

Competing Claims to the Diaoyu/Senkaku Islands under International Law: A Critical Evaluation

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Abstract: Both China and Japan lay claim in the East China Sea to a group of islands and rocky outcroppings called Diaoyu Dao or Diaoyutai in China and Senkaku Islands in Japan. Prior to 2012, the conflict was kept mostly at bay through an informal agreement between the countries to shelve the issue of sovereignty until a later date. However in September 2012, Japan unilaterally nationalized three islands of the island chain, refusing to acknowledge that a dispute and an agreement to shelve the dispute exist. The current controversy is infused with a strong Japan-driven narrative of China having a flimsy claim to the islands under international law. With this narrative taking hold, especially in the West, it is important to assess the relative strength of China's claim against Japan's, regardless of whether the dispute would eventually be submitted to international arbitration. This paper explores the question of which of these countries has the better right to title through analyzing critical points of contention with respect to these countries' sovereignty claims. These are: whether China had possessed a historic title at the time Japan claimed Diaoyu Dao/Senkaku Islands to be *terra nullius*, whether China ceded the island group in the Maguan/Shimonoseki Treaty in 1895, and which document, i.e., Japan's signed Instrument of Surrender accepting the provisions of the Potsdam Declaration or the San Francisco Peace Treaty, is relevant to the resolution of the dispute. Evidence suggests China to have the stronger claim under precepts of international law and international case law governing territorial disputes. Japan's

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assertion of having effective control is highly debatable while the imputation of China's motive to its thirst for the potential reserves of hydrocarbon resources could be applied to Japan equally. China, on the other hand, may value the island group more for its strategic location to ensure China's coastal defense and maritime security, in the context of the U.S. Pivot to Asia and Japanese Prime Minister Shinzo Abe's avowed intention to re-write Japan's pacifist constitution.

Key Words: Diaoyu Dao; Diaoyutai; Senkakus; Competing claims; Territorial dispute; Sovereignty

I. Setting the Stage for Conflict: Nationalization of the Diaoyu/Senkaku Islands

The dispute over the Diaoyu Dao/Senkakus flared up again between China and Japan in September 2012 over the latter's nationalization of three of these islands through "purchase from a Saitama owner." Escalation soon followed. The dispute is at a level where an accident on the high seas or in the air surrounding the islands could spark a military confrontation between the two countries. And this time, it looks like the will to de-escalate may not be there on either side.

The island group in question, called Diaoyu Dao in China and Senkakus in Japan,¹ consists of five islands and three rocky outcroppings. Whether these islands are capable of sustaining human habitation remains in doubt. The largest of the island group called Diaoyu Yu/island or Diaoyutai by the Chinese and Uotsuri-jima by the Japanese² has a land mass of 4.3 km² and a limited fresh water supply, but without other supplies from the outside, an insular group can hardly establish a permanent abode there.

1 Diaoyu Islands or Diaoyu Dao are used throughout this article when discussing China's claim/evidence. The term Senkaku Islands or Senkakus is used when discussing Japan's claim/evidence. Diaoyu/Senkaku Islands or Diaoyu Dao/Senkakus are used when referring to the competing claims from both sides. The same practice will be followed in referring to the Maguan/Shimonoseki Treaty.

2 Both Diaoyu Dao/Islands and Senkakus are used in this paper as a group noun denoting the archipelago or the group of five islets and three outcroppings. When individual islands are referred to, then such names as Diaoyu Yu/island or Diaoyutai and Uotsuri-jima are used.

China claims a historic title to Diaoyu Dao/Senkaku.³ It maintains that the islands were ceded to Japan through the Treaty of Maguan/Shimonoseki in 1895, and accordingly, they should have been returned based on various agreements China made with the Allies during World War II (WWII) and by the terms of the surrender document Japan signed in 1945.

Japan, however, claims the island group was found to be *terra nullius* after a ten-year investigation that began with its so-called discovery by Koga Tatsushiro in 1884. Japan's Cabinet incorporated two of the islands in 1895 in the midst of the first Sino-Japanese war, approximately three months before the Maguan/Shimonoseki Treaty was signed. After WWII, a geographical area consisting of island chains, including the Diaoyu Dao/Senkaku, was put under the administration of the United States (US) pursuant to the 1951 San Francisco Peace Treaty (SFPT). Neither the People's Republic of China (PRC) nor the Taiwan administration was a signatory of this treaty, with the PRC publicly protesting the treaty's illegality from the very start.

The dispute first erupted in the 1970s when the Taiwan administration, which was then China's representative to the United Nations (UN), found to its dismay that the Diaoyu Dao/Senkaku was to be handed over to Japan in the Okinawa Reversion Treaty. Under pressure from the Taiwan administration, and in its desire to establish relations with the PRC, the US compromised. It declared in 1971 it was turning over only administrative control of the island group to Japan – and not sovereignty rights. Concurrently the US affirmed the Diaoyu Dao/Senkaku to be under the extended deterrence of article 5 of the US–Japan Mutual Security Treaty, a position the US maintains to date. Since 1972 the island group has been under the *de facto* administrative control of Japan.

In 1968, four years before the 1972 reversion, a potential reserve of hydrocarbon presumably equal to the greatest in the world was discovered in the seabed around Diaoyu Dao/Senkaku. Japan asserts this discovery to be the reason for China's claim after decades of silence.

The current dispute is infused with a strong, US-driven narrative of China

3 The author is of the view that there is only one China and that China Taiwan and China Mainland are integral parts of this one China. Therefore, in this article the author uses "China" to refer to both China Mainland and China Taiwan when both are in agreement with regard to their claims over Diaoyu Dao. When a distinct reference is called for, as at different periods when the official representative government at the UN differs or when their claims are different, then China Mainland or Beijing and China Taiwan or Taipei are used.

being the provocateur, completely ignoring the fact that it was Japan who nationalized three islands in the face of China's stern warning not to do so. From the Chinese perspective, Japan violates both in deeds and words the tacit agreement the two countries reached in 1972 and reaffirmed in 1978 to shelve the contentious issue.

In response China begins to challenge Japan's *de facto* control of the islands, dispatching marine surveillance ships and airplanes into the Diaoyu Dao/Senkaku surroundings on a patrol and law enforcement mission as Japan has done for years. Japan roundly accuses China of intrusion into its territorial space. But few Anglophone observers and commentators know or bother to point out that the very concept of territorial space in sea and air is derived from the notion of unquestioned sovereignty to a given region; territorial space cannot be said to exist when there are unresolved competing claims.

In an effort to lower the tension, Western observers suggest the parties should submit the dispute to the International Court of Justice (ICJ) for a resolution. Japan demurs, indicating that with its *de facto* control of the islands, it should not be the one to make the first move.⁴ Few, however, realize that Japan's acceptance of the ICJ's compulsory jurisdiction is based on "all disputes arising on and after 15 September 1958 with regard to situations or facts subsequent to the same date and being not settled by other means of peaceful settlement."⁵ Given Japan's reservations when the bulk of evidentiary materials to support China's claim is pre-1958, an ICJ adjudication is highly unlikely even if China were to accept ICJ's com-

4 Koichiro Genba, Japan–China Relations at a Cross-Road, *New York Times*, at http://www.nytimes.com/2012/11/21/opinion/koichiro-genba-japan-china-relations-at-a-crossroads.html?pagewanted=1&_r=0&ref=japan, 26 February 2013. Regarding submitting the dispute to ICJ, Koichiro Genba answered "[t]his is a question that is often wrongly directed toward Japan. It is Japan that has valid control over the Senkaku Islands under international law, and it is China that is seeking to challenge the status quo. The question should be posed to China. Japan has accepted the jurisdiction of the ICJ as compulsory. Since China is undertaking various campaigns to promote their assertions in international forums, it seems to make sense for China to seek a solution based on international law. Why don't they show any signs of accepting the jurisdiction of the ICJ as compulsory and taking their arguments to the ICJ?"

5 Japan resubmitted a declaration in 2007, at <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3&code=JP>, 26 February 2013. This is the same as the one in the *I.C.J. Yearbook 1988–1989*, 1989, pp. 74–75, quoted in Hungdah Chiu, An Analysis of the Sino-Japanese Dispute over T'iaoyutai Islets (Senkaku Gunto), *Chinese (Taiwan) Year Book of International Law and Affairs*, Vol. 15, 1996–1997, pp. 9–31.

pulsory jurisdiction.⁶

Still other Japanese politicians attribute China's reluctance to settle the dispute by an international court to the shaky legal basis of its claim,⁷ fueling the speculation that China would most certainly lose in any adjudication under international law. In view of this dominant Western and Japanese narrative, this paper proposes to critically evaluate China's claim against Japan's. Which of these countries has the better right to title under international law?

II. A Historic Title or a Title by Occupation of *Terra Nullius*?

China claims a historic title to Diaoyu Dao until it was ceded to Japan in 1895 in the Treaty of Maguan after the first Sino-Japanese War. Japan claims that, after repeated surveys of the islands in which they were found to be *terra nullius*, it incorporated them in 1895. An evaluation of these two claims follows.

A. China's Claim to a Historic Title

The term "historic title," sometimes referred to as "historical title," appears in various well-known rulings of the International Court of Justice.⁸ In other judicial/arbitral cases, the concept is also used interchangeably with the term of "ancient"

6 Of course both countries can request arbitration with the Permanent Court of Arbitration (PCA) or any other arbitral bodies. But before the arbitral tribunal can be constituted, both Japan and China would have to sign an agreement to bring the case to PCA and to abide by its decision. Then the agreement has to spell out scope of the dispute; each party is allowed to appoint same number of arbitrators to sit on the tribunal, etc. Neither party needs to make the first move in a PCA case. China cannot bring suit without Japan's agreement; neither could Japan without China's agreement. Both have to agree on the parameters of the dispute. In other words, any caveats would have to be accepted by the other party. Such a pre-arbitration agreement is unlikely.

7 Kenichiro Sasae (Japan's Ambassador to the United States), New Envoy Vows to Push for TPP Talks, Downplays Isle Row with China, *The Mainichi*, at <http://mainichi.jp/english/english/newsselect/news/20121128p2g00m0dm072000c.html>, 27 February 2013. Kenichiro Sasae said "[i]f they (China) are really confident about their territorial problem, I don't know why they are not going to the ICJ." "I think they don't have any confidence or basis for their claims," he added.

8 For example, in the Fishery Case, Judgment of 18 December 1951, *I.C.J. Reports*, 1951, p. 130; in ICJ's verdict in the Minquiers and Ecrehos Case, *I.C.J. Reports*, 1953, p. 53.

or “original” title.⁹

The acquisition of a historic title is not a process that is much distinct from the customary mode of occupation as an examination of its three constituent elements shows.¹⁰ First, there must be a sufficient lapse of time such that the title created “has so long been established by common repute that this common knowledge is itself a sufficient.”¹¹ Historic rights accorded the title, Blum observes, “are the product of a lengthy process comprising a long series of acts, omissions and patterns of behavior which, in their entirety, and through their cumulative effect, bring such rights into being and consolidate them into rights valid in international law.”¹² Second, the state must maintain an open, continuous and peaceful exercise of sovereignty over the territory. The range and scope of activities undertaken by a state constituting evidence of its sovereign authority is very wide. As to the last element, various terms have been proposed to capture its essence such as acquiescence, explicit recognition, and positive consent.¹³ The International Law Commission employs the term of “tolerance,” namely, toleration by other states of the effective and continued sovereignty of a state over a given territory.¹⁴ In fact, Blum considers this last element, which he calls acquiescence, to be the legal basis for the formation of a historic title, “the very pillar of historic rights.”¹⁵ Summarizing these elements and applying them to the case in point, a historic title then is considered to have emerged and sustained, if China had exercised continuous sovereignty over the islands from time immemorial to 1895 under the general toleration of other states.

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- 9 The Indo-Pakistan Western Boundary (Rann of Kutch) between India and Pakistan, 19 February 1968, *Reports of International Arbitral Awards*, Vol. XVII, p. 436; The Eritrea-Yemen Arbitration, Phase I: Territorial Sovereignty and Scope of Dispute, 9 October 1998, *Reports of International Arbitral Awards*, Vol. XXII, pp. 211~334; Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v. Singapore), *I.C.J. Reports*, Judgment of 23 May 2008, para. 290, at <http://www.icj-cij.org/docket/files/130/14492.pdf>, 3 August 2013.
 - 10 Artur Kozłowski, The Legal Construct of Historic Title to Territory in International Law – An Overview, *Polish Yearbook of International Law*, Vol. 30, 2000, pp. 68~78.
 - 11 Eritrea-Yemen Arbitration, Phase I: Territorial Sovereignty and Scope of Dispute, 1998, *Reports of International Arbitral Awards*, Vol. XXII, p. 239, para. 106.
 - 12 Yehuda Zvi Blum, Historic Rights, in R. Bernhardt ed., *Encyclopedia of Public International Law*, Vol. II, Amsterdam: North Holland, 1995, p. 711.
 - 13 Yehuda Zvi Blum, *Historic Titles in International Law*, The Hague: M. Nijhoff, 1965, pp. 53~55.
 - 14 Juridical Regime of Historic Waters, Including Historic Bays: Study Prepared by the Secretariat, A/CN.4/143, *Yearbook of International Law Commission*, Vol. II, 1962, paras. 109~110.
 - 15 Yehuda Zvi Blum, *Historic Titles in International Law*, The Hague: M. Nijhoff, 1965, p. 131.

1. China's Discovery and Naming of the Diaoyu Dao

The name "Diaoyutai" and other names such as "Chi Yu" first appeared during the Southern Song dynasty in the 1221 geography book *Yudi Jisheng* by Wang Xiangzhi.¹⁶ Wang wrote about the provenance of and the myths associated with these names, which were originally given to famous landscape sites in China. It is quite likely that around the same time period, the Chinese discovered the islands, but no record of the discovery has been located to date.¹⁷ Suganuma conjectures that with the discovery, the emperor named these islands and the government recognized them as Diaoyutai, Chi Yu and so on, as was the custom then, during the six-year period from the publication of Wang's book in 1221 until the disappearance of a large portion of it in 1227. Such conjecture seems plausible because the islands were already known by these names before the book *Yudi Jisheng* was rediscovered in toto in 1801;¹⁸ their names appear in extant official Ming and Qing records, defense manuals and books, Ryukyu documents and Japanese books.

2. Supporting Documents from the Ming Dynasty:

The Compass Route to Ryukyu Kingdom

The official records containing the names of these islands in the Diaoyu Dao are the investiture mission reports. When Ryukyu became a tributary state of China in 1372, Chinese envoys were sent on *cefeng* missions to Ryukyu for the investiture of new Ryukyu kings. Upon each mission's return to China, the envoy submitted a detailed written report to the emperor about his journey and these reports were stored as official documents in the imperial archive. It is in this context that various references to the Diaoyu Islands resurfaced in existent official records of the Ming dynasty.

The first investiture mission took place in 1373 and the last in 1866; in all, 24

16 Unryu Suganuma, *Sovereign Rights and Territorial Space in Sino-Japanese Relations: Irredentism and the Diaoyu/Senkaku Islands*, Honolulu: University of Hawaii Press, 2000, p. 42.

17 A look at the map of the East China Sea clearly shows there to be two probable candidates in the past to the discovery and claim to ownership of these islands, Ryukyu or China. Ryukyu according to historians, books and its official records had always claimed its kingdom to be comprised of 36 islands, excluding those of Diaoyu Dao/Senkakus.

18 Unryu Suganuma, *Sovereign Rights and Territorial Space in Sino-Japanese Relations: Irredentism and the Diaoyu/Senkaku Islands*, Honolulu: University of Hawaii Press, 2000, p. 44. Also on p. 44, "[h]istorically, before the Chinese adopted or used a new name of any landscape or location, the new name would have to be recognized by the government. The most likely case is that the emperor would name the location or rename a landscape in his honor... The Southern Song government, ergo, probably was responsible for recognizing the existence of the Diaoyu Islands in the East China Sea and naming these islands."

cefeng missions were undertaken during the Ming and Qing dynasties.¹⁹ Fire in the imperial archive destroyed the records of the first 11 missions, so that when Chen Kan, the Chinese envoy, embarked on his mission in 1534, he had to rely on the directions gathered from previous officials and the accompanying Ryukyuan to inform him of the “compass route.” The compass route, which was the customary passage taken, was so called because it required the envoys, starting out from the seaport of Fuzhou, to reset their compass when they passed by each island so as to reach the next one, en route to the Ryukyu seaport of Naha. In essence Diaoyu and other Chinese islands on this route were used as navigational aids, “similar to modern-day beacons and lighthouses” built by states which the ICJ has accepted as an exercise of state function.²⁰ Such usage of the islands was not confined to the Chinese; the Ryukyuan also used the islands as guides in the many more tributary missions they made to China.

During his 1534 voyage, Chen cited the Diaoyu Islands by names in their exact order as the ship sailed past them. When his ship drifted away from the compass route, the Ryukyuan who accompanied him reassured him that he was not far from the boundary between China and Ryukyu – and that he had not drifted so far as to come into the territory of Japan.²¹ Thus the official record of this mission clearly indicated a mutual recognition between Chinese and Ryukyuan officials of the international boundaries in the East China Sea. Further, the boundary between China and Ryukyu was described as being located “up to Kume Island,” while “Chiwei, Huangwei, and the Diaoyu Islands *d[id]* not belong to the territory of

19 Unryu Suganuma, *Sovereign Rights and Territorial Space in Sino-Japanese Relations: Irredentism and the Diaoyu/Senkaku Islands*, Honolulu: University of Hawaii Press, 2000, pp. 46, 70.

20 Unryu Suganuma, *Sovereign Rights and Territorial Space in Sino-Japanese Relations: Irredentism and the Diaoyu/Senkaku Islands*, Honolulu: University of Hawaii Press, 2000, p. 50.

21 Chen Kan, Shi Liuqiu (Rykyu) Lu [The Record of the Mission to the Liuqiu (Ryukyu) Kingdom], in *Shi Liuqiu (Ryukyu) Lu Sanzhong*, Taipei: Taiwan Yinhang, 1970, p. 13 (in Chinese), as quoted in Unryu Suganuma, *Sovereign Rights and Territorial Space in Sino-Japanese Relations: Irredentism and the Diaoyu/Senkaku Islands*, Honolulu: University of Hawaii Press, 2000, p. 48.

the Liuqiu (Ryukyu) Kingdom,”²² but rather implicitly to China. This implication was made explicit in Wang Ji’s 1683 mission record in which he stated it was “the boundary between China and foreign country.”²³ (See section on Qing Records below.)

Thus by the 16th century, China had clearly established an original or historic title to the islands based on the existent record of Chen’s 12th investiture mission. Documentation on the exact historical evolution from the probable discovery and actual naming in the 13th century to the consolidation of title to the islands may be lost forever. However, with regard to small and uninhabited islands “where the requisite evidence of occupation could not be collected,”²⁴ the performance of a symbolic act may be sufficient to establish an “exclusive title.”²⁵ Which act of possession could be more potently symbolic than the fact that the islands were named by Chinese with names of famous landscapes in China? Moreover, “Chinese *cefeng* missions to tributary states... signify symbolic acts of Chinese-fashion ‘sovereignty’ during both the Ming and Qing times.”²⁶ The fact that the islands figured so prominently in a symbolic sovereignty ceremony created “rights of sovereignty” that “cannot be denied.”²⁷ Although these may not be Western-style symbolic acts of possession, judicial and arbitral decisions in settling territory disputes repeatedly return to this notion that to apply Western rules to the acquisition

22 Inoue Kiyoshi, *Senkaku Retto: Chogyo Shoto No Shiteki Kaimei*, Tokyo: Daisan Shokan, 1996, p. 29, as quoted in Unryu Sukanuma, *Sovereign Rights and Territorial Space in Sino-Japanese Relations: Irredentism and the Diaoyu/Senkaku Islands*, Honolulu: University of Hawaii Press, 2000, p. 50. Since there was no other state bordering these islands which could have claimed them as part of their territory, it was obvious the boundary was between China and Ryukyu.

23 Unryu Sukanuma, *Sovereign Rights and Territorial Space in Sino-Japanese Relations: Irredentism and the Diaoyu/Senkaku Islands*, Honolulu: University of Hawaii Press, 2000, p. 75; Han-yi Shaw, *The Diaoyutai/Senkaku Islands Dispute: Its History and an Analysis of the Ownership Claims of the P.R.C., “R.O.C.” and Japan*, *Maryland Series in Contemporary Asian Studies*, Vol. 1999, No. 3, 1999, p. 48.

24 Surya P. Sharma, *Territorial Acquisition, Disputes and International Law*, The Hague: Martinus Nijhoff Publishers, 1997, p. 47.

25 Surya P. Sharma, *Territorial Acquisition, Disputes and International Law*, The Hague: Martinus Nijhoff Publishers, 1997, p. 50, on Clipperton Island case; with respect to other inhabited territories, such symbolic possession would produce an inchoate title.

26 Unryu Sukanuma, *Sovereign Rights and Territorial Space in Sino-Japanese Relations: Irredentism and the Diaoyu/Senkaku Islands*, Honolulu: University of Hawaii Press, 2000, p. 109.

27 Unryu Sukanuma, *Sovereign Rights and Territorial Space in Sino-Japanese Relations: Irredentism and the Diaoyu/Senkaku Islands*, Honolulu: University of Hawaii Press, 2000, p. 112.

of an ancient title is nothing short of “sheer anachronism”²⁸ and “highly artificial.”²⁹ For example, in *Rann of Kutch*, the Court states “the rights and duties which by law and custom are inherent in and characteristic of sovereignty present considerable variations in different circumstances, according to time and place, and in the context of the various political systems.”³⁰

Further, for centuries China’s title to these islands was acknowledged by Ryukyuan officialdom and known among Japanese scholars and even officials (See discussion of *Zhongshan Chuanxin Lu* below). Chen’s mission was accompanied by Ryukyuan envoys, as were many other missions. A passage in Chen’s record that identified the Diaoyu Islands and pointed to the implied boundary between Ryukyu and China was also found in the document written by a Ryukyu civil administrator, Sho Shoken.³¹ Absent challenges for centuries by other states in the region,³² China could be said to have attained a historic title to these islands.

3. Supporting Documents from the Ming Dynasty: Defense Manuals and Maps

Support for China’s claim is not confined to the *cefeng* records and general tolerance exhibited by other states. A non-symbolic indication of China’s title to these islands and its continuous display of state functions can be found in various defense manuals and maps of the Ming dynasty.

Prior to the Ming dynasty, the threat of foreign attacks came primarily from the north; thus the building of the Great Wall to fence off invasions by the barbarians. During the Ming dynasty, attention shifted to the seas as Japanese pirates, called *wokou*, frequently raided China’s coastal areas, sometimes in collusion with Chinese pirates. In response to these raids, the Ming dynasty set up a maritime system to defend the coastal regions. Under the auspices of Hu Zongxian, the

28 The 1998 Eritrea–Yemen Arbitration, *International Law Reports*, Vol. 114, pp. 1, 116.

29 The Dubai/Sharjah Arbitration Award (1981), *International Law Reports*, Vol. 91, pp. 543, 587.

30 Indo–Pakistan Western Boundary Case (*Rann of Kutch*) (1968), *International Law Reports*, Vol. 50, p. 2.

31 Unryu Sukanuma, *Sovereign Rights and Territorial Space in Sino-Japanese Relations: Irredentism and the Diaoyu/Senkaku Islands*, Honolulu: University of Hawaii Press, 2000, p. 49.

32 As Diaoyu Dao is located close to the boundary between China and erstwhile Ryukyu, “there was no room for a third party to claim ownership,” and “there were no territorial disputes” between the two countries. See Unryu Sukanuma, *Sovereign Rights and Territorial Space in Sino-Japanese Relations: Irredentism and the Diaoyu/Senkaku Islands*, Honolulu: University of Hawaii Press, 2000, p. 112.

governor-general of Jiangsu region, Zheng Ruozeng, a noted geographer and master of military arts, published the *Chouhai Tubian* in 1561, an illustrated compendium on maritime security and the most well-known of the Ming defense manuals. In it, the Diaoyu Islands, i.e. Diaoyu Yu, Huangwei Yu and Chi (Chiwei) Yu, were shown in two separate maps illustrating the perimeter defense of the coastal region from Shandong to Guangdong. The reproduction of the maps in subsequent Ming defense publications merely reaffirmed the islands' continuing role in a naval system for enforcing the Ming dynasty's jurisdictional boundary.³³

4. Supporting Documents from the Ming Dynasty:

A Navigational Logbook

Interestingly enough, the earliest extant reference to the Diaoyu Dao is not found in the *cefeng* mission records but in a Chinese navigational logbook entitled *Shunfeng Xiangsong* (*Fair Winds for Escort*) which was published probably as early as 1403 by an unknown author or authors. Included in the various routes of Ming navigation is the Fuzhou–Ryukyu compass route, with suggestions of how to set and reset the compass for a successful voyage to Ryukyu.³⁴ *Shunfeng Xiangsong* provided not only critical navigational information but also geographical knowledge by its portrayals of the ports on the different routes, along with the season and time of departure. Specifically with regard to the Fuzhou–Ryukyu route, the Diaoyu island was apparently not only used as a navigational marker but also as a major port of refuge, for its description included this information: “berths with a depth of 15 *tu* (80 inches) on Diaoyutai are good for refueling wood and drinking water.”³⁵

5. Supporting Documents from the Qing Dynasty

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- 33 Xu Bida, *Qiankun Yitonghai FangQuanTu*, 1605; Mao Yuanyi, *Wubei Zhihaifang Erfu Jianyanhai Shansha Tu*, 1621, as cited in Unryu Suganuma, *Sovereign Rights and Territorial Space in Sino-Japanese Relations: Irredentism and the Diaoyu/Senkaku Islands*, Honolulu: University of Hawaii Press, 2000, pp. 61–63; Han-yi Shaw, *The Diaoyutai/Senkaku Islands Dispute: Its History and an Analysis of the Ownership Claims of the P.R.C., “R.O.C.” and Japan*, *Maryland Series in Contemporary Asian Studies*, Vol. 1999, No. 3, 1999, p. 56. Japan questions the importance of these copies, clearly missing the point that they are evidence of a continuous display of state functions. Intermittency has not been a problem with ICJ but continuity has proven essential (in, for example, the Island of Palmas case).
- 34 *Shunfeng Xiangsong*, 1403?, reprint Washington D.C.: Library of Congress, 1975, p. 1 (in Chinese); also republished in Xiang Da ed., *Liangzhong Haidao Zhenjing* (*Two Logbooks*), Beijing: Zhonghua Shuju, 1961 (in Chinese). According to *Shunfeng Xiangsong*, navigational logbooks were written as early as the Zhou dynasty in the 11th century; unfortunately none of those survived.
- 35 *Shunfeng Xiangsong*, 1403?, reprint Washington D.C.: Library of Congress, 1975, p. 13. (in Chinese)

Eight more of these *cefeng* missions took place during the Qing dynasty, the last one in 1866. Of note is the 1683 mission, in which Wang Ji was accompanied by a Ryukyuan delegation sent by the new Ryukyu King to forestall any needless wanderings on the high seas.³⁶ In Wang's description of this voyage after passing the Chiwei island, not only was the boundary noted but was now clearly identified as that between China and Ryukyu, recognized by both the Chinese and Ryukyu envoys:

*“At dusk as the boat passed the outskirts (or trough), heavy winds and strong tides rose up. (A ritual of crossing the trough took place.) Upon [my] inquiring about what the outskirts meant, I (Wang) was told that it was the boundary between Chinese and foreign land.”*³⁷

The trough in this passage is the Okinawa Trough, commonly known at the time as the *heishuigou*. It created a sense of fear, as the water changes suddenly from a green to an ink black color where the continental shelf slopes precipitously into the East China Sea. Crossing its unpredictable currents led to a customary ritual to pray for the sea god's help called *guogouji* or *haishenji*.³⁸ The trough was recognized by both countries as the exact delimitation and legitimate maritime boundary between Ryukyu and China.³⁹ Thus long before the appearance of Western concepts of international law and sovereignty, this *Pax Sinica* that China created had international boundaries, customarily recognized and respected by tributary and neighboring states.

Of the mission records written during the Qing era, the most authoritative

36 Unryu Suganuma, *Sovereign Rights and Territorial Space in Sino-Japanese Relations: Irredentism and the Diaoyu/Senkaku Islands*, Honolulu: University of Hawaii Press, 2000, p. 73.

37 Han-yi Shaw, *The Diaoyutai/Senkaku Islands Dispute: Its History and an Analysis of the Ownership Claims of the P.R.C., “R.O.C.” and Japan*, *Maryland Series in Contemporary Asian Studies*, Vol. 1999, No. 3, 1999, p. 48.

38 Unryu Suganuma, *Sovereign Rights and Territorial Space in Sino-Japanese Relations: Irredentism and the Diaoyu/Senkaku Islands*, Honolulu: University of Hawaii Press, 2000, pp. 51~53. A description of this ritual can be found in records as far back as the 13th mission of Guo Rulin during the Ming dynasty.

39 Unryu Suganuma, *Sovereign Rights and Territorial Space in Sino-Japanese Relations: Irredentism and the Diaoyu/Senkaku Islands*, Honolulu: University of Hawaii Press, 2000, p. 53; Han-yi Shaw, *The Diaoyutai/Senkaku Islands Dispute: Its History and an Analysis of the Ownership Claims of the P.R.C., “R.O.C.” and Japan*, *Maryland Series in Contemporary Asian Studies*, Vol. 1999, No. 3, 1999, p. 48.

and widely known beyond China is the *Zhongshan Chuanxin Lu*, written by Xu Baoguang in 1719. Xu's work contained detailed descriptions of Ryukyu, a map of its 36 islands (which excludes the Diaoyu Islands), and maps of his journey, including the famed compass route. In its preface, "Xu specifically mentioned ... his work was completed and validated with the assistance of high-ranking Ryukyuan officials sent by the (Ryukyu King), in particular, the distinguished Tei Junsoku,"⁴⁰ the famed Ryukyuan scholar and geographer. Accordingly, this *Lu* again reaffirmed Chinese and Ryukyuan official recognition of their maritime boundary – and therefore the status of the Diaoyu Islands at the time.⁴¹

After *Zhongshan Chuanxin Lu* found its way to Japan, it was translated into Japanese and became the main source of knowledge about Ryukyu in Japan during the late Edo era. Even Japanese officials in the late 19th century knew of this text. For in the exchanges of the Okinawa Prefectural Magistrate and the Home Minister in 1885 regarding the possibility of annexing three of the Diaoyu Islands, both referred to the *Zhongshan Chuanxin Lu*. More specifically, the Okinawa Prefectural Magistrate voiced his concern over the fact that the islands that were presumably *terra nullius* might be the same as the ones that were recorded in the *Zhongshan Chuanxin Lu*. However, the Home Minister, while acknowledging the islands might be the same, dismissed the significance of their reference to aver the islands showed no signs of belonging to anyone.⁴²

The practice of incorporating the islands into the maritime defense of China also continued through the Qing dynasty, although during this period the islands were more closely tied to China Taiwan after Taiwan's official incorporation into

40 Han-yi Shaw, *The Diaoyutai/Senkaku Islands Dispute: Its History and an Analysis of the Ownership Claims of the P.R.C., "R.O.C." and Japan*, *Maryland Series in Contemporary Asian Studies*, Vol. 1999, No. 3, 1999, p. 46.

41 Han-yi Shaw, *The Diaoyutai/Senkaku Islands Dispute: Its History and an Analysis of the Ownership Claims of the P.R.C., "R.O.C." and Japan*, *Maryland Series in Contemporary Asian Studies*, Vol. 1999, No. 3, 1999, pp. 46–47; Unryu Suganuma, *Sovereign Rights and Territorial Space in Sino-Japanese Relations: Irredentism and the Diaoyu/Senkaku Islands*, Honolulu: University of Hawaii Press, 2000, pp. 74–77.

42 Han-yi Shaw, *The Diaoyutai/Senkaku Islands Dispute: Its History and an Analysis of the Ownership Claims of the P.R.C., "R.O.C." and Japan*, *Maryland Series in Contemporary Asian Studies*, Vol. 1999, No. 3, 1999, pp. 72–74.

Chinese territory in 1683.⁴³ The first surviving record in which this connection was made is Huang Shujing's book *Taihaishi Chalu* (*A Tour of Duty in the Taiwan Straits*). Huang completed the report after he was dispatched to China Taiwan in 1722 as a provincial censor. Focusing primarily on China Taiwan, Huang still managed to provide valuable information on the Diaoyu Dao in Volume 2, which discussed Taiwan's military preparation. The Diaoyu island was included in Taiwan's patrol routes; its viability for naval deployment was evidenced by the statement that "in the seas north of Taiwan is an island Diaoyutai where ten or more large ships may be anchored."⁴⁴ This description of the island was repeated, in some cases in greater detail, in various local annals covering the administrative area of the Taiwan prefecture of Fujian province.⁴⁵ Later annals such as, among others, Volume 86 of the *Recompiled General Annals of Fujian*, compiled by Chen Shouqi in 1871, showed that the Diaoyu island was placed under the naval command of the administrative unit of Gemalan/Kavalan (known as Yilan County today), China

43 China Taiwan is naturally treated quite differently from the uninhabited Diaoyu Dao. Taiwan was not taken possession of by China in an act of naming it after a famous place in China. Its discovery may have been attributed to the Portuguese but Taiwan was already inhabited at the time by indigenous people and immigrants from China Mainland. More importantly although Taiwan might also have appeared in mission records etc., it was later fought over and colonized by foreign powers. Therefore China did not consider Taiwan to have been official Chinese territory until it was incorporated in 1683.

44 "Ministry of Interior, Republic of China (Taiwan)", The Diaoyutai Islands: An Inherent Part of the Territory of Taiwan, at <http://www.mofa.gov.tw/official/Home/Detail/4ad52054-ebc7-452c-a6c1-d182b25c8001?arfid=2b7802ba-d5e8-4538-9ec2-4eb818179015&opno=027ffe58-09dd-4b7c-a554-99def06b00a1>, 5 January 2013. The translation of this passage differs slightly from author to author. See Unryu Suganuma, *Sovereign Rights and Territorial Space in Sino-Japanese Relations: Irredentism and the Diaoyu/Senkaku Islands*, Honolulu: University of Hawaii Press, 2000, p. 86; Han-yi Shaw, *The Diaoyutai/Senkaku Islands Dispute: Its History and an Analysis of the Ownership Claims of the P.R.C., "R.O.C." and Japan*, *Maryland Series in Contemporary Asian Studies*, Vol. 1999, No. 3, 1999, p. 57.

45 Han-yi Shaw, *The Diaoyutai/Senkaku Islands Dispute: Its History and an Analysis of the Ownership Claims of the P.R.C., "R.O.C." and Japan*, *Maryland Series in Contemporary Asian Studies*, Vol. 1999, No. 3, 1999, p. 57. Shaw discussed the official nature of these local annals or gazetteers in note 68 at pp. 57-58, tracing their official nature back to the Tang dynasty in 780 A.D., during which all sub-prefectures were required to submit one every few years covering various aspects of the local unit including administrative structure, local affairs, customs and noteworthy personages and sites, geography, and so on.

Taiwan.⁴⁶

In sum, China's evidence based on Ming and Qing documents demonstrates an original title was created. Further, this title was perfected by China's open, continuous and peaceful exercise of sovereignty over the Diaoyu Dao which was tolerated by other states for centuries.

B. Japan's Claim of Terra Nullius

Against the above-discussed evidence of China's historic possession of these islands, Japan maintains, after repeated surveys, it determined the Senkakus to be *terra nullius* and incorporated it in the midst of the first Sino-Japanese War. But a closer look at the documents of the incorporation process, declassified in the 1950s, shows these to contradict directly Japan's assertion that the islands "showed no trace of having been under the control of Qing dynasty of China."⁴⁷ For, in addition to the exchanges of the Okinawa Prefectural Magistrate and the Japanese Home Minister mentioned above, these declassified documents repeatedly and specifically mention "Qing China" thereby conveying Japan's initial concern about arousing China's suspicion. Although the Home Minister was eager to have the islands annexed in 1885, the Foreign Minister intervened to have the process delayed until the arrival of the appropriate moment. That moment came 10 years later in November 1894, with Japan's assurance of China's defeat in the first Sino-Japanese war. Despite the Japan Ministry of Foreign Affairs' (MOFA) current claim, the declassified documents also reveal that, apart from the initial survey, no further investigation of the islands was done between 1885 and 1895.⁴⁸

The process to incorporate, initiated in December of 1894, resulted in the

46 Chinese Government Official Web Portal, White Paper: Diaoyu Dao, an Inherent Territory of China, at http://english.gov.cn/official/2012-09/25/content_2232763.htm, 5 January 2013; "Ministry of Foreign Affairs, Republic of China (Taiwan)", The Diaoyutai Islands: An Inherent Part of the Territory of Taiwan, at <http://www.mofa.gov.tw/EnOfficial/Topics/TopicsArticleDetail/fd8c3459-b3ec-4ca6-9231-403f2920090a>, 5 January 2013; Han-yi Shaw, The Diaoyutai/Senkaku Islands Dispute: Its History and an Analysis of the Ownership Claims of the P.R.C., "R.O.C." and Japan, *Maryland Series in Contemporary Asian Studies*, Vol. 1999, No. 3, 1999, pp. 58-59.

47 Japan Ministry of Foreign Affairs, Q&A on the Senkaku Islands, answer to Q5, at http://www.mofa.go.jp/region/asia-paci/senkaku/qa_1010.html, 19 March 2013.

48 Han-yi Shaw, The Inconvenient Truth Behind the Diaoyu/Senkaku Islands, *New York Times*, at <http://kristoff.blogs.nytimes.com/2012/09/19/the-inconvenient-truth-behind-the-diaoyusenkaku-islands/>, 8 February 2013.

Cabinet's Decision of January 14, 1895. However the Cabinet Decision was not ratified by an Imperial Edict, a requirement under the Meiji Constitution for the incorporation to take effect. "Consequently, the decision of the Japanese cabinet to give permission to build a national landmark (on the Diaoyu Islands) on April 1, 1896, cannot be considered a formal or valid law enacted by the state."⁴⁹ In addition, with the "information" derived from the so-called "surveys," the Cabinet annexed only *two* of the *three* islands it initially investigated in 1885, Kuba-shima and Uotsuri-jima; the Taisho-jima islet was not annexed until 1921.⁵⁰

In its incorporation of other islands that it regarded as *terra nullius* at about the same time, Japan made every effort to follow the prevailing international standards such as conducting thorough surveys of the islands, ratifying the cabinet decision by Imperial Edict, and publicizing the information in *Kanpo* (Official Gazette).⁵¹ This and all the above-mentioned factors militate against the claim that Japan determined the Senkakus to be *terra nullius* in 1895.⁵²

Recognizing the claim of *terra nullius* may not stand, some Japanese and American scholars contend that Japan could have gained sovereignty under the modality of prescription; that is to say, Japan could have acquired title to the Senkakus when it presumed its ownership was unknown, uncertain or questionable. However, "scholarly opinion and international jurisprudence have long had reservations and to some extent continue to do so about prescription."⁵³ Besides, acquiescence to prescription should only be assumed in cases where the acquiescing state has

49 Unryu Sukanuma, *Sovereign Rights and Territorial Space in Sino-Japanese Relations: Irredentism and the Diaoyu/Senkaku Islands*, Honolulu: University of Hawaii Press, 2000, p. 107.

50 Steven Wei Su, The Territorial Dispute over the Tiaoyu/Senkaku Islands: An Update, *Ocean Development and International Law*, Vol. 36, 2005, p. 60; see the status of the other five outcroppings at Tao Cheng, The Sino-Japanese Dispute Over the Tiao-yu-tai (Senkaku) Islands and the Law of Territorial Acquisition, *Virginia Journal of International Law*, Vol. 14, No. 2, 1973, p. 246, note 3.

51 Han-yi Shaw, The Diaoyutai/Senkaku Islands Dispute: Its History and an Analysis of the Ownership Claims of the P.R.C., "R.O.C." and Japan, *Maryland Series in Contemporary Asian Studies*, Vol. 1999, No. 3, 1999, pp. 104~105.

52 For a more detailed discussion of the secretive incorporation of Diaoyu Dao, see Ivy Lee and Fang Ming, Deconstructing Japan's Claim of Sovereignty over the Diaoyu/Senkaku Islands, *The Asia-Pacific Journal*, Vol. 10, Issue 53, No. 1, at <http://japanfocus.org/site/view/3877>, 8 August 2013.

53 Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v. Singapore), *I.C.J. Reports*, Judgment of 23 May 2008, para. 15, at <http://www.icj-cij.org/docket/files/130/14492.pdf>, 3 August 2013.

constructive knowledge of the prescriptive state's claim.⁵⁴ Japan, however, took great care to deny China that constructive knowledge, keeping the incorporation of the islands secret until the documents were declassified in the 1950s,⁵⁵ while the islands were not named Senkakus until 1900.⁵⁶ A more thorough evaluation of a variant of this contention will be presented in the later section on "Effective Control."

C. Historic Title Consolidated and Maintained vs. Occupation of Terra Nullius

To the Japanese government, "[n]one of the arguments that the Chinese government or Taiwanese authorities have presented as historical ... grounds is valid evidence under international law to support the Chinese assertion of its territorial sovereignty over the Senkaku Islands."⁵⁷ Although China might not have exercised state functions as Western states have done, in applying present-day standards to China's historical evidence and in completely ignoring their evidentiary context, Japan fails to appreciate the ICJ's opinion in the *Western Sahara Case*. In it, the ICJ specifically states that "where sovereignty over territory is claimed, the particular structure of a State may be a relevant element in appreciating the reality or otherwise of a display of State activity adduced as evidence of that sovereignty," especially when no international law "requires the structure of a State to follow any particular pattern."⁵⁸

Furthermore, Japan ignores the fact that prior to the 18th century, a mere symbolic act might have conferred an exclusive title to uninhabited islands. Besides, even if intertemporal law for the maintenance of title in inhabited territory is taken

54 Judge Dugard expressed this view in his dissenting opinion on the Pedra Branca/Pulau Batu Puteh case stating "[p]ublicity is an essential requirement for prescription" in Dissenting Opinion of Judge Dugard, para. 33, at <http://www.icj-cij.org/docket/files/130/14502.pdf>, 3 August 2013.

55 Han-yi Shaw, The Diaoyutai/Senkaku Islands Dispute: Its History and an Analysis of the Ownership Claims of the P.R.C., "R.O.C." and Japan, *Maryland Series in Contemporary Asian Studies*, Vol. 1999, No. 3, 1999, p. 100.

56 Unryu Suganuma, *Sovereign Rights and Territorial Space in Sino-Japanese Relations: Irredentism and the Diaoyu/Senkaku Islands*, Honolulu: University of Hawaii Press, 2000, pp. 93-94.

57 Japan Ministry of Foreign Affairs, Q&A on the Senkaku Islands, answer to Q5, at http://www.mofa.go.jp/region/asiapaci/senkaku/qa_1010.html, 4 March 2013.

58 Eric Heinze and M. Fitzmaurice eds., *Landmark Cases in Public International Law*, The Hague: Martinus Nijhoff Publishers, 1998, p. 424.

into account, China's continuous display of sovereignty before 1895 as evidenced in the Ming and Qing documents, would suffice to support its claim. Additional evidence to cement China's claim to a historic title can be found in the toleration of Chinese sovereignty by other states. Examples of this include the Ryukyuan and Japanese use of the Chinese names for these islands before the 20th century, the use of *Hoa-pin-san* (Diaoyu island) and *Tia-usu* (Huangwei island) by Captain Edward Belcher in his 1840s voyage on the *H.M.S. Samarang*,⁵⁹ and maps published by Japan and other Western countries indicating the islands were Chinese territory.⁶⁰

In the past the ICJ has not shown much interest in adjudicating historical controversies,⁶¹ especially when such claims are charged with questions of national identity and emotionalism.⁶² China's claim of an original title, however, should be non-controversial, for like the *Eastern Greenland* case it is a claim of title versus one of *terra nullius* by Japan.⁶³ In addition the claim is made in the context of a chain of claims that rests eventually on formal international agreements. These agreements have properties similar to treaties, while treaties are the most persuasive and juridically justifiable of all territorial claims in the ICJ's view.⁶⁴

59 Edward Belcher, *Narrative of the Voyage of H. M. S. Samarang during the Years, 1834-46, Vol. 1*, London: Reeve, Benham, and Reeve, 1848 as cited in Unryu Suganuma, *Sovereign Rights and Territorial Space in Sino-Japanese Relations: Irredentism and the Diaoyu/Senkaku Islands*, Honolulu: University of Hawaii Press, 2000, pp. 89-90.

60 In Japan, for example, the oldest existent Japanese document affirming China's title to the Diaoyu Dao was a map by Hayashi Shihei, a noted Japanese geographer, in 1785. Although his map was dismissed by Japanese apologists as being based on China's *Zhongshan Chuanxin Lu*, the mere possibility demonstrates the authoritativeness and the widespread acceptance of the book and its contents among Japanese scholars at the time. Other foreign acknowledgments consist of maps such as that in *The Empire of China with Its Principal Divisions* by Robert Sayer in 1790, and *Atlas of the World* by Rand McNally & Co. in 1894, as indicated in Edward Belcher, *Narrative of the Voyage of H. M. S. Samarang during the Years, 1834-46, Vol. 1*, London: Reeve, Benham, and Reeve, 1848; also see Unryu Suganuma, *Sovereign Rights and Territorial Space in Sino-Japanese Relations: Irredentism and the Diaoyu/Senkaku Islands*, Honolulu: University of Hawaii Press, 2000, p. 91.

61 For example in *The Minquiers and Ecrehos Case, I.C.J. Reports*, 1953, p. 56, the Court states "[f]or the purpose of deciding the present case it is, in the opinion of the Court, not necessary to solve these historical controversies."

62 Andrew F. Burghardt, *The Bases of Territorial Claims, Geographical Review*, Vol. 63, No. 2, 1973, p. 230.

63 Surya P. Sharma, *Territorial Acquisition, Disputes and International Law*, The Hague: Martinus Nijhoff Publishers, 1997, p. 77.

64 Brian Taylor Sumner, *Territorial Disputes at the International Court of Justice, Duke Law Journal*, Vol. 53, 2004, pp. 1779-1812.

III. Cession through the Treaty of Magan/Shimonoseki, or Non-Cession but Cabinet Incorporation?

China claims to have ceded the Diaoyu Dao to Japan through the Maguan/Shimonoseki Treaty, signed in April 1895. Japan maintains otherwise as the Treaty did not expressly name the island group. Indeed the pertinent portion of article 2 of the Maguan/Shimonoseki Treaty only mentions “all islands appertaining or belonging to (Taiwan)”:

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 (Taiwan), together with all islands appertaining or belonging to the said island of Formosa (Taiwan).⁶⁵

As the foregoing section of this paper has established China’s superior claim to an original title, the question remains as to whether Diaoyu Dao was included in the rather ambiguous phrase, “islands appertaining or belonging to,” that evidently refers to a set of islands without specifying each. A map did not accompany article 2(b) of the treaty to delimit the boundaries of Taiwan and its appertaining islands,⁶⁶ and it is not known what maps, if any, the treaty drafters consulted.

A. Exploring Competing Claims in the Context of the “Ordinary Meaning” of the Treaty

The ICJ has applied the rules of the Vienna Convention on the Law of Treaties (VCLT) to interpret treaties concluded before the VCLT came into being, consid-

65 The signatories agreed to use the English version of this treaty as the authentic text should any controversies arise regarding the intent and meaning of the treaty; see Quan Hexiu, An Examination of the Similarities and Differences in Wording of the Chinese, Japanese and English Version of the Treaty of Maguan, *The 21st Century*, No. 86, 2004, pp. 38~39 (in Chinese). Treaty of Maguan/Shimonoseki, at <http://www.taiwandocuments.org/shimonoseki01.htm>, 19 March 2013.

66 A map of the Liaotung Peninsula and “appertaining islands” of southern Fengtien was attached to the Maguan/Shimonoseki Treaty; however, Japan was forced by the European powers to retrocede that portion of Fengtien together with its appertaining islands.

ring them to be derived from and to have the force of customary international law.⁶⁷ Article 31 of the VCLT 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 light of its object and purpose.”⁶⁸ Accordingly, ascertaining the “ordinary meaning” of the vague phrase “islands appertaining or belonging to” is critical. The Merriam-Webster dictionary defines “to appertain” as “to belong or be connected as a rightful part or attribute.” Were the island chain included in article 2(b) of the treaty, then the phrase clearly points to some sort of rightful connection or relationship between Diaoyu Dao and Taiwan. China points to, among others, an administrative and historical, as well as a geographical and geological relationship between these two.

1. China’s Claim: An Administrative and Historical Relationship

From a legal standpoint, the most persuasive may be an administrative relationship, namely, the fact that Diaoyu Dao had been placed historically under the administration of Taiwan after the latter’s 1683 incorporation into the territory of the Qing dynasty. A significant piece of supportive evidence is the above-noted imperial censor Huang Shujing’s *Taihaishi Chalu (A Tour of Duty in the Taiwan Straits)* in the 1720s, which described Diaoyu island’s position in Taiwan’s maritime patrol routes as the location where ten or more large ships could be anchored. Further, as previously mentioned, Chen Shouqi’s 1871 *Recompiled General Annals of Fujian* specifically listed the island under Gemalan (now Yilan County), Taiwan Prefecture, in Volume 86 on Coastal Defense and Strategically Important Places in all Districts.

Taiwan in turn emerged as the key to the late Qing dynasty’s maritime defense. As early as 1737, the Grand Secretary and Minister of Rites, Wu Jin, wrote in his memorial (as communication to the emperor is called) that Taiwan was “the gate-

67 For a discussion of the problems associated with what might be considered a retroactive application of the VCLT, see Hazel Fox, Application of Article 31(3)(A) and (B) of the Vienna Convention and the Kasikili/Sedudu Case, in M. Fitzmaurice, Olufemi A. Elias and Panos Merkouris eds., *Treaty Interpretation and the Vienna Convention on the Law of Treaties*, Leiden: BRILL, 2010.

68 Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679, entered into force 27 January 1980, article 31(1), at <http://www.unhcr.org/refworld/docid/3ae6b3a10.html>, 9 August 2013.

way to the outer seas and the hedgerow of the bordering oceans.”⁶⁹ But Taiwan’s strategic importance was not fully recognized until Japan’s Taiwan Expedition in 1874. Imperial Japan’s dispatch of an expeditionary force to attempt to take control of Taiwan set in motion a series of governmental responses that led to the eventual separation of Taiwan from the Fujian province and its establishment as a province in 1885. The French blockade of the island during the Sino-French war in 1884 added further impetus as China had to send its army to defend its maritime frontier. Hence maritime defense became a priority etched in Qing dynasty’s consciousness, while Taiwan, being “the gateway to the seven coastal provinces,” was considered “crucial to the whole national defense.”⁷⁰ Diaoyu Dao, which was part and parcel of maritime defense since the Ming dynasty and administered by Taiwan when the latter was a prefecture, naturally remained an appertaining island at Taiwan’s emergence as a Chinese maritime province.

2. China’s Claim: A Geographical and Geological Relationship

Present-day scientific knowledge also reveals that Diaoyu Dao is geographically a part of Taiwan. For example, the herpetofauna of the Diaoyu/Senkaku Islands is found to be distinct from that of other parts of the Ryukyu archipelago, but is similar to that of China Taiwan and eastern continental China.⁷¹ A mole endemic to the Diaoyu island is discovered to be morphologically most similar to the mole found in China Taiwan, rather than to other species of moles found elsewhere.⁷² Further “[t]hese islands are situated in the northbound path of the Kuroshio Current, and share the same monsoon zone with [China] Taiwan. Thus, the air and water currents are favorable for sail from northern [China] Taiwan to Diaoyutai Islands, and not favorable for sail from the Ryukyu Islands to the

69 *Taian Huilu Bingji (Collected Materials on Taiwan, Vol. 3)*, Taiwan 176, Taipei: Taiwan Yinghang, 1963, pp. 291~293. (in Chinese)

70 From the 1877 memorial submitted by Zuo Zongtang, head of the Hunan Army in the Xinjiang Campaigns, in Katoaka Kazutada, *Shincho Shinkyō Tochi Kenkyū (Study on Qing Dynasty’s Governance of Xinjiang)*, Kaga: Yuzankaku, 1991, p. 142.

71 H. Ota, H. Sakaguchi, S. Ikehara and T. Hikida, The Herpetofauna of the Senkaku Group, Ryukyu Archipelago, *Pacific Science*, Vol. 47, No. 3, 1993, p. 248.

72 M. Motokawa, L-k Lin, H. C. Cheng and M. Harada, Taxonomic Status of the Senkaku Mole, *Nesoscaptor uchidai*, with Special Reference to Variation in *Mogera insularis* from Taiwan (Mammalis: Insectivora), *Zoological Science*, Vol. 18, 2001, pp. 733~740.

Diaoyutai Islands.”⁷³

Paleogeographical evidence indicates that most islands of the Diaoyu group and China Taiwan were connected to the eastern margin of the continent during the most recent glacial period, while the Ryukyu archipelago was never connected by dry land with China.⁷⁴ Thus, the continental shelf on which China Taiwan and Diaoyu Dao sit is a “prolongation of China’s land territory.”⁷⁵ The edge of this continental shelf is marked by the Okinawa Trough, “an important geomorphological unit with prominent cutoff characteristics,”⁷⁶ formed by a sudden topographical change involving a significant drop in sea depth reaching a maximum of over 2,300 meters.⁷⁷

The above scientific information bolsters China’s claim that Diaoyu Dao appertains to China Taiwan. The ICJ has opined in the 1999 *Kasikili/Sendudu* case that “[i]n order to illuminate the meaning of words, there is nothing that prevents the Court from taking into account the present-day scientific state of knowledge,” in interpreting the ordinary meaning of the “main channel” in the 1890 treaty between Germany and Great Britain.⁷⁸ The Court cited the 1994 Arbitral Award of the *Laguna del Desierto Case* to support its use of current information derived from science.⁷⁹ In two other cases that deal with defining the states’ relevant coasts, the Court further emphasized the need to “be faithful to the actual geographical

73 “Ministry of Foreign Affairs, Republic of China (Taiwan)”, The Diaoyutai Islands: An Inherent Part of the Territory of Taiwan, at <http://www.mofa.gov.tw/EnOfficial/Topics/TopicsArticleDetail/fd8c3459-b3ec-4ca6-9231-403f2920090a>, 8 February 2013. See also Directorate of Intelligence, Intelligence Report, The Senkaku Islands Dispute: Oil Under Troubled Waters?, CIA/BGI GE 71-9, May 1971, Point 11, p. 6, at <http://cryptome.org/2013/07/guccifer-cia-senkaku.pdf#sthash.sadTucKD.dpuf>, 8 October 2013.

74 H. Ota, H. Sakaguchi, S. Ikehara and T. Hikida, The Herpetofauna of the Senkaku Group, Ryukyu Archipelago, *Pacific Science*, Vol. 47, No. 3, 1993, p. 248.

75 Executive Summary, Submission by the People’s Republic of China Concerning the Outer Limits of the Continental Shelf beyond 200 Nautical Miles in Part of the East China Sea, 11 January 2013, p. 1, at http://www.un.org/Depts/los/clcs_new/submissions_files/chn63_12/executive%20summary_EN.pdf, 24 February 2013.

76 Executive Summary, Submission by the People’s Republic of China Concerning the Outer Limits of the Continental Shelf beyond 200 Nautical Miles in Part of the East China Sea, 11 January 2013, p. 1, at http://www.un.org/Depts/los/clcs_new/submissions_files/chn63_12/executive%20summary_EN.pdf, 24 February 2013.

77 Executive Summary, Submission by the People’s Republic of China Concerning the Outer Limits of the Continental Shelf beyond 200 Nautical Miles in Part of the East China Sea, 11 January 2013, p. 3, at http://www.un.org/Depts/los/clcs_new/submissions_files/chn63_12/executive%20summary_EN.pdf, 24 February 2013.

78 Case Concerning Kasikili/Sendudu Island (Botswana/Namibia), Judgment of 13 December 1999, *I.C.J. Reports*, 1999, p. 1060, para. 20.

79 *Laguna del Desierto Case*, *International Law Reports*, Vol. 113, p. 76, para 157.

situation”⁸⁰ in one, and to avoid “completely refashioning nature”⁸¹ in the other.

3. Social Construct, Societal Recognition and Linguistic Usage Linkage

To a certain extent, this 20th-century information merely provides a much better understanding of the physical bases for social constructs that existed since the 16th-century. For instance, constructs such as “*heishuigou*”, i.e., the Okinawa Trough, attest to the fact that Chinese and Ryukyuan implicitly recognized these geographic/geological features and used them to order their social world and delimit their “*guojiaojie*”, i.e., their national boundary. The Kuroshio Current underlay the *cefeng* missions’ departure time in May or June to Ryukyu and their return in October when the winds and currents were favorable for such voyages as noted in the 15th century book, *Shunfeng Xiangsong* (*Fair Winds for Escort*). Together, these characteristics of the natural world structured the centuries-old compass route of the imperial envoys, which linked the various Diaoyu Islands with China Taiwan.

Zheng Shungong, who was well versed in maritime trade and familiar with Japan, was sent by a governor-general of the Jiangsu region to Japan for a lengthy stay in order to gather information on the *wokou* route. He wrote in his 1565 *Riben Yijian* (*A Mirror of Japan*) that Diaoyu island was a “*xiaodong xiaoyu ye*”, i.e., a small island that is a part of Taiwan.⁸² Rather than being a refutation of China’s claim per some Japanese’s assertion, as at the time Taiwan had not yet been officially annexed by China, Zheng’s statement merely shows how a conceptualization derived from the physical world shaped the Chinese experience and their view of the connectedness of various parts of their social world. Wu Tianying, a Chinese scholar specializing on the Diaoyu Dao issue, speculates this statement might also have reflected the common understanding in Japan in those days.⁸³

When in 1885 the Japanese foreign minister urged caution in proceeding

80 Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, *I.C.J. Reports*, 1985, p. 45, para. 57.

81 North Sea Continental Shelf, Judgment, *I.C.J. Reports*, 1969, p. 49, para. 91.

82 Zheng Shungong, *Riben Yijian*, Vol. 5, 1565; reprint Beijing? (1909), p. 4; quoted in Unryu Suganuma, *Sovereign Rights and Territorial Space in Sino-Japanese Relations: Irredentism and the Diaoyu/Senkaku Islands*, Honolulu: University of Hawaii Press, 2000, p. 65. Taiwan at the time was also named “*xiaodong*.”

83 Wu Tianying, *A Textual Research on the Ownership of the Diaoyu Islands to the Sino-Japanese War of 1894–1895: Also a Query to Professor Toshio Okuhara and Others*, Beijing: Social Sciences Academic Press, 1994, pp. 77–81. (in Chinese)

with the incorporation of the Diaoyu Islands because Chinese newspapers were abuzz with reports of suspicious Japanese activities there, a headline of the 1885 Shanghai-based *Shen Bao* newspaper reads, “An Alarming Report Concerning the Island of *Taiwan*”⁸⁴ and not “An Alarming Report Concerning the Island of Diaoyutai.” Moreover, 19th-century fishermen of northern China Taiwan found their rich fishing grounds and livelihood around the island chain.⁸⁵ When necessary they sought shelter from the storm on the Diaoyu island, leaving remains of their wreckages that were discovered in the 1840s by Captain Edward Belcher on his tour of the area in the *H. M. S. Samarang*.⁸⁶

Thus the myriad linkages between Diaoyu Dao and China Taiwan were not confined to the historical and administrative aspects; nor would the account be complete by adding the geographic/geological factors. It is the devolution of these elements to the linguistic and societal connection, that is, the social construct and perception of the Diaoyu Islands as being a part of China Taiwan that speaks most eloquently for China’s claim that the island chain was ceded through the Maguan/Shimonoseki Treaty.

4. Japan’s Claim of Non-Cession

From an exploration of the “ordinary meaning” of the ambiguous phrase above, Japan’s claim of non-cession based on the fact that the Senkakus was not explicitly mentioned in the Shimonoseki Treaty⁸⁷ is questionable. Japan’s contention that the islands were already annexed approximately three months before the Treaty was signed does not stand either as, among other reasons, the islands were not *terra nullius*, and therefore not subject to acquisition by incorporation.

Japanese and other scholars have further pointed out that the separate treatment of Penghu (Pescadores) in another provision of the Shimonoseki Treaty means

84 Shaw’s translation of the Chinese newspaper. See Han-yi Shaw, *The Diaoyutai/Senkaku Islands Dispute: Its History and an Analysis of the Ownership Claims of the P.R.C., “R.O.C.” and Japan*, *Maryland Series in Contemporary Asian Studies*, Vol. 1999, No. 3, 1999, p. 76.

85 Tao Cheng, *The Sino-Japanese Dispute over the Tiaoyutai (Senkaku) Islands and the Law of Territorial Acquisition*, *Virginia Journal of International Law*, Vol. 14, No. 2, 1973, pp. 221~266.

86 Edward Belcher, *Narrative of the Voyage of H. M. S. Samarang during the Years, 1834–46, Vol. 1*, London: Reeve, Benham, and Reeve, 1848, pp. 315~320.

87 The term “Senkakus” is used here for convenience sake. Kuroiwa Hisashi coined the term after his private survey in 1900. Before that the Japanese navy for instance adopted Chinese and also incorporated English (British) nomenclature, confusing themselves and everyone else. See Unryu Sukanuma, *Sovereign Rights and Territorial Space in Sino-Japanese Relations: Irredentism and the Diaoyu/Senkaku Islands*, Honolulu: University of Hawaii Press, 2000, pp. 89~96.

Penghu was not considered to be an island “appertaining” to China Taiwan. Since the Senkakus is much farther from China Taiwan than Penghu, it could not possibly be regarded as an “appertaining” island and was therefore not included in those islands that were ceded.⁸⁸ But Penghu, then as now, was part of Taiwan province; in addition, Pengjia Yu which is further away than Penghu, was still acknowledged to be ceded in the Shimonoseki Treaty. Thus distance was not a major determining factor nor is it in the ICJ’s reasoning since the Court awarded to Singapore Pedra Branca, which is closer to and arguably on the territorial sea of Malaysia based on the United Nations Convention on the Law of the Sea (UNCLOS).⁸⁹

It should be noted that Penghu at the time was strategically much more important than the Senkakus, for Japan mounted its successful attack on China Taiwan from Penghu during the first Sino-Japanese war. As Japan had its eyes on China Taiwan ever since its 1874 Expedition to Taiwan, it might have demanded in no uncertain terms Penghu’s cession in a separate provision of the Shimonoseki Treaty to guarantee its continued occupation of China Taiwan.

B. Exploring the Object and the Purpose of the Maguan/Shimonoseki Treaty

Per VCLT, an examination of the object and the purpose of the treaty may add to treaty interpretation; accordingly an exploration of the purpose of the Maguan/Shimonoseki Treaty follows. Unquestionably, the treaty’s main purpose was territorial and other concessions extracted as spoils of the war by the victor from the vanquished. The British minister to Japan learned that Japan began drafting its demands to be included in the peace settlement a few months after the war started in 1894.⁹⁰ The employment of the ambiguous expression was probably for the convenience

88 Erdem Denk, Interpreting a Geographical Expression in a Nineteenth Century Cession Treaty and the Senkaku/Diaoyu Islands Dispute, *International Journal of Marine and Coastal Law*, Vol. 20 , No.1, pp. 100~101; Y. Matsui, International Law of Territorial Acquisition and the Dispute over the Senkaku (Diaoyu) Islands, *Japanese Annual of International Law*, Vol. 40, 1997, note 2.

89 Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v. Singapore), *I.C.J. Reports*, Judgment of 23 May 2008, para. 290, at <http://www.icj-cij.org/docket/files/130/14492.pdf>, 3 August 2013.

90 Han-yi Shaw, The Diaoyutai/Senkaku Islands Dispute: Its History and an Analysis of the Ownership Claims of the P.R.C., “R.O.C.” and Japan, *Maryland Series in Contemporary Asian Studies*, Vol. 1999, No. 3, 1999, p. 86.

of the drafters and signatories.⁹¹ The terms of the treaty can be expected to reflect mostly what Japan coveted from China.

The cession of Taiwan was one of Japan's main objects in this treaty. An inspection of the trajectory of Japan's territorial expansion, from the annexation of Ryukyu to the colonization of Taiwan, shows the inclusion of the Senkakus, situated in between those two island groups, as part of the concession was most likely on the minds of the Japanese drafters. Despite the fact that the island chain was known to Japan as being navigational aids on the route from Fuzhou to Ryukyu in those days, the 1884 so-called discovery of the islands, was accredited in Japan to Koga Tatsushiro from Fukuoka. When Koga applied to Okinawa Prefecture for a lease of the islands after the "discovery," he was turned down, but he set in motion a secretive process to incorporate the islands beginning with the Home Minister's proposal to place national markers on the islands in 1885. Therefore the intent was certainly there to take possession of these islands prior to the war. The cession treaty only legitimated Japan's incorporation of Diaoyu Dao/Senkakus, an incorporation that the Cabinet could not effect because the January 1895 Cabinet Decision was never ratified by the emperor.

C. Exploring the Subsequent Conduct of Parties to the Treaty

According to the VCLT, "any subsequent practice in the application of the treaty" may be taken into account to arrive at a more definitive interpretation of treaty language.⁹² China's silence with regard to Diaoyu Dao accords with its understanding that it had ceded the islands after the first Sino-Japanese War; it was punctilious in observing the maxim of *pacta sunt servanda*, i.e., fulfilling its treaty obligations in good faith, without protest. The silence extended to those newspapers which were so eager to sound the alarm bells regarding suspicious Japanese activities on the islands in 1885; after the war they no longer took note of Koga's development of the islands, or of his bringing over workers from Okinawa

91 At <http://www.mofa.gov.tw/official/Home/Detail/217bb223-b19c-4b8e-a510-ee54dfae7fec?arfid=2b7802ba-d5e8-4538-9ec2-4eb818179015&opno=027ffe58-09dd-4b7c-a554-99def06b00a1>, 12 August 2013; China Taiwan has a different explanation and believes the ambiguity was deliberately planted so as to facilitate claims of more islands later.

92 Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679, entered into force 27 January 27, 1980, Article 31(3)(b), at <http://www.unhcr.org/refworld/docid/3ae6b3a-10.html>, 12 August 2013.

to gather albatross feathers and to operate a bonito processing plant.

Interestingly enough, subsequent behavior of the Japanese government also appears to substantiate the point that the islands were ceded. Although the Cabinet Decision to incorporate Senkakus took place a few months before the signing of the treaty, it was never ratified by the emperor. Additionally, the decision named and incorporated only *two* of the *three* Senkaku islets that Japan professes to have thoroughly surveyed to arrive at the *terra nullius* determination. Koga, who had repeatedly applied for use of the islands since 1885, filed yet another application on June 10, 1895, six days after Japan officially occupied China Taiwan. In a biography about him, Koga attributed Japan's possession of the islands to "the gallant military victory of our Imperial forces."⁹³ When the Ministry of Home Affairs finally approved his application in September of 1896, Koga was granted a lease to *four* islands: Uotsuri-jima, Kuba-shima, Minami-kojima and Kita-kojima,⁹⁴ while only *two* of them were "incorporated" according to the Cabinet Decision.

Japan points to the fact the Senkaku Islands have always been administered by Okinawa Prefecture; if ceded as appertaining islands of China Taiwan, they should have been kept under the jurisdiction of Taiwan. But once the process to have them incorporated began in 1885, two different Okinawa Prefectural governors had applied to have the islands put under their jurisdiction, one in 1890 and another in 1893, for the purpose of regulating marine products, fishing and related business attempts.⁹⁵ Although the last petition asked for an urgent response, it was put aside until after the war, at which point the request proceeded along the line of least resistance already established before the war, and the islands were placed under

93 Han-yi Shaw, The Inconvenient Truth behind the Diaoyu/Senkaku Islands, *New York Times*, at <http://kristoff.blogs.nytimes.com/2012/09/19/the-inconvenient-truth-behind-the-diaoyusenkaku-islands/>, 8 February 2013.

94 Han-yi Shaw, The Diaoyutai/Senkaku Islands Dispute: Its History and an Analysis of the Ownership Claims of the P.R.C., "R.O.C." and Japan, *Maryland Series in Contemporary Asian Studies*, Vol. 1999, No. 3, 1999, p. 30. The corresponding Chinese names of these islets are Diaoyu Yu, Huangwei Yu, Nanxiao Dao and Beixiao Dao. In 1978, the islands were sold for a nominal price of 30 yen per 2.3 square meters to the Kurihara family. In 2012 Japan purchased and nationalized three of these islands. Kuba-shima, the fourth islet, is currently under the "ownership" of a relative of the Saitama businessman; it is being rented by Japanese Department of Defense for an undisclosed sum. See Jun Hongo, Tokyo's Intention for Senkaku Islets, *Japan Times*, at <http://www.japantimes.co.jp/news/2012/04/19/national/tokyos-intentions-for-senkaku-islets/#.UV8Q80cTSF8>, 2 March 2013.

95 Han-yi Shaw, The Diaoyutai/Senkaku Islands Dispute: Its History and an Analysis of the Ownership Claims of the P.R.C., "R.O.C." and Japan, *Maryland Series in Contemporary Asian Studies*, Vol. 1999, No. 3, 1999, pp. 78-80.

the administration of Okinawa Prefecture. Thus the fact that Senkakus was not administered by China Taiwan after 1895 has nothing to do with whether it was ceded or not.

In sum China appears to have a solid case in arguing that the Diaoyu Islands were ceded in the Maguan/Shimonoseki Treaty through an exploration of the ordinary meaning of the phrase “islands appertaining or belonging to” China Taiwan. This interpretation is additionally strengthened when the object and purpose, and the subsequent conduct of the parties to the treaty are taken into account.

IV. Resolution through the Cairo and Potsdam Declarations, and the WWII Surrender Terms, or the San Francisco Peace Treaty?

Koga invested large sums of his own money to develop the islands after he was granted a lease to the Senkakus. With growing China–Japan tensions, he closed his business on the islands in the 1930s. The islands have remained uninhabited ever since.

During World War II, US President Franklin Roosevelt coined the term “United Nations” to represent the Allies. On New Year’s Day 1942, the Big Four (the US, Britain, Soviet Russia and China) came together to sign a United Nations Declaration that later became the basis of the modern United Nations (UN). This document states “[e]ach Government pledges itself to cooperate with the Governments signatory hereto and not to make a separate armistice or peace with the enemies.”⁹⁶

In 1943 Roosevelt conferred in Cairo with Winston Churchill of U.K. and Chiang Kai-shek of China; during the meeting all parties agreed “that territories taken from China by Japan, including Manchuria, Taiwan, and the Pescadores, would be returned to the control of the Republic of China after the conflict ended.”⁹⁷ The resulting Cairo Declaration additionally states that “Japan will also be expelled from all other territories which she has taken by violence and greed.”⁹⁸

96 United Nations Declaration, 1 January 1942, at <http://www.un.org/en/aboutun/charter/history/declaration>, 23 March 2013.

97 Cairo Declaration, Dec. 1, 1943, 3 U.S.T. 858; U.S. Department of State Archive, Information released online from 2000–2009, at <http://2001-2009.state.gov/r/pa/ho/time/wwii/1071-84.htm>, 11 March 2013.

98 United Nations Declaration, 1 January 1942, at <http://www.un.org/en/aboutun/charter/history/declaration>, 23 March 2013.

The Potsdam Declaration of July 26, 1945, outlined the terms of surrender for Japan, including an affirmation of the terms of the Cairo Declaration, plus a territorial delimitation of Japan to “the islands of Honshu, Hokkaido, Kyushu, Shikoku and such minor islands as (the Allies) determine.”⁹⁹ Thus “Japan was to be reduced to her pre-1894 territory and stripped of her pre-WWII empire including Korea and Taiwan, as well as all her recent conquests.”¹⁰⁰ The actual instrument of surrender that Japan later signed in the same year pledges to accept the provisions of the Potsdam Declaration.

Thus China claims that when the Maguan/Shimonoseki Treaty is considered and interpreted as an integrated whole with these other relevant legal agreements, then Diaoyu Dao should have been returned to China after World War II.¹⁰¹ Japan maintains, on the other hand, that the 1951 San Francisco Peace Treaty (SFPT) should be the final arbiter on postwar disposition of its conquered and annexed territories.¹⁰²

Since the SFPT did not specifically name Diaoyu Dao/Senkakus in its list of territories Japan must renounce under article II, Japan contends that the treaty affirms its title to the islands.¹⁰³ Further, although the SFPT did not specifically include the islands under article III of the territories to be placed under the administration of the US via the UN trusteeship, the proclamation of the United States Civil Administration of the Ryukyus (USCAR) No. 27, issued on December 25, 1953, did.¹⁰⁴ Japan goes on to say the fact that China has expressed no objections

99 Potsdam Declaration, 26 July 1945, 3 U.S.T. 1204, para. 8, at <http://www.ndl.go.jp/constitution/e/etc/c06.html>, 11 March 2013.

100 Potsdam Declaration posted on the Princeton University site, at http://www.princeton.edu/~achaney/tmve/wiki100k/docs/Potsdam_Declaration.html, 11 March 2013.

101 Both China Mainland and China Taiwan put forth the same claim. China Taiwan makes an additional point that in the Sino-Japanese Peace Treaty of 1952, per article 4 Japan agreed to rescind all treaties signed with China before 1941. From the author’s point of view, it does not matter whether the islands are returned to China Taiwan or to China Mainland. China Taiwan and China Mainland are parts of the same country and eventually will be reunited into one indivisible China.

102 There are dissenting voices within Japan, the most recent of which is Prof. Yabuki’s. See his statement, “The issues of the Senkaku Islands and the Nansha Islands and Xisha Islands are symbolic of the fact that imperial Japan’s postwar settlement is *not yet completed*,” in China-Japan Territorial Conflicts and the US–Japan–China Relations in Historical and Contemporary Perspective, *The Asia–Pacific Journal*, Vol. 11, Issue 9, No. 2, 2013.

103 Japan Ministry of Foreign Affairs, The Basic View on the Sovereignty over the Senkaku Islands, at http://www.mofa.go.jp/region/asia-paci/senkaku/basic_view.html, 19 March 2013.

104 United States Civil Administration of the Ryukyus (USCAR) Number 27, (Washington, 1953) reprinted in *Kikan Okinawa* [*Okinawa Quarterly*] 56, 108.

to “the status of the Islands being under the administration of the United States ... clearly indicates that China did not consider the Senkaku Islands as part of [China] Taiwan.”¹⁰⁵

Japan’s reasoning is flawed because neither China Mainland nor China Taiwan was a signatory to that treaty. Moreover, while the SFPT was silent on the status of Diaoyu Dao/Senkakus, it is unreasonable to expect either Beijing or Taipei to raise a specific objection as to the island group’s disposal. Finally, although USCAR No. 27 subsequently included the Diaoyu/Senkaku Islands within the boundaries of Nansei Shoto, the information about the latter was based on none other than a 1939 Japanese map Japan provided General Douglas MacArthur in September of 1945 immediately after its unconditional surrender.¹⁰⁶

PRC Premier Zhou Enlai did in fact object, pointing to the treaty’s invalidity based on the United Nations Declaration of 1942. “China,” Zhou stated, “reserves [the] right to demand reparations from Japan and would refuse to recognize the treaty.”¹⁰⁷

The Taiwan administration kept silent about its rejection of the SFPT, being dependent at the time on the US for diplomatic recognition and economic and military assistance. While it might have recognized the article II of the SFPT later in the 1952 Sino-Japanese Peace Treaty, Taipei did not consider the treaty to

105 Japan Ministry of Foreign Affairs, The Basic View on the Sovereignty over the Senkaku Islands, at http://www.mofa.go.jp/region/asia-paci/senkaku/basic_view.html, 19 March 2013.

106 Unryu Suganuma explains in his October 3, 2013 blog, at <http://chinajapanusrelations.blogspot.com/>, 8 October 2013, that a confidential memo in the National Archive and Records Administration exposes how the US arrived at the boundaries of Nansei Shoto: “The term ‘Nansei Shotō’ was defined on the basis of a 1939 Japanese map to include the Sankaku [Senkaku] Islands, which were not specifically referred to in the (Peace) Treaty.” Suganuma then continues: “In other words, the information provided by Tokyo was the fundamental source for the U.S. determining the boundary of the Nansei Shoto. This is extremely ‘smart’ for the Japanese...”

107 From *Documents on New Zealand External Relations [DNZER]*, Vol. III, 1095 (1985), quoted in John Price, A Just Peace? The San Francisco Peace Treaty in Perspective, Japan Policy Research Institute, Working Paper No. 78, June 2001.

have any bearing on the question of sovereignty.¹⁰⁸ The postwar disposition of the Diaoyu/Senkaku Islands was not evident either, in view of the November 1943 conversation Roosevelt had with Chiang during a private dinner at Cairo. At the time Roosevelt asked Chiang whether China would want Ryukyu after the war;¹⁰⁹ Chiang replied that he would accept joint administration with the US.¹¹⁰ As the conversation was conducted in the context of territorial restoration after the war, the US president's intention to restore to China territories that Japan had gained through aggression after the war was much more unmistakable.

Although the terms of the SFPT were generous to Japan, the treaty was drafted to reflect the geopolitical and strategic interests of the US, with little attention devoted to the problem of settling territorial disputes of rival claimants in Asia. Despite Japan's statement that "[t]he facts outlined herein (i.e., articles II and III in the SFPT) clearly indicate the status of the Senkaku Islands being part of the territory of Japan,"¹¹¹ these articles have no implication for the sovereignty of the islands. Indeed, the US made this point very clear in the Okinawa Reversion Treaty Hearing in the US Congress in 1971.

Contrary to Japan's desires, the US then and since has maintained neutrality with regard to the sovereignty issue and declares that it transferred administrative rights only in the Okinawa Reversion Treaty.¹¹² However, the US assures Japan that the Diaoyu/Senkaku Islands are protected by article 5 of the 1960 US–Japan

108 When Taiwan administration realized too late this mistake in November 1953, Taipei raised objections to the American decision to "return" the Amami islands to Japan. However, over Taipei's objections the US returned these islands as a "Christmas present" in December 1953. China Taiwan's objections were recorded in "The Memorandum of the Chinese Ministry of Foreign Affairs to the US Ambassador in Taipei," November, 1953 and China, Legislative Yuan, *Li-fa-yuan Kung-pao* [*The Records of the Legislative Yuan*], 12th Session, No. 8 (15 January 1954), pp. 88–89, as noted in Tao Cheng, *The Sino-Japanese Dispute Over the Tiao-yu-tai (Senkaku) Islands and the Law of Territorial Acquisition*, *Virginia Journal of International Law*, Vol. 14, No. 2, 1973, p. 252.

109 See Chinese Summary Record [translation] of Roosevelt–Chiang Dinner Meeting [23 November 1943], *FRUS*, *The Conferences at Cairo and Tehran, 1943* (Washington, D.C.: Government Printing Office, 1961), p. 324.

110 See Chinese Summary Record [translation] of Roosevelt–Chiang Dinner Meeting [23 November 1943], *FRUS*, *The Conferences at Cairo and Tehran, 1943* (Washington, D.C.: Government Printing Office, 1961), p. 324.

111 Japan Ministry of Foreign Affairs, *The Basic View on the Sovereignty over the Senkaku Islands*, at http://www.mofa.go.jp/region/asia-paci/senkaku/basic_view.html, 19 March 2013.

112 U.S. Congress, Senate Committee on Foreign Relations, *Okinawa Reversion Treaty Hearing*, 92nd Congress, 1st Session, 27–29 October 1971, (Washington, D.C.: US Government Printing Office, 1971), pp. 89–90.

Mutual Security Treaty, which obligates the US to come to Japan's aid if territories under Japanese administration are attacked.¹¹³ As to the "residual sovereignty" Japan claims to have retained over the islands,¹¹⁴ US officials explained at the 1971 Congressional Hearing that the term referred to the US intention and policy of returning to Japan all territories it administered pursuant to article III of the SFPT.¹¹⁵

To sum up, China is in a much stronger position in claiming that the Diaoyu Dao should have been returned after WWII. The wartime international agreements, i.e., Cairo and Potsdam Declarations, China cites, like treaties, are "something more than statements of expected future conduct."¹¹⁶ The intent to create binding relations is evident.¹¹⁷ Thus the agreements are contractual in nature, creating legally recognizable expectations in terms of rights and obligations on all parties,¹¹⁸ especially when the Cairo Declaration was re-affirmed through the Potsdam Declaration, while the latter became the instrument of surrender to which Japan became a party by its acceptance. As to the SFPT, the US never recognizes the importance Japan attributes to it with respect to the disposition of the islands; the US position has always been that "the treaty alone is not necessarily the final

113 The Treaty of Mutual Cooperation and Security between Japan and the United States, 11 U.S.T. 1632. It was signed on 19 January 1960, and entered into force on June 23 of the same year, commonly known as the US–Japan Mutual Security Treaty.

114 Japan Ministry of Foreign Affairs, Q&A on the Senkaku Islands, answer to Q15, at http://www.mofa.go.jp/region/asiapaci/senkaku/qa_1010.html, 11 March 2013. "As is clearly expressed in a statement issued by Secretary of State Dulles at the San Francisco Peace Conference and in the Joint Communique of Japanese Prime Minister Kishi and U.S. President Eisenhower issued on June 21, 1957, the U.S. Government did recognize Japan's 'residual sovereignty' over the Nansei Shoto Islands."

115 U.S. Congress, Senate Committee on Foreign Relations, Okinawa Reversion Treaty Hearing, 92nd Congress, 1st Session, 27–29 October 1971, (Washington: US Govt. Print. Office, 1971); also *New York Times*, 23 April 1972, p. 17, col. 1.

116 Mark W. Janis, *An Introduction to International Law*, 4th ed., New York: Aspen Publishers, 2003, p. 9, note 14.

117 The most important element common to international agreements is the intent to create binding relations; it is this element that makes the agreements legally binding. See Kelvin Widdows, What is An International Agreement in International Law?, *British Yearbook of International Law*, Vol. 20, 1979, pp. 117–149.

118 Mark W. Janis, *An Introduction to International Law*, 4th ed., New York: Aspen Publishers, 2003, p. 9, note 14.

determinant of the sovereignty issue.”¹¹⁹

V. Could Japan Have Acquired Diaoyu/Senkaku Islands on the Basis of Effective Control?

In putting Diaoyu Dao/Senkakus under its administration along with Okinawa and other islands, the US had seemingly forgotten that the islands were China's, previously administered by China Taiwan.¹²⁰ Instead, at the start of the Cold War, in attempting to draw Japan into its “San Francisco System” which changed “Japan from a conquered and occupied country to a military ally,”¹²¹ the US appeared to have accepted the administrative arrangements of the pre-war Japanese government under which the Senkakus was attached to Okinawa Prefecture shortly after the Shimonoseki Treaty was signed. Since the Okinawa Reversion Treaty in 1972, the island group has been under the *de facto* administrative control of Japan.

Therefore, except for the 1945–1972 period during which it did not have “direct” control, Japan points to the “valid, (i.e., effective) control” it has exercised over the island group since 1895 as additional evidence it has sovereignty over the Senkakus.¹²² Justifications for territorial claims before the ICJ can generally be grouped into categories, with “effective control” being highly determinative in judicial decisions.¹²³ The *Minquiers and Ecrehos Case*, for instance, shows that “[n]o amount of historical or documentary evidence will trump the actual long-term, peaceful occupation or the exercise of state authority over a territory in

119 Seokwoo Lee, Territorial Disputes in East Asia, the San Francisco Peace Treaty of 1951, and the Legacy of US Security Interest in East Asia, based on Telegram regarding Senkaku Islands (14 September 1970) US NARA/Doc. No.: Pol 32-6 Senkaku Is and XR Pol 33 China Sea (4 September 1970) in Seokwoo Lee and Hee Eun Lee eds., *Dokdo: Historical Appraisal and International Justice*, The Hague: Martinus Nijhoff Publisher, 2011, p. 58, note 51.

120 According to China Taiwan, because Japan used Senkakus to refer to the islands, both China Taiwan and the Allies were unaware it was one and the same island group as Diaoyu Dao. Thus the islands were mistakenly placed under US trusteeship per article III of the SFPT. The author believes this may be another reason for the confusion in addition to the one-sided Japanese map General MacArthur was given and used.

121 Iriye Akira, *The Cold War in Asia: A Historical Introduction*, Upper Saddle River: Prentice Hall, 1974, p. 182.

122 Japan Ministry of Foreign Affairs, Q&A on the Senkaku Islands, answer to Q3, at http://www.mofa.go.jp/region/asiapaci/senkaku/qa_1010.html, 19 March 2013.

123 Brian Taylor Sumner, Territorial Disputes at the International Court of Justice, *Duke Law Journal*, Vol. 53, 2004, pp. 1779~1812.

controversy,”¹²⁴ absent any protest from other states.

However, as the ICJ also notes “in the *Burkina Faso/Mali* case, the word ‘title’ or sovereignty comprehends both any evidence which may establish the existence of a right and the actual source of that right.”¹²⁵ Effective control is evidentiary in nature. From 1895 to 1945, the source of that right to exercise state authority might have stemmed legitimately from China’s cession of title in the Maguan/Shimonoseki Treaty. Putting aside for the moment China’s contention that the islands should have been returned after WWII, the question remains as to whether Japan has the “actual source of that right” from 1945 to date to exercise effective control.

In order to answer this question, the activities which comprise administrative versus effective control must first be explored. Under international law these overlap considerably.¹²⁶ Thus, effective control may be said to include administrative acts and a range of other activities, while the exercise of administrative functions comprises part of effective control. As a result of this overlap, administrative and effective control may appear on the surface to be interchangeable. But the two are qualitatively different in the Diaoyu Dao/Senkaku dispute and cannot be equated with the type of effective control judicial and arbitral courts have found to be determinative in past territorial disputes.

Japan admits it “could not exercise direct control over the Islands until the administrative rights were reverted to Japan in 1972.”¹²⁷ Therefore its “direct” or “valid/effective” control is derived from its administrative control. Japan, however, did not establish and maintain administrative control from 1972 to the present on its own. Per US official statements, the administrative rights were transferred to

124 William B. Heflin, Diaoyu/Senkaku Islands Dispute: Japan and China, Oceans Apart, *Asian-Pacific Law and Policy Journal*, Vol. 18, 2000, pp. 16–17.

125 Malcolm N. Shaw, *International Law*, 5th ed., Cambridge: Cambridge University Press, 2003, p. 412.

126 For example, in the case of *Sovereignty over Pulau Ligitan and Pulau Sipadan*, Indonesia and Malaysia presented competing claims to the islands of Ligitan and Sipadan based on a number of factors such as history, treaty law and so on. See *Sovereignty over Pulau Ligitan and Pulau Sipadan*, *I.C.J. Reports*, 2002, pp. 625, 630. The International Court of Justice found Malaysia’s “legislative, administrative or quasi-judicial acts,” namely, instances of effective control, sufficient to award it the title. See Press Release, ICJ/605, International Court Finds that Sovereignty over Islands of Ligitan and Sipadan belongs to Malaysia, 17 December 2002, at <http://www.un.org/News/Press/docs/2002/ICJ605.doc.htm>, 13 December 2012.

127 Japan Ministry of Foreign Affairs, Q&A on the Senkaku Islands, answer to Q3, at http://www.mofa.go.jp/region/asiapaci/senkaku/qa_1010.html, 19 March 2013.

it. The status quo of administrative control is maintained thereon not by Japan's efforts alone so much as by the US standing firmly behind Japan with article 5 of the 1960 US–Japan Mutual Security Treaty. The trilateral nature of the conflict is obvious, for whenever the dispute escalates Japan calls on the US to reaffirm the latter's commitment to the alliance.

In this sense, the so-called “valid/effective control” Japan claims to exercise can hardly be said to fall under the purview of “effective control” as the term is generally understood and has been previously used in international arbitrations and adjudications. In no other dispute is there a similar instance of this so-called “valid/effective control” enabled by an administrative control which is transferred and then backed by the strength of the world's only superpower. The anomaly of this case makes it difficult to assess how it would be adjudicated were it to be submitted to the ICJ.

At worst, the administrative control Japan acquires over the Senkakus may be viewed as a product of its territorial expansionism and imperialism, that is, a seizure of land by a state upheld by a stronger state. At best, Japan may be said to exercise “circumscribed”¹²⁸ administrative, rather than effective control, over the islands. Its right to exercise this administrative control, however, was disputed by China in 1971 as soon as China realized the islands were to be turned over to Japan. Then in 1972 both countries reached a tacit agreement to “shelve” the dispute during normalization talks between Japanese Prime Minister Tanaka Kakuei, and PRC Premier Zhou Enlai. In 1978, PRC Vice Premier Deng Xiaoping, after meeting with Japanese Prime Minister Fukuda Takeo, again talked about shelving the issue, commenting that “[o]ur generation is not wise enough to find a common language on this question. Our next generation will certainly be wiser. They will find a solution acceptable for all.”¹²⁹ As a result of this tacit agreement, both

128 Paul O'Shea, *Sovereignty and the Senkaku/Diaoyu Territorial Dispute*, p. 4, at <http://www.hhs.se/EIJS/Research/Documents/240.pdf>, 15 August 2013.

129 Deng Xiaoping speech on the Diaoyu Dao conflict, quoted in Chi-Kin Lo, *China's Policy towards Territorial Disputes: The Case of the South China Sea Islands*, London: Routledge, 1989, pp. 171–172; see BBC Summary of World Broadcasts, 1 June 1979 for a similar quote.

countries had engaged in “active dispute management” prior to September 2012.¹³⁰

For instance, both governments attempted to limit activists’ access to the islands. Japan had refrained from developing and putting military installations on the islands.¹³¹ Although the American media and politicians repeatedly blamed Beijing for mobilizing Chinese opinion against Japan on the island dispute, in actuality for many years China had officially or unofficially tried to minimize media coverage of the conflict. Further, “the Chinese government ha[d] restricted the number, scope and duration of protests against Japan over this issue.”¹³²

During this period of active dispute management, stability seemingly prevailed despite occasional eruptions of confrontation between the two countries. Now, however, with the nationalization of the islands, Japan not only denies that a territorial dispute exists but that an agreement has ever been reached to shelve the issue,¹³³ signaling the end of the status quo and ushering in a new period of instability and conflict with China.

130 Taylor Fravel, Explaining Stability in the Senkaku (Diaoyu) Dispute, in Gerald Curtis, Ryosei Kokubun and Wang Jisi eds., *Getting the Triangle Straight: Managing China–Japan–US Relation*, Washington, D.C.: The Brookings Institution Press, 2010, p. 151, at <http://taylorfravel.com/documents/research/fravel.2010.stabilitiy.senkakus.pdf>, 15 August 2013.

131 Taylor Fravel, Explaining Stability in the Senkaku (Diaoyu) Dispute, in Gerald Curtis, Ryosei Kokubun and Wang Jisi eds., *Getting the Triangle Straight: Managing China–Japan–US Relation*, Washington, D.C.: The Brookings Institution Press, 2010, pp. 153–155, at <http://taylorfravel.com/documents/research/fravel.2010.stabilitiy.senkakus.pdf>, 15 August 2013.

132 Taylor Fravel, Explaining Stability in the Senkaku (Diaoyu) Dispute, in Gerald Curtis, Ryosei Kokubun and Wang Jisi eds., *Getting the Triangle Straight: Managing China–Japan–US Relation*, Washington, D.C.: The Brookings Institution Press, 2010, p. 154, at <http://taylorfravel.com/documents/research/fravel.2010.stabilitiy.senkakus.pdf>, 15 August 2013.

133 Japan Ministry of Foreign Affairs, Q&A on the Senkaku Islands, answer to Q14, at http://www.mofa.go.jp/region/asiapaci/senkaku/qa_1010.html, 19 March 2013. The tacit agreement existed according to among others, Westerner and Japanese journalists, as this statement from *Japan Times* shows, “[p]revious governments under the LDP, which was ousted from power by the DPJ in the 2009 general election, had respected (this) tacit agreement Tokyo allegedly reached with Beijing in the 1970s,” in Ayako Mie, No quick Senkakus fix, but return to status quo likely: domestic issues preventing quick resolution of row, *Japan Times Online*, 12 October 2012, at <http://www.japantimes.co.jp/text/nn20121012f1.html#sthash.LcnYxzYU.dpuf>, 20 March 2013. In addition, Professor Yabuki Susumu charged that Japan MOFA excised the minutes of the Zhou–Tanaka exchange from the MOFA website along with Tanaka’s solemn apology for Japanese aggression in the Asia-Pacific War, in Stephen Harner, Interview with Professor Yabuki on the Senkaku/Diaoyu Crisis and US–China–Japan Relations, *Forbes*, 3 October 2012, at <http://www.forbes.com/sites/stephenharner/2012/10/03/interview-with-professor-yabuki-on-the-senkakudiaoyu-crisis-and-u-s-china-japan-relations/>, 13 December 2012.

Accordingly, Japan not only does not have the “actual source of that right” to exercise effective control, its exercise of the so-called effective control is by no means peaceful; instead the relative calm with respect to the dispute was sustained by an implicit agreement between the two states. Nor can Japan be said to have exercised “effective” control, for whatever “circumscribed” administrative control it has exhibited to date would probably fail the bar the courts have set for awarding title to territories in the past.

VI. Access to Petroleum Resources, or Strategic Location of Diaoyu/Senkaku Islands?

Japan accuses China of not making a sovereignty claim until the discovery of potential reserves of hydrocarbon in the seabed around Diaoyu Dao/Senkaku.¹³⁴ But the discovery of oil happened around the time when China Taiwan first learned that the US would terminate its trusteeship of the islands and turn them over to Japan. Therefore, does China really covet the seabed resources or is it simply a matter of coincidence that the claim and discovery occurred within the same time period?

Oil may be one of the motivations for China’s claim. Another cause for China Taiwan’s silence until the 1970s was discussed in the previous section: the future disposition of the islands by the US in favor of Japan was not obvious in the context of the 1943 Roosevelt/Chiang conversation. After the war, China Taiwan would have no reason to object to their trusteeship under the US, its ally, until it became clear that the US, without consultation, decided to transfer administrative control of these islands to Japan. As to China Mainland, it had protested the SFPT all along, including that treaty’s violation in spirit and letter of the 1942 United Nations Declaration.

The imputation of China’s motive behind its claim, i.e., thirst for the potential reserves of hydrocarbon resources, could be applied to Japan as well. Japan, after all, had also remained silent until then. In fact before the discovery of oil, both

134 Japan Ministry of Foreign Affairs, The Basic View on the Sovereignty over the Senkaku Islands, at http://www.mofa.go.jp/region/asia-paci/senkaku/basic_view.html, 19 March 2013.

countries “were confused about the existence of (these islands)”¹³⁵ and both seemed to have forgotten about the issue of their sovereignty.¹³⁶

Moreover, Japan may need a significant source of domestic oil supply more than China. Although concluding from tortuous reasoning that Japan has a strong claim, the Central Intelligence Agency nevertheless finds in a 1971 report, declassified in 2007, that “[w]hile all concerned powers are eager to establish their rights to these potentially large resources, the importance of petroleum to the nations involved varies greatly ... Japan is in the most critical position from the standpoint of oil supply. This is due to the almost total lack of significant domestic crude oil resources (in Japan)...”¹³⁷

Yet the extent to which these islands would contribute to a state’s claim of potential riches under the seabed and to their maritime delimitation is uncertain. Under article 121 of UNCLOS, an “island” generates, in addition to its territorial sea, a contiguous zone, an economic exclusive zone and a continental shelf, as any land territory would, whereas a “rock” which cannot sustain human habitation and economic life, does not. Whether the Diaoyu/Senkaku islands qualify as islands, rocks or something in-between remains in doubt, for even the *travaux préparatoires* for article 121 give little clue as to its possible classification.¹³⁸

Case law indicates the value of an island in maritime delimitation would be determined by its “size, importance and like considerations in the general geographi-

135 Unryu Suganuma, *Sovereign Rights and Territorial Space in Sino-Japanese Relations: Irredentism and the Diaoyu/Senkaku Islands*, Honolulu: University of Hawaii Press, 2000, p. 124. He gave numerous examples of this “confusion” in pp.124-129; the confusion extends to maps, textbooks, etc. in both countries, which should have but did not include the islands as territory of either Japan or China. In fact Suganuma calls the period “Years of Confusion.” Between cession of the islands and the discovery of oil, China went through a series of disruptions brought on by changes in government due to revolutionary and civil wars. So from the author’s point of view, the confusion is entirely understandable. Causes for Japan’s confusion is well stated by Prof. Yabuki, *China–Japan Territorial Conflicts and the US–Japan–China Relations in Historical and Contemporary Perspective*, *The Asia–Pacific Journal*, Vol. 11, Issue 9, No. 2, 2013, note 135.

136 Prof. Yabuki noted in *China–Japan Territorial Conflicts and the US–Japan–China Relations in Historical and Contemporary Perspective*, *The Asia–Pacific Journal*, Vol. 11, Issue 9, No. 2, 2013, that “Japan, a defeated nation, forgot about the uninhabited Senkaku islands,” until the reversion and discovery of hydrocarbon reserves.

137 Directorate of Intelligence, *Intelligence Report, The Senkaku Islands Dispute: Oil Under Troubled Waters?*, CIA/BGI GE 71-9, May 1971, Point 47, p. 20, at <http://cryptome.org/2013/07/guccifer-cia-senkaku.pdf#sthash.sadTucKD.dpuf>, 8 October 2013.

138 See Steven Wei Su, *The Tiaoyu Islands and Their Possible Effect on the Maritime Boundary Delimitation between China and Japan*, *Chinese Journal of International Law*, Vol. 3, 2004, pp. 393-397.

cal context.”¹³⁹ Small and isolated islands would probably have limited effect if they were not ignored altogether.¹⁴⁰ But Japan’s claim of a 163,000-mile² maritime zone around the Okinotorishima rocks, peaking less than 20 feet above high tide, with Japanese-built walls around them to keep the sea level low, demonstrates Japan would attach more value to these islands than China would with respect to Japan’s resulting ability to lay claim to the continental shelf of the East China Sea.¹⁴¹ Japan’s imputation may simply be a projection of its own motives onto China.

Besides, in 1990 and again in 2006 China offered, and Japan turned down, joint resource development of the region surrounding the Diaoyu Dao/Senkakus. The offer was renewed as late as 2010, but Tokyo saw no reason for joint development as “China’s claims on the Senkakus lack grounds under international law and history.”¹⁴² However, in the two countries’ maritime boundary dispute, China and Japan did reach an agreement in 2008 to jointly develop the gas deposit in the Chunxiao/Shirakaba field, although not much progress has been made since 2008.¹⁴³ Clearly then, China’s position is not all about making a unilateral claim to the oil and gas reserves in the seabed around Diaoyu Dao.

Nonetheless, the current flare-up has taken on a new dimension. Now that Japan has repudiated the implicit agreement to shelve the dispute, China must respond. China has limited room to maneuver on this issue for it has to answer to what its domestic constituency regards as another instance of Japan’s territorial aggression. The PRC’s very legitimacy rests in large part on the ability to preserve the nation’s territorial integrity after a century of dismemberment by Japan and other foreign powers.

139 Eritrea/Yemen Case, Phase II Maritime Delimitation, Award, 17 December 1999, para. 117, at http://www.pca-cpa.org/showpage.asp?pag_id=1160, 15 August 2013; cases such as Tunisia/Lybia Case, Judgment, *I.C.J. Reports*, 1982, p. 18, para. 79, and Qatar v. Bahrain Case, Judgment, *I.C.J. Reports*, 2001, p. 39, para. 248, also affirmed these criteria.

140 Steven Wei Su, The Tiaoyu Islands and Their Possible Effect on the Maritime Boundary Delimitation between China and Japan, *Chinese Journal of International Law*, Vol. 3, 2004, pp. 404–408.

141 M. Carr, China and the Law of the Sea Convention, *The Australian Journal of Chinese Affairs*, Vol. 9, 1983, p. 44.

142 Tokyo Nixed Joint Senkaku Exploitation, *Japan Times Online*, 22 October 2010, at <http://www.japantimes.co.jp/text/nn20101022a1.html>, 13 December 2012.

143 For details of this agreement on joint development, see Disputed Claims in the East China Sea: An Interview with James Manicom by Chris Acheson, *The National Bureau of Asian Research*, 25 July 2011, at <http://www.nbr.org/research/activity.aspx?id=159>, 16 August 2013.

More importantly, the islands not only sit along important sea lanes but they could also be used “to project power” over the seas in that region.¹⁴⁴ For the US and Japan, control of these islands may mean the installation of radar or sonar to monitor the movement of China’s developing ballistic submarine fleet, a crucial advantage to the US’ Pivot to Asia geopolitical policy and to Japan’s general defense strategy. For China, control would provide an opening in the “first island chain” of US allies to permit continuing unobserved Chinese submarine access to the Pacific Ocean;¹⁴⁵ it would also ensure no enemy could use the islands as “a platform for radar and missiles”¹⁴⁶ in launching an attack on China.

It may be recalled that the Ming dynasty, which experienced frequent depredations of the *wokou*, switched its attention from guarding its land territory to the north only, to establishing a maritime defense along its coast. Consequently, Diaoyu, Huangwei and Chiwei islands were incorporated into its seacoast defense as shown in the seventh and eighth Fujian defense maps in *Chouhai Tubian*. The strategic importance of Diaoyu Dao, sustained through the Ming period, was carried into the Qing dynasty which made maritime defense its priority in 1885 following the 1874 Japan Expedition and the Sino-French war of 1883–1885.

In modern times, immediately after the PRC’s split with the Soviet Union in the 1960s, China considered one of its main security threats to be a Soviet land invasion from the north. However, such an attack was later deemed improbable and with the advances in modern naval warfare in the 1980s, China once again turned its attention to coastal defense.¹⁴⁷ This change in policy is further reinforced by the recent US announcement of its Pivot to Asia in 2011. In spite of the Obama administration’s insistence that “U.S. rebalance toward the Asia-Pacific is also a

144 Taylor Fravel, Explaining Stability in the Senkaku (Diaoyu) Dispute, in Gerald Curtis, Ryosei Kokubun and Wang Jisi eds., *Getting the Triangle Straight: Managing China-Japan-US Relation*, Washington, D.C.: The Brookings Institution Press, 2010, p. 158, at <http://taylorfravel.com/documents/research/fravel.2010.stabilitiy.senkakus.pdf>, 15 August 2013.

145 Robert Wade, The Island Dispute between China and Japan: the Other Side of the Story, at <http://triplecrisis.com/the-island-dispute-between-china-and-japan-the-other-side-of-the-story/>, 17 March 2013. The *first island chain* refers to the first chain of major archipelagos out from the East Asian continental mainland coast including the Philippines, Korea, Japan, etc., all allies of the US.

146 Robert Wade, The Island Dispute between China and Japan: the Other Side of the Story, at <http://triplecrisis.com/the-island-dispute-between-china-and-japan-the-other-side-of-the-story/>, 17 March 2013.

147 People’s Liberation Navy – Offshore Defense, at <http://www.globalsecurity.org/military/world/china/plan-doctrine-offshore.htm>, 18 March 2013.

response to the strong demand signal from leaders and publics across the region,”¹⁴⁸ China believes that the US is attempting China’s encirclement to deter its rise as a regional power.¹⁴⁹ Moreover, Japan’s unilateral decision to nationalize three of the Diaoyu/Senkaku Islands in 2012 not only deepens China’s mistrust, but also plays into China’s fear that Japan may be too eager to be a partner in the US strategy to contain China.

Therefore, in contrast to Japanese allegation of China’s thirst for the hydrocarbon reserves under the seabed, China now “values the islands for their location in the ‘first island chain.’”¹⁵⁰ During the period of active dispute management, the islands were not under any particular country’s control. But after Japan nationalized the islands and denied the existence of the implicit agreement, China perceives a potential threat that had not existed previously. As a result China feels it must regain control of the islands to ensure its continuing unobserved access to the oceans and its safety from enemy attack. Thus the Diaoyu islands have come full circle to re-assume the strategic position they held in the Ming and Qing dynasties for the coastal defense and security of China.

VII. Conclusion

China’s claim to sovereignty over the Diaoyu/Senkaku Islands, compared to Japan’s, is much more solidly grounded in international law. Evidence from the Ming and Qing dynasties demonstrates China had established and consolidated an original or historic title to the islands before 1895. Japan’s assertion that the islands were *terra nullius* is disingenuous, if not in violation of the cardinal principle of good faith in applying and observing international law. China credibly contends it ceded the islands in the Maguan/Shimonoseki Treaty and therefore its silence from 1895 to 1945. Between 1972 to late 2012, stability in the dispute prevailed, founded on an implicit agreement reached in 1972 and reaffirmed in 1978 by both countries to shelve the issue to a later day, despite Japan’s current denial of this agreement.

148 Remarks by Tom Donilon to the Asia Society, at http://www.foreignpolicy.com/files/fp_uploaded_documents/130311_Donilon%20Asia%20Society.pdf, 18 March 2013.

149 Li Jie, US in Position to Strangle China’s Maritime Life Lines, *Global Times*, at <http://www.globaltimes.cn/content/725455.shtml>, 17 March 2013.

150 Robert Wade, The Island Dispute between China and Japan: the Other Side of the Story, at <http://triplecrisis.com/the-island-dispute-between-china-and-japan-the-other-side-of-the-story/>, 17 March 2013.

Based on international agreements and the surrender instrument Japan signed, China has good reasons to maintain the islands should have been returned after WWII. The SFPT, on the other hand, has no implication for the disposition of the islands; the US remains neutral as to their sovereignty status, while Japan would have retained residual sovereignty when the island group reverted to its administration only if it had acquired legitimate title before reversion. Although the ICJ has shown effective control to be determinative in a number of its rulings, a close scrutiny of Japan's so-called "valid control" reveals it to be no more than transferred administrative control, sustained with the efforts of a third party, the US, thus bearing scant resemblance to the concept of effective possession/control in other adjudicated cases. Finally, Japan's imputation of motive to China may merely be a reflection of its own thirst for territory and resources.

With its nationalization of the islands in 2012, Japan may have crossed the line China drew in the sand to avoid confrontation. By so doing Japan may have qualitatively "transformed the nature of the issue."¹⁵¹ Scholars in the past have observed how difficult it would be for China to regain control of the islands short of war.¹⁵² Yet Japan's denial of a territorial dispute and its repudiation of the implicit agreement to shelve the issue alerted China to the necessity of conducting regular patrols of the disputed territory by sea and air, much as Japan had done since the 1970s, to sustain its claim. Despite being tarred as an aggressor who is intruding into Japanese sea and air space, and under constant challenge by Japan's better armed "self-defense" forces and the unspoken threat of US involvement if a military confrontation with Japan ensues over these islands, China may yet manage to defy the prognostication of these scholars. To an impartial observer, China is now making gradual progress to reclaiming control of the islands it has lost since the turn of the 20th-century.

151 Shelve What Controversy? Develop What Resources? With Whom?, *China Times*, editorial (Taipei, China Taiwan), translated by Bevin Chu, at http://datelinetaipei.blogspot.tw/2012/11/shelve-what-controversy-develop-what_1488.html, 13 December 2012.

152 Paul O'Shea, *Sovereignty and the Senkaku/Diaoyu Territorial Dispute*, p. 4, at <http://www.hhs.se/EIJS/Research/Documents/240.pdf>, 15 August 2013; basically that is the underlying tenor of Fravel's article as well.