The Diaoyu / Senkaku Islands Dispute

Questions of Sovereignty and Suggestions for Resolving the Dispute

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Content

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Abstract:
The territorial conflict over the Diaoyu / Senkaku Islands sovereignty has dragged on since the 1970s. Today, Japan administers the islands, which are also claimed by Taiwan and the People's Republic of China. All claimants use historical evidence to bolster the legal strength of their claim. The dispute over the islands is also linked to other important factors, such as nationalism in an unreconciled international environment and the rights to exploitation of natural resources. The unresolved Taiwan / China question puts another burden on its resolution. This particular conflict will be compared to other similar remote islands, which already have been subject to a legal procedure and, in some cases, resolution. This thesis aims to outline the impediments involved in a potential legal resolution without ignoring the political and other relevant facts. Given the regional political setting, the only viable resolution is likely to be more political than legal. This thesis aims to propose a join-development scheme on basis of other previously settled territorial disputes.

Acknowledgements

It goes without saying that in general research is the fruit of long study and hard work coupled with alternating periods of joy and frustration. I spent many solitary hours in front of the computer screen in order to write this LL.M. thesis. My topic is the Diaoyu / Senkaku Islands dispute and the thesis contains three of my main areas of interest: Politics, International Public Law and the Mandarin language. Having taken Mandarin as a minor in Law School and having undergone extensive travelling in most parts of Asia, I felt morally obliged to choose a China-related topic. As most of the primary literature is found abroad, I had to rely predominantly on secondary literature. Studying the literature, I often had to remind myself to reading "in between the lines". Quite many scholars have produced biased articles on the dispute, often distorting the sources they were quoting. This conflict will not only be resolved by legal means but by the concurrence of politics. This can be seen by reading the articles: Most authors tend to adopt a rather partial view in favour of their own country in this dispute.

I feel deep gratitude to many people and institutions for alleviating my hardships and for helping me tackle such a research proposal.

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"It is true that the two sides maintain different view of this question... It does not matter if the question is shelved for some time, say ten years. Our 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."[1]

[1] Deng Xiaoping holding a speech on the Diaoyutai conflict, cited in Chi-Kin Lo, China's Policy Towards Territorrial Disputes: The case of the South China Sea Islands 171-172 (1989); No. 44 Beijing Review, (November 3rd, 1978), 16

1. Introduction

The topic of this thesis is: which state has the better title in law to the Diaoyutai / Senkaku Islands[2] and their resources. It is also proposed to suggest ways in which the territorial and hence the title to appurtenant resources might be resolved.

The Diaoyu / Senkaku Islands are situated in the Eastern Chinese Sea about 400 km west of Okinawa and 170 km northeast of Taiwan. These five volcanic islands and three rocky outcroppings are subject to a severe dispute between Japan, China and Taiwan.[3] They are uninhabited islands sustaining scarce flora of little economic value, except for some fishing and feather collecting activities.[4] Their military significance is high as a strategic outpost.[5] The islands are too small to be delineated on most maps and they sit on the edge of the continental shelf of mainland Asia. They are separated from the Japanese Okinawa islands by a deep (2270 meter) sea trench.[6]

The Eastern Chinese Sea is rich in fishing stocks, oil and gas deposits. The islands became a celebrity in Asian politics when the rich oil reserves of almost 100 billion barrels were discovered in 1969. They represent a value of about $ 6 trillion US, which is the equivalent of more than the annual GNP of the United States of America. In addition to the oil, 200 billion cubic meters of natural gas are located in the area.[7]

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[2] In order to adapt a neutral stance, the islands are named "Diaoyutai" when analysing the Chinese claims, Tiao yu T'ai whenever Taiwanese claims are concerned and they are called the "Senkaku Islands" when dealing with the Japanese perspective

[3] All parties of the dispute use the term "islands" for the agglomeration of uninhabited soil - although the question whether they may be regarded as islands is disputed.

[4] Yoshiro Matsui, "International Law Of Territorial Acquisition And The Dispute Over The Senkaku (Diaoyu) Islands", Vol. 40 The Japanese Annual of International Law (1997), 3

[5] Tao Cheng,"The Sino-Japanese Dispute Over the Tiao-yu-tai (Senkaku) Islands and the Law of Territorial Acquisition", Vol. 14 V.J.I.L. (1973), 265

[6] Daniel Dzurek; The Senkaku/Diaoyu Islands Dispute, www.ibru.dur.ac.uk/resources/docs/senkaku.html, accessed on February 20th, 2007

[7] Jean-Marc F. Blanchard, The U.S. Role in the Sino-Japanese Dispute over the Diaoyu (Senkaku) Islands, 1945-1971, No. 161 China Quarterly (2000), 95; Curtin, Sean J, "Stakes rise in Japan, China gas dispute", University of Alberta: http://www.uofaweb.ualberta.ca/chinainstitute/nav03.cfm?nav03=44057&nav02=43872&nav01=43092, accessed on July 24th, 2007

The question arises as to whether they are islands in the sense of UNCLOS. Are they capable of sustaining human habitation and economic activity? It is doubtful that they fulfil these requirements in the strict sense. However, all parties of the dispute take their status as islands for granted. The legal consequence of this specific status would be that they create their own territorial sea, continental shelf, and their own Exclusive Economic Zone (EEZ). According to the United Nations Convention on the Law of the Seas (UNCLOS) the islands are entitled to create an Exclusive Economic Zone (EEZ) of 40,000 sq km.[8] The country holding the sovereignty over the islands automatically becomes the owner of the natural resource deposits. If China was entitled to a full continental shelf and EEZ, then the PRC could claim the shelf up to the Okinawa Trough and an EEZ to an equidistant line with the proximate undisputed Japanese Island. On the contrary, provided that Japan is the holder of the legal title over the disputed islands, the islands could legally generate their own continental shelf and their own EEZ, which would put Japan into a position to claim the median line with Taiwan and China.[9] The parties of the conflict have overlapping maritime claims, thus the settlement of the territorial question is a precondition for the maritime boundary issue.

One has to forget that the disputed should not simply be regarded as another conflict about oil. The conflict is a centrepiece for Asian nationalistic ideas; governments have a tendency to stir up a conflict with the goal of deviating attention away from social problems in their own country. The Chinese government is not inclined to alienate domestic anti-Japanese protesters as they could easily try to provoke social unrest in mainland China.[10]

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[8] According to Art. 121(II) UNCLOS islands can create a territorial sea, contiguous zone and Exclusive Economic Zone (EEZ); Daniel Dzurek, The Senkaku/Diaoyu Islands Dispute, www.ibru.dur.ac.uk/resources/docs/senkaku.html, accessed on February 20th, 2007

[9] Mark J. Valencia, Yoshihisa Amae, "Regime Building in the East China Sea", Vol. 43 Ocean Development & International Law (2003), 191

[10] Erica Strecker Downs, Phillip C. Saunders, "Legitimacy and the Limits of Nationalism", Vol. 23 International Security (1998), 126

One reason that the conflict has not been settled is the unsolved political situation of the two Chinese countries, namely the Republic of Taiwan (PRO) and the People's Republic of China (PRC / China mainland). Both countries claim to be the legitimate representative of the Chinese people. In addition, for the Taiwanese government the conflict is related to the question of formal independence of the country. This dispute also has an effect on other unresolved territorial conflicts of the claimant states: Japan is eager to recover the Kurile Islands, which are under Russian control,[11] and its claim to the Liancourt Rocks[12] vis-à-vis South Korea.[13] Similarly, China has many claims in the Southern Chinese Sea, for example, about the Spratly islands. At the same time, the mutual economic dependence of all disputants ensures that the dispute has not evoked any severe military deployments. It is therefore the interest of all parties to keep the dispute at a low level.

All claimants state that they were the first to have discovered and occupied the islands. As early as 1372 Chinese Imperial Envoys used the islands as a navigation point.[14] China argues that even in the 18th century Japanese maps showed the islands to be Chinese territory.[15] Taiwan's claim to the islands concentrates on the argument that Taiwan had occupied them for a long time and that the islands form a natural prolongation of the Taiwanese continental shelf. Japan claims that until the end of the 19th century the islands were "terra nullius". Since 1894, the islands have been under Japanese administration.

In the Sino-Japanese war in 1895, China was forced to cede Taiwan and all the islands belonging to her to Japan. Later, in the Sino-Japanese treaty of 1952 the parties signed that as a consequence of the war all prior agreements

[11] Terashima Hiroshi, "On becoming an Ocean State", Vol. 34 Japan Echo (2007), 39
[12] The Koreans call it the "Dokdo" rock and the Japanese refer to them as "Takeshima" island
[13] Serita Kentaro, "The Takeshima Dispute: A Radical Proposal", Vol. 34 Japan Echo (2007), 35
[14] Tao Cheng, The Sino-Japanese Dispute over the Tiao-yu-tai (Senkaku) Islands and the Law of Territorial Acquisition, Vol. 14 V.J.I.L (1973), 253
[15] Sina Xinwen zhongxin, "Zhongguo lingtu diaoyudao dili lishi ziliao", (25.3.2005); http.//news.sina.com.cn/c/2005-03-25/10396192318.shtml., accessed on March 30th, 2007

were hereby null and void.[16] After World War II, the U.S. administered the disputed islands in conjunction with the Okinawa Islands. In 1972, the U.S. returned administration to Japan.[17]

Source: http://de.wikipedia.org/wiki/Senkaku-Inseln (accessed on February 14th, 2007)

In former times, the significance of a state was determined by its territorial space. In modern economy a state's might is mainly determined by the stake it has in the global economy. Since the three claimants' national economies have become more and more entwined and mutually dependent, a bellicose outcome of the conflict does not appear very probable because all claimants fear domestic struggles as a suite of such a conflict.

[16] quoted in: Caleb Wan, "Security Flashpoint: International Law and the Islands Dispute in the Far East", The New Zealand Postgraduate Law E-Journal (2/2005), 42, www.nzgraduatelawejournal.auckland.ac.nz./PDF%20Articles/Issue%202%20(2005)/1%20Caleb's%20Final.pdf ,accessed on March 13th, 2007

[17] Baidu bailiao, "Diaoyu dao"; http://baike.baidu.com/view/2876.htm", accessed on March 30th, 2007; Ericka Strecker, Phillip C. Saunders, "Legitimacy and the Limits of Nationalism – China and the Diaoyu Islands", Vol. 23 International Security (1998), 125

To sum up, the dispute is not only territorial but also maritime, including legal questions of discovery and occupation. If the dispute is to be settled, the resolution is likely to be as much political as legal. The political importance of the dispute is too critical that the parties of the conflict feel that a purely legal strategy contains too many risks. Political factors very often outweigh reasonable legal arguments in Asia and international law is perceived as Western – influenced. International law is distrusted by Asian governments. The Asian approach to dispute resolutions is one which permits both parties to save face, for this reason a common political solution is more likely to be found than a high risk international litigation strategy.

The proposed solution of this thesis is for a joint development plan. Some bilateral fishery treaties will be analysed and will be the basis for the author's own proposal for a solution to the conflict.

1.1. Emergence of the name of the islands

The first Chinese reference to the name of the islands dates back to the year 1221.[18] The five islands and three rocks all bear their own name. The general term originates from the biggest island, which is called the Uotsuri- / Diaoyu Island. The Diaoyu name may also be used as a general term, whenever someone wants to refer to the group of the Diaoyu / Senkaku islands. In Mandarin, the Diaoyu Islands are either called Diaoyu Dao or Diaoyutai islands. Both names have a similar meaning: Diaoyu Dao means "fishing island", whereas Diaoyutai means "fishing platform".[19] Taiwanese stick more to the word "Tiao-yu-tai," whereas China Mainland prefers to use the name "Diaoyu-dao".[20] As the Pinyin transliteration predominates in mainland China, the PRC writers usually write using simplified characters and the Romanization of "Diaoyu dao". The "Taiwanese" characters are romanized by the "Wade Giles"- System and thus the transliteration is "Tiao-yu-tai."

[18] Yudi Jisheng, (History of Famous Geographical Locations in China), Wang Xiangzhi, quoted in Suganumu, 42

[19] Yu-His Nieh, "Taiwans Seerechtsansprüche", in:Werner Draghun, Umstrittene Seegebiete in Ost- und Südostasien (1rst ed., 1985), 232

[20] Baidu bailiao, "Diaoyu dao"; http://baike.baidu.com/view/2876.htm, accessed on March 30th, 2007

Depending if someone uses simplified Chinese characters (then: Diaoyu) or traditional Chinese characters (then: Tiao Yu T'ai) the transliteration in Mandarin language alternates. [21]

The origin of the Anglo-Saxon word "Pinnacle Islands" does not date back to as long ago. In the year 1843, the British naval vessel "Samarang" explored the islands and named them to the "Pinnacle Islands."[22] This word was then instrumental for the creation of respective term in Japanese language.

Actually, the English word "Pinnacle" literally means a pointed formation such as the "top of a mountain" or "peak".[23] This name only dates back to the year 1900 when the Japanese explorer Tsune Kuroiwa[24] published his experiences under the headline "Exploration of the Senkaku Islands[25]." Kuroiwa was inspired to grant this name to the islands by the British translation of the "Pinnacle Group" into Japanese language: "Sento Shoto".[26] "Sento" means "sharp point" or "peak"; "Senkaku" means the same as "Sento". For this reason, the name Senkaku also means "sharp point" or "peak".[27]

Tablet of all names of the islands and rocks:[28]

PRC Name	Japanese Name	Latitude	Longitude
Islands			
Huangwei Yu	Kuba-shima or Kobi Sho	25° 58'	123° 41'

[21] William b. Heflin,"Diaoyu/Senkaku Islands Dispute: Japan and China Oceans Apart", Asian-Pacific Law & Policy Journal (2000), 1; www.hhawaii.edu/aplpj, accessed on July 15th, 2006; Note: The simplified Character system is predominantly applied in the People's Republic of China, whereas traditional Characters are the only ones to be applicable in Taiwan

[22] Han-yi Shaw, "It's history and an analysis of the ownership claims of the P.R.C., R.O.C. and Japan", No. 3 Occasional Papers 1999, 95

[23] Steven Wei Su, "The Tiaoyu Islands and Their Possible Effect on the Maritime Boundary Delimitation between China and Japan", Vol. 3 Chinese Journal International Law (2004), 385

[24] Tsune Kuroiwa was actually a teacher of the Okinawa Prefecture Normal School

[25] The report was published in the 12th issue of the Geographic Magazine

[26] Zheng Hailin, Tiao-yu-t'ai lieh yu chih li shih yu fa li yen chiu, (1rst ed., 1998), 276; Japanese Militarism& Diaoyutai (Senkaku) Islands – A Japanese Historian's View, by Kiyoshi Inoue, www.skycitygallery.com/Japan/ diaoyuhist.html, accessed on September 15th, 2006

[27] Kojen, Great Dictionary of Ideograms, Shinmura Izuru, (1rst ed., 1998); quoted in Suganuma, 92

[28] Toshio Okuhara, Vol. 15 Japanese Annual of International Law, (1971), 106

Chiwei Yu[29]	Taisho-jima or Akao-sho	25° 55’	124° 33’
Diaoyu Dao	Uotshuri-shima	25° 45’	123° 29’
Beixiao Dao	Kita Kojima	25° 45’	123° 33’
Nanxiao Dao	Minami Kojima or Minami-ko-shima	25° 44’	123°34’

Rocks: PRC name:	Japanese name
Dabeixiao Dao	Okino Kitaiwa
Dananxiao Dao	Okino Minamiiwa
Feilai Dao	Tobise

1.2. Location, topography, geological features and vegetation

The islands group consists of five uninhabited islands and three barren rocks situated in the Eastern Chinese Sea. Their exact position extends from 25°40’ to 26°00’ north and 123°25’ to 123°45’ east.[30] The Eastern Chinese Sea borders to the Yellow Sea (northern) and the South China Sea (southern). Altogether, they measure a surface area of only 6.3 sq km[31] and Diaoyu dao / Uotsuri accounts for 3.6 sq km of the total.[32] The islands are situated approximately 120 nautical miles (nm) northeast of Taiwan, 200 nautical miles east of the Chinese mainland and 200 nm southeast of Okinawa.

[29] The Chiwei Island is also referred to as the Raleigh Rock
[30] Tao Cheng,”The Sino-Japanese Dispute Over the Tiao-yu-tai (Senkaku) Islands and the Law of Territorial Acquisition”, Vol. 14 V.J.I.L. (1973), 221
[31] The equivalent would be 2.2 square miles or 1.4 acres
[32] Draghun, Umstrittene Seegebiete in Ost- und Südostasien (1rst ed., 1985), 85; Renmin wang people, “Diaoyu Dao Zhengduan de lai long qu mai” (March 2004) ; http://www.people.com.cn/GB/papers2836/11730/1057574.html, accessed on March 30th, 2007

Source: www.globaldefence.net/artikel__analysen/artikel__analysen/senkaku__diaoyu-inseln_18_34.html (accessed on February 14th, 2007)

The largest island is Diaoyu dao / Uotsuri[33] with the most of the islets surrounding the largest island. The surface area covers eight ha and is 170 km distant northeast of Taiwan and 410 km west of Okinawa. Two remote islets, Kobi-sho / Huangwei Yu and Akao-sho / Chiwei Yu,[34] are 31 km and 108 km from the (main) Diaoyu / Uotsuri Island.[35]

The elevations of the islands vary considerably. The highest point of the Diaoyu dao / Uotsuri measures 383 meters. In comparison, the barren rock Dananxiadao only has an elevation of only 13 meters.[36]

The islands are geographically part of the Taiwanese continental shelf. The sea between Taiwan, China and the islands is no deeper than 200 meters.[37] From Japan's position, a 2270-meter deep underwater Okinawa Trench

[33] "dao" means "island" in Mandarin
[34] also referred to as the "Raleigh Rock"
[35] "Senkaku Islands" www.globalsecurity.org/military/world/war/senkaku.html, accessed on July 15th, 2006
[36] www.globalsecurity.org/military/world/war/senkaku.html; accessed on July 15th, 2006; Unryu Suganuma, Sovereign Rights and Territorial Space in Sino-Japanese Relations (1rst ed., 2000), 12
[37] The Times- Atlas of the world (7th ed., 1985), 76

separates the islands from the Japanese Okinawa Islands.[38] This Okinawa Trench is situated in the eastern East Chinese Sea between China and the Japanese chain of the Ryukyu/ Liu Qui islands[39] south of the large Japanese island Kyushu.[40]

Due to their unremarkable geological features, the islands were "forgotten" in people's minds in the first half of the last century. However, this changed in the year 1968 when research undertaken by a multinational (South Korean, Chinese and Japanese) joint exploration committee. The committee was surveyed under the sponsorship of the United Nations Economic Commission for Asia and the Far East (UNECAFE).[41] It discovered that the seabed of the Eastern Chinese Sea could possibly be one of the richest oil and gas deposits in the Asian region.[42] Although the discovery took place before the first world oil shock in 1973, all coastal states were motivated by a perception that their own land based mineral deposits were diminishing at that time.[43] The offshore reserves are comparably easy to exploit as most areas of the Continental Shelf in the Chinese Seas are only 60-80 meters deep. In these shallow areas, the sea bottom is flat and stable, which makes it easier for the prospectors to anchor drilling rigs.[44]

All the islands bear scarce vegetation with the only plants being palm trees, prickly pear and statice arbuscula, which is a rare herb for the production of medicine. According to one source, only two islands provide potable water[45]

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[38] Han-yi Shaw, "Its History and an analysis of the ownership Claims of The P.R.C., R.O.C. and Japan", No. 3 Occasional Papers 1999, 96

[39] all these denominations are possible for the Okinawa islands

[40] The Times- Atlas of the world (7th ed., 1985), 76

[41] Today the name has changed to "United Nations Economics and Social Commission for Asia and the Pacific" (UNESCAP)

[42] Wei-chin Lee, "Troubles under the Water: Sino-Japanese Conflict of Sovereignty on the Continental Shelf in the East China Sea", Vol. 18 Ocean Development & International Law (1987), 586; Mark J. Valencia, Yoshihisa Amae, "Regime Building in the East China Sea", Vol. 34 Ocean Development & International Law (2003), 192; David G. Muller, China as a Maritime Power (1rst ed., 1983), 196

[43] Choon-ho Park, China's Maritime Jurisdiction: The Future of Offshore Oil and Fishing, in: Harrison Brown (ed.) China among the Nature of the Pacific, 106

[44] David G. Muller, China as a Maritime Power (1rst ed., 1983), 190

[45] Ying-Jeou Ma, "The East Asian Seabed Controversy Revisited: Relevance (or Irrelevance) of the Tiao Yu Tai (Senkaku) Islands Territorial Dispute", Vol. 2 Chinese Yearbook of International Law and Affairs (1982), 7; Unryu Suganuma, Sovereign Rights and Territorial Space in Sino-Japanese Relations (1rst ed., 2000), 12

and most sources state that there is no fresh water to be found on any of the islands.[46] The sea surroundings of the islands have fisheries potential.[47] Due to recent overfishing the stocks in the East Chinese Sea are suffering depletion.[48]

Source: http://www.answers.com/topic/senkaku-islands (accessed on February 14th, 2007)

The strategic value of the islands is attributed to their location adjacent to important waters: Their ownership confers **a)** either China its most northeastern territory in the East Chinese Sea or **b)** Japan's most southwest point of the Japanese archipelago. The islands lie close to strategic sea lines of communication. Japan's crude oil imports from the Middle East pass through the area[49] so the country possessing the islands inevitably gains the closest spot to erect installations for aerial surveillance and military reconnaissance and the title of sovereignty empowers the owner to spy well into the neighbour's territories. In this context it has to be mentioned that the PRC's navy has undergone a fundamental change from a self-restricted

[46] Dietmar Ebert, "Pack die Badehose ein"; www.ruhr-uni-bochum.de/oaw/poa/tea/; accessed on January 25th, 2007
[47] Choon-ho Park, "China's Maritime Jurisdictions: The Future of Offshore Oil and Fishing", in Harrison Brown (ed.), China among the Nations of the Pacific, 106
[48] David G Muller Jr., China as a maritime Power (1rst ed., 1983), 191
[49] Jean-Marc F. Blanchard, "The U.S. Role in the Sino-Japanese Dispute over the Diaoyu (Senkaku) Islands, 1945-1971", No. 161 China Quarterly (2000), 96

coastal “watch-guard” to a powerful navy in the last twenty years.[50] This navy was deployed in the Taiwan Strait in 1996. Thus, this strategic outpost creates also a military link to the unsettled China / Taiwan question.

1.3. Legal question arising from this dispute

A pure legal solution to this dispute does not seem very likely. According to international law, the contesting states’ prior consent is a prerequisite to the initiation of proceedings before an international court or tribunal. Nonetheless, it must be acknowledged that several legal questions arise in this dispute. Under public international law, the conflict may be subdivided into three major categories:

1.) The question of the sovereignty of the islands is to be answered.[51]

2.) The impact of the acquisition of sovereignty over the islands on the adjacent maritime zones in the Eastern Chinese Sea is significant. It may allow the successful claimant state to generate new, extended maritime zones. This gives rise to the question of in which state’s favour the islands may be used to construct a baseline for boundary delimitation. It gives rise to a further question whether a littoral state owning an island off its mainland and contiguous to its neighbouring state is entitled to set up the baseline for its 200 miles EEZ boundary either from the mainland or the remote island.[52]

3.) Having resolved the question of ownership and the entitlement of a claimant state to create maritime zones, international law must then focus on the means by which disputes over maritime delimitations between neighbouring countries may be settled. The East Chinese Sea is less than 400 nm in width; how must one deal with two opposite states’ 200 nm EEZ claims?[53] The main framework of international law is called the United Nation

[50] You Ji, The Armed Forces of China (1rst ed., 1999), 165
[51] Compare, e.g. Prosper Weil, The Law of Maritime Delimitation – Reflections (1rst ed., 1989)
[52] Guifang Xue, China and International Fishery Law &Policy (1rst ed., 2005), 168; Kim Byung Chin, The Northeastern Asian Continental Shelf Controversy (1rst ed., 1980), 54
[53] Guifang Xue, China and International Fishery Law &Policy (1rst ed., 2005), 167

Convention of the Law of the Sea (1982) and it grants only little guidance for the settlement of boundary disputes.[54]

Today, Japan administers the islands as part of Ishigaki City, Okinawa Prefecture. Ishigaki is the middle island of the Sakishima-shoto Islands, which are part of the Nansei islands.[55] The People's Republic of China however, claims the islands as part of Daxi Village, Toucheng Township, Yilan County, Taiwan Province.[56]

1.3.1. Domestic Maritime legislation

The PRC government promulgated a Marine Law in 1992. Art. 2 of the Chinese Marine Law, which expressly stated that the Diaoyu islands were part of the territory of the People's Republic of China. Japan has so far not enacted any national legislation regarding the Senkaku Islands. Since the 1970s, it has been Japan's official stance to deny that there is any disagreement about their ownership.[57]

1.3.2. Legal Effect on national legislation of the Parties of dispute

Independent from the question of whether the islets may be considered islands in the legal sense under Art.121 (I-III) UNCLOS, the sovereignty over the Diaoyu / Senkaku Islands entitles the owner to 12 nautical miles of territorial sea. Thus, the islands' ownership could also have an impact on ships navigating through the territorial sea of the Diaoyu / Senkaku Islands. Quite separately, the People's Republic of China and Japan both established a national legislation going beyond the international agreement of UNCLOS 1982. This is even more surprising taking into account that Japan and China

[54] The Territorial Dispute Over Dokdo; www.geocities.com/mlovmo/page4.html, accessed on April the 28th, 2007
[55] The Time - Atlas of the world (9th ed., 2004), 99, Aktuell 2006, 521
[56] Daniel Dzurek, The Senkaku/Diaoyu Islands Dispute, www.ibru.dur.ac.uk/resources/docs/senkaku.html, accessed on January 15th, 2006
[57] Linus Hagström, Japan's China Policy, (1rst ed., 2005), 129

are both parties of UNCLOS. Taiwan, although it signed the Convention of the Continental Shelf in 1958, is not a signatory of UNCLOS.[58]

According to Art.17 to 26 UNCLOS all ships are entitled to be granted an innocent passage within the 12 nautical miles zone. Pursuant Art.6 (II) Chinese Marine Law the PRC demands transiting "foreign ships for military purposes" to give prior notification of their entry to the zone.[59] Furthermore, China asserts the right to maintain special fishery zones and certain military zones.[60]

Correspondingly, Japan claims that the movement of vessels carrying nuclear weapons through its territorial sea is not "innocent" in the sense of Art. 17 UNCLOS.[61] Even though none of these conflicting claims infringes "ius cogens"[62] this internal legislation was considered as being excessive and unlawful.[63] While ratifying the Convention, other littoral countries such as Italy, Germany, the Netherlands and the United Kingdom stated that these claims are not covered by any interpretation of UNCLOS. Since it also contradicts the customary state practice this national legislation must be regarded as incompatible with prevailing international law.[64]

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[58] Toshio Okuhara, "The Territorial Sovereignty Over the Senkaku Islands and Problems on the Surrounding Continental Shelf", Vol. 11 Japan Annual of International Law (1967), 103; William B. Heflin, "Diaoyu/Senkaku Islands Dispute: Japan and China Oceans Apart", Asian-Pacific Law & Policy Journal (2000), 1; www.hhawaii.edu/aplpj, accessed on July 15th, 2006

[59] Art. 6 II of the Law on the Territorial Sea and the Contiguous Zone: "Foreign ships for military purposes shall be subject to approval by the government of the People's Republic of China for entering the territorial sea of the People's Republic of China"; See, e.g.: Jerome Alan Cohen, Hungdah Chiu, People's China and International Law (1rst ed., 1974), 533; Ivan Shearer, "Military Activities in the Exclusive Economic Zone: The Case of Aerial Surveillance" Vol. 17 Ocean Yearbook (2003), 552

[60] Jeanne Greenfield, China's Practice in the Law of the Sea (1992), 151, quoted in Jonathan Charney, "Central East Asian Maritime Boundaries and the Law of the Sea", Vol. 89 A.J.I.L. (1995), 743; Michael Strupp, Chinas territoriale Ansprüche (1rst ed., 1982), 21; Mark J. Valencia, Yoshihisha Amae, "Regime Building in the East China Sea", Vol. 34 Ocean Development & International Law (2003), 199

[61] Tsuneo Akaha, "Internalising International Law: Japan and the Regime of Navigation under the UN Convention on the Law of the Sea", Vol. 20 Ocean Development .& International Law (1989), 113

[62] Jonathan Charney, "Central East Asian Maritime Boundaries and the Law of the Sea", Vol. 89 A.J.I.L. (1995), 744

[63] Zou Keyuan, China's Maritime Legal System and the Law of the Sea (1rst ed., 2005), 78

[64] Zou Keyuan, China's Maritime Legal System and the Law of the Sea (1rst ed., 2005), 83

2. Political Implications of the Conflict

"Safety and Certainty in oil lie in variety and variety alone"[65]

2.1. Diaoyu / Senkaku relation to oil

It is often the case that when a scramble for a territory occurs, the clash is not rooted solely in a mere legal disagreement, but stems from various other motives. The most important of these other motives are economic gain and geopolitical security.[66] One of the main reasons the Diaoyutai Islands attracted political attention was the discovery of oil and gas. After great excitement about the discovery, these resources turned out to be not as plentiful as predicted at the beginning of the seventies.[67] Additionally, oil price slipped to a level below $ 20 US a barrel in the mid-eighties.[68] In the eighties, oil was of no great international concern, but this has changed significantly today:

Before the discovery of oil and gas deposits in the area of the islands all three governments had a rather inert attitude towards the Diaoyu / Senkaku Islands. Today though, there is no denial that the Diaoyu / Senkaku conflict is related to the presence oil. The amount of mineral reserves and the ability to export energy resources determines every country's role in world politics. Therefore, it is in the interest of all the parties of the dispute to become the actual holder of the islands. Once the possession of them is completed, the energy resources may be used as a handy bargaining chip in international politics.

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[65] First Lord of the Admiralty Winston Churchill after shifting to power source of the British navy from Welsh coal to oil; quoted in: Daniel Yergin, "Ensuring Energy Security", Vol. 85 Foreign Affairs (2006), 69

[66] Bob Catley and Makmur Keliat, Spratlys: The dispute in the South Chinese Sea (1rst ed., 1987), 39

[67] Werner Draghun, Umstrittene Seerechtsgebiete on Ost- und Südostasien, (1rst ed., 1985), 92

[68] In the year 1986, the average price for a barrel was about 14,50 US $, see: www.poel-tec.ipmac.de/oel_preise/index.php, accessed on March 22nd, 2007

The price of oil has soared due to the increased demand of China, India and the United States of America.[69] Crude oil prices are now around $ 95 US per barrel. The term “energy securitisation” has been revitalized after having been shed by many political academics as oil can more than ever be used as a bargaining power in word politics.[70] Currently, China imports 37% of its oil demand from the Middle East, whereas the rate of Taiwan and Japan still is about 80%.[71] For these reasons, all parties to the conflict strive for a diversification of their energy supplies. The islands and their resources are part of each country’s “self-reliance” strategy. The following table indicates the annual oil consumption in million of tons.[72]

Country	1990	2000	2004
China	116.6	219.8	308.6
Japan	247.7	255.5	250.5
Taiwan	26.8	39.8	41.7
U.S.A.	779.0	887.8	927.3
India	57.9	98.0	115.3

The next table gives an overview about the current proven oil resources in the mentioned countries. The quantities are measured in millions of barrels capable of being explored in 2005 / 2006.[73]

[69] Leonardi Maugeri, “Two Cheers for Expensive Oil”, Vol. 85 Foreign Affairs (2006), 157

[70] note: some academics call the foreseeable sword rattle for oil the new “cold war” alluding to the term used for the division of the world between “West” and “East”, see Frank Umbach, “Asiens Energiesicherheit und Resourcennationalismus: Kooperation oder Konfliktpotential fur die Region?” in: Christine Berg, Gunter Schucher (ed.), Regionale politische und wirtschaftliche Kooperation in Asien (1rst ed., 2006), 34

[71] Xuewu Gu, “Chinas Engagement in Afrika: Trends und Perspektiven” (2006), Vol. 10 Konrad Adenauer Stiftung – Auslands Informationen, 66; Rafael Kandiyoti, “De nouvelles routes pour le pétrole et le gaz » (2005),www.monde-diplomatique.fr/2005/05/KANDIYOTI/! » » »= ?var_recherche=iles%20de%diaoyu , accessed on January 15th, 2005; Friederike Wesner, Energiepolitik Taiwans, in in Xuewu Gu, Kirstin Kupfer, ”Die Energiepolitik Ostasiens“ (1rst ed., 2006), 115

[72] The continental European ton measures 1000kg; www.welt-in-zahlen.de; Geo Hive, “Energy oil consumption,” www.geohive.com/charts/en_oilcons.aspx, accessed on August 24th, 2007

[73] www.welt-in-zahlen.de; Geo Hive, “Energy proved oil reserves,” www.geohive.com/charts/en_oilres.aspx, accessed on August 24th, 2007

Country	Oil resources in 2005 / 2006
China	18.260
Taiwan	2
Japan	29
U.S.A.	29.300
India	5.900

Today, China's economic growth is about 10% per year. The PRC is nowadays the largest importer of crude oil after the U.S.A.[74] Between 2000 and 2004 its oil consumption rose by 40%.[75] By 2020, the estimated consumption of the PRC will total more than 500 million tons of oil and over 100 billion cubic meter of natural gas.[76] As the government is not at the mercy of the public votes, the Communist government can afford to adopt a more lenient or "pragmatic" stance towards oil-exporting autocratic regimes.[77]

The ongoing development of the PRC to one of the most important economic global players is limited by her insufficiency of energy resources. Since the majority of the oil deposits are situated in the west[78] (Xinjiang Province[79]), there is a mismatch between the location of the primary resources of the country and the main centres of demand.[80]

From the writer's perspective, the fate of the Chinese Communist Party is closely linked to the extent to which the "Asian Tiger" may climb to the level of the industrialised economies. Possessing almost no natural resources[81] Japan was up to 89.2% dependent on oil imports from the Middle East.

[74] Heinrich Kreft, "China's Quest for Energy" (2006), Policy Review, 139
[75] Leonardi Maugeri, "Two Cheers for Expensive Oil", Vol. 85 Foreign Affairs (2006), 157; note: China still accounted only for 8% of the worldwide demand in 2004
[76] CCH Asia China E-News Alert, No. 43, February 2004, quoted in: Zou Keyuan, China's Maritime Legal System and the Law of the Sea (1rst ed., 2005), 133
[77] David Zweig, Bi Jianhai, "China's Global Hunt for Energy", Vol. 84 Foreign Affairs (2005), 27
[78] "Senkaku Diayutai Islands" www.globalsecurity.org/military/world/war/senkaku.htm, accessed on March 23rd, 2007
[79] Xinjiang Province - situated close to border of Kasakan – according to Chinese officials, a lot of "terrorist" attacks take place in the Muslim region.
[80] Philip Andrews-Speed, "China's Energy Woes: Running on Empty" (2005), www.feer.com/articles1/2005/0506/free/p013.html , accessed on March 5th, 2007
[81] Japan has to import 99% of its oil and natural gas, see: Kent E. Calder, "China and Japan's Simmering Rivalry", Vol. 85 Foreign Affairs (2006), 130

Having given up her $ 2 billion US controlling interest in Iran's Azadegan oil- and gas field due to tensions about the Tehran nuclear program, Japan is looking to Russia and African countries as possible suppliers.[82] Being the strongest ally of the U.S. in Asia and being dependant on their military protection in case of regional conflict, the Japanese administration shifted its focus to the Russian pipeline currently under construction in the Pacific.[83]

In the Republic of China (ROC) Liquefied Natural Gas (LNG) is gaining importance every year. Nevertheless, Taiwan's main energy resources still are oil and coal, which all must be imported. As 37% of the coal resources are imported from the Chinese mainland, the transit routes for these all-important resources pass by territories claimed by communist China. Being an island in the South Chinese Sea Taiwan is particularly vulnerable to maritime blockades.[84]

2.2. Diaoyu Islands as a symbol for Sino-Japanese relations

2.2.1. Diaoyu / Senkaku island as a proxy conflict

Notwithstanding the importance of the natural resources, the dispute must not be regarded as merely conflict about oil. There is far more behind the scene than the question as to which of the contesting states the Diaoyu / Senkaku islands belong. The conflict also serves as a useful diversion for governmental failure in the domestic area. In the past foreign behaviour was primarily influenced by domestic dynamics.[85]

Something, which cannot be underestimated, is that the conflict is a vehicle for Chinese and Japanese nationalism. All countries have steadily used the

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[82] Hisane Masaki, "Oil hungry Japan looks to other sources" (Febr. 21rst, 2007), Asia Times, www.atimes.com/atimes/Japan/IB21Dh01.html, accessed on March 22nd, 2007

[83] Frank Umbach, „Energiepolitik Japans", in: Xuewu Gu, Kirstin Kupfer, Die Energiepolitik Ostasiens (1rst ed., 2006), 55-58

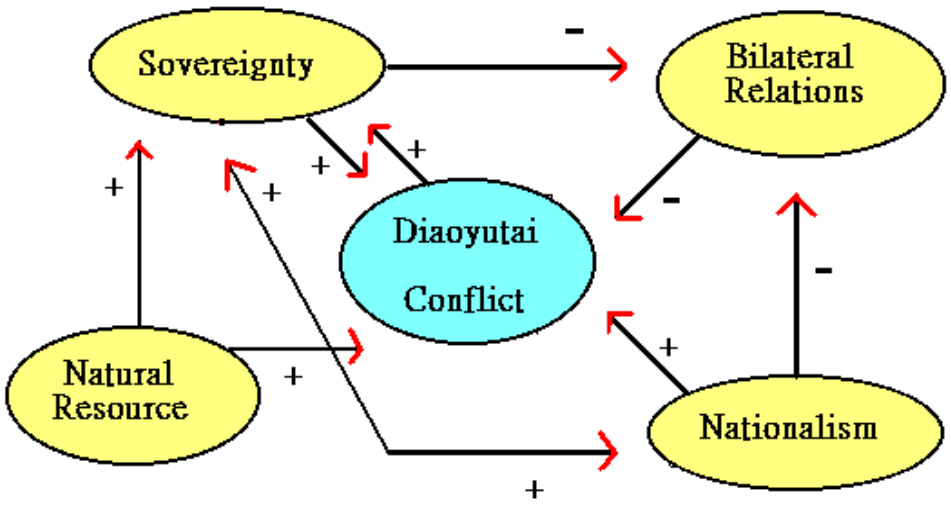
[84] Charles Esser, Taiwan (2005), wwweia.doe.gov/emeu/cabs/taiwan.html; accessed on March 22nd, 2007; Friederike Wesner, "Energiepolitik Taiwans", in Xuewu Gu, Kirstin Kupfer, Die Energiepolitik Ostasiens (1rst ed., 2006), 105 onwards

[85] Christopher Hill, The Changing Politics of Foreign Policy (1rst ed., 2003), 220

Diaoyutai / Senkaku conflict as a symbol to express their national pride.[86] The emergence of nationalistic movements and the question of legitimacy are closely related to each other.[87] For the leaders of each state such a proxy conflict may be embraced as it is a handy device to channel or escalate national emotions.

2.2.2. Historical rise of nationalism in the countries

The present dispute cannot be understood without acknowledging the political and historical experiences of the three countries involved. Doing this over 60 years after WW II it has to be recalled that historical disputes are distorted by many persuasive publications, which have been written from a rather subjective point of view.



Source: http://www.american.edu/projects/mandala/TED/ice/DIAOYU.HTM (accessed on February 14th, 2007)

[86] "Japanische Flaggen verbrannt", Frankfurter Allgemeine Zeitung, 26.03.2004
[87] Erica Strecker, Phillip C. Saunders, "Legitimacy and the Limits of Nationalism", Vol. 23 International Security (1998), 116

2.2.3. Chinese Nationalism

In the Middle Ages China was the dominating power in Asia. The territory of today's Korea and Japan once were an integral part of China.[88] Unlike Western powers, the Middle Kingdom never sought to overthrow or colonize other territories; instead, as early as in the Han Dynasty (206 B.C. – 220 A.D.) the Chinese erected a system of tributary states. These tributary states owed political submission to the Chinese emperors in exchange for material rewards.[89] During that time the Diaoyu Islands belonged to the Ryukyu Kingdom, which had been such a tributary state to the Chinese emperor since 1372.[90]

In the Song Dynasty (960 –1279) the Chinese government dispatched navy vessels into the South China Sea to patrol around the Paracel Islands.[91] Afterwards the Chinese state did not display interest in subduing other states. This prohibition was reinforced by the "forbidden to the sea" policy in the 18th century when the Chinese were not allowed to go to sea and potential perpetrators were deterred by the death penalty.[92]

China's Age of Humiliation until WW I

A proverb of the famous Chinese philosopher Confucius was proven wrong when imperial China was deemed as a "grab what you can" country by Western powers. Contrary to their own understanding of treatment of other countries, the Chinese were appalled to witness the humiliating acts committed by Western powers on their own territories.[93] The first degrading and victimizing experience with Western powers was the Opium War in 1842. After having refuted the influx of further Opium traded by the British East India

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[88] Jacques Gernet, A History of Chinese Civilisation (1rst ed., 1982), 722
[89] Chen Zhimin, "Nationalism, Internationalism and Chinese Foreign Policy", Vol. 14 Journal of Contemporary China, 37
[90] Compare: Jean-Marc F. Blanchard, "The U.S. Role in the Sino-Japanese Dispute over the Diaoyu (Senkaku) Islands, 1945-1971", No. 161 China Quarterly (2000), 95
[91] Zou Keyuan, China's Marine Legal System and the Law of the Sea (1rst ed., 2005), 5
[92] Zou Keyuan, China's Marine Legal System and the Law of the Sea (1rst ed., 2005), 5
[93] For a brief overview of China's consecutive fragmentation, see: Xiao Bin Ji, Facts about China (1rst ed., 2003), 457-569

Company, the British declared war on China. The British expeditionary force outpaced the combat strength of the Chinese.[94]

In 1895, after Japan's military victory in the Sino-Japanese War, the Chinese were forced to cede Taiwan and recognize Korea as an independent country.[95] In the aftermath of this treaty, China had to renounce its sovereignty over the Liaodong peninsula where Russia was taking over this region.[96]

In 1900, the Boxer rebellion aimed to overthrow the Qing Dynasty and to expel the barbarians by slaughtering thousands of Chinese Christians. The final humiliation was the Boxer Protocol which required the Chinese to pay a compensation[97] of 67 million pounds of Sterling.[98]

The year 1911 was a milestone in China's history. In the course of the Xinhai Revolution, the feudal System was formally abrogated. This happened after the fall of the Qing Dynasty and the dynasty was replaced by the Republic of China.[99] On August 14th, 1917, The Beijing government declared war on Germany joining the allied forces in World War I. Despite this assistance the former German concession Shantung peninsula (Qingdao), Tianjin and Hankou were not reverted to Chinese sovereignty. Instead, the territories remained under Japanese control.[100] As a result, the Chinese delegation at the Treaty of Versailles refused to sign in 1919 because the Chinese public

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[94] This treaty is considered as the first unequal treaty in the history of China; as a result of he war, Hong Kong island was ceded indefinitely to the British, the Chinese had to pay a war reparation of 21 million Silver Dollars and had to grant exterritorial rights to foreigner; see John S Gregory, The West and China since 1500 (1rst ed., 2003), 76-87; Richard Hooker, Opium War (1996), www.wsu.edu/*dee/Ching/opium/html, accessed on March 22nd, 2007

[95] Hans C. Jakob, Reisen und Bürgertum (1rst ed., 1995), 80

[96] Ibid

[97] The incessant reparations impact were a considerable depreciation of the Chinese currency: The price silver plunged whereas the US $ soared- the Chinese exports had less buying power – as a result the Chinese economy disintegrated even more. The payments to the victor Japan represented three times the state's annual revenues; compare: Jacques Gernet, A History of Chinese Civilisation (1rst ed., 1972), 609

[98] Dick Wilson, China - The big Tiger – A Nation awakes (1rst ed., 1996), 12

[99] Xiao Bin Ji, Facts about China (1rst ed., 2003), 470

[100] Stephen G. Craft, "John Bassett Moore, Robert Lansing, and the Shandong Question" Vol. 66 Pacific Historical Review (1997), 239

regarded the Treaty as a betrayal.[101] The Shantung issue triggered a great wave of anti-imperialist and anti-warlord nationalism, which ended in 1919 with the May 4th incident.[102]

In 1937, after having occupied Manchuria in 1931 Japan attached eastern China causing an enormous disruption.[103] It was the time, when China suffered more than 200,000 civilian casualties and mass executions of prisoners of war.[104] After the eight years of conquest, Japan was forced to surrender at the end of World War II and semi-colonial China was returned to the Chinese people. As in Germany the punishment of the Japanese war criminals could not match the sins and atrocities they had committed.[105]

Popular Chinese nationalism may be traced back to the Chinese humiliation complex left by these historic experiences.[106] Their ancestors suffering during the unlawful dominance of foreign intruding powers is deeply engraved in Chinese minds. Former victims equate sovereignty with the recovery of all that they had to cede to invading imperialistic powers. After the WW II China was able to restore its sovereignty and after having witnessed how their claims were cast down in the course of international treaty negotiations the country became highly conscious about its new status and willingness to maintain the status-quo.[107] As a result, the PRC cannot afford any conciliatory stance since

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[101] note: Shantung is the birthplace of Confucius; thus of particular cultural value for China

[102] John E. Schrecker, Imperialism and Chinese Nationalism- Germany in Shantung (1rst ed., 1971), 248

[103] Harold C. Hinton, The People's Republic of China A Handbook, 65; John K Fairbanks, Edwin O. Reischauer, China – Tradition & Transformation, (1rst ed., 1989), 462

[104] www.geocities.com/nankingatrocities/Fall/fall_01.htm (2000); accessed on March 8th, 2007

[105] Arnold C. Brackmann, The other Nuremberg: The Untold Story of Tokyo War Crime Trials (1987), Caleb Wan, "Security Flashpoint: International Law and the Islands Dispute in the Far East", The New Zealand Postgraduate Law E-Journal (2/2005), 15, www.nzgraduatelawejournal.auckland.ac.nz./PDF%20Articles/Issue%202%20(2005)/1%20Caleb's%20Final.pdf ,accessed on March 13th, 2007

[106] Wu Zhengyu, "China and East Asia Security in the 21rst century – Challenges and Implications" (2005), www.dur.ac.uk/chinese-politics/Public%20lectures/wu%20Zhengyu%20Durham%20Lectures.pdf, accessed on March 6th, 2007

[107] Jianwei Wang,"China's Calculus of Japan's Asian Policy", in Takahashi Inoguchi (ed.), Japan's Asian Policy (1rst ed., 2002), 118; Takashi Inoguchi, Japan's Asian Policy (1rst ed. 2002), 15

this would equate to a “political suicide” in the light of the public’s ardent wish to restore the territorial integrity of the country.[108]

From this perspective it is understandable that territorial questions are handled with “sensitive care” – especially if one country (Japan) as a former imperial power is involved. Today, the political leaders’ appeals to nationalistic ideas should no longer be considered in an anti-imperialistic context, but in means to consolidate the regime’s legitimacy as a soft power.[109] In such a context, the Diaoyu conflict can be useful for Chinese leaders as the rivalry about the Diaoyu islands is simply a replay in miniature of China’s wartime humiliation.[110]

In the past twenty years, China has undergone tremendous development from an agrarian developing country to a state with an unprecedented economic outlook. The disjuncture between the ideological communist idea and economic reality in the PRC is more apparent today than ever. Given that the Chinese leaders are the inheritors of an ideology that has lost most of its appeal the Chinese populace feels alienated from its government.[111] The CCP’s central problem is to run the tightly controlled system in concert with an open-economy while ensuring that the opening process does not cause any spill - over effects on the political sector.[112]

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[108] Hans Scheerer, Patrick Raszelenberg, “China, Vietnam und die Gebietsansprüche im chinesischen Meer“ (1rst ed., 2002), 33

[108] Liu Jie, “The Danger of China’s disaffected Masses”, Vol. 31 Japan Echo (2004), 51

[109] Xiaoxiong Yi, “Chinese Foreign Policy in Transition: Understanding China’s Peaceful Development”, Vol. 19 Journal of East Asian Affairs (2005), 107; Ericka Strecker, Phillip C. Saunders, “Legitimacy and the Limits of Nationalism – China and the Diaoyu Islands”, Vol. 23 International Security (1998), 120

[110] Anthony Spaeth, “Nationalism Gone Awry: Death in the Diaoyus”, www.time.com./time/international/1996/961007/diaoyu.html, accessed on February the 10th, 2007

[111] Aaron L. Friedberg, “The Future of U.S.-China Relations”, Vol. 30 International Security (2005), 30; Ingrid d’Hooghe, “Public Diplomacy in the People’s Republic of China,” in: Jan Melissen (ed.) The New Public Diplomacy (1rst ed., 2005), 90; Liu Jie, “The Danger of China’s disaffected Masses”, Vol. 31 Japan Echo (2004), 51

[112] Russell Org, China’s Security Interests in the 21rst Century (1rst ed., 2007), 129

For example; China is – even in comparison with other developing countries - one of the countries with the most unequal salary level[113]; low paid migrant workers ("waidiren") often unsuccessfully claim their wages and the unemployment rate (more than 230 million) is much higher than in the official statistics.[114] Corruption is wide - spread[115] and administrative confiscation regularly occurs without compensation.[116] Social unrest may be regarded as the biggest threat to the Chinese government.[117] Evading questions of its own legitimacy by putting the blame on enemies abroad remains an unstable "recipe" for the Chinese leaders. In order to forestall any riots the staking of claims on islands and making this well known to the public is used for sustaining the national integration of the PRC.[118]

As Chinese nationalism is at the same level a "lubrication apparatus" to maintain stable governance and popular Chinese nationalism will, without any doubt, shorten the scope of choices faced by Chinese politicians. As losing face is deeply entrenched in Asian mentality, the "dual use" of this conflict

[113] The inequality of wealth distribution is measured by the so called "Gini Index": Azizur Rahman Khan, Carl Riskin, "Income and Inequality in China: Composition, Distribution and Growth of Household Income, 1988 – 1995", No. 154 China Quarterly (1998), 238; Qingshan Tan, "Growth Disparity in China: provincial cause", No. 33 Journal of Contemporary China (2002), 735; Tobias Debiel, Sascha Werthes, "Fragile Staaten und globale Friedenssicherung", in: Global Trends 2007 (1rst ed., 2006), Tobias Debiel, Dirk Messner, Franz Nuscheler (ed.), 91

[114] The unemployment rate in urban areas is more than 8%, additionally there are 200 million jobless workers in the countryside; see: David Hale, Lyric Hughes Hale, "China Takes Off", Vol. 82 Foreign Affairs (2003), 41; Unemployed (shiye) workers – according to the official designation are only those whose company has gone bankrupt; see: Dorothy J. Solinger, "Why we cannot count the Unemployed", No. 167 China Quarterly (2001), 677; Kai Lange, "Knechte des Booms", Der Spiegel (12.3.07), Thomas Awe, "Der verzweifelte Marsch in die Stadt und das Phänomen der Migration", No. 7 KAS Auslandsinformationen (2007), 76 www.spiegel.de/wirtschaft/0,1518,470890,00html, accessed on March 26th, 2007

[115] Shawn Shieh, "The Rise of Collective Corruption in China: the Xiamen smuggling case", No. 42 Journal of Contemporary China (2005), 67; Harry Williams, "Socialism and the End of the Perpetual Reform State in China", Vol. 31 Journal of Contemporary Asia (2001), 175-177; John L. Thornton, "China's Leadership Gap", Vol. 85 Foreign Affairs (2006), 137

[116] Günther Schucher, „Ein Gespenst geht um in China – das Gespenst der sozialen Instabilität", China aktuell 5/2006, 48 onward

[117] Ibid

[118] Erica Strecker Downs, Phillip C. Saunders, "Legitimacy and the Limits of Nationalism", Vol. 23 International Security (1998), 126; compare: C. R. Mitchell, The Structure of International Conflict (1rst ed., 1981), 39

puts further burden on its solution because all parties will unyieldingly defend their positions.[119]

2.2.4. Japan's Nationalism

Japanese Nationalism is not primarily a veneration of the glorious past, but rather a response to what it perceives as a shift of power in the East Asian hemisphere. The former Prime Minister Junichiro Koizumi made a habit of paying homage to WW II war criminals by visiting the Yasukuni Shrine.[120] Japan's Ministry of Education approved a school textbook[121] that euphemises and downplays the war atrocities committed by the Japanese.[122] The Japanese Diet passed a law giving official legal status to the country's de-facto national flag and the "Kimigayo" national anthem in 1999. Both are regarded as emperor worshiping and Japanese militarism of the past.[123]

The Japanese actions towards the Senkaku Islands must be seen in the context of the emergence of China as an economic and military giant. Over the last 16 years, the struggling Japanese economy has had a profound psychological effect on its citizens.[124] Although it has excellent trade relations (a 17% rise in 2004), it is foreseeable that China will replace Japan as the most powerful regional state.[125] China - blaming has become a winning factor

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[119] Wu Zhengyu, "China and East Asia Security in the 21rst century – Challenges and Implications" (2005), www.dur.ac.uk/chinese-politics/Public%20lectures/wu%20Zhengyu%20Durham%20Lectures.pdf, accessed on March 6th, 2007

[120] Martin Jacques, As China rises, so does Japanese nationalism, The Guardian (17.11.2005), www.guardian.co.uk/comment/story/0,,1644023,00.html, accessed on March 9th, 2007; Marco Cuturi, "Japon, Chine – Le poids de l'histoire" (24.3.2003), www.ism.ac.jp/~cuturi/misc/japan_chine.pdf, accessed on March 16th, 2007

[121] Pursuant to other sources only 0.4% of Japanese schools have introduced the books; see: Mitsuru Kitano, "The myth of rising Japanese nationalism", International Herald Tribune (12.1.2006), www.iht.com/articles/2006/01/12/opinion/edkitano.php, accessed on March 9th, 2007

[122] Erich Marquardt, "The Price of Japanese nationalism", Asia Times (14.4.2005), www.atimes.com/atimes/Japan/GD14Dh05.html, accessed on March 9th, 2007

[123] Peter Symonds, "Obuchi raises the banner of Japanese nationalism" (1999), www.wsws.org/articles/1999/aug1999/jap-a02.shtml , accessed on March 9th, 2007

[124] The latest recovery of Japan's economy does not affect the individuals' personal financial situation

[125] Ma Licheng, "Beyond Nationalism: A Prescription for Healthy Sino-Japanese Relations", Vol. 31 Japan Echo (2004), 40; Erich Marquardt, "The Price of Japanese nationalism", Asia Times (14.4.2005), www.atimes.com/atimes/Japan/GD14Dh05.html, accessed on March 9th, 2007; Frankfurter Allgemeine Zeitung, "Der Kontinent der Zukunft", (27.11.2006)

in Japan's domestic politics.[126] Lacking "soft power" in the region and being dependant on the U.S. in terms of military protection, Japan has to be careful about not to be marginalized in the region.[127] Japan's vulnerability and subordination to the U.S. needs a "theatre" of nationalism, which is shown by the reprisal of nationalism, which denies the debasing truth of the loss of power in substance. Therefore it must be celebrated in rituals and in symbols.[128]

2.2.5. Taiwanese Nationalism

The Taiwanese claim to the Tiao-yu-tai Islands[129] correlates with their contention of Taiwan of being the legal representative of the Chinese people. For the Taiwanese, laying claim to the Tiao-yu-tai as their own territory could effect their formal independence. If an international court were to award the islands to Taiwan, this verdict would imply a further recognition of the Republic of China (ROC).[130]

Today, it has been argued that the status of Taiwan is not about right and wrong in international law, but about pragmatism is politics.[131] After the U.S. modified their China policy in 1971-72 Taiwan lost its seat in the United Nations.[132] Today, Taiwan maintains diplomatic relations with only 25 countries and thus receives little international recognition. This recognition is mainly based on a "dollar diplomacy", a policy whereby Taiwan buys diplomatic relations.[133] Only 48 countries have established representative

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[126] Senkaku/Diaoyu Islands Dispute Threatens Amiability of Sino-Japanese Relations (3rd May 2004), www.pinr.com/report.php?ac=view_printable&report_id=165&language_id=1, accessed on Dezember 7th, 2006

[127] Kent E. Calder, "China and Japan's Simmering Rivalry"; Vol. 85 Foreign Affairs (2006), 135

[128] Mark Selden, "Nationalism, Historical Memory and Contemporary Conflicts in the Asia Pacific" (27.8.2006), www.zmag.org/contest/showarticle.cfm.?ItemID=10837, accessed on March 9th, 2007

[129] note: This is the Taiwanese spelling of the Pinyin system

[130] Cheng Huang, Diayutai islands dispute, (June 1997), www.american.edu/TED/ice/Diaoyu.HTM, accessed on August 15th, 2006

[131] Steve Tsang, Putting Chinese Unity and the Relations between Taiwan and Mainland China into a historical Context, 30, www.duei.de/ifa/shop/pdf/mia387-Schucher-Inhalt.pdf, accessed on July 15th, 2007

[132] The Resolution 2785 ascertained China it could replace Taiwan in the UN. Simultaneously, China was granted a permanent seat in the Security Council.

[133] Inna Ward, Whitakel Almanack 2007 (1rst ed., 2007), 1015; Dennis Van Vranken Hickey, Foreign Policy Making in Taiwan (1rst ed., 2007), 46

offices in Taipei.[134] Legally speaking, Taiwan is today a self-governing dominion under the benign of the military occupier U.S.A.. A Taiwanese nation does not yet fully exist.[135]

The President regularly hints at a declaration of independence, which causes severe threats from China mainland.[136] Taking into account the common standards to be applied for probing the independence of a state (such as territory, population, government, capacity to enter in relation with other states) it must be concluded that Taiwan is not legally an independent state and "owns" only de-facto Taiwan and some offshore islands.[137] Interestingly, Taiwan has not yet claimed its own statehood (declaration of independence) and declared that it would actually secede from China. In 1991, the ROC recognized mainland China authorities as a "political entity".[138] Although being aware of their common roots with the Chinese mainland, today more and more Taiwanese people consider themselves as Taiwanese rather than Chinese.[139]

The two Chinas do not grant international recognition to each other. Dealing with Taiwan, the Chinese press continuously refers to the Taiwan as the "Taiwan province" to make clear that they regard the ROC as a renegade island belonging to mainland China.[140] As a result, a peaceful settlement of the Diaoyu question with participation of the ROC and the PRC has realistically to be ruled out until the Taiwan question is finally resolved. A

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[134] Information of the Taiwanese government, www.gio.gov.tw/ct.asp?xItem=18852&ctNode=2587&&mp=807, accessed on March 15th, 2007

[135] Richard W. Hartzell, "Understanding the San Francisco Peace Treaty's Disposition of Formosa And The Pescadores", Vol. 8 Harvard Asia Quarterly (2004), 1, www.taiwankey.net/dc/hartzell5.pdf, accessed on July 30th, 2007

[136] Kenneth Lieberthal, "Preventing a War Over Taiwan", Vol. 84 Foreign Affairs 2005, 54; Huiyun Fen, "Crisis Deferred: An Operational Code Analysis of Chinese Leaders Across The Strait", in: Mark Schafer, Stephen G. Walker (ed.), Beliefs and Leadership in World Politics (1rst ed., 2006), 152

[137] Von Glahn, Law Among Nations (7th ed., 1996), 311

[138] Sheng-tsung Yang, "The Right to Participate in the United Nations", in: Jean-Marie Henckaerts (ed.), The International Status of Taiwan in the New World Order (1rst ed., 1996), 127

[139] Andrew Perrin, "What Taiwan wants", Time (8.3.2004), www.time.com/time/printout//0,8816,501040315-598584,00.html ; accessed on March 7th, 2007; Shiraishi Takashi,"Nationalism in East Asia", Vol. 31 Japan Echo (2004), 43; Gary Marvin Davison, "A Short History of Taiwan–A Case for Independence", (1rst ed., 2003), 126

[140] The author relies on his own experiences while reading Chinese periodicals

solution could be achieved through a bilateral treaty. Signing such a treaty usually implies the recognition of the other partner as a state. Even tough is it possible to sign a bilateral agreement without causing an implicit recognition of the partner[141], the issue is too much about the politics that the PRC will consider Taiwan as an equal treaty partner. The current status positions (reunification for Beijing and "independence" for Taiwan) do not seem to be approachable to each other so at the moment a potential political relaxation between the two "Chinas" appears too far-fetched.[142] The Taiwan question is "hovering" like the Sword of *Damocles* over the Tiao-yu-tai islands' dispute.

2.3. Impact on disputes over other islands

It cannot be ignored that the Diaoyu / Senkaku islands are not the only unsettled territorial conflicts that the parties are faced with. If one claimant concedes the legal ownership of the islands, this will have an effect on the ensuing maritime disputes as well. In dealing with the Diaoyu / Senkaku issue the littoral states are afraid that they might establish a (legal) precedent, which could affect other territorial claims:

2.3.1. Okinotorishima

The Okinotorishima islets / Coral reefs lie about 1800 km from Tokyo and represent Japan's most remote territory. Typhoons and global warming are a menace to the existence of three islets and at high water level, the islets are no more than 20 cm above water.[143] Their total minute landmass is measuring about 10 sq m.[144]

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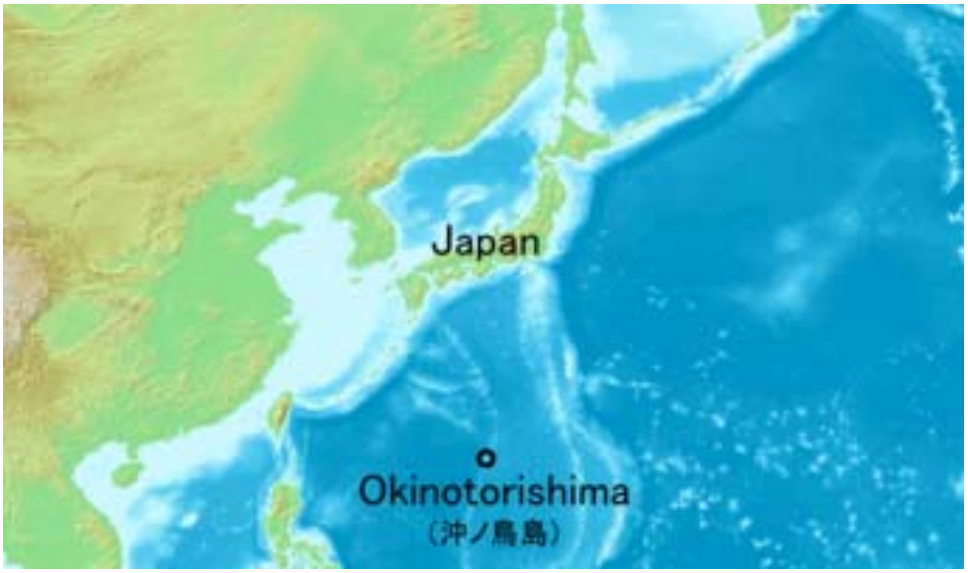
[141] Malcom N. Shaw, International Law (5th ed., 2003) 386; see: with special focus to the special positions between the Federal Republic of Germany and the Democratic Republic of Germany

[142] Kenneth Lieberthal, "Preventing a War Over Taiwan", Vol. 84 Foreign Affairs (2005), 61; Zhang Changtai, "Les defies strategiques de la Chine", No. 1 Défense nationale (2006), 65; Dennis Van Vranken Hickey, Foreign Policy Making in Taiwan (1rst ed., 2007), 115

[143] www.answers.com/topic/okinotorishima, accessed on January 20th, 2007

[144] BBC News, 15.06.2007; www.news.bbc.co.uk/go/pr/fr/-/hi/asia-pacific/6758271.stm, accessed on 17th, June, 2007

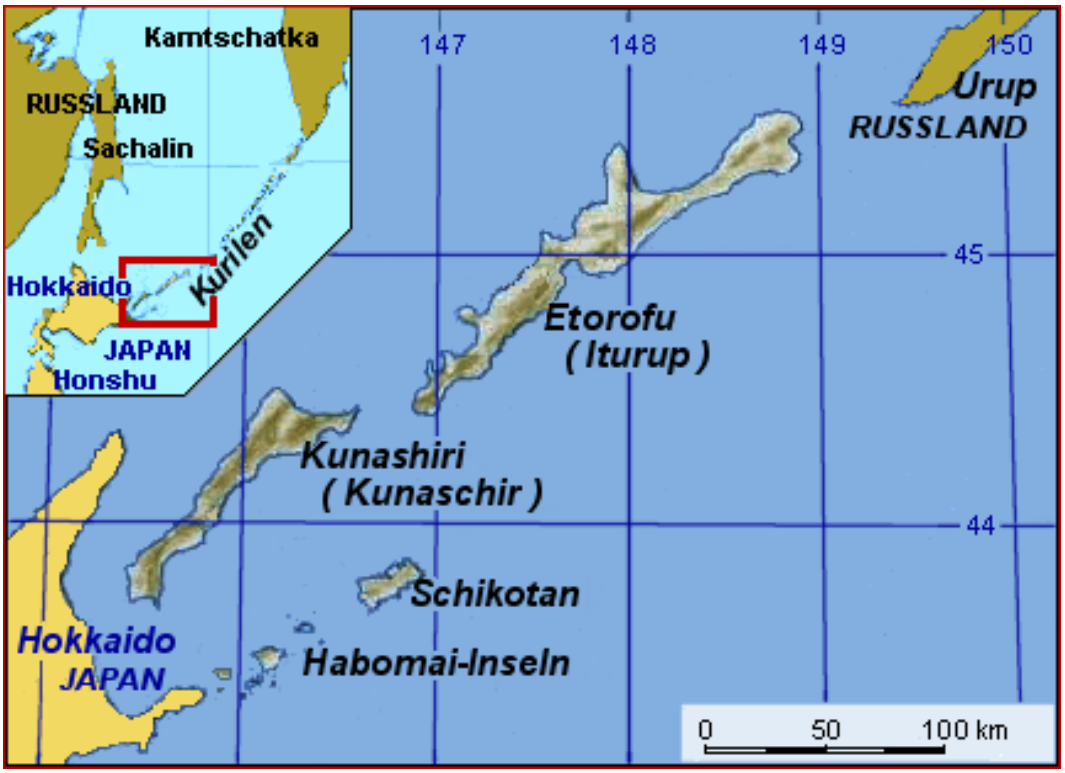


Source: http://www.answers.com/topic/okinotorishima (accessed on February 14th, 2007)

Japan puts forward that Okinotorishima consists of islands. This status entitles Japan to expand its maritime territory to about 430,000 sq km.[145] China does not call into question Japan's ownership, but stresses that the legal qualification of the barren rock, which cannot sustain human life as islands do not comply with the definition by the UN Convention of the Law of the Sea.[146]

[145] Ibid
[146] "Senkaku Islands"www.globalsecurity.org/military/world/war/senkaku.htm, accessed on August 15th, 2006; BBC News, 15.06.2007; www.news.bbc.co.uk/go/pr/fr/-/hi/asia-pacific/6758271.stm, accessed on June 17th, 2007

2.3.2. Kurile Islands Dispute



Source: http://de.wikipedia.org/wiki/Kurilenkonflikt, accessed on August 16th, 2007

Russia as the "successor" of the former Soviet Union and Japan are arguing about the ownership of the islands Habomai, Shikotan, Kunarshiri and Etorofu. The U.S.S.R. snatched the islands a couple of days before the Japanese final surrender (in August 1945) breaching a neutrality pact signed in 1941.[147] Due to the Kurile Islands dispute Japan and Russia have never signed a peace treaty and still are technically at war.[148] The Soviet Union did not sign the San Francisco Peace Treaty in 1952 because other allied countries were reluctant to include these islands and the southern half of Sakhalin into the treaty.[149]

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[147] The Kurile Islands Dispute, www.american.edu/projects/mandala/TED/ice/kurile.htm, accessed on February the 10th, 207; Ernesto de la Guardia, "La Question des iles Kouriles", Vol. 37 Annuaire Francais De Droit International (1991), 407

[148] David A. Welch, Painful Choices (1rst ed., 2005), 95

[149] Robert E. Ward, "The Legacy of Occupation", in: Herbert Passin (ed.), The United States and Japan (2nd ed., 1975), 35

2.3.3. Takeshima / Dokdo / Liancourt Rocks Islands

In 1905, Korea and Japan both formally incorporated the Takeshima / Dokdo islands into their territory. The two little 0.23 sq km[150] uninhabited islets lie midway between the landmasses of Japan and Korea.[151]

Source: http://en.wikipedia.org/wiki/Liancourt_Rocks, accessed on July, 20th, 2007

The two islets are both rocks that are the remainder of a volcanic crater and today serve as a birds refuge. Dokdo / Takeshima islets are situated about 90 km off the South-Korean island Ullung and about 157 km northwest of Japan's Oki Island. In the course of the islands dispute a maritime sea space area of 16,600 square nautical miles is at stake. Since the Korean War South Korea is administering the islands on the grounds of the so-called "Rhee line" of 1952 (boundary line between Japan and South Korea) encompassing the Dokdo / Takeshima Islands.[152] Originally, South Korea considered the islands to be rocks, but then shifted its position and claimed that they were islands.[153] In 1954, Japan suggested to seek a final solution before the International

[150] This is comparable to the size of Tokyo's Hibiya Park
[151] Serita Kentaro, "The Takeshima Dispute: A Radical Proposal"; Vol. 31 Japan Echo (2007), 32; Douglas M. Johnston, Mark J. Valencia, Pacific Ocean Boundary Problems – Status and Solutions (1rst ed., 1991) 113
[152] "The Territorial Dispute Over Dokdo", www.geocities.com/mlovmo/page4.html, accessed on April 28th, 2007
[153] Serita Kentaro, "The Takeshima Dispute: A Radical Proposal" Vol. 34 Japan Echo (2007), 32

Court of Justice, which was declined by South Korea. Japan has always interpreted exposed rocks in the middle of the Sea of Japan as islands.

2.3.4. Torishima / Danjo Gunto

The Torishima / Danjo Gunto[154] islands are two isolated and separate clusters situated in the north East Chinese Sea. These islands lie close to Japan's most southern main island Kyushu and are far closer to Japan than to South Korea.[155] Randomly because of their location, they are separated from the main Japanese archipelago by the Okinawa trough.[156] In contrast to Takeshima / Tokdo conflict, the Republic of South Korea does not call into question Japan's ownership of the Danjo Gunto Islands. South Korea adopts the view of denying any legal significance to the islands. Since the islands lie on the Korean continental shelf, the islands are discounted for marking the EEZ boundary.[157] In this (unique) case, the parties are divided only about the legal significance arising from the islands' ownership.[158]

2.3.5. Spratly– Paracel- Pratas- Macclesfield Islands / Reefs

These islands and reefs are all situated in the South Eastern Chinese Sea. The islands are rich in natural resources and thus of a high strategic value as they – unequivocally stated by all claimants- are islands, which engender an EEZ. Japan is not party of any of the conflicts affecting theses islands; in this case, China and Taiwan are in dispute with the Philippines, Indonesia, Vietnam, Malaysia and Brunei.[159]

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[154] Another name is "Marcus Island"

[155] Choon-Ho Park, "Oil Under Troubled Waters: The Northeast Asia Sea-Bed Controversy", Vol. 14 Harvard International Law Journal (1973), 239

[156] Jon M. van Dyke, "The Republic of Korea's Maritime Boundaries" (2002); www.hawaii.edu/elp/publications/faculty/theRepublicofKorea.doc , accessed on March 12th, 2007

[157] Y.H. Nieh, "Der Streit Um Die Klippeninseln Tiaoyütai Und Das Problem Des Festlandsockels Im Ostchinesischen Meer", Vol. 4 Verfassung in Übersee (1971), 449

[158] Mark J. Valencia, „Ways forward East China Sea Dispute" (22.9.06), www.isn.ethz.ch/news/se/details.cfm?ID=16699 , accessed on March 12th., 2007

[159] Hans Scheerer, Patrick Raszelenberg, China, Vietnam and die Gebietsansprüche im Südchinesischen Meer (1rst ed., 2002), 51; Guiqing Wang, Territoriale Streitfragen im Südchinesischen Meer (1rst ed., 2005), 17 onward

Source: http://www.asiaquarterly.com/content/view/160/, accessed on August 16th, 2006

2.4. Mutual Economic Dependence

Despite the range of all the various factors underlying the dispute over the Diaoyu / Senkaku Islands the economic interdependence of the claimants should not be underestimated: the claimants particularly fear a deterioration of their bilateral (trade) relations. These mutual economic networks probably represent the biggest incentive for each of the governments to step back from any escalation of the dispute.

2.4.1. Taiwan – Chinese / mainland trade relation

Although all the claimants are WTO-members in the most rapidly growing economic region in the world, the countries cannot even deploy military forces without harming their own economy. In 1996, due to the Chinese / Chinese political tensions involving U.S. deployment, the Taiwanese stock market

declined by 27%.[160] Despite certain Taiwanese trade restrictions e.g., no export of high technology allowed[161] and no regular direct flight connections[162] available Taiwan has to realise that Taiwan needs China more than the "mainlanders" need Taiwan.[163]

The PRC is not only the number one recipient of foreign direct investments worldwide making it the working bench of the globe, but also an expanding market for Taiwanese made products. Between 1990 and 2005, Taiwanese entrepreneurs had invested more than $100 billion US in the "Middle Kingdom". The export surplus of Taiwan vis-à-vis the PRC is US $ 75 Billion in favour of the Taiwanese Island.[164] Since the relaxation of cross strait investments in 1991 Taiwan has invested 53% of its total foreign investment expenditure in China mainland amounting to a sum of 47 billion US $ up to 2005.[165] Taiwan sold 37% (2004) of their exports to their cross-straight partner.

2.4.2. Japan – China / Mainland trade relation

After a long period of recession, the Japanese economy has managed a respectable recovery.[166] China's stake in Japan's trade volume surpasses the

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[160] William T. Tow, "US Strategic Capacities and Coercive Options", 173, in Greg Austin, Missile Diplomacy and Taiwan's Future: Innovations in Politics and Military Power (1rst ed., 1997); Robert S Ross, "Balance of Power Politics and the Rise of China: Accommodation and Balancing in East Asia", No. 3 Security Studies (2006)

[161] "WTO says China's biggest trade deficit is with Taiwan", Taipei Times (20.3.2006); www.taipeitimes.com/NEWS/biz/archives/2006/03/20/2003298344/print, accessed on March 14th, 2007
Note: this has been liberalized; Taiwan has now liberalised the investment legislation: See: "Taiwan liberalisiert Barrieren für Investitionen in der VR China" (2.8.06), www.china9.denewsticker/taiwan-liberalisiet-barrieren-fur-investitionen-in-vr-china.htm, accessed on March 12th, 2007

[162] flights go via Hong Kong or via Macau; Note: The freight has to bypass these cities, too. It is the Taiwanese side which imposes theses restriction due to security reasons

[163] Ralph N. Clough, "Growing Cross-Strait Cooperation Despite Political Impasse", in Donald S. Zagoria, "Breaking the China Taiwan Impasse", 132; Günther Schubert, "Wie viel Chinahandel ist gesund?" (2001), www.liberary.fes.de/fulltext/stabsabteilung/00917.htm#E283E4; accessed on March 12th, 2007

[164] Roland Rohde, "Die ehemalige britische Kronkolonie bildet einen wichtigen Brückenkopf" (2007), Beilage des "Parlaments" - "Aus Politik und Zeitgeschichte", www.bundestag.de/cgibin/druck.pl?N=parlament , accessed on March 12th, 2007

[165] Taiwanese Bureau of Foreign Trade, Taiwan yearbook 2006 (1rst ed., 2006), 126

[166] Although the current economic boost does so far not affect the unemployment rate of 5,3%

20% margin,[167] whereas China accounts for 13% of Japan's total exports (approximately: $100 billion US in 2004).[168] For the first time since WW II China – including Hong Kong – has become Japan's biggest trading partner surpassing the United States.[169] In 2004, Japan invested around $6 billion US in Mainland China.[170] The Japanese Yen spiralling down in the recent years has been favoured by the fact that China and Japan are typically complementary developing and developed countries respectively.[171]

2.4.3. Taiwanese / Japanese Trade relation

The Japanese colonized the Taiwanese Island from 1895 to 1945; even today, those two countries are not only geographically, but also economicly intertwined.[172] Taiwan and Japan's trade relations totalled $60 billion US in 2005 facing unbalanced trade relations. In 2005, Taiwan's economy was lagging behind and daunted by a rough $20 billion US trade deficit. Moreover, the Japanese only invested some $825 million US in Taiwan.[173]

2.5. U.S. interests in the dispute

Japan is an unsinkable U.S. aircraft carrier in Asia Pacific and question concerning its territorial sovereignty is of considerable strategic interest. Under Art. 6 of the Japanese Mutual Defence Treaty of 1955, both the U.S. and Japan agree to equate a military attack against the Japanese island with an attack against its own domestic ground.

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[167] J. Sean Curtin, "China-Japan flames scald business", Asia Times (19.5.2005), www. atimes.com/atimes/Japan/GD19Dh03html accessed on March the 14th, 2007

[168] William A. Mc Geveran, The World Almanac 2006, note: the dates refer to the year 2004; www.mofa.go.jp/region/asia-paci/china/index.html, accessed on May 4th, 2007

[169] "Japanese trade surplus rises 1.8%", Taipei Times (27.1.2005), www.taipeitimes.com/News/worldbiz/archives/2005/01/27/2003221171, accessed on March 14th, 2007

[170] Wirtschaft in Japan, Deutsche Botschaft Tokyo www.auswaertiges-amt.de/diplo/de/Laenderinformation/Japan/Wirtschaft/html , accessed on March 15th, 2007

[171] "China-Japan trades to exceed US $ 130 bn in 2005, Experts", People's Daily, (18.8.2003); accessed on March the 14th, 2007

[172] Taipei Times, "Calm heads needed on fishing row" (14.7.2005), 8; www.taipeitimes.com/News/editorials/archives/2005/07/14/2003263479/print, accessed July 23rd, 2007

[173] Information of the Taiwanese government, www.gio.gov.tw/ct.asp?xItem=18852&ctNode=2587&&mp=807, accessed on March 15th, 2007: Information of the Japanese government: www.mofa.go.jp/region/asia-paci/taiwan/index.html, accessed on May 4th, 2007

"The United States and Japan recognize that an armed attack against either party in the territories under the administration of Japan would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional provisions and processes."[174]

The Japan-U.S. security alliance refers to the Diaoyu / Senkaku Islands as well. Because the U.S. adopts a neutral stance to whom the islands belong, it is questionable if the U.S. would grant military assistance to Japan in the case of a bellicose confrontation. The American diplomat and former Ambassador to Japan Walter F. Mondale stated in 1996 though that the U.S. would not be "*automatically committed to defend the islands in case of an emergency*.[175] According to an American think tank, the U.S. has an interest in keeping the conflict alive. The islands make Japan drift closer to America.[176]

My Conclusion: In fact, the ongoing deepening of mutual economic ties implies that the price of a military conflict is rising every day. All of the governments utter their rhetoric for various domestic, historical and political reasons. Nevertheless, the risk of a military conflict has to be regarded as too unpredictable as well as being capable of destabilizing the entire region. Given that economic interdependence outweighs the risks of any military action, no party in the conflict adopts conspicuous or belligerent behaviour. It does not appear that the contesting states are motivated solely by their greed for oil, but they are interested in keeping the conflict at a low, diplomatic and non-military level. Given that the power in the region is incrementally shifting from the "allied" U.S. - / Taiwanese- / Japanese - axis to the PRC, the time is undoubtedly running in favour of the Communist regime…

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[174] quoted in: Han-yi Shaw, "Its History and an analysis of the ownership Claims of The P.R.C., R.O.C. and Japan", No. 3 Occasional Papers (1999), 125

[175] International Boundary Consultants (15.8.1998), www.boundaries.com/US-Asia.htm, accessed on July 16th, 2006

[176] O'Hanlon, Michael; Mochizuki, Mike (21.5.2005): "Calming the Japan-China Rift", The Brooking Institution, quoted in Maren Becker, Konrad Adenauer Stiftung Washington., www.kas.de/db_files/dokumente/7_dkumente_dok_pdf_6791_1.pdf, accessed on February 20th, 2007

3. History of the Conflict from 1372 to today

Most historians who wrote about the islands tend to interpret the historical "truth" in their country's favour.[177] In analysing the literature it is undeniable that some commentators deviate from a strictly legal interpretation of the conflict by mixing the historical truth with their own political convictions. Very few Chinese or Japanese scholars cover the question of sovereignty from a neutral stance. Most of them argue tendentiously why their country enjoys sovereignty over the islands.

3.1. Missions of the Ming Dynasty to the Ryukyu[178] Kingdom

The Chinese and Taiwanese claims on the Diaoyu Islands are mainly historically - based. As early as 1372 during the Ming Dynasty (1368-1644),[179] the Chinese emperor initiated tributary relations with the Ryukyu kingdom whose reign extended from Amami to the Yaeyama islands.[180] The Ryukyu kingdom maintained these relations with China throughout the Ming and Qing eras.[181] At that time, every time the investiture of a new king occurred, the heir to the throne had to pledge loyalty and await the imperial's consent. The kingdom adopted Confucianism, Chinese classical language and Chinese folk music.[182] Despite being compelled to pay monetary tributes the kingdom's position as a trading centre and as a bridge to various kingdoms paid off these

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[177] An appraisable exception own nation loving history interpretation is the late Japanese History Professor of Kyoto University who advocates the Senkakus to China: Kiyoshi Inoue, "Japanese Militarism & Diaoyutai (Senkaku) Island – A Japanese Historian's View", www.skycitygallery.com/japan/diaohist.html, accessed on December 7th, 2006

[178] The Chinese name is: Liuqiu kingdom

[179] K. R. Dark, The Wave Of Time (1rst ed., 1998), 205

[180] Yaeyama island is the most southern island of the Okinawa chain being the nearest island to the Senkaku Islands

[181] "Early History of the Ryukyu Kingdom and it's Relationship with China and Japan", http://shitokai.com/ryukyu.php, accessed on March 14th, 2007

[182] Man-houng Lin, "The Ryukyu and Taiwan in the East Asian Sea. A Longue Durée Perspective", No. 1084 Academia Sinica Weekly (24.8.2004) ; www.japanfocus.org/products/topdf/2258, accessed on March 14th, 2007

feudal obligations.[183] The last Ryukyu was dispatched to the Middle Kingdom in the year 1874; five years later Japan formally annexed the islands.[184] From this point of time, the Ryukyu Kingdom paid tribute to China's emperor as well as to Japan's Tenno.[185]

During the 500 year (1372-1879) reign over the Ryukyu the Chinese emperors dispatched some twenty-four investiture missions to the vassal state. Once the missions was completed, the envoys shared their knowledge in written reports to the Chinese Emperor. The Chinese reports dealt with the itinerary – named the "*compass route*"-, which the imperial navigators used. The routes' departure location was Foochow in Fukien Province to Naha, which was Ryukyu's capital at that time. These documents were just as useful devices for the navigators as beacons and lighthouses would have been. Using Mandarin language the travel records provided instructions to determine the vessel's position. All these documents were stored in the government's archives.[186] The following records were conserved:

3.1.1. Chen Kan Mission in 1532

The first imperial envoy was Yang Zai in the year 1372. Before the mission of Chen Kan in 1532,[187] a total of ten imperial envoys had been dispatched to the Ryukyu Kingdom. Due to a fire in the Fujian archives, those records have been lost making the data of Chen Khan the oldest still in existence.[188] Nevertheless, it may be presumed that his voyage was taking the same route

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[183] "Ryukyu kingdom", www.answers.com/topic/ry-ky-kingdom, accessed on March 13th, 2007; Ta-Tuan Ch'en, "Investiture of Liu-Ch'iu Kings in the Ch'ing Period", in: John K. Fairbanks, The Chinese World Order (1rst ed., 1968), 136

[184] China also established tributary relationships with Korea, Nepal, Sikkim, Assam, Burma, Andaman Islands, Malaya, Singapore, Thailand, French Indochina, Sulu Archipelago of the Philippines, Sakhalin Island; see: Greg Austin, China's Ocean Frontiers (1rst ed., 1998), 14

[185] www.answers.com/topic/ry-ky-kingdom, accessed on March 13th, 2007; Ta-Tuan Ch'en, "Investiture of Liu-Ch'iu Kings in the Ch'ing Period", in John K. Fairbanks, The Chinese World Order (1rst ed., 1968), 136

[186] Tao Cheng, "The Sino-Japanese Dispute Over the Tiao-yu-tai (Senkaku) Islands and the Law of Territorial Acquisition", Vol. 14 V.J.I.L. (1974), 254

[187] Other sources date this mission in the year 1534: see: Baidu bailiao, "Diaoyu dao", http://baike.baidu.com/view/2876.htm, accessed on March 30th, 2007

[188] Kiyoshi Inoue, "Japanese Militarism & Diaoyutai (Senkaku) Island – A Japanese Historian's view", www.skygallery.com/japan/diaohist.html, accessed on December 7th, 2006

to the vassal state as all of the previous missions had done. Chen Kan wrote in his diary:

"We sailed past Pingjia Mountain, then Diaoyu Island, Huangwei Island and Chiwei Island, using only one day to cover a distance which normally required three days. Kume Hill[189], which belongs to the Ryukyu (naishu Liuqiu zhe) appeared on the evening of the eleventh day…"[190]

Of note is the fact that at that time Chen Kan already used the name "Diaoyu Yu". Most importantly, it was stated in the records that Kume Hill was under the rule of the Ryukyu Kingdom. Kume Hill was the closest Ryukyu Mountain to the most eastern Chiwei Island being situated only 40 nm west of it. As Chen Kan was departing from Foochow (today: Fuzhou), this provides a hint that the Diaoyu Islands were not acknowledged to belong to the Ryukyu Kingdom.[191] In reverse, it means that the boundary at that time lay between Kume Hill and the Diaoyu Islands and that the Diaoyu Islands were considered to be on the Chinese side.

3.1.2. Kuo Ju Lin Mission in 1561

After the death of another king of the Ryukyu Kingdom, Kuo Ju Lin was appointed to undertake an investiture mission to the vassal state. Into his records, he made the following statement:

[189] Actually, he confused the Kume Hill with Yebi Mountain. Calling it in the records erroneously Yemi Mountain (boundary between Japan and the Liuqiu Kingdom) he lost his way to Naha; see: Unryu Suganuma, Sovereign Rights and Territorial Space in Sino-Japanese Relation (1rst ed., 2000), 54

[190] Chinese Ministry of Foreign Affairs, Lun Diaoyu Zhuquan de guishu (Considering to whom belong the Diaoyu), handed out to the author on July 15th, 2006 by the Chinese embassy in New Delhi ; Chen Kan, "Shi liuqiu Lu (The Record of the Mission to the Liuqiu Kingdom)" (1970-reprint), 11, 14

[191] Kiyoshi Inoue, "Japanese Militarism & Diaoyutai (Senkaku) Island – A Japanese Historian's view", www.skygallery.com/japan/diaohist.html, accessed on December 7th, 2006

"Chiyu zhe, jie Liuqiu difang shan ye / This is Chiwei Island, where there is the boundary with the Liuqiu Kingdom"[192]

This statement can be regarded as a repetition of what Chen Kan wrote down 29 years ago. The area beyond Kume Hill was Ryukyu's territory, whereas the Diaoyu - including Chiwei – were part of China.[193] Suganuma states that the word "jie" (boundary) was used in the record. This provides a hint that the boundary began just beyond the Chiwei Island. As the Diaoyu Islands northern part bore a blue sea (depth 110 – 170 meters), the southern coast of Chiwei Island entails the end of the continental shelf reaching a depth of more than 2200 meters. This indicates that even in former times, maybe due to the changing colours of the seawater, the continental shelf was regarded as the delimitation of the boundary. Pursuant Chinese official records a Saint-King yellow dragon white fish (shengwang huanglong baiyu) was supposed to live in the Oceanic trough. In order to appease the dragon the navigators sacrificed pigs and sheep in the course of a trench crossing ritual.[194]

3.1.3. Xiao Chong Mission in 1576

Whilst on another investiture mission to the Ryukyu Kingdom Xiao Chong reprinted navigation maps taking into account the experiences and descriptions of Chen Kan and Kuo Ju Lin.[195] This envoy recorded in 1576 that before "*having passed the Yebi Mountain (Kume Hill) it took days to enter the Kingdom (ruguo)*".[196] Xiao Xiong erroneously utilized the Yebi Mountain,

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[192] Chinese Ministry of Foreign Affairs, "Lun Diaoyu Zhuquan de guishu" (Considering to whom belong the Diaoyu), handed out to the author on July 15th, 2006 by the Chinese embassy in New Delhi

[193] Kiyoshi Inoue, "Japanese Militarism & Diaoyutai (Senkaku) Island – A Japanese Historian's View", www.skygallery.com/japan/diaohist.html, accessed on December 7th, 2006

[194] Unryu Suganuma, Sovereign Rights and Territorial Space in Sino-Japanese Relation (1rst ed., 2000), 52, 53

[195] Unryu Suganuma, Sovereign Rights and Territorial Space in Sino-Japanese Relation (1rst ed., 2000), 54

[196] Xiao, Shi Liuqiu Lu, 79; quoted in: Unryu Suganuma, Sovereign Rights and Territorial Space in Sino-Japanese Relation (1rst ed., 2000), 54

which his predecessor (Chen) had done, too.[197] Interestingly, Xiao Chong uses the proper Chinese word (ruguo) for passing the national border.

3.1.4. Xia Ziyang Mission in 1606

At that time, piracy challenged the trade relation between China and the Ryukyus. Departing from China Xia wrote in his records:

"In the afternoon we passed Diaoyu Island. The next day we sailed past Huangwei Island. At night, the sea became rough and the ships shook terribly. Day after day, we sailed through an area of deeply black (shenheisede) water as if muddy trench (zhuogou) water or dark blue water (dianse). On the 29th, when we saw the head of Kume Hill, the Ryukyuans were extremely happy as if they were at home."[198]

Although the second person (Xiao was the first) to draft charts, he was the first navigator to describe the China – Ryukyi route in detail: He delineates all the navigation aids, such as Meihua Minor Garrison and Jilong Island, which the mission leaders utilized at this period of time. He explicitly mentioned the Diaoyu Islands and drew the boundary line between China and Ryukyu reckoning that the Diaoyu Islands appertained to China. Additionally, he stated that the citizenry of Ryukyu greeted the navigators on the Kume Hill, which indicates that this was the most remote territory of the kingdom. It can be assumed that the king of the Ryukyu kingdom dispatched a "welcome committee" to receive the missions so that he could thereby display his obsequious comportment. At last, the alternation of the colours coincided with the line where he delineated the boundary delimitation. In other words, the

[197] Unryu Suganuma, Sovereign Rights and Territorial Space in Sino-Japanese Relation (1rst ed., 2000), 55

[198] Xia, Shi Liuqiu Lu, 222-223; quoted in: Unryu Suganuma, Sovereign Rights and Territorial Space in Sino-Japanese Relation (1rst ed., 2000), 56

Chinese utilized the words trench (gou), which was synonymous with the word boundary (jie).[199]

3.1.5. Shunfeng Xiangsong Logbook of 1403

Navigation pilots for the control of tributary systems are of crucial importance. The Chinese did not only invent the compass, but were also very advanced in terms of editing precise navigation booklets. Already during the Zhou Dynasty around the eleventh century B.C., the Chinese invented guidebooks for their navigation.[200] The Shunfeng Xiangsong Guide Book published around 1403 depicted the Diaoyu Islands as following:

"…berth with a depth of 15 tuo (one tuo = 6 inches) in Diaoyu Island are good for refuelling wood and drinking water…." [201] "After passing Pengjia Mountain, the ship goes towards Diaoyu Island. The ship leaves Diaoyu Islands following the south wind towards the east…"[202]

The guidebooks gave instructions to navigators for what purpose the Diaoyu Islands could be used. It can be assumed by the instructions that disembarkations took place in these early times and sailors touched the Diaoyu Islands' soil. For safety - reasons the Diaoyu Islands served as navigation aids as well as a resort to find a safe refuge in case of unstable weather conditions.[203]

3.1.6. Defence Manuals

3.1.6.1. Zheng Ruozheng manual of 1561

In China's former history, "barbarians" attacked the Middle Kingdom. During the Qing Dynasty, Japanese pirates (Wako or Wo kou) endangered the

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[199] Unryu Suganuma, Sovereign Rights and Territorial Space in Sino-Japanese Relation (1rst ed., 2000), 57
[200] Unryu Suganuma, Sovereign Rights and Territorial Space in Sino-Japanese Relation (1rst ed., 2000), 59
[201] Shunfeng Xiangsong, May Fair Winds Accompany You (1975), 13
[202] Shunfeng Xiangsong, May Fair Winds Accompany You (1975), 62, 63
[203] Unryu Suganuma, Sovereign Rights and Territorial Space in Sino-Japanese Relation (1rst ed., 2000), 60

investiture missions when they crossed the navigators' routes.[204] As Zheng Ruozeng[205] who was appointed military adviser by Hu Zongxian published the 13 fascicles of Chouhai Tubian in 1561 using the information he had acquired from the captured Wako / wo-kou. He also had access to the highest political decision makers and documented his insight about the deployment of Chinese military forces at that time. Thanks to his writings it was reported that the Ming Dynasty built up a military defence system extending from the northern Shantung province to Canton province. In the Choubai Tubian defence manual, the Diaoyu Islands are documented to be appurtenant to the Fujian garrison defence system.[206]

3.1.6.2. Military relation between China and the Ryukyu

Contrary to the wo-kou, it must be stated regarding military affairs that no territorial disputes between China and the Ryukyu Kingdom could be historically observed.[207] At no point of time did the Ryukyu Kingdom did object the Chinese conception that the Diaoyu Islands belonged to them.[208]

3.2. Missions to the Ryukyu Kingdom in Qing Dynasty

The Qing Dynasty lasted from 1644 to 1911.[209] In this time-period the investiture missions were continued.

3.2.1. Records of Zhang Xueli mission in 1663

Zhang Xueli was the first chief envoy of an investiture mission during the Qing Dynasty. One major circumstance regarding the Ryukyu regime occurred: In 1609, the Japanese took advantage of the uprisings and the social disorder at the end of the Ming Dynasty by subduing the Ryukyu Kingdom. From thereon,

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[204] see: Samuel Couling, Encyclopaedia Sinica (1rst ed., 1917), 255

[205] Note: Other possible spelling is: Cheng Jo-tsung
This seafarer is not to be confused with Zheng, the great seafarer of the Ming Dynasty

[206] Tao Cheng, "The Sino-Japanese Dispute Over the Tiao-yu-tai (Senkaku) Islands and the Law of Territorial Acquisition", Vol. 14 V. J. I.L. (1974), 256; Baidu Bailiao, "Diaoyu Dao", http://baike.baidu.com/view/2876.htm, accessed on March 30th, 2006, Zheng Hailin, Tiao-yu-t'ai lieh yu chih li shih yu fa li yen chiu (1rst ed., 1998), 11

[207] Unryu Suganuma, Sovereign Rights and Territorial Space in Sino-Japanese Relation (1rst ed., 2000), 70

[208] Kiyoshi Inoue, "Japanese Militarism & Diaoyutai (Senkaku) Island – A Japanese Historian's view", www.skygallery.com/japan/diaohist.html, accessed on December 7th, 2006

[209] K. R. Dark, The Wave Of Time (1rst ed., 1998), 205

the kingdom had to pay tribute to emperors. In Zhang recordings though, no observation of islands was retained. In fact, he lost his orientation on its way to the Ryukyu Kingdom. Being lost in the East China Sea they could only verify that they transited the boundary by the colour of the ocean water.[210]

"The colour of water began to change from blue to dark blue. "Hey! We entered the ocean", shouted the captain. There is a white water line crossing between south and north. "Here, therefore, is (jiezhongwai) the boundary between China and a foreign country," stated the captain. Thereafter we witnessed many schools of fish."[211]

Based on this rather unrefined piece of information it is not possible to prove whether the boundary is in vicinity of the Chiwei Islands. The core information does not deprive the reader of the significance of the changing colours of the water. It meant that the trench was equated to the national boundary.[212]

3.2.2. Records of Wang Chi in 1683

In the year 1682, the Ryukyu Crown Prince Shangzhen pledged for a Chinese investiture mission. The next year Wang Chi executed the Ryukyu's request. After his return to China the seafarer, Wang disclosed some hitherto unknown facts. As the preceding mission lost its way, some Ryukyu citizens helped him to seek his orientation. The outcome was that his voyage lasted only three days until their arrival in Nasha. He documented his experiences by complementing the "Shi Liuqiu Lu" by five facsimiles.[213] From this record, it is possible to derive his awareness about the location of the maritime boundary:

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[210] Unryu Suganuma, Sovereign Rights and Territorial Space in Sino-Japanese Relation (1rst ed., 2000), 71

[211] Zhang, Shi Liuqiu Ji, 137

[212] Unryu Suganuma, Sovereign Rights and Territorial Space in Sino-Japanese Relation (1rst ed., 2000), 71

[213] Unryu Suganuma, Sovereign Rights and Territorial Space in Sino-Japanese Relation (1rst ed., 2000), 72,73; Chinese Ministry of Foreign Affairs, Lun Diaoyu Zhuquan de guishu (Considering to whom belong the Diaoyu), handed out to the author on July 15th, 2006 by the Chinese embassy in New Delhi

“For some unknown reasons, we arrived at Chiwei Island without passing by Huangwei Island. In the evening, the ships went through the jiao or guo (trough) to celebrate the Haishenji (ritual to the sea god) or guogouji (crossing trough ritual). Along with rice, live pigs and sheep were sacrificed to the sea god. ”What does “jiao” (suburbs/outskirts) mean asked Wang Chi. ”This means that there is a zhongwai zhi jie (the boundary between China and foreign country)”, replied the captain.” “How do you distinguish the boundary?” asked Wang again. “I believe the boundary is located here, But this does not mean that everyone can guess this location. Nor is my belief irresponsible”, replied the captain.[214]

Reading the previous records of Khan or Xiao it may be assumed that the Diaoyu islands could have been in theory terra nullius (soil not belonging to anyone). The terminology clarifies this quite far-fetched idea utilizing the phrase “the boundary between China and foreign country”: Thanks to this document, it is no longer deniable that the Diaoyu islands were considered to be located on the Chinese side of the boundary.[215] As consequence, the idea of terra nullius can be eliminated.

3.2.3. Xu Baoguang Mission in 1709

The investiture missions were continued in the Ming Dynasty. Xu Baoguang’s records (Zhong shan zhuan xin lu) were quoted in the navigation guide of Tei Junsoku. This document was called “Shinan Kogi” (Broad Interpretation of Navigation Guide). This pamphlet meticulously describes the existing marine condition a voyage faced on its way from China to the Ryukyu.[216] The guide reveals one striking piece of information:

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[214] Wang, Shi Liuqiu Lu, 101, 102

[215] Kiyoshi Inoue, ”Japanese Militarism & Diaoyutai (Senkaku) Island – A Japanese Historian’s view”, www.skygallery.com/japan/diaohist.html, accessed on December 7th, 2006

[216] Tei Junsoko, Shinan Kogi, quoted in: Unryu Suganuma, Sovereign Rights and Territorial Space in Sino-Japanese Relation (1rst ed., 2000), 76

"After sailing 10 geng (one geng= 18, 6 miles), vessels pass Diaoyu Island…. After sailing 6 geng, vessel will arrive at Kume Hill, where is located the southwest boundary between the Ryukyu Kingdom and China (liuqiu xinanfang jieshang zhenshan)."[217]

Whereas the first two navigators equivocally stated the Diaoyu islands did not belong to the Ryukyu Kingdom, Xu and Wang Chi stated clearly that between Chiwei Island and Kume Hill was China's boundary. In addition, Xu Baoguang drew a comprehensive map (Chungshan Mission Records) of the Ryukyu Kingdom in 1719 depicting all its thirty-six islands. None of the Diaoyu islands were claimed as belonging to the tributary state.[218]

It is noteworthy that at the end of an explanatory footnote on the Ishigaki and the eight other areas of the Yaeyama archipelago (which are the closest islands to the Diaoyu islands) it was stated that were "the south-western most boundary of the Ryukyu."[219] A long time ago Chungshan Mission Records were edited in a Japanese edition. This edition, according to Chinese interpretation contributed largely to the Japanese understanding of the Ryukyu Kingdom.[220] As the Chungshan Mission Records were influenced by the great scholar Cheng Shun Tse and by many other Ryukyu people - including high rank officials of the court of the Ryukyu king - one must attach legal value to them.[221] According to the Japanese historian Inoue, it may be assumed that records document the genuine opinion of the Chinese and the Ryukyu state at the same time. [222]

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[217] Ibid

[218] Baidu Bailiao, "Diaoyu", http://baike.baidu.com/view/2876.htm, accessed on March 30th, 2007, Renmin wang people, "Diaoyu Dao Zhengduan de lai long qu mai" (March 2004) ; http://www.people.com.cn/GB/papers2836/11730/1057574.html, accessed on March 30th,

[219] Kiyoshi Inoue, "Japanese Militarism & Diaoyutai (Senkaku) Island – A Japanese Historian's view", www.skygallery.com/japan/diaohist.html, accessed on December 7th, 2006

[220] Chinese Ministry of Foreign Affairs, "Lun Diaoyu Zhuquan de guishu", 2004 (Considering to whom belong the Diaoyu), handed out to the author on July 15th, 2006 by the Chinese embassy in New Delhi / India

[221] Unryu Suganuma, Sovereign Rights and Territorial Space in Sino-Japanese Relation (1rst ed., 2000), 77

[222] Kiyoshi Inoue, "Japanese Militarism & Diaoyutai (Senkaku) Island – A Japanese Historian's view", www.skygallery.com/japan/diaohist.html, accessed on December 7th, 2006

3.2.4. Zhou Huang Mission in 1755

After having returned to China, the Chinese Envoy Zhou Huang renewed the previous shilu by enriching them by important historical, political, social and cultural knowledge about the Ryukyu Kingdom. Zhou named the kingdom's major cities. Sailing the compass route he included the Diaoyu Islands as practical navigation aids in his records. As did all his predecessors, he celebrated the ritual of the trench crossing (guogouki) as he passed the Ryukyu Trough.[223]

3.2.5. Geographer's point of view

3.2.5.1. Hayashi Shifei

In a reputed book called "Sangoku Tsuran Zusetsu" the Japanese geographer Hayashi Shifei analysed the Ryukyu Kingdom. Relying on Zhongshan Chuanchin Ku by Xu Baoguang, he illustrated the known world's geography using altitudes and latitudes. He also revealed that the Ryukyu Kingdom was composed of thirty-six islands not comprising the Diaoyu Islands.[224]

3.2.5.2. Cheng Shuntse in 1708

A crucial point for the Chinese claim to the islands might be that as early as in the eighteenth century Japanese scholars believed the Senkaku Islands belonged to China. Cheng Shuntse stated in his booklet "General Guide Book for Navigation" in 1708 that "*the Kume Shima is the western boundary mountain of the Ryukyus.*"[225]

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[223] Unryu Suganuma, Sovereign Rights and Territorial Space in Sino-Japanese Relation (1rst ed., 2000), 78

[224] Hayashi Shihei, Sangoku Tsuran Zusetsu (1rst ed., 1785), 12-14; see also: www.2gol.com/users/hsmr/contents/East%20Asia/Korea/Dokto_Islands/Maps/Sangoku_html, accessed on August 15th, 2007

[225] Cheng Shuntse, Chih-Nan Kuang-I (1708), quoted in: Tao Cheng, "The Sino-Japanese Dispute Over the Tiao-yu-tai (Senkaku) Islands and the Law of Territorial Acquisition", Vol. 14 V.J.I.L. (1974), 256

3.2.5.3. Lin Tzu-ping in 1785

A reputed Japanese cartographer named Lin Tzu Ping published a map about the Ryukyu. In his publication "An Illustrated General Map of the three Countries," he accounted the Diaoyu Islands to be Chinese territory.[226]

3.2.6. Location for gathering herbs and fishing

During the second half of the nineteenth century, Chinese pharmacists in quest of herbs extended their range to the islands. At that time, Chinese began to catch fish in the surroundings of the islands. The Chinese asserted that the islands were used as shelters for Chinese and Taiwanese fishermen in case of an emergency. Being aware that private fishermen could not have occupied the islands in the legal sense, the Chinese rely on a subtle contention behind it: The fishermen of Taiwan never operated in non-Chinese waters at that time indicating a special geographic and economic link to China at that time. This provides a strong hint that the Diaoyu Islands were considered to be within the Chinese domestic waters.[227]

3.3. Japan's discovery of the Diaoyu Islands

3.3.1. Japan's Invasion to the Ryukyu Kingdom

As already mentioned, from the year 1609 on the Ryukyu Kingdom was a tributary state to both countries: China and Japan. The last Chinese envoys to the kingdom were noticing that the Ryukyuans were becoming more and more japanized than their own people once sinicized them. Apparently, they felt the pressure to "respect" the Japanese more than to honour the Chinese explaining that they started Ryukyu (or Japanese) names to identify the Diaoyu Island as Uotsuri.[228] In 1872, the Japanese government set up the "Ryukyu han" subjugating the Ryukyuans under the jurisdiction of the Foreign

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[226] Renmin wang people, "Diaoyu Dao Zhengduan de lai long qu mai" (March 2004) ; http://www.people.com.cn/GB/papers2836/11730/1057574.html, accessed on March 30th, 2007; Lin, Tzu-ping, An Illustrated General Map of the three countries (1785), quoted in: Tao Cheng, "The Sino-Japanese Dispute Over the Tiao-yu-tai (Senkaku) Islands and the Law of Territorial Acquisition", Vol. 14 V.J.I.L. (1974), 258

[227] Tao Cheng, "The Sino-Japanese Dispute Over the Tiao-yu-tai (Senkaku) Islands and the Law of Territorial Acquisition", Vol. 14 V.J.I.L. (1974), 258

[228] OeKenzaburo, Okinawa Noto (Record of Okinawa) 1993, 92-94; quoted in: Unryu Suganuma, Sovereign Rights and Territorial Space in Sino-Japanese Relation (1rst ed., 2000), 83

Ministry. After the Botan tribe incident the Japanese compelled the Ryukyu to break ties with the Chinese Emperor. In 1876, the jurisdiction for the former independent kingdom was delegated to the Home Secretary.[229]

3.3.2. China's - Japanese Mediation as a suite to Japan's Invasion

Having been invaded the government of the Ryukyu Kingdom sent envoys to the Middle Kingdom so that they could request military assistance. Being weakened by internal disorder the Qing court could not do much in favour of the Ryukyuans.[230] Actually, the former U.S. President Ulysses S. Grant had led negotiations between China and Japan in a private meeting. In this mediation, Japan proposed that from the Okinawa Islands to the north all territories should become Japanese. All the territories belonging to Miyako-Yaeyama islands should remain Ryukyu / Chinese. In this peace negotiation, the Diaoyu Islands were not subject to any discussions indicating that they were not considered Ryukyu territory. In 1881, the Qing government finally turned in and signed the treaty to divide the Ryukyu Kingdom into two parts following the Japanese proposal. The Qing emperor withheld his imperial assent to this humiliation.[231]

3.3.3. Japan's Discovery of the Islands in 1884

In the year 1884, Tatsushiro Koga, a native businessman from the Fukuoka Prefecture discovered the Senkaku Islands for the Japanese. He tried to cultivate the barren soil of the Senkaku Islands.[232] In 1894, he sent an application for a leasehold contract of the islands to the Okinawa prefecture government. The local Prefecture turned down his application as "*it was not clear at that time whether the islands belonged to the Japanese empire*" Being dissatisfied with the results, he then adressed the request directly to the Home Ministry and the Ministry of Agriculture and Commerce in Tokyo. The outcome

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[229] Man-houng Lin, "The Ryukyu and Taiwan in the East Asian Seas: A Longue Durée Perspective", www.japanfocus.org/products/topdf/2258, accessed on March 13th, 2007

[230] "Ryukyu Kingdom"; www.answers.com/topic/ry-ky-kingdom, accessed on March 12th, 2007

[231] Kiyoshi Inoue, "Japanese Militarism & Diaoyutai (Senkaku) Island – A Japanese Historian's View", www.skygallery.com/japan/diaohist.html, accessed on December 7th, 2006

[232] Makino Kiyoshi, Igunkuba Jima Shoshi, 66 quoted in: Unryu Suganuma, Sovereign Rights and Territorial Space in Sino-Japanese Relation (1rst ed., 2000), 9

was the same: On the grounds that the ownership of the islands was "*uncertain*", he could not lease the Senkaku Islands.[233]

3.3.4. Japan's acquisition of the Senkaku Islands

3.3.4.1. Background of Japan's tardiness

Thanks to the enforced opening of Japan in 1868, the Meiji Restoration reforms were instrumental in expanding the nation's influence. The Ryukyu Kingdom was not the only country to be subdued: Korea was coercively "opened" by Japan in 1874.[234] The Senkaku Islands were thereafter as well on Japan's agenda.[235] The Japanese had already insinuated to be willing to extend the territory to the Senkaku Islands by 1879.[236] Japan's acquisition of the Ryukyu Kingdom did not coincide with the final incorporation of the Senkaku Islands in 1895.

The reasons for such tardiness are subject to manifold interpretations: According to Japanese officials the Japanese government was rather reluctant to seize the islands due to their smallness, their proximity to China and the fear of triggering negative publicity in the Chinese media.[237]

The Governor of the Okinawa Prefecture made a request to the central government on Tokyo in 1885 and 1890 that the Senkaku Islands should be designated as part of his prefecture.[238] Actually, it is not clear if the Magistrate acted on behalf of a secret order from the Home Secretary or if he

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[233] Okinawa Mainichi Shimbum, quoted in Kiyoshi Inoue, "Japanese Militarism & Diaoyutai (Senkaku) Island – A Japanese Historian's view", www.skygallery.com/japan/diaohist.html, accessed on December 7th, 2006

[234] Marco Cuturi, "Japon, Chine Le poids de l'histoire" (24.1.2003). Available on : www.ism.ac.jp/~cuturi/misc/japan_chine.pdf, accessed on March 16th, 2007

[235] Han-yi Shaw, "Its History and an analysis of the ownership Claims of The P.R.C., R.O.C. and Japan", No. 3 Occasional Papers (1999), 71

[236] Chubei Mutsui, Dai Nippon Zensu (The Complete Map of Great Japan) 1879; quoted in: Toshio Okuhara, "The Territorial Sovereignty over the Senkaku Islands and Problems on the Surrounding Continental Shelf", Vol. 11 Japan Annual of International Law (1967), 97

[237] Nihon Gaiko Monjo Vol. 18 (Documents on the Japanese Foreign Relations), 573-576, Vol. 23, 531-532, quoted in: Toshio Okuhara, "The Territorial Sovereignty over the Senkaku Islands and Problems on the Surrounding Continental Shelf", Vol. 11 Japan Annual of International Law (1967), 98

[238] Toshio Okuhara, "The Territorial Sovereignty over the Senkaku Islands and Problems on the Surrounding Continental Shelf", Vol. 11 Japan Annual of International Law (1967), 98

independently submitted the request.[239] In 1894, the central government reacted to his third submission of 1893 and conferred the islands to the Okinawa Prefecture. On January 14th, 1895, the Japanese government eventually instructed the prefecture to erect landmarks on the islands.[240] All these cabinet decision were secretly made; they were declassified and were published no earlier than in March 1952 (*Japan Foreign Affairs Documents*).[241] The details of Japan's reluctance are to be mentioned:

3.3.4.2. First Letter of Okinawa Prefecture Magistrate in 1885

Apparently, there must have been some "turbulences" while incorporating the Senkaku Islands. The Magistrate of Okinawa, Nishimura Sutezo reported in a letter dated September 22nd, 1885 his concerns about the incorporation to the national Home Secretary. This letter was formally declared as a "petition".[242]

"Because Kumeseki-shima, Kuba-shima and Uotsuri-shima have since ancient times been the names used by this prefecture to refer to them, and since they are uninhabited islands close to the islands Kume, Miyako, Yaeyama under the jurisdiction of this prefecture, there should not exist any difficulties hindering their incorporation into this prefecture. Yet, due to their differences in terms of topography from the earlier reported islands Daitojima, the possibility must not be ignored that they are the same islands recorded as Diaoyutai, Huangweiyu, and Chiweiyu in the Zhongshan Records. If they truly are the same islands, then it is obviously the case that the details of the islands have

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[239] Han-yi Shaw, "Its History and an analysis of the ownership Claims of The P.R.C., R.O.C. and Japan", No. 3 Occasional Papers (1999), 71

[240] Japanese Foreign Ministry, "The Basic View on the Sovereignty over the Senkaku Islands", www.mofa.go.jp/region/asia-paci/senkaku/senkaku/html, accessed on July 15th, 2006; Toshio Okuhara, "The Territorial Sovereignty over the Senkaku Islands and Problems on the Surrounding Continental Shelf", Vol. 11 Japan Annual of International Law (1967), 98

[241] Han-yi Shaw, "Its History and an analysis of the ownership Claims of The P.R.C., R.O.C. and Japan", No. 3 Occasional Papers (1999), 100

[242] Han-yi Shaw, "Its History and an analysis of the ownership Claims of The P.R.C., R.O.C. and Japan", No. 3 Occasional Papers (1999), 72

already been well-known to Qing envoy ships dispatched to crown the former Zhongshan King and already given fixed (Chinese) names and used as navigation aids en route to the Ryukyu Islands."[243]

After the reception of this letter, the Home Secretary Yamagata Aritomo forwarded this letter for the final approval to the Foreign Minister Inoue Kaoru. In this request, the Home Secretary attached the Magistrate's acknowledgements asserting that they were not relevant in the legal sense.[244] The Foreign Minister could not consent to the Home Minister and appealed for much more caution on October 21rst, 1885:

3.3.4.3. Letter of the Foreign Secretary in 1885

The Minister proposed to delay the incorporation of the islands to a more suitable point of time:

"Most recently Chinese newspapers have been reporting rumours of our government's intention of occupying certain islands owned by China located next to Taiwan, demonstrating suspicion towards our country and consistently urging the Qing government to be aware of this matter. In such a time, if we were to publicly place national markers on the islands, this must necessarily invite China's suspicion towards markers on the islands; this must necessarily invite Chin's suspicion towards us. In regard to the matter of placing national markers and developing the islands, it should await a more appropriate time."…."Moreover, the investigations of the above-mentioned islands should not be published in the

[243] Ministry of Foreign Affairs of Japan, Nihon Gaiko Bunsho (Japan Foreign Affairs Document), Vol. 18 (Tokyo:1950), 573

[244] Han-yi Shaw, "Its History and an analysis of the ownership Claims of The P.R.C., R.O.C. and Japan", No. 3 Occasional Papers (1999), 71

Official Gazette or newspaper. Please pay attention to this."[245]

The "lowest denominator", which even all pro-Japanese advocates must abide by, is that there must have been fear within the Japanese government of creating diplomatic hardships with the Chinese in case of an publicized incorporation of the islands.[246]

3.3.4.4. Second Okinawa Magistrate's letter in 1885

After having been informed about the unfortunate timing of the incorporation the Home Secretary received a second letter from the Magistrates submitted on November 24th, 1885 reiterating that the rightness of the claim could be dubitable:

"In regard to construction of national markers…, since the matter is not unrelated to China, if problems do indeed arise, I would be in grave repentance for my responsibility."[247]

3.3.4.5. Response of the Home Secretary

In conjunction with the Foreign Secretary Inoue Kaoru, the Home Secretary Yamagata Aritomo signed a letter on December 4th, 1885 that the erection of landmarks should be forborne. The confidential letter reads as following:

"Based on the reasons given in your previous letter of inquiry, please acknowledge that the construction (of national markers) shall currently not be undertaken."[248]

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[245] Ministry of Foreign Affairs of Japan,Vol. 18 Nihon Gaiko Bunsho (Japan Foreign Affairs Document), (1950), 575

[246] A similar case is the French stance with the British Crown in the Minquiers and Ecrehos case, ICJ Reports (1953), 47, 70

[247] Ibid

[248] Ministry of Foreign Affairs of Japan, Vol. 18 Nihon Gaiko Bunsho (Japan Foreign Affairs Document), (Tokyo: 1950), 576

Up to the end of Word War II, the Japanese government kept silence about the envisaged incorporation in order not to stir up anti-Japanese sentiments in China. The pending issue was just postponed. The Chinese scholars take all the preceding statements of Japanese officials as evidence, which Japan's administration deemed the islands to appertain to China.[249]

3.3.4.6. Further letters of request of Okinawa's Magistrate

In the year 1890, the Magistrate of Okinawa, Maruoka Kanji, submitted a subsequent request to the Home Secretary. After Okinawa's second request was declined the succeeding Prefecture Governor Narahara Shigeru renewed the request in 1893 by submitting a third "petition" to the Tokyo government. Nevertheless, all these attempts of the Okinawa Prefecture were doomed to failure. The politically suitable time had not yet arrived.[250]

3.3.4.7. Decree of Empress Dowager Cixi of 1893

In 1893, the Empress Dowager Cixi granted the Diaoyu Islands to Sheng Xuanhuai who was the Chief Minister of the Court of Imperial sacrifices at that time. Being also a businessman in the pharmaceutical sector, he was keen on harvesting the plant "*statice arbuscula*" on the islands. The Chinese used these herbs to manufacture pills to prevent high blood pressure and relieve pain because of dampness. Being thrilled about the effectiveness of the pills the Dowager Cixi awarded three of the disputed islands to the Chinese pharmacologist.[251] This decree carried the imperial seal thereby making it official:

"The medical pills submitted by Sheng Xuanhuai have proved to be very effective. The herbs used in making the pills are said to have been collected from the small

[249] Chinese Ministry of Foreign Affairs, "Lun Diaoyu Zhuquan de guishu" (Considering to whom belong the Diaoyu), handed out to the author on July 15th, 2006 by the Chinese embassy in New Delhi; Han-yi Shaw, "Its History and an analysis of the ownership Claims of The P.R.C., R.O.C. and Japan", No. 3 Occasional Papers (1999), 78

[250] Han-yi Shaw, "Its History and an analysis of the ownership Claims of The P.R.C., R.O.C. and Japan", No. 3 Occasional Papers (1999), 80

[251] Tao Cheng, "The Sino-Japanese Dispute Over the Tiao-yu-tai (Senkaku) Islands and the Law of Territorial Acquisition", Vol. 14 V.J.I.L. (1973), 257

island of Diaoyutai, beyond the seas of Taiwan. It has come to my knowledge that the said official's family has maintained for generations pharmacies offering free treatment and herbs to destitute patients. This is really most commendable. The three islands of Diaoyutai, Huangwei Yu, and Chiwei yu are hereby ordered to be awarded to Sheng Xuanhuai as his property for the purpose of collecting medicinal herbs.[252]

Seal of Queen Mother Cixi

By virtue of this imperial act the three mentioned islands could have become Chinese "property". At least the Qing Dynasty recorded officially the existence of the islands.

3.3.4.8. Information of Okinawa Prefecture in 1894

Until the 1894, the Japanese could not make any progress regarding the incorporation of the islands. In a letter of response to the Director of the Prefecture Administration Bureau of the Ministry of Home Affairs Egi Kazuyuki the Okinawa Prefecture Governor stated that no investigation had been carried out so far on the islands. In his request, Mr. Kazuyuki wondered as well whether there was evidence such as old records or folklore that demonstrate the islands belong to our country. The answer of the Okinawa Prefecture was the following:

"…there exist no old records related to the said islands or any transcribed evidence or folklore and legends demonstrating that the islands belong to our territory"[253]

This secret letter conveys a different idea of what is the official Japanese contention published on the web page of the Japanese Foreign Ministry

[252] U.S. Senate, "Agreement with Japan Concerning the Ryukyu Islands and the Daito Islands," Congressional Records, 92nd Cong., 1.rst Session, 40161 (microfiche) quoted in: Unryu Suganuma, Sovereign Rights and Territorial Space in Sino-Japanese Relation (1rst ed., 2000), 87

[253] Han-yi Shaw, "Its History and an analysis of the ownership Claims of The P.R.C., R.O.C. and Japan", No. 3 Occasional Papers (1999), 82

(Mofa): "*From 1885 on, surveys of the Senkaku Islands had been thoroughly made by the Government of Japan through the agencies of the Okinawa Prefecture and by way of other methods.*"[254] The question if the official internet information contains factual distortions[255] can be left open – at least the contention is not beyond reasonable doubt.

3.3.4.9. Sino - Japanese War 1894 / 1895

The advent of the Sino-Japanese War was instrumental for the Japanese government regarding the incorporation of the Senkaku Islands. The long awaited "suitable moment" had finally arrived. After the outbreak of the war on August 1rst, 1894, China's military defeat enabled the Japanese Tenno to impose harsh peace condition upon the struggling Qing Dynasty. China lost its territory in Taiwan and on the Liaodong peninsula.[256] An indemnity of 200 million Liang – equivalent to 4.5 annual imperial Japanese budgets- instigated the other occidental powers to precede their annexation greed.[257] The victory of Japan was achieved not so much thanks to superior military or navy tactics, but because of the sheer technological underdeveloped equipment of the Chinese military, which could not match the Japanese level. By the end of the war in March 1895, the Chinese were compelled to realize that their cultural isolation from the West in their "*sinical world order*" was a significant impediment to combat the "barbarians."[258]

3.3.4.10. Cabinet Decision on January 14th, 1895

On January the 14th, 1895, the Japanese cabinet enacted the decisive resolution to incorporate the islands. Upon request of the Home Secretary, the Prime Minister gave his final consent one week later. In conjunction with the discovery and the Imperial Decree, this Cabinet decision is the main pillar for

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[254] Japanese Foreign Ministry, "The Basic View on the Sovereignty over the Senkaku Islands", www.mofa.go.jp/region/asia-paci/senkaku/senkaku/html, accessed on July 15th, 2006;

[255] Han-yi Shaw, "Its History and an analysis of the ownership Claims of The P.R.C., R.O.C. and Japan", No. 3 Occasional Papers (1999), 84

[256] Ian Nish, "An Overview of Relations Between China and Japan, 1895-1945", in Christopher Howe, "China and Japan: history, trends, and prospects" (1rst ed., 1996), 23

[257] Jaques Gernet, Le Monde Chinois, 520; Kären Wigen, The Making of a Japanese Periphery, 1750 – 1920 (1rst ed., 1995), 218

[258] Unryu Suganuma, Sovereign Rights and Territorial Space in Sino-Japanese Relation (1rst ed., 2000), 117

the Japanese claim. Surprisingly though, the Cabinet decision omitted the Chiwei Yu Island on the verge of the continental shelf. This means that this cabinet decision raises doubtful questions.[259] This Cabinet took the decision under secrecy and no other country – not even the concerned China was informed.[260]

"The Home Minister has requested a cabinet decision on the following matter: the islands, Kuba-shima (Huangwei yu) and Uotsuri-shima (Diaoyu-yu), located north-westward of Yaeyama Islands under the jurisdiction of Okinawa Prefecture, have heretofore been uninhabited islands. Due to recent visits to the said islands by individuals attempting to conduct fishing related business, and such matters may require regulation, it is decided that the islands be placed under the jurisdiction of Okinawa Prefecture. Based on this decision, the Okinawa Prefectural Governor's petition should be approved."[261]

An analysis of the Cabinet's decision may lead to the following presumptions:

1. Interestingly, the cabinet decision's wording reinforces the idea that Japanese officials did not conduct the surveys rather they were rather private expeditions. If the surveys were privately run, then these action cannot by accredited to the Japanese government. As a result, this might be a second hint that the Japanese standpoint contradicts its historical records.

2. The second peculiar point about the incorporation bill of the Cabinet is that they apparently by mistake omitted the third island Chiwei Yu. The Japanese may argue that the Japanese denomination Uotsuri-shima was supposed to comprise all the islands. This again raises the question why they explicitly have enclosed the Kuba-shima Island into the cabinet bill. The Japanese

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[259] Kiyoshi Inoue, "Japanese Militarism & Diaoyutai (Senkaku) Island – A Japanese Historian's view", www.skygallery.com/japan/diaohist.html, accessed on December 7th, 2006

[260] Han-yi Shaw, "Its History and an analysis of the ownership Claims of The P.R.C., R.O.C. and Japan", No. 3 Occasional Papers (1999), 99, Sina xinwen zhongxin, "Zhongguo Lingtu Diaoyudao Dili Lishi Ziliao" (25.3.2005), http://news.sina.com.cn/c/2005-0325/10396192318.shtml., accessed on March 30th, 2006

[261] Ryukyu Government, "Reference 3: Official Documents", History of Okinawa Prefecture, Vol. 13 (1967), 593

government and their scholars are taciturn about this inadequacy, which does not dissolve the doubt why Chihwei islands was not included in the bill.[262]

3.3.4.11. Treaty of Shimonoseki of April 17th, 1895

Taiwan was a part of Imperial China from 1887 to 1895, when the following treaty entered into force converting Taiwan into a Japanese colonial possession.[263] The victorious Japan was able to dictate onerous conditions in the Treaty of Shimonoseki signed on April 17th, 1895. The crucial clause referring to the Diaoyu / Senkaku Islands was sealed in Art. 2:

*"**a)** 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."*[264]

The exact wording of the treaty does not give a clue about whether the Diaoyu / Senkaku Islands were adjudged to belong to Taiwan. This question has lead to the most fervent debates between pro-Japan and pro-China irredentist scholars. The pro-Chinese advocates argue that the Diaoyu islands were an integral part of the wording "*islands belonging to China.*"[265] This treaty consolidated the disintegration of the Middle Kingdom implying that the Chinese were no longer much concerned about these tiny islands.[266]

3.3.4.12. Imperial Decree No. 13 on March 5th, 1896

The Cabinet decision in the previous year was possibly seconded by the imperial decree No. 13. It can be arguably put forward that this Imperial decree implemented the Meiji Government decision of January 21rst, 1895.

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[262] Kiyoshi Inoue, „Japanese Militarism & Diaoyutai (Senkaku) Island – A Japanese Historian's view", www.skygallery.com/japan/diaohist.html, accessed on December 7th, 2006
[263] Von Glahn, Law Among Nations (7th ed., 1996), 310
[264] cited in: Choon-Ho Park, "Oil Under Troubled Waters: The Northers Eastern Asia Sea-Bed Controversy", Vol. 14 Harvard International Law Journal, (1973), 250
[265] Tao Cheng, "The Sino-Japanese Dispute Over the Tiao-yu-tai (Senkaku) Islands and the Law of Territorial Acquisition", Vol. 14 V.J.I.L. (1973), 259
[266] Unryu Suganuma, Sovereign Rights and Territorial Space in Sino-Japanese Relation (1rst ed., 2000), 118

This decree, which was not publicised at that time, enunciated the formation of Okinawa Prefecture:

" ***Art.1 Imperial Decree:***
"Excluding the two areas of Naha and Shuri, the rest of Okinawa Prefecture is to be divided into the following five counties:

Shimajiri County	*Each magiri (traditional regional unit) of Shimajiri Kume-Jima; Kerama Islands group; Tonaki-jima; Aguni-jima; Iheya-jima Islands group, Torishima and Daito-jima.*
Nakagami County	*Each magiri of Nakagami*
Kunigami County	*Each magiri of Kunigami; and Ie-jima*
Miyako County	*Miyako Islands group*
Yaeyama County	*Yaeyama Islands group*

Art. 2 Imperial Decree:
In the event that the boundaries or names of the counties need to be changed, they shall be decided by the Home e Minister."[267]

The Imperial Decree nowhere mentions the Senkaku Islands. This indubitable fact did not impede the Okinawa civil government from publishing an article[268] in 1970 stating that "these islands have been made Japanese territory on April 1rst in the 29th year of Meiji under the administration of Ishigaki village, Yaeyama District, Okinawa Prefecture, by virtue of a Cabinet decision and on the basis of Imperial Decree No. 13".[269] This Imperial decree raises the following questions:

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[267] Kanpo Bureau of the Cabinet, Horei Zensho, Vol. 29-3 (1979), quoted in: Han-yi Shaw, "Its History and an analysis of the ownership Claims of The P.R.C., R.O.C. and Japan", No. 3 Occasional Papers (1999), 101

[268] Article's name: "Views Concerning the Title to the Senkaku Islands and the Sovereign Right Over the Development of Resources of the Continental Shelf"

[269] Kiyoshi Inoue, "Japanese Militarism & Diaoyutai (Senkaku) Island – A Japanese Historian's View", www.skygallery.com/japan/diaohist.html, accessed on December 7th, 2006

1. Why was the imperial assent granted to the aforementioned Cabinet decision ten month after they had passed the bill? Was the nearby end of the Sino-Japanese war a coincidence or were political reasons behind it?

2. It is striking that in Art. 1 (Shimonoseki Treaty) under Shimajiri county all the islands belonging to it are listed. If the Japanese side puts forward that the Senkaku Islands were implicitly counted to the Yaeyama County; why were the Japanese bureaucrats so careless about mentioning the Senkaku Islands?[270] Why are they so silent about this contradiction?

3. Why did the Japanese government deviate from its previous incorporation proceedings? The Cabinet Decision about the incorporation of the Ogasawara Islands was made public in the Official Gazette bearing the Imperial Decree No.190 including the exact names, coordination and the local authorities. On the contrary, the Cabinet Decision about the Senkaku Islands' incorporation was conspicuously made. Additionally, the concerned states were neither notified about Japan's incorporation nor were any formal acts carried out, which could have been regarded as Japan's symbolic incorporation.[271] How can the Japanese explain these clashing differences of procedure?

3.3.4.13. Taiwanese Consul General in Nagasaki 1920

In the year 1920, a vessel carrying thirty-one fishermen and their families from Fuzhou suffered a breakdown. Because of this incident they were obliged to land on the main Diaoyu Island. Four rescuers from the Japanese Ishigaki Village took them back to Japan where they received proper treatment.[272] Following this event, the Taiwanese General Consul of Nagasaki Feng Mian expressed his thanks in a letter of gratitude to the rescuers. He wrote that *"the 31 fishermen from Fujian Province in 1920 who were wrecked… within the Senkaku Retto of the Yaeyama County of Okinawa prefecture, the Great*

[270] Han-yi Shaw, "Its History and an analysis of the ownership Claims of The P.R.C., R.O.C. and Japan", No. 3 Occasional Papers (1999), 102
[271] Han-yi Shaw, "Its History and an analysis of the ownership Claims of The P.R.C., R.O.C. and Japan", No. 3 Occasional Papers (1999), 104, 111
[272] Toshio Okuhara, "The Territorial Sovereignty Over the Senkaku Islands and Problems on the Surrounding Continental Shelf", Vol. 11 Japan Annual of International Law (1967), 100

Japan."[273] It should not be forgotten that Taiwan was occupied the by the Japanese at that time. For this reason, it is doubtful this act of state is imputable to Taiwan.[274]

3.3.4.14. Koga ran Japanese business on the island until 1920s

The Sino-Japanese War in 1894/1895 was very advantageous for the Japanese businessman Koga who discovered the islands for the Japanese in 1884. In 1896, he obtained the rights from the Japanese government to use four of the islands / islets (Uotsuri, Huangwei dao, Bei Xiaodao and Nan Xiaodao) for thirty years. Investing considerable money on the islands he set up devices so that his some thirty subordinates could make a living on the islands. He built houses, wharves, reservoirs, drainage and sanitary facilities. His goal was to collect feathers and guano of albatrosses, which could be exported to European hat makers and which were useful fertilizer in the agriculture. The islands' climax in terms of habitation was achieved in 1909 when some 99 families consisting of 148 people lived on the islands.[275] After the death of Koga in 1918, his son Zenji Koga took charge of the business. The free lease ended as a result and he seized the chance of purchasing the islands. He paid 1.825 Yen for Diaoyu, 247 Yen for Huangwei Dao, 47 Yen for Nan Xiaodao, and 31.5 Yen for Bei Xiaodao.[276] By this means the islands were transferred into private ownership. Koga conducted his business until 1941 marking the last Japanese activity on the islands until the 1950s. From 1958, the American Civil Administration of Okinawa transferred money to Koga's son to pay for the right to use these islands.[277]

3.3.4.15. Tokyo Court Ruling 1941-44

In the last year of the WW II, the Tokyo Court presumably had to decide about a court procedure between the Okinawa district government and the Thaihoku

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[273] Midorima, Senkaku Retto 180, 181; quoted in: Unryu Suganuma, Sovereign Rights and Territorial Space in Sino-Japanese Relation (1rst ed., 2000), 124

[274] Unryu Suganuma, Sovereign Rights and Territorial Space in Sino-Japanese Relation (1rst ed., 2000), 124

[275] Unryu Suganuma, Sovereign Rights and Territorial Space in Sino-Japanese Relation (1rst ed, 2000), 118

[276] Ibid, 119

[277] Tao Cheng, "The Sino-Japanese Dispute Over the Tiao-yu-tai (Senkaku) Islands and the Law of Territorial Acquisition", Vol. 14 A.J.I.L. (1973), 247

prefecture (Taipei prefecture) about a Senkaku-related fishing trade problem. In this case, the Taipei prefecture took legal action in order to retain its fishing grounds around the islands. The Tokyo court allegedly ruled that the Senkaku islands under the jurisdiction of the Taiwan province.[278] To the Chinese, this represents a Japanese admission that the Japanese judiciary itself did not consider the Diaoyu Islands as belonging to their own jurisdiction. The Court's decision is neither known nor does the Court's procedure have a solid legal value. Children of former witnesses reported about the Court procedure. The Court procedure, which has only allegedly taken place, lacks reliable sources. But it cannot be proven that the procedures took place or that a ruling was given.

3.4. The Islands status in the post-war era

3.4.1. Cairo Declaration 1943

World War II in Asia was initiated by the outbreak of the Second Sino-Japanese War in 1937. By 1939, the Japanese military had occupied the entire Eastern Chinese coast and the islands in the South China Sea including the Xisha- and the Nansha archipelagos. In the same year, the Chinese communist leader Mao Zedong described the Ryukyu Islands as one of the many territories and dependencies stripped away from China by the imperialists.[279] The Japanese military success came to a standstill soon after the attack on Pearl Harbour in 1941. From this moment on, the U.S. joined the Allies against the German-Japanese-Italian axis. On November 27th, 1943 the President of the United States, Franklin D. Roosevelt, Prime Minister Winston Churchill from Great Britain and first President of the future Taiwan, Chiang Kai-shek assembled in Egypt's capital to issue the famous "*Cairo Declaration*":[280]

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[278] Chinese Foreign Ministry, "Lun Diaoyudao zhuquan de jiushi" (Discourse about the belonging of the Diaoyu islands, handed out to the author by the Chinese Embassy in New Delhi in July 15th, 2006; "Diaoyu Islands: Inalienable Part of China's Territory" (Translation of China Foreign Affairs University), www.cfau.edu.cn/jiaoxue/english/index.htm, accessed on July 15th, 2006

[279] Quoted in: Jean-Marc Blanchard, "The US Role in the Sino-Japanese Dispute over the Diaoyu (Senkaku) Islands, 1945-1971", No. 161 The China Quarterly (2000), 104

[280] Unryu Suganuma, Sovereign Rights and Territorial Space in Sino-Japanese Relation (1rst ed., 2000), 119, 120

"Japan shall be stripped off all the islands of the Pacific which she has seized or occupied since the beginning of the First World War I, and that all the territories Japan has stolen from the Chinese, such as Manchuria (Northeast China), Formosa (Taiwan), and the Pescadores (Penghu Archipelago), shall be restored to the Republic of China. Japan will also be expelled from all other territories which she has taken by violence and greed."[281]

It has to be stated that the Diaoyu Islands in contrast to many other occupied islands were not explicitly referred to in the Cairo Declaration. Thus, the Japanese may draw a "reverse conclusion" arguing that the Diaoyu islands were not integral part of this proclamation.

3.4.2. Yalta Conference 1945

The Yalta Conference did not deal specifically with Diaoyu Islands. The Allies agreed upon a solution to the Kurile Islands after Japan's defeat. Stalin, on the other hand, "*promised to render assistance to China with its armed forces for the purpose of liberating China from the Japanese yoke.*"[282]

3.4.3. Potsdam Declaration in 1945

A couple of days before the U.S. Air Force dropped an atomic bomb on the Japanese cities of Hiroshima and Nagasaki, Japan's post-war fate was subject to one important proclamation. In July / August 1945, the three victorious political leaders of the U.S.S.R., U.S.A. and Great Britain convened the Potsdam Conference. There they stipulated the post-war order, which existed until the fall of the iron curtain in 1989 / 1990. Regarding the "*Proclamation Defining Terms for the Japanese Surrender,*" Art. 8 stated:

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[281] Japanese National Diet Library, "Cairo Declaration" (2003),www.ndl.go.jp/constitution /e/etc/c03.html, accessed on March 23rd, 2007;

[282] The Avalon Project, Yale Law School (2007), www.yale.edu/lawweb/avalon/wwii/yalta.htm, accessed on March 23rd, 2007

"The terms of the Cairo Declaration shall be carried out and Japanese Sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku and such minor islands as we determine."[283]

3.4.4. Japanese Surrender August 15th, 1945

On August 15th, 1945, the Japanese declared their unconditional surrender to the Allied Forces marking the conclusion of World War II. This step represented Japan's acceptance of the loss of Taiwan and other territories "stolen from China".[284] On September 2nd, 1945, the Japanese signed the formal instrument of surrender at Tokyo Bay:

"We, … hereby accept the provisions set forth in the declaration … issued at Potsdam."[285]

Thus, through the reference to the Potsdam Declaration the Cairo Declaration became part of the Japanese surrender by incorporation.[286]

3.4.5. Decree 667 of the U.N.

On January 29th, 1946 the recently founded United Nations published decree 667. It stated that Japanese territory should be limited to the five major islands including the Ryukyu Islands north of 30° degree of north latitude. As a consequence, the U.N. did not make any provisions to account the Diaoyu / Senkaku Islands to be Japanese territory.[287]

3.4.6. American occupation

3.4.6.1. American Maps

Official publications of the U.S. underpin the idea that the U.S. considered the Senkakus as belonging to the Ryukyu chain. In April 1947 the U.S.

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[283] quoted in: Caleb Wan, "Security Flashpoint: International Law and the Islands Dispute in the Far East", The New Zealand Postgraduate Law E-Journal (2/2005), 42, www.nzgraduatelawejournal.auckland.ac.nz./PDF%20Articles/Issue%202%20(2005)/1%20Caleb's%20Final.pdf ,accessed on March 13th, 2007

[284] Von Glahn, Law Among Nations (7th ed., 1996), 310

[285] Byung-Chin, The Northeast Asia Continental Shelf Controversy (1rst ed., 1980), 171

[286] Choung Il Chee, Legal Status Of The Dok Island In International Law (1rst ed., 1997), 39

[287] Chinese Embassy, "lun diaoyu dao zhuquan de guishu" (25.3.2004), handed out to the author by the Chinese embassy in New Delhi, July the 15th, 2006

Department of State published the book “Atlas and Gazetteer” depicting the Senkakus as part of Yaeyama county in Okinawa prefecture. By the end of the same year, an American SCAP (Supreme Commander for the Allied Forces) map included the Sakishima group (Senkakus are part of them) as an integral part of Taiwan.[288]

3.4.6.2. Ordinance No. 22 in 1950

During the time of occupation from 1945-51 the SCAP was the only governing authority over Japan.[289] Before the enactment of the two peace treaties the U.S. administration regulated in Art. 1(d) Ordinance No. 22 that the administration of the Yaeyama Islands comprised the Senkaku Islands.[290]

3.4.7. Background of the two separate treaties

At this time, the U.S.A. was at the brink of the Korean War and American leadership was increasingly being challenged by the USSR, which resulted in the Korean War. This Korean War triggered American “containment policy” in South-East Asia by relying on Japan and Taiwan as allies in Asia-Pacific. At this time, the main goal for the U.S. administration was to limit the expansion of communism in the world. Therefore, the U.S. had to respect the political views of the Tokyo and the Taipei governments.[291]

The final peace agreement with Japan was not settled until 1951.[292] The reversion of Chinese sovereignty to the PRC or Taiwan was ill - fated from its beginning. Taiwan’s claim to the Tiao-yu-tai Islands cannot be understood without highlighting the creation of the Republic of China (Taiwan). The Chinese Civil War caused that the nationalist Chinese under the leadership of

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[288] Jean-Marc Blanchard, “The US Role in the Sino-Japanese Dispute over the Diaoyu (Senkaku) Islands, 1945-1971”, No. 161 The China Quarterly (2000), 103

[289] Robert E. Ward, “The Legacy of Occupation”, in: Herbert Passin (ed.), The United States and Japan (2nd ed., 1975), 31

[290] Toshio Okuhara, “The Territorial Sovereignty Over the Senkaku Islands and Problems on the Surrounding Continental Shelf”, Vol. 11 Japan Annual of International Law (1967), 100

[291] Caleb Wan, “Security Flashpoint: International Law and the Islands Dispute in the Far East”, The New Zealand Postgraduate Law E-Journal (2/2005), 16, www.nzgraduatelawejournal.auckland.ac.nz./PDF%20Articles/Issue%202%20(2005)/1%20Caleb’s%20Final.pdf ,accessed on March 13th, 2007

[292] “The San Francisco Treaty and the lack of conclusion on Taiwan; www.org.tw/fortaiwan/fortaiwan11/new_page_68.htm, accessed on March 23rd, 2007

Chiang Kai-shek were expelled from mainland China. They had to flee to Taiwan. As a result, the People's Republic of China was established on October 1, 1949. As the United Kingdom had leased territories on mainland China, they quickly recognized the PRC in January 1950. The U.S. on the other hand continued to recognize the government in Taipei as the sole legitimate Government of China.[293] As the political stances of the U.K. and the U.S. were opposed, neither side could enter into negotiations with the Chinese to find a viable solution. The two Chinese governments did not recognize each other, either. Thus, the only possible approach was to have separate treaties. Pressured by Britain, the Japanese did not "*return"* sovereignty to Taiwan, but they merely "*renounced"* any claim to sovereignty.[294] This implies that the question, to whose jurisdiction Taiwan belonged, had purposely been left open in the treaties. U.S. President Harry Truman remarked in 1950 that Taiwan's status "*remains to be determined.*"[295]

3.4.7.1. San Francisco Treaty in 1951

The San Francisco Treaty was signed between Japan and 48 allied signatories. It went into effect on April 28th, 1952.[296] Neither the ROC nor the PRC were part of this treaty. The USSR did not sign the treaty and informally terminated their martial legal situation towards Japan through a joint "peace declaration."[297] Regarding Chinese territories, Japan was forced to make the following concessions:

"Art. 2 (b):
Japan renounces all rights, title and claim to Formosa and the Pescadores"

Art. 3)

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[293] Gary D. Rawnsley, Taiwan's Informal Diplomacy and Propaganda (1rst ed., 2000), 11
[294] Steve Tsang, "Putting Chinese Unity and the Relations between China and Taiwan into a Historical Context", Günter Schucher, Margot Schüller (ed.), Perspectives on Cross-Strait Relations : Views from Europe (1rst ed., 2005),28; Qiang Zhai, The Dragon, the Lion, and the Eagle (1rst ed., 1994), 40
[295] Quoted in: James Wang, The Taipei Times (May the 9th, 2002), www.taipeitimes.com/News/archives/2002/05/09/0000135297, accessed on March 23rd, 2007
[296] Robert E. Ward, "The Legacy of Occupation", in: Herbert Passin (ed.), The United States and Japan (2nd ed., 1975), 35
[297] Robert E. Ward, "The Legacy of Occupation", in: Herbert Passin (ed.), The United States and Japan (2nd ed., 1975), 35

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

The San Francisco Treaty circumnavigated the question of the ownership of the Diaoyu / Senkaku Islands. Although the Taiwanese were not part of the negotiations, they should have urged the incorporation of the islands into the Taipei Treaty. No matter which treaty one looks at, no matter which language was used, the question about the Diaoyu / Senkaku Islands was totally omitted.[298] Only the PRC leader Zhou Enlai has contested the legality of the San Francisco Treaty in August 1951 on the grounds of the lack of Chinese participation, although this did not happen in regard to the Diaoyu Islands.

"the inviolable sovereignty of the People's Republic of China over the Spratly Islands and the Paracel Archipelago will by no means impaired, of whether the American British draft for a peace treaty with Japan should make any stipulation and of the nature of any such stipulation."[299]

The ROC missed the historically unique chance to strip of the islands from Japan.[300] The PRC performance in the process was no less ill-fated. The PRC could not sign the treaty despite the fact that the Soviet Union requested their participation. Other evidence of the Chinese oblivion about the Diaoyu Islands is the amendment offered by the USSR regarding Art. 2 (b), which was more than likely introduced at the behest of the PRC:

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[298] Unryu Suganuma, Sovereign Rights and Territorial Space in Sino-Japanese Relation (1rst ed., 2000), 123

[299] reprint see in: Beijing Review, 25 January 1974, pages 3-9

[300] People's China, 1. September 1951, 3-6; quoted in: Unryu Suganuma, Sovereign Rights and Territorial Space in Sino-Japanese Relation (1rst ed., 2000), 123

"Japan recognises full sovereignty of the Chinese People's Republic over Manchuria, the Island of Taiwan (Formosa) with all islands adjacent to it, the Pescadores, the Pratas Islands, as well as over the Islands of Sishatsuntao and Chunshatsuntao and Nanshatsuntao Islands including the Spratlys, and renounces all right, title and claim to the territories named herein."[301]

In 1949, Communist China arose and leading American officials realized the significance of keeping the Ryukyu south of 29° north latitude. Following Japanese advice the draft peace treaty changed the wording of "Ryukyu Islands south of 29° north latitude by the wording of "Nansei Shoto south of 29° north latitude. The difference in this choice of words has to be seen on the grounds, that Nansei Islands is a geographic, not an administrative term[302]; it refers to the arc of islands lying between the southern end of Kyushu and Formosa. As the Senkaku Islands were part of Okinawa prefecture and were geographically seen as part of Japan's south-west islands, the disputed islands were an integral part of the San Francisco Treaty.[303]

Referring to Art.3 the U.S. State's Department replied to the question of a journalist in 1970:

"The term (Nansei shoto), as used in that Treaty, refers to all islands south of 29th degree north latitude under Japanese administration at the end of the Second World War that were not otherwise specifically referred to in the Treaty. The term, as used in the treaty, was intended to include the Senkakus."[304]

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[301] Washington, U.S. Department of State, Publication 4392, December 1951, 292; quoted in: Marwyn S. Samuels, Contest for the South China Sea (1rst ed., 1982), 78

[302] Taira Koji, "The China-Japan Clash Over the Diaoyu/Senkaku Islands" (20.9.2004), www.zmag.org/content/print_article.cfm?itemID=6269&sectionID=1, accessed on June 29th, 2007

[303] Jean-Marc Blanchard, "The US Role in the Sino-Japanese Dispute over the Diaoyu (Senkaku) Islands, 1945-1971", No. 161 The China Quarterly (2000), 109

[304] quoted in: Toshio Okuhara, "The Territorial Sovereignty Over the Senkaku Islands and Problems on the Surrounding Continental Shelf", Vol. 11 Japan Annual of International Law (1967), 100

Regarding the question of sovereignty over the Nansei Shoto Islands John Foster Dulles (Consultant to the Secretary of State) made the following statement:

"*Several of the Allied Powers urged that the treaty should require Japan to renounce its sovereignty over theses islands in favour of United States sovereignty. Other suggested that these islands should be restored completely to Japan. In the face of this division of Allied opinion, the United States felt that the best formula would be to permit Japan to retain residual sovereignty, while making it possible for these islands to be brought into the U.N. trusteeship system, with the United States as administering authority*."[305]

3.4.7.2. Treaty of Taipei 1952

On April 28th, 1952, in accordance with the San Francisco Peace Treaty the Treaty between the Republic of China and Japan was signed. Art. 2 (a) pursues the same aim as the San Francisco Treaty does in Art. 2 (a). Quite interestingly, the Spratly - and Paracel Islands enriched the list of islands, which Japan had to renounce:

"Art. 2(a):

It recognises that under Art. 2 of the Treaty of Peace which Japan signed at the city of San Francisco on 8 September 1951 (hereinafter referred to as the San Francisco Treaty), Japan renounces all right, title and claim to Formosa and the Pescadores as well as the Spratly Islands and the Paracel Islands"[306]

Art. 4:

[305] See: 25 Dept. State Bulletin 452-9 (1952), quoted in: Oliver J. Lissitzyn, Judicial Decisions, Vol. 49 A.J.I.L. (1955), 89

[306] "The San Francisco Treaty and the lack of conclusion on Taiwan"; www.org.tw/fortaiwan/fortaiwan11/new_page_68.htm, accessed on March 23rd, 2007

It is recognised that all treaties, conventions, and agreements concluded before 9 December 1943 between Japan and China have become null and void as a consequence of the war.“[307]

Due to Taiwan's unclear status it was not named which state should be the recipient of sovereignty over the Taiwanese Islands. The late Taiwanese Foreign Minister George Yeh explained the Taiwan's status before the Yuan (Taiwanese parliament) as follows:

“In fact, we control them (Taiwan and the islands) now, and undoubtedly they constitute a part of our territories. The delicate international situation, however, means that they do not belong to us. In these circumstances, Japan has no right to transfer Taiwan and the Pescadores to us. Nor could we accept such a transfer from Japan even if she wished to do so”[308]

This means that the sovereignty over Formosa was in no treaty ever expressly allocated to the Taipei government. It still could be argued that the treaties ceded back Taiwan's sovereignty to China without determining which Chinese state should be the actual recipient.

3.4.8. USCAP 27 – of 25th December 1953

According to Art. 3 of the San Francisco Peace Treaty the islands were placed under American administrative control. This trusteeship under U.S. control had the following legal background. The Atlantic Charter of 1941 proclaimed a peace settlement without annexation on the grounds of post-war agreements. The British and American governments agreed that their countries would not seek an aggrandizement of territory. The trusteeship was a compromise between the Charter and the American desire to acquire exclusive rights on specific Pacific Islands. Providing naval and aerial basis this thorough

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[307] quoted in: Caleb Wan, “Security Flashpoint: International Law and the Islands Dispute in the Far East”, The New Zealand Postgraduate Law E-Journal (2/2005), 42, www.nzgraduatelawejournal.auckland.ac.nz./PDF%20Articles/Issue%202%20(2005)/1%20Caleb's%20Final.pdf ,accessed on March 13th, 2007

[308] Quoted in: James Wang, The Taipei Times (May the 9th, 2002), www.taipeitimes.com/News/archives/2002/05/09/0000135297, accessed on March 23rd, 2007

American legal feature was instrumental for the U.S. forces during the Cold War.[309] Although the Americans did not install any military devices on the Diaoyu / Senkaku Islands themselves, the integration into their trusteeship was nevertheless advantageous to the extent that no Communist regime could acquire a strategic outpost close to Japan. The San Francisco Peace Treaty ("Nansei shoto") does not expressly include the Diaoyu / Senkaku islands. The proclamation of USCAP[310] 27 (25th December 1953) describes the islands as being situated between the latitudes, which are controlled by the U.S.[311] Drawing a line of the geographical boundaries, the Diaoyu / Senkaku Islands form incontrovertibly part of the territory administered by the U.S.[312] Given that the U.S. airforce used two of the islands for training purposes,[313] neither Japan nor Taiwan wanted to disturb the U.S. by raising the question of the islands' sovereignty. It has to be recalled that Taiwan and Japan were undergoing American de-facto tutelage. Both countries had ratified military defence pacts in order to forestall the Communist threat.[314] From this point of view, it was arguably politically speaking wise not to raise an artificial dispute about islands administered by the country granting the military shield.

3.4.9. 1954 ROC-US Mutual Defence Treaty

On December 2nd, 1954 the Mutual Defence treaty between the U.S. and the ROC was signed, which immediately prompted a reaction of the Communist government.[315] The Renmin Ribao stated that the "The Chinese people's determination to liberate Taiwan is unalterable."[316] Since Taiwan lack international capacity to contract it cannot be subject to any international

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[309] Sharon Korman, The Right of Conquest, (1rst ed., 1996), 163
[310] USCAP means United States Civil Administration Proclamation
[311] Seokwoo Lee, "Territorial Disputes among Japan, China and Taiwan Concerning the Senkaku Islands" Vol. 3 Boundary and Territory Briefing (2002) , 11
[312] Byung-Chin, The Northeast Asia Continental Shelf Controversy (1rst ed., 1980), 168; For the exact wording see: Seokwoo Lee, "Territorial Disputes among Japan, China and Taiwan Concerning the Senkaku Islands" Vol. 3 Boundary and Territory Briefing (2002) , 5
[313] Toshio Okuhara, "The Territorial Sovereignty Over the Senkaku Islands and Problems on the Surrounding Continental Shelf", Vol. 11 Japan Annual of International Law (1967), 101
[314] Marco Cuturi, "Japon, Chine – Le poids de l'histoire", (24.1.2003), www.ism.ac.jp/~cuturi/misc/japan_chine.pdf, accessed on March 16th, 2007
[315] Qiang Zhai, The Dragon, the Lion, and the Eagle (1rst ed., 1994), 166
[316] Renmin Ribao December 5, 1954

treaty.[317] Interestingly, the 1954 Taiwanese-American defence treaty might have contained a wording implying that the ROC actually controlled the Tiao-yu-tao Islands. Art. 7 stipulated:

"*The government of the Republic of China grants, and the government of the United States accepts, the right to dispose of such United States land, air, and sea forces in and* ***about*** *Taiwan and the Pescadores as may be required for their defence as determined by mutual agreement*"

It could be refuted that the word "about" indirectly indicates that the surrounding seas are under the control of the ROC. It is possible to assume that not only the Japanese granted patrolling rights to U.S. forces, but the Taiwanese also could have done so by virtue of this defence treaty.[318] On the other hand, this inaccuracy is probably a result of Taiwan's dangerous offshore policy (Matsu, Quemoy). In this regard the U.S. was reluctant to defend these Taiwanese possessions, which are located directly in vicinity of China mainland. [319] The U.S. renounced the Mutual Security Treaty in 1978 in order to obtain diplomatic ties with the PRC. In 1979, the Taiwan Relation Act was passed into law by the U.S. Congress, which substituted the prior treaty.[320]

3.4.10. Domestic confusions about the islands ownership

3.4.10.1. Yearbooks 1951 – 1975

Until the 1970s, the National Government in Taipei was recognized as the "incumbent" legitimate representative of the Chinese people by most countries. Up to today, the Taiwanese government edits a yearly compendium called the "ROC Yearbook". This yearbook's editors were oblivious about the Tiaoyu-tai Islands until the 70s. According to the 1962 /1963 issue, Taiwan's

[317] J. A. Cohen, Hungdah Chiu, People's China and International Law (1rst ed., 1974), 1239
[318] Qiu Hongda, Diaoyutai Lieyu Zhuquan Zhengshi Wenti Jiji Jiejue Fangfa de Yanjiu (1rst ed., 1991), 28
[319] Qiang Zhai, The Dragon, the Lion, and the Eagle (1rst ed., 1994), 172
[320] Russell Org, China's Security Interests in the 21rst Century (1rst ed., 2007), 47; Huiyun Fen, "Crisis Deferred: An Operational Code Analysis of Chinese Leaders Across The Strait", in: Mark Schafer, Stephen G. Walker (ed.), Beliefs and Leadership in World Politics (1rst ed., 2006), 151; Gary D. Rawnsley, Taiwan's Informal Diplomacy and Propaganda (1rst ed., 2000), 17

location lies between 21°45'25 and 25°37'53 north latitude and 119°18'3 and 122°6'25 east longitude. This implies that at that time the islands were not counted as being under sovereignty be of Taiwan. In the 1968 edition of the Taiwanese yearbook[321] it was stated that the northern limit of Taiwan is Agincourt Island, which is located approximately 150 km south-west of the Tiao-yu-tai.[322]

3.4.10.2. Other Taiwanese Publications excluding the Tiaoyu-tai

In 1965, the book "The outline of Local-Self Government[323] in Taiwan Province" recalls the Jilong Island as the most northern territory of Taiwan. This implies as well that the Tiaoyu-Tai Islands were not deemed as domestic territory.[324] Simultaneously, the two Taiwanese logbooks, compiled by Xiang Da in 1961 stated that "*Diaoyu Yu is an island of the Senkaku Gunto on the way to Liuqiu from Jilong of Taiwan. Today's name is Gyocho Jima.*"

3.4.10.3. Chinese Publications

The official « public relation » organ for the Chinese Communist Party (CCP) criticised the administration of the Ryukyu Islands by the U.S. The periodical allocated the islands to Okinawa Prefecture; the newspaper stated that "*the Ryukyu Islands are located northeast of our Taiwan Islands ... including Senkaku Shoto.*"[325] Today, Chinese contemporary atlas, although delineating the maritime borders vis-à-vis other countries, renounce to indicate any border in regard to the Diaoyu Dao.[326]

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[321] Chung Hua Min Guo Nian Jian (The yearbook of the Republic of China - 1965), 48; quoted in Toshio Okuhara, "The Territorial Sovereignty Over the Senkaku Islands and Problems on the Surrounding Continental Shelf", Vol. 11 Japan Annual of International Law (1967), 103

[322] Toshio Okuhara, "The Territorial Sovereignty Over the Senkaku Islands and Problems on the Surrounding Continental Shelf", Vol. 11 Japan Annual of International Law (1967), 103

[323] Taiwan Shen Ditan Tzy Jy Iau (The outline of the Local Self government in Taiwan Province, November 1965), 125, quoted in: Toshio Okuhara, "The Territorial Sovereignty Over the Senkaku Islands and Problems on the Surrounding Continental Shelf", Vol. 11 Japan Annual of International Law (1967), 103

[324] Unryu Suganuma, Sovereign Rights and Territorial Space in Sino-Japanese Relation (1rst ed, 2000), 125; Toshio Okuhara, "The Territorial Sovereignty Over the Senkaku Islands and Problems on the Surrounding Continental Shelf", Vol. 11 Japan Annual of International Law (1967), 103

[325] Liuqiu Qundao Renmin Fandui Meiguo Zhangling de Douzheng, Renmin de Ribao, January 8th, 1953, 8; quoted in: Unryu Suganuma, Sovereign Rights and Territorial Space in Sino-Japanese Relation (1rst ed., 2000), 127

[326] The Contemporary Atlas of China (1rst ed., 1988), 33

3.4.10.4. Similarities of Chinese and Taiwanese publications

Obviously, neither Chinese government could remember the exact status of the disputed islands. It is again striking that in some Chinese publications the Chinese began to adopt the Japanese names. It seems that the former "Middle Kingdom" simply did not worry about its own history by just forgetting about it.[327] As regards to the possible legal recognition of the border, it seems that official Taiwanese books intended to exclude the disputed islands, too.

3.4.10.5. Japanese Textbooks

According to Takahashis book "*Senkaku Retto Noto*" the Japanese have published altogether ten school textbooks from 1944-1971, which did not mention the Senkaku Islands. All these textbooks were subject to an approval by the Japanese Ministry of Education.[328]

3.4.10.6. Taiwanese Labourers

It was reported that on August 12th, 1968 forty-five Taiwanese workers undertook some works to dismantle a wrecked ship on Minami-kojima (Nanxiaodao) Island.[329] As they did not have a residency permit of the Ryukyu government, Japanese officials deported them from the islands. However, they could prove their identity by Taiwanese emigration permits. In order to continue their work they subsequently applied for Japanese permission. A similar incident took place in 1970. The Japanese contend that their officials' reaction in these incidents amounts to the exercise of sovereign rights and that the Taiwanese government did not regard the islands as being subject to its sovereignty.[330]

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[327] Unryu Suganuma, Sovereign Rights and Territorial Space in Sino-Japanese Relation (1rst ed., 2000), 127

[328] Unryu Suganuma, Sovereign Rights and Territorial Space in Sino-Japanese Relation (1rst ed., 2000), 129

[329] It is probably the same case although dating it at 1966: Y.H. Nieh, "Der Streit Um Die Klippeninseln Tiaoyutai Und Das Problem Des Festlandssockels Im Ostchinesischen Meer", Vol. 4 Verfassung und Recht in Übersee (1971), 452

[330] Han-yi Shaw, "Its History and an analysis of the ownership Claims of The P.R.C., R.O.C. and Japan", No. 3 Occasional Papers 1999, 34

3.4.11. Conclusion

From the above-mentioned history it must be concluded that all three claimant states must have gone through an era of confusion. It seems that none of the disputants were entirely cognizant of their own potential claim to sovereignty.

3.5. The Year 1969 – The Oil Discovery

3.5.1. Valuable resources next to the islands

Under the sponsorship of the United Nations Economic Commission for Asia and the Far East (ECAFE) geologists of the Republic of Korea and the Philippines established a Committee for Joint Prospecting for Mineral Resources in Asian Offshore Areas (CCOP). This survey was published in a sensational way and altered every coastal state's domestic perceptions[331]: According to the experts' report, there was a "*high probability existing that the continental shelf between Taiwan and Japan may be one of the most prolific oil reservoirs in the world.*" The response of Japan, South Korea and Taiwan was to lay claim to seventeen seabed oil zones in the Yellow and East Chinese Sea; thirteen of them overlapped the adjacent state's claim.[332] The most valuable part of the region was determined to be a 200,000 sq km next to the Diaoyu / Senkaku Islands.[333]

3.5.2. Japan's national government's action

In May 1969, Okinawa Prefecture erected a national marker on the main island of Diaoyu underpinning its claim to the island chain.[334] The Japanese claim to sovereignty pursued the following objectives: to ensure that the U.S. returned the Okinawa islands as soon as possible, to prevent Chinese

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[331] Zheng Hailin, Tiao-yu-t'ai lieh yu chih li shih yu fa li yen chiu, (1rst ed., 1998), 185; Choon-Ho Park, "Oil Under Troubled Waters: The Northeast Asia Sea-Bed Controversy", Vol. 14 Harvard International Law Journal (1973), 212

[332] Choon-Ho Park, "China's Maritime Jurisdictions: The Future of Offshore Oil and Fishing", in Harrison Brown (ed.) China among the Nations of the Pacific (1rst ed., 1982), 107

[333] Victor H. Li, "China and Offshore Oil: The Diaoyu Tai Dispute" Vol. 10 Stanford Journal of International Studies (1975), 143

[334] Han-yi Shaw, "Its History and an analysis of the ownership Claims of The P.R.C., R.O.C. and Japan", No. 3 Occasional Papers 1999, 11

fishermen from entering the maritime territory and to allocate exploration rights to American companies.[335]

On July 17th, 1970, the Japanese Ambassador to Taiwan delivered a diplomatic note to the PRC government claiming the sovereignty over the islands.[336] This note was a pre-emptive measure towards the Taiwanese Yuan, which approved a draft on July 30th, 1970 about the drilling rights of oil and gas in China's territorial waters and the adjacent continental shelf enclosing the area of the Tiao-yu Islands.[337]

In September 1970, Taiwanese protesters hoisted a flag, which Japanese authorities removed on the following day. The Japanese foreign ministry published the announcement that "*there is no question that Japan has territorial rights over (the Senkakus) and there is no need to discuss their territorial status with any country.*"[338] The dispute triggered an anti-Japanese protest movement called the "*Safeguard the Diaoyutai movement,*" which made the islands into a kind of totem for all Chinese nationals wherever they lived.[339]

3.5.3. Taiwanese action

In September 1970, the Taiwanese government made the following assertions: **1)** the Japanese have no exploration rights on the Chinese continental shelf arising from small islands; **2)** the predictable reversion of the islands from the U.S. to Japan would be a unilateral decision, which would not affect the Chinese claims.[340] On December 30th, 1971, the Taiwanese formally declared the islands to be Chinese territory.[341] Soon afterwards, they

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[335] Tao Cheng, "The Sino-Japanese Dispute Over the Tiao-yu-tai (Senkaku) Islands and the Law of Territorial Acquisition", Vol. 14 V.J.I.L. (1973), 242
[336] Han-yi Shaw, "Its History and an analysis of the ownership Claims of The P.R.C., R.O.C. and Japan", No. 3 Occasional Papers 1999, 11
[337] Unryu Suganuma, Sovereign Rights and Territorial Space in Sino-Japanese Relation (1rst ed., 2000), 131
[338] Japan Times, 5. December, 1970
[339] Han-yi Shaw, "Its History and an analysis of the ownership Claims of The P.R.C., R.O.C. and Japan", No. 3 Occasional Papers 1999, 11
[340] Tao Cheng, "The Sino-Japanese Dispute Over the Tiao-yu-tai (Senkaku) Islands and the Law of Territorial Acquisition", Vol. 14 V. J.I.L. (1973), 243
[341] Linus Hagström, Japan's China Policy (1rst ed., 2005),120

speedily proclaimed the Continental Shelf following the principles established in the Truman Doctrine and they ratified the 1958 Geneva Convention on the Continental Shelf. Seeking the political support of their strongest ally, the Taiwanese also issued exploration titles to American companies.[342]

3.5.4. People's Republic of China action

Until 1970, the PRC had been silent about the conflict. This silence might be interpreted that the islands still were under U.S. trusteeship; the PRC officials did not want to slow down the foreseeable switch of diplomatic recognition.[343] By the end of 1970, the Communist Party's newspaper stated:

"*The Chiang Kai-shek gang is a political mummy, spurned long ago by Chinese people. All agreements and contract concerning the exploration and exploitation of China's sea-belt and subsoil resources that gang concluded with any country…. are illegal, null and void*." [344]

As a result of the Chinese announcement, the U.S. Department of State advised American oil companies to disengage their commitment in the area. The advent of Sino-Soviet antagonism was another driving force making the U.S. shift their stance and to grant more consideration to the Chinese position.[345]

3.5.5. Other Countries' Switch of Recognition 1972 / 79

In the same year U.S. President Richard M. Nixon visited the PRC the Taiwanese national government was expelled from its U.N. membership and its (permanent) seat in the Security Council in 1972 (U.N. Resolution 2758). The Sino-Japanese Communiqué of September 29th, 1972 had established

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[342] Tao Cheng, "The Sino-Japanese Dispute Over the Tiao-yu-tai (Senkaku) Islands and the Law of Territorial Acquisition", Vol. 14 V.J.I.L. (1973), 242

[343] Ibid, 242

[344] People's Daily (Peking), December 29th, 1970; quoted in: Tao Cheng, "The Sino-Japanese Dispute Over the Tiao-yu-tai (Senkaku) Islands and the Law of Territorial Acquisition", Vol. 14 V.J.I.L. (1973), 242

[345] Unryu Suganuma, Sovereign Rights and Territorial Space in Sino-Japanese Relation (1rst ed., 2000), 133

relations at an ambassadorial level between the Japan and China.[346]In order to obtain diplomatic ties with China the Japanese had to announce that Japan's 1952 treaty with Taiwan was null and void. In return, the Chinese abandoned their claim to war reparations from Japan.[347] The result was that China and Japan today do not formally recognize Taiwan as a state entailing the consequence that Taiwan cannot claim sovereignty over the Diaoyu / Senkaku Islands according to the Japanese perception of international law.[348]

In 1972, the "Shanghai Communiqué" between the U.S. and the PRC laid the basis for the further political cooperation between China and the West. As the principle occupying power of Taiwan, the U.S. altered the Taiwanese status from "undetermined" to a "part of China" and Taiwan was put on a flight-path for eventual reunification with the PRC.[349] As a consequence, many countries abrogated their recognition of the PRC, which culminated in the U.S. Switch of Recognition in 1979. As a pre-condition for the normalisation of diplomatic ties with the PRC, the U.S. had to remove its troops from Taiwan and to abrogate the 1954 U.S.-ROC Mutual Security Treaty.[350]

3.5.6. Japan regains full sovereignty over Okinawa in 1972

Under the Okinawa Reversion Treaty, which entered into force on May 15th, 1972 Japan regained full sovereignty over the Okinawa Islands. The Okinawa Reversion Agreement reads as follows:

"Considering that the United States of America desires, with respect to the Ryukyu Islands and the Daito Islands, to relinquish in favour of Japan all rights and interests under Art. 3 of the Treaty of Peace with Japan signed at the city

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[346] Vincent Wei-cheng Wang, "Can Taiwan Join the United Nations?", in: Jean-Marie Henckaerts (ed.) The International Status of Taiwan in the New World Order (1rst ed., 1996), 93

[347] Walter LaFeber, The Clash (1rst ed., 1997) 357

[348] Note: According to international law only states can bear the sovereignty over territory; Han-yi Shaw," Its History and an analysis of the ownership Claims of The P.R.C., R.O.C. and Japan", No. 3 Occasional Papers 1999, 13

[349] Richard W. Hartzell, "Understanding the San Francisco Peace Treaty's Disposition of Formosa And The Pescadores" Vol. 8 Harvard Asia Quarterly (2004), 1, www.taiwankey.net/dc/hartzell5.pdf, accessed on 30th July, 2007

[350] Dennis Van Vranken Hickey, "Taiwan: Deterring A Rising Giant" in: William M. Carpenter, David G. Wiencek (ed.), Asian Security Handbook (3rd ed., 2005), 291; Russell Org, China's Security Interests in the 21rst Century (1rst ed., 2007), 47

of San Francisco on September the 8th, 1951, and thereby to have relinquished all its rights and interests in all territories under the said Article….
Art. 1. 2*. For the purpose of this agreement, the term ("the Ryukyu Islands and the Daito Islands") means all the territories and their territorial waters with respect to which the right to exercise all and any powers administration, legislation, and jurisdiction was accorded to the United States of America under Art. 3 of the Treaty of Peace with Japan other than those with respect to which such right has already been returned to Japan in accordance with the Agreement of Amami Islands and the Agreement concerning the Nanpo Shoto and other islands signed between the United States of America and Japan…."*[351]

By virtue of this agreement, Okinawa returned to Japanese control. But as compensation to the U.S., the wording was left so loose that President Nixon could launch nuclear attacks from Okinawa.[352] The Reversion Agreement ambiguously included the Diaoyu / Senkaku Islands. Referring to the San Francisco Peace Treaty of 1952, the agreement hinted that the rights over the Diaoyu / Senkaku must have also been reverted. The Okinawa Reversion Treaty raised the suspicion of the PRC from the outset and at the same tried to secure its interests through the following statement:

"*Diaoyu and the other islands have been China's territory since ancient times. There is no question about this whatsoever…. It is even more absurd from the United States to want to include China's territory Diaoyu and other islands it has occupied into the area of reversion in accordance with the Okinawa Reversion Agreement*"[353]

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[351] Quoted in: Kim Byung Chin, The Northeast Asia Continental Shelf Controversy (1rst ed., 1980), 166

[352] Walter LaFeber, The Clash (1rst ed., 1997), 350: Shakai Shimpo, "On the Japan - U.S. Joint Communique", in; J. Livingston, J. Moore, F. Oldfather (ed.), Postwar Japan 1945 To The Present, 281.

[353] Beijing Review, "Tiaoyu and other Islands have been Chinese Territory since Ancient Times", (7. January 1972), 13-14

China's alertness paid off as the U.S. construed the content of the Okinawa Reversion Agreement as being different from the 1952 Peace Treaty with Japan. According to the United States Department of State

"*The United States believes that a return of administrative rights over those islands to Japan, from which the rights were received, can no way prejudice any underlying claim. The United States cannot add to the legal rights of Japan possessed before it transferred administration of the islands to us, nor can the United States, by giving back what it received, diminish the rights of other claimants. The United States has made no claim to the Senkaku Islands and considers that any conflicting claims to the islands are a matter for resolution by the parties concerned*."[354]

The U.S. Secretary of State William O. Rogers reiterated the U.S. interpretation, which stated "the reversion treaty does not affect the legal status of those islands at all". In another declaration the U.S. Foreign Relations Committee uttered that the Reversion Agreement grants Japan the rights of administration and not sovereignty.[355] The U.S. held that during the trusteeship of the Okinawa Islands Japan still had residual sovereignty over the islands.[356]

3.5.7. Sino-Japanese Peace and Friendship Treaty in 1978

In 1978, the U.S. government determined that it would recognize the PRC government as the sole legitimate representative of the Chinese people. This decision went into effect on January 1rst, 1979.[357] Henceforth, it broke diplomatic ties with Taiwan.[358] The year 1978 provided though a much more important setting for the conflict. China and Japan were to sign a peace treaty,

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[354] U.S. Senate Committee on Foreign Relation, Agreement with Japan Concerning the Ryukyu Islands and the Daito Islands: Hearing before the Senate Committee on Foreign Relations, 92nd Congress. 1rst session (1971), 91; quoted in: Unryu Suganuma, Sovereign Rights and Territorial Space in Sino-Japanese Relation (1rst ed., 2000), 135

[355] Unryu Suganuma, Sovereign Rights and Territorial Space in Sino-Japanese Relation (1rst ed., 2000), 135

[356] Jean-Marc Blanchard, "The U.S. Role in the Sino-Japanese Dispute over the Diaoyu (Senkaku) Islands, 1945-1971", No. 161 The China Quarterly (2000), 117

[357] Walter LaFeber, The Clash (1rst ed., 1997), 368

[358] Dennis Van Vranken Hickey, Foreign Policy Making in Taiwan (1rst ed., 2007), 33

but due to the islands dispute the signing of the treaty dragged on. In Japan, the right-wing and pro-Taiwan party Liberal Democratic Party (LDP) parliament members urged for an inclusion of an anti-hegemony clause, which would perpetuate Japan's claim to the islands. On April 7th, 1978, about 93 LDP anti-treaty Diet members urged the Japanese government to resolve the status of the islands in the friendship treaty.[359]

Until this point of time, the parties had sidelined the islands' question in the negotiations. Once the pressure of the Diet members had been made public, the Chinese no longer could afford to keep silent about it. China's reaction was assertive, instantly dispatching about a hundred armed fishing boats to the islands on April 13th. Shortly after the confrontation, the Chinese Vice-Premier Keng Piao claimed that "*the incident was accidental… neither intentional nor deliberate*". The incident finally proved to be advantageous for the Japanese since they could publicly pressurize Beijing to retreat from their confrontational stance. In order to ensure the conclusion of the treaty, the Chinese sacrificed their assertive position. Japan acquired thereby at least the de - facto ownership of the islands.[360]

On August 23rd, 1978, whilst signing the treaty, the Diaoyu / Senkaku Islands dispute was circumnavigated. Vice Premier Deng Xiaoping confirmed the omission during his visit in Japan, where he stated that the dispute should be shelved to be dealt with by wiser future generations.[361] The future Japanese Prime Minister Yasuhiro Nakasone accepted that the dispute "shall be postponed" and was thus the first Japanese representative to admit that there was a dispute over the islands.[362] Following this Sino-Japanese disagreement, the Japanese private youth organisation "Japanese Qingnianshi" refurbished the beacon on the islands, which they had

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[359] Xiaohong Liu, Chinese Ambassadors (1rst ed., 2001), 140; Kim Byung Chin, The Northeast Asia Continental Shelf Controversy (1rst ed., 1980), 152;

[360] Kim Byung Chin, The Northeast Asia Continental Shelf Controversy (1rst ed., 1980), 153

[361] Renmin wang people, "Diaoyu Dao Zhengduan De Lai Long Qu Mai" (March 2004) ; http://www.people.com.cn/GB/papers2836/11730/1057574.html, accessed on March 30th;Han-yi Shaw, "Its History and an analysis of the ownership Claims of The P.R.C., R.O.C. and Japan", No. 3 Occasional Papers 1999, 14

[362] Linus Hagström, Japan's China Policy (1rst ed., 2005), 122

established already little after 1972. In 1978, they proclaimed on behalf of Japan sovereignty and the Japanese side constructed a helicopter landing-pad on the Diaoyu / Senkaku Islands in 1979.[363]

3.5.8. The Diaoyu islands today

3.5.8.1. The beginning of the 1990s

In the year 1990, the Japanese Maritime Safety State agency recognized the lighthouse on Diaoyutai as an official beacon. ROC students gave prominence to the lighthouse controversy and planted a Taiwanese flag on the Diaoyutai Islands. Japanese officials immediately removed this flag.[364] Furthermore, the Taiwanese government wanted to place an Olympic torch on the islands.

3.5.8.2. The Mid-1990s

In the year 1996, the People's Republic of China announced its willingness to conduct a joint exploration of the oil field subject to the prerequisite that Japan recognizes China's sovereignty. Japan declined this proposal arguing that the owner of this privately owned land does not object private committees to land on the islands. The national government could not legally hinder the private activities on the islands. Given these circumstances the Japanese government could not concede to something, which is beyond their powers.[365]

In July, proponents of right wing Japanese Youth Organisation built a temporary lighthouse, erected two memorials and returned to repair the lighthouse. Anti-Japanese demonstrations took place in Hong Kong and Taiwan; Taipei exhorted the Communist government to protect the Chinese interest. In one poll five out of six Taiwanese were in favour of military action against the Japanese. The government realizing that the dispute could trigger a serious clash immediately eased the tensions afterwards.[366] In the same

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[363] Baidu, "Diaoyu", http://baike.baidu.com/view/2876.htm, accessed on March 30th, 2006; Seokwoo Lee, "Territorial Disputes among Japan, China and Taiwan Concerning the Senkaku Islands" Vol. 3 Boundary and Territory Briefing (2002) , 8

[364] Unryu Suganuma, Sovereign Rights and Territorial Space in Sino-Japanese Relation (1rst ed., 2000), 139

[365] Linus Hagström, Japan's China Policy (1rst ed., 2005), 151

[366] Alan Dupont, "The Environment and Security in Pacific Asia", Vol. 319 Adelphi Papers, 34

year, a Chinese protester drowned in stormy weather conditions when he attempted to land on the islands. Since then civil and political groups from all claiming states are regularly visiting the islands to demonstrate the sovereignty of their domestic government.[367] This time, the Japanese deviated from their usual arresting of illegal immigrants and they were only expelling the activists.[368] At the same time, the Chinese government's conduct was quite contradictory. Despite claiming that Japanese intruders had "grossly violated" its sovereignty, the Chinese leaders focussed on downplaying the incident by declining all applications for any anti-Japanese agitations. President Jiang Zemin appealed to public patriotism, but he aimed to keep the students off the street. He feared that the protesters would not stop at the issue of war crimes, but that they would turn themselves against his own autocratic regime.[369]

3.5.8.3. Today and Near Future

Although all claimants view a joint development and exploitation of the resources adjacent to the islands as a possible solution, no progress on this matter can be reported.[370] In February 2001, China and Japan concluded a mutual prior notification agreement stipulating that each side must inform the other before entering the waters of an area in which this country "takes interest." Chinese authorities must notify Japan before entering its territorial sea, including the surface around the disputed islands. This does not imply China's tacit recognition of Japan's ownership.[371] The agreement cleverly avoids any clear stipulations, from which line a notification is required.[372] On the other side, China has started drilling closer to the disputed territory

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[367] Han-yi Shaw, "Its History and an analysis of the ownership Claims of The P.R.C., R.O.C. and Japan", No. 3 Occasional Papers 1999, 18, 19

[368] Linus Hagström, Japan's China Policy (1rst ed., 2005), 151

[369] Antonym Spate, "Nationalism Gone Awry: Death In The Diary's", www.time.com/time/international/1996/961007/diaoyu.html, accessed on February 14th, 2007: Gordon Mathews, "A collusion of discourse," in: Globalisation Japan: ethnography of the Japanese presence in Asia, Europe and America (1rst ed., 2001), by Harumi Befu, Sylvie Guichard-Anguis (eds.), 163

[370] Wei-chin Lee, "Troubles under the Water: Sino-Japanese Conflict of Sovereignty on the Continental Shelf in the East Chinese Sea", Vol. 18 Ocean Development and International Law (1987), 600

[371] Linus Hagström, Japan's China Policy (1rst ed., 2005),150

[372] Mark J. Valencia, Yoshihisa Amae, "Regime Building in the East China Sea", Vol. 43 Ocean Development & International Law (2003), 198

arousing Japanese suspicion that the Chinese will siphon the gas of the Chunxiao / Shirakaba, Duanqiao / Kusunoki, Tianwaitian / Kashi fields, which are on the Japanese side of the median line. As these undertakings were confirmed by the Shanghai-based Sinopec oil-company, the Japanese allowed their national oil company Teikoku Oil to do the same.[373] Currently the countries have avoided exacerbating the dispute.

In 2005, Japan's administration printed marine maps indicating the Japanese lighthouse upon it.[374] Currently, the claimants have contented themselves with maintaining the status-quo. In these days, the new sworn in Japanese Prime minister Abe seeks to reinvigorate Sino-Japanese ties, which have deteriorated under his predecessor Kiuzumi. As both countries see the unsettled territorial status in the Eastern Chinese Sea as their possibly greatest security threat, they convened on installing a 24/7 telephone hotline in 2007. In case, that the dispute becomes again more acute, the states wish to use this device in order to prevent a further escalation.[375]

For a long-term resolution, the time factor might be decisive: The rising economic giant China can increasingly rely on its economic power to claim the islands, while Japan can arguably increasingly assert the historical consolidation of its territorial title.

4. Modes of Acquiring and Losing Territory

The territorial dispute in the East Chinese Sea involves several areas of international law. The conflict's topics includes the different modes of acquiring territory, the intertemporal law, the Law of the Sea and the peaceful settlement of these territorial and maritime conflicts. The thorough legal analysis could be a prerequisite to freezing the dispute.

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[373] Curtin, Sean J, "Stakes rise in Japan, China gas dispute," University of Alberta: http://www.uofaweb.ualberta.ca/chinainstitute/nav03.cfm?nav03=44057&nav02=43872&nav01=43092, accessed on July 24th, 2007
Marc J. Valencia, "The East China Sea Dispute: Context, Claims, Issues, And Possible Solutions", Vol. 31 Asian Perspective (2007), 128, 135

[374] Renmin wang people, "Riben dangju yinzhi xin ban haiyang ditu, http://japan.people.com.cn/GB/35469/35473/4304196.html, accessed on March 30th, 2007

[375] "Telefonleitung vereinbart" Vol. 15 Der Spiegel (16.4.07), 155

4.1. Subjects in Public International Law

In any domestic legal system, certain legal subjects, no matter if they are individuals or companies, will be regarded as possessors of rights and duties enforceable by law.[376] The legal subject "state" is the entity of law that is the primary entity under international law, which is capable of possessing international rights and duties. The state has the capacity to maintain its rights by bringing up international claims.[377] In Public International Law, the state is the primary bearer of duties, whereas individuals can only be subjects of obligations and duties in a mediate way.[378] On the contrary, the four 1949 Geneva War Conventions made an exception by granting direct subjective rights to individuals.[379]

4.2. Sovereignty

All the three disputants contest the sovereignty of the islands. A state cannot exist without territorial sovereignty[380] and the sovereignty can only be exercised by states;[381] thus, the concepts of sovereignty, statehood and territory are inseparable.[382] Oppenheim defined state territory as

"State territory is that defined portion of the surface of a globe which is subjected to the sovereignty of the State. A State without territory is not possible, although the necessary territory may be very small. The importance of State territory lies in the fact that it is the space within which the State exercises its supreme authority."[383]

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[376] Malcom N. Shaw, International Law (5th ed., 2003), 175
[377] Jellineck, System der subjectiven Rechte (1rst ed., 1892), 310-314; Ian Brownlie, Principle of Public International Law (6th ed., 2003), 57
[378] L. Oppenheim, International Law – Peace Vol. 1, Hersch Lauterpacht (ed.), (8th ed., 1955), 639
[379] Peter Fischer, Heribert Franz Köck, Völkerrecht – Das Recht der universellen Staatengemeinschaft (5th ed., 2004), 246
[380] compare to the case of former navy platform "Sealand" on the British coast
[381] Malcom N. Shaw, International Law (5th ed., 2003), 411, Dominik Zaum, The Sovereignty Paradox (1rst ed., 2007), 28
[382] Christos Roszakis, "Territorial Sovereignty" in R. Bernhardt (ed.) Encyclopaedia of Public International Law (1rst ed., 2000), 827
[383] Sir Robert Jennings, Sir Arthur Watts, Oppenheim's International Law, Peace Vol. 2 (9th ed., 1992), 563-564

What does sovereignty of a state actually mean? The word sovereignty emanates from the Latin word “super” (meaning over, above), which was switched to “superanus” in the Middle Ages and resulted finally in the French term of sovereign.[384] The late Dutch jurist Hugo Grotius (1583-1645) noted in his famous oeuvre “De Jure Belli ac Pacis” that sovereignty is

“That power is called sovereign whose actions are not subject to the legal control of another, so that they cannot be rendered void by the operation of another human will…”[385]

It can also be stated that sovereignty equates to legal independence.[386] Sovereignty / legal independence grants the state not only the title to territory, but also the jurisdictional reach of its state bodies. One of the major parameters of statehood is the capacity to exercise judicial, administrative and legislative jurisdiction over territory and nationals.[387]

4.3. The accessory maritime rights

Under international law, the ownership of maritime space can only be claimed on the basis of sovereignty over land territory. In the present disputes, the claimants all seek ownership of the Diaoyu / Senkaku islands in order to claim not only the territory of the islands themselves, but also the various maritime zones, which arise from them. The future owner of the disputed islands is entitled to claim the territorial water zone of 12 miles. The dispute over the islands does not lie in the question of the territorial water, but it is more the Exclusive Economic Zone that the parties of the conflict seek to obtain. The islands sovereignty entitles the owner to claim an Exclusive Economic Zone

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[384] Franz Xaver Perez, Cooperative Sovereignty (1rst ed., 2000), 18; Ángel Modesto Paredes, Manual De Derecho Internacional Público (1rst ed., 1951), 268

[385] Hidemi Suganami, “Grotius and International Equality”, in: Hedley Bull, Benedict Kingsbury, Adam Roberts, Hugo Grotius and International Relations (1rst ed., 1992), 230

[386] Neil Fenton, Understanding the UN Security Council (1rst ed., 2004), 17; George Sorensen, “Global polity and changes in statehood”, in: Mortem Cougar, Richard Piggott, Towards A Global Polity (1rst ed., 2002), 44; M. D. Mattel, Doritos des Genes - Tome I (1rst. ed., 1830), 55

[387] Hilary Charles Worth, Christine Chinking, The boundaries of international law (1rst ed., 2000), 143

(EEZ) of 200 miles and a Continental Shelf, which mirror the economic side of the islands.[388]

4.4. Distinguishing Acquisition relating to two Chinese countries

Covering the question how a state may acquire territory, one should differentiate between the acquisition of territory by an existing state and the birth of a new state.[389] This question could be vital taking into account that at least one of the two Chinese countries might have arisen after the islands were possibly already Chinese territory. The acquisition of territory by new states is problematic as long as the creation of a new state is not completed, there is no legal entity to hold the title to territory.[390] Relating to the claim of Taiwan the question arises of whether Taiwan's emergence as a new state is already completed. This must be questionable because the Taiwan government has never received the title of sovereignty over their territory. The Japanese renunciation over Taiwan in Art.2 (b) of the San Francisco Treaty in conjunction with the nullification of the Treaty of Shimonoseki arguably implied that "China" should be the beneficiary of Japan's renunciation. The Taiwanese legal status, though, remained undetermined.[391] On the grounds of Art. 23 of the San Francisco Treaty, the U.S.A. was assigned to be the principle occupying power of Taiwan Island. Art. 4 (b) granted the U.S. Military government the final disposition rights over the territory of Taiwan. Legally speaking, Taiwan is not an independent country and it does not hold the title of territory over their island.[392]

Referring to Taiwan this raises the question of whether the National government in Taipei can be granted the disputes islands' territory considering

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[388] Jean Combacau, Serge Sur, Droit international public (7th ed., 2006), 415; See also: Art. 56 UNCLOS

[389] Malcom N. Shaw, International Law (5th ed., 2003), 416

[390] Malcom N. Shaw, International Law (5th ed., 2003), 414

[391] Hans Kuijper, "Is Taiwan Part of China?", in: Jean-Marie Henckaerts, The International Status of Taiwan in the New World Order (1rst ed., 1996), 13

[392] Richard W. Hartzell, "Taiwan's legal standing", Taipei Times (16.5.2005); www.taipeitimes.com/New/editorials/archives/2005/05/16/2003254968, accessed on June 20th, 2007

that they are not even holding the legal title of their main Taiwanese island. Although these reflections may be dogmatically correct, the sui generis status of Taiwan as a quasi independent state recognized unofficially by the entire world community does not impede that the Diaoyu / Senkaku Islands could be attributed to Taiwan. If they are capable of sustaining a de facto state without formal title of sovereignty, the same principle shall apply to the disputed islands. Thus, the incomplete emergence of the Taiwanese "state" has no impact on the question of whether Taiwan may be the "owner" of the disputed islands.

4.5. Modes of acquiring the title

In the Middle Ages the state territory was identified with the private property of the monarch. For this reason, the rules of Roman law regarding the acquisition of private property were applied to the acquisition of territories of the state.[393] It has been suggested that these methods developed by the Romans are no longer to be applied today.[394] The early principles governing acquisition of title of territory applied today were developed during the period of colonialism at the beginning of the 16th century onwards.[395]

4.5.1. Occupation

Acquisition of territory by occupation derives from the Roman law concept. It is an original mode of acquisition and refers to territory, which at the time of occupation was not under the sovereignty of any other state.[396]

4.5.1.1. Terra nullius

In former times, in International Public Law many scholars considered every territory to be terra nullius, provided that no one lives there or provided that the people living there did not belong to a civilized polity.[397] This position was modified in the Western Sarah Case.

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[393] L. Oppenheim, International Law – Peace Vol. 1 (8th ed., 1955), L. Oppenheim (ed.), 545
[394] Guiqin Wang, Territoriale Streitfragen im Südchinesischen Meer, (1rst ed., 2005), 27
[395] Gillian D Triggs, International Law: Contemporary Principles and Practices (1rst ed., 2006), 212
[396] Surya P. Sharma, Territorial Acquisition, Disputes and International Law (1rst ed., 1997), 61
[397] L. Oppenheim, International Law – Peace Vol. 1 (8th ed.), Hersch Lauterpacht (ed.), 555

"Whatever differences of opinion there may have been among jurists, the state practice of the relevant period indicates that territories inhabited by tribes or people having social and political organisation were not regarded as terra nullius"[398]

As a result, during the epoch of colonialism whenever the soil was used by indigenous people (e.g. tribes) the territory cannot be regarded as terra nullius. As a matter of a fact, occupation is also possible in the unlikely scenario that one state has abandoned the territory prior to the occupation.[399] Today, terra nullius probably does not exist at any place on the globe given that even the most remote lands are claimed by at least one country.[400]

4.5.1.2. Occupation on behalf of a state

Unless the terra nullius is not res communis (territory belonging to the community) a state, not a private individual, may acquire the territory.[401] This does not, however, impede a state from authorizing private agents, officials, businessmen, diplomats to occupy the territory on its behalf.[402] In order to assure the state's liability it does not matter whether the "state seal" is *a priori* or *a posteriori* placed on the occupation. In the Age of Discovery and until the development of modern communication, the ratification of acquisition on behalf of the state could only be implemented after the discovery – after the existence of the territories could be reported to the Crown.[403] On the other hand, prior authorisation that any discovery was accrue to the sovereign, effectively bypassed this method.

4.5.1.3. Actual taking possession and the will to possess as a sovereign

International law lays emphasis on effective control as this factor mirrors the core value of stability within the international legal order.[404] Today, theory and

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[398] The Western Sahara Case (Advisory Opinion), 1975 ICJ Reports, 39, para.79
[399] I. A. Shearer, Starke's International Law (11th ed., 1994), 147
[400] Guiqin Wang, Territoriale Streitfragen im Südchinesischen Meer, (1rst ed., 2005), 29
[401] Malcom N. Shaw, International Law (5th ed., 2003), 424
[402] Ian Brownlie, Principles of International Law (5th ed., 1998) 144; Malcom N. Shaw, International Law (5th ed., 2003), 43
[403] Surya P. Sharma, Territorial Acquisition, Disputes and International Law (1rst ed.), 1997), 70; O'Connell, International Law (2nd ed., 1970), 418
[404] Gillian D Triggs, International Law: Contemporary Principles and Practices (1rst ed., 2006), 215

practice are unanimous about the rule that occupation is rendered effective by taking physical possession of the territory and factually administering it. In order to demonstrate effectiveness of control it is necessary that territory is placed under the sway of the state and that the intention of acquiring sovereignty is fulfilled. The requirements of "*corpus and animus occupandi*" can be met by a settlement on the territory, by a proclamation and by hoisting a flag.[405]

A declaration or notification to other states can provide sound evidence of the animus occupandi.[406] The 1885 Congress of Berlin stipulated in its precise terms of its General Act that in regard to African territories the allegedly completed acquisition should be notified to the other states.[407] A failure to notify did not leave the occupied territory open to appropriation.[408] Until the Convention of St. Germain was signed in 1919, it was not mandatory to notify other state parties of the claims.[409]

Thereupon it can be stated that occupation requires a real element of "*corpus occupandi*" (taking possession) as well as an element of "*animus occupandi*" (the will). Whenever these two prerequisites are fulfilled, the occupied territory becomes territory of the occupant state.

4.5.1.4. Limitation of physical presence

The physical presence on remote and inhospitable islands or islets might represent a considerable challenge in order to exercise effective control on these distant territories. The isolated nature of some islands made the courts reconsider the strict requirements, which they previously demanded for an assumption of effective control.[410]

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[405] L. Oppenheim, International Law – Peace Vol. 1 (8th ed., 1955), Hersch Lauterpacht (ed.), 557, 558
[406] Alfred-Maurice De Zayas, "Territory, Discovery", in R. Berhardt (ed.) Vol. 4 Encyclopaedia of Public International Law (1rst ed., 2000), 840
[407] Monique Chemillier-Gendreau, Sovereignty over the Paracel and Spratly Islands (1rst ed. 2001), 30
[408] M.F. Lindley, The Acquisition And Government Of Backward Territory In International Law (1rst ed., 1926), 299
[409] Gillian D Triggs, International Law: Contemporary Principles and Practices (1rst ed., 2006), 216
[410] Gillian D Triggs, International Law: Contemporary Principles and Practices (1rst ed., 2006), 216

4.5.1.4.1. Netherlands versa U.S.A. (Islands of Palmas Case of 1928)

The Islands of Palmas case is regarded as a leading case in this area. Here, Judge Huber observed:

"Manifestations of territorial sovereignty assume, it is true different forms, according to the conditions of time and place. Although continuous in principle, sovereignty cannot be exercised in fact at every moment on every point of territory. The intermittence and discontinuity compatible with the maintenance of the right necessarily differ according as inhabited or uninhabited regions are involved." [411]

In this case, Judge Huber meticulously examined which disputant had the better title of sovereignty: He stated that, although the island between Indonesia and the Philippines was isolated, it was permanently inhabited so that "*acts of administration could not be lacking for very long periods.*" The island inhabitants were subject to Dutch taxation and the Dutch distributed flags on the island prior to the moment when the U.S. claimed to have a legal title. These unchallenged acts of peaceful display of Netherlands sovereignty during the period of 1700-1906 were considered as a sufficient proof of Dutch sovereignty.[412]

4.5.1.4.2. Clipperton Island Case of 1932

Situated about 1200 km south-west of Mexico in the Pacific Ocean the uninhabited Clipperton Island was declared French territory by a French lieutenant in 1858. The lieutenant notified the French consulate in Honolulu. Afterwards the consulate informed the government of Haiwaii and made the declaration public in a local Haiwaii journal called "The Polynesian".[413] Other than granting a guano concession to some U.S. citizens, France did not carry out any activities on the territory. Thirty years later, a Mexican gunboat disembarked some sailors on the island and claimed the territory on behalf of Mexico based on a title of prior Spanish discovery and, by virtue of the law

[411] Islands of Palmas Case (1928), 2 RIAA 828 at 840
[412] Gillian D Triggs, International Law: Contemporary Principles and Practices (1rst ed., 2006), 218
[413] Dixon, Mc Corquodale, Cases on International Law (4th ed., 2003), 236

being in force at that time, on the Bull Inter Caetera of Alexander VII. The Bull was promulgated on May 4th, 1493 and was underlined by the Treaty of Tordessillas in the following year.[414] In this case, the sole arbitrator King Emmanuel III of Italy stated:

"Thus, if a territory, by virtue of the fact it was completely uninhabited, is, from the first moment when the occupying state makes its appearance there, at the absolute and undisputed disposition of that state, from that moment the taking of possession must be considered as accomplished, and the occupation is thereby completed."[415]

Hereby the arbitrator found that France had effectively occupied the islands and had displayed no intention of abandoning the island. The case is important as it reveals the minimal requirements established for isolated and uninhabited islands. The requirements of effective occupation on these remote islands are much lower than elsewhere.[416]

4.5.1.4.3. Eastern Greenland Case of 1933

At the beginning of the 20th century, Norway erected a wireless station and some of their expeditions wintered in Eastern Greenland causing Danish protests.[417] The dispute erupted in 1931 when Norway issued a Royal Resolution claiming sovereignty over the east coast of Greenland. Soon afterwards, Denmark seized the Court and claimed to be the peaceful and continuous occupant, which was uncontested on a long-term basis. In 1814, Greenland as a whole was assigned to the Danish Crown in the Treaty of Kiel.[418] Norway admitted that the western, southern and south - eastern part

[414] Clipperton Arbitration Award, Vol. 26 A.J.I.L. (1932), 392, M. De Vattel., Le Droits Des Gens (1rst ed., 1830), 222
[415] Clipperton Island Case (1933), 2 RIAA 1105 at 1110
[416] Gillian D Triggs, International Law: Contemporary Principles and Practices (1rst ed., 2006), 219
[417] Malcom N. Shaw, International Law (5th ed., 2003), 434
[418] Martii Koskenniemi, From Apology to Utopia (1rst ed., 2005), 289

were under Danish rule, but asserted that Eastern Greenland still was terra nullius.[419] The Permanent Court of International Justice ruled in 1933.

"It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of actual exercise of sovereign rights…. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled areas."[420]

From a virtual perspective, Denmark had not gained possession of all of Greenland, particularly not of the inaccessible eastern part. The Court was satisfied by the Danish "animus occupandi," which Denmark displayed by the promulgation of hunting, fishing and other administrative regulations for all of Greenland.[421]

Lauterpacht notably remarks of the Court's ruling: "The borderline between attenuated conditions of effectiveness of occupation and the total relinquishment of the requirement of effectiveness has become shadowy to the point of obliteration."[422]

4.5.1.4.4. Western Sahara Advisory Opinion of 1975

In 1975, the General Assembly of the U.N. requested that the ICJ to give an advisory opinion on the status of the Western Sahara. Morocco claimed the sovereignty over Western Sahara on the grounds of having been the only independent country in the region for a long time. Regarding the requirements of effective occupation the Court viewed it differently than in the Eastern Greenland Case. The Western Sahara, even though scarcely populated, contained tribes with coherent social and political structures amongst whom

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[419] O'Connell, International Law - Vol. 1 (1rst ed., 1965), 472
[420] Eastern Greenland Case (1933) PCIJ (Series A/B No. 53 at 46, quoted in: Gillian D Triggs, International Law: Contemporary Principles and Practices (1rst ed., 2006), 221
[421] Gillian D Triggs, International Law: Contemporary Principles and Practices (1rst ed., 2006), 221
[422] Hersch Lauterpacht, "Sovereignty Over Submarine Areas", Vol. 27 B.Y.I.L. (1950), 416

conflicts took place quite frequently. War animosities took place quite frequently in the region. The paucity of evidence turned out to be a predicament for Morocco in that it could not exhibit sufficient legal ties to claim the effective control.[423] The ICJ stated as well that the tribes[424] living in the deserts impeded the territory from being considered "terra nullius".[425]

4.5.1.4.5. Minquiers and Ecrehos Case of 1953

This case concerned a dispute between the United Kingdom and France over some islets and rocks in the English Channel. Both parties based their claim on historical titles.[426] According to the U.K., William the Conqueror bases its title on conquest in 1066. In contrast, France argued the islands were under French rule after the Duchy of Normandy was disconnected from England in 1204.[427] The islands belonged to the criminal jurisdiction of the English Jersey Island and the few British housing dwellers belonged to taxation of the British Empire.[428] The Jersey Coroner also has jurisdiction over wrecks and bodies washed up on the islands.[429] The Court did not disregard the ancient titles, but it decided on basis of more recent displays of sovereignty. Notwithstanding the historical evidence, the ICJ opined that the actual and continuous display of state functions, e.g. local administration, jurisdiction and acts of legislative bodies are necessary to confirm a title. Without doubt, the state functions were exercises by the United Kingdom, for this reason, the ICJ adjudicated the islands to the British claim.[430] Thus, an original title suffices, if

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[423] Dixon, Mc Corquodale, Cases on International Law (4th ed., 2003), 239; D.J Harris, Cases and Materials on International Law (5th ed., 1998), 208;
Martii Koskenniemi, From Apology to Utopia (1rst ed., 2005), 297

[424] Contrary, in Australia where aborigines did not have any political organisation, occupation was held to be the appropriate way of acquiring "New Holland"; see M.F. Lindley, The Acquisition And Government Of Backward Territory In International Law (1rst ed., 1926), 41

[425] International Court of Justice, ICJ Reports (Western Saharah Case), 39

[426] D.J. Harris, Cases and Materials on International Law (5th ed., 1998), 204, ICJ Reports (1953), 47

[427] Surya P. Sharma, Territorial Acquisition, Disputes and International Law (1rst ed., 1997), 85

[428] D.J Harris, Cases and Materials on International Law (5th ed., 1998), 206; William B. Heflin, "Diaoyu/Senkaku Islands Dispute: Japan and China Oceans Apart", Asian Pacific Law & Policy Journal, 14, www.hawii.edu/aplpj, accessed on July 15th, 2006

[429] Court of International Justice, ICJ Reports (Minquiers and Écrèhous case), 65

[430] I.A. Shearer, Starke's International Law (11th ed., 1994), 148

the sovereignty is not called into question. Whenever the sovereignty is disputed, its incessant and positive exercise must be displayed.[431]

4.5.1.4.6. Summary

The four juridical cases display the crucial factor, which need to be construed in the Diaoyu / Senkaku Islands' conflict. It shall be analysed whether the islands

- were terra nullius until what point of time?
- Who discovered at first the islands?
- was the Chinese investiture mission sufficient to claim an effective occupation?
- was the effective occupation ever lost by the Chinese?

4.5.2. Acquisitive Prescription

4.5.2.1. Background of Prescription

According to International Public law, a recognisable title might be obtained by prescription.[432] Contrary to the preceding Roman model, today's prescription no longer requires "good faith".[433] Most modern jurists can agree on the idea that prescription confers a legal title, which has a close relationship to the principle of acquiescence.[434]

4.5.2.2. Definition of Prescription

Prescription means that a doubtful acquisition of territory might be finally legitimised and legalized. The arbitrators' definition of prescription in the Grisbadarna case was "*that it is a settled principle of the law of nations that a state of things which actually exists and has existed for a long time should be changed as little as possible*."[435]

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[431] Herndl, Kurt, "Miniquiers and Ecrehos Case", in Bernhardt (ed.), Vol. III Encyclopaedia of Public International Law, 427
[432] Gillian D Triggs, International Law: Contemporary Principles and Practices (1rst ed., 2006), 229
[433] Ian Brownlie, Principles of Public International Law (5th ed., 1998), 151
[434] Gillian D Triggs, International Law: Contemporary Principles and Practices (1rst ed., 2006), 229
[435] Grisbadarna Case 1916, HCR 121, 130

Although the occupation might have been illegal at the beginning, the possession of the territory for a certain period might grant a legal title to the occupant. Prescription implies the necessity of a virtual exercise of sovereignty. It is different from occupation insofar as the later can only emerge from virgin territory.[436] In order to claim the title of prescription the occupying state must publicly exercise the possession *à titre de souverain,* which is a familiar element to effective occupation.[437] Apart from publicity, it has to occupy the territory in an unchallenged, undisturbed and uninterrupted way. Thus, acquiescence - express or implied - and the lack of protest are two main pillars of prescription. [438] A very controversial question is the amount of time required for either the acquisition of a title or the extinction of a title. Analysing the literature it must be concluded that a period of twenty or thirty years is not sufficient. In the British Guiana – Venezuela Boundary dispute the arbitrators considered a period of 50 years as sufficient.[439]

4.5.2.3. Prerequisites of Protest

How must the protest be uttered? Today, it suffices if diplomatic protest is expressed and is formally registered on the international stage.[440] These formalities are called into question; for example Brownlie states: "*If acquiescence is the crux of the matter one cannot dictate what its content is to be, with the consequence that the rule that jurisdiction rests on consent may be ignored and failure to resort to certain organs is penalized by loss of territorial rights.*"[441] Nevertheless, the necessity to avoid the completion of prescription by diplomatic correspondence is recognized by the state practice.[442]

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[436] Rebecca Wallace, International Law (4th ed., 2002), 94
[437] Ian Brownlie, Principles of Public International Law (5th ed., 1998), 153
[438] Ian Brownlie, Principles of Public International Law (5th ed., 1998), 153
[439] Holder, Brennan, The International Legal system (1rst ed., 1972), 333
[440] Rebecca Wallace, International Law (4th ed., 2002), 94; I.C. Mac Gibbon, "Some Observation on The Part Of Protest In International Law", Vol. 27 B.Y.I.L. (1950), 346
[441] Ian Brownlie, Principles of Public International Law (5th ed., 1998), 154
[442] I.C. MacGibbon, "Some Observations on The Part Of Protest In International Law", Vol. 27, B.Y.I.L. (1953), 308

4.5.2.4. Value of a possible claim based on prescription

There is no decision of any international tribunal, which is expressly based on the grounds of prescription.[443] Even in the Islands of Palmas Case Judge Huber employed the term "so-called prescription".[444] In the *Chamizal* arbitration between Mexico and the U.S. the American claim of prescription was denied due to Mexican protest.[445] Basing a claim merely on prescription might not be advisable as this legal device is quite elastic and unpredictable. Each claim to title of prescription needs to be evaluated upon the special circumstances of the case (geographical nature of the territory / absence or existence of other claims) and no general rules can be established about this legal device.[446]

4.5.3. Conquest / Annexation

Conquest, as distinct from occupation is the use of force to take possession of alien territory.[447] To be implemented the requirements of the actual taking over (factum) and the intention (animus) to take over had to be fulfilled.[448] Once the war was finished, the second prerequisite for a valid conquest had to be completed. This was possible in a threefold way: a) through subjugation, b) through the mere cessation of hostilities, when the parties of the military conflict abstain from further bellicose action and hover into a peaceful coexistence without regulating expressly their new relation, and c) through a treaty of peace.[449]

It can be observed that the terms conquest and annexation are interchangeably utilized in the language of international law books. There is, however, one slight difference. The two words vary in terms of transfer of sovereignty. In a subjugated state, the sovereignty is not yet displaced until the final step of annexation is completed. The annexation can be completed

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[443] I.A. Shearer, Starke's International Law (11th ed., 1994), 154
[444] Ian Brownlie, Principles of Public International Law (5th ed., 1998), 152
[445] Dixon, Mc Corquodale, Cases on International Law (4th ed., 2003), 237, 238
[446] Gillian D Triggs, International Law: Contemporary Principles and Practices (1rst ed., 2006), 229
[447] Monsieur De Vattel, Law of Nations, (1rst ed., 1834), 384
[448] Rebecca Wallace, International Law (4th ed., 2002), 95
[449] Sharon Korman, The Right of Conquest (1rst ed., 1996), 112

by any expression of the conqueror to regard the territory as his own in order to shift the sovereignty to the conqueror.[450]

Since the 1928 Kellogg Briand Pact the use of force as an instrument of national policy (ius ad bellum) is no longer lawful.[451] This pact, which had its origins in various Hague Conventions of the late nineteenth / early twentieth century War Conventions and in the League of Nations Covenant[452] certainly does not prohibit a state to resort to force in a case of national defence.[453]

The Romans went even as far as touting the principle of a just war[454], whereas in modern times the ius ad bellum was recognised principle of international law until 1928.[455] The 1974 Definition of Aggression stipulates that no political, economic, military or any other reason may justify the use of force. Art. 2 (IV) of the UN Charta prohibits the "*threat or use of force against the territorial integrity or political independence of any state*". The 1970 Declaration of Principles of International Law concerning the Friendly Relations and Cooperation stated that "no territorial acquisition resulting from a threat or use of force shall be recognised as legal"[456] Thus, the Israeli occupation of Palestinian territory after the "*Six Day War*" in 1967 must be deemed illegal as Indonesia's integration of East Timor was in 1976. This point of view was affirmed in the U.N. Security Council Resolutions 242 and 478.[457] This means, territory can no longer be acquired by force although the use of force e.g. in the frame of self - defence might still be legal.

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[450] O'Connell, Vol. I International Law (1rst ed., 1965), 498, 499; L. Oppenheim, International Law – Peace Vol. 1 (8th ed., 1955), Hersch Lauterpacht (ed.), 567; Surya P. Sharma, Territorial Acquisition, Disputes and International Law (1rst ed., 1997), 143

[451] Peter Fischer, Heribert Franz Köck, Völkerrecht – Das Recht der universellen Staatengemeinschaft (5th ed., 2004), 411

[452] David Kennedy, International Legal Structures (1rst ed., 1987), 259

[453] Oscar Schachter, International Law in Theory and Practice (1rst ed., 1991), 135; Sven Bernhard Gareis, Johannes Varwick, The United Nations (1rst ed., 2005), 71

[454] David J. Bedermann, International Law in Antiquity (1rst ed., 2001), 222

[455] Adolfo Miaja De La Muela, Introduccion Al Derecho International Publico (6th ed., 1974), 581; Sven Bernhard Gareis, Johannes Varwick, The United Nations (1rst ed., 2005), 66

[456] Rebecca Wallace, International Law (4th ed., 2002), 95

[457] SC Res. 242, UN Doc S/RES/242 (1967); SC Res 384, UN Doc/RES 384 (1975)

Because the invalidity of such a territorial acquisition does not retroactively apply to conquests made before 1928, ancient tiles acquired by force may be valid today.[458] Historically, any post war treaty tended to be coerced to the defeated state insofar as the victor state, bearing the stronger bargaining position, could put almost arbitrary pressure on the subdued state. Under traditional law, this compulsory force using "unequal treaties" was accepted as a perfect legal way of acquiring sovereignty over territory.[459]

4.5.4. Cession

A state may transfer a part of its territory including sovereignty to another state. This is usually done by a cession, which represents the most common form of acquiring territory. Cession requires that one state is aggressed to transfer its title of sovereignty and another state will take it over. The transfer of sovereignty byvirtue of cession is limited because of the inhabitants' right of self-determination. The cession might be implemented by the use of force as territorial sovereignty often was transferred from the defeated power after a war.[460] Pursuant to Art. 52 of the Vienna Convention on the Law of Treaties 1969 the use of force implies the treaty to be null and void. Treaties signed before 1969 are again protected by the non-applicability of the principle of retroactivity. In other words, former coerced cessions, depending on the time, still may be regarded as valid under current international law. [461]

In Europe, cession is frequently used for facilitating the border delimitation of two neighbouring countries by e.g. interchanging parcels of states' territory. One other famous China-related cession was the Sino-British Joint Declaration of 1984 where that part of Hong Kong was transferred which China had ceded to the U.K. in the middle of the 19th century. Another famous example was Russia selling Alaska to the U.S.A. for $ 7.2 US million in 1867.[462]

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[458] Rebecca Wallace, International Law (4th ed., 2002), 96
[459] Sharon Korman, The Right of Conquest (1rst ed., 1996), 124
[460] Rebecca Wallace, International Law (4th ed., 2002), 97
[461] Gillian D Triggs, International Law: Contemporary Principles and Practices (1rst ed., 2006), 246
[462] Gillian D Triggs, International Law: Contemporary Principles and Practices (1rst ed., 2006), 246

4.5.5. Accretion and Avulsion

Accretion and avulsion, both are put into practice by a geographical process. Accretion means the gradual addition of territory. This principle does not cause so much trouble as the added territory forcibly belongs to the adjacent state.[463] There are two modes of accretion to be distinguished: The natural and artificial accretion.[464] Whereas the artificial accretion of home based territory by aggradations (for example, Principality of Monaco), some states are setting up artificial islands in the South Chinese Sea.[465]

Avulsion describes the violent shift of territory through a flood or by the creation of new islands. For example, this could be observed in a new volcano island, which emerged in the territorial sea of Japanese Iwo Jima. This island was henceforth regarded as Japanese territory.[466]

4.5.6. Adjudication

According to some jurists, a state also may acquire territory by adjudication of a judicial organ. The verdict of a tribunal surely will ascribe the title of territory to a state, but is the adjudication itself cannot be a formal means of acquiring a title. The adjudication between two claimants cannot foreclose the possible better claim of a third state.[467] Again, these examples do not attribute a title to territory in the strict sense.

4.5.7. Discovery

It has been argued that in the fifteenth and sixteenth century the mere discovery of territory conferred the title of sovereignty as well.[468] The discovery could confer an inchoate title (an option) to the discovering country to consolidate their title by exerting the effective occupation in a reasonable time.[469] According to Arbitrator Huber in the Islands of Palmas Case the

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[463] Gillian D Triggs, International Law: Contemporary Principles and Practices (1rst ed., 2006), 248
[464] L. Oppenheim, International Law – Peace Vol. 1 (8th ed., 1955), Hersch Lauterpacht (ed.), 565
[465] Guiqin Wang, Territoriale Streitfragen im Südchinesischen Meer, (1rst ed., 2005), 37
[466] Malcom N. Shaw, International Law (5th ed., 2003), 420
[467] Gillian D Triggs, International Law: Contemporary Principles and Practices (1rst ed., 2006), 214
[468] L. Oppenheim, International Law Peace Vol. 1 (8th ed., 1955), Hersch Lauterpacht (ed.), 558
[469] Ian Brownlie, Principles of Public International Law (5th ed., 1998), 144; see as well the Islands Palmas case

ongoing existence of this inchoate title must be confirmed by subsequent manifestation of control.[470] However, if the inchoate title is not perfected, any other country may occupy the territory. As Keller states:

"*Throughout this lengthy period (1400-1800), no state appeared to regard mere discovery, in the sense of physical discovery or simple "visual apprehension" as being in any way sufficient per se to establish a right of sovereignty over, a valid title to, terra nullius. Furthermore, mere disembarkation upon any portion of such regions… was not regarded as sufficient….the formal ceremony of taking of possession, the symbolic act, was generally regarded as wholly sufficient per se…"*[471]

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To sum up, the mere discovery does not enable the discoverer to preserve the state's priority to the title.[472]

4.5.8. Contiguity

The principle of contiguity was recognized just in one very peculiar case: Rooted in the Trumann Doctrine many states started claiming the continental shelf of the sea. The exploitation of the continental shelf though remained the sole legal principle where the thesis of contiguity found its recognition as a state praxis.[473]

Although the principle of contiguity was a latent consideration in the Permanent's Court decision of the Eastern Greenland case, the Court was willing to accept Denmark's intention to occupy all of Greenland. Today the right of propinquity is just a material fact albeit it does not state a legal necessity.[474] As Arbitrator and Judge Huber stated in the Islands Palmas case:

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[470] Ian Brownlie, Principles of Public International Law (5th ed., 1998), 144

[471] Arthur Keller, Creation of Rights of Sovereignty through Symbolic Acts 1400-1800 (1rst ed., 1938), 148, 149

[472] O'Connell, Vol. I International Law (1rst ed., 1965), 479; Lauterpacht, Oppenheim's International Law (8th ed., 1955), 559

[473] Hermann Weber, Falkland Inseln oder Malvinas, (1rst ed., 1977) 102; Bernd Rüster, Die Rechtsordnung des Festlandssockels (1rst ed., 1977), 197

[474] Greig, International Law (2nd ed., 1976), 169; Gillian D Triggs, International Law: Contemporary Principles and Practices (1rst ed., 2006), 239

"it is impossible to show the existence of a rule of positive international law that islands situated outside territorial waters should belong to a State from the mere fact that its territory forms the…. nearest continent or island of considerable size."[475]

"The principle of contiguity, in regard to islands, may not be out of place when it is a question of allotting them to one state rather than another, either by agreement of the Parties, or by a decision not necessarily based on law; but a rule establishing ipso iure the presumption of sovereignty in favour of a particular State, this principle would be in conflict with what has been said as to territorial sovereignty… nor is this principle of contiguity admissible as a legal method of deciding questions of territorial sovereignty; for the wholly lacking in precision and would in it application lead to arbitrary results"[476]

The Courts have sometimes ruled that little islands within the 12 miles territorial sea belonged to the coastal state.[477] The validity of the contiguity was indirectly denied for example in the 1977 award[478] of the Anglo French Channel Islands (Guernsey, Jersey, Alderney, Sark, Herm and Jethou). Although the British islands lie 6.6 km from the French Normandy coast, they are not French territory.[479] As the principle of contiguity has arisen to determine the effective occupation of the land-locked hinterland the principle in relation to islands needs to be regarded as inapplicable.

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[475] Arbitrator Huber in the Islands Palmas case, quoted in: Greig, International Law (2nd ed., 1976), 168

[476] Islands of Palmas Case ICJ Reports, 1951, 116; see also: Vol. 22 A.J.I.L. (1928), 893

[477] Qatar v. Bahrain ICJ Reports 1995; Gillian D Triggs, International Law: Contemporary Principles and Practices (1rst ed., 2006), 239

[478] It has to be stated, that the dispute did not deal with the islands sovereignty!

[479] Jon M. van Dyke, Dale L. Bennett, "Islands and the Delimitation of Ocean Space in the South China Sea" Vol. 10 Ocean Yearbook (1993), 81

4.6. Loss of territory

4.6.1. Six modes

Altogether, there are six modes of losing territory: dereliction, cession, operation of nature, subjugation, prescription and revolt.[480] They are converse to the acquisitive title and describe the way of getting rid of territory. From the author's view, the principle of adjudication is not considered as a mode of losing territory because a tribunal's ruling only makes a legal decision on the basis of historical facts.

4.6.2. Dereliction

The dereliction is the abandonment of territory resulting in its conversion to no man's land. This device requires the intention to abandon and the actual abandonment.[481] In the Clipperton award, it was ruled that France never had the animus to abandon the islands and the lack of exercise of authority did not forfeit the protected title of sovereignty.[482] Thus, a definite renunciation must be put forward.

4.7. Relativity of title

In the Diaoyu / Senkaku Islands dispute each claimant puts forward different theories on how they possibly could have obtained a title of sovereignty. In some cases, (Minquiers and Ècrèhos) the international tribunal equated the question of sovereignty with actual possession. Therefore, the title does not necessarily mean that its holder will win a potential court procedure. In other words, it must be taken into consideration that a title to territory is relative, e.g. the state showing the superior claim, even though it might be imperfect, will be granted the title.[483] The fact that an imperfect title might be superior to a perfect one is reflected in the intimate relationship between foreign politics

[480] L. Oppenheim, International Law- Peace Vol. 1 (8th ed., 1955), Hersch Lauterpacht (ed.), 578
[481] Seokwoo Lee, "Territorial Disputes among Japan, China and Taiwan Concerning the Senkaku Islands" Vol. 3 Boundary and Territory Briefing (2002), 23
[482] Ian Brownlie, Principles of Public International Law (5th ed., 1998), 143
[483] see: Albert Bleckmann, Völkerrecht (1rst ed., 2001), 192

and public international Law.[484] In the Rann of Kutch (Pakistan v. India) case, the area was adjudicated on the grounds of current actual exercise of sovereignty functions. In regard to the historical evidence put forward by the parties, the Chairman of the tribunal, however, explicitly stated that this does not imply that the disputed territory was historically terra nullius.[485]

One the one hand the factual political conditions of the acquisition must be fulfilled, which might be subject to continuous and gradual modifications. On the other hand, the sphere of international law seeking to shelve the political issues on a permanent basis represents another aspect.[486] In other words, international law cannot afford to simply ignore stable political conditions over many decades. The Falkland Islands dispute is a useful example in this context. The Argentineans arguably own the historical title over the islands, but the U.K. can claim to have the superior title because they administered the islands for many centuries.[487] As a consequence, the U.K. arguably has the imperfect, but superior title.

4.8. Applicability of these principles to the Diaoyu / Senkaku Islands

The islands are situated in the middle of the Eastern Chinese Sea. As aforementioned, they are uninhabited, bear scarce vegetation and are of minor size. It is almost impossible to make a permanent living in the islands without onshore food deliveries. The preconditions for leading an elementary life are not sufficiently existing, such as grain, water supplies etc. The principles laid down in the Islands of Palmas (inhabited) and Clipperton (uninhabited) awards can be transferred to this case.

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[484] compare e.g. the Falkland islands: Although the U.K. occupied them centuries ago when they were not terra nullius before, the U.K. is entitled to lay claim on the islands

[485] The Indo - Pakistan Western Boundary Case Tribunal, quoted in: Surya P. Sharma, Territorial Acquisition, Disputes and International Law (1rst ed., 1997), 89

[486] Friederich Berber, Lehrbuch des Völkerrechts I. Band (1rst ed., 1960), 336

[487] Raphael Perl, The Falkland Islands Dispute In International Law (1rst ed., 1983), 30; Tim Hillier, Principles of International Law (2nd ed., 1999), 115

4.8.1. Principle of Occupation

All disputants agree that the islands a priori at a certain point of time were terra nullius. Only the date, at which the islands were incorporated into the claimant states' territories, is debated. The claimant having acquired the title of occupation and being able to prove that it had not lost it by e.g. annexation or acquisitive prescription can demonstrate a better title of the Diaoyu / Senkaku Islands.

4.8.2. Extent of Occupation

The question arises whether the occupation of one of the islands does extend to the occupation of the entire group of islands and rocks. In fact, the islands lie quite far from each other. The historical evidence is rather scarce in this matter. In no mission record or transcription is it demonstrated that voyagers disembarked on the little rocks. Certainly, the beacons for orientation were not erected on all islands. The literature remains vague. The same applies to the legal principles laid down by the international tribunal, which have to be considered for adjudging the title of territory of the islands.

4.8.3. Summary

The traditional international public law contains five modes to acquire territory. From a historical perspective the most important ones are probably occupation and annexation. The most decisive principle for assessing the ownership of the Diaoyu / Senkaku Islands will be without a doubt the principle of occupation, annexation and prescription. Analysing the historical evidence one must not forget that international law remains deeply influenced by factors envisaging political stability, effective governance and practical viability.

5. Applicability of Intertemporal Law

5.1. Introduction

The creation of the principle of the intertemporal law has to be regarded as a device for preserving a balance between the stability in state relations and the

gradual development of international law. This principle aims to stabilize juridical conditions and to ensure that legal results, such as e.g. the adjudication of property, are not subject to changes as a consequence of a modification of the law.[488] The rule requires the analysis of events in the light of the rules in existence at the time the events occurred. This can lead to difficult problems as a territorial title of e.g. annexation might be valid under the law of the 16th century, but might be invalid under the rules of international law prevailing in the 20th century.[489] The same principle, which evaluates the creation of rights to the law in force at the time the rights emerges demands that the continuous existence of the right shall be assessed by the conditions required by the evolution of the law.[490]

5.2. Two-way application of this doctrine

The principle of intertemporal law was first applied in the Islands of Palmas Arbitration. The arbitrator Huber probably erroneously considered - due to customary law of the 16th century - the title of the Spanish discovery as sufficient. As demonstrated above, at the beginning of the 20th century the mere discovery could not grant a title of sovereignty, but only conferred an "inchoate title". Huber ruled: Distinguishing between the creation and the continuation of rights Huber required the continuous manifestation of the title.[491] He stated that

"*it cannot be sufficient to establish a title by which the territorial sovereignty was validly acquired at a certain moment; it must also be shown that the territorial sovereignty has continued to exist and did exist at the moment which for the decision of the dispute must be considered as critical.*"[492]

Huber stated thereby that a possible lawfully acquired title might due to lack of manifestation, be lost afterwards. In the Minquiers and Ecrehos Case, the ICJ

[488] Gillian D Triggs, International Law: Contemporary Principles and Practices (1rst ed., 2006), 224
[489] Malcom N. Shaw, International Law (5th ed., 2003), 429
[490] Taslim O. Elias. The International Court of Justice and some contemporary problems (1rst ed. 1983), 120
[491] Gillian D Triggs, International Law: Contemporary Principles and Practices (1rst ed., 2006), 224
[492] Islands of Palmas arbitration (1928) 2 RIAA, 829

ruled that all feudal titles were dislodged as a consequence of the supervening events in the year 1204 when the Duchy of Normandy was disconnected from England. According to the Jessup's admonishing words, sovereign title insurance has become impossible. If a state has failed to exercise its title and has abandoned the territory, it simultaneously acquiesces to the potential claim of a third party.[493] This affirms the idea that a continuous display of sovereignty is required under international law.

5.3. The evolution of new legal principle

How does the prohibition of retroactivity correlate with the emergence of new legal principles? A noteworthy and important decision was taken in the Aegean Continental Shelf case. The question was whether the continental shelf of the Greek Aegean Sea is accounted to belong to the wording of a treaty of 1928 "*disputes relating to the territorial status of Greece*". This doctrine of the continental shelf was unknown at that time. The ICJ ruled by allowing exceptionally the retroactivity that the continental shelf dispute has to be taken into consideration to territorial Greek disputes.[494]

5.4. The critical date question

The determination of a critical date establishes an important "crossing" for the final decision. Until what point of time shall the facts be analysed? Up to today? This option must be ruled out – this would bolster the state's position, which tries to improve its legal position through contrived manoeuvres.[495] Generally, it may be stated that the critical date can be set when the dispute arises between the parties. Logically, in the Eastern Greenland case the critical date was to be determined in 1931 when Norway proclaimed sovereignty and its claim was interfering / crisscrossing for the first time with the Danish claim.[496]

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[493] Gillian D Triggs, International Law: Contemporary Principles and Practices (1rst ed., 2006), 224
[494] Malcom N. Shaw, International Law (5th ed., 2003), 430
[495] Malcom N. Shaw, International Law (5th ed., 2003), 431
[496] Gillian D Triggs, International Law: Contemporary Principles and Practices (1rst ed., 2006), 226

The ICJ though has not applied this theory dogmatically: In the Minquiers and Ecrehos case the Court held it to impossible to rule out all the circumstances, which occurred after the year 1886 and 1888 respectively.[497] In the Argentine-Chile Frontier case the ICJ stated that it "*had considered the notion of a critical date to be of little value in the present litigation and has examined all the evidence submitted to it, irrespectively of the date of the acts to which such evidence relates.*"[498] Henceforth, it must be concluded that due to the peculiarity of the case the critical date must be assumed at a much later point of time than when the dispute emerged. The concept of the critical date remains relative and being dependant on each individual case. Indeed, there might be multiple critical dates in each particular case.

5.5. Provisions of the Vienna Convention of the Laws of Treaties

Art. 28 of the Vienna Convention of the Law of Treaties provides treaties may not be applied retroactively unless the parties agree on a legal binding towards the acts having taken place before the treaty was signed.[499]

5.6. Relevance to the Diaoyu / Senkaku Islands

The principle of the intertemporal law must be taken into consideration while assessing the opposing claims in the Eastern Chinese Sea. The question of whether the Chinese discovery of the islands was sufficient to form a root of title and if they fulfilled the prerequisites of effective occupation before the Japanese occupation of terra nullius can only be clarified by utilizing the intertemporal law.

5.7. Important legal principles of international law

The question of which party might be awarded title to the islands, relies also on the claimant's subsequent behaviour. The three principles of recognition, acquiescence and estoppel are almost indistinguishable and overlap to a

[497] Gillian D Triggs, International Law: Contemporary Principles and Practices (1rst ed., 2006), 226
[498] ICJ Award 1966 quoted in: Ian Brownlie, Principles of Public International Law (5th ed., 1998), 129
[499] Paul Reuter, Introduction to the Law of Treaties (2nd ed., 1989), 77

considerable extent. They are all based on the principles of good faith and equity.[500]

5.7.1. Recognition

The pliability of recognition as a precise decision making tool makes it a valuable mechanism to establish a title. No matter how weak the title may be, recognition by the international community may operate to perfect it. Recognition is irreversible: Once a state has uttered its recognition, the recognition cannot be revoked anymore.[501] Recognition of title does bind third states, although it might indicate some evidentiary weight.[502]

5.7.2. Acquiescence

Acquiescence has the same effect as express recognition, but it arises from a lack of protest when such a protest is usually to be expected. Acquiescence is basically passive and tacit conduct.[503] A crucial question is whether acquiescence can be imputed when the acquiescing state has no knowledge of the relevant facts. In the Islands of Palmas Case Judge Huber inferred that a clandestine exercise of state authority over an inhabited territory during a considerable length of time would be impossible.[504]

5.7.3. Estoppel

The principles of acquiescence and recognition are rooted in a certain way of granting consent. The estoppel does not oblige a state to express its intentions. Judge Fitzmaurice stated that "*estoppel is essentially a means of excluding a denial that might be correct – irrespective of its correctness.*"[505] Whenever a state confers express recognition by a bilateral treaty, the state will be henceforth estoppeled from denying the existence of the title. The same applies to tacit behaviour as may be seen in the Temple case: The Thailand governments relied on French maps for more than 50 years

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[500] Malcom N. Shaw, International Law (5th ed., 2003), 437
[501] Georg Schwarzenberger, "Title to Territory: Response to a Challenge", Vol. 51 A.J.I.L. (1957), 316
[502] Gillian D Triggs, International Law: Contemporary Principles and Practices (1rst ed., 2006), 226
[503] Phil C.W. Chan, "Acquiescence / Estoppel in International Boundaries", No. 3 Chinese Journal of International Law (2004), 422; Malcom N. Shaw, International Law (5th ed., 2003), 437
[504] Islands of Palmas Case, ICJ Reports 1928, 868
[505] Temple of Preah Vihar , ICJ Reports 1962, 63 (Separate Opinion of Judge Fitzmaurice)

indicating that the disputed area of Temple of Preah Vihear belonged to the former French colony Cambodia. The Thai government accepted the maps and requested some more copies. Noteworthy was that the Court declined Thailand's plea of an error by not recognizing the true border delimitation. In addition, the Prince Damrong of Siam took part in an official reception on behalf of the Resident Superior in the area. As Thailand did not express any reaction of protest, its government was precluded to claim the area. Thailand was estoppeled by its conduct to claim the territory although the line of reasoning was also propped on implied recognition, peaceful occupation, prescription and failure of protest.[506]

5.7.4. Legal Device of "Historical waters"

5.7.4.1. Emergence

In pre-modern times maritime territory was regarded as territory belonging to the community (res communis), but in the 13th century Venice started appropriating bays and gulfs adjacent to the land, which they occupied. This represented an unlawful act at that time. Nevertheless, according to jurists at that time this incorporation of marine territory was done by prescription.[507] Later in the 17th century, the maritime territory was claimed on basis of the cannon shot doctrine to extend to the distance cannon could fire at that time.[508] This distance resulted in the emergence of a three-mile limit of the territorial sea of many states.[509] As states could only claim the three-mile territorial sea until the end of World War II, more than 70 % of the maritime area was ownerless.[510] The Republic of China (1930) and Japan (1870) also adopted this limit into their domestic legislation.[511]

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[506] Temple of Preah Vihear Case, ICJ Reports 1962, 23, 33; Gillian D Triggs, International Law: Contemporary Principles and Practices (1rst ed., 2006), 235; Malcom N. Shaw, International Law (5th ed., 2003), 437; Dixon, Mc Corquodale, Cases on International Law (4th ed., 2003), 248

[507] Percy Thomas Fenn, "Origins Of The Theory Of Territorial Waters", Vol. 19 A.J.I.L. (1926), 486

[508] Churchill and Lowe, The Law of the Sea (1rst ed., 1983), 59; T.O. Elias, New Horizons In International Law (2nd ed., 1992), 65

[509] O'Connell, Vol. 1 The International Law Of The Sea (1rst ed., 1982), 151

[510] G.H. Hornig, Gilles Despeux, Seeabgrenzungsrecht in der Ostsee (1rst ed., 2002), 1

[511] Choon-Ho Park, "Maritime Claims in the China Seas: Current State Practice", Vol. 18 San Diego Law Review (1981), 448, 449

The term “historic rights” refers to a title created in derogation of international law through a historical process by which one state has maintained jurisdiction originally unlawful, but this title has been - due to a lack of protest - acquiesced by the neighbouring states.[512] The originally unlawful possession is based on the following reasoning: The high sea is to be considered as res communis where all states have the same rights of the maritime territory. Under Roman law res communis could not be acquired.[513] As the high sea does not represent terra nullius, it cannot be acquired by occupation. Thus, the only way of gaining a sovereign title of this area is to be done by prescription.[514] It can be concluded that the title of sovereignty is historically acquired from the former owner the international community. This title must henceforth be consolidated by continuous exercise similar to the prescription.

5.7.4.2. Anglo-Norwegian Fishery Case

In the Anglo-Norwegian Fishery Case, the above-mentioned principle was judicially applied for the first time. The principles of acquiescence and tacit recognition were applied to develop one of the boldest judicial decisions ever delivered by an international tribunal.

In the Anglo - Norwegian Fishery case the ICJ ruled that the delimitation of the Norwegian territorial sea was measured from a system of straight baselines joining the outmost points of the fjords and the skjaergaard. This system might be regarded as an act of historical consolidation of Norway’s maritime patrimony.[515] As a result, the fringing islands aggrandized the Norwegian territorial sea. The Court was requested to consider a 100 year old Norwegian

[512] O’Connell, International Law, Vol. 1 (1rst ed., 1965), 485; Zou Keyuan, “Historic Rights in International Law and in China’s Practice”, Vol. 32 Ocean Development & International Law (2001), 150

[513] Joshua Getzler, A History of Water Rights at Common Law (1rst ed., 2004), 67

[514] Sir Gerald Fitzmaurice, “The Law and the Procedure of the International Court of Justice, 1951-54”, Vol. 30 B.Y.I.L. (1953), 28

[515] C.H.M. Waldock, “The Anglo-Norwegian Fishery Case”, Vol. 30 B.Y.I.L. (1953), 143; Art. 7 UNCLOS reflects the Anglo-Norwegian fishery case; see: Hiran W. Jayewardene, The Regime Of Islands In International Law (1rst ed., 1990), 63 ; Martii Koskenniemi, From Apology to Utopia (1rst ed., 2005), 295; Tullio Scovazzi, “Le régime des eaux historique” in: Donard Pharand, Umberto Leanza (ed.), The Continental Shelf And The Exclusive Economic Zone / Le Plateau Continental Et La Zone Économique Exclusive (1rst ed., 1993), 326

decree, which was peacefully exercised without British protest.[516] In the long-term course of a historical consolidation in conjunction with acquiescing behaviour of the neighbouring states (e.g. Great Britain), a state may acquire maritime territory beyond its territorial sea. Another important factor in this judgment was the high level of interconnectedness of the land and the sea to such an extent that the land domain dominated the maritime domain.[517] This interconnectedness was not present in the Tunisia / Libya case. In this case, the ICJ stated that historic rights might be relevant in this case in a number of ways. The Court was able to settle the dispute without relying on the Libya's historic fishery historic rights. Therefore, the existence of the principle of historic rights was simultaneously reaffirmed and circumnavigated.[518]

5.7.4.3. Relevance for the Diaoyu / Senkaku Dispute

The historic water's principle represents an exception to the general rules of international law. Relying on this device the owner of marine territory may claim territorial rights by this uncommon method. The geographic features of the Diaoyu / Senkaku Islands are quite different from the situation of the Norwegian coast. Drawing a straight baseline from northern China via the islands towards Taiwan would be inadmissible. The shape of the Chinese Sea is quite different from the Norwegian Sea to the extend that it does not bear any interconnectedness between the landmass and the islands; on the contrary the disputed islands are comparatively remote from mainland China.

5.8. The United Nations Convention on the Law of the Sea UNCLOS

5.8.1. The UN Convention on the Continental Shelf 1958

In medieval times, the open sea was of such a nature that it did not admit the holding of possession of sea territory. The right of free navigation and fishing in the open sea was an unalienable right of all men. The Dutch Hugo De

[516] Anglo-Norwegian fishery case: L.C. Green, International Law through the cases (3rd ed., 1970), 474
[517] Gillian D Triggs, International Law: Contemporary Principles and Practices (1rst ed., 2006), 226
[518] Hugh Thirlway, "The Law And Procedure Of The International Court Of Justice 1960-1989", Vol. 65 B.Y.I.L. (1994), 101; James C. F. Wang, Handbook On Ocean Politics & Law (1rst ed., 1992), 76

Groot (Grotius) expressed this idea of free access to the sea in juridical terms for the first time.[519] In his treatise, "De Mare Liberum", he argued that no state could appropriate the sovereignty over the sea, which was to immense for anyone to effectively occupy. This concept was based on Roman law, which advocated the freedom of the seas.[520] Contrary to divini iuris and res communis, only humani iuris could be susceptible of private appropriation.[521] Between the two world wars the development of ocean technology and the states ocean enclosure led to a gradual change of the concept of the freedom of the sea. [522] As a result, the freedom of the ocean faced gradual erosion.[523]

The Geneva Convention on the Continental Shelf of 1958 had its origin in the Truman Proclamation of 1945, which extended the geographic concept of the continental shelf to a legal sphere entitling the owner (coastal state) to claim the natural resources of the seabed and the subsoil. According to the Convention the Continental Shelf definition was to include "the seabed and subsoil of the submarine areas adjacent to the coast, outside the area of the territorial sea to a depth of 200 meters or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas."[524] In the absence of an agreement or special circumstances, the 1958 Convention stipulated in Art. 6 the boundary is to be determined by the equidistance principle.[525] However, the Conference's participants could not agree on uniform provisions about the width of the territorial sea (3-6-12 miles).[526]

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[519] Oscar Schachter, International Law in Theory and Practice (1rst ed., 1991), 275; Dirk Zeller, "From Mare Liberum to Mare Reservarum: Canada's Opportunity for Global Leadership in Ocean Resource Governance", Vol. 19 Ocean Yearbook (2005), 1; Manfred Lachs, The Teachers In International Law; (2nd ed., 1987), 54

[520] Percy Thomas Fenn Jr., "Origins Of The Theory Of Territorial Waters," Vol. 19 A.L.I.L. (1926), 480

[521] Joshua Getzler, A History of Water Rights at Common Law (1rst ed., 2004), 67

[522] Monsieur de Vattel, The Law of Nations (1rst ed., 1834), 125-127

[523] Oscar Schachter, International Law in Theory and Practice (1rst ed., 1991), 274

[524] Jean Combacau, Serge Sur, Droit international public (7th ed., 2006), 124

[525] Malcom N. Shaw, International Law (4th ed., 1997), 436

[526] Louis Henkin, How Nations Behave, (2nd ed., 1979), 214; T.O. Elias, New Horizons In International Law (2nd ed., 1992), 65

Lacking international recognition at that time the People's Republic of China did not become a party of this convention. Japan took part in the first conference of the Convention, but finally refused to sign the Convention fearing it would jeopardize its sedentary fisheries in the North Pacific. Taiwan signed the convention at the very most opportunistic moment of 1970 and the Taiwanese made some reservations.[527] For signatory countries (like Taiwan), not having signed the UNCLOS 1982 the Convention of the Continental Shelf remains legally effective.

5.8.2. Ratifying the UNCLOS 1982 in 1996

The 1958 UNCLOS Conventions caused problems as technology was advancing rapidly facilitating the exploration and exploitation of the continental shelf to a much greater depth than 200 meters. The exploitation criterion was therefore dismissed in UNCLOS IV.[528] In 1996, Japan and the PRC ratified the UN Convention of the Sea of 1982.[529] Due to its special legal status, the Taiwanese could not become part to the convention.[530] Despite their special status, Taiwan proclaimed an EEZ in 1998, which may be interpreted as applicable to all of China and not only the island of Taiwan.[531] Art. 6(I) UNCLOS reads as following:

"*The continental shelf of a coastal state comprises the seabed and the subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which*

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[527] Choon-Ho Park, "Oil Under Troubled Waters: The Northeast Asia Sea Bed Controversy", Vol. 14 Harvard International Law Journal (1973), 212; Zhu Fenglan, "The Demilitation of East China Sea Continental Shelf: Sino-Japanese Disputes from the Perspective of International Law"; http://iaps.cass.cn/english/articles/showcontent.asp?id=793, accessed on April 18th, 2007

[528] I.A. Shearer, Starke's International Law (11th ed., 1994), 242

[529] UNTS, "Ocean and Law of the Sea", www.un.org/Depts/los/reference_files/chronological_lists_of_ratification.htm, accessed on 20th June, 2007; Zou Keyuan, China's Marine Legal System and the Law of the Sea (1rst ed., 2005), 3

[530] Marc J. Valencia, The East China Sea Dispute: Context, Claims, Issues, And Possible Solutions, Vol. 31 Asian Perspective (2007), 140

[531] Ivan Shearer, "Military Activities in the Exclusive Economic Zone: The Case of Aerial Surveillance", Vol. 17 Ocean Yearbook (2003), 550; Law on the EEZ and the Continental Shelf of the ROC, promulgated on 21 January 1998, Vol. 16 Chinese Yearbook of International Law (1997-98), 129

the breath of the territorial sea is measured where the outer edge of continental margin does not extend up to that distance"

During UNCLOS III negotiations, the Chinese favoured the equitable principle as the fundamental principle of marine boundary limitation. This principle would need to be complemented by mutual consultations. The Japanese argued for the median line or equidistance principle for delineating the boundary.[532] As a consequence of the diversity of legal stances, the Convention now provides an arbitrary and not technically geographical definition. No mention of the equidistance line is present in the wording of the law.[533] As Shaw states: "Where the continental shelf does not extend as far as 200 miles from the coast, natural prolongation is complemented as a guiding principle by that of distance."[534] In the case of delimitation disputes, the two different stances again found a compromise in Art 83 (I), which reads reads:

"*the delimitation of the continental shelf between States with adjacent or opposite coasts shall be effected by agreement on the basis of international law, as referred to in Art. 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.*"

As a consequence, it must be stated that neither Japan's nor China's position was duly implemented by UNCLOS 1982. The geomorphologic criterion is enriched by the principle of distance measurement. Under the 1958 Convention of the Continental Shelf in absence of an agreement, the median line should be the boundary.[535]

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[532] Zhu Fenglan, "The Demilitation of East China Sea Continental Shelf: Sino-Japanese Disputes from the Perspective of International Law"; http://iaps.cass.cn/english/articles/showcontent.asp?id=793, accessed on April 18th, 2007

[533] Chris Carleton, "Maritime Delimitation in Complex Island Situation", in: Rainer Lagoni, Daniel Vignes, Maritime Delimitation (1rst ed., 2006), 155

[534] Malcom N. Shaw, International Law (4th ed., 1997), 435

[535] Victor Prescott, Clive Schofield, The Maritime Political Boundary of the World (2nd ed., 2005), 237

The matter has been even further complicated by the emergence of a new device: The enactment of UNCLOS disclosed a new legal method, the so-called Exclusive Economic Zone (EEZ) pursuant Art. 55 – 75 UNCLOS. In this 200 nautical miles zone, the littoral state is granted specific exploration rights of natural resources.[536] In the case of a boundary disagreement, Art. 74 (I) reads as follows:

"The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be affected by agreement on the basis of international law, as referred to in Art.38 of the Statute of the International Court of Justice, in order to achieve an equitable solution."

5.8.2.1. Islands under Art. 121 UNCLOS

The islands are held to be territory capable of bearing the state's rights to a territorial sea, a contiguous zone, an exclusive economic zone and a continental shelf. The UNCLOS of 1982 states in Art.121 (II) that islands also have an exclusive economic zone. Even states' minor remote islands are used as baselines to determine the state's EEZ causing that relatively small countries, like New Zealand, to be able to claim the fourth biggest EEZ (1,409,500 nautical miles)[537] in the world.[538] For this reason in combination with the discovered natural resources, the ownership of the Diaoyu / Senkaku islands is that much more coveted. It is the land territory, which gives rise to the specific zones such as for example the EEZ. Regarding the legal status of islands Art. 121 UNCLOS is the crucial provision:

1. *"An island is a naturally formed area of land, surrounded by water, which is above water at high tide.*
2. *Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory.*

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[536] R. Jennings, A. Watts, Oppenheim's International Law (9th ed., 1992), 725
[537] in comparison: Australia has 2,043,300 nautical miles; the U.S. 2,222,000 nautical miles
[538] James C.F. Wang, Handbook On Ocean Politics & Law (1rst ed., 1992), 74

3. *Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf."*

The crucial question lies in the determination of whether the Diaoyu / Senkaku Islands are capable of sustaining human life according to Art. 121 (III) UNCLOS. Independently of its size, any island can be used for drawing state's baselines. This article is not very helpful in terms of judicial stability and clearness because it does not define exactly the prerequisites for how to interpret the capability of sustaining human life.[539]

As the articles *travaux preparatoires* expressed the wording "human habitation and economic life," the deliberate modified textual approach of "or" provides the view that either one prerequisite may be sufficient to create an EEZ.[540] The ordinary meaning of the word supports this view.[541] If the criterion for the capacity of sustaining human habitation is the existence of fresh water, then the disputed islands would not fit this criterion. As a matter of fact, the withdrawal of inhabitants dwelling on behalf of the Japanese businessman at the beginning of the last century must lead to the conclusion that a capability of human habitation seems rather unlikely. It does not seem very realistic that the barren rocks' soil allows an appropriate vegetation to nourish the inhabitants. Maritime places, where formerly only fishermen seasonally dwelled, are nowadays sustained by military barracks (Spratly Islands). As military personal can be stationed almost everywhere, these non-civilian dwellers shall be discounted for the determination of the sustainability of human habitation.[542]

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[539] R.R.Churchill, A.V.Lowe, The law of the sea (1rst ed., 1983), 36; Victor Prescott, Clive Schofield, The Maritime Political Boundary of the World (2nd ed., 2005), 75; Chris Carleton, "Maritime Delimitation in Complex Island Situation", in: Rainer Lagoni, Daniel Vignes, Maritime Delimitation (1rst ed., 2006), 155

[540] Marjius Gjetnes, "The Spratlys: Are They Rocks or Islands", Vol. 32 Ocean Development & International Law (2004), 195

[541] Alex G. Oude Elferink, „The Islands in the South China Sea: How Does Their Presence Limit the Extent of the High Seas and the Area and the Maritime Zones of the Mainland Coast", Vol. 32 Ocean Development & International Law (2001), 174

[542] Marjius Gjetnes, "The Spratlys: Are They Rocks or Islands", Vol. 32 Ocean Development & International Law (2004), 195

The other alternative ("economic life of its own") does not appear to fit the islands' feature, either. It seems that complete economic self-sufficiency shall not be required for bearing an economic life of its own. In cases, where the islands are used as outposts for activities, which are completely in fact rooted in a land-based business these activities should not be taken into account.[543] Others are satisfied with regular visits of fishermen on the islands in order to ascribe an economic life of it's own to the islands.[544]

This poorly drafted article has led to the awkward state practice of every state trying to "upgrade" its reefs and rocks to the legal status of an island.[545]Some countries, such as Maldives, Honduras, India, Myanmar Seychelles and Vanuatu, in the past went even so far to claim jurisdictional rights over artificial islands.[546] Since a common states practice does not follow the rigid textual meaning of Art. 121 (III) UNCLOS, it is hardly possible to present the ultimate resolution for a legal classification of the Diaoyu / Senkaku Islands.

5.8.2.2. Archipelagos according to Art. 46 (b) UNCLOS

Provided, that the Diaoyu / Senkaku territories might be considered as islands they could claim the title of archipelago according to Art.46 (b) UNCLOS. According to Art.46 (b) UNCLOS an archipelago means a group of islands, which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such. The prerequisite for claiming such a legal status is that the ratio between the land and the water space must from 1:1 up to 1:9 and that the state's feature bears certain cohesiveness.[547] The Philippines, consisting of 7,107 islands north of the equator, are a good

[543] Monique Chemillier-Gendreau, Sovereignty over the Paracel and Spratly Islands (1rst ed., 2000), 24
[544] Jon M. van Dyke, Dale L. Bennett, "Islands and the Delimitation of Ocean Space in the South China Sea" Vol. 10 Ocean Yearbook (1993), 79
[545] Such extension would not convert the character into an artificial island; see: Jonathan I. Charney, "Central East Asian Maritime Boundaries And The Law Of The Sea", Vol. 95 A.J.I.L. (1995), 734
[546] Barbara Kwiakowska, The 200 Mile Exclusive Economic Zone In The New Law Of The Sea (1rst ed., 1989), 114
[547] see: Art. 47 (I) UNCLOS; Mohamed Munavvar, Ocean States Archipelagic Regimes In The Law Of The Sea (1rst ed., 1995), 114

example of an archipelago.[548] Interestingly, the Philippines, despite their ratification of 1982 UNCLOS, refuse to implement the Convention's regime into their domestic legislation. This state violates the clear wording of the Convention by upholding that they are entitled to maintain their historic rights of 140 miles baselines and by demanding authorisation of overflight and navigation in the waters.[549]

China has more than 6500 islands and the mainland coastline is about 18,000 km.[550] The PRC and Taiwan are without a doubt not archipelago states as their territory predominantly consist of land mass, whereas Japan could claim to be an archipelago state consisting of the four major islands and some other (remote) minor islands. Japan consists of four major islands and about 6000 lesser islands. In non-juridical booklets, Japan is considered to be an archipelago state.[551] Although Japan falls within the definition of an archipelago state pursuant Art. 47 (I), Art. 49 (I) UNCLOS, this country does not consider itself having such a status.[552]

6. Comparison to the related Islands conflict

6.1. Spratly and Paracel Islands in the Southern Chinese Sea

The Diaoyu Islands are not the only islands that China and Taiwan are laying their claim. The two Chinese states also stake their claims on the Spratly- and the Paracel Islands[553] in the South China Sea. The area comprises some 180 - 600 small islands, rocks and reefs. All the islands spread over a 190.000 sq

[548] The Philippine Archipelago, www.cityofpines.com/maps.html, accessed on June 20th, 2007; J.R.V. Prescott, The Political Geography of the Oceans (1rst ed., 1975), 106

[549] George V. Galdorisi, Kevin R. Vienna, Beyond The Law Of The Sea (1rst ed., 1997), 150; Hiran W. Jayewardene, The Regime of Islands in International Law (1rst ed., 1990), 135; Robin R. Churchill, "The Impact Of State Practice On The Jurisdictional Framework Contained In The Los Convention", in: Alex G Oude Elferink (ed.), Stability and the Change in the Law of the Sea (1rst ed., 2005), 120

[550] Greg Austin, China's Ocean Frontier (1rst ed., 1998), 34

[551] Sekai Bunka, Japan a pictorial portrait (1rst ed., 2005), 124

[552] R. R.Churchill, A. V. Lowe, The law of the sea (1rst ed., 1983), 93, 97; J. A. Roach, R. W. Smith, United States Responses To Excessive Maritime Claims, (2nd ed., 1996), 213

[553] Their Chinese names are "Nansha" and "Xisha" Islands

km sea zone comprising a total land mass of just 20 sq km. The number of islands varies according to the tide level.

The Spratly Islands ownership is contested by the People's Republic of China, by Taiwan, by Vietnam, by the Philippines, by Brunei and Malaysia. Today, each of the claimants administers to some of these marine territories. The Chinese administer the most of them.[554] The possibility of exploration rights is accompanied by the threat of political instability; the overlapping claims makes it easy for the parties to concoct belligerent sentiments.[555] The islands' marine sea territory lies in between the main transit route of freight and oil ships on the way to their Asian destination ports.[556] Similar to the Diaoyu Islands, this conflict is also linked to the unresolved China –Taiwan question because Taiwan occupied the biggest island of the Spratlys named Itu Aba (Taiping Dao).[557]

6.2. Disputants Contentions

Apart from the Japanese during WW II, no country has ever possessed all the islands at the same time. Until recently, no human beings resided on the islands. Today, except Brunei, which does not possess one single island, every country has occupied some of the islands; at least one of the other states contests every state's claim.[558] China is again basing its islands's claims on historical reasons.[559] Their historic rights all lie within the 1947 U-shaped line, which encompasses all the islands in the area.[560] The islands

[554] John Pike, "Spratly Islands" (17.12.2006), www.globalsecurity.org/military/world/war/spratly.htm, accessed on April 21rst, 2007; Samuel M. Makinda, "Das Tauziehen um die Spratly-Inseln" (Oktober 1995), www.internationalepolitik.de/archiv/jahrgang1995/oktober1995/das-tauziehen-um-die-spratly-inseln.html, accessed on April 21rst, 2007

[555] Alan Collins, The Security Dilemmas of Southeast Asia (1rst ed., 2000), 144

[556] Jonathan I. Charney, "Central East Asian Maritime Boundaries And The Law Of The Sea," Vol. 89 A.J.I.L. (1995), 746

[557] Barbara Schneider, "Die Spratly-Inseln – Krisenherd im Südchinesischem Meer"; www.weltpolitik.net/Regionen/AsienPazifik/Teilregionen/OstasienAustralien/Grundlagen/Spratly.html, accessed on March 13th, 2007; Yoshio Otani, "À Qui Appartient L'Archipel Des Spratly? Un Point De Vue Sur Les Revendications Chinois", Annuaire du Droit de la Mer (1996), 179

[558] Bob Catley and Makmur Keliat, Spratlys: The dispute in the South Chinese Sea (1rst ed., 1997), 31, 32

[559] see for example: Michael Strupp, Chinas territoriale Ansprüche (1rst ed., 1982), 29

[560] Zou Keyuan, "Historic Rights In International Law", Vol. 32 Ocean Development & International Law (2001), 161; U – line see: Greg Austin, China's Ocean Frontier (1rst ed., 1998), page: XV

had been an integral part of the Chinese sea area as early as during the Han Dynasty (200 B.C.).[561] Chinese fishermen and merchant left archaeological evidence behind. In 1933, France formally incorporated the islands and notified this deed to the world, which arouse Japanese and Chinese protest. In 1974 - 76 China snatched the Paracel Islands from Vietnam and ousted the Vietnamese troops. This incident was followed by another bellicose clash between the two countries in 1988, when China violently occupied 6 further islands around the Johnson Reef (Spratly Islands) resulting in an interruption of diplomatic ties between the states for more than one decade.[562]

Taiwan puts forward, like in the Tiao-yu-tai conflict, mainly the same reasons as the PRC does. The San Francisco Treaty obliged Japan to abandon the islands without determining to whom they shall be reverted. Since China was the only legitimate owner prior to the Japanese annexation, the islands must fall back to China. One slight difference to the Chinese claim is that the Taiwanese also rely on the Treaty of Taipei, by which the Japanese renounced the sovereignty of the islands.[563]

In this conflict, the Philippines take over Japan's role by assuming that the islands were "terra nullius" before a Filipino citizen occupied them in 1954. The archipelago state claims approximately 60 islands in the Spratly region. Malaysia is using the contiguity argument that three islands and four rocks lying in their Exclusive Economic Zone (EEZ) should belong to them.[564]

Altogether Vietnam today controls 21 islands, reefs, shoals and cays; Vietnam's claim is based on the former French colonial title and on the

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[561] Marwyn S. Samuels, Contest for the South China Sea (1rst ed., 1982), 52 Wolfgang Bethge, "Der Wettlauf um die Spratly Inseln" (2002), http://bethge.freepage.de/spratlydeutsch.htm, accessed on April 21rst, 2007

[562] Scott Snyder, "The South China Sea Dispute: Prospects for Preventing Diplomacy," www.usip.org/pubs/specialreports/early/snyder/south_china_sea1.html, accessed on August 16th, 2007

[563] Bradford L. Thomas, "The Spratly Islands Imboglio: A Tangled Web of Conflict", No. 74 Peace Research Center, 3

[564] Barbara Schneider, "Die Spratly-Inseln – Krisenherd im Südchinesischem Meer"; www.weltpolitik.net/Regionen/AsienPazifik/Teilregionen/OstasienAustralien/Grundlagen/Spratly.htm, accessed on March 13th, 2007

Continental Shelf.[565] It was Vietnam, which has effectively administered the islands since the 18th century. The Chinese military takeover of several islands in 1974 and the skirmish with the Chinese in 1988 are not only unlawful but also motivated by Chinese hegemonistic policy.[566]

Brunei does not posses an islands; its position to be a party of the conflict derives from their membership of the UNCLOS Convention. Brunei's Exclusive Economic Zone has the shape of a corridor extending to the south of the Spratlys. As the islands lie within the Brunei's marine zone of 200 nautical miles, the country simultaneously has to stake its claim on the islands as well.[567]

6.3. Comparison to the Diaoyu / Senkaku Conflict

It is striking how many parallels can be drawn between the Diaoyu / Senkaku Islands and the Spratly / Paracel Islands. As Japan is not a party of this particular conflict, the main-focus must be laid on Taiwan and China.

a. The first similarity is to be detected in the fact that both Chinese states in both conflicts use the identical line of reasoning respectively, because each Chinese state claims to be the sole representative of the Chinese people. In sharp contrast, Japan having been the former occupation force, is not a party of this conflict.

b. Their line of reasoning for the title's claim is cogent and does not interfere with other statements previously released. No matterwhether analysing the interpretation of the San Francisco Treaty or the validity of other claimant's incorporation, the Chinese position is in itself sound and coherent in a logical line towards the Diaoyu Islands conflict.

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[565] Territorial claims in the Spratly and Paracel Islands, www.globalsecurity.org/military/world/war/spratly-claims.htm, accessed on April 21rst, 2007;

[566] Bob Catley and Makmur Keliat, Spratlys: The dispute in the South Chinese Sea (1rst ed., 1997), 34, 35; Scott Snyder, "The South China Sea Dispute: Prospects for Preventing Diplomacy", www.usip.org/pubs/specialreports/early/snyder/south_china_sea1.html, accessed on August 16th, 2007

[567] Marc J. Valencia, "China and the South China Sea Dispute", No. 298 Adelphi Paper (1995), 8

c. In contrast to the Diaoyu Islands, the Spratly and Paracel Islands were expressly mentioned in the San Francisco / Taipei Treaty. This slight difference does not affect the major similar dispute behind it, either. Regarding both conflicts, the two treaties lacked precision of determining to which country the sovereignty of the Diaoyu / Senkaku Islands shall be reverted.

d. In both conflicts, China claims to have been the first country that had officially put the respective islands under the jurisdiction of its local and national government. Historical maps, official records and chronicles of the respective time underline the Chinese claim. The Chinese were doubtlessly the first who discovered the islands, but the level of effective control over the islands was rather limited. Thus, in both cases the crucial question arises whether by using the intertemporal law, the Chinese were able to solidify their historical claim even before other disputants had gotten aware of the existence of the islands.

e. The Spratly / Paracel dispute has led to a military clash between Vietnam and China in 1988. In thas year, a sharp difference in regard to the Diaoyu Islands arose since China had so far not dared to challenge the Japanese forces in the Eastern Chinese Sea conflict. The South Chinese Sea Islands conflict led to a deployment of military forces so far unprecedented in the area of the Diaoyu Islands, where military personal is not even stationed on the barren islands. Notwithstanding this difference, China thrives on a comparable hard / soft line in both conflicts. On the one side, Beijing uses the treat of force to intimidate its competing claimants in order to get a foothold on the islands. On the other side, China utters its willingness to negotiations and to a participation of joint development, whenever economic interest overrules the prestige of the ownership's of the islands. However, when China is the only country in possession of some islands, like in the case of the Paracel Islands, China refuses to seek a compromise.[568]

[568] Marc J. Valencia, "China and the South China Sea Dispute", No. 298 Adelphi Paper (1995), 20

f. The Chinese political approach is quite similar as well. In both conflicts, the Communist Party fears that Taiwan might use the conflict to broaden its recognition. For this and other reasons, the Chinese are proponents of bilateral agreements and not of multilateral agreements. In bilateral agreements the Chinese, being in a more powerful position, they will easier achieve a beneficial result for them. The more time that passes will likely enhance the Chinese bargaining position. Once China has emerged as a powerful global player on the world stage, the other countries will be best advised to give up their claims.[569]

g. The South China Sea islands all lie beyond the Chinese continental shelf.[570] Contrary to the Diaoyu Islands dispute, the Chinese cannot put forward the continental shelf argument in this case. As the continental shelf has no legal importance anyhow in determining islands' sovereignty, one should not pay too much attention to this slight contradiction.

h. Last but not least, the islands' features are rather similar. Although the Spratlys entail shoals, reefs and banks, their character is very much alike to the one of the Diaoyu / Senkaku Islands. The islands bear little intrinsic value. In both cases the islands dispute is carried out because of their geo-strategic value, their title to nearby oil / gas resources, their symbolic value for triggering nationalistic ideas and thereby giving societal glue for the claimants' societies. It is undeniable that all states seek to "beat around the bushes" whenever they want to convince the legal world that the islands in their possession are able of sustaining human life and may have an economic life of their own in accordance with Art. 121 UNCLOS.

6.4. Comparison to the Dokdo / Takeshima conflict

Similar to the Diaoyu / Senkaku Islands, these "islands" bear no value in and of themselves. It is the Exclusive Economic Zone, which the claimants seek to appropriate. The islands ownership still is disputed, whereas in this region of

[569] Marc J. Valencia, "China and the South China Sea Dispute", No. 298 Adelphi Paper (1995), 15
[570] Greg Austin, China's Ocean Frontier (1rst ed., 1998), page: XIII

this world the parties of a territorial marine dispute were able to agree upon joint development. Japan and South Korea have undergone such an approach by establishing an EEZ of 200 miles. After a couple of years of negotiations, the countries consented on fishing quotas and other regulations in each other's zones.[571]

6.4.1. Japanese and South Korean Contentions

Korea's contention is that Japan unlawfully subjugated the islands in 1905.[572] The Japanese incorporation was closely connected to the overall Japanese aggression vis-à-vis their neighbouring countries at the end of the 19th century. The 1900 Korean Government Imperial Ordinance No. 41 (land survey) is instrumental for the Korean claim insofar as after that point of time the islands could no longer be regarded as terra nullius. The Korean records referred to the islands as early as 512 AD. According to the Koreans, if the Japanese consider their claim lawful based on its occupation in 1905, it must return all islands taken by greed and violence by virtue of the stipulations of the Cairo Conference.[573]

The Japanese contend that the islands have to be considered terra nullius until 1905 and therefore, the Japanese Shimane Prefecture could enter the name in the state land register. South Korea's independence resulted of the 1952 San Francisco Treaty stating that its territory included the islands of Jeju, Geomun and Ulleung, but it did not mention the Takeshima Islands. As the treaty's draft included the islands to be taken from Japan, its omission must be regarded that the Takeshima Islands should remain part of Japan. The islands referred to in the 1900 Imperial Edict do not mean the Takeshima islands.[574]

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[571] The Territorial Dispute Over Dokdo, www.geocities.com/mlovmo/page4.html, accessed on April 28th, 2007

[572] Choung Il Chee, Legal Status Of Dok Island In International Law (1rst ed., 1997), 14

[573] The Territorial Dispute Over Dokdo, www.geocities.com/mlovmo/page4.html, accessed on April 28th, 2007

[574] Howard W. French, "A Glimpse of the World: Islands with a past: Takeshima? Tokdo", http://www.howardwfrench.com/archives/2005/03/30/an_island_dispute_with_a_past_takeshimatokdo/, accessed on August 15th, 2007

6.4.2. Islands effect on the boundary issue

Although a joint development plan was signed, the boundary issue still raises questions. Joint development does not mean though that the boundary issue is finally settled. Korea initially took the position of drawing the maritime boundary between Korea's Ullong-do and Japan's Oki Gunto,[575] but now Korea takes the views that the equidistance no longer has to be drawn between the two countries for the boundary as the islands would affect the maritime delimitation. (According to the parties interpretation of Art. 121 III UNCLOS)[576]

Japan has always interpreted the elevation of rocks in the middle of the Sea of Japan as islands. Interestingly, the western denomination of the islands is the "Liancourt Rocks," which conveys a historical hint that the outcropping were not recognized as islands in former times. China does not claim the Takeshima / Dokdo territory but regards them as islands.[577]

6.4.3. Comparison to the Diaoyu / Senkaku Islands

It is at first striking that Japan's claim to both groups of islands dates back to the same era as when Japan's expansionist politics hit its peak. The Senkakus were integrated at the very opportunistic moment after the Sino-Japanese War; the Takeshima Islands were occupied when Korea became a de facto puppet state of China at the beginning of the 20th century. Although the islands' features are very alike and are not islands capable of bearing human habitation and vegetation (Art. 121 III UNCLOS) in the proper sense, all parties of the conflict regard these territories as islands in the legal sense. In both cases the Japanese claim is contested by an opponent's act of state, such as the 1893 Chinese Dowager Empress Decree or the Korean Imperial Ordinance of the year 1900.

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[575] Jon M Van Dyke, "The Republic of Korea's Maritime Boundaries", No. 4 Journal of Maritime and Coastal Law (2003), 527

[576] Serita Kentaro, "The Takeshima Dispute: A Radical Proposal"; Vol. 34 Japan Echo (2007), 32; note: the alternated position of Korea is unlikely to be rooted in a modified interpretation of the UNCLOS rather than political reasons have to be suspected in the change of juridical view

[577] Serita Kentaro, "The Takeshima Dispute: A Radical Proposal"; Vol. 34 Japan Echo (2007), 32; Terashima Hiroshi, "On Becoming an Ocean State", Vol. 34 Japan Echo (2007), 37

Apparently, the Allies after WW II could not agree on every island in detail; whenever a disagreement arouse, they omitted the islands or they just "forgot" about them (like about the Diaoyu Islands). The real sharp contrast to the Diaoyu / Senkaku conflict is that the claimants could agree on a joint development in this case, which possibly needs to be seen as the future crux to resolve such territorial problems. Another deviating aspect is that the Japanese Foreign Ministry stresses its proposals to submit the legal dispute to the ICJ in 1954 and 1962, which was declined by the Koreans.[578] Whenever Japan does not exercise the effective occupation, it proposes a submission to the ICJ. Contrary, Japan is in charge of the administration over the Senkaku Islands; in such setting, this proposal has never been made. In order to sum up, Japan does not put forward any argument in the Takeshima conflict, which deviates from the logical and cohesive Japanese way of contention in the Senkaku islands conflict.

6.5. Conclusion

It is indeed not an easy task to judge to whom the Diaoyu / Senkaku Islands should be attributed. Before doing that, one needs to recall the essential questions, which need to be responded after having assessed the material.

- What is the critical date to start the legal analysis?
- Fulfilled the Chinese the requirements of occupation prior to 1895?
- Where the islands included in the 1895 Treaty of Shimonoseki?
- What was the islands' status in the post-war treaties?
- What is the islands' juridical status during the trusteeship of the U.S.?
- Can the Japanese claim be based on prescription, if not on occupation?
- Relying on previous islands' solution, what is the most viable way for a solution of this conflict?

[578] Japanese Foreign Ministry, www.mofa.go.jp/region/asia-paci/takeshima/position.html, accessed on May 4th, 2007

7. Evaluation of the islands ownership

Before putting the historical facts in the legal context, one should visualize the political, geographical, legal and historical arguments, which the parties of the dispute put forward.

7.1. Critical Date for the legal analysis

Before sticking to the legal analysis, one needs to pay attention to the question of the crucial date. Generally, the crucial date is the date when two claims clashed for the first time. As in many previous cases, in this conflict it is possible to consider two dates as the final limit: either it would be the year 1895 or the year 1972.

Assuming that the year 1895 is the last temporal resort, this point of view would be very favourable to China. Setting up the year in 1895, means that an entire historical analysis until this year is required for the judicial award. China would argue in a potential court procedure that 1895 is the date of the famous Japanese Cabinet decision. In 1895, the two adversarial claims clashed for the first time in history because both states claimed the tenure of effective occupation at that time. It is the author's perspective that strictly speaking and dogmatically abiding by the principles of the ICJ, the critical date has to be set up in 1895.

Notwithstanding the principles, the ICJ has also ruled that the notion of critical date might be of little value (Argentine / Chile Frontier Case), whenever the peculiarity of a case makes an overall evaluation of the conflict much more suitable.[579] Japan is more likely to argue that the critical date is to be set at the end of the year 1972; in other words after the reversion of the Okinawa / Senkaku Islands to Japanese jurisdiction. Japan could put forward that the

[579] Argentine-Chile Frontier Award, Vol. 38 I.L.R. (1966), 79, 80

conflict bearing this particular feature was initiated on the verge of the 1970s. Following this interpretation, the tribunal in charge of the conflict would be obliged to evaluate all the historical incidents prior to 1972, which would considerably enhance the Japanese position.[580]

One needs to imagine that the Japanese assumption of having occupied terra nullius in 1895 possibly fails. Instead, it is conceivable that Japan's title is based on acquisitive prescription. As many precedents give evidence, international law tends to favour stability rather than pursuing dogmatically - run justice at any price. The ICJ Minquiers and Ecrehos Case of 1953 also underpinned this assumption. This case evaded the exact determination of a critical date and instead, stressed the importance of current effective occupation.

"But in view of the special circumstances of the present case, subsequent acts should also be considered by the Court, unless the measure in question was taken with a view to improving the legal position of the Party concerned."[581]

The Diaoyu Islands dispute is similar to the Minquiers and Ecrehos case: The parties (France and England / Japan, China, Taiwan) laid their claim on an original title and they all refute that their title was always maintained and was never lost. Considering the special circumstances of the case (possible Japanese prescription or an imperfect, but superior Japanese claim), it must be stated that the conflict crystallized for the first time in the present condition with the official communication of the ROC and Japan in 1970.

From the author's point of view, taking into account the previous ICJ rulings, the critical date has to be set in 1972 when the conflict crystallized for the first time between the three claiming states including Taiwan. This means that up

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[580] Caleb Wan, "Security Flashpoint: International Law and the Islands Dispute in the Far East", The New Zealand Postgraduate Law E-Journal (2/2005), p. 32. Available on: www.nzgraduatelawejournal.auckland.ac.nz./PDF%20Articles/Issue%202%20(2005)/1%20Caleb's%20Final.pdf ,accessed on March 13th, 2007

[581] International Court of Justice, ICJ Reports 1953 (Minquiers Et Écréhouse Case), 59, 60

to 1972 all legally relevant action of the claimants have to be thoroughly examined.

7.2. Can Western influenced law be applied in ancient East Asia?

The question must be raised if it is "equitable" to apply Western-influenced methods to determine the ownership of the islands. It is noteworthy that the Chinese in regard to the Diaoyu Islands use the crucial word of terra nullius in their official documents.[582] In current days, the Communist People's Republic of China distrusts modern concepts of international public law. The occupation of terra nullius is regarded as a disguised way of aggression. From their academic point of view, the modes of acquiring territory are residual instruments of the colonial epoch embroidered with many bourgeois ideas.[583] This minimal acceptance of international law is complemented by Chinese attempts to find "loopholes" in the existing system of the world order to expand the Chinese own ideological beliefs.[584]

Despite the official Chinese stance of distrust, it may be observed that the PRC has assimilated their legal framework to almost all western titles of territory. Whenever the Chinese claim territories, they rely on the historically grown effective administration (prescription / youxiaode guanxia), which is embedded in the typical symbolic acts of acquisition. Roughly speaking, the official Chinese line of reasoning resembles remarkably a lot to the Western-influenced international law.[585] As Suganuma observes: "*China's behaviour at the UN reflects its "pick and choose*" attitude; China's views towards international law are often based its own political agenda rather than legal considerations, such as judicial decisions of the ICJ and principles of international law.[586] Utilizing the principle of the "bona fide", the Chinese are

[582] The author could at least never read this word in regard to the Diaoyu Islands
[583] Michael Strupp, Chinas territoriale Ansprüche (1rst ed., 1982), 26
[584] James C. Hsuing, "China's Recognition Practice and International Law", in China's Practice Of International Law: Some Case Studies (1rst ed., 1972), Jerome Alan Cohen (ed.), 42
[585] Michael Strupp, Chinas territoriale Ansprüche (1rst ed., 1982), 26-29
[586] Unryu Suganuma, Sovereign Rights and Territorial Space in Sino-Japanese Relation (1rst ed., 2000), 23

estoppeled of disclaiming the validity of the Western law. If they rely on it in a similar way in their official way of reasoning whenever it is favourable to them, they also must abide by these rules whenever the judicial award might disadvantageous for them.

Contrary to the Chinese resistance to the usage of international law, the Japanese receptiveness was much higher throughout the 19th century. Therefore, it is very much legal and "equitable" to interpret the Japanese historical records in the light of public international law because the first legally important Japanese action on the island took place no earlier than 1895.[587]

7.3. Does Chinese Discovery grant a title?

Without doubt, it was the Chinese who at first discovered the islands. The Japanese even do not dare to call into question this historical fact. As already stated above, the mere discovery only granted an inchoate title to the discovering nation. Such a title might be easily lost if it was not propped by an actual and effective occupation. Although some academics claim that the discovery had been sufficient for a title in the 16th century, one needs to adhere to the rules set up by the international tribunals. These institutions unequivocally demand more than an inchoate title; thus, the mere sighting of the islands while the envoys transited to the vassal state Ryukyu cannot be regarded sufficient for a lawful title of territory.

7.4. Chinese effective occupation before 1885

7.4.1. Chinese arguments put forward

The Chinese lay their islands claim on manifold reasons. The Chinese view that their investiture missions from 1372 onwards fulfilled the prerequisites of an effective occupation of the islands.[588] It was the Chinese envoys on the way to the Ryukyu Kingdom who ascribed the islands in official records as belonging to China. These reports written by high government officials

[587] Han-yi Shaw, "Its History and an analysis of the ownership Claims of The P.R.C., R.O.C. and Japan", No. 3 Occasional Papers 1999, 67
[588] Kim Byung Chin, The Northeast Asia Continental Shelf Controversy (1rst ed. 1980), 148

(comparable to diplomats today), contain the description of their duties, which they had to exercise on their missions. Stored in the official archives they represent the same value as official documents. The mission exercised a boundary trench crossing ceremony, which displayed some rituals and ceremonies in regard to their actual territorial possessions. Geographical maps published in Japan attributed the islands to the Chinese.[589] The effective occupation and the will to possess the islands can be found in the Chinese acts of state. **a)** the islands were used as a source of rare herbal medicine in the mid 18th century, **b)** the 1893 Imperial decree conferred the title of territory to a Chinese private citizen, **c)** the islands were instrumental for the Chinese coastal defence system **d)** the islands were used as navigation aids and emergency refuge for many centuries. For these reasons, the islands could not have been no man's land prior to 1895 and the Japanese government's behaviour during the process of incorporation proved their legal sensitivity as well as their uneasiness about it[590]

7.4.2. Taiwanese refutation to the time prior to 1895

The Taiwanese claim the islands to be theirs on the grounds that they are the lawful representative of the Chinese people. There is, however, one rarely mentioned historical argument supporting the idea that the islands must be solely attributed as Taiwanese islands. A record compiled in 1561 by the military officer in charge of defending against Japanese pirates showed that the Tiao-yu-tai were part of the five patrol areas of Fuzhou prefecture. In a quoted map of the record, three of the islands are represented by Chinese names together with Taiwan. Contrarily, in another map showing the border of Fujian province drawn before Taiwan was integrated to it, the islands were not marked out. This fact is invoked as a strong hind that the islands were

[589] "Xinwen zhongxin, zhongguo lingtu diaoyudao dili lishi ziliao", http://news.sina.com.cn/c/2005-03-25/10396192318shtml, accessed on March30th, 2007; Tao Cheng, "The Sino-Japanese Dispute Over the Tiao-yu-tai (Senkaku) Islands and the Law of Territorial Acquisition", Vol. 14 V.J.I.L. (1974), 249; Beijing Rundschau, "Geschichtlicher Rückblick zeigt: Diaoyu-Inseln sind chinesisch", Beijing Rundschau 39 / 1996, 12

[590] Tao Cheng, "The Sino-Japanese Dispute Over the Tiao-yu-tai (Senkaku) Islands and the Law of Territorial Acquisition", Vol. 14 V.J.I.L. (1974), 259

deemed to belong to Taiwan.[591] Another argument that the Taiwanese put forward is that the area around the disputed islands was part of a "historical fishing ground." The concept of a historical fishing ground is claimed to be recognized by international law.[592]

7.4.3. General Japanese refutations over the islands

It is striking that in the official line of the Japanese government a dispute over the islands does not exist. Whereas Taiwanese and Chinese refutations are rather similar, the Japanese line of reasoning is the exact contrast of the Chinese standpoint. The Japanese claim that they acquired the title of sovereignty by virtue of discovery / occupation. The Tokyo government contends that the Japanese explorer Koga Tatsushiro discovered the Senkaku Islands. From 1885 onwards, surveys were conducted which proved that the islands were uninhabited islands and no trace of Chinese rule could be discovered.[593]

The Japanese deny an effective Chinese occupation prior to 1895. The Japanese do not raise doubts about the existence of historical data; it is more the legal value, which is debated among the disputing states. As a mater of fact, the Japanese object that the missions are of any relevance for the acquisition of a valid title to the islands. The Japanese refuse to ascribe any legal importance to the missions because a disembarkation of Chinese sailors was not recorded in the Chinese archives. The mere sighting and passing of the islands does not equate to an exercise of control over the islands in the legal sense.[594] The Chinese had never publicised any will of occupying the islands and they did not leave any symbols of occupation (cross or plaque)

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[591] Steven Wei Su, "The Territorial Dispute over the Tiaoyu/Senkaku Islands: An Update" Vol. 36 Ocean Development & International Law (2005), 48

[592] Taipei Times, "Calm heads needed on fishing row" (14.7.2005), 8; www.taipeitimes.com/News/editorials/archives/2005/07/14/2003263479/print, accessed 23rd July, 2007

[593] Japanese foreign Ministry, "The Basic View on the Sovereignty over the Senkaku Islands", www.mofa.go.jp/region/asia-paci/senkaku/senkaku.html, accessed on July 15th, 2006; M. Pohl, "Territorialfragen und Abgrenzungsprobleme: Japan", in Werner Draguhn, Umstrittene Seegebiete in Ost-Südostasien (1rst ed., 1985), 89

[594] Tao Cheng, „The Sino-Japanese Dispute Over the Tiao-yu-tai (Senkaku) Islands and the Law of Territorial Acquisition", Vol. 14 V.J.I.L. (1974), 260

behind. The 1893 Dowager Empress Decree cannot be held as a lawful act of state. The Japanese call its validity into question because the decree contains certain oddities, such as for example, the seal was stamped at an unusual place.[595] The most remarkable difference between China and Japan is the mode of acquisition of title. The Japanese hold the staunch position that the Cabinet Decision was the legal provision for the incorporation of territory.[596]

7.4.4. Transformation of Chinese notion of sovereignty

7.4.4.1. Importance and Impact of this Decision

The decisive question is whether the Chinese acts in the Eastern Chinese Sea from 1371 to Japan's possible acquisition in 1895, granted an islands title of territory to the Chinese. If the islands represented terra nullius on January 14th / 21rst, 1895, the Chinese would have no legal title for their claim. If Japan were to be held the lawful owner after the incorporation, all post-war agreements would have to be interpreted in Japan's favour as well. Therefore, the most crucial question is whether the Chinese fulfilled the requirements of effective occupation prior to 1895.

7.4.4.2. Transformation of the sino-centric idea of sovereignty

The problem faced by the Chinese side is that the Confucian world order did not acknowledge the conjunction between territory and sovereignty. Their philosophical order stemmed from the idea that the fiefs were to show loyalty to the Emperor, his administration, and to the imperial hierarchical system. The Emperor's sovereignty was clarified in the rule about the citizenry, but was not clearly defined in a geographical sense. The power over areas went as far as Emperor-observant people would dwell. Little attention was paid to areas lacking human habitation and they were regarded as places without civilisation.[597] It maybe correctly assumed that in the course of the investiture missions the Chinese Imperial Court had more than likely no idea about the Western prerequisites to establishing a title of territory. The Chinese had a

[595] Unryu Suganuma, Sovereign Rights and Territorial Space in Sino-Japanese Relation (1rst ed., 2000), 105
[596] Japanese Foreign Ministry, "The Basic View on the Sovereignty over the Senkaku Islands", www.mofa.go.jp/region/asia-paci/senkaku/senkaku/html, accessed on July 15th, 2006
[597] Marwyn S. Samuels, Contest for the South Chinese Sea (1rst ed., 1982), 51

different understanding of (maritime) sovereignty in ancient times than the West. The Emperor was held to be the only person to possess the marine territory and the sole landowner who was lending the territory to his fiefs.[598]

Logically, if sovereignty was rooted in the people's loyalty to the throne, it was arguably difficult to establish sovereignty in the modern sense over uninhabited islands. The feature of inhabited space (like the Diaoyu Islands) was not akin to the Confucian understanding of government control. The Chinese did not develop a comprehension of the High Sea as "res communis"; neither did they adhere to coastal state jurisdiction limits as the Western Powers did.

How then is the Chinese world order to be made compatible with the Western notion of sovereignty? It is clear that the Chinese sovereignty cannot just be denied on the grounds that the Chinese were too incompetent at that time to have sophisticated knowledge about international law. It would be too Western-centred to grant a sovereign title only according to the strict abidance to the law of Western Powers. The Eritrea / Yemen Arbitration award acknowledged that "*western ideas of territorial sovereignty are strange to people brought up in the Islamic tradition and familiar with notions of territory very different from those recognized in contemporary international law*".[599] This award adopts a lenient approach to the legal necessities and eases the prerequisites for Chinese to have effectively occupied the disputed islands.

As a result, a possible Chinese title cannot be denied, for example, because they failed to erect national landmarks on the islands. Given the fact that Western Powers used multiple, non-uniform ways for the symbolic act (landmark, cross, gunshots),[600] no reproach can be made to the Chinese that they did not correspond to Western symbolic action. Therefore, typical

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[598] Percy Thomas Fenn Jr., "Origins of the Theory of Territorial Waters", Vol. 19 A.J.I.L. (1926), 471
[599] Eritrea/Yemen Award , Vol. 114 International Law Review (1998), 137
[600] Arthur Keller, Creation of Rights of Sovereignty through Symbolic Acts 1400-1800 (1rst ed., 1938), 6-147

Chinese symbolic acts, like the Okinawa Trench crossing ceremony, must be included in a legal assessment.

After the transformation of the western notion of sovereignty into the Chinese understanding of their "sphere of influence" it is conceivable that the disputed islands were part of the Chinese rule. From the theoretical point of view, the physical power to exclude other states was not regarded as an essential element in possession.[601] Therefore, it is admissible in such a context to define territorial sovereignty in a rather figurative and mental sense.[602] Taking into account Chinese understandings the Chinese notion of sovereignty must be extended to the limit where the Chinese attributed the territories to be situated within the border of their sphere of influence.[603]

To sum up, as it is not equitable to apply the same understanding of sovereignty in East Asia for a time-period starting in 1372, one must acknowledge that the equally valued Chinese notion of sovereignty was a sphere of interest in the people's minds.

7.5. Chinese Symbolic Acts grant sovereignty to China?

7.5.1. Chinese corpus occupandi

The actual taking possession (corpus occupandi) of the islands faces some predicaments. The Japanese are insofar right that the investiture missions just sighted the islands and no disembarkation on behalf of the state had ever been recorded in the archives. This raises the question of whether a government can effectively occupy islands in the legal sense, although there are not any citizens on the islands who possibly can be subject to their effective occupation.

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[601] M.F. Lindley, The Acquisition And The Government Of Backward Territory In International Law, (1rst ed., 1926), 140

[602] Unryu Suganuma, Sovereign Rights and Territorial Space in Sino-Japanese Relation (1rst ed., 2000), 154

[603] Attention with the usage of the word "sphere of interest", which refers normally to African land belonging to no state, but where a special interest of a future occupation is indicated by one state; see: Axel Möller, International Law In Peace and War (1rst ed., 1931), 112

7.5.1.1. Chinese lack of settlement on the islands

Under normal circumstances, possession and effective administration of the islands are the two essential facts that constitute an effective occupation. The occupying state must take the territory under its sway, which usually requires a settlement accompanied by some formal acts. In conjunction, these two pre-conditions ensure that the state has effectively taken possession of the territory.[604] Deducing from these requirements a Chinese occupation cannot have taken place because they never established any settlements on the islands.

As a matter of fact, this legal prerequisite has been updated and modified by arbitral and judicial decisions in three cases involving acquisition of island territories: the Islands of Palmas Case of 1928, the Legal Status of the Eastern Greenland Case of 1933, and the Clipperton arbitration award of 1932. Since the African Conference of Berlin in 1885, the emphasis among the requirements has shifted from the physical taking of possession of the land and the exclusion of others to the manifestation and exercise of the functions of government in regard to the territorial space. Additionally, the legal world was forced to develop juridical concepts for uninhabitable and ruffed territories. The law had to be updated so that the deficient inhabitability of remote territories would not lead to the consequence that no state could take possession of them.[605] As a result, since the status of uninhabitable islands could not forever persist to be terra nullius, the deficient Chinese settlement cannot prejudice a potential Chinese effective occupation. The lack of Chinese settlements henceforth has to be regarded as immaterial in regard to the question of effective occupation.

7.5.1.2. Chinese irregular manifestation of possible effective occupation

The exercise of effective control of the sea area around the disputed islands had a low profile; it could happen that the next investiture missions took place some decades later. Given this long periods of time it is conceivable that the

[604] L. Oppenheim, International Law - Peace Vol. 1 (9th ed., 1992), Hersch Lauterpacht (ed.), 688
[605] C.H.M. Waldock, “Disputed Sovereignty in the Falkland Islands Dependencies”, Vol. 25 B.Y.I.L. (1948), 317

Chinese acquiesced to abandon the possible title of territory. In the Rann and Kutch Arbitration Case (India v. Pakistan) the tribunal held that "…*sovereignty presents considerable variation in different circumstances according to time and place, and in the context of various political systems*."[606] In the Clipperton award the French inactivity during thirty-nine years was held to be irrelevant.[607] The particular circumstances (technological development, tributary system) made it virtually impossible to annually reaffirm the manifestation of sovereignty over the islands. Thus, the irregularity of Chinese manifestation of sovereignty must also be considered to be irrelevant.

7.5.1.3. Display of sovereignty on behalf of the state

7.5.1.3.1. Investiture missions and defence system

The display of Chinese sovereignty must be put into effect on behalf of the Chinese Emperor who must have authorized the potential effective control over the islands. The fishing activities of Taiwanese fishermen cannot be seen as belonging to the evidence of Chinese effective occupation. Neither the usage of the islands as a source of herbs nor the fishing businesses are of any importance. In the Pulau Litigan and Pulau Sipidan Case, the ICJ ruled that activities of private people could not be seen as state activities, which could engender an effective occupation, unless they take place under government authority.[608] Comparing this to the Diaoyu islands, the Chinese contention that the islands were a source for herbal medicine and a traditional fishing region is worthless for making a lawful claim because the Chinese fishery activities were privately - run.

Contrary to the private Taiwanese fishermen, the government officials on the investiture missions to the vassal state Ryukyu were, without any doubt, imperially endorsed. These were diplomat-politicians who conferred the power to reign on behalf of the Chinese Emperor to the head of state of the tributary

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[606] Rann and Kutch Arbitration, Vol. 50 International Law Reports (1976), 501

[607] C.H.M. Waldock, "Disputed Sovereignty in the Falkland Islands Dependencies", Vol. 25 B.Y.I.L. (1948), 325; Clipperton Award, reprint in: Vol. 26 A.J.I.L. (1932), 394

[608] Final Judgement Pulau Litigan and Pulau Sipidan Case, 683, www.icj-cij.org, accessed on May 10th, 2007

state Ryukyu. These navigation aids became part of official Chinese documents and were stored in the official archives. These documents disclose that the Chinese attributed the islands to belong to them and not to the Ryukyu Kingdom. Moreover, the will to possess is emphasised and reiterated by the integration of the islands into the national defence system against the wokou pirates in the 16th century. As a result, the investiture missions and the integration of the islands in its defence system are due acts of state.

7.5.1.3.2. Dowager Empress Decree 1893

The 1893 Dowager Empress Decree sheds the same light on this question. The Empress Dowager's decree of 1893 explicitly grants the exploitation rights for collecting herbs on the islands to a private person. In the ICJ Pulau Litigan and Pulau Sipidan Case, Malaysia put forward that a Turtle Preservation Ordinance was issued for the two islands, which restricted the collection of turtles on the islands. A license to collect the animals was also granted. The ICJ Court was of the opinion that these two measures must be regarded as regulatory and administrative assertions of authority over territory. The Court attributed these two islands to Malaysia on the grounds of activities, which were

"*modest in number but that they are diverse in character and include legislative, administrative and quasi judicial acts. They cover a considerable period of time and show a pattern revealing an intention to exercise State function in respect to the two islands in the context of administration of a wider range of islands.*" [609]

From this judgment it can be deduced that granting licenses and enacting regulations must be interpreted as "effectivités" or effective occupation. The same principles apply to the Chinese 1893 decree: Within the Chinese state system the Dowager Empress was not only entitled to make decisions about geographical sovereignty but she also used this state representation in some

[609] Final Judgement Pulau Litigan and Pulau Sipidan Case, 684, www.icj-cij.org, accessed on May 10th, 2007

cases.[610] According to Art. 37 of the Qing Code it did not matter whether an Imperial prescript is coming from the Emperor's paternal grandmother, his mother, or whether the Emperor publicized it himself.[611] Due to this domestic code the Decree of the Empress Dowager must be considered as a lawful act of state. In Chinese domestic law the Empress was eventually entitled to edict such a decree.[612] It needs to be considered that this Decree was publicized a long time before the conflict emerged. Although it does inhere some abnormalities, such as the seal was stamped in the wrong place and the person who issued the decree on behalf of the Dowager Empress remains unknown. Notwithstanding theses doubtful questions the decree has to be considered a due act of state at that time.[613] This means that the Chinese state displayed state function just two years prior to the possible Japanese annexation.

7.5.1.4. Chinese exercise of sovereignty was peaceful

It must be concluded that the Chinese could also exercise their effective occupation peacefully. This rule means no more than that the first assertion of sovereignty may not be the usurpation of another state's territory nor be contested from the first by competing acts of sovereignty. Once the occupation is completed, contrary to the principle of prescription, express protests from third states do not alter the peaceful character of occupation. Therefore, as the Japanese ignored the islands until 1884, the potential Chinese effective occupation must be considered as being peaceful.

7.5.1.5. Chinese lack of disembarkation on the islands

Without doubt, it is problematic that the historical data does not reveal any Chinese disembarkation on the islands. The judicial practice ruled that disembarkation forcibly is not mandatory for an effective occupation, either. A symbolic annexation might also be sufficient. Regarding remote and tiny islands, in the Clipperton Award the Arbitrator Victor Emmanuel ruled that

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[610] A.L. Sadler, A Short History Of Japan (1rst ed., 1946), 280
[611] William C. Jones, The Great Qing Code (1rst ed., 1994), 70
[612] Tao Cheng, „The Sino-Japanese Dispute Over the Tiao-yu-tai (Senkaku) Islands and the Law of Territorial Acquisition", Vol. 14 V.J.I.L. (1974), 257
[613] Unryu Suganuma, Sovereign Rights and Territorial Space in Sino-Japanese Relation (1rst ed., 2000), 105

there might be one exception possible. If an uninhabited territory appears to the discovering country, by virtue of its lack of habitation, the state's absolute and undisputed disposition must be considered as accomplished. The awards wording could be conducive for the decision of the Diaoyu / Senkaku Islands dispute: *„from the first moment, when the occupying state makes its appearance there …the taking possession must be considered as accomplished*".[614] The line of reasoning of the award was based on the appearance and not on the disembarkation of some sailors. In fact, some crew - members succeeded in landing on the islands after some attempts failed to do so. Once being on the island, they did not leave behind any sign of sovereignty.[615] Apparently, the arbitrator did not attach any further importance to this disembarkation. As they did not set up a sign or plaque, no further legal importance can be imputed to the sailors' disembarkation. As the arbitrator's wording states, the appearance consequently was held sufficient per se to establish a title of sovereignty.

Deducing from the Clipperton award it may assumed that the lack of proclaiming Chinese sovereignty by the means of official signs could not preclude the assumption of Chinese sovereignty over the Diaoyu Islands. In the line of the Clipperton award, one may refute that the actual taking of possession by making an appearance in vicinity of the islands may be sufficient to establish a title of territory over the islands.

7.5.1.6. Chinese lack of possessing a incorporation ceremony

After the Diaoyu Islands had been discovered, the discoverers had to display their taking possession of the territories by some symbolic acts. In the age of the discoveries, the formal ceremony of taking possession, the formal act, was usually held sufficient *per se* to establish a title of sovereignty over areas thereby claimed. The rituals of these symbolic acts varied even among Western Powers, although their differences of celebrating them, they all granted the same effect to these symbolic acts that the territory claimed from

[614] Clipperton Award, reprint in: Vol. 26 A.J.I.L. (1932), 394
[615] Clipperton Award, reprint in: Vol. 26 A.J.I.L. (1932), 391

henceforth would be duly theirs. Similar to the symbolic act of taking possession (flags, plaques), the modes and details of these formal ceremonies varied remarkably under Western Powers. Finally, the ceremonies implied the legal results of the acquisition of the title.[616] The Chinese saw no sense in setting up a national marker because **a)** this principle was not inherent to Chinese sovereignty and **b)** no country challenged the Chinese view that the islands would be duly theirs.

Chinese historical records do not convey a formal official ceremony by which the Chinese incorporated the specific Diaoyu Islands in their domestic territory. The only real historical evidence of effective control has to be seen in the trench crossing ceremony: If one transfers the Chinese notion of sovereignty, the Chinese officials could effectively delineate their outer border of their kingdom. The ceremonies though were never held on these islands themselves. As their was no common practice among Western Powers to celebrate the territory incorporation, the trench crossing ceremony of the investiture missions might be a viable means to display the incorporation in terms of rituals.[617]

The change of the water - colours of the sea, shortly after having passed the disputed islands, indicated the Chinese outer maritime border. Most Chinese investiture missions took great pride in processing the boundary / trench crossing ritual; this means that the Chinese were very much aware of the delineation of their national boundary vis-à-vis the Ryukyu Kingdom. Notwithstanding this idea, this ritual the Chinese seafarers declared that all the territories west of the trench were considered to be Chinese. Therefore, the trench crossing ceremony must be held as a suitable means to display the taking of possession of the space.

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[616] Keller, Lissitzyn, Mann, Creation of Rights of Sovereignty through Symbolic Acts 1400-1800 (1rst ed., 1938), 147

[617] Kiyoshi Inoue, "The Diaoyu Tai Islands (Senkaku Islands) are China's Territory", www.skycitygallery.com/japan/diaohist.html, accessed on July 15th, 2006

7.5.1.7. Chinese failure to notify other states

It might be to the Chinese disadvantage that they failed to notify their neighbouring states about their possible effective occupation over the disputed islands. Art. 34 of the Congo Act proclaimed at the Conference of Berlin in 1885 urged for a notification in regards to an occupation of African territories. This requirement cannot be held applicable by analogy in other cases.[618] The Clipperton award stated clearly that in the year 1885 a rule to inform other countries about its assertion of territory did not exist.[619] There was no explicit rule of law for the notification until the Convention of St. Germain[620] in 1919 was signed.[621] For these reasons, the Chinese incorporation of the islands in their sphere of influence in the times from 1371-1895 must be held as sufficient for an effective occupation of terra nullius.

7.5.2. Chinese animus occupandi

The Chinese must have completed the necessity of the subjective will to act as a sovereign, otherwise named the "*animus occupandi*". In other words, this means that the Chinese must have had the intent and will to act as a sovereign. Even in terms of Western understanding of sovereignty, it must be concluded that the Chinese had the "animus occupandi", the will to incorporate the islands into their territory. The Chinese government, transliterating the Chinese notion of sovereignty into the Western model, lawfully considered the islands to be their territory. Official missions have stated unequivocally that the islands were situated on the Chinese side before arriving at Kumi hill, the border to the Ryukyu Kingdom. The islands integration in the defence system stresses again the will of animus occupandi. Given this background of will and intent to act as a sovereign, the specific incorporation of the islands must not be expressly recorded. As a consequence, the Japanese reproach of a deficient will of incorporation must be held as irrelevant.

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[618] Axel Möller, International Law In Peace and War (1rst ed., 1931), 113
[619] Clipperton Award, reprint in: Vol. 26 A.J.I.L. (1932), 394
[620] This was the Peace Convention Austria signed with the Allied Forces after WW I
[621] Gillian D. Triggs, International Law (1rst ed., 2006), 216

7.5.3. Conferral of Chinese title of sovereignty?

The author's contention that the Chinese succeeded in effectively occupying the islands has been backed in a recently delivered award. In the Eritrea/Yemen award the inhospitable isolated islands Zuquar-Hanish were granted to Yemen. The tribunal held a lighthouse, petroleum agreements, naval patrol and a logbook as sufficient for an acquisition of title.[622] In the Diaoyu / Senkaku Islands dispute the islands were accordingly used as beacons, the guano concessions are equivalent to the petroleum agreement, the naval patrol is analogous to the incorporation in its defence system and the logbooks very much resemble to the investiture missions' records. Taking into account the transformed Chinese notion of sovereignty in combination with the aforementioned judicial awards there cannot be any other conclusion than that the Chinese acquired more than just an inchoate title based on discovery in pre-1895 times. The Chinese sovereignty was displayed in accordance with the Western states of making their appearance in vicinity of small uninhabitable islands. To sum up, there cannot be other conclusion that the Chinese obtained a title of sovereignty over the Diaoyu / Senkaku Islands prior to 1895.

7.5.4. Loss of title by Japanese surveys?

Under international law a title will not be lost if another states intrudes on the islands without the titleholder's consent. The Japanese just did not want to infuriate the Chinese public; therefore is can be assumed that the surveys were conducted in secrecy. The observation of the Japanese that no traces of Chinese sovereignty were found must not be equated with the possibility that no Chinese sovereignty over the islands existed. A symbolic seizure by the Chinese, by for example, hoisting a flag, was by itself not sufficient to establish a title, a formal declaration and notification were not required, either.[623] Thus, the lack of Chinese markers on the islands does not impede that the ownership question must be decided in China's favour. A secretly conducted survey never can undermine the other nation's sovereignty.

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[622] Eritrea/Yemen Award 1998, para. 491, 502, 503, 507; http://www.pca-cpa.org, accessed on July 2nd, 2007

[623] Alf Ross, A Textbook Of International Law (1rst ed., 1947), 147

Acquiescence may only be assumed on the grounds of tacit knowledge, which cannot be imputed to the Chinese in this case. As the surveys were conducted under secrecy, it is not possible to impute a Chinese acquiescence, either.

7.6. Legal evaluation of the Japanese occupation in 1895

7.6.1. Value of Japanese discovery in 1884

As a result of the Chinese effective title, the Japanese cannot claim an inchoate title on the grounds of their discovery of 1884 made by Koga. The Japanese incorporation in 1895 after the Japanese "rediscovery" can only be considered as occupation of terra nullius" provided that the Chinese had abandoned the islands before the Japanese took them over. This must be denied because the Chinese never acquiesced to the abandonment at that point of time. Given the fact that the last investiture mission took place in 1867 and that the Empress Dowager Edict was issued in 1893 the Chinese must have considered the islands to be duly theirs. The term "discovery" used by the Japanese is already misleading since the islands had already been discovered. In conclusion, it must be stated that the discovery of Koga turns out to be an "empty shell" for the Japanese.

7.6.2. Chinese view of acquisition of title by the 1895 Peace Treaty

The Chinese argue that the disputed islands were an integral part of the Treaty of Shimonoseki. In this treaty, the cession of Taiwan and its surrounding islands contained as well the transfer of title of the Diaoyu Islands. According to the Chinese point of view the Diaoyu islands clearly belonged gradually more to the major island Taiwan and not to the Ryukyu (Okinawa) islands.[624] Therefore, the Japanese received the title of territory by the cession treaty.

[624] M. Pohl, "Territorialfragen und Abgrenzungsprobleme: Japan", in Werner Draguhn, Umstrittene Seegebiete in Ost-Südostasien (1rst ed., 1985), 89

7.6.3. Japanese view of the incorporation by the Cabinet Decision

Japan puts forward that a title of sovereignty had not been established by any other state at the point of time Japan incorporated the islands in 1895. Japan's claim towards the islands fulfilled the prerequisites of discovery / occupation of terra nullius in the year 1895. The Senkaku Islands were **a)** terra nullius at that time **b)** Japan showed its will to act as a sovereign to occupy the islands by its Cabinet Decision on January 14th / 21rst, 1895 and **c)** Japan from this point of time on peacefully displayed state authority over the islands.[625]

7.6.3.1. Japanese view: Islands not part of the Treaty of Shimonoseki

The Japanese ardently oppose the idea that the Senkaku Islands were part of the Treaty of Shimonoseki. The Japanese title of sovereignty is based on discovery / occupation of "terra nullius" and not on a cession of territory. As they were not included in this treaty, Japan was neither obliged to return them, unlike Taiwan, by virtue of the post-war agreements.[626]

7.6.3.2. Argument of timing

The Japanese legal title is not rooted in the clause of the Treaty "*all islands appertaining or belonging to the said island of Formosa.*" The Cabinet decision of the incorporation (January 14th 1895) had taken place four month prior to the moment when the Sino-Japanese Treaty went into effect in May 1895. Japan's claims are thus to be seen independent from the cession Treaty of Shimonoseki. The Japanese acquisition of territory of the islands did not rely on a cession, but on occupation of terra nullius.[627]

7.6.3.3. Wording of the Treaty

The Shimonoseki Treaty did not entail the Diaoyu Islands because the Pescadores (Penghu) Islands when they were ceded they were explicitly

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[625] Han-yi Shaw, "Its History And An Analysis Of The Ownership Claims Of The PRC, ROC, And Japan", No. 3 Occasional Papers (1999), 35

[626] Han-yi Shaw, Its History And An Analysis Of The Ownership Claims Of The PRC, ROC, And Japan", No. 3 Occasional Papers (1999), 23

[627] Tao Cheng, "The Sino-Japanese Dispute Over the Tiao-yu-tai (Senkaku) Islands and the Law of Territorial Acquisition", Vol. 14 V.J.I.L. (1974), 261; Japanese Foreign Ministry, "The Basic View on the Sovereignty over the Senkaku Islands", www.mofa.go.jp/region/asia-paci/senkaku/senkaku.html, accessed on July 15th, 2006

identified by its longitudes and its latitudes. As an adverse argument is put forward: if the Diaoyu Islands were to be enclosed in the treaty, they would have been mentioned at least by their location as well.[628]

7.6.4. Assessment of Japanese Cabinet Decision January 14th, 1895

The Japanese refute that thanks to the January 14th, 1895 Cabinet Decision the Senkaku Islands, originally terra nullius, had become Japanese territory by the discovery / occupation principle. Why were the Japanese cabinet members so reluctant to incorporate the islands just after their "discovery"? It may be assumed that they more than likely knew about their status as actually not being terra nullius. Therefore, prior to 1895 many requests for the incorporation by the Okinawa Prefecture were turned down.[629] It must be concluded from the Japanese timing that the Japanese had very precise knowledge about the legal status of the islands.

7.6.4.1. Cabinet internal authority

The Cabinet Decision by itself is problematic on grounds that under the Meji government (1867 – 1912) the cabinet disposed of a very limited scope of jurisdiction and power. The ultimate power to pass a legal act was within the realm of the Japanese Emperor; it was he who had to grant the Japanese pendant of the British royal assent to all major legal enactments.[630] The question emerges whether an international tribunal would be at all cognisant to deal with such domestic issues. Contrary to the "act of state doctrine" ensuring that no state verifies and judges the legal acts of another state, the municipal law might be applied before international tribunals as well. Therefore, once this case was taken to Court, the tribunal would be cognisant

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[628] Tao Cheng, "The Sino-Japanese Dispute Over the Tiao-yu-tai (Senkaku) Islands and the Law of Territorial Acquisition", Vol. 14 V.J.I.L. (1974), 261

[629] Unryu Suganuma, Sovereign Rights and Territorial Space in Sino-Japanese Relation (1rst ed., 2000), 107

[630] John Owen Haley, Authority Without Power (1rst ed., 1991), 78
The Meiji Constitution of 1889 reads as follows:
Art. IV. The Emperor is the head of the Empire, combining in himself the rights of Sovereignty, exercising them according to the provisions of the present Constitution.
Art. V. The Emperor exercises the legislative power with consent of the Imperial Diet
Art. VI. The Emperor gives sanctions to laws and orders then to be promulgated and Executed
Art. IX. The Emperor issues or causes to be issued, the Ordinances necessary for carrying out of the laws, or for the maintenance of public peace and order, and for the promotion of the welfare of the subjects.

whether the Japanese Cabinet Decision was in accordance with domestic national law.[631]In such a case, it would be questionable if the Japanese Cabinet under Japanese municipal law had the representation on behalf of the state. In other words, the Court would analyse, if they had the power of to incorporate the Senkaku Islands into domestic territory.

Since 1885, the Japanese had implemented a new political system. At the head of the Cabinet stood the Minister President of State (otherwise referred to as Prime Minister) with powers and control over the administrative bodies, which made him a Japanese counterpart to the German Chancellor. Moreover, the ministers are not responsible to the Diet, but to the Emperor who also selected the Minister President of State. The Emperor had the supreme command over external matters such as the declaration of war and of peace; he was the chief commander of the navy and the army.[632] In this system, the Emperor was the personal despot who could exercise absolute powers in accordance with the counselling of the Minister President of State.[633] Thus, the Japanese cabinet within the state organisation was not the actual power bearing political body, which could validate such an act of state.

7.6.4.2. Imperial Assent required

Taking the deficient authority of the Cabinet into consideration, one must conclude that the Cabinet Decision of January 14th, 1895 could not create any legal international bindings since the Japanese municipal law prescribed that all formal Japanese acts of state had to be assented by the Japanese Tenno. The pro-Japanese scholar Toshio Okuhara endorsed this point of view. He stated that the Cabinet Decision plus the Imperial Decree was necessary for the legal completion of the incorporation under Japanese domestic law.[634] The incorporation of territory is a major act of state, which can only be made

[631] Ian Brownlie, Principles Of Public International Law (5th ed., 1998), 40
[632] A. L. Sadler, A Short History Of Japan (1rst ed., 1946), 277
[633] Walter Wallace Mc Laren, A Political History Of Japan During The Meiji Era 1867 – 1912 (1rst ed., 1965), 184 ; Kenzo Takayanagi, "A Century of Innovation: The Development of Japanese Law 1868-1961"; in Taylor, von Mehren (ed.), Law in Japan: The legal order in a changing society (1rst ed., 1963), 6
[634] Toshio Okuhara, "The Territorial Sovereignty Over The Senkaku Islands And Problems On The Surrounding Continental Shelf", Vol. 11 Japanese Journal of International Law (1967), 98

official by the Emperor himself. In this line of reasoning, the Cabinet Decision is deficient of the domestic power of representation and cannot create any legal bindings in favour of Japan. As a consequence, the decision of the erection of national landmarks on April 1rst, 1896 must not be deemed as a formally valid act of state.[635]

7.6.5. Validation of the Cabinet Decision

In theory, there are three possible ways by which the premature Cabinet Decision could have been validated after its enactment.

aa) It could be possible that the deficient Cabinet decision could have been validated by a tacit approval by the Tenno. The temporary silence of the Tenno about the incorporation cannot be interpreted as a tacit approval. On the contrary, he drafted an (irrelevant) decree about the formation of Okinawa Prefecture shortly afterwards. The Tenno's full Power assent to this Cabinet Decision was not granted by tacit approval, either.

bb) The validity of the Cabinet Decision cannot be made on the grounds of the legalistic device of apparent authority. The prerequisites of apparent authority are **a)** deficient power of representation, **b)** continuous representational exercise of the agent, **c)** tacit knowledge of the Tenno. This way, he would not personally wield the power, but the administrative organ would possess the respective right as entrusted to it by the Tenno. There is no known common practice of the Japanese Cabinet known that it was tacitly empowered to incorporate alien territories. On the contrary, when the Japanese incorporated the Ogasawara (Bonin) Islands in 1892, an Imperial Decree also complemented this process.[636] The apparent authority cannot be instrumental for this conflict.

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[635] Unryu Suganuma, Sovereign Rights and Territorial Space in Sino-Japanese Relation (1rst ed. 2000), 107

[636] Han-yi Shaw, "Its History and an analysis of the ownership Claims of The P.R.C., R.O.C. and Japan", No. 3 Occasional Papers 1999, 104

cc) The Cabinet Decision could have theoretically been validated by the Imperial Decree No. 13, which it due to the following reasons finally did not do. The Japanese refutation is that the conjunction of the Cabinet Decision of January 1895 together with the Imperial Decree No. 13 of March 5th, 1896 gave legal effect to the incorporation. The Imperial Decree nowhere mentions the Senkaku Islands because the Senkakus cannot be counted to belong to the Yaeyama Island group.[637] Therefore, the Japanese contention that the Imperial Decree No. 13 provides a legal basis for the Japanese incorporation must be considered as false. The Imperial Decree does not help to bolster the Japanese refutations, either.

By the virtue of Japanese domestic law the Japanese Cabinet lacked the capacity to make a lawful representation for Japan. As a consequence, the incorporation of the Senkaku Islands decision must be regarded as null and void.

7.7. Japanese Acquisition by the Treaty of Shimonoseki 1895

As a last resort, the Japanese could have acquired a legal title of sovereignty of the islands by a valid Chinese cession of the Senkaku Islands by virtue of the 1895 Treaty of Shimonoseki. The treaty's wording does not expressly state a possible cession of the Diaoyu / Senkaku Islands. For this reason, the special circumstances of the cession treaty must be highlighted. The question remains by which methods of interpretation of international law the issue shall be tackled.

The 1969 Vienna Convention on the Law of the Treaties, which went into legal effect in 1980, might be regarded as a possible recourse. According to Art. 4 of the Vienna Convention the Convention does not retroactively apply for treaties signed prior to its entry. A similar problem arose in the Pulau Litigan and Pulau Sipidan Case, which made the ICJ state that Art. 31 (I, III) Vienna

[637] Han-yi Shaw, "Its History and an analysis of the ownership Claims of The P.R.C., R.O.C. and Japan", No. 3 Occasional Papers 1999, 101

Convention may be applicable for treaties from 1891 because they just represent codified customary laws valid from that time.[638]

Art. 31 (I, III) being customary law also help to overcome another application problem. Japan has accessed the Convention in 1981 and the PRC in 1997 respectively. The question whether Art. 31 of the Convention may be applicable to Taiwan, which signed the Convention in 1970, but not ratified it[639], becomes superfluous. Neither party of the conflict has been a persistent objector to these continuously exercised rules so that the customary rules laid down in the Convention may be applied for this conflict.[640] For these reasons, it is admissible to apply Art. 31 (I, III) of the Convention to **a)** treaties signed prior to 1980, and **b)** to states, such as Taiwan have not ratified it.

Art. 31 (I) Vienna Convention[641]

"A *treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*."

As a result, the Treaty of Shimonoseki may be construed on basis of Art. 31 of the Vienna Convention. Lastly, it should be underlined that the "object and purpose" of the treaty is to be referred to in determining the meaning of the "terms of the treaty" and that it has no independent basis for interpretation.[642] Instead, they need to be regarded as auxiliary means of interpretation aside from the textual approach.

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[638] ICJ Pulau Litigan and Pulau Sipidan Case (2002), Press Release, www.icj-cij.org, accessed on March 20th, 2007

[639] Vienna Convention on the Law of Treaties, www.untreaty.un.org/sample/EnglishInternetBible/partI/chapterXXIII/treaty1.htm, accessed on May 23rd, 2007

[640] It may be assumed that before the Statute of the Permanent Court went into effect, the customary law was a source of law as well.

[641] Convention online: http://fletcher.tufts.edu/multi/texts/BH538.txt, accessed on May 23rd, 2007

[642] D.J. Harris, Cases And Materials On International Law (5th ed., 1998), 814; C.F. Amerasinghe, Principles of the Institutional Law of International Organisations (2nd ed., 2005), 41

7.7.1. Textual Interpretation

The treaty is without doubt a cession treaty because China cedes territories and sovereignty over the said territories to Japan. The crux of this 1895 treaty is whether the phrase “all islands appertaining or belonging to the islands of Formosa” comprises the Diaoyu / Senkaku Islands. The determination of whether islands were ceded to Japan depends on the relationship the islands had to Taiwan. This can be deduced from the wording of Art.2, which relies on “*belonging or appertaining to Taiwan*.” The relationship of the Diaoyu / Senkaku Islands can possibly be determined by geographical, political / administrative and historical reasons.[643]

7.7.1.1. Historical / Political belonging to Taiwan

As already stated, China legally effectively occupied the islands prior to 1895. It is though questionable whether the Islands historically belonged to the Taiwan Province under the Imperial Chinese rule. Pursuant to pro-Chinese / Taiwanese scholars, the disputed islands were considered to be under Taiwanese jurisdiction under the Qing rule.[644] It is hard to find any records or documents that clearly demonstrate the Taiwanese ownership of the islands.[645] From the authors standpoint this makes it hardly impossible to create any political or historical bindings between Taiwan and the disputed islands.

7.7.1.2. Economic / Military appurtenance to Taiwan

In former times, the area around the islands was a fishing ground for Chinese fishermen and a destination to collect herbs. There is no historical evidence that the Chinese government endorsed these private activities at that time. The historical investiture missions were probably also of official economic value for China; though from that it remains difficult to impute any economic

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[643] Erdem Denk, “Interpreting a Geographical Expression in a Nineteenth Century Cession Treaty and the Senkaku/Diaoyu Islands Dispute”, Vol. 20 The International Journal of Marine and Coastal Law (2005), 103

[644] Han-yi Shaw, ”Its History and an analysis of the ownership Claims of The P.R.C., R.O.C. and Japan”, No. 3 Occasional Papers 1999, 117

[645] Erdem Denk, “Interpreting a Geographical Expression in a Nineteenth Century Cession Treaty and the Senkaku/Diaoyu Islands Dispute”, Vol. 20 The International Journal of Marine and Coastal Law (2005), 108

value to the Taiwanese island. Given the fact that the islands are worthless in terms of intrinsic value, it is impossible to create an economic relationship between them and Taiwan.

The islands were integrated into China's military defence system against Japanese pirates. This Chinese military security system of 1561 did not aim to safeguard the security of Taiwan proper because at that time Taiwan did not belong to mainland China. It has to be recalled that since 1683 the Qing Dynasty reigned over Taiwan. The island was governed from Fukien Province until 1885, when it became a separate province of China.[646] As neither military device has ever been installed nor any military personnel have been stationed on the islands, it is impossible to argue that the islands have ever been used to maintain the security of Taiwan Island.

7.7.1.3. Geographical appurtenance to Taiwan

The islands lie on the Chinese / Taiwanese continental shelf and they are separated from Japan by the Okinawa trench. Although this juridical concept only entered into law after WW II, the ICJ manifested in the Greek Aegean Case that the doctrine of the continental shelf has to be applied retroactively.[647] However, this idea is from its beginning ill - fated. In 1895, the Diaoyu Islands were regarded to be situated on the mainland China continental shelf. Only states can foment a continental shelf. As consequence, the continental shelf does not provide a hint whether the Diaoyu Islands were accounted to belong to Taiwan or to mainland China. Furthermore, many judicial awards held the Continental Shelf doctrine to be too arbitrary in order to determine an island's sovereignty.

Could the appurtenance be scaled in an amount of km? The ICJ ruled in the 2002 Pulau Litigan and Pulau Sipidan Case that the wording "*the islets belonging thereto can only be interpreted as referring to the small islands lying*

[646] Hungdah Chiu, "The International Legal Status of Taiwan", in: Jean-Marie Henckaerts (ed.), The International Status of Taiwan in the New World Order (1rst ed., 1996), 3

[647] Aegean Sea Continental Shelf Case (1978), ICJ Report, 23; Nancy Kontou, The Termination and Revision of Treaties in the Light of New Customary International Law (1rst ed., 1994), 18

in the immediate vicinity of the three islands which are mentioned by name, and not islands which are located at a distance of more than 40 nautical miles."[648] The distance from the islands to Taiwan is much farther than 40 nautical miles. Applying this principle of the ICJ on the present conflict and having recourse to the a fortiori argument, the only conclusion to be drawn is that the argument of vicinity is groundless for establishing any geographical relationship between the islands and Taiwan.

7.7.1.4. Relatively closer to Taiwan than China

Another idea could be the islands vicinity to Taiwan Island. Without doubt, the islands are located much closer (170km) to Taiwan Island than to the People's Republic of China. A possible interpretation of the natural and ordinary meaning of "belonging to Taiwan Island" is that the Diaoyu / Senkaku Islands were relatively closer to Formosa than to mainland China. Therefore, they were more often attributed to Taiwan Island than to China. Japanese government officials probably created the wording of the unequal treaty from the Japanese geographic location (particularly from the city of Shimonoseki); the islands almost lie on the way from Taiwan Island to Japan. From the Japanese geographic position, the disputed islands appear much closer to Taiwan than to Japan. As the islands are the closest to Taiwan, the geographic appurtenance permits, together with the textual approach to account the disputed islands to belong to Taiwan.

7.7.1.5. Conclusion of textual interpretation

As the Diaoyu / Senkaku Islands have no genuine, unique relationship to the Island of Formosa neither in the historical, military, economic nor in the administrative sense, the textual interpretation that the disputed islands belong to Taiwan seems inadmissible at first glance. Just the relatively close geographical proximity to Taiwan Island allows the surmise that in the course of geographical reasons the disputed islands belonged to Taiwan Island in the natural textual meaning of the treaty. None of the other claimants is located closer to the islands than Taiwan. Thus, the mere textual interpretation neither

[648] ICJ Pulau Litigan and Pulau Sipidan Case (2002), Press Release, www.icj-cij.org, accessed on March 20th,2007

clearly includes nor excludes the disputed islands in the 1895 treaty. One must recall that the wording has to be regarded in its context and in the light of its purpose.

7.7.2. Context and Purpose Interpretation

7.7.2.1. Contextual Interpretation: mentioning of the Pescadores Islands

It is striking that the cession treaty mentions the inhabited Pescadores Islands whereas it keeps silent about the Diaoyu / Senkaku Islands. Art. 2 (c) of the Treaty of Shimonoseki explicitly states the retrocession of them:

"The Pescadores Group, that is to say, all islands lying between the 119th and 120th degrees of longitude east of Greenwich and the 23rd and 34th of north latitude."

The question arises as to why the 23 to 34 nautical mile far away ceded Pescadores / Penghu Islands were expressly mentioned? According to Art. 31 (I) Vienna Convention the treaty must be read in its context and in the light of its purpose. The exact location laid down in the treaty provides a hint that the parties were very wary about the exact boundary between Japan and China. Japan apparently wanted to take advantage of the strategic location of the Pescadores towards China. The Pescadores are located 60 km west of Taiwan and about 100 km east of mainland China and have a size of 126 sq km.[649] Japan's aim must have been to ensure and bolster Taiwan's security by the ownership of the Pescadores.[650] One more reason might be that the Pescadores Islands are much bigger in terms of territory and for this reason, the importance of the biggest islands cession had to be underpinned. The omission of the more distant Diaoyu / Senkaku Islands conveys at first the idea that they were purposely left out.

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[649] Chinese State Department, "Commentary: Taiwan Independence No Easy Thing", www.houston.china.consulate.org/eng/nv/t52261.htm, accessed on May 23rd, 2007

[650] Erdem Denk, "Interpreting a Geographical Expression in a Nineteenth Century Cession Treaty and the Senkaku/Diaoyu Islands Dispute", Vol. 20 The International Journal of Marine and Coastal Law (2005), 115

On the eastern Taiwanese coast are located the Taiwanese Western Pacific Orchid Island (65 sq km) and Green Island (roughly 15 sq km), which were inhabited by the Taiwanese indigenous Yami people. These islands are about 33 km and 65 km away from Formosa and were not mentioned in the cession treaty, either.[651] Thanks to their aboriginal population, they had a proper genuine link to Formosa; they are accounted to belong to Formosa. Although they were not expressly mentioned in the Treaty of Shimonoseki, Orchid Island and the Green Island belonged to the ceded territory as well.[652] The simultaneous cession of these two islands proves that the question of whether the Diaoyu / Senkaku Islands belonged to the ceded territory has nothing to do with its omission in the Treaty of Shimonoseki, nor with its size or its vicinity to the main Taiwanese Island.

7.7.2.2. Interpretation of Purpose

Interpreting the treaty using the teleological approach, the legalistic a fortiori argument might be instrumental for the decision. As the Japanese were so careful to snatch the strategic important Pescadores Islands, the Liaodong and Korean Peninsula, it would have been very foolhardy of them not to integrate the Diaoyu / Senkaku Islands into the cession treaty. The disputed islands are much closer to Japan than the Pescadores, it would be contradictory within the Japanese stance to be so keen on an exact boundary delimitation regarding the Pescadores and be so careless about territories close to their own heart, the southern Japanese islands of Okinawa and Kyushu. The disputed islands are located between Japan and the newly gained Taiwan Island; it would be utterly dangerous for the Japanese to tolerate Chinese soil in between them putting the Chinese in a most favourable position to interfere with the inter-Japanese naval traffic. The purpose of the treaty was to solidify the expansionist warfare of the Japanese, which meant all territories close to the Japanese mainland should be stripped

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[651] "Green Island"; www.answers.com/topic/green-island-taiwan, accessed on May 24th, 2007; www.sinica.edu/tw/tit//scenery/1095.scn2.html, accessed on May 15th, 2007; ICE Case Studies, "Nuclear Dump Dispute on Orchid Island"; www.american.edu/ted/ice/orchid-waste.htm, accessed on May 23rd, 2007

[652] they were not integrated in the U.S. naval surveillance area; see: Greg Austin, China's Ocean Frontiers (1rst ed., 1998), p. xxiv

off from China. The Japanese had waited about ten years for the appropriate moment of incorporation, which has been postponed a couple of times until the most opportunistic moment of the Sino-Japanese War finally arrived. Therefore, it would be far-fetched to impute to the Japanese state agents that at the time of the treaty negotiations they wanted to exclude the disputed islands. From the historical perspective, it must be assumed that the said islands were accounted to belong to Taiwan because they are much closer to Taiwan than to mainland China. The Japanese probably did not have knowledge about the domestic Chinese administration of the islands. They just took it for granted that the disputed islands belonged to proper Taiwanese domestic jurisdiction because of their relatively closer location to Taiwan than to China. For this reason, it is just to assume that it was the purpose and the original Japanese intention of the cession treaty to include the Diaoyu / Senkaku Islands. In the context of expressly including the Pescadores Islands and keeping in mind the general purpose of hegemonistic Japan, there cannot be any other conclusion than that the Diaoyu / Senkaku Islands were an integral part of the 1895 Shimonoseki Treaty.

7.7.3. Principle of good Faith

The usage of the principle of "good faith" could contribute significantly to enlighten the question in favour of either one direction. Being an integral part of the textual approach, the sense of this principle possibly lies to restrict an excessive literalism. On the other side, it aims to hinder a state from being precluded of its rights as a result of an error of the wording.[653] The idea of good faith in this case underlines the above-depicted textual approach to assume an integration of the Diaoyu / Senkaku Islands in the 1895 Treaty. Taking into consideration Japan's multiple adjournments of its final domestic legislation it is more than fair to state that the Sino Japanese War was the long awaited incident to incorporate the islands into Okinawa Prefecture. It could be contradictory of Japan and an infringement of the good faith principle to claim that although the war had been the key incident for the islands

[653] Francis G. Jacobs, "Varieties Of Approach To Treaty Interpretation: With Special Reference To The Draft Convention On The Law Of Treaties Before The Vienna Diplomatic Conference", in Scott Davidson, The Law Of Treaties (1rst ed., 2004), 312

incorporation, the islands were not part of the 1895 Treaty of Shimonoseki. On the other hand, the temporal closeness of these two historical facts could also be the result of an unfortunate coincidence. Given the precaution the Japanese applied whilst the integration this seems very unlikely.

The omission of the Diaoyu / Senkaku Islands is though more than likely an error of wording because the Japanese records do not rebut the assumption of the Japanese "mala fide" towards the islands ownership. Despite of that in conjunction with the other modes of interpretation the principle of good faith advocates that the disputed islands were meant to be part of the 1895 Treaty.

7.7.4. Subsequent conduct of the Parties (Art. 31 III)

Pursuant to Art. 31 (III, b) Vienna Convention the subsequent conduct of the parties regarding the treaty should be taken into account. Fitzmaurice stated that:

" *…where this is the case it is so because it is possible and reasonable in the circumstances to infer from the behaviour of the parties that the have regarded the interpretation they have given to the instrument in question as the legally correct one, and have tacitly recognized that in consequence certain behaviour was legally incumbent upon them.*"[654]

From 1941 to 1944, the Tokyo High Court reportedly was in charge of deciding to whose jurisdiction the disputed islands belonged. The Court allegedly held that the islands were appurtenant to Taiwan. The verdict of the Tokyo High Court could not be found in the archives; nevertheless, the Chinese put forward this argument.[655] The lack of documentary evidence makes this contention immaterial for a legal consideration because the outcome of an unsafe refutation based on the hearsay-principle is unpredictable in a Court procedure. Therefore, this argument needs to be disregarded.

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[654] Judge Sir Gerald Fitzmaurice in: ICJ Reports, Temple of Preah Vihear Case (1962), 56, 66

[655] "Diaoyu Islands: Inalienable Part of China's Territory" (Translation of China Foreign affairs University), www.cfau.edu.cn/jiaoxue/english/index.htm, accessed on July 15th, 2006

After the Japanese had won the war against China, they put into effect some governmental measures, such as the integration into Okinawa Prefecture and the erection of land markers. The Senkaku Islands were leased to a private Japanese citizen in 1896.[656] It is very improbable that the Japanese did not have precise knowledge about own domestic law so that by such an international valid claim could be made. Knowing possible Chinese claim they put into effect the leasehold contract with a private person and the erection of land markers. Therefore, this subsequent conduct must be imputed to the ratification of the cession treaty and not to the groundless Cabinet Decision. These Japanese activities in the wake of the victory of the first Sino-Japanese War convey the idea that they were not executed as a result of an independent Cabinet Decision. This is an indication that the Japanese in former times, contrary to their position today, deemed the islands to be included in the Treaty of Shimonoseki. The subsequent Japanese conduct does support the author's conviction that the Japanese originally sought to include the islands in the treaty.

From 1895 up to the criticisms of the post-war treaties in 1951 / 1952, the Chinese kept silent about the islands. After the downfall of the tributary system, the Chinese abstained from any act of state in the area. They ceased to collect herbs on them. How may the Chinese silence be interpreted in terms of subsequent practice? The wording "practice" does not seem to require an active behaviour, but to include all active and passive means of conduct. As the erection of Japanese markers on the islands was not notified to the Chinese, it is very probable that the Chinese had just forgotten about the islands in the meantime. After having been fragmented by unequal treaties, the Chinese did not want to interfere with the Japanese sphere of marine interest. The subsequent Chinese conduct was that they considered the Diaoyu Islands to be taken away by the Japanese.

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[656] Han-yi Shaw, "Its History and an analysis of the ownership Claims of The P.R.C., R.O.C. and Japan", No. 3 Occasional Papers 1999, 103

The conclusion to be drawn is that according to Art. 31 (III, b) Vienna Convention the subsequent practice of the parties supports the interpretation that the Diaoyu / Senkaku Islands must have been part of the crucial 1895 Treaty of Shimonoseki.

7.7.5. Final Conclusion

To sum up, although sticking to the mere textual interpretation, a clear resolution cannot be presented. Departing from the single textual interpretation it is admissible, but it is by no means mandatory, to attribute the islands to be part of the cession treaty. The islands were probably too minor to be expressly mentioned.[657] When using the contextual approach and the principle of good faith there cannot be any other conclusion than that the Japanese historically considered that they had acquired the islands by virtue of the debatable 1895 treaty. This point of view is backed by the auxiliary means of interpretation. All in all this must lead to the conclusion that the Diaoyu / Senkaku Islands were meant to be part of the Treaty of Shimonoseki.

7.8. Auxiliary Documents

7.8.1. Chinese Consul's letter of 1920

Japanese scholars attach certain importance to the letter of gratitude written by the Chinese Consul of Nagasaki in 1920. The Diaoyu Islands were reportedly to be imputed to Japanese territory in this letter. Containing the official Chinese seal and written in the Consul's official capacity it is claimed that this letter implies recognition of the islands to belong to Japan.[658] As Taiwan was under Japanese sovereignty at that time, the Chinese Consul in Nagasaki was actually a domestic agent of the Japanese state. In this line of reasoning, this internal document cannot provide any hints for thorough legal assessment. As a result, one should not attribute any legal value to it.

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[657] S. W. Su, "The Territorial Dispute over the Tiaoyu/Senkaku Islands: An Update", Vol. 36 Ocean Development & International Law, 55

[658] Han-yi Shaw, "Its History And An Analysis Of The Ownership Claims Of The PRC, ROC, And Japan", No. 3 Occasional Papers (1999), 33

7.8.2. Tokyo Court Ruling 1941-44

According to the Chinese stance, the Japanese implicitly admitted that the Diaoyu Islands were appurtenant to Taiwan. In 1944, a Tokyo court ruled in a trail between the governors of Taiwan and Ryukyu Islands that the Diaoyu Islands were an integral part of Taiwanese jurisdiction.[659] Since the verdict's document could not be found in the archives, the Court ruling's legal value is rather doubtful. For the final legal assessment this Tokyo Court ruling eventually cannot convey the islands to one of the claimants, either.

7.9. War Time Declarations

In 1937 the Second Sino-Japanese war commenced. This war led to World War II two years later. Special attention must be paid to the War Time Declaration on the grounds of their undetermined legal character. It is questionable whether the declaration is a mere "Gentlemen's Agreement" or a fully internationally binding treaty.[660] Pursuant to the Cairo Conference Declaration in 1943, Japan was to be expelled from all the territories, which it had taken by violence and greed. It is important to acknowledge that these declarations were incorporated into the Japanese Surrender terms of September 1945.

7.9.1. Chinese view of the Declaration of Potsdam and Cairo

In the Chinese view, the reversion of the Diaoyu Islands to the Japanese (even though under a trusteeship of the United Nations) violated the Potsdam and Cairo Declarations. In the Cairo Declaration, it has been stated that all annexed territories must be returned to the Chinese. The Potsdam / Cairo Declaration signed by the Japanese upon their surrender obliged the Japanese to execute these stipulations. As a consequence, the islands must have been reverted to Chinese rule because the Instrument of Surrender was

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[659] Chinese foreign ministry, lun diaoyudao zhuquan de guishu, handed out to the author by the Chinese embassy in New Delhi on July 15th, 2006; "Diaoyu Islands: Inalienable Part of China's Territory" (Translation of China Foreign Affairs University), www.cfau.edu.cn/jiaoxue/english/index.htm, accessed on July 15th, 2006

[660] Compare: Adolfo Miaja De La Muela, Indroduccion Al Derecho International Publico (6th ed.), 126

legally binding for Japan.[661] Since the PRC refuses to recognize the San Francisco and Taipei Treaty, the only pillar for China / mainland's claim are the Japanese Surrender Terms of 1945.

7.9.2. Japanese view of the Declarations

The Japanese do not attach any further importance to the Surrender Terms. As the islands were not part of the 1895 Treaty of Shimonoseki, Japan could not be bound to return them on basis of any post-war agreement. The valid legal devices determining the islands status are the San Francisco and the Taipei Treaty, which the Chinese did not use to lodge any protest.[662]

7.9.3. American view about the Declarations

The Americans actually do not attach any importance to the war - time declarations. Their point of view presumably is that the establishment of a trusteeship over the Diaoyu / Senkaku islands was not an infringement of the war-time declarations because Art. 8 of the Potsdam Declaration expressly laid down that Japan's sovereignty should not be removed from minor islands as the Allies will determine. Therefore, the minor disputed islands could still enjoy Japanese sovereignty.[663]

7.9.4. Legal value of the Declarations

The Diaoyu / Senkaku Islands were not expressly mentioned in the declaration. Particular reference was made to the annexation of Chinese territories forcefully stolen. Special referral was made in the enumeration of the stolen territories, "*such as Manchuria, Formosa and the Pescadores*". The express mentioning of these territories conveys the idea that the three Allied Powers agreed upon a converse declaration laying down the reversion of the 1895 Treaty of Shimoneseki. The goal of this declaration was very clear: The Japanese should be forced to abandon what they had annexed in prior times.

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[661] Erica Strecker, Phillip Saunders, "Legitimacy and Limits of Nationalism", Vol. 23 International Security (1998), 125

[662] Han-yi Shaw," Its History And An Analysis Of The Ownership Claims Of The PRC, ROC, And Japan", No. 3 Occasional Papers (1999), 23

[663] The wording "minor islands as we determine" is the only way, which permits the interpretation that the post-war agreements have not been violated. See: U.S. involvement: Han-yi Shaw, "Its History And An Analysis Of The Ownership Claims Of The PRC, ROC, And Japan", No. 3 Occasional Papers (1999), 123 onwards

As a result, the 1945 Potsdam Proclamation aimed to restrict Japanese sovereignty to the four major Japanese islands and to minor islands as the Allied wished to determine.

7.9.5. No transfer of Japanese sovereignty over stolen territories

It has to be recalled that declarations and proclamation are soft law and only a mere declaratory legal effect is attributed to them.[664] The question of the documents' legal value is irrelevant because these Allies' agreements became part of the Japanese Instrument of Surrender in 1945. The Surrender Terms are more than a mere declaration; they resemble, talking in legal categories, more to binational treaties. It is characteristic of international treaties that they are legally binding. Strictly speaking, by virtue of the Surrender Terms the Japanese obliged themselves inter alia towards the victors that (China was a signatory!)[665] they will renounce their rights to the territories taken by greed. Therefore, the Surrender Terms are legally binding for the Japanese. There are several valuable arguments, which deny the PRC's position that the Surrender Terms already incorporated a cession of title.

7.9.5.1. By virtue of the Surrender Terms Japan only agreed to "issue orders and take whatever action may be required for the purpose of giving effect to the Potsdam Declaration." Although being bound by their signature, the textual interpretation militates against the assumption that this agreement functioned as a cession treaty.[666] Cession treaties usually avoid equivocal wordings.

7.9.5.2. It has to be recalled that the declaration's and the proclamation's content - despite their legally binding character - entail just an expression of intent. The precise text of the two components of the Surrender Terms all the wording "shall be restored". This means in other words, the sovereign question is not shelved in the Surrender Terms; it just expresses an

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[664] Ian Brownlie, Principles of Public International Law (5th ed., 1998), 641-643

[665] China was represented by General Hsu Yung-chang; see: "Peace in the Pacific", http://the.honoluluadvertiser.com/peaceinthepacific/september2, accessed on 11th June, 2007

[666] Peter N. Upton, "International Law And The Sino-Japanese Controversy Over Territorial Sovereignty Of The Senkaku Islands", Vol. 52 Boston University Law Review (1972), 783

agreement to settle this between the victors in the near future. The Instrument of Surrender therefore was, technically speaking, only an armistice and did not prejudice any question of sovereignty.[667] To sum up, the Surrender Terms contained an "agreement to agree" on the sovereignty over the stolen territories in the future. Therefore, the Taiwanese - Chinese contention that the Chinese sovereignty over Taiwan and the Pescadores Islands was returned to the Chinese by virtue of the Surrender Terms[668] is false.

7.9.5.3. Pursuant to international law, a transfer of sovereignty is required for a legally effective cession of Taiwan and the islands. Being signatory among the Allied Powers, the United Kingdom and Australia held the view that Japan is endowed *de jure* of all powers until the final peace treaty.[669]

7.9.5.4. The wording of Art. 8 of the Potsdam Declaration that Japan's sovereignty shall be limited to the four major Japanese islands and such minor islands as we determine does not rule out the option that the Japanese could maintain the title of sovereignty over the Senkaku Islands. The precise extent of Japanese islands sovereignty remained clearly undetermined. It is possible that the Senkaku Islands were counted to belong to the "minor islands as we determine".

7.9.5.5. The terms of the Cairo and Potsdam Declaration were concluded in too vague and equivocal language that one could reasonably assume that the Japanese already ceded a title of sovereignty in the Surrender Terms. As a consequence, after signing the Surrender Terms Taiwan still was a territory occupied by the Allies, which was subject to Japanese sovereignty. As the Diaoyu / Senkaku Islands were under Japanese sovereignty at that time, the same line of reasoning must be applied to them. Their legal status was altered neither by the War Agreement nor by the Surrender Terms.

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[667] Steve Tsang, Peace and Security Across the Taiwan Strait (1rst ed., 2004), 3
[668] "Recent Chinese History", wwwtaiwanadvice.com/ustaiwan/history3.htm, accessed on June 4th, 2007
[669] Chairmian Edwards Toussaint, The Trusteeship System Of The United Nations (1rst ed., 1956), 89

7.10. Analysis of the San Francisco Peace Treaty of 1952

In the course of the oncoming Cold War and the foundation of the People's Republic of China it took some time to settle the sovereignty question over the conquest territories. These signatories signed the treaty on September 8th, 1951 and the document went into effect on the April 28th, 1952.[670] In Art. 2 (b) of the treaty, Japan had to renounce the territorial title of Formosa and the Pescadores.

7.10.1. The Taiwanese refutations

Taiwan alleges that the Tiao-yu-tai Islands historically were a part of Taiwanese administration. The Taiwanese and Chinese lines of reasoning are quite alike. For this reason, Taiwan and China mainly put forward the same line of reasoning; both Chinese states claim historical rights on the grounds that they are the lawful representative of the Chinese people. The dividing line between the two states had to be laid down in the year 1949. The only big difference of opinion between the two Chinese countries lies in the Treaty of Taipei of 1952, which is without value for the PRC. On the contrary, Taiwan is willing to found its refutations on the Cairo- and Potsdam Declarations, the Sino-Japanese Treaty of Taipei in 1952 and the San Francisco Treaty.[671]

7.10.2. Japanese view of the San Francisco Treaty of 1952

The Japanese admit that the Senkaku Islands were meant to be included in the Treaty of San Francisco despite the fact that they were not explicitly mentioned. Under the treaty, the islands were without a doubt included into "Nansei Shoto" together with the Ryukyu Islands. Additionally, Art. 3 stipulated the establishment of a trusteeship over the islands, which conferred the administrative rights to the U.S.A.[672] This Japanese interpretation of the status of the Senkaku Islands as part of the Ryukyu Islands was also

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[670] "Recent Chinese History", www.taiwanadvice.com/ustaiwan/history3.htm, accessed on June 4th, 2007; Richard W. Hartzell, "Understanding the San Francisco Peace Treaty's Disposition of Formosa And The Pescadores", Vol. 8 Harvard Asia Quarterly (2004), 1, www.taiwankey.net/dc/hartzell5.pdf, accessed on July 30th, 2007

[671] Han-yi Shaw, "Its History And An Analysis Of The Ownership Claims Of The PRC, ROC, And Japan", No. 3 Occasional Papers (1999), 39

[672] Ibid, 23

supported by a U.S. court decision in Hawaii relating to the question of Japanese sovereignty over the Ryukyu Islands.[673]

7.10.3. Chinese view of the San Francisco Treaty of 1952

Neither of the two Chinese governments were members of the San Francisco Treaty and the PRC consistently denounced the validity of this treaty.[674] Therefore, the Treaty of San Francisco must be deemed ineffective and invalid because foreign powers are not entitled to make decision about the Chinese territorial "fate".[675] Instead, the PRC bases its claims mainly on the Japanese Surrender as the sole legal basis to the disputed islands.[676] The illegal incorporation of the Diaoyu Islands by the Japanese government could conveniently be adopted by the U.S. military while drafting the peace treaty conditions. The U.S. thus just solidified an unlawful theft of the islands by using them for their own purposes.[677]

7.10.4. Chinese auxiliary Interpretation of the 1952 Treaty

Although the PRC does not recognize the Treaty of San Francisco, their scholars nevertheless put forward (as a precautionary action) some arguments how to interpret the treaty: The legal relationship between Art. 2 and Art. 3 of the San Francisco Treaty arguably may not have been set up in the clearest way. It is questionable whether the Japanese sovereignty pursuant Art. 2 shall be limited to its five major islands or if Art. 3 permits further exceptions. The Chinese put forward that the separate Art. 3 aimed to prevent Art. 2 from being fully implemented. This article determines just the cases where Japanese territory is detached for different reasons than in Art.

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[673] Seiko Lee, "Territorial Disputes among Japan, China and Taiwan Concerning the Sneak Islands" Vol. 3 Boundary and Territory Briefing (2002) , 25

[674] Un'yu Suganuma, Sovereign Rights and Territorial Space in Sino-Japanese Relations (1rst ed., 2000), 123

[675] Chinese Ministry of Foreign Affairs, diaoyudao wenti, handed out to the author by the Chinese embassy of New Delhi on July 15th; www.fmprc.gov.cn/chn/wjb/zzjg/yzs/gjlb/1281/t5797.htm

[676] Chinese Ministry of foreign affairs, lun diaoyudao zhuquan de guishu, handed out to the author by the Chinese embassy in New Delhi on July the 15th, 2006; Han-yi Shaw, Its History And An Analysis Of The Ownership Claims Of the PRC, ROC, and Japan, No. 3 Occasional Papers (1999), 40

[677] "Shishe zhongguo", http://www.sszg.com/2005/2-27/08352024002.html, accessed on March the 20th, 2007

2.[678] The Chinese perspective is that Art. 3 is not a specification in the form of a subsection of Art. 2.

7.10.5. Chinese Position on the U.S. Decree No. 27 of 1953

According to Chinese interpretations the American Decree No. 27 - as it was issued on basis of the provisions of the San Francisco Treaty of 1951- the decree was consequently also illegal. In this decree the geographical Ryukyu boundary delimitation had to be established pursuant to the stipulations of the San Francisco Treaty. Since the Treaty of San Francisco did not include the Diaoyu Islands location, the decree must had been changed to provisions including only the area northern of 24° degree north latitude and western of 122° east longitude.[679]

7.10.6. Legal Assessment of the Treaty of San Francisco

The San Francisco Treaty obliged Japan to renounce the title of sovereignty over Taiwan. The treaty's wording made it clear that Japan had to abandon the title of sovereignty. It could be refuted that on the grounds of this important treaty the Chinese were entitled to recover Taiwan and the minor islands.

7.10.6.1. Subjective third party's right of the Chinese?

Another question is whether the Chinese are entitle to make a legal claim by virtue of this peace treaty. The principle of "*pacta tertiis nec nocent nec prosunt: Res inter alios acta*" was a well respected legal principle under civilized nations in former times.[680] It is also possible that a non-signatory third state is entitled to raise the claim.[681] The third party's right must be clearly determined. In the case of doubts, no rights can be deduced from the right in favour of the third party.[682] Art. 36 of the Vienna Convention reflects these

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[678] Tao Cheng, "The Sino-Japanese Dispute Over the Tiao-yu-tai (Senkaku) Islands and the Law of Territorial Acquisition", Vol. 14 V.J.I.L. (1974), 251

[679] Chinese Foreign Ministry, lun diaoyudao zhuquan de guishu, handed out to the author by the Chinese embassy in New Delhi on July 15th, 2006

[680] Arnold Duncan, The Law of Treaties, (1rst ed., 1938), 309-332; Alan Boyle, Christine Chinkin, The Making of International Law (1rst ed., 2007), 238

[681] Gerald Fitzmaurice, "The Law And Procedure Of The International Court Of Justice 1951-4: Treaty Interpretation And Other Treaty Points", Vol. 33 B.Y.I.L (1953), 251

[682] Max Sörensen, Manual of Public International Law (1rst ed., 1968), 217

ideas, which were applied by the ICJ for legal problems arising from treaties of the post-war era.[683]

Art. 36 Vienna Convention

"A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides."

The peace treaty was concluded between Japan and the Allies; the Chinese were not part of the Allies this time. The Chinese must henceforth be considered as a third party of this treaty. It could impossibly be deduced that any rights were intended to be conferred to the Chinese.[684] The Allies, particularly Russia envisaged to encroach some of the Japanese territories. Therefore, it must not be assumed that the parties of the treaty intended to confer any rights to the Chinese. The subsequent parties conduct (Treaty of Taipei) also proves that the Treaty of San Francisco was restricted to the removal of Japanese sovereignty over Taiwan without determining its recipient. Neither Taiwan nor the PRC as a possible third party may claim any rights on the grounds of this treaty. Not knowing which Chinese state was the lawful representative of the Chinese people, the negotiators circumnavigated the problem of which party became the recipient of the sovereignty over Taiwan and the Pescadores. The naming of the cession's recipient was simply omitted. As a result, the San Francisco Treaty has to be regarded as immaterial for the Chinese restoration of sovereignty over Taiwan and the minor islands.

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[683] Gerald Fitzmaurice, "The Law And Procedure Of The International Court Of Justice 1951-4: Treaty Interpretation And Other Treaty Points", Vol. 33 B.Y.I.L. (1953) , 251

[684] Seokwoo Lee, "Territorial Disputes among Japan, China and Taiwan Concerning the Senkaku Islands", Vol. 3 Boundary & Territory Briefing, 21

7.10.6.2. Provision for U.N. trusteeship in Art. 3 of the Treaty

The wording "Formosa and all the islands belonging to it", as in the 1895 Shimonoseki Treaty, was not chosen. Instead, another textual approach was selected in Art. 3 that Japan was obliged to set the Nansei Shoto south of the 29 degree northern latitude under a trusteeship of the United Nations. The term Nansei-shoto means "south west islands", thereby doubtlessly comprising the disputed islands. The term Nansei Shoto was purposely selected to include to Diaoyu / Senkaku Islands in the wording.[685] On this grounds the United States Civil Administration Proclamation (USCAP), Number 27 of December 25th, 1953 could set the disputed islands under their administrative control.

7.10.6.3. Does Art 3 cause an immediate cession of (partial) sovereignty?

Another interesting question arises as to whether the Japanese were still able to return the title of sovereignty over the Diaoyu / Senkaku Islands as part of the Taipei Treaty after the ratification of the San Francisco Treaty. This could be doubtful because by virtue of the Treaty of San Francisco the Japanese had to abide to concur on any proposal of an U.N. trusteeship administered by the U.S. If the trusteeship obligation over the Diaoyu / Senkaku Islands had comprised a transfer of title of sovereignty, the subsequent Treaty of Taipei would have been depleted of the Diaoyu / Senkaku Island's sovereignty. The title could not be returned to the Chinese, if it was possibly handed over prior to the Americans. Therefore, the question must be raised of whether the Japanese had lost their sovereignty over the Diaoyu / Senkaku Islands by the Treaty of San Francisco, which went into effect three month earlier than the Taipei Treaty. Japan must respect the principle "*nemo dat quod non habet*" (no donor can give a greater interest than that what he himself has).[686]

7.10.6.3.1. Standpoint of Art. 3 causes a transfer of sovereignty

The San Francisco Treaty's wording does not expressly state a cession of sovereignty: ("*Japan will concur in any proposal of the United States").* It could

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[685] Jean-Marc Blanchard, "The US Role in the Sino-Japanese Dispute over the Diaoyu (Senkaku) Islands, 1945-1971", No. 161 The China Quarterly (2000), 109

[686] Ian Brownlie, Principles of International Law (5th ed., 1998), 160

be argued that the contractual obligation for an approval to a trusteeship including administrative, legislative and jurisdictional powers already represents the cession of sovereignty. This treaty creates the legal obligation for Japan to concur on any potential proposal of the United States.[687] Japan should no longer have power over the disputed islands. It could be argued that although the question of sovereignty was not expressly dealt with in the stipulations, virtually all typical sovereign rights were transferred from Japan to the U.S. From this point of view, Japan must no longer be held as the sovereign of the disputed islands after the San Francisco Treaty came into effect.

7.10.6.3.2. Standpoint sovereignty remained Japanese

It might also be put forward that the obligation to concur on any proposal of the U.S. does not comprise the sovereignty question at all. The contextual interpretation of the San Francisco Treaty favours this view as well. Japan had to renounce all rights and title of Formosa and the Pescadores, whereas regarding the Okinawa and Senkaku Islands they only had to concur on any proposal made by the U.S. on behalf of the United Nations. The treaty's wording "*Japan will concur*" does not cause the limitation of sovereignty to simultaneously come into effect with the treaty. The final proposal of the U.S. towards the United Nations must be seen as the legal grounds for the limitation of sovereignty because Art. 3 only stipulated Japan's obligation to follow any U.S. proposal. Given this background Japan still holding the title of sovereignty could return the disputed islands to the former owner China by virtue of the Taipei Treaty.

7.10.6.3.3. Author's point of view

Conversely to most other analysts, the author refutes that Art. 3 does not directly affect the Japanese sovereignty over the Senkaku Islands. It is the final U.S. proposal to the U.N. that will influence the extent of Japanese sovereignty over the disputed islands. Art. 3 expressly lies down that *pending the making of such a proposal and affirmative action thereon the U.S. will*

[687] See: 25 Dept. State Bulletin 452-9 (1952), quoted in: Oliver J. Lissitzyn, Judicial Decisions, Vol. 49 A.J.I.L. (1955), 89

have administrative rights. In other words, until this proposal was not made, Japan could retain its entire sovereignty.

7.10.6.4. Conferral of contingent right in Art. 3

It could be argued that Art. 3 of the San Francisco Treaty, albeit not putting into effect an immediate transfer of title, grants a so-called contingent right to the U.S. In some codified civil law countries, such as Germany[688], the legal order recognized certain rights could develop during the performance of contractual obligations. According to Art. 38 (III) of the ICJ Statute legal principles of other civilized nations are recognized as a valid source of law. In such a case, where the transferor of title has done everything required for the transfer so that the completion lies solely within the decision leeway of the transferee, the latter has acquired a legal position, which cannot be invalidated against the will of the transferee. This legal position is of lesser status than, but similar in nature to the full right. The transferor Japan was therefore incapable of frustrating the U.S. legal position after the ratification of Art. 3. The U.S. legal position must therefore be held as comparable to one of a contingent right. As a consequence, this contingent right is to be dealt with like the full right in most regards.[689]

7.10.6.5. Optional clause

It could also be refuted that the terminology of Art. 3 lays down an optional clause in favour of the U.S.. To be effective, the option must set out the terms of the agreement. In other words, an option will only give rise to a contract, provided that it does not reserve matters for a future agreement and that the option has been exercised within the scope of its precise terms.[690] In such a

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[688] See: Raymond Youngs, Sourcebook on German Law (2nd ed., 2002), 365; Art. 158 (I) German Civil Code (BGB): If a legal transaction is entered into subject to a condition precedent, the effect made dependent on the condition occurs when the condition takes effect. Art. 161 (I) German Civil Code (BGB):
If someone disposes of an object subject to a condition precedent, every further disposal, which he makes during the period of suspense in relation to the object is, in case of fulfilment of the condition, ineffective so far as the effect dependent on the condition would frustrate or infringe it.

[689] Jürgen Kohler, "Property Law", in: Mathias Reimann, Joachim Zekoll (ed.), Introduction to German Law (2nd ed., 2005), 248

[690] Burrows, Finn & Todd, Law of Contract (7th ed., 1997), 82

clause, the optionee (U.S.) is not bound to any obligation, but the offeror (Japan) is obligated to it as long as the optionee has not rejected it.

7.10.6.6. Final Conclusion and Summary

The U.S. was in a "master-servant legal position" vis-à-vis Japan because Japan had to concur on any proposal of the U.S. towards the U.N. Art. 3 did not confer a contingent right to the U.S.A. because the feature of a contingent right does not allow for the entry into force of the full right to be determined by only one party's subjective decision. [691] The German legalistic device of the contingent right ("Anwartschaftsrecht") does not really correspond to Art. 3 either because a condition in the sense of § 158 (I, Alt. 1) German Civil Code (BGB) does not comprise an option whose exercise is based on one party's will. The drafters of Art. 3 presumably, instead of granting a contingent right to the U.S., wanted rather to convey an optional clause to the U.S. To sum up, up to the final establishment of the trusteeship, the U.S. was the beneficiary of an optional clause, which did not immediately affect the disputed islands sovereignty.

7.11. Legal Situation under the trusteeship

Shortly afterwards the U.S. incorporated this disputed islands under their U.N. trusteeship system.[692] As the 1972 Reversion Agreement between Japan and the U.S. clearly does not comprise a transfer of title, the question about Japan's legal position under the trusteeship must be raised. As a result of a lack of transfer to Japan in this agreement, it is important for Japan's claim that Japan could maintain a certain degree of residual sovereignty in order to claim today's title of sovereignty over the islands. Could the Japanese withhold a certain degree of residual sovereignty within the U.S.-run trusteeship? Was it possible to divide the sovereignty between the U.S. and Japan?

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[691] Helmut Heinrichs, § 158, in: Palandt (ed.) (66th ed., 2007), 168, para. 1

[692] Peter N. Upton, "International Law And The Sino-Japanese Controversy Over Territorial Sovereignty Of The Senkaku Islands", Vol. 52 Boston University Law Review (1972), 779

7.11.1. Taiwanese Position towards "residual sovereignty"

The Taiwanese refuse that any residual sovereignty remained to Japan. Taking this into consideration the Chinese government felt no urgency to make any objections towards the administration based on an U.N. trusteeship. As a reversion of the islands would contradict the terms of the Japanese Surrender, there was no necessity to grant residual sovereignty to the Japanese.[693] The Taiwanese government considered the U.S. administration of the Okinawa islands to have no genuine link to the question of sovereignty. Instead, the Taiwanese government uttered a statement clarifying that the arrangement of military presence needs to be detached from the question of sovereignty and that it has no impact on it, either.[694]

7.11.2. Japan's stance about Japanese residual sovereignty

Japan is in favour of the U.S. assumption of residual sovereignty under their administration. The inhabitants of the Okinawa Islands were still Japanese nationals. Japan maintained the right to issue passports to its citizen on the Okinawa Islands. The Japanese Courts held e.g. that Japanese nationals still were to abide by the personal sovereignty's jurisdiction of Japan.[695] The U.S. could not determine the final fate of the territory. The provisions assured that once the U.S. withdrew from the islands, the territory *ipso facto* falls back on Japan. The islands' sovereignty was stripped off except that the "territorial sovereignty" remained to the Japanese.[696] Additionally, the Power (U.S.A.) exercising sovereignty on the islands paid an annual rent to the Japanese private proprietor of the islands what they had not done if the sovereignty would be duly theirs.[697] The U.S. accommodated the Japanese residual sovereignty. The Executive Order from President J. F. Kennedy reaffirmed this:

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[693] Han-yi Shaw, "Its History And An Analysis Of The Ownership Claims Of The PRC, ROC, And Japan", No. 3 Occasional Papers (1999), 39

[694] Han-yi Shaw, "Its History And An Analysis Of The Ownership Claims Of The PRC, ROC, And Japan", No. 3 Occasional Papers (1999), 114, 115

[695] Toshio Okuhara, "The Territorial Sovereignty Over The Senkaku Islands And The Problems On The Surrounding Continental Shelf", No. 11 Japan Annual of International Law (1967), 110

[696] Seiko Lee, "Territorial Disputes among Japan, China and Taiwan Concerning the Senkaku Islands", Vol. 3 Boundary & Territory Briefing, 23

[697] Jean-Marc F. Blanchard, "The U.S. Role in the Sino-Japanese Dispute over the Diaoyu (Senkaku) Islands, 1945-1971", No. 161 The China Quarterly (2000), 102 onwards

"*I recognize the Ryukyu to be a part of Japanese homeland and look forward to the day when the Security interest of the Free World will permit their restoration to full Japanese sovereignty. In the meantime, we face a situation which must be met with a spirit of forbearance and mutual understanding*"[698]

At the same time, it was the U.S. position that the San Francisco Treaty alone did not represent the final determinant of the sovereignty issue.[699]

7.11.2.1. Legal Construction of the U.N. trusteeship

The trusteeship system is part of the U.N. Charta, which does not clearly determine the question of sovereignty, either.

Art. 75 Charta of the United Nations

"The United Nations shall establish under its authority an international trusteeship system for the administration ad supervision of such territories as may be placed there under by subsequent individual agreements. These territories are hereinafter referred to as trust territories."

The introductory paragraph does not provide any indications to assume that the sovereignty of former enemies' territories shall be stripped off, either. The legal construction of a "trust", borrowed from the Anglo Saxon common law system, makes one assume that the core sovereignty should remain with Japan. In Anglo-Saxon law, the trustee is under a fiduciary obligation imposed by the contractual terms or by law so that they cannot take advantage of their position detrimental to the beneficiaries.[700] This legalistic device ascertains that the beneficiary (Japan) remains the owner (sovereign) and the trustee (U.S.A.) has the fiduciary (administrative) rights. Today it is well-recognized under scholars that a state's sovereignty, although it is not divisible in the eyes of most academics, it is limitable. As Crawford indicates, "*sovereignty is*

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[698] quoted in Jean-Marc F. Blanchard, "The U.S. Role in the Sino-Japanese Dispute over the Diaoyu (Senkaku) Islands, 1945-1971", No. 161 China Quarterly (2000), 118

[699] Seokwoo Lee, "Territorial Disputes among Japan, China and Taiwan Concerning the Senkaku Islands" Vol. 3 Boundary and Territory Briefing (2002), 26

[700] D.J. Hayton, The Law of Trusts (3rd ed., 1998), 4

not to be confused with the exercise of sovereignty and a state may continue to be sovereign even though important government functions are carried out, by treaty or otherwise, by another state."[701] Notwithstanding this brainstorming the various legal ideas shall be briefly sketched out.

7.11.2.2. Allies and associated Powers Sovereignty

It is refuted that the trustee's territories sovereignty lies in the hands of the Allies and the associated powers. This theory is quite far-fetched because there is no indication in the terms of the trusteeship that any sovereignty should be delegated to the common exercise of the Allies. Additionally, as the trusteeship itself was never regarded as a state entity, the nationality of an Okinawa citizen would have in this case been divided into five.[702]

7.11.2.3. United Nations Sovereignty

Some advocates back the idea that the Allies wanted to attribute sovereignty to the United Nations. Although the U.N. may be considered as subject to international public law these days, they rely too much on the consent of the administering authority (U.S.A.) for making decisions. Hans Kelsen stated that the U.N. could not establish itself as the administering authority or confer the administrative charge to a third state by a unilateral act.[703]

7.11.2.4. Joint Sovereignty

The supporters of this theory argue that the sovereignty is subdivided with the United Nations and the administering authority.[704] This position is contrary to the well-recognized principle of indivisible sovereignty. This concept must be declined as a shared sovereignty leads to a total confusion of the concept of sovereignty. In the interest of the reliability of public international law the legal title of sovereignty must not be subject to any joint tenure of such.

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[701] John Crawford, The Creation of States in International Law (1rst ed., 1979), 27
[702] R.N. Chowdhuri, International Mandates and Trusteeship Systems (1rst ed., 1955), 231; Chairmian Edwards Toussaint, The Trusteeship System Of The United Nations (1rst ed., 1956), 91
[703] Hans Kelsen, The Law of the United Nations (1rst ed., 1950), 693
[704] Lauterpacht, Vol. I International Law - Peace, in Oppenheim ed. (7th ed., 1952), 214

7.11.2.5. Administering agent has sovereignty

It could also be held plausible that the administering authority, in this case the U.S., is the sole owner of the title of sovereignty. The agents' national flags were flying in the territories.[705] This must be doubtful on grounds that the administering authorities are not entitled to transfer or to cede the territory to a third state. The agents were legally bound by the trust agreement; if the agent wanted the agreement to be amended, then they had to seek the consent of the U.N. organs. They had to submit annual reports to the U.N. and they were obliged to undergo U.N. supervisory inspections.[706] The U.N. still was empowered to revoke trusteeship agreements, although in this particular case, the U.S. could have vetoed any attempt of revocation.[707] In the theoretical case that the agent abandoned its prerogatives in the trusteeship administration, the territories would not become "terra nullius", either. All these arguments lead to the conclusion that at least the entire sovereignty could not have layn in the hands of the agents.

7.11.2.6. The inhabitants of trust territories retain residual sovereignty

One should bear in mind that the *de jure* sovereignty remains in the hands of the inhabitants of the territories. United States courts ruled that the Ryukyu Islands were foreign territories and its inhabitants were not American nationals so American decrees and statutes were not to be applied on the Okinawa Islands under the trusteeship.[708] The wording of the Treaty of San Francisco supports this stance. It only mentions the U.S. right to exercise all powers of administrative, legislative and jurisdictional power. The 1972 Reversion Agreement expressly returns the administrative rights to Japan.

7.11.2.7. Author's Conclusion

The last position seems the most consistent with the practical terms of the setting up of the trusteeship. The trustee's agent, in this case the U.S., did not

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[705] R.N. Chowdhuri, International Mandates and Trusteeship Systems (1rst ed., 1955), 238

[706] Chairmian Edwards Toussaint, The Trusteeship System Of The United Nations (1rst ed, 1956), 114; Supervisory Inspection see: South West Africa Case (Advisory Opinion), ICJ Reports (1955), 76; T.O. Elias, New Horizons In International Law (2nd ed., 1992), 315

[707] James Crawford, The Creation of States inInternational Law (2nd ed., 2006), 590

[708] See: 25 Dept. State Bulletin 452-9 (1952), quoted in: Oliver J. Lissitzyn, Judicial Decisions, Vol. 49 A.J.I.L. (1955), 89

dispose of the power of alienation over the administered territory. The right of alienation though is one of the key rights of the sovereign if total sovereignty is held. As this is not the case and since the concept of shared or joint sovereignty must be discarded, there cannot be any other conclusion than that it was Japan, which held a certain residual degree of sovereignty over the Okinawa / Senkaku Islands from 1951-1972.

7.12. Analysis of the Taipei Treaty of 1952

Neither the conferral of a contingent right to the U.S. (by virtue of Art. 3 of the San Francisco Treaty), nor the final U.S. proposal to the U.N. could entirely eliminate Japanese sovereignty over the disputed islands. It is possible that Japan lost its title of (residual) sovereignty by virtue of this Taipei Treaty. In Art. 4 of the Taipei Treaty, the Japanese conceded that all treaties prior to 1941 became void as a consequence of the war.

7.12.1. Taiwanese view towards the Treaty of Taipei

Taiwan argues that the islands' sovereignty was restored in favour of Taiwan by virtue of the Treaty of Taipei in 1952. After the conquest of Taiwan in 1895, the Japanese government annexed the disputed islands as well. As Art. 4 of the Taipei Treaty declared all Japanese wartime acquisitions prior to 1941 to be void. From their point of view; the islands fell back to Taiwan.[709]

7.12.2. PRC's view of the Treaty of Taipei of 1952

As the People's Republic of China does not recognize Taiwan and rejects its capacity to conclude legally binding agreements under international law, the PRC considers as well the Treaty of Taipei as void.[710] Interestingly, the Taiwanese argue that in the Treaty of Shimonoseki "Taiwan, together with all islands appertaining to Taiwan" was ceded to Japan. Consistently, it was

[709] Kim Byung Chin, The Northeast Asia Continental Shelf Controversy (1rst ed. 1980), 169

[710] Peter N. Upton, "Sovereignty over the Senkaku Islands", Vol. 52 Boston University Law Review (1972), 779; Han-yi Shaw, "Its History And An Analysis Of The Ownership Claims Of The PRC, ROC, And Japan", No. 3 Occasional Papers (1999), 41

illegal to hand over the Diaoyu and other islands appertaining to Taiwan to the United States.[711]

7.12.3. Japan's view of the Treaty of Taipei

The Japanese staunchly disagree that the Taipei Treaty refers in some way to the Senkaku Islands because the islands were incorporated as terra nullius in 1895.[712] The islands were already envisaged to be put under a trusteeship and the Treaty of Shimonoseki did not include the disputed islands.

7.12.4. Legal assessment of Taipei Treaty

The Japanese renounced all rights to the territories illegally snatched by greed prior to 9th December 1941. Does Art. 4 of the Taipei Treaty include the Diaoyu / Senkaku Islands, too? As stated above, the disputed islands arguably formed an integral part of the 1895 Treaty of Shimonoseki. This treaty was unquestionably signed prior to 1941 and was a treaty securing the territorial greed of Japan. Therefore, it must be logically deduced that this treaty was to include the disputed islands in Art. 4.[713] Therefore, the Taipei Treaty caused a nullification of the 1895 Treaty of Shimonoseki. As a result, the sovereignty of the Diaoyu / Senkaku islands must have been reverted to the "Chinese" by virtue of the Taipei Treaty. In a case of a renunciation of sovereignty, the recipient of it does not have to be expressly mentioned because a renunciation automatically restores the ownership of the former (Chinese) sovereign.[714] This means that the "Chinese", in case of a Japanese renunciation of sovereignty, received the legal title already as early as in 1952.[715] The Taipei Treaty caused a legal situation, which was incoherent with the practical terms of the trusteeship set up by virtue of the San

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[711] Beijing Review, "Tiaoyu and Other Islands Have Been China's Territory Sinve Ancient Times" January 7th , 1972, 13

[712] Han-yi Shaw, "Its History And An Analysis Of The Ownership Claims Of The PRC, ROC, And Japan", No. 3 Occasional Papers (1999), 23

[713] Taira Koji, "The China-Japan Clash Over the Diaoyu/Senkaku Islands," (20.9.2004), www.zmag.org/content/print_article.cfm?itemID=6269&sectionID=1, accessed on June 29th, 2007

[714] Shen, "China's Sovereignty over the South China Sea Islands", Vol. 1 Chinese Journal of International Law (2002), 139

[715] By contrast, the receiving countries for the cessions in the 1947 Peace Treaty with Italy were expressly mentioned; see: Richard W. Hartzell, "Understanding the San Francisco Peace Treaty's Disposition of Formosa And The Pescadores", Vol. 8 Harvard Asia Quarterly (2004), 1, www.taiwankey.net/dc/hartzell5.pdf, accessed on July 30th, 2007

Francisco Treaty. On the one side, “China” was the recipient of the islands sovereignty and on the other hand Japan held the de-facto marginal legal control over them. From today’s perspective, the holder of title of territory over the Diaoyu / Senkaku Islands has been alienated of its rights since 1952.

7.13. Legal Situation after creation of the Continental Shelf 1958

7.13.1. Chinese Geological argument

One of the Chinese refutations recurs on the principle of contiguity and of the Continental Shelf. As the islands are separated from Japan’s Okinawa islands by an approximately 2200-meter deep sea trench (Ryukyu trough), they are geologically located on the Chinese side.[716] This cannot mean but that the Diaoyu Islands are a natural extension of China’s land territory.[717]

Even if the islands were adjudged one day to China, the legal dispute over maritime space would remain in existence. China claims the broad margin of the continental shelf refuting that the shelf actually terminates at the trough close to the Ryukyu Islands at depth of 2,000 metres.[718] China’s claim is based on Art. 76 UNCLOS. This article lays down that an extended continental shelf in certain circumstances can go up to 350 nm or 100 nm beyond the 2,500-metre isobath.[719]

7.13.2. Japanese position: Equidistance Principle

Japan’s position consists of denying any legal importance to the up to more than 2700-meter deep Okinawa trench. Japan considers the entire East

[716] Mark J Valencia, “Ways forward East China Sea dispute”, www.isn.ethz.ch/news/sw/details.cfm?ID=16699, accessed on March the 12th., 2007; Choon-Ho Park, ”Oil Under Troubled Waters: The Northeast Asia Sea Bed Controversy“, Vol. 14 Harvard International Law Journal (1973), 212

[717] China Foreign Affairs University, “Diaoyu Islands Inalienable Part of China’s Territory”, Translation of a 2004 graduate student, on file with the author

[718] Douglas M. Johnston, Mark J. Valencia, Pacific Ocean Boundary Problems Status and Solutions (1rst ed., 1991), 108

[719] Chris Carleton, “Maritime Delimitation in Complex Island Situation”, in: Rainer Lagoni, Daniel Vignes, Maritime Delimitation (1rst ed., 2006), 154

Chinese Sea as one single area of Continental Shelf.[720] Not having signed the 1958 Convention of the Continental Shelf, the Japanese government still acclaims the technical exploitability clause of this Convention. This clause states that the continental shelf may extend to a territory measuring a depth exceeding the 200-meter margin.

Japan favours the principle of equidistance. The maritime boundary therefore shall be drafted by using the Senkaku islands as baselines. As a consequence, the delimitation shall be made by an agreement and by the usage of equitable principles taking into account the special circumstances of the case, just as the ICJ observed in the North Sea Continental Shelf Case.[721]

7.13.3. Taiwanese ratification of the Continental Shelf Convention of 1958

After the natural resources were discovered, the Taiwanese government hastened to sign to Continental Shelf Convention of 1958. The Taiwanese made the following reservation to the Convention:

a) *that the boundary of the continental shelf appertaining to two or more States whose coasts are adjacent to and/or opposite each other shall be determined in accordance with the principle of the natural prolongation of their land territories*
b) *that in determining the boundary of the continental shelf of the Republic of China, exposed rocks and islets shall not be taken into account.*

Given the temporal proximity of the signing of the treaty in 1970 to the oil discovery, it may be reasonably assumed that the reservations refer to the

[720] Douglas M. Johnston, Mark J. Valencia, Pacific Ocean Boundary Problems Status and Solutions (1rst ed., 1991), 108
[721] Y.H. Nieh, "Der Streit Um Die Klippeninseln Tiaoyutai Und Das Problem Des Festlandssockels Im Ostchinesischen Meer"; Vol. 4 Verfassung und Recht in Übersee (1971), 448; Toshio Okuhara, "The Territorial Sovereignty Over The Senkaku Islands And The Problems On The Surrounding Continental Shelf", Vol. 11 Japan Annual of International Law (1967), 105

Tai-yu-tai Islands. For the Taiwanese government was important to clarify that the boundary delimitation should not be affected by islands.[722]

7.13.4. Legal Assessment of the 1958 Continental Shelf Doctrine

Analysing the geological surroundings of the Eastern Chinese Sea there is no denying that the Diaoyu Islands are located within the area of the Chinese continental shelf. Nevertheless, it must be concluded that the Diaoyu / Senkaku Islands' location on the verge of the Chinese Continental Shelf must be held immaterial under public international law. The principle of the Continental Shelf is predominantly restricted to exploitation rights and not for the settlement of islands' sovereignty disputes. The principle is useless for determining the ownership of off-sea islands.

7.14. Estoppel by historical records

All claimant states could be estoppeled (*venire contra factum proprium*) to lay claim on the islands because they displayed a previous behaviour, which was contradictory to their claims today.

7.14.1. Japanese position towards Chinese textbooks and maps

After the World War II, some school textbooks and yearbooks were published in Taiwan and a world atlas edited in Beijing were published using Japanese place names. The Chinese put forward that as the islands were administered by the U.S., these books simply took over the names used by the former Japanese Empire. The publications just mirror this historical fact.[723]

7.14.2. Chinese position of Japanese historical documents

The first recorded Japanese documentation dates back to 1785 when the Japanese cartographer Li Tzu Pin published the book "*A general and illustrated map of the three countries*". This map not only used the Chinese word of "Diaoyutai", but also used the same red colour for the Chinese Fujian Province as for the islands. On the contrary, the Japanese Kumi Mountain

[722] Toshio Okuhara, "The Territorial Sovereignty Over The Senkaku Islands And The Problems On The Surrounding Continental Shelf", Vol. 11 Japan Annual of International Law (1967), 103, 104

[723] Tao Cheng, "The Sino-Japanese Dispute Over the Tiao-yu-tai (Senkaku) Islands and the Law of Territorial Acquisition", Vol. 14 V.J.I.L. (1974), 252

was indented in a yellow colour just like the other Ryukyu Islands. This proves that the Japanese at that time agreed that the Diaoyu Islands were Chinese territory.[724]

7.14.3. Legal Assessment of the geographic maps

7.14.3.1. Comparison to the Preah Vihear Case

In the 1962 Temple of Preah Vihear Case, the ICJ attributed the disputed area to Cambodia because Siam (Thailand) accepted a map as an annex of an interpretation agreement concerning a treaty of 1904 where the disputed territory was imputed to be French (Cambodian) territory. The Court ruled that Siam was precluded from claiming the territory because it had accepted the map's interpretation for many decades.[725] The Preah Vihear case exemplifies the high prerequisites of an estoppel in conjunction with the publicising of maps. In this present dispute, the maps were not annexed to an interpretation of an international agreement. The maps were not part of any binational agreement so that they are not comparable to the maps of the above-mentioned case.

7.14.3.2. Comparison to the Nuclear Test Case

A second argument can be put forward that the documents do not express a state's will to create legal bindings. In the East Greenland Case, a statement of the Norwegian Foreign Minister in response to a request of the Danish government was held as capable of making an international legally binding declaration.[726] On the other hand, in the Nuclear Test case (Australia v. France) the ICJ ruled that a unilateral public announcement of the French Foreign Minister to stop nuclear tests in the Pacific did not create any legal bindings on France. The Court denied that the French Minister had any intention to enter into an international obligation.[727] The documents' value is more similar to the circumstances of the Nuclear Test case. The international value Chinese schoolbooks or newspaper articles in the Renmin Ribao,

[724] Chinese Foreign Ministry, "lun diaoyudao zhuquan de guishu", handed out to the author by the Chinese embassy in New Delhi on July 15th, 2006
[725] International Court of Justice, Temple of Preah Vihear Case, ICJ Reports 1962, 32
[726] International Court of Justice, Eastern Greenland Case, ICJ Reports 1933, 70
[727] International Court of Justice, Nuclear Test Case, ICJ Reports 1974, 270

although they were probably approved by the Cultural Ministry, is not so far-reaching as to impute a state's will to enter into any obligations.

7.15. Legal Situation after the 1972 Reversion Agreement

7.15.1. Chinese Position towards the Okinawa Reversion Agreement

According to the Chinese, the Okinawa Reversion Agreement of 1972 does not affect the legal status of the islands. The U.S. administration over the Okinawa Islands in tandem with the Diaoyu Islands was unlawful anyhow. This Chinese stance was backed by the U.S. interpretation affirming the strict neutrality of the U.S. in this dispute and stating that the agreement does not prejudice the ownership of the islands.[728]

7.15.2. Japanese refutation about the Reversion Agreement

The Japanese put forward that after a period of residual sovereignty their state regained full sovereignty over the Okinawa Islands and the Senkaku Islands by virtue of this agreement. As the Treaty of Taipei's nullification of the pre-war thefts of territory does not include the Senkakus, Japan considers itself as the permanent holder of the title of sovereignty since 1895.[729]

7.15.3. Legal Assessment of the Reversion Agreement

Thanks to the Reversion Treaty, which came into effect on May 15th, 1972, the Japanese regained full administrative, legislative and jurisdictional powers over Okinawa including the Senkaku Islands.[730] This time, the American expressly mentioned the Senkaku Islands that they were to be included in the agreement.[731] The agreement's wording nowhere refers to a transfer of sovereignty. It just states that the U.S. relinquishes all rights they have received by virtue of Art. 3 of the San Francisco Treaty.

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[728] Chinese Ministry of Foreign Affairs, "diaoyudao wenti", handed out to the author by the Chinese embassy of New Delhi on July 15th; 2006, www.fmprc.gov.cn/chn/wjb/zzjg/yzs/gjlb/1281/t5797.htm

[729] Steven Wei Su, "The Territorial Dispute over the Tiaoyu/Senkaku Islands: An Update", Vol. 36 Ocean Development (2005), 49

[730] The Reversion Agreement is named an agreement; in legal terms it has the character of a binding binational treaty

[731] Department of State officer Charles Bray; see Victor H. Li, "China Off Shore Oil: The Tiao-yu Tai Dispute", Vol. 10 Stanford Journal of International Studies (1975), 151

Within the line of assumption that the Treaty of Taipei restored the Chinese juridical sovereignty over the disputed islands it must be concluded that America reverted only the political control to a recipient (Japan), which did not own the title of territory over the Senkakus. The U.S. was apparently rather poorly knowledgeable about the real legal status of the islands. They just equated the legal situation of the Diaoyu / Senkaku Islands with the one of the Okinawa islands.

The author agrees that the Japanese snatched the islands in 1895, but he contends that the *de jure* sovereignty was returned to the Chinese by 1952. The Chinese / Taiwanese are thus the de jure sovereign of the disputed islands since 1952. The Chinese regained the title of sovereignty in this year.

7.16. Japanese Prescription of the title of sovereignty

Despite their unfavourable position, the Japanese might have acquired a legal title by the principle of prescription. Most of the legal analysis of this conflict set the time range for the question of Japanese prescription between 1895 up to today. It is the author's contention that Japan was the lawful sovereign of the islands from 1895 until 1952 because a coerced territorial cession must be held as legal at that time. Thus, up to the time of World War II a possible Japanese prescription must not be discussed.

However, the only period of time where the Japanese could have prescribed the title is from 1952 – 1970. The Japanese enjoyed a peaceful residual political control for less than twenty years. The Chinese, being the holder of the territorial title, forgot to protest against the Japanese tenure of the islands up to the beginning of the 1970s. Afterwards the Chinese consecutively lodged protest against the Japanese ownership in multiple ways.

7.16.1. Chinese explanation of failure of protest

During the Cold War no Chinese protest of residual Japanese political control could be observed. China's first protest was lodged shortly after oil resources

had been discovered within the proximity of the islands. The spokesman of the Taiwanese Foreign Minister, Yu-Sun Wei, explained the Chinese inertia in the following terms:

"China's sovereign rights over Tiaoyutai do not permit any doubt historically or legally…It should be explained that when the islands were placed under the U.S. military control after WW II, the Chinese Government regarded this as a necessary measure based on the maintenance of regional security. China and the United States have reached an agreement on demarcation of area of patrol"[732]

According to the Chinese interpretation of international law, the failure to protest may never invalidate a valid title to territory. According to some Chinese scholars, the "shixiaoqude" principle is not considered as a legal principle recognized by the majority of international legal academics. For this reason, the Japanese acquisition cannot be consolidated by prescription.[733] As the Japanese might lay their claim on an acquisitive prescription one day, the Chinese Ministry of foreign affairs has turned down this doubtful principle.

7.16.2. Japanese stance to Chinese failure of protest

From 1945 to 1969, both Chinese state entities entirely forgot about the islands. Regarding this time - period no Chinese objection of the U.S. administration could be recorded. It is true that neither of the two Chinese systems was allowed to take part in the San Francisco Peace conference. Despite their absence their protest would have been be recorded. The Japanese put forward that the lack of Chinese objection means that the Chinese acquiescence to the Japanese residual sovereignty.[734]

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[732] Quoted in: Seokwoo Lee, "Territorial Disputes among Japan, China and Taiwan Concerning the Senkaku Islands", Vol. 3 Boundary and Territory Briefing (2002) , 22

[733] Chinese Foreign Ministry, lun diaoyudao zhuquan de guishu, handed out to the author by the Chinese embassy in New Delhi on July 15th, 2006

[734] Japanese Foreign Ministry, "The Basic View on the Sovereignty over the Senkaku Islands", www.mofa.go.jp/region/asia-paci/senkaku/senkaku.html, accessed on July 15th, 2006; Choon-Ho Park, "Oil Under Troubled Waters: The Northeast Asia Sea Bed Controversy", Vol. 14 Harvard International Law Journal (1973), 255

7.16.3. Legal Assessment of a Japanese Prescription

It must be concluded that the Chinese protest in the 1970s interrupted the peaceful possession of political control. The international tribunals have never determined the exact length of time necessary for a title acquired by prescription. Although in all cases pondering seriously upon the assumption of prescription, the international tribunals had to decide about a minimum time length of at least 50 - 100 years.[735] A time - period of less than 20 years is certainly not sufficient for the prescription of a title. Thus, the possibility of the Japanese acquisition of a title by the mode of prescription must be refused.

7.17. Conclusion of the sovereignty question

The question of the legal historical sovereignty must be decided in China's / Taiwan's favour albeit Japan maintains the entire factual sovereignty since 1972. The Japanese refutation of having incorporated terra nullius in 1895 cannot be backed by the legal facts. Looking at the legal situation by interpreting the international treaties, the position of Japan seems to be rather weak in the light of the 1952 retrocession of the islands to the Chinese. The Chinese regained the formal legal title by the Treaty of Taipei.

As aforementioned, under international law the ownership is not only about "rightful or wrongful" possession. It must be remembered that the permanent effective territorial control is another key factor in determining the ownership of islands. Japan has exercised full political, legal and administrative control over the islands since 1972 and some nominal control between 1952-1972. The legal and factual sovereignty of the islands will remain split between the parties of the conflict. In lieu of taking legal action before the international tribunals the claimant states will probably accept the current status-quo as it has the least inroads on their interest. Finally, it must be stated that China owns the title, but it is questionable, if this historical title in the light of continuous exercise of Japanese control still bears any material value in an unpredictable court procedure.

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[735] see for example: Chamizal Arbitration, Vol. 5 A.J.I.L. (1911), 805

8. Suggestions for a resolution of the islands dispute

The diverging opinions about the islands ownership nowadays exist for more than 110 years. Given this background a prospective resolution of the islands dispute has to be found by recurring on peaceful channels. From the author's perspective, it is very likely that the conflict will drag on for quite a long time. The only realistically viable solution that could be found one day is the one of a joint development of the maritime resources.

8.1. Diplomatic Methods

8.1.1. Claimants standpoints towards negotiation

The claimants' points of view concerning the final solution of the conflict are not favourable either. Regarding island disputes, the partys' official positions are very much alike. Whenever they are administering the islands they even deny the existence of a dispute. Japan, which administers the islands today, boldly puts forward that no conflict over the Senkakus exists.[736] On the contrary, Japan does not administer the Takeshima Islands; in this case, it proposed a procedure before an international tribunal.[737] China strongly disagrees on the point that no dispute over the Diaoyu Islands exists. At the same time, it has to be recalled that China adopts a very similar position in the South China Sea dispute. Regarding the Nansha Islands, the Chinese leader Deng Xiaoping said in 1988 that the Philippines and China should put the issue aside for the time being and take the approach of pursuing a joint development.[738] Wherever China upholds the administration of a certain

[736] Linus Hagström, Japan's China Policy (1rst ed., 2005), 122
[737] Howard W. French, "A Glimpse of the World: Islands with a past: Takeshima? Tokdo," http://www.howardwfrench.com/archives/2005/03/30/an_island_dispute_with_a_past_takeshimatokdo/, accessed on August 15th, 2007
[738] Chinese Ministry of Foreign Affairs, "Set aside dispute and pursue joint development," www.new.fmprc.gov.cn/eng/ziliao/3602/3604/t18023.htm, accessed on July 19th 2007

island it is reluctant to negotiate over the sovereignty. If this is not the case, its position towards negotiations is much more lenient.[739]

To sum up, China and Japan follow a rather similar pattern. Whoever is in the weaker position proposes ways for a final resolution; whenever the particular state is already in governmental control, the standpoint towards negotiations is very much the contrary.

8.1.2. Diplomatic resolution of the conflict

A comparison to other former conflicts outlines that most of them could be resolved by the means of diplomatic channels. The most logical idea would be to transfer this experience made by other states to the current conflict. The major advantage of a diplomatic solution is that each party would have to concede something and no party will entirely lose a court procedure.

In fact, this particular conflict has periodically given rise to some trouble. The diplomats' task in previous times did not cover the goal of a final solution of the conflict. Instead, they were forced to deal with secondary consequences such as for example, the installation of a permanent telephone hotline. The claimants do not dare to concede anything because each of them considers itself as the sole legitimate owner of the islands.

8.1.2.1. Negotiations

Negotiations are the handiest device to solve territorial disputes with neighbouring states. In the past, China successfully settled its boundary delimitations with Russia or India for example. The Kingdom of Denmark and Germany successfully complemented their boundary delimitations based on the 1969 ICJ award by an agreement.[740] As a mutual cession of territory is able to grant a transfer of sovereignty, this method is also a very convenient one.

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[739] compare: Michael Strupp, Chinas territoriale Ansprüche (1rst ed., 1982), 17, 18

[740] Jonathan Charney, Lewis Alexander, International Maritime Boundaries Vol. II (1rst ed., 1993), 1809

8.1.2.2. Mediation

Mediation is the prolonged annex of negotiation. The important difference lies in the involvement of a third party, which channels the communication, advances his own proposals, transmits and interprets each party's proposal to the other party. The prerequisite for mediation is that the disputants can agree upon a common mediator who must enjoy the credibility of both sides. The down side of mediation is that the result might be incomplete in the end and that failure is sometimes unavoidable.[741]

8.1.2.3. Conciliation

Conciliation is very similar to mediation; there is no clear line between the two dispute settlement structures. In the conciliation process, the third party role is a more semi – judicial one in evaluating the factual and legal issues. In other words, conciliation puts the third party intervention on a more formal footing and institutionalises the mediation process. Contrary to arbitration, the result of conciliation is not binding to the parties. [742]

8.1.2.4. Inquiry

Under Art. 50 of the ICJ Statute, the principle of inquiry was laid down so that parties may set up an impartial and independent body to determine the facts. In the past states only rarely resorted to inquiries.[743]

8.1.3. Reasons against a diplomatic settlement in these days

From the author's perspective, the inducement of a settlement of the conflict by the means of mediation, compromise or negotiations is in this case not very probable, either. In these days, the power distribution in the area is undergoing some considerable shifts. Some other factors also have an adverse effect obstructing a possible resolution. Firstly, all parties of the dispute publicised a firm and non negotiable stance of their rights. The claims based on historic rights downsized the leeway for a compromise. Second, all

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[741] John Merrils, "The means of Dispute Settlements", in: Malcom D. Evans (ed.), International Law (1rst ed., 2003), 533, 535

[742] John Merrils, "The means of Dispute Settlements", in: Malcom D. Evans (ed.), International Law (1rst ed., 2003), 537

[743] Gillian D Triggs, International Law: Contemporary Principles and Practices (1rst ed., 2006), 643

states' political relationships are imbued with distrust, if it is not hostile. The mutual dependencies cannot conceal that the historical pain inflicted on the other side exacerbated the distrust and impedes a peaceful resolution. Political congeniality has been found to be very conducive towards finding a boundary limitation in other conflicts.[744] The relationship between the two Chinese states is even less congenial than the historically strained ties with Japan in this case. The PRC does not recognize the Taiwanese government as an equal partner. China still threatens to attack the islands should Taiwan declare itself independent.[745] Thirdly, if the knowledge about the hydrocarbon reserves cannot be measured exactly, it is difficult to divide the territory among the claimants because each party is afraid of giving something away. Fourthly, there is a wide benchmark of diverse legal opinions on the relationship between old and new Marine Law, between the 1985 Convention of the Continental Shelf and the 1982 U.N. Convention and between the customary and the conventional compounds in the new laws of the sea.[746]

8.2. Institutionalised Means for a resolution of the conflict

8.2.1. Solution by the Security Council of the United Nations

None of the claimants has referred to the United Nations so far in order to shelve the dispute. The expulsion of Taiwan out of the U.N. at the beginning of the 1970s does not impede the U.N. from theoretically being put in charge of the dispute. Art. 2 (VI) U.N. Charter expressly provides that the U.N. should take care that states who are not members of the U.N. act in accordance with the principles laid down in the Charter. The enforcement measures can also be used against non-members, who are unwilling to abide by the principles.[747] In recent times, the number of UN-brokered peace settlements has declined in proportion to other methods.[748]

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[744] Douglas Johnston, Mark Valencia, Pacific Ocean Boundary Problems (1rst ed., 1991), 51
[745] Cheng-wen Tsai, "Development of Cross-Strait Policies", in: Jean-Marie Henckaerts (ed.) The International Status of Taiwan in the New World Order (1rst ed., 1996), 226
[746] Douglas Johnston, Mark Valencia, Pacific Ocean Boundary Problems (1rst ed., 1991), 51-56
[747] Hans Kelsen, The Law of The United Nations (1rst ed., 1950), 106
[748] John Darby, Roger Mac Ginty, The Management of Peace Processes (1rst ed., 2000), 5

8.2.1.1. Chapter VII of the U.N. Charter

The basic provision of the Charter relating to the authority of the Security Council is Art. 39. U.N. Charter. The prerequisites for the Security Council to be in charge of maintaining international peace and security in the case of a conflict are **a)** any threat of peace **b)** any breach of the peace **c)** any act of aggression. Among the three possibilities, the least severe infringement of peace represents the threat of peace.[749] The conflict has not escalated to a threat of peace so far. A threat of peace is prevalent when a state uses force or the threat to force to compel another state to meet its demands. The majority of the Charter commission members held that the support or forbearance to prevent armed bands crossing into the territory of another has to be considered as a threat to peace.[750] Chinese armed fishery boats intruded the area surrounding the Diaoyu / Senkaku Islands in the past. As the Chinese government consistently denies that these actions were state-sponsored, it is impossible to legally impute these intrusions to the Chinese state. There has been neither the use nor the menace to use state violence in the conflict.

8.2.1.2. Chapter VI of the U.N. Charter

The authority of the Security Council to settle conflicts as a body of peaceful dispute settlement are regulated in Art. 33 - 38 of the U.N. Charter. Pursuant to Art. 33 the maintenance of international peace and security must be endangered. As mentioned above, the conflict has not yet escalated to a point where one may assume that there is a threat to international peace. Art. 33 (II) U.N. Charter makes it clear that the Council should only call upon the parties to shelve the dispute when it is “likely to endanger” peace and security. As this dispute does not have such a feature, the Council must remain passive.[751]

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[749] Anthony Arend, Robert Beck, International Law & the use of force (1rst ed., 1993), 48; Edward C. Luck, UN Security Council (1rst ed., 2006), 22; Sven Bernhard Gareis, Johannes Varwick, The United Nations (1rst ed., 2005), 69

[750] Leland Goodrich, Anne Simons, The United Nations and the Maintenance of International Peace and Security (1rst ed., 1955), 355, 356

[751] compare: Leland Goodrich, Edvard Hambro, Charter of the United Nations (1rst ed., 1946), 144

8.2.1.3. No legal cognisance of the U.N. Security Council

It must be stated that since the parties keep the dispute at a non-military level the Security Council does even have the authority to make suggestions. According to Art. 27 (III) U.N. Charter the PRC has a permanent seat in the Council. Upholding this position, it has the power to veto any detrimental decision against Chinese interests. As a consequence, if the parties sought to resolve the dispute by the means of the Security Council, Japan never can meet the PRC on equal footing because it does not have a permanent seat in the Security Council.

8.2.1.4. Mediation by Secretary General of the United Nations

The “secretary-generals missions” on behalf of the U.N. may take pride in having successfully mediated the 1948-1949- crisis between Israel and Egypt.[752] In the strict sense, Art. 99 has been invoked overtly only in the 1960 Congo crisis and in the 1979 occupation of the American embassy in Tehran.[753] Art. 99 of the U.N. Charter emphasizes the cognizance of the Secretary General for such preventive diplomacy stating that he may bring any matter, which in his opinion may threaten the maintenance of international peace and security to the attention of the Security Council.[754]

As depicted above, the claimants have to first accept mediation at the highest political level. It is hardly imaginable that the parties would agree on a mediation effort under the supervision of the U.N. Secretary-General. All in all, the idea of shelving the issue by the means of the U.N. must be ruled out.

8.2.2. International Court of Justice (ICJ)

Similar to many territorial conflicts before, one could submit the conflict for a final award to the International Court of Justice (ICJ) in The Hague. The problem is that in no international stipulation is the mandatory cognisance of the ICJ laid down. First, the potential parties have to agree upon a Court

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[752] Kim Hunter Tunnicliff, The United Nations And The Mediation Of International Conflict (1rst ed., 1984), 47
[753] Bruno Simma, The Charter of the United Nations – A Commentary (1rst ed., 1994), 1048, 1049
[754] Jean Combacau, Serge Sur, Droit international public (7th ed., 2006), 642

procedure before the ICJ. This will most likely not take place in the foreseeable future.

8.2.2.1. Compulsory jurisdiction of the ICJ (Art. 36 II Statute)

All members of the U.N. are automatically parties of the ICJ Statute. Access to the ICJ cannot be equated with any state being is ipso facto subject to the ICJ jurisdiction. The principle of sovereignty requires that a state cannot be brought before court against its express will.[755] Only Japan accepted the compulsory jurisdiction of the ICJ laid down in Art. 36 (II) of the ICJ Statute on 15th September 1958. This means that other countries can take Japan to trial without further Japanese consent.[756] The Taiwanese National government signed the faculty clause of Art. 36 (II) on 26th October 1946, which laid down the cognizance of the ICJ under the condition that the other state also ratified the compulsory clause.[757] On September 5, 1972 the PRC stated that it would not recognize this legal obligation established by Taiwan. Up to today, the PRC has made no efforts to give its consent for a compulsory jurisdiction that international disputes shall be shelved before the ICJ. The PRC's attitude towards the ICJ implies that a resolution of the territorial conflict on the grounds of an adjudication of the ICJ is not possible.

8.2.2.2. The consensual basis of jurisdiction on Art. 36 (I) ICJ Statute

A peaceful resolution could be perceivable by a consensual submission of the case to the ICJ. Art. 36 (I) determines that the tribunal can deal with cases referred to it by agreement of the parties.[758] Notwithstanding Taiwan virtually being an independent state, neither Japan nor the PRC recognize Taiwan as a legally sovereign state. Being neither a member of the U.N. nor the ICJ Statute[759], Taiwan could become a party of a Court procedure by virtue of Art. 35 (II) of the ICJ Statute. This specific legal provision requires the (very

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[755] Elihu Lauterpacht, Aspects Of The Administration Of International Justice (1rst ed., 1991), 55

[756] International Court of Justice, "Declaration Recognizing the Jurisdiction of the Court as Compulsory", www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3, accessed on June 17th, 2007; Guiqin Wang, Territoriale Streitfragen im Südchinesischem Meer (1rst ed., 2005), 112

[757] R.P. Anand, Compulsory Jurisdiction of the International Court of Justice (1rst ed., 1961), 54

[758] Shabtai Rosenne, The International Court of Justice (1rst ed., 1957), 261

[759] "States entitled to appear before Court", International Court of Justice www.icj-cji.org/jurisdiction/index.php?p1=5&p2=1&p3=1&sp3=3, accessed on June 17th, 2007

unlikely) consent of the Security Council.[760] Given the tense China / Taiwanese relation the PRC will probably veto any proposal in the Security Council. In any case, the PRC will never be willing to call upon an international tribunal against Taiwan because this could lead to an implicit recognition of Taiwan.

8.2.2.3. Advisory Opinions of the ICJ

Under Art. 65 of the ICJ Statute the Court is entitled to give an advisory opinion on "any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a "request." An advisory opinion is not binding on the parties of the conflict.[761] The ICJ has made clear that this legalistic device does not allow the states to circumvent the necessity of the other state's consent for a court procedure.[762] Again, the unresolved Taiwan question impedes a request for an advisory opinion.

8.2.3. Jurisdiction of the ITLOS

China and Japan are members of the 1982 UNCLOS Treaty. Given this background it sounds reasonable to find a solution on the basis of the 1982 UNCLOS convention. Art. 279 UNCLOS obliges the parties to seek a solution of their legal issues only by peaceful means.

If the parties could not agree upon a common resolution, a member state of UNCLOS is entitled to seize several court procedures, which are laid down in Art. 287 (I) UNCLOS. Under Art. 287 (I) it is possible for the parties to resort to the ITLOS, the ICJ or a special arbitration chamber.[763]

According to Art. 21 of the ITLOS Statute the tribunal has, unless the parties confer special authority to it, the only power to judge legal question in regard to legal questions arising in a context of the UNCLOS Convention. An important principle of maritime sovereignty is that "land reigns over the sea".

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[760] Shabtai Rosenne, The International Court of Justice (1rst ed., 1957), 232
[761] Jean Combacau, Serge Sur, Droit International public, (7th ed., 2006), 643
[762] Gillian D Triggs, International Law: Contemporary Principles and Practices (1rst. ed., 2006), 675
[763] Henry G. Schermers, Niels M. Blokker, International Institutional Law (4th ed., 2003), 438

Primarily, the islands dispute is a conflict about land and not about the sea. The question of sovereignty over land territory is not regulated in UNCLOS. It has to be clearly understood that the UNCLOS Convention only provides legalistic assistance in the case of, e.g. maritime boundary delimitation. It has been pointed out that the parties of the conflict are not claiming the islands for its territory, but for the economic value of the islands' Exclusive Economic Zone (EEZ). The UNCLOS Convention does not provide any legal devices to resolve territorial land disputes. On the contrary, Art. 298 (I,a,i) UNCLOS provides that any signatory state may declare at any time that it does not accept a court procedure in regard to the sovereignty over insular land territory.[764]

For this reason, the UNCLOS Convention must be regarded as a worthless recourse for the islands sovereignty question.

8.2.4. Arbitration

In a case where a diplomatic dispute settlement structure fails, the parties of a conflict may opt to refer the case to an arbitrational tribunal. Contrary to other forms of settlements, an arbitration award is always binding to the parties.[765] The main difference between arbitration and a judicial settlement lies in the method of selecting the members. The privilege of appointing the arbitrators ensures that the states feel a certain degree of confidence.[766] The arbitration experience proved that dissenting opinions of national arbitrators against their state are very rare. The major advantage of arbitration towards the rules of the ICJ is that an arbitration award can be kept secret.[767] As it is important for Asian nations to save face, this might be a very conducive way to resolve the case.

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[764] Alex G. Oude Elferink, "The Islands in the South China Sea: How Does Their Presence Limit The Extent of the High Seas and the Area and the Maritime Zones of the Mainland Coast", Vol. 32 Ocean Development & International Law (2001), 172; Jonathan I. Charney, "Central East Asian Maritime Boundaries And The Law Of The Sea", Vol. 89 A.J.I.L. (1995), 754

[765] Gillian D Triggs, International Law: Contemporary Principles and Practices (1rst ed., 2006), 646

[766] G. Schwarzenbeck, Manual of International Law (6th ed., 1976), 195

[767] Christine Gray, Benedict Kingsbury, "Development In Dispute Settlement: Inter-State Arbitration Since 1945, Vol. 63 B.Y.I.L. (1992), 110

8.2.5. ASEAN

One needs to raise the question of whether there is a multilateral organization, which is comparable to the OSCE in the western world and which could secure the dangers that possibly could arise from a military clash. The answer is not very affirmative: In the entire region of Asia there is no regional multilateral entity capable of handling security questions at the highest political level.

8.2.5.1. 1992 Manila Declaration

Fearing a military clash in the South China Sea the ASEAN organisation issued the Manila Declaration in 1992 ”urging all parties concerned to exercise restraints in order to create a positive climate for the eventual resolution of all disputes.” The sad truth about the declaration is that the disputants could not agree upon a binding treaty. Despite this code of conduct, many incidents occured in the past.[768] Adverse Chinese military actions, for example the destruction of the Philippine military structure on the Mischief Reef rendered the 1992 declaration null and void.[769]

8.2.5.2. Regional Forum (ARF)

Both Japan and China are not member of the ASEAN group.[770] Although not ASEAN member, China and Japan joined the annexed Regional Forum (ARF), which comprised a total of 25 member states. This forum aims to promote confidence building, to enhance preventive diplomacy and to elaborate the approaches to conflicts.[771] There are many prevailing factors causing that a viable multinational effort to establish such a political structure is doomed to failure from its beginning. First, the idea of the creation of such a multinational entity is not deeply entrenched in Asian mentality. As result of a lack of common values and common political philosophy, the concept of a

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[768] Mark J. Valencia, “South China Sea Agreement: Close but No Cigar”, No. 1 Taipei Review (2003), 36: Zou Keyuan, “A New Model of Joint Development for the South China Sea”, in: Recent Developments in the Law of the Sea and China (1rst ed., 2006), Kuen-chen Fu (ed.), 158

[769] ICE Case Studies: “Spratly Islands”, www.americanedu/ted/ice/spratly.htm, accessed on April 27th, 2007

[770] Aktuell 2006, (1rst ed., 2005), 800

[771] Russell Org, China’s Security Interests in the 21rst Century (1rst ed., 2007), 122
ASEAN Overview, www.aseansec.org/328.htm, accessed on June 25th, 2007

regional community applies only in the most limited sense in Asia.[772] Secondly, past Japanese imperialism committed in the entire Asian region is not forgotten. This makes it difficult for other states to accept Japan as an equal security partner. Thirdly, as China expects to play the leading role in Asia, it is also very reluctant to line up with less significant countries on the same diplomatic level. Fourthly, the final amount of ASEAN members is disputed. Establishing an East Asian Community China insists that the ASEAN body should be limited to the ASEAN+3 (China, Japan, South Korea) so that it may ensure its leadership.[773] Fifthly, the states disagree on the U.S. military presence in the region.[774] Last but not least, China emphasised that the forum is for exchanging views for negotiating and not a forum to negotiate; it resisted expanding the purview of ARF to include the Spratly dispute.[775]

8.3. Obstacles of a formal resolution based on maritime delimitation

8.3.1. China / Taiwan question overshadows the islands dispute

China and Japan have upheld mutual diplomatic ties since 1972. Taiwan as the third claimant is an isolated member of the international community. China does not at all recognize the virtually existing state Taiwan; Japan stays in rather unofficial contact with the ROC. Unlike other territorial conflicts, this dispute is overshadowed by the unresolved China-related issue of, which state is to be considered the lawful representative of the Chinese people. The PRC would never upgrade Taiwan's political status by ratifying a bilateral treaty with the ROC. Unless the China / Taiwan question is shelved, a diplomatic solution seems to be impossible because no Chinese state entity would accept a resolution stipulated by the other one. The two political

[772] Guifang Xue, China and International Law & Policy (1rst ed., 2005), 165
[773] The National Institute for Defence Studies, East Asian Strategic Review 2007 (1rst ed., 2007), 5
[774] Alan Collins, "The Security Dilemmas of Southeast Asia", (1rst ed., 2000), 155; Vincent Kelly Pollard, Globalization, Democratization and Asian Leadership (1rst ed., 2004), 101
[775] ICE Case Studies: "Spratly Islands", www.americanedu/ted/ice/spratly.htm, accessed on April 27th, 2007

systems are too opposed to each other for a reunification under the formula "one country, two systems" (like in Hong Kong) to be reached.[776]

8.3.2. Asian mentality is very face-loving

Generally, nations seem to consider it convenient to resort to third party adjudication, whenever well-established rules of international law can control the matter and whenever the subject matter is of a lesser, more secondary importance to the disputants' vital national interests.[777] In respect to the islands these two preconditions have to be denied on the grounds that any legal interpretation, no matter in whose favour, will remain rather shaky since the dispute concerns vital interests (oil, nationalism) of the claimants.

Despite the abstract possibility of a Court procedure before an international tribunal it must be stated that presumably all claimants are very resentful towards such an idea. As a judicial decision would emanate from the international jurists, Asian political leaders could easily divert the blame of an unfavourable result to the Court. There is no chance that the islands could be distributed among the claimants; the judicial award is a "zero-sum game". As the conflict is entwined with other factors (nationalism, oil), each party of the potential case has too much to lose in comparison to what it has to put at risk. Given that Asian countries stick very much to face-loving ideas, a defeat before an international tribunal would result into a too unpredictable domestic turbulence.[778] From this perspective, it is understandable that the claimants lack the necessary political will to take legal action against the other states.

8.3.3. Summary why all methods possibly will fail

Given the political background it is not possible to find a solution on the basis of territorial repartition. The only possible viable solution is that of a joint development of the natural resources. In this proposal the crux of the matter is that the territorial status of the disputed islands must be circumnavigated.

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[776] Jean-Marie Henckaerts, "Self Determination in Action for the People of Taiwan", in: Jean-Marie Henckaerts (ed.) The International Status of Taiwan in the New World Order (1rst ed., 1996), 245

[777] F. Friedmann, O.Lissitzyn & R. Pugh, International Law (1rst ed., 1996), 243, 244

[778] Wei-chin Lee, "Troubles under the Water: Sino-Japanese Conflict of Sovereignty on the Continental Shelf in the East China Sea", Vol. 18 Ocean Development and International Law (1987), 596

8.4. Joint Development

In September 2005, Japan proposed a joint development in the gas fields of Tianwaitian, Chunxiao, Duanxiao and Longjing. China did not make any efforts towards such a cooperation fearing that such a project would imply a tacit recognition of the Japanese EEZ. China insists that it did not accept the median line and that the Chunxiao field was located on the Chinese side of the boundary.[779] As claimant states will not overcome their fretfulness in the near future, this represents the only realistic resolution. This presumably easy to manage task still faces some predicaments.

8.4.1. Different Conceptions of the claimants

First, the parties must overcome their different understandings of the term joint development. Japan thinks that China is to make the first step by stopping its exploitation in the Chunxiao / Shirakaba field, which is situated on the Japanese side of the median line as claimed by Japan. On the other hand, China believes that Japan will interfere with the exploitation of fields on its side of the median line. The Chinese hold that a joint development is only feasible in the area between the median line and the claimed continental shelf maritime space.[780]

8.4.2. Important factors of an equitable solution for a JDZ

Maybe it is possible to transfer the principle of equity developed for the delimitation of maritime sea space to the model of a joint development zone. In previous ICJ precedents, equity in regard to the continental shelf was determined by geological and by geomorphologic factors beyond the 200 nm zone.[781] Within the 200 miles from each coast natural prolongation, geology and geomorphologic factors only play a minor role. Equidistance, which has been adjusted by the proportionality of the coast length and access to natural

[779] Marc J. Valencia, "The East China Sea Dispute: Context, Claims, Issues, And Possible Solutions", Vol. 31 Asian Perspective (2007), 132
[780] Marc J. Valencia, "The East China Sea Dispute: Context, Claims, Issues, And Possible Solutions", Vol. 31 Asian Perspective (2007), 158
[781] Chris Carleton, "Maritime Delimitation in Complex Island Situation" in: Rainer Lagoni, Daniel Vignes, Maritime Delimitation (1rst ed., 2006), 156

resources were the decision-making factors.[782] The 1985 Malta / Libya case was the first award, in which the court significantly adjusted the median line solution in favour of state with the longer coast. The coast length ratio between Libya and Malta (distance between the coasts: 195 nm) was 8:1, which resulted in an adjustment of 18 miles of the maritime boundary.[783] As a result, one should not attribute too much attention to the different coast length ratio between Japan and China (36:64) because the two/thirds ratio of the present case may only slightly dislocate the maritime boundary. To conclude, the principle of equity does not present the ultimate resolution for a precise maritime area distribution, either.

8.4.3. How much effect has been granted to the islands?

Hence, one must shed light on the question how much effect has been granted to remote offshore islands in previous cases. Actually, of the 157 maritime agreements signed up to the year 2000, 124 (79%) contained in some form the principle of equidistance.[784] About 270 boundaries remain to be delimited.[785] On the contrary, state practice varies considerably on the question of how much effect is granted to remote offshore islands. If a state used remote islands as base-points for its Continental Shelf, then the delimitation vis-à-vis an adjacent state was put into practice by different means. Depending on the case, islands were **a)** completely ignored (North Sea Continental Shelf Case) **b)** given half effect (Scilly Islands between the U.K. and France)[786], **c)** granted full effect (Barbados / Trinidad and Tobago award or the agreement between Spain and Italy in regard to Minorca) and **d)** a twofold method evolved in the Channel islands. In this case, the Channel

[782] Jonathan I. Charney, "Central East Asian Maritime Boundaries And The Law Of The Sea", Vol. 89 A.J.I.L. (1995), 740; M.D. Blecher, "Equitable Delimitation Of Continental Shelf", Vol. 73 A.J.I.L. (1979), 65

[783] Chris Carleton, "Maritime Delimitation in Complex Island Situation" in: Rainer Lagoni, Daniel Vignes, Maritime Delimitation (1rst ed., 2006), 161

[784] Victor Prescott, Clive Schofield, The Maritime Political Boundary of the World (2nd ed., 2005), 239

[785] Chris Carleton, "Maritime Delimitation in Complex Island Situation", in: Rainer Lagoni, Daniel Vignes, Maritime Delimitation (1rst ed., 2006), 156

[786] Chris Carleton, "Maritime Delimitation in Complex Island Situation", in: Rainer Lagoni, Daniel Vignes, Maritime Delimitation (1rst ed., 2006), 157

Islands were ignored, but at the same time an enclave was adjudged to them.[787]

8.4.4. Extra - territorializition of the conflict

The only viable solution is the ex-territorializition of the islands dispute; in other words the parties must agree upon evading and circumnavigating the question of the islands' sovereignty and must lay their focus on the repartition of exploitation rights.[788] The first step would be to agree on a 12 nautical mile territorial sea enclave around the islands and to declare them to be a neutral zone. This implies that the territorial and jurisdictional questions are separable and that the latter maybe resolved before the first one.[789]

8.4.5. Taiwanese claims

Taiwan and China do not regard themselves as foreign countries, but each legal entity is entitled to its own maritime rights.[790] As the relations between the two Chinese state will probably remain at an irresolvable impasse in the foreseeable future, the only realistic option is for Taiwan to be forced to renounce its specific Taiwanese claims. From today's point of view, only the U.S., possibly be supported by Japan, might be capable to induce Taiwan to do so. Under such a joint development proposal, Taiwan would not repeat its claims to the seabed beyond the median line based on its claim of jurisdiction over the mainland.[791]

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[787] M. D. Blecher, "Equitable Delimitation Of Continental Shelf", Vol. 73 A.J.I.L. (1979), 60-79; Barbara Kwaitkowska, "The 2006 Barbados/ Trinidad and Tobago Award: A Landmark in Compulsory Jurisdiction and Equitable Maritime Boundary Delimitation", Vol. 22 The International Journal of Marine and Coastal Law (2007), 51; G. Francalanci, T. Scovazzi, Lines In The Sea (1rst ed., 1994), 220; Gerard J. Tanja, The Legal Determination of International Maritime Boundaries (1rst ed., 1990), 312; M.D. Blecher, "Equitable Delimitation Of Continental Shelf", Vol. 73 A.J.I.L. (1979), 77

[788] A comparable example was the 1965 agreement between Kuwait and Saudi Arabia, which partitioned an overland neutral zone; see: G.L. Kesteven, "The Resilience of Shrimp Resources" Vol. 10 Ocean Yearbook (1993), 122

[789] Marc J. Valencia, "The East China Sea Dispute: Context, Claims, Issues, And Possible Solutions", Vol. 31 Asian Perspective (2007), 159; Miyoshi Masahiro, "Seabed Petroleum In The East China Sea", 6 www.wilsoncenter.org/topics/docs/Miyoshi_Masahiro.pdf., accessed on July 23rd, 2007

[790] Zou Keyuan, China's Marine Legal System and the Law of the Sea (1rst ed., 2005), 46

[791] Marc J. Valencia, "The East China Sea Dispute: Context, Claims, Issues, And Possible Solutions", Vol. 31 Asian Perspective (2007), 162

8.4.6. Sino Japanese Fishery Agreement a model for solution?

Up to today, China has signed three bilateral fishery agreements with Japan, South Korea and Vietnam. The most important for this case is the 1997 fishery agreement between China and Japan to cooperate in the East China Sea.[792] In this agreement, China and Japan agreed on three different zones. The principle of coastal jurisdiction applies to 52 miles from their respective baselines in the area between 27° N and 30, 40° N latitude. Beyond that line joint regulations apply; a certain number of fishing boats of both states may pursue their business without prior approval of the other state's government.[793]

The island-affected area is omitted to safeguard the status-quo.[794] Art. 7 stipulates that a provisional measure zone south of and parallel to 27°N (proximate to the disputed islands) is set up in the Eastern Chinese Sea, where both parties will refrain from exercising their jurisdiction towards fishermen of the other state.[795]

8.4.7. Korean-Japanese Joint Development Agreement

In this agreement, the boundary line in the northern section was delineated that it pushes slightly more to the Korean coastline along the equidistance line between the two states. The Joint Development Zone is divided into geographical subzones, where each state should authorize one or more concessionaires to explore and exploit the resources.[796] The concessionaires of both states shall enter into operating agreements, determining the sharing

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[792] David Rosenberg, "Managing The Resources of the China Seas", (July 1rst, 2005), www.zmag.org/content/print_article.cfm?itemID=8205.&sectionID=1, accessed on July 23rd, 2007

[793] Mark J. Valencia, Yoshihisa Amae, "Regime Building in the East China Sea", Vol. 43 Ocean Development & International Law (2003), 195; People's Daily, New Sino-Japanese Fishery Agreement to TakeEffect, www.english.peopledaily.com.cn/english/200003/24/eng20000324W104.html, accessed on July 23rd, 2007

[794] S. W. Su, "The Territorial Dispute over the Tiaoyu/Senkaku Islands: An Update", Vol. 36 Ocean Development & International Law, 56; English text see: Vol. 41 Japanese Annual of International Law (1998), 122-129

[795] Masahiro Miyoshi, "New Japan-China Fisheries Agreement", Vol. 41 The Japanese Annual of International Law (1998), 37, 40

[796] Clive R. Symmons, The Maritime Zones Of Islands In International Law (1rst ed., 1979), 188; Rainer Lagoni, "Interim Measures Pending Maritime Delimitation Agreements", Vol. 78 A.J.I.L. (1984), 361; Miyoshi Masahiro, "Seabed Petroleum In The East China Sea", 7 www.wilsoncenter.org/topics/docs/Miyoshi_Masahiro.pdf., accessed on July 23rd, 2007

of the profits and the expenses.[797] Jurisdiction is regulated as follows: **a)** the share of a concessionaire of one party is considered as natural resources extracted from the continental shelf of that party, **b)** each subzone is governed by the laws of the state, which has granted concessions and **c)** neither state is entitled to impose taxes or other charges on profits of the other party.[798]

8.4.7.1. Proposal of a Chinese - Japanese Joint Development Zone

So far, a ratification of such a joint development does not seem very probable. The region is looking impatiently towards continuing economic growth in order to grant a higher standard of living to its citizen. The size of a state's territory has lost its value in determining the state's power position in the global community. A military clash would do more harm to the PRC than it could possibly grant benefit to it because economic growth needs a peaceful and stable environment. If the exploitation rights are distributed in favour of the rising giant China one day, the more powerful China might be satisfied with a formally "extra-territorialized" status of the islands, which will remain administered by Japan.

8.4.7.2. Proposal of a third line in the northern zone

One option consists of the establishment of a zone north of the approximate 27° N latitude, whose delineation would be consistent with the one of the Japanese Chinese Fishery Agreement. As the question of the Diaoyu / Senkaku Islands' ownership did not affect the delimitation above 27° northern latitude, the parties were able to agree on common fishery stipulations. According to the jurist Valencia the equidistance principle should be applied between China and Japan in this zone.[799]

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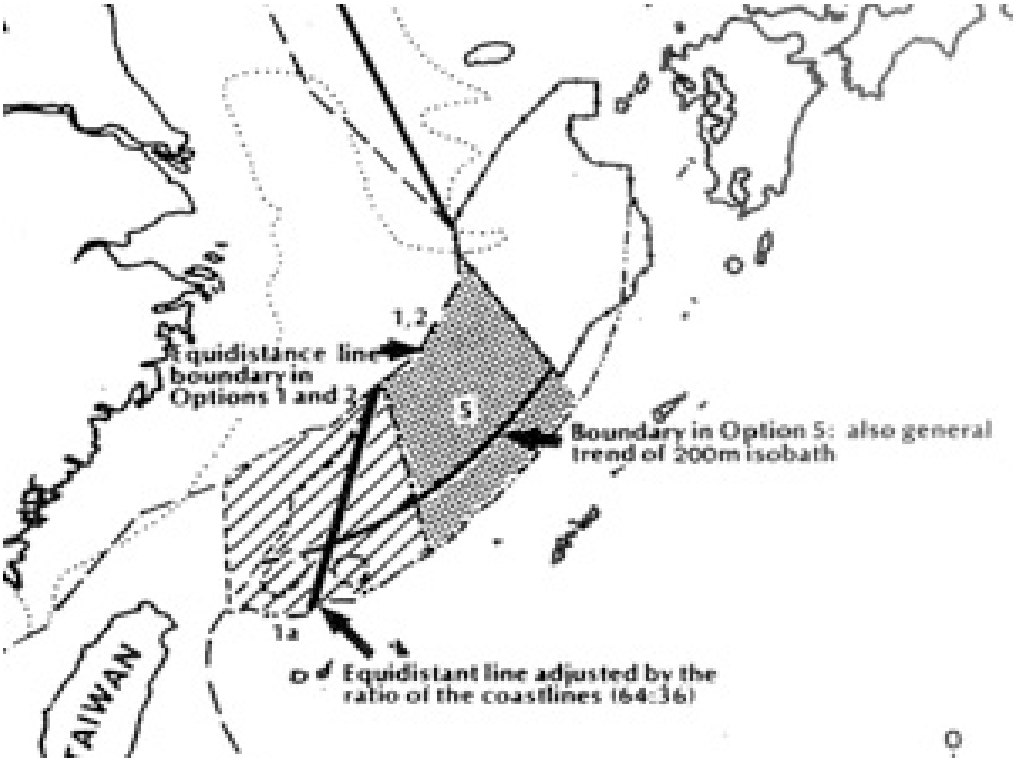
[797] Joint Development Agreement, on file of the author
[798] Rainer Lagoni, "Oil And Gas Deposits Across National Frontiers", Vol. 73 A.J.I.L. (1979), 225
[799] Marc J. Valencia, "The East China Sea Dispute: Context, Claims, Issues, And Possible Solutions", Vol. 31 Asian Perspective (2007), 160



Source: Marc J Valencia; see footnote 915

From the author's perspective, this proposal is an unrealistic option. The continental shelf claim and the Japanese median line also overlap in the area north of 27° degrees. The author therefore contends that the median line between the isobath (Ryukyu trough) and the equidistance line between China and Japan should be the maritime border between the disputants. Consequently, the author's contention lies in a compromise between the continental shelf and the median line principle. This so-called "third line" shall be fixed up by using exact geographic coordinates.

8.4.7.3. Southern Zone

Valencia proposes several modes to do a joint development in the southern zone, which comprises the area of the disputed islands. While ignoring the contested islands, the repartition of territory could be done either by the equidistance principle or by a median line, which would have been adjusted according to the ratio of the length of the states (China and Taiwan) coastlines

(64:36). The Japanese median line and the Chinese isobath boundary are connected via a dividing line subdividing the area according to this ratio.[800]

8.4.8. Author's point of view

From the author's perspective, this cannot be held as a political viable option. It will not be politically viable because of the following reasons. As may be deduced from previous awards the ratio of the coastline length is not an exact parameter how maritime space should be divided; it is just an auxiliary tool to complete an equitable result. The length of the coastline has so far never been the only determining factor for a repartition of sea space, but only played a reasonable degree of relevance.[801] The largest resources were discovered on the Chinese side of the Diaoyu / Senkaku Islands. No matter which scenario is applied, the Japanese will have either to concede the loss of the islands or a tremendous loss of exploitation capacity. As the Japanese currently administer the islands, they had to abandon too much whilst being able to gain too little in such a deal.

8.4.9. Condominium settlement in the southern zone

A condominium means that the area would be administered jointly with a dual jurisdiction. The exploitation of the resources in the condominium would be administered by a committee of China and Japan, which will enable it to operate. The profit distribution must be established according to the ratio how the seabed is delimited among the claimants. The most delicate point of such a project is the distribution of the profits. As the resources are not entirely explored and as current data contains un- predictabilities, it is rather imaginable that the dispute will continue under a different setting.[802] The idea of a condominium still may be conducive on the grounds that a common exploitation of the resources is the only viable way in this dispute.

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[800] Marc J. Valencia, "The East China Sea Dispute: Context, Claims, Issues, And Possible Solutions", Vol. 31 Asian Perspective (2007), 160

[801] compare: Barbados/Trinidad and Tobago Award, in: Barbara Kwaitkowska, "The 2006 Barbados/ Trinidad and Tobago Award: A Landmark in Compulsory Jurisdiction and Equitable Maritime Boundary Delimitation", Vol. 22 The International Journal of Marine and Coastal Law (2007), 51; Jonathan I. Charney, "The Delimitation of Ocean Boundaries", in: D. G. Dallmeyer, L. DeVorsey (ed.), Rights To Oceanic Resources (1rst ed., 1989), 41

[802] Monique Chemillier-Gendreau, Sovereignty over the Paracel and Spratly Islands (1rst ed., 2000), 142

8.4.10. Only conceivable solution: Subzones in the southern zone

From the author's perspective, any current attempt to resolve the dispute on the basis of distributing the sea area will fail. It is not possible to award or adjudicate the islands to neither of the claimants. Therefore, the disputed islands regime shall be left for a future resolution. With this background, the only conceivable solution might be of adopting the Joint Development model of multiple subzones (JDZ) in the southern zone. Thus, the subzone model of the Japanese Korean JDZ should be transferred to the southern zone. The zone's delimitation shall be as following: The JDZ borders shall enclose the Japanese median line claim on the eastern side and the Chinese continental shelf claim on the western side. The territory of these two overlapping claims is almost equal to each other so that each disputant will concede about the same amount of sq miles to the JDZ. In this scenario, the two states enjoy a equal rights and obligations. Each party is required to nominate at least one concessionaire for each subzone; the respective concessionaires of both parties will enter an agreement. In this contract, the concessionaires must agree on a sharing of revenues, the profits of either concessionaire will be taxed in the respective state. It shall be stipulated that the JDZ does not prejudice each party's sovereign rights over the overlapping claims.[803]

Any proposal for a joint development in this area needs to keep in mind that the vast part of supplies is situated towards the Chinese side and on the Chinese continental shelf. At the same time the exact extend of the resources is beyond the scientists' knowledge. Therefore, any stringent demarcation of the area will be doomed to failure. The major advantage of such a model is that the disparate supplies in each subzones would be shared equally and that the risk of unpredictability of the quantities of supplies is equally balanced. If any concessionaire should seek to siphon the other subzone's resources, this act will at least harm the own national company's interest as well.

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[803] Zhiguo Gao, Jilu Wu, "Key Issues In The East China Sea", 3 www.wilsoncenter.org/topic/docs/Zhiguo_Gao_and_Jilu_wu.pdf, accessed on. July 23rd, 2007

8.4.11. Probability of implementation

It is very likely that the conflict will drag on for a while. An implementation of a negotiation / mediation effort will be largely dependent upon the claimants' balance of power as well on the claimants' economic performance in the foreseeable future. Given the oil price level reaching a peak of $90 US per barrel in mid-2007 a political and peaceful solution may be found more quickly than anticipated. The Japanese are probably right in suspecting that the Chinese will play on the factor of time, which doubtlessly runs in favour of the PRC. Although the Japanese possess the disputed islands today, they might be very happy one day to implement a joint agreement, which does not allocate the entire resources up to the median line in favour of Japan.

This contention is based on previous experiences of negotiations. In the past, a disputant's perception of equal power among negotiators tended to result in more effective and quicker resolutions than negotiations between unequal powers because the disputants were less resilient to "damage tactics" that were used.[804] One day, when the PRC's economic performance has caught up to the Japanese level, each side will perceive the bilateral relations from the perspective of its own merits rather than serving exogenous and extrinsic political purposes.[805] In order to conclude, the time factor runs in favour of an equal partnership resolution.

9. Conclusion

So far many states involved in disputes have been able to resolve a large number of maritime boundary conflicts through negotiation. The states' practice of resolving disputes is not reflected in the current legal situation of 1982 UNCLOS, which does not permit ready resolutions of extant boundary

[804] I. William Zartman, Jeffrey. Z. Rubin, Power and Negotiations (1rst ed., 2000), 15
[805] Jianwei Wang, "China's Calculus of Japan's Asian Policy", in: Takashi Inoguchi (ed.), Japan's Asian Policy (1rst ed., 2002), 131

disputes.[806] As a mandatory legal regime does not exist between the disputants, a pure legal solution will not be implemented in the Diaoyu / Senkaku Islands conflict. Concerning the possession of the islands, no party will concede the ownership of the islands to the opposite party because the islands are too closely linked to other soft factors, such as nationalism and retaliation of former humiliations. A military solution is not very probable either because China has espoused the peaceful rise tactics. Its ascendancy requires a peaceful international environment so that access to supplies still can boost their economic growth. Given China's domestic instability it would be foolhardy for the CCP regime to put this supportive environment at risk.[807]

On these grounds the only viable solution is from the author's point of view a joint development. Similar to the Japanese-Korean joint development, the question of the islands sovereignty should be discarded and the emphasis laid on an equal repartition of the resources. In order to ensure this goal the parties should establish many subzones south of 27° northern latitude and east of the Chinese / Japanese continental Shelf. From today's perspective, the bilateral ties between Japan and China seem to be too strained for a common solution and the conflict will presumably drag on for a while. Being aware of the claimants' leeway, the author contends that the factor of time and the dwindling supplies may make the disputants alter their standpoints in the near future and that Deng Xiaoping's foresight will become reality.

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[806] Jonathan I. Charney, "The Delimitation of Ocean Boundaries", in: D. G. Dallmeyer, L. DeVorsey (ed.), Rights To Oceanic Resources (1rst ed., 1989), 42

[807] Russell Org, China's Security Interests in the 21rst Century (1rst ed., 2007), 119; Ingrid d'Hooghe, "Public Diplomacy in the People's Republic of China", in: Jan Melissen (ed.) The New Public Diplomacy (1rst ed., 2005), 90

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