhabited territories and islands’ but *terra nullius* may be established if the territories inhabited by tribes or peoples did not demonstrate a social and political organisation.³⁹

Derived from *occupatio* in Roman Law, the word occupation ‘does not necessarily signify occupation in the sense of actual settlement and a physical holding.’⁴⁰

³⁵ Ibid 423.

³⁶ Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, General Assembly Resolution 2625, UN Doc A/8028 (1970). See also Shaw, above n 14, 423 and Bernardez, above n 22, 837.

³⁷ Brownlie, above n 13, 133.

³⁸ Shaw, above n 14, 424.

³⁹ Malcolm N Shaw “The Western Sahara Case” 49 BYIL 1978, cited in Shaw, above n 14, 425.

⁴⁰ Brownlie, above n 13, 133.

However, another essential element of occupation is ‘effective possession’ which refers to a combination of two criteria also borrowed from Roman Law: ‘the material apprehension of a *corpus* and the manifestation of *animus possidendi* (intention to act as sovereign).⁴¹ Thus, it has been argued that a more appropriate term to use is ‘effective occupation’.

It should be further noted that effective occupation is more than discovery and fictive occupation. Shaw points out quite explicitly that ‘mere realisation or sighting’ of the existence of a particular piece of land ‘was never considered as significant to constitute title to territory.’⁴² It was further noted in the *Island of Palmas* case that discovery might give an inchoate title to a state but which then ‘had to be completed within a reasonable time by effective occupation of the relevant region.’⁴³

Furthermore, though it may be true that discovery of *terra nullius* often consisted of a landing and the symbolic taking of possession, this declaration by the discoverer (be that a private individual or an authorized state envoy or representative) is of little relevance. Such a declaration or other official notification can serve as solid ‘evidence of *animus occupandi*’⁴⁴; nevertheless, ‘it is not a necessary condition for the validity of a state’s claim.’⁴⁵ It has been pointed out that in international law ‘discovery becomes legally relevant when a state affirms that the discovery was made on its behalf and proceeds to claim territorial sovereignty.’⁴⁶ Even with physical occupation, a state must demonstrate acts of sovereignty by peaceful and continuous performance rather than merely an intention to claim sovereignty over the area.⁴⁷

5 Prescription

Prescription (sometimes called ‘acquisitive prescription’) originated from the Roman word *usucapio* -- to ‘acquire ownership of (a thing) by virtue of

⁴¹ Bernardez, above n 22, 835. See also Brownlie, above n 13, 134.

⁴² Shaw, above n 14, 425.

⁴³ Ibid 425-426.

⁴⁴ *Animus occupandi* is used interchangeably with *animus possidendi* meaning intention to take possession. It is a rule stating that in order for a state to claim title to a territory, the state must intend to exercise sovereign powers therein.

⁴⁵ Alfred-Maurice De Zayas “Territory, Discovery” in R Bernhardt (ed) *Encyclopedia of Public International Law* (North Holland, New York, 2000) volume 4, 840.

⁴⁶ Bernardez, above n 22, 839-840.

⁴⁷ Ibid 836.

uninterrupted possession'⁴⁸. In contrast to occupation, this mode of establishing title is applied to territory which is not *terra nullius*. Rather, it is related to territory which has previously been under the sovereignty of a state. According to Shaw, prescription is used to legitimise doubtful title which might be 'obtained either unlawfully or in circumstances wherein the legality of the acquisition cannot be demonstrated', by the passage of time.⁴⁹ In essence, it is legitimisation of a fact.

However, there are other criteria to be fulfilled. In order to acquire territorial sovereignty under this mode of acquisition, the possession of the territory must be exercised *a titre de souverain*.⁵⁰ A state must demonstrate peaceful, uninterrupted exercise of effective control and it must endure for a certain period of time. Such possession must also be public so that all interested states can be made aware of it. In addition, acquiescence by the former sovereign must be evident.⁵¹

While some commentators emphasise the uncertainty and the difficulties of measuring the passage of time, others suggest that acquisitive prescription promotes *quieta non movere* (not to move settled things).⁵² This has important pacifying properties and is regarded as an essential factor to maintain regional, political and legal stability. However, there is diverse opinion as to 'the intensity which must characterize any counteraction if it is to constitute an interruption of the process.'⁵³

E General Principles

Apart from the five modes of acquisition, there are fundamental principles and substantive rules guiding the area of territorial disputes. These principles are mutually constitutive and are not confined to any particular mode of acquisition. Most of these became general principles through frequent state proclamations, consistent state practice, case-law and consensus by the international community.

First and foremost is the fundamental principle which relates to the maintenance of

⁴⁸ *The Pocket Oxford Latin Dictionary* James Morwood (ed) (Oxford Press, Oxford, 1994). See also Bernardez, above n 22, 838.

⁴⁹ Shaw, above n 14, 426.

⁵⁰ A French term meaning "under the authority of a sovereign". The rule requires that certain activities must be done by a sovereign state and not by private persons.

⁵¹ Bernardez, above n 22, 838. See also Shaw, above n 14, 426-427.

⁵² *The Oxford Essential Dictionary of Foreign Terms in English* Jennifer Speake (ed) (Berkley Books, New York, 1999).

⁵³ Bernardez, above n 22, 838.

international peace and security. International disputes in general should be settled in a peaceful manner and in a civilized way. In addition, the prohibition on resort to armed force should be respected. These principles are enshrined in the UN Charter.⁵⁴

In terms of substantive rules, the exercise of effective control (or the so-called 'principle of effectiveness') is emphasised. The issue here is exactly what acts of sovereignty are required to found title and what is meant by effective control. According to Shaw, the answer depends on all the relevant circumstances of the case; namely, 'the nature of the territory involved, the amount of opposition that such act [of sovereignty] ...have aroused, and [the] international reaction'.⁵⁵ For instance, 'it would not be logical to require the same intensity of exercise of sovereignty as elsewhere when an area is uninhabited, inhospitable and or of difficult access'.⁵⁶

Another rule of thumb in territorial disputes is succinctly articulated by Max Huber, the arbitrator of the *Island of Palmas* case. In his arbitral award concerning title to the island he stated, 'the actual continuous and peaceful display of state functions is in case of dispute the sound and natural criterion of territorial sovereignty'.⁵⁷ His ruling set the precedent for future territorial disputes.

Lastly is the notion of acquiescence. "Acquiescence [is]... the absence of protest when this might reasonably be expected."⁵⁸ As mentioned in the previous discussion regarding cession, apart from the treaty of cession, consent must be given by the parties involved in order for the transfer of territory to take place. Recognition and acceptance of territorial sovereignty may occur in the absence of any legal instrument. When 'a situation arises which would seem to require a response denoting disagreement and, since this does not transpire, the state making no objection is understood to have accepted the new situation.'⁵⁹ It is noted that acquiescence is not an essential factor to confer title but 'it gives significance to actual control of territory and acts of state authority in circumstances when these do not of themselves provide a complete foundation for title' (i.e., where there are competing acts of possession).⁶⁰

⁵⁴ UN Charter, above n 33, Article 2(3) and 2(4).

⁵⁵ Shaw, above n 14, 432.

⁵⁶ Bernardez, above n 24, 834.

⁵⁷ Cited in Shaw, above n 14, 432. See also Brownlie, above n 13, 135.

⁵⁸ Brownlie, above n 13, 151.

⁵⁹ Shaw, above n 14, 437.

⁶⁰ Brownlie, above n 13, 151.

In summary, in the absence of any clear legal title to an area, acquiring that territory under international law is governed by the following rules:

1. The entity that makes the claim must be under the authority of a sovereign (*a titre de souverain*).
2. The entity must have an intention to act as sovereign (*animus possidendi*) in that particular territory.
3. The entity must be able to exercise effective control over the territory.
4. Effective control must be accompanied by a peaceful and continuous (uninterrupted) display of state function,
5. Acquiescence by the parties directly involved would serve as concrete evidence of the effectiveness of control.
6. International recognition is essential.⁶¹

III HISTORIAL OVERVIEW OF THE DISPUTE

‘Hindsight is always better than foresight’. Almost 60 years after World War II, historical issues and deadlocks in the islands dispute continue to be revealed. When dealing with historical disputes one must be careful to read the facts through the correct historical lens. We know that histories are often written by victors and they can often be subjective. But, as we enter the new millennium, the free flow of information allows us to access and compare different historical facts, widen our horizons, and perhaps enable us to discover some historical truth. In order to apply the law in the correct political and historical context later in this article, this section provides a relevant overview of the history of the Far East since the nineteenth century. This period may be classified into four categories: (1) The Age of Humiliation⁶²; (2) The Age of Japanese Militarism; (3) The Post War Era; and (4) The Era of Recognition.

⁶¹ Shaw, above n 14, 442. According to Shaw, ‘International recognition involves not only a means of creating rules of international law in terms of practice and consent of states, but may validate situations of dubious origins. It could validate an unlawful acquisition of territory and could similarly prevent effective control from ever hardening into title.’

⁶² Wu Xinbo ‘Memory and Perception’ in Gerrit W Gong (ed) *Memory and History In East and Southeast Asia* (CSIS Press, Washington DC, 2001) 65-85.

A *The Age of Humiliation*

During the nineteenth century, the balance of power in world politics shifted decisively towards the West. Dominant powers -- namely the United Kingdom and France -- practiced imperialism and expansionism in Asia. As a result of the despicable Opium War, the Anglo-Chinese Treaty of Nanjing 1842 was signed.⁶³ It is usually referred to as the first 'unequal treaty' in the modern history of China. Subsequently, the Chinese were forced to sign various unequal treaties of cession including the Treaty of Tianjin 1858⁶⁴, the First Convention of Beijing 1860, and the Second Convention of Beijing 1898.⁶⁵ In the late nineteenth century, seeing that China's door had been opened by superior Western military might, Japan began to assert its significance in the region through militaristic practice. The first Sino-Japanese War broke out in August 1894. The Chinese were defeated and forced to sign the Treaty of Shimonoseki 1895. Apart from having to pay a large indemnity, according to the treaty China also ceded the Pescadores Islands, the Liaodong Peninsula, all islands appertaining to Taiwan and the island of Taiwan itself.⁶⁶ Ten years after the first Sino-Japanese war, Japan defeated Russia and took control of the industrial base in Manchuria (North-East China) in 1905. In 1910, Japan also invaded Korea and established it as a Japanese colony.

⁶³ The British Navy easily defeated the Chinese. Hong Kong Island was ceded to the British as a colony and the British used Hong Kong as their trading port. The treaty required the Chinese government to pay 6 million yuan for the opium, 3 million yuan to the merchants and 12 million yuan for the expenses incurred. Full text of the treaty available at <http://web.jjay.cuny.edu/~jobrien/reference/ob24.html> (at 23 August 2005). For a discussion of the moral dimension of the opium trade and Opium War, see John S Gregory *The West and China Since 1500* (Palgrave Macmillan, New York, 2003) 76-87.

⁶⁴ The Treaty stated that ten trading ports should be open, and foreign ships were allowed to pass along the Chang Jiang. Foreigners were allowed to travel and trade in the mainland. Missionaries were free to spread their religions. There was also compensation of four million, and two million yuan, to Britain and France respectively. Full text of the treaty available at <http://web.jjay.cuny.edu/~jobrien/reference/ob28.html> (at 23 August 2005).

⁶⁵ Kowloon Peninsula and Stonecutters Island were ceded to the British under the First Convention of Beijing 1860 and the compensation was increased to eight million taels for the expenses incurred. Under the Second Convention of Beijing 1898, the New Territories which included more than 200 outlying islands were leased from China for 99 years.

⁶⁶ A week after the treaty was signed, however, Russia, France, and Germany -- acting together in the so-called 'Triple Intervention' -- demanded that Japan renounce claims to the Liaodong Peninsula. The Japanese complied and therefore the cession of the Liaodong Peninsula was reversed in return for an additional indemnity of 30 million taels as provided for by the Liaodong Convention 1895. Full text of the Treaty of Shimonoseki 1895 available at <http://www.taiwandocuments.org/shimonoseki01.htm> (at 23 August 2005).

B The Age of Japanese Expansionism and World War II⁶⁷

The Chinese Revolution of 1911 brought an end to the last Chinese dynasty (Qing/Manchu). The Republic of China was established. Yuan Shi Kai as a successor to Sun Yat Sen made himself president for life and attempted to create another imperial dynasty. With strong opposition from various sectors, Yuan failed and China fell into the Age of Warlordism.⁶⁸ During World War I, in August 1917, China joined the Allies and declared war on Germany. However, as a victor, the Chinese demand to end foreign concessions in China was ignored in the Treaty of Versailles. Instead, the former German concessions in Shandong were handed over to Japan.⁶⁹ In 1921, the Chinese Communist Party (CCP) was founded. At first the CCP cooperated with the Chinese Nationalist Party -- the Kuomintang (KMT) -- in an attempt to unite China and to challenge the local warlords. However, in 1926 civil war broke out between the CCP and KMT. It was not until 1937 that the two parties agreed to unify to resist the Japanese invasion at the commencement of the second Sino-Japanese War.⁷⁰ At the end of World War II -- as a result of the War Time Declarations and eventually the San Francisco Peace Treaty -- Japan surrendered and agreed to relinquish all the territories it had taken from the Chinese.⁷¹ However, the war crimes committed by the Japanese during the war were not duly addressed.⁷² Two thirds of Class A war criminals were never tried but instead released and the United States played a major part in this.⁷³

⁶⁷ For a useful overview of this period see Ian Nish "An Overview of Relations Between China and Japan, 1895-1945" in Christopher Howe (ed) *China and Japan: History, Trends and Prospects* (Clarendon Press, Oxford, 1996) 23-45.

⁶⁸ John S Gregory *The West and China Since 1500* (Palgrave Macmillan, New York, 2003) 138-143.

⁶⁹ For a discussion of the secret agreement between France, Britain and Italy regarding this event see Allen S Whiting *China Eyes Japan* (University of California Press, Berkeley, 1989) 32-37.

⁷⁰ Allen S Whiting *China Eyes Japan* (University of California Press, Berkeley, 1989) 32-37. See also Y L Ting "Nanjing Massacre: A Dark Page in History" *Beijing Review*, 2 September 1985, 15-21.

⁷¹ Cairo Declaration 1943 available at <http://www.yale.edu/lawweb/avalon/wwii/cairo.htm> (at 23 August 2005).

⁷² See, eg, Nicholas D Kristof "Japan Confronting Gruesome War Atrocity: Unmasking Horror" *New York Times* (New York, USA, 17 March 1995). The article discusses the infamous "Unit 731" and the Japanese biowarfare program during World War II as well as America's part in helping to cover up atrocities in exchange for valuable data generated from human experiments.

⁷³ See, eg, Arnold C Brackman *The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trials* (Morrow, New York, 1987). The US struck a deal with Lt. Gen. Ishii Shiro, former commander of Japanese biological warfare Unit 731. Ishii and all members of the unit would be exonerated for war crimes in exchange for data they had acquired through human experimentation on thousands of Chinese, Koreans, Soviets, and even US prisoners of war. For more detail, see the Nanjing Massacre Collection at the Chinese University of Hong Kong available at <http://www.arts.cuhk.edu.hk/NanjingMassacre/NM.html> (at 23 August 2005). See generally Philip R Piccigallo *The Japanese on Trial: Allied War Crimes Operations in the East 1945-1951* (University of Texas Press, Austin, 1979) and Richard Minear *Victors' Justice: The Tokyo War Crimes Trial*

*C The Post War Era*⁷⁴

After World War II, the KMT and the CCP resumed their fighting. Despite enjoying considerable support from the United States, Chiang Kai Shek's KMT lost the war and fled to the island of Taiwan. On 1 October 1949, Communist party leader Mao Zedong proclaimed the establishment of the People's Republic of China (PRC), while Chiang proclaimed Taipei, Taiwan, the temporary capital of the Republic of China (ROC). Chiang continued to assert his government as the sole legitimate authority over the whole of China.

In June 1950, the Korean War broke out between the Democratic People's Republic of Korea (DPRK - North Korea) and the Republic of Korea (ROK - South Korea). The PRC supported North Korea while the United States supported South Korea. The Chinese and American armies collided in combat and an agreement to end the war was not reached until July 1953.⁷⁵ The Korean War was significant because it gave birth to the Cold War which divided the world into competition between communist and capitalist societies. The anti-communist atmosphere in the West contributed to the unwillingness to grant diplomatic recognition to the PRC until the 1970s.⁷⁶ The Americans also formulated a military and political strategy in Asia -- the so-called 'containment policy' -- by concluding a security treaty with Japan and by supporting and recognising the Taipei government as the sole legitimate authority over China. In this respect, the survival of Taiwan, at least to a certain extent, relied on support from the United States. During the Taiwan Strait Crisis, the PRC's vigorous effort to reclaim Taiwan strengthened the United States' determination to protect Taiwan and led to a US-ROC mutual defence treaty in 1954.⁷⁷ At the time, the main goal of American foreign policy was to contain communism, especially Russia and the PRC in the Asia Pacific region.⁷⁸

(Princeton University Press, Princeton, 1972).

⁷⁴ For a useful overview of this period see Akira Iriye "Chinese-Japanese Relations 1945-1990" in Christopher Howe (ed) *China and Japan: History, Trends and Prospects* (Clarendon Press, London, 1996) 46-59.

⁷⁵ Mark Weisburd *Use of force: The Practice of States Since World War II* (Pennsylvania State University Press, Pennsylvania, 1997) 103-107.

⁷⁶ Meanwhile, 'the US, reminding the United Nations that China had fought UN Troops in Korea, was able to block the PRC's bid to unseat the KMT government from membership in the [UN]'. June Teufel Dreyer *China's Political System: Modernization and Tradition* (3rd ed, Macmillan, New York, 2000) 312.

⁷⁷ June Teufel Dreyer *China's Political System: Modernization and Tradition* (3rd ed (Macmillan, New York, 2000) 309-318. See also Gregory, above n 68, 176-182.

⁷⁸ Whiting, above n 70, 37-40.

D *The Era of Recognition*⁷⁹

Following the Sino-Soviet split and eventual confrontation between the two countries⁸⁰, the United States seized the opportunity to bring about a Sino-US rapprochement after twenty years of isolating the PRC.⁸¹ United Nations General Assembly Resolution 2758 was passed in 1971 to recognize that ‘the representatives of the Government of the PRC are the only lawful representatives of China to the United Nations and that the PRC is one of the five permanent members of the Security Council’.⁸² A subsequent Sino-Japanese Joint Communiqué on 29 September 1972 established diplomatic relations between the two countries. In 1978 the Treaty of Peace and Friendship between the PRC and Japan emphasised peaceful co-existence and endeavoured toward further economic and cultural relations.⁸³ These agreements were carefully drafted to exclude the islands dispute. In fact, Deng Xiaoping, the former Chinese head of state, stated that both governments agreed to shelve the issue in 1972:⁸⁴

It is true that the two sides maintain different views on this question...It does not matter if this question is shelved for some time, say, ten years. Our generation is not wise enough to find common language on this question. Our next generation will certainly be wiser. They will certainly find a solution acceptable to all.

In 1998 the Joint Declaration on Building a Partnership of Friendship and Cooperation for Peace and Development again focused on the bilateral economic partnership and cooperation between the two countries and downplayed the islands dispute.⁸⁵ By 2003 Sino-Japanese trade continued to soar and reached the unprecedented level of USD \$130 billion. Although the islands dispute appears to be a minor aspect of this important bilateral relationship, incidents in the water around

⁷⁹ For a useful overview of the period see Hidenori Ijiri “Sino-Japanese Controversy Since the 1972 Diplomatic Normalization” in Christopher Howe (ed) *China and Japan: History, Trends and Prospects* (Clarendon Press, Oxford, 1996) 60-82.

⁸⁰ For a discussion of the Sino-Soviet split see Joseph Camilleri *Chinese Foreign Policy – The Maoist Era and its Aftermath* (Martin Robertson, Oxford, 1980) 47-77.

⁸¹ ‘[We Americans] cannot afford to leave China forever outside the family of nations...there is no place on this small planet for a billion of its potentially most able people to live in angry isolation...’ cited in Gregory, above n 68, 182-186. See also Dreyer, above n 77, 318-325.

⁸² General Assembly Resolution 2758, UN Doc. A/8439 (25 October 1971).

⁸³ Full text of Treaty of Peace and Friendship 1978 available at www.taiwandocuments.org/beijing.htm (at 23 August 2005).

⁸⁴ Deng Xiaoping, quoted in Chi-kin Lo *China's Policy Toward Territorial Disputes: The Case of the South China Sea Islands* (Routledge, London, 1989) 171-172. The ROC stated that the agreement between Japan and the PRC would not alter Taiwan's title to the Diaoyutai Islands.

⁸⁵ For Sino-Japanese trade data between 1979-1994 see Robert Taylor *Greater China and Japan – Prospects for an Economic Partnership in East Asia* (Routledge, London, 1996) 111-128.

these islands have increased in number since 1996. Recently, explorations of an offshore gas field in the East China Sea provoked a resurgence of the dispute.⁸⁶

IV APPLICATION OF LAW

A *The Beginning of the Dispute*

At the end of World War II the Ryukyu Islands and surrounding areas in the East China Sea (including Diaoyu Tai) were occupied by American forces. These areas were then incorporated into the United States Administrative Area under Article 3 of the San Francisco Peace Treaty of 1951. As a result of the bilateral agreement between the United States and Japan, the Okinawa Reversion Treaty of 1971 returned the disputed islands to Japanese control. Both Taiwan and the PRC protested and issued a statement claiming sovereignty over the Diaoyu Tai Islands.

B *Japan's Position*

On 8 March 1972, Japan's Ministry of Foreign Affairs issued a statement regarding 'the Rights to Ownership over the Senkaku Islands'.⁸⁷ The statement can be summarised into six points for analytical purposes: (1) the disputed islands were *terra nullius* during 1885-95; (2) the Japanese Cabinet Decision of 14 January 1895 incorporated the Senkaku Islands into Japanese territory; (3) the Senkaku Islands were not included in Article 2 of the Treaty of Shimonoseki 1895; (4) the Senkaku Islands were not part of the territory which Japan relinquished under the San Francisco Peace Treaty; (5) there was a legitimate transfer of title through the Okinawa Reversion Treaty 1971⁸⁸; and (6) there was Chinese acquiescence from 1952-1970.

⁸⁶ Joseph Ferguson *The Diaoyutai-Senkaku Islands Dispute Reawakened* (2004) *China Brief* (Volume 4, Issue 3) www.jamestown.org/publications_view.php?publication_id=4 (at 23 August 2005). See also Kosuke Takahashi "Gas and Oil Rivalry in the East China Sea" *Asia Times Online* (2004) <http://www.atimes.com> (at 23 August 2005) and Reiji Yoshida "Is the Senkaku Row About Nationalism or Oil?" *The Japan Times Online* (2004) <http://www.japantimes.co.jp/cgi-bin/getarticle.pl5?nn20040327a4.htm> (at 23 August 2005).

⁸⁷ See full text in Appendix III.

⁸⁸ It has also been pointed out that '[f]or more than three decades, the Japan Coast Guard has stationed at least one patrol ship in the waters surrounding the islands to prevent intrusions.' Reiji Yoshida "Is the Senkaku Row About Nationalism or Oil?" *The Japan Times Online* (2004) <http://www.japantimes.co.jp/cgi-bin/getarticle.pl5?nn20040327a4.htm> (at 23 August 2005).

C China's Position

The basis of the Chinese claim to sovereignty over the disputed islands rests on six main points: (1) the Chinese argue that valid title was obtained through the principle of discovery-occupation as early as 1372⁸⁹; (2) there was a peaceful and continuous display of territorial sovereignty over the disputed islands for more than five hundred years (1372-1895)⁹⁰; (3) Japan previously recognised and acquiesced to Chinese sovereignty over the disputed islands⁹¹; (4) the Diaoyu Tai Islands were not *terra nullius* in 1895; (5) the islands were ceded to Japan through the Treaty of Shimonoseki 1895; and (6) the islands must be returned to China under the War Time Declarations and Sino-Japanese Peace Treaty 1952.

D Preliminary Assessment Based on the Modes of Acquisition

When dealing with any complex historical dispute, it is useful to trace the roots of the arguments presented by both sides. In this dispute it is clear that Japan's contentions are based on the contemporary mode of 'effective occupation' and proving *terra nullius*. Alternatively, Japan is ready to resort to the doctrine of prescription.⁹²

China's contentions are a combination of various modes of acquisition. First, China argues it established *terra nullius* through the classical mode of discovery and occupation. Second, recognising evolutions in international law, China further claims they maintained effective occupation over the islands. Lastly, China maintains that there has been a transfer of title through the mode of subjugation and cession.

At a glance, Japan appears to fulfil all the relevant requirements to acquire title over the disputed islands under contemporary international law. Japan is a state and it would seem that, by patrolling the surrounding waters for three decades, it

⁸⁹ "Tsung Shih Liu Chiu Lu Kan Tiao-yu-yu" [To View the Diaoyu Tai Through the 'Mission to the Ryukyu Records'] (1972) 14 Hsueh Tsui (Sinological Studies) 2, 48.

⁹⁰ Tao Cheng "The Sino-Japanese Dispute Over The Tiao-yu-tai (Senkaku) Island and the Law of Territorial Acquisition" (1974) 14 Va J Int'l L 221, 259.

⁹¹ Fung Hu Hsiang "Evidence Beyond Dispute: Tiaoyutai is Chinese Territory" cited in William B Heflin "Recent Developments Diayou/Senkaku Islands Dispute: Japan and China, Oceans Apart" (2000) 1 APLPJ 18.

⁹² 'In practice, the prescription mode is used when 'it reflects the need for stability felt within the international system by recognising that territory in the possession of a state for a long period of time and uncontested cannot be taken away from that state without serious consequences for the international order.' Shaw, above n 14, 426.

demonstrated an intention to act as a sovereign over the islands. Japan also seems to have exercised effective control through a peaceful and continuous display of state function over the territory. It is therefore easy to reach an initial conclusion that Japan has a stronger claim to the disputed islands. Nevertheless, scratching beneath the surface, the Japanese assertions are problematic. Several questions must be addressed. First, were the islands really *terra nullius* as claimed by Japan in 1895 bearing in mind the counter claim by the Chinese? Second, even if they were *terra nullius*, may valid title be obtained solely by means of a domestic cabinet decision? Third, given the conflicting interpretations of the Treaty of Shimonoseki, how should the treaty be interpreted under the Vienna Convention on the Law of Treaties?⁹³

E The ICJ Approach

To facilitate the analysis of these issues it is helpful to look at the most recent jurisprudence on island sovereignty disputes at the International Court of Justice (ICJ). The *Pulau Ligitan and Pulau Sipadan* case⁹⁴ is important to this analysis because it sets out clearly how the Court addressed the legal issues in the dispute. Because international law evolves and changes over time, this case sets a benchmark for future reference. The analysis of this article is designed to follow the approach of the Court. First, the Court looked at whether there were any existing treaties between the parties which related to the disputed islands. Having interpreted the relevant treaties according to the Vienna Convention and taking subsequent conduct by the parties into account, the Court attempted to discern whether there was any transfer of title. The Court found that neither party had a treaty-based title to the disputed islands and therefore proceeded to consider whether title to the disputed islands was acquired by virtue of *effectivités*. The concept of *effectivités* resembles the principle of effective occupation and prescription outlined earlier in this article. The Court awarded the islands to Malaysia on the basis of *effectivités*.⁹⁵

F Treaty Interpretation

Applying the ICJ approach to the instant dispute, the first task is to examine the

⁹³ Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) (“Vienna Convention”).

⁹⁴ *Sovereignty Over Pulau Ligitan and Pulau Sipadan* (Malaysia/Indonesia) [International Court of Justice, 17 December 2002] available at <http://www.icj-cij.org/> (“Pulau Ligitan and Pulau Sipadan”).

⁹⁵ *Ibid* para 148.

relevant treaties between China and Japan. Because China and Japan hold different views on the interpretation of the various treaties -- and these treaties are crucial in determining title to the disputed islands -- each treaty will be discussed in turn. The analysis will apply Articles 31 and 32 of the Vienna Convention. It should be noted that Article 31 and 32 are considered customary international law and therefore apply even to those countries who are not parties to the Convention.⁹⁶

1 *Treaty of Shimonoseki 1895*

As a general rule of interpretation, Article 31(1) states that ‘a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’⁹⁷ Looking to the relevant portion of the Treaty of Shimonoseki, Article 2 states that:⁹⁸

China cedes to Japan in perpetuity and full sovereignty the following territories, together with all fortifications, arsenals, and public property thereon...(b) The island of Formosa, together with *all islands appertaining or belonging* to the said island of Formosa [emphasis added].

The point of debate is whether the phrase ‘all islands appertaining or belonging to the said island of Formosa’ include the islands of Diaoyu Tai. It should be noted that the Treaty of Shimonoseki was not only a treaty of peace but also a treaty of cession which ended the first Sino-Japanese War. In this sense, the Treaty of Shimonoseki had two objectives. First, it sought to justify and confirm territories ceded by Japan during war time that originally belonged to China. Second, it provided for indemnity in the form of payment and further annexation in return for peace. Although the Japanese government issued a cabinet decision to incorporate the islands in January 1895, that is three months prior to the Treaty. It is obvious that the Japanese government treated the islands as part of Chinese territory before

⁹⁶ Nonetheless, China stated that Taiwan’s signing of the treaty on 27 April 1970 is illegal and invalid. Although Taiwan may no longer be a party to the Convention, in accordance with customary international law, the Convention it is still applicable to the interpretation of the 1952 Peace Agreement between ROC (Taiwan) and Japan. See, eg, statement by the Permanent Mission of the PRC to the United Nations <http://www.china-un.org/eng/zghlhg/flsw/t28583.htm> (at 23 August 2005) and *Pulau Ligitan and Pulau Sipadan* above n 94, para 37. See also *Territorial Dispute* (Libyan Arab Jamahiriya/Chad) [International Court of Justice, 1994] para 41; *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain* (Qatar/Bahrain) [International Court of Justice, 1995] para 33; *Kasikili/Sedudu Island* (Botswana/Namibia) [International Court of Justice, 1999] para 18. All available at <http://www.icj-cij.org/>.

⁹⁷ Vienna Convention, above n 93, Article 31(1).

⁹⁸ Full text of Treaty of Shimonoseki 1895 available at <http://www.taiwandocuments.org/shimonoseki01.htm> (at 23 August 2005).

that.⁹⁹ The Japanese cabinet decision claiming sovereignty over the islands was not sufficient for it was not communicated to any other party, either directly or indirectly. Furthermore, because Japan claimed the islands during the first Sino-Japanese War, its position that the islands were not included in the treaty is weak. It is probable that only after the war did Japan, by provisions of the peace treaty, assume sovereignty over the islands. Thus, Article 2(b) of the Treaty of Shimonoseki, when read in context and in light of its object and purpose, appears to include the islands of Diaoyu Tai.

According to Article 31(3) of the Vienna Convention, subsequent conduct of the parties regarding the treaty should also be taken into account. After the Treaty of Shimonoseki there was ample evidence that Japan exercised effective control over the islands including a lease of the islands to a Japanese citizen since 1896.¹⁰⁰ During one occasion in 1920, it was pointed out by a Japanese writer that the Chinese Consul in Nagasaki mentioned the disputed islands as part of the Okinawa District of the Japanese Empire in a letter thanking the Japanese for rescuing Chinese fishermen.¹⁰¹ However, these instances do not contradict the Chinese position. The Chinese have never disputed the status of the islands between April 1895 and 1952, as it is conceded by the Chinese that the islands were incorporated into Japanese territory by the Treaty of Shimonoseki. Instead, the Chinese argue that the disputed islands should be returned under the subsequent War Time Declarations and the ROC-Sino Peace Treaty 1952.

2 *War Time Declarations*

Let us now turn to the Cairo Declaration 1943. The declaration was concluded by ROC President Chiang Kai-shek, US President Franklin Roosevelt, and UK Prime Minister Winston Churchill at the Cairo Conference. It stated that:¹⁰²

⁹⁹ The repeated requests for permission to place national markers on the island by the Okinawa Magistrate during 1885-1895 were either rejected or ignored. The correspondence between the Japanese Interior Minister and Foreign Minister revealed a certain fear of creating difficulties with the Chinese government. This was a similar situation to the French dealings with the English Crown in the *Minquiers and Ecrehos* case [1953] ICJ 47, 70 cited in Cheng, above n 90, 248-249.

¹⁰⁰ *The Okinawa* (A quarterly devoted to the problems of Okinawa and Ogasawara Islands) cited in Cheng, above n 90, 247.

¹⁰¹ Okuhara "Senkaku Retto to Ryoyuken Kizoku Montai" [The Problem of the Right of Sovereignty Over the Senkaku Island] (1972) 3 *Asahi Asian Rev* 22.

¹⁰² *Declaration of the Cairo Conference* (1 December 1943) available at <http://www.taiwandocuments.org/cairo.htm> (at 23 August 2005).

The Three Great Allies are fighting this war to restrain and punish the aggression of Japan. They covet no gain for themselves and have no thought of territorial expansion. It is their purpose that Japan shall be stripped of all the islands in the Pacific which she has seized or occupied since the beginning of the First World War in 1914, and that *all the territories Japan has stolen from the Chinese*, such as Manchuria, Formosa, and the Pescadores, shall be restored to the Republic of China. Japan will also be expelled from all other territories which she has taken by violence and greed.

On 2 August 1945 the Potsdam Proclamation was concluded by UK Prime Minister Winston Churchill, US President Harry Truman and USSR Premier Joseph Stalin. Under the section entitled 'Proclamation Defining Terms for Japanese Surrender, July 26, 1945', Article 8 states:¹⁰³

The terms of the Cairo Declaration shall be carried out and Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku and such minor islands as we determine.

The objective of these agreements was unequivocal: 'to restrain and punish the aggression of Japan' by defining the limits of its territory'. However, Japan can still argue that the disputed islands were acquired prior to 1914 and were not therefore taken from the Chinese during the period of Japanese aggression. The specific territories named in the Cairo declaration do not include the disputed islands. On the other hand, China believes that the Diaoyu Tai Islands were islands appertaining to Formosa. It further asserts that the disputed islands are included in 'all other territories which [Japan] has taken by violence and greed' as a result of the first Sino-Japanese War. The Potsdam Proclamation simply confirmed the earlier Cairo Declaration. It is noted that in international law proclamations and declarations have no binding effect. However, by signing the Instrument of Surrender on 2 September 1945, Japan 'accept[ed] the provisions set forth in the declaration issued by the heads of the Governments of the United States, China, and Great Britain on 26 July 1945 at Potsdam'.¹⁰⁴ China contends that the disputed islands should therefore be returned. It denounces the current Japanese occupation of the disputed islands as illegal and invalid.

¹⁰³ *Potsdam Proclamation* (1 August 1945) available at <http://www.taiwandocuments.org/potsdam.htm> (at 23 August 2005).

¹⁰⁴ *Surrender by Japan: Terms Between the United States of America and the Other Allied Powers and Japan* (2 September 1945) available at <http://www.taiwandocuments.org/surrender01.htm> (at 23 August 2005).

3 *San Francisco Peace Treaty 1951*

Nevertheless, Japan may still argue that the territorial clauses in the San Francisco Peace Treaty 1951 do not specifically mention the disputed islands. According to Article 2(b), Japan merely ‘renounces all right, title and claim to Formosa and the Pescadores.’¹⁰⁵ Japan further argues that the disputed islands were instead placed under United States administration according to Article 3 of the Treaty as part of the Nansei Shoto Islands.¹⁰⁶ China in this circumstance may call upon Vienna Convention Article 32 to examine the preparatory work of the San Francisco Peace Treaty as a supplementary means of interpretation.

Despite the fact that the disputed islands were not specifically mentioned in the final treaty, they were nevertheless mentioned in the first draft of the San Francisco Peace Treaty in a clause relating to the limits of post-war Japanese territory dated 19 March 1947. The draft provided that:¹⁰⁷

the territorial limits of Japan shall be those existing on 1 January, 1894, subject to the modifications set forth in Articles 2, 3...as such these limits shall include the four principal islands of Honshu, Kyushu, Shikoku and Hokkaido...

Because Japan did not claim the disputed islands until the Cabinet Decision of 1895, it is clear that the drafters on the San Francisco Peace Treaty did not envision Japan as the rightful owner of the disputed islands. Nevertheless, the above clause did not appear in subsequent drafts of the treaty.¹⁰⁸ Furthermore, it should be noted that neither the ROC nor the PRC were invited to the San Francisco Peace Conference and neither were parties to the San Francisco Treaty. The reason is unknown, but considering the circumstances, it is highly likely that the Chinese were left out because of the Korea War.¹⁰⁹ It is probable that the Allies amended the subsequent draft in the absence of the Chinese as a result of a change in attitude towards the Chinese during the Korean War. Regardless of the cause, it is undisputed that the San Francisco Peace Treaty is not an agreement between either the ROC or the

¹⁰⁵ See Appendix II for relevant provisions of the San Francisco Peace Treaty 1951.

¹⁰⁶ China may argue that the disputed islands were too small and of insufficient economic value at that time for it to be specifically mentioned in the San Francisco Peace Treaty. Furthermore, China’s interests are protected by Article 2 as it is believed that the disputed islands were appertaining to the island of Formosa.

¹⁰⁷ Dean G Acheson, US Secretary of State, Memorandum to General MacArthur, Outline and Various Sections of Draft Treaty cited in Seokwoo Lee “The 1951 San Francisco Peace Treaty with Japan and the Territorial Disputes in East Asia” (2002) 11 *Pac Rim L & Pol’y J* 124.

¹⁰⁸ *Ibid.*

¹⁰⁹ The Chinese supported North Korea and engaged in heavy combat with the Americans who supported South Korea.

PRC and Japan. The ROC concluded a separate Treaty of Peace with Japan in 1952.

4 *Treaty of Peace between the Republic of China and Japan 1952*

Article 4 of the Treaty of Peace between the Republic of China and Japan 1952 states that ‘all treaties, conventions, and agreements concluded before 9 December 1941 between Japan and China have become null and void as a consequence of the war.’¹¹⁰ To the Chinese this meant that the Treaty of Shimonoseki had become null and void and therefore the cession of the Diaoyu Tai Islands had been reversed and the islands should be returned together with the island of Formosa. On the other hand, Japan reaffirmed its earlier argument that title to the disputed islands was established by the Cabinet Decision of 1895 and was not therefore included in the Treaty of Shimonoseki. The issue of whether the disputed islands were indeed included in the Treaty of Shimonoseki was discussed previously. It is the opinion of this author that they were not.

From the above analyses, China seems to have a stronger claim. If the issue were before the ICJ, and the Court was convinced and satisfied with China’s claim of sovereignty over the islands, the Court would not have to look to further evidence. Nonetheless, for the purposes of this article, we now turn to the concept of *effectivités*.

The concept of *effectivités* mentioned in the *Pulau Ligitan and Pulau Sipadan* case resembles the principle of effective occupation and prescription outlined earlier in this article. The basic concept involves the intention and will to act as sovereign accompanied by the actual, continued exercise of state sovereignty over the disputed territory. However, before evaluating the facts produced by both parties, one must be aware of the crucial concept of ‘critical date’.

G *The Question of Critical Date*¹¹¹

The determination of the critical date is crucial to the analysis because it effectively determines the admissibility of evidence. Essentially, no act after the critical date will be considered by the Court as evidence. While some international tribunals have

¹¹⁰ Treaty of Peace between the Republic of China and Japan 1952 available at <http://www.taiwandocuments.org/taipei01.htm> (at 23 August 2005).

¹¹¹ For a general overview see Brownlie, above n 13, 125-6 and Bernardez, above n 22, 835.

explicitly employed this judicial technique (e.g., the *Island of Palmas*¹¹² and *Eastern Greenland*¹¹³ cases), other tribunals do not specifically refer to a critical date (e.g., *Minquiers and Ecrehos* case¹¹⁴). However, in most territorial sovereignty disputes -- especially island disputes -- the determination of the critical date is simple. This has been articulated by Fitzmaurice:¹¹⁵

Occupation: the issue is 'res nullius' or not. The position here is that one of the parties maintains that a certain piece of territory, island, etc., is ownerless – *res nullius* – and therefore that sovereignty over it can be acquired and asserted by taking the proper steps prescribed by international law for that purpose...The other party maintains that the territory or island is not *res nullius*, but is already under its sovereignty. In this type of case, it is clear that the critical date must be that of the claim or event that raises the issue of *res nullius*.

When examining the most recent islands dispute at the ICJ -- the *Pulau Ligitan and Pulau Sipadan* case -- the concept of critical date is applied:¹¹⁶

The Court further observes that it cannot take into consideration acts having taken place after the date on which the dispute between the Parties crystallized unless such acts are a normal continuation of prior acts and are not undertaken for the purpose of improving the legal position of the Party which relies on them. The Court will, therefore, primarily, analyse the *effectivités* which date from the period before 1969, the year in which the Parties asserted conflicting claims to Ligitan and Sipadan.

It should be noted, as in the instant case where historical facts are highly complex and subject to conflicting interpretation, the selection of the critical date is decisive to the final outcome. On the issue of whether the islands were *terra nullius*, China is

¹¹² The US argued that title to the island was transferred to it by Spain through the Treaty of Paris 1898. The court then looked at whether the island was indeed Spain's territory 'in the critical period' prior to 1898. The court found that prior to 1898, the Netherlands rather than Spain controlled the region and dismissed the United States' claim. See *Island of Palmas Case* (United States/Netherlands) (Permanent Court of Arbitration, 1928) 2 R Int'l Arb Awards 829 (1928), reprinted in 22 AJIL 867 (1928).

¹¹³ In the *Eastern Greenland* case, Norway announced its occupation of the area on 10 July 1931. The Permanent Court of International Justice (PCIJ) held that 10 July 1931 was the critical date and looked at the question of whether Denmark, prior to that date, established a valid title over the area.

¹¹⁴ It should be noted that the *Minquiers and Ecrehos* case did not address the question of *terra nullius*. The Court was specifically asked to decide whether the UK or France 'had produced the more convincing proof of title to these groups'. The Court rejected France's assertion that 2 August 1839 was the critical date (as that would be to France's advantage) nor did it accept the British claim that the dispute crystallised only after both parties submitted the case to the ICJ in 1950. Since the court was not asked to decide the question of *terra nullius* specifically, the court looked at all relevant evidence, both ancient and recent, produced by both parties. See Johnson "The Minquiers and Ecrehos Case" (1954) 3 Int'l & Comp L Q 211.

¹¹⁵ Fitzmaurice "The Law and Procedure of the International Court of Justice 1951-54" (1957) 32 Brit Y B Int'l L 30, 21.

¹¹⁶ *Pulau Ligitan and Pulau Sipadan*, above n 94, para 135.

likely to argue that the critical date is 1895. Japan, on the other hand, is likely to argue that the critical date is 30 December 1971, a few months after the Okinawa Reversion Treaty whereby the United States returned the islands to Japan. It is obviously in Japan's interest to argue for a later date which takes into account all the years of Japanese occupation over the islands prior to 1970. China, however, will maintain that the islands were not *terra nullius* in 1895 and therefore will seek to prove that the islands were under its sovereignty prior to 1895. China will argue that 14 January 1895 should be the critical date because that was the date of the Japanese cabinet decision in which Japan formally incorporated the islands into its territory and treated them as *terra nullius*.¹¹⁷ Japan, however, will argue that the dispute over the islands crystallised in 1970 with official communication between Japan and the ROC.¹¹⁸ Both arguments appear equally convincing and this article will examine both scenarios.

1 Scenario I: critical date 14 January 1895

Under this scenario, the Chinese must establish that the disputed islands were not *terra nullius* and they were subject to Chinese sovereignty on or before 14 January 1895.

First, the Chinese claim their title to the disputed islands was obtained through the principle of discovery-occupation as early as 1372. Similar to the claim made by the United States in the *Island of Palmas* case, China contends that discovery of the islands alone in the fourteenth century -- consistent with the custom of that time -- grants valid title to the discoverer state.¹¹⁹ The arbitrator of the *Island of Palmas* case, Max Huber, acknowledged the view that 'a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or fails to settle.'¹²⁰

Having established a valid title, China may then proceed to argue that it maintained

¹¹⁷ A similar argument was made and accepted in the *Eastern Greenland* case. See above n 113.

¹¹⁸ This argument is similar to Indonesia's claim in *Pulau Ligitan and Pulau Sipadan* which was accepted by the Court. See above n 94. See also Appendix II for important dates during the 1970's.

¹¹⁹ Some argue that the Diaoyu Tai case 'cannot be judged properly on the basis of the traditional rules of international law' because 'the concept of sovereignty did not appear until the last quarter of the sixteenth century' and 'international law between sovereign nations was not developed until the early seventeenth century.' Cheng, above n 90, 253.

¹²⁰ *Island of Palmas (Miangas) Case* (United States/Netherlands) (Permanent Court of Arbitration, 1928) 2 R Int'l Arb Awards 829 (1928), reprinted in 22 AJIL 867 (1928) ("Island of Palmas").

a peaceful and continuous display of territorial sovereignty over the disputed islands for more than five hundred years (1372-1895). In order to do this, the Chinese will rely on four major pieces of evidence prior to 1895.¹²¹ These are: (1) the incorporation of the disputed islands into China's coastal defence system in the mid-sixteenth century¹²²; (2) the islands were used as a rare source of Chinese herbal medicine¹²³; (3) the islands were also utilized as navigational aids¹²⁴; and (4) the Imperial Decree of 1893 conveyed the islands to a private citizen.¹²⁵

On the other hand, having claimed the islands since 14 January 1895, Japan may only rely on the survey conducted by the government agencies of Okinawa Prefecture in an attempt to prove that the islands were *terra nullius*.¹²⁶ According to a statement by the Japanese Ministry of Foreign Affairs, a ten year survey from 1885-1895 'confirmed that the Senkaku Islands had been uninhabited and showed no trace of having been under the control of China'. Japan, drawing on the *Island of Palmas* case, may argue that the creation of rights should indeed be separated from the existence of rights. Arbitrator Huber articulated this point clearly:¹²⁷

The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law. International law in the nineteenth century...laid down the principle that occupation, to constitute a claim to territorial sovereignty, must be effective, that is offer certain guarantees to other states and their nationals.

Japan may argue accordingly that under 'contemporary' international law, discovery

¹²¹ Cheng, above n 90, 254-258.

¹²² In the mid-sixteenth century the disputed islands were incorporated into the Chinese coastal defence system as one of the five patrol areas of the Foochow Prefecture Coastal Defence Command. See Huang "Wu-kuo-ti Hai-chiang Chi Ta-lu-Chiao-Tsun Wen-ti" [The Problem of Our Country's Coastal Frontiers and Continental Shelf] (August 1972) 7 Ming Pao No 8, 4. See also Cheng, above n 90, 256.

¹²³ The name of the medicine in Chinese is 'Shih Tsung Yung' (Statice Arbuscula). See Sheng "Tiao-yu-tai Lieh-yu Tsai-yo-chi" [Some Accounts About the Medicinal Herb-Collecting Expeditions to the Diaoyu Tai Islands] cited in Cheng, above n 90, 257.

¹²⁴ Between 1372-1879 'the Chinese Emperors sent some twenty four investiture missions to the Ryukyu Islands to confer title of "Chung-Shan King" on their new rulers'. These missions were recorded as 'the Record on the Mission to the Ryukyu Islands' by the Chinese high officials. The disputed islands were used as a modern day lighthouse to guide the route of these missions. See Yang Chung-Kuei "Tiao-yu-tai Lieh-yu Chu-Chuan Ping-I" [On the Sovereignty over the Diaoyu Tai Archipelago] cited in Cheng, above n 90, 254.

¹²⁵ After taking the Chinese herbal medicine collected from the islands, the Empress Dowager Tsu Hsi found it highly effective. She awarded three of the islands to Sheng Hsuan Huai as private property for the purpose of collecting medicinal herbs. See Cheng, above n 90, 257.

¹²⁶ Evidence of Japan's effective occupation after 1895 is inadmissible under this scenario.

¹²⁷ *Island of Palmas*, above n 120.

only grants ‘inchoate’ title and this title may be lost if it was not accompanied by actual and effective occupation.¹²⁸ Similarly, in the *Island of Palmas* case, arbitrator Huber argued that Spanish discovery created title and Spain passed its ‘inchoate’ title to the United States, but such title ‘could not prevail over the continuous and peaceful display of authority by [the Netherlands]’.¹²⁹ Huber awarded the Island of Palmas to the Netherlands. Thus, the Japanese may argue that the mere sighting of the islands as navigational aids by Chinese officials during their trips to the Ryukyu Islands did not constitute effective occupation of the islands.

Furthermore, using the islands as a source of herbal medicine by private persons has nothing to do with effective occupation by China. In the *Pulau Ligitan and Pulau Sipadan* case, Indonesia claimed that the waters around the disputed islands were traditionally used by Indonesian fishermen. Nevertheless, the Court stated that the ‘activities by private persons cannot be seen as *effectivités* if they do not take place on the basis of official regulations or under governmental authority.’¹³⁰ Thus, based on these arguments, Japan will contend that China lost its inchoate title because it did not demonstrate actual and effective occupation of the islands.

Lastly, Japan may draw on the *Clipperton Island* case claiming that apart from the ‘*animus occupandi* [intention to occupy], the actual, and not the nominal, taking of possession is a necessary condition of occupation.’¹³¹ The Chinese officials travelling to the Ryukyu Islands demonstrated neither an intention to occupy nor actual occupation of the islands. As mentioned, the islands were merely sighted by the Chinese officials but there was no subsequent act to incorporate them into Chinese territory. Furthermore, a Japanese writer notes that the Imperial Decree should not be admissible to support the Chinese claim of legislation, as it has not been properly dated.¹³²

Despite this, the Chinese may argue that the Imperial Decree and the incorporation of the islands into its defence system are ‘acts of sovereignty’. Moreover, exactly

¹²⁸ De Zayas, above n 45, 839-840.

¹²⁹ *Island of Palmas*, above n 120.

¹³⁰ *Pulau Ligitan and Pulau Sipadan*, above n 94, para 140.

¹³¹ *Clipperton Island Case* (Mexico/France) reprinted in 26 AJIL 390 (1932).

¹³² The Imperial Decree only contained the month and year but not the day of issuance. However, it is worth asking if this would affect the admissibility of evidence. See, eg, Okuhara “Senkaku Retto to Ryoyuken Kizoku Montai” [*The Problem of the Right of Sovereignty Over the Senkaku Islands*] (1972) 3 Asahi Asian Rev No 2, 20.

when did China's valid title become only an inchoate title?¹³³ The Chinese reject the idea that their title to the islands was ever an inchoate one.

Considering the circumstances of the time, by incorporating the islands into its coastal defence system and the conveyance by the act of a sovereign to a private Chinese citizen, China fulfilled the contemporary principle of 'effective occupation' coupled with a continuous and peaceful display of territorial sovereignty from 1372-1895. In effect, China must establish that their title has never been inchoate but rather has always been actual. While the activities relied upon by the Chinese are not plentiful, the Japanese likewise cannot provide any proof of *terra nullius* other than the ten year survey conducted on the islands. Relatively speaking, the evidence provided by the Chinese in this case seems more than enough.¹³⁴ The importance of relativity in such instances was pointed out in the *Eastern Greenland* case:¹³⁵

It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal 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.

The Chinese may also point to the prior recognition and acknowledgement by Japan of Chinese control over the area by exposing incidents where there have been repeated requests by the Japanese for permission to place national markers on the island. These requests were made by the Okinawa Magistrate during 1885-1895 and were either rejected or ignored by the Chinese.¹³⁶

This written correspondence between the Japanese Interior Minister and Foreign Minister reveal a certain fear of creating difficulties with the Chinese government. A similar tendency was evident in French dealings with the English Crown in the

¹³³ It has been argued that the change in law over time has a significant impact on the Sino-Japanese dispute. In earlier times, it was a common view that certain behaviour led to certain legal consequences and subsequent changes in customary law are irrelevant. If the actions of the Chinese authorities were consistent with the customs of that time, their legal consequences should still form the basis for any present evaluation. For criticism on Arbitrator Huber's decision in the *Island of Palmas* case, see Philip C Jessup "The Palmas Island Arbitration" (1928) 22 Am J Int'l L 740. For a general discussion of problems associated with intertemporal law, see Cheng, above n 90, 226-228.

¹³⁴ There is no evidence that establishes any act of sovereignty over the islands by Japan to counterbalance the manifestations of Chinese sovereignty.

¹³⁵ *Legal Status of Eastern Greenland* (Denmark/Norway) [Permanent Court of International Justice, 5 April 1933] 45-56 available at <http://www.icj-cij.org/> ("Eastern Greenland").

¹³⁶ Japanese Ministry of Foreign Affairs, 18 For Aff Rep No 311 [The Report of the Okinawa Magistrate to the Minister of the Interior, 22 Sept 1885] 573-574.

Minquiers and Ecrehos case.¹³⁷ In the 1953 ICJ decision awarding the islands to the United Kingdom, the Court emphasised similar facts. For example, in 1784 a French national made a request to the French Minister of Marine to use the Minquiers but the request was rejected. The Court said that ‘the correspondence between the French authorities, relating to this matter, does not disclose anything which could support the present French claim to sovereignty, but it reveals certain fears of creating difficulties with the English Crown’¹³⁸

Moreover, other aspects of the *Minquiers and Ecrehos* case may help strengthen the Chinese claim. In reaching his decision, Judge Basdevant noted the absence of treaties clearly determining the status of the islands during the fourteenth century. However, Basdevant then concluded that by virtue of their dominant military and naval power in the area, England should probably be the rightful owner of the disputed islands.¹³⁹ This line of reasoning can be applied in the instant case whereby the Chinese were the dominant naval power in Asia from the early fourteenth century to the late nineteenth century.

Lastly, the Chinese maintain they created a ‘community of tributary states’ in the East. Within the so called ‘community’, there are clear boundary lines mutually and customarily respected by all.¹⁴⁰ China, as the dominant power in Asia, has maintained the tributary system with the Ryukyu Islands since 1372.¹⁴¹ The relationship ceased when Japan formally annexed Ryukyu in 1879. But, during the preceding 500 years, Chihwei Yu was recognised as the boundary between the Ryukyu region and China’s territory.¹⁴² Similarly, drawing on the *Islands of Palmas* case, the Netherlands also claimed some sort of suzerainty relationship with the native princes, who were the overlords of the Island of Palmas. The Court recognised this form of relationship and early contact with the region as a peaceful display of territorial sovereignty.¹⁴³

¹³⁷ Ibid 574-575.

¹³⁸ *Minquiers and Ecrehos Case* (France/United Kingdom) [International Court of Justice, 17 November 1953] available at <http://www.icj-cij.org/> (“Minquiers and Ecrehos”).

¹³⁹ Ibid.

¹⁴⁰ E Reischauer and J Fairbank “East Asia: The Great Tradition” cited in Cheng, above n 90, 253.

¹⁴¹ The idea is similar to the western concept of colonialism but it allowed greater autonomy for the tributary state to self-govern.

¹⁴² Chih Wei Yu is one of the five islets composing the Diaoyu Tai Islands located at the furthest east of the islands group. The boundary of China is Chih Wei Yu and the area west of it. This view is shared by a Japanese historian who believes that the disputed islands were Chinese territory. See Kiyoshi Inoue “The Diaoyu Tai Islands (Senkaku Island) are China’s Territory” Kyoto University <http://www.skycitygallery.com/japan/diaohist.html> (at 23 August 2005).

¹⁴³ *Island of Palmas*, above n 120.

2 Scenario II: critical date 30 December 1971¹⁴⁴

This scenario assumes that the critical date is set at 1971. Because all evidence existing prior to 1971 would be admissible, Japan would be in an advantageous position. Based on the general principles governing territorial acquisition outlined in Part II, several conclusions can be drawn. First, Japan demonstrated an intention to occupy the islands in 1885 when it began to carry out surveys of the islands. Second, since 1895, Japan has maintained ‘peaceful and continuous occupation’ over the islands. The importance of this was emphasised in the *Island of Palmas* case where Arbitrator Huber argued that inchoate title can in fact be lost if it is not accompanied by a further display of state function over the area.¹⁴⁵ Third, the exercise of state sovereignty over the islands was evident as early as 1896 when the islands were leased to a Japanese private citizen.¹⁴⁶ Fourth, Chinese recognition and acquiescence to Japanese sovereignty over the islands was not only observed during the period 1895-1945, but also after World War II.¹⁴⁷

On the last point, Japan claims that China never objected to Japanese control of the islands until 1970 after learning that the seabed and subsoil around the disputed area may have mineral and oil resources. Furthermore, China demonstrated neither the intent to possess nor actual possession over the islands between 1952-1970. In short, the strength of the Japanese claim lies in Japan’s more recent control over the islands rather than a historical claim.

Drawing on the *Minquiers and Ecrehos* case, the ICJ stated that ‘what is of decisive importance is not indirect presumptions based on matters in the Middle Ages, but the evidence which relates directly to the possession of the [disputed islands].’¹⁴⁸

¹⁴⁴ It should be noted that even after the US returned the disputed islands to Japan, the Japan Youth Association has repeatedly attempted to erect a lighthouse on the island -- notably in 1988 and 1996. The overseas Chinese community as well as Chinese activists in Taiwan, Hong Kong and China responded to these attempts with large protests. However, since these activities were carried out by private individuals, they can not be seen as a representation of any governmental authority. Even if these protests were state sponsored, because they occurred after the critical date of 30 December 1971, this article does not consider their validity.

¹⁴⁵ *Island of Palmas*, above n 120.

¹⁴⁶ *The Okinawa* (A quarterly devoted to the problems of Okinawa and Ogasawara Islands) cited in Cheng, above n 90, 247.

¹⁴⁷ The Japanese interpretation of the Treaty of Shimonoseki and San Francisco Peace Treaty are discussed previously in Part IV:F of this article.

¹⁴⁸ *Minquiers and Ecrehos*, above n 138.

Similar arguments are also reflected in the *Pulau Ligitan and Pulau Sipadan* case:¹⁴⁹

...that the activities relied upon by Malaysia...are modest in number but that they are diverse in character and include legislative, administrative and quasi-judicial acts. They cover a considerable period of time and show a pattern revealing an intention to exercise State functions in respect of the two islands in the context of the administration of a wider range of islands. The Court moreover cannot disregard the fact that at the time when these activities were carried out, neither Indonesia nor its predecessor, the Netherlands, ever expressed its disagreement or protest.

Furthermore, despite the critical date being set at 1971, Japan may argue for special weight to be given to acts after 1971; namely, its continued patrolling of the region. A similar argument was asserted by Malaysia in the *Pulau Ligitan and Pulau Sipadan* case: ‘a tribunal may always take into account post-critical date activity if the party submitting it shows that the activity in question started at a time prior to the critical date and simply continued thereafter’¹⁵⁰ Nevertheless, this claim may be refuted by China based on the fact that agreements were made by the two countries to shelve the issue.¹⁵¹

Assuming the critical date is set at 1971, the Chinese must establish that the disputed islands were not *terra nullius* in 1895 and must prove that the Japanese occupation was and remains illegal and invalid.¹⁵² The viability of this argument was discussed previously.

Furthermore, China must provide reasons for their alleged acquiescence during 1952-1970. One such reason may be found in the geo-political situation during that period. The importance of the Korean War must be emphasised.¹⁵³ The world was divided into a bipolar system. Millions of Chinese lives were lost defending North Korea. At the same time, the United States’ plan to reunite Korea failed. From that point forward, any territorial claims by the Chinese over the disputed islands might be perceived by the Americans as a hostile act against the West.

The United States’ containment policy was successful in isolating China for twenty years until the Sino-US rapprochement when President Richard Nixon visited Beijing. Instead of recognising the victorious communist government of the PRC,

¹⁴⁹ *Pulau Ligitan and Pulau Sipadan*, above n 94, para 148.

¹⁵⁰ *Ibid* para 129.

¹⁵¹ See, eg, Deng Xiaoping’s remark, above n 84.

¹⁵² This is apart from the period where China ceded the islands to Japan through the Treaty of Shimonoseki 1895.

¹⁵³ For further detail see Part III:C of this article.

many western states only recognised the KMT government of Taiwan. Because Taiwan's survival depends on the support of the US, the KMT clearly wished to avoid any form of protest that might antagonise the United States. Likewise, because there were no immediate danger to the Chinese by allowing the United States to administer the disputed islands, there was no need for urgent protest. Although some writers argue that political and civil factors should not be allowed to justify a failure to timely protest,¹⁵⁴ China argues that a failure to timely protest does not invalidate title under international law.¹⁵⁵ A similar point was raised in the *Island of Palmas* case where Arbitrator Huber stated:¹⁵⁶

It would be entirely contrary to the principles laid down above as to territorial sovereignty to suppose that such sovereignty could be affected by the mere silence of the territorial sovereign as regards a treaty which has been notified to him and which seems to dispose of a part of his territory.

Furthermore, it has been pointed out that as a result of heavy Chinese protests, the United States Department of State and United States Senate made it clear that the reversion of Okinawa (including the disputed islands) to Japan did not affect the determination of sovereignty over the disputed islands. This remained to be settled between China and Japan.¹⁵⁷ The logic behind this is articulated clearly by Cheng:¹⁵⁸

...that the reversion of the disputed islands to Japan by the United States does not affect the legal status of the islands because the United States could not acquire through the San Francisco Peace Treaty more than what Japan possessed after her surrender in 1945. Nor could it return to Japan, under the Okinawa Reversion Agreement, more than what it had acquired from Japan in 1951.

With regards to the ten year survey done by Japan between 1885-1895 -- which supposedly found that the islands were not under Chinese control -- China may draw on the *Clipperton Island* case to support its reasoning. First, it should be noted that in the *Clipperton Island* case 39 years of French inaction regarding the exercise of sovereignty did not nullify French title to Clipperton Island. Secondly, the requirement of actual possession as a 'necessary condition of occupation' of an uninhabited island was outlined in the case. The occupation requirement for

¹⁵⁴ William B Heflin "Recent Developments Diaoyu/Senkaku Islands Dispute: Japan and China, Oceans Apart" (2000) 1 APLPJ 18, 21.

¹⁵⁵ See Part II of this article.

¹⁵⁶ The United States informed the Netherlands that the Island of Palmas was ceded to it by Spain and the Netherlands did not express any objections. It did not affect the valid title acquired by the Netherlands through its suzerainty relations with the region. *Island of Palmas*, above n 120.

¹⁵⁷ Chiu "A Study on the Diaoyu Tai Islands" (1972) 6 Chengchi L Rev 14.

¹⁵⁸ Cheng, above n 90, 251.

uninhabited islands is substantially lower than for inhabited islands. In the *Clipperton Island* case, there was neither actual settlement nor any form of administrative function by the French authority on the island. On this issue, Arbitrator Huber also expressed a similar view in the *Island of Palmas* case:¹⁵⁹

Manifestations of territorial sovereignty assume, it is true, different forms, according to conditions of time and place. Although continuous in principle, sovereignty cannot be exercised in fact at every moment on every point of a territory. The intermittence and discontinuity compatible with the maintenance of the right necessarily differ according as inhabited or uninhabited regions are involved.

With regards to the Japanese cabinet decision, China denounces this action as unilateral and perhaps more importantly, the decision was not made public. This means that the Chinese were never notified.

It was mentioned above in the *Clipperton Island* case that the occupation by the French was minimal. Even so, the Commissioner of the French Government, Lieutenant Le Coat de Kerweguen, notified his declaration of sovereignty over the island to the Consulate of France in Honolulu. Subsequently, the declaration was published in the Hawaii journal, *The Polynesian*.¹⁶⁰ With this in mind, it seems difficult for Japan to argue that its Cabinet Decision has the same legal effect. China can further argue that even if the cabinet decision was made public, Japanese acts of aggression during the war deprived the Chinese of a fair chance to challenge the claim.¹⁶¹

With respect to Japan's use of the *Minquiers and Ecrehos* case, it is true that the ruling in the case focused heavily on actual displays of authority in the nineteenth century; that is, the administrative, legislative and judicial functions performed by the state. Simply put, the case gives more weight to recent effective occupation rather than historical evidence and proof of *terra nullius*. However, the Chinese may distinguish the case on the basis that the disputed islets of Minquiers and Ecrehos were inhabitable. Thus, the degree of occupation required is not comparable. Also, because both countries in the *Minquiers and Ecrehos* case claimed that they held and maintained original title to the disputed islets and that title was never lost, the

¹⁵⁹ *Island of Palmas*, above n 120.

¹⁶⁰ *Clipperton Island*, above n 131.

¹⁶¹ Cheng, above n 90, 250. Cheng argues that even if the Japanese Foreign Ministry's statement was free from factual distortions, such a claim is still not automatically legally effective because the decision was never made public. Furthermore, the Japanese national markers were not placed on the islands until 1969.

case does not ‘present the characteristics of a dispute concerning the acquisition of sovereignty over *terra nullius*.’¹⁶² Because the Court was not asked to address the question of *terra nullius*, the case is inapplicable to the Sino-Japanese dispute whereby *terra nullius* is indeed the main legal issue.

H The Question of Terra Nullius

Notwithstanding the above analysis, the question of *terra nullius* is the core issue in this dispute. This is because the status of *terra nullius* is directly related to the question of whether the Treaty of Shimonoseki indeed included the disputed islands. For example, hypothetically, if the islands were *terra nullius* in 1895, would it be necessary for them to be included in the Treaty of Shimonoseki? The answer is no, because it makes no sense for one to cede a territory one does not own.¹⁶³ In this respect, Japan has a probable claim that the disputed islands were not included in the Treaty. However, if the islands were not *terra nullius* -- that is, if they were Chinese territory -- a domestic cabinet decision appears insufficient to justify a claim to sovereignty over the islands.¹⁶⁴

I Possibility of Adjudication

It is important to note that settlement of territorial disputes by judicial decision or arbitration merely confirms the existence of title. The decisions or judgements by the international court or arbitral tribunal are in the ‘majority of cases declaratory rather than constitutive.’ Boundary or arbitral awards are therefore not the foundation of title to the territory.¹⁶⁵

Regarding the ICJ, it is stated in Article 93(1) of the UN Charter that ‘[a]ll members of the United Nations are facto parties to the Statute of the International Court of Justice.’ Despite this, states may choose not to accept the compulsory jurisdiction of the ICJ. Regardless, once the parties submit their case to the ICJ, Article 60 states ‘the Court's judgment is final and without appeal.’ Should one of the states involved fail to comply with the Court’s decision, the other party may

¹⁶² *Minquiers and Ecrehos*, above n 138.

¹⁶³ As in the *Island of Palmas* case, the core issue is: ‘Was [the island] Spain’s to give? If valid title belonged to Spain, it passed, if Spain had no valid title, she could convey none.’ *Island of Palmas*, above n 120.

¹⁶⁴ A similar argument is made by Cheng, above n 90, 261.

¹⁶⁵ Bernardez, above n 22, 839. See also Shaw, above n 14, 419 and Brownlie, above n 13, 132.

have recourse to the United Nations Security Council.¹⁶⁶

In the case of the Diaoyu Tai Islands dispute, it is unlikely that China and Japan will resort to the ICJ. There are several reasons for this. First, it is not in the interests of either party to damage the growing economic partnership between the two nations. Secondly, the potential economic benefits at stake is huge. Both China and Japan probably would not want to risk an adverse decision at the ICJ.¹⁶⁷ Thirdly, due to the historical remnants and painful memories of World War II, it is easier to suppress radical nationalism if the settlement of the dispute is not done publicly. In fact, there are many other alternatives to solve this type of dispute. According to Article 33(4) of the UN Charter:¹⁶⁸

The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

If determined to resolve the dispute, China and Japan should be able to come to a mutual agreement.

V CONCLUSION

While Japan may have a relatively stronger claim based on effective occupation and a peaceful and continuous display of state function over the islands since 1895, Japan has not acquired title automatically. The question of a critical date and the interpretation of the Treaty of Shimonoseki 1895 are also determining factors. In the worst case scenario for Japan, Japan may only have acquired title through the Treaty of Cession 1895 and lost its title with the Instrument of Surrender 1945. China's contention that Japan's current occupation of the islands is illegal may be justified in such a way. However, through the principle of prescription, Japan may acquire title to the islands even if its occupation is deemed unlawful.

As for China, it has a stronger claim than Japan based on relevant treaties and *terra nullius*. However, Arbitrator Huber's statement in the *Island of Palmas* case -- that the actual display of sovereignty is as good as title -- has been upheld on several

¹⁶⁶ UN Charter, above n 33, Article 94(2).

¹⁶⁷ In recent articles in the *Asahi Shimbun*, veteran Japanese columnist Yoichi Funabashi points out that the disputed islands could add an additional 40,000 square kilometres to Japan's exclusive economic zone.

¹⁶⁸ UN Charter, above n 33, Article 33(4).

occasions. Because the Japanese have actual control over the islands, it is difficult for China to assert any 'act of sovereignty' over the area after 1895. Nevertheless, as previously mentioned, the determining factors are indeed the interpretation of the Treaty of Shimonoseki and the setting of a critical date.

If the critical date is set at 1895, then all subsequent actions by the Japanese are null and void. The Chinese may also argue that even if the critical date is set at 1970, based on an interpretation of the Treaty of Shimonoseki, Japan's so-called 'effective occupation' of the island during 1895-1945 is largely irrelevant. Furthermore, from 1952-1972, the islands were placed under United States administration. The actual effective control over the islands by Japan during this period is thus nominal.

Author's Remark:

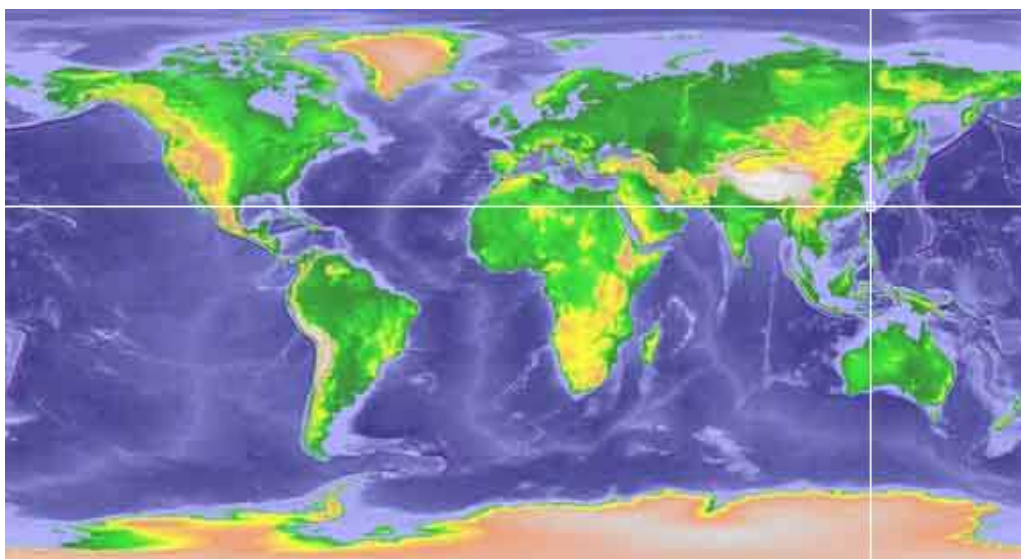
As bilateral trade continues to grow between the two countries, the economic ramifications of the islands dispute loom ever larger. A recently discussed alternative involves the creation of a joint Sino-Japanese venture to exploit the minerals and oil in and around the seabed and subsoil. Although some have dismissed this as wishful thinking, the author believes such a solution presents a viable option for peacefully ending the dispute.

Appendix I
Map of Diaoyu Tai Islands

Map A - Security Flashpoint in the Far East



Map B - East China Sea



Map C - The Islands of Diaoyu Tai



Diaoyutai Islands (釣魚台列島) or Senkaku Gunto (尖閣諸島) in Japanese consists of 5 islets and 3 rocks:

The largest of all being Diaoyu Dao (釣魚台主島) or Uotsuri-jima(魚釣島): 4.319 km²
 Huangwei Yu (黃尾嶼 – meaning "Yellow Tail") or Kuba-jima(久場島): 1.08 km²
 Chiwei Yu (赤尾嶼 – meaning "Red Tail") or Taisho-jima (大正島)
 Kita Kojima or Beixiao Dao (北小島 – meaning "Northern Islet")
 Minami Kojima or Nanxiao Dao (南小島 – meaning "Southern Islet")

3 Rocks:

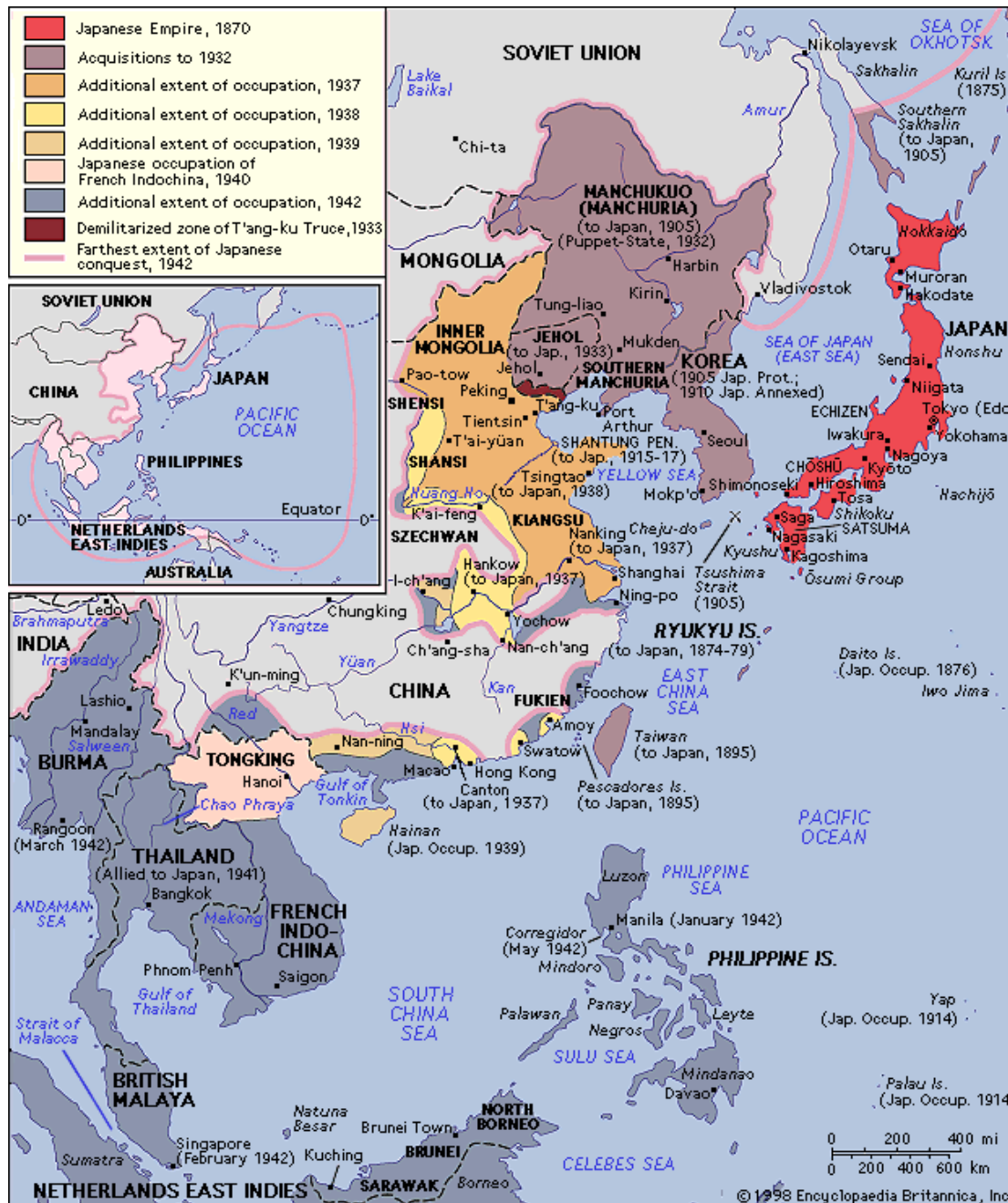
Dabeixiao Dao or Okino Kitaiwa (沖ノ北岩 "Northern Rocks of the Open Sea")
 Dananxiao Dao or Okino Minamiwa (沖ノ南岩 "Southern Rocks of the Open Sea")
 Feilai Dao or Tobise (飛瀨 "Flying Shoal")

The islands are administered by Japan as part of Ishigaki City , Okinawa prefecture, but claimed by China as part of Daxi Village (大溪里), Toucheng Township (頭城鎮), Yilan County, Taiwan Province.

Cited in:

<http://www-ibru.dur.ac.uk/docs/senkaku.html>

Map D – Japan’s Military Expansion



Appendix II

Important Dates

1895

14 January – **Japanese Cabinet Decision**

17 April – **Treaty of Shimonoseki**

Article 2

China cedes to Japan in perpetuity and full sovereignty the following territories, together with all fortifications, arsenals, and public property thereon:

(b) The island of Formosa, together with *all islands appertaining or belonging to the said island of Formosa*.

1943

1 December – **Declaration of the Cairo Conference** (in part)

The Three Great Allies are fighting this war to restrain and punish the aggression of Japan. They covet no gain for themselves and have no thought of territorial expansion. It is their purpose that Japan shall be stripped of all the islands in the Pacific which she has seized or occupied since the beginning of the First World War in 1914, and that *all the territories Japan has stolen from the Chinese*, such as Manchuria, Formosa, and the Pescadores, shall be restored to the Republic of China. Japan will also be expelled from all other territories which she has taken by violence and greed.

1945

2 August – **Potsdam Proclamation**

Under the Section 'Proclamation Defining Terms for Japanese Surrender, July 26, 1945',

Article 8

The terms of the Cairo Declaration shall be carried out and Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku and such minor islands as we determine.

1951

8 September - **San Francisco Peace Treaty**

Article 2 (b) Japan renounces all right, title and claim to Formosa and the Pescadores.

Article 3

Japan will concur in any proposal of the United States to the United Nations to place under its trusteeship system, with the United States as the sole administering authority, Nansei Shoto south of 29deg. north latitude (including the Ryukyu Islands and the Daito Islands), Nanpo Shoto south of Sofu Gan (including the Bonin Islands, Rosario Island and the Volcano Islands) and Parece Vela and Marcus Island. Pending the making of such a proposal and affirmative action thereon, the United States will have the right to exercise all and any powers of administration, legislation and jurisdiction over the territory and inhabitants of these islands, including their territorial waters.

1952

28 April – **Treaty of Peace between ROC and Japan** (5 August 1952)

Article 4

It is recognised that all treaties, conventions, and agreements concluded before 9 December 1941 between Japan and China have become null and void as a consequence of the war.

1968

Study by the United Nations Economic Commission for Asia and the Far East (UNECAFE) suggested that the sea-bed of the East China Sea could be one of the richest oil-deposit areas in the region.

1970

- 17 July Japan's letter to Taipei 'declaring the Chinese petroleum development lots in the continental shelf between Japan and Taiwan to be unilateral in nature, void under international law, and without any effect on Japan's rights in the said continental shelf'¹⁶⁹
- 24 September Taipei's reply - rejected the Japanese assertion and stated that it cannot agree to any Japanese claim to the status of Diaoyu Tai and denounced the unilateral decision of the US to return the Ryukyu Islands to Japan.¹⁷⁰
- 29 December PRC's objection published on the front page of *People's Daily*. "It said that on December 21, the 'joint committee for ocean development research' of the Japan-Chiang-Pak 'liaison committee' held a meeting in Tokyo which brazenly

¹⁶⁹ Chiu "A Study on the Tiao-yu-tai Islands" (1972) 6 Chengchi L Rev (Taiwan) 1.

¹⁷⁰ *The Central Daily* (Taipei) 24 September 1970.

decided to carry out ‘investigation, research and development’ of the oil and other mineral resources of the sea-bed and subsoil of the seas around China’s Taiwan Province and the islands appertaining thereto and of the shallow seas adjacent to other parts of China and adjacent to Korea.” The article said that such action was a serious infringement of the Chinese sovereignty. It reaffirmed that Taiwan is a province of China and Diaoyu Tai islands were the territory of China and belonged to China exclusively. It denounced any exploration and exploitation of China’s sea-bed and subsoil by any parties and stated that they were illegal and null and void.¹⁷¹

1971

- 17 June The Okinawa Reversion Treaty
- 9-11 July Henry Kissinger, US President Nixon’s assistant for national security affairs secretly visited the PRC and held talk with Premier Zhou Enlai.¹⁷²
- 20-26 October Henry Kissinger held talks with Premier Zhou Enlai in Beijing to make concrete arrangements for President Nixon’s visit.¹⁷³
- 25 October UNGA Resolution 2758
- 30 December The PRC Foreign Ministry issued a statement noting that the Okinawa Reversion Treaty between the Japan and US had flagrantly including the Diaoyu and other islands in the ‘area of reversion’. The statement reiterated that the Diaoyu Tai islands namely ‘Diaoyu, Huangwei, Chiwei, Nanxiao and Beixiao islands are islands appertaining to Taiwan and have been an inalienable part of the Chinese territory since ancient times, and that China is determined to recover Diaoyu and other islands appertaining to Taiwan.’¹⁷⁴

1972

- 21-28 February US President Richard Nixon visited China¹⁷⁵
- 27 February Shanghai Communiqué – affirming One China policy¹⁷⁶
- 8 March Japan Foreign Ministry Statement concerning the rights to ownership over the Senkaku islands
- 15 May US actual return the disputed Islands of Nansei to Japanese control according to the Okinawa Reversion Treaty 17 June 1971

¹⁷¹ *The People’s Daily* (Beijing) 29 December 1970. See also Xinhua News Agency *China’s Foreign Relations: A Chronology of Events (1949-1988)* (Foreign Languages Press, Beijing, 1989) 224.

¹⁷² Ibid 530.

¹⁷³ Ibid.

¹⁷⁴ Ibid 224.

¹⁷⁵ Ibid 530-531.

¹⁷⁶ Ibid.

29 September Sino-Japan Joint Communique established diplomatic relations at the ambassadorial level.¹⁷⁷

Appendix III

Statement by the Ministry of Foreign Affairs of Japan

From 1885 on, surveys of the Senkaku Islands had been thoroughly made by the Government of Japan through the agencies of Okinawa Prefecture and by way of other methods. Through these surveys, it was confirmed that the Senkaku Islands had been uninhabited and showed no trace of having been under the control of China. Based on this confirmation, the Government of Japan made a Cabinet Decision on 14 January 1895 to erect a marker on the Islands to formally incorporate the Senkaku Islands into the territory of Japan.

Since then, the Senkaku Islands have continuously remained as an integral part of the Nansei Shoto Islands which are the territory of Japan. These islands were neither part of Taiwan nor part of the Pescadores Islands which were ceded to Japan from the Qing Dynasty of China in accordance with Article II of the Treaty of Shimonoseki which came into effect in May of 1895.

Accordingly, the Senkaku Islands are not included in the territory which Japan renounced under Article II of the San Francisco Peace Treaty. The Senkaku Islands have been placed under the administration of the United States of America as part of the Nansei Shoto Islands, in accordance with Article III of the said treaty, and are included in the area, the administrative rights over which were reverted to Japan in accordance with the Agreement Between Japan and the United States of America Concerning the Ryukyu Islands and the Daito Islands signed on 17 June 1971. The facts outlined herein clearly indicate the status of the Senkaku Islands being part of the territory of Japan.

The fact that China expressed no objection to the status of the Islands being under the administration of the United States under Article III of the San Francisco Peace Treaty clearly indicates that China did not consider the Senkaku Islands as part of Taiwan. It was not until the latter half of 1970, when the question of the development of petroleum resources on the continental shelf of the East China Sea came to the surface, that the Government of China and Taiwan authorities began to raise questions regarding the Senkaku Islands.

Furthermore, none of the points raised by the Government of China as "historic, geographic or geological" evidence provide valid grounds, in light of international law, to support China's arguments regarding the Senkaku Islands.¹⁷⁸

¹⁷⁷ Ibid 225.

¹⁷⁸ The Ministry of Foreign Affairs of Japan "The Basic View on the Sovereignty Over the Senkaku Islands" <http://www.mofa.go.jp/region/asia-paci/senkaku/senkaku.html> (at 18 October 2004).