

Deconstructing Japan's Claim of Sovereignty over the Diaoyu/Senkaku Islands 釣魚/尖閣に対する日本の統治権を脱構築する

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"The near universal conviction in Japan with which the islands today are declared an 'integral part of Japan's territory' is remarkable for its disingenuousness. These are islands unknown in Japan till the late 19th century (when they were identified from British naval references), not declared Japanese till 1895, not named till 1900, and that name not revealed publicly until 1950." Gavan McCormack (2011)¹

Abstract

In this recent flare-up of the island dispute after Japan "purchased" three of the Diaoyu/Senkaku Islands, Japan reiterates its position that "the Senkaku Islands are an inherent part of the territory of Japan, in light of historical facts and based upon international law." This article evaluates Japan's claims as expressed in the "Basic View on the Sovereignty over the Senkaku Islands" published on the website of the Ministry of Foreign Affairs, Japan. These claims are: the Senkaku/Diaoyu island group was *terra nullius* which Japan occupied by Cabinet Decision in 1895; China did not, per China's contention, cede the islands in the Shimonoseki Treaty; Japan was not required to renounce them as war booty by the San Francisco Peace Treaty; and accordingly Japan's sovereignty over these islands is affirmed under said Treaty. Yet a careful dissection of Japan's claims shows them to have dubious legal standing. Pertinent cases of adjudicated international territorial disputes are examined next to determine whether Japan's claims have stronger support from case law. Although the International Court of Justice

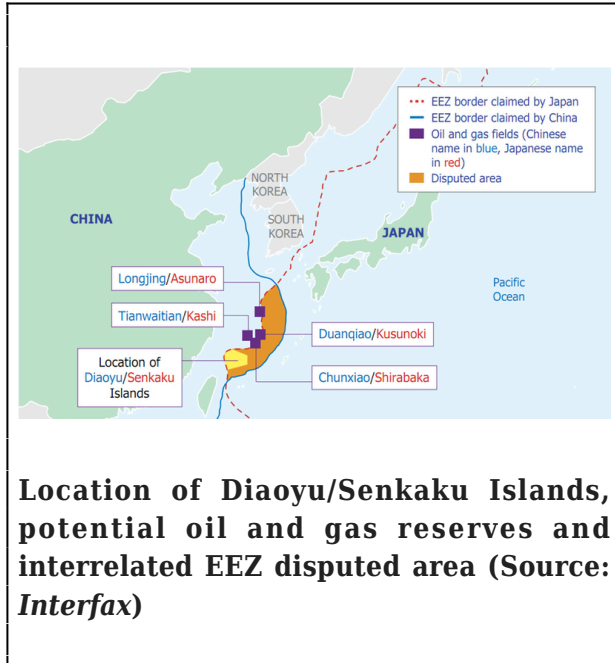
has shown effective control to be determinative in a number of its rulings, a close scrutiny of Japan's effective possession/control reveals it to have little resemblance to the effective possession/control in other adjudicated cases. As international law on territorial disputes, in theory and in practice, does not provide a sound basis for its claim of sovereignty over the Diaoyu/Senkaku Islands, Japan will hopefully set aside its putative legal rights and, for the sake of peace and security in the region, start working with China toward a negotiated and mutually acceptable settlement.

Keywords

Diaoyu Dao, Diaoyutai, Senkakus, territorial conflict, sovereignty,

I Introduction

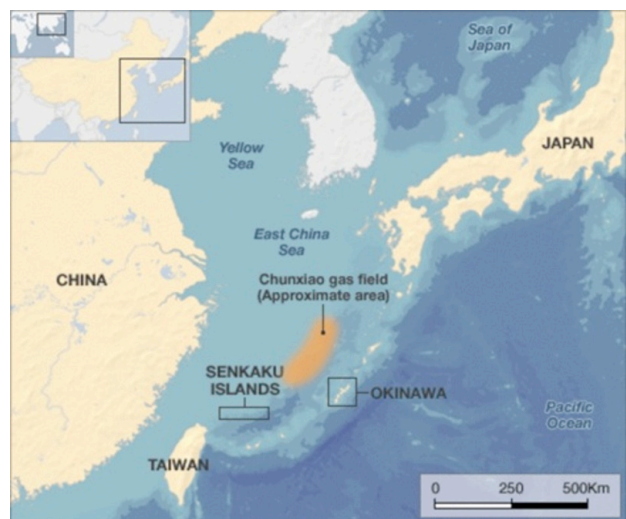
A cluster of five uninhabited islets and three rocky outcroppings lies on the edge of the East China Sea's continental shelf bordering the Okinawa Trough, extending from 25° 40' to 26° 00' of the North latitude and 123° 25' to 123° 45' of the East longitude,² roughly equidistant from Taiwan and the Yaeyama Retto. Both Japan and China lay claim to this island group. Known as the Senkakus, or Senkaku Retto, Japan claims the islands are "clearly an inherent territory of Japan, in light of historical facts and based upon international law."³ Rich in fishing stock and the traditional fishing grounds of Chinese fishermen, China has called the islands Diaoyutai,⁴ meaning "fishing platform," or Diaoyu Dao, meaning fishing islands, since their discovery in the 14th century.



China claims a historical title to Diaoyu Dao on the bases of its discovery, its inclusion into its defense perimeter from Japanese pirates during the Ming dynasty, and its incorporation into China as part of Taiwan in the Qing dynasty. Japan, on the other hand, claims to have incorporated these islands as *terra nullius* in January 1895, while China maintains they were ceded to Japan at the end of the first Sino-Japanese War in April of the same year. From 1952 to 1972, the United States (US) administered these and other island groups under United Nations (UN) trusteeship according to the provisions of the San Francisco Peace Treaty (SFPT). In 1972 pursuant to the Okinawa Reversion Treaty, the US transferred administrative control of these islands back to Japan over strong protestations from China. At the urging of Japan, the US then inserted itself in the dispute by declaring any attack on the Senkakus to be equivalent to an attack on the US under Article 5 of the 1960 US-Japan Mutual Security Treaty. As China was not a signatory to the SFPT and is not bound by its terms, China continues to regard the islands as its own, citing as evidence the Cairo and Potsdam Declarations and the surrender terms Japan signed in 1945.t

The competing claims defy easy solution. The situation is complicated by the discovery of gas and oil reserves in the late 1960s, making it more difficult to disentangle the intertwining threads of irredentism, a territorial and Exclusive Economic Zone boundaries dispute, and the geopolitical considerations of the two claimants and the US.

In 1990 and again in 2006 China offered, and Japan turned down, joint resource development of the region surrounding the Diaoyu Dao/Senkakus. The offer was renewed as late as 2010, but Tokyo saw no reason for joint development as “China's claims on the Senkakus lack grounds under international law and history.”⁵ However, in the two countries’ maritime boundary dispute, China and Japan did reach an agreement in 2008 to jointly develop the gas deposit in the Chunxiao/Shirakaba field, although not much progress has been made since then.⁶ Up to mid-2012, both countries managed to skillfully tamp down occasional flare-ups of the sovereignty dispute to avoid jeopardizing Sino-Japanese political relations, the close intertwining of the two economies and the peace and security of the whole region.



Map of Diaoyu Dao/Senkaku islands, Chunxiao gas field, Okinawa, Taiwan,

China and Japan



Meeting of Hu and Noda at APEC (Source: *China Times*)

However, in 2012 a report began circulating that the Japanese government planned to purchase three of the Senkaku Islands, Uotsurijima, Kita-kojima and Minami-kojima, from a private Saitama businessman. Prime Minister Noda Yoshihiko confirmed the planned purchase on July 7, attributing the move to the government's desire to block a more disruptive attempt by Tokyo Governor Ishihara Shintaro to buy and to develop the islets.⁷ On September 9, 2012, President Hu Jintao met with Prime Minister Noda on the sidelines of a regional Asia-Pacific Economic Cooperation summit in Vladivostok to discuss the issue. Hu issued a stern warning that China was firmly opposed to the purchase plan as China also claims Diaoyu Dao as its own.⁸ The next day, on September 10, the Japanese Cabinet closed the purchase deal with the private owner for 2.05 billion yen.⁹

China's Ministry of Foreign Affairs swiftly issued its own statement on the same day, stating: "Regardless of repeated strong representations of the Chinese side, the Japanese government announced on 10

September 2012 the 'purchase' of the Diaoyu Island and its affiliated Nan Xiaodao and Bei Xiaodao and the implementation of the so-called 'nationalization' of the islands. This constitutes a gross violation of China's sovereignty over its own territory and is highly offensive to the 1.3 billion Chinese people."¹⁰ China then took a number of steps to strengthen its own claim. On September 13, 2012, China's Permanent Representative to the UN, Li Baodong, met with UN Secretary General Ban Ki-moon to file with him a copy of the maritime chart outlining the territorial seas of China's Diaoyu Dao and its affiliated islands. With this chart, China proposed to establish the basis on which to claim national jurisdiction over the Exclusive Economic Zone and continental shelf according to the provisions of the United Nations Convention on the Law of the Sea.¹¹

Next, six Chinese marine surveillance ships were sent into the East China Sea on what China called a "patrol and law enforcement mission." In the ensuing weeks, more of these non-military ships patrolled the seas around the Diaoyu Dao/Senkakus, leading to Japanese and Western media reports of China's relentless harassment of the Japanese Coast Guard,¹² although these ships were doing no more than what the latter has been doing since 1972. In a new move aimed at re-affirming to the international community China's sovereignty over Diaoyu Dao, the State Oceanic Administration and the Ministry of Civil Affairs jointly released on September 20, 2012 a list of standardized names for the geographic entities on the Diaoyu Island and 70 of its affiliated islets and their exact longitude and latitude, along with location maps.¹³ Finally, on September 26, 2012, the Chinese Government published a White Paper, captioned "Diaoyu Dao, an Inherent Territory of China."¹⁴ As *Global Times*, published by the *People's Daily*, opined, "backing off is not an option for China" now.¹⁵

Substantial segments of the international press have portrayed this flurry of acts on China's part as unnecessary and excessive. However, China's response can be traced to its growing knowledge of and confidence in operating in a world governed by Western rules. For example, under international law, Japan's "purchase" is considered an effective exercise of sovereignty. Consequently, unless answered with equally forceful countermoves, Japan would have further consolidated its claim to the Diaoyu Dao/Senkakus. China's policy of decisive response, in effect, keeps it in the "sovereignty game"¹⁶ and leaves open the ultimate question of who owns the islands.

Beijing was not alone in this response. Taipei reacted likewise. The Republic of China (ROC) released a position paper on September 17, 2012, captioned "Summary of historical facts concerning Japan's secret and illegal occupation of the Diaoyutai Islands." The paper is similar to the People's Republic of China's (PRC) White Paper in its arguments for the sovereignty of Diaoyu Dao and identical in the historical evidence presented.¹⁷ Then on October 10, 2012, the ROC published a full-page ad in the *New York Times* staking out the bases for its sovereignty claim and offering an initiative for joint development of the East China Sea.¹⁸

Japan's "purchase" reopened the still festering wound of the aggressive wars Japan waged against China in its imperial expansionism. Mass protests against Japan's island purchase erupted in as many as 85 cities across China on the weekend after the purchase announcement.¹⁹ Television broadcast indelible images of Chinese anti-riot and paramilitary police, several layers deep, forming a phalanx around the Japanese embassy in Beijing to hold back waves of enraged protestors seemingly trying to storm the building. Stores selling Japanese goods and Japanese cars were vandalized.



Demonstrations across China (Source: *Kyodo News*)

Source: *Russia Today*

Meanwhile, the "purchase" prompted an armada of over 70 fishing boats to sail from Yilan (Ilan) County, Taiwan, into the territorial waters around the disputed islands to assert Taiwanese fishermen's rights to operate in their "traditional fishing grounds."²⁰ Ten Taiwan Coast Guard ships escorted these fishing boats, prepared to respond in kind should the Japanese Coast Guard try to drive them off, while Taiwanese air patrols over the islands were stepped up should any contingencies arise from the protest on the high seas. Nearly 1,000 people marched through the town of Toucheng in northeastern Yilan (Ilan) County, carrying banners and flags, and chanting slogans in support of the fishing boats from the area.²¹

In anticipation of another flare-up of the dispute after Japan confirmed its intention to "buy" the islands on July 7, a reporter questioned the US stance in a State Department press conference on August 28, 2012. Spokesperson Victoria Nuland reaffirmed that the Diaoyu Dao/Senkakus fall under the scope of Article 5 of the US-Japan Mutual Security Treaty; she also reiterated that the US takes no position on the sovereignty

issue. As to the competing claims advanced by China and Japan, she stated, "[o]ur position on that's been consistent, too. We want to see it negotiated."²²

Japan tried to split the uncoordinated but united front presented by Taipei and Beijing. Foreign Minister Gamba Koichiro called for a restart to the current round of fishery talks with Taipei which has been suspended since February 2009 due to differences over the island sovereignty issue.²³ The talks were initiated in 1996 after Japan enacted a Law on the Exclusive Economic Zone and the Continental Shelf, and Japanese Coast Guard ships started to harass and impound Taiwanese fishing boats, jeopardizing the men and threatening their livelihood. But 16 rounds of negotiations have failed to produce any results.

As in China and Taiwan, the domestic political climate in Japan has precluded any compromises on this issue since the purchase of the three Senkaku islands. On September 26, 2012, Prime Minister Noda delivered a speech at the UN General Assembly in an effort to rally the international community to Japan's side in various territorial disputes with its neighbors. At a press conference after the speech Noda specifically denied a dispute exists about the Senkakus and asserted that the island group is "an inherent part of our territory in light of history and also under international law." He continued, "[t]herefore, there cannot be any compromise that represents a retreat from this position."²⁴



Noda speaking at UN (Source: *Kyodo News*)

Japan's position that "there is no dispute" regarding the Senkakus may be one of those denials in line with its other denials of war responsibility, the Rape of Nanking, the comfort women and so on. If so, the contention does not require a serious effort at rebuttal.

Alternatively, Japan may mean that the basis of its claim is so solid as to be beyond dispute. China's evidence to the title has been amply and capably documented by scholars.²⁵ This paper proposes to assess Japan's claim as presented in the "Basic View of the Sovereignty over the Senkaku Islands" (Basic View) on the Japan Ministry of Foreign Affairs (MOFA) website. Under close scrutiny, is Japan's claim so legally unassailable as to admit of no other result than a ruling in its favor should the case be brought before the International Court of Justice?

II Japan's Claim of Sovereignty over the Senkakus through Occupation and/or Prescription

The Basic View states:

"[f]rom 1885 on, surveys of the Senkaku Islands were thoroughly carried out by the Government of Japan through the agencies of Okinawa Prefecture and by way of other methods. Through these surveys, it was confirmed that the Senkaku Islands had been uninhabited and showed no trace of having been under the control of the Qing Dynasty of China. Based on this confirmation, the Government of Japan made a Cabinet Decision on 14 January 1895 to erect a marker on the Islands to formally incorporate the Senkaku Islands into the territory of Japan."²⁶

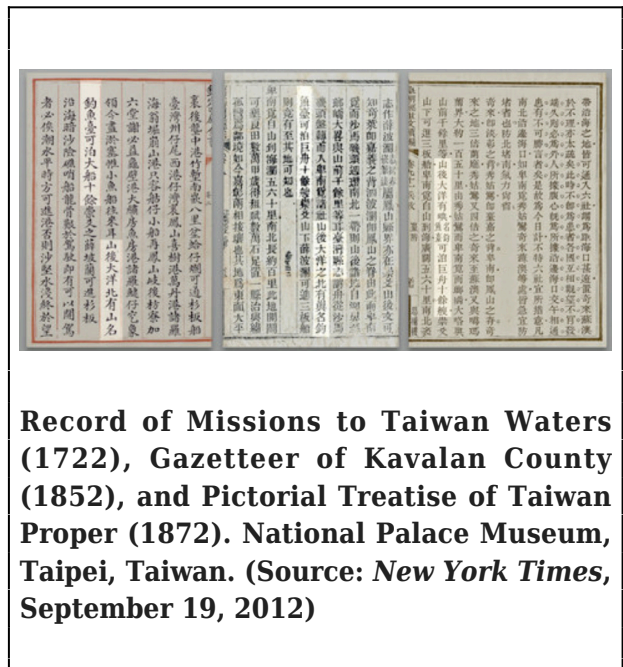
In essence the Japanese government contends that in 1895, the islands were *terra nullius*, i.e., land without owners, when Japan decided to occupy them. *Terra nullius* does not necessarily mean "undiscovered" so much as unclaimed territory, the title to which can be obtained through occupation. The following sections first examine whether the island group per Japan's assertion was truly *terra nullius*, then whether Japan could have gained sovereignty over the Senkakus through either occupation or prescription, two legal modes of territorial acquisition.

Context of Japan's Claim of *Terra Nullius*

After using gunboat diplomacy to force Korea to open its ports in 1876, and annexing the Ryukyu Kingdom in 1879, Japan turned its eyes next to the islands lying in between Okinawa and Taiwan.²⁷ Documents declassified in the 1950s include a report dated September 22, 1885 from the Okinawa Prefectural Magistrate who, on secret orders from the Home Minister, investigated three islands, the Uotsuri-jima (Diaoyu Dao), Kuba-jima (Huangwei Yu), and Taisho-jima (Chiwei Yu). The Okinawan Magistrate noted in said report that incorporating, i.e., placing markers on, the islands would present no problem. However, he also noted that the possibility existed that these islands might be the same ones that were already recorded in the *Zhongshan Mission*

Records, used as navigational aids by the Qing envoys to the Ryukyu Kingdom, details of which were well known to the Qing dynasty. He concluded:

"...[i]t is therefore worrisome regarding whether it would be appropriate to place national markers on these islands immediately after our investigations..."²⁸



Record of Missions to Taiwan Waters (1722), Gazetteer of Kavalan County (1852), and Pictorial Treatise of Taiwan Proper (1872). National Palace Museum, Taipei, Taiwan. (Source: *New York Times*, September 19, 2012)

Ignoring the Magistrate's warning, the Home Minister proceeded with a petition to the Grand Council of State to install the national markers. Acknowledging that the islands might have *some relation* (emphasis added) to China, he nevertheless wrote:

"...[a]lthough the above mentioned islands are the same as those found in the *Zhongshan Mission Records*, they were only used to pinpoint direction during

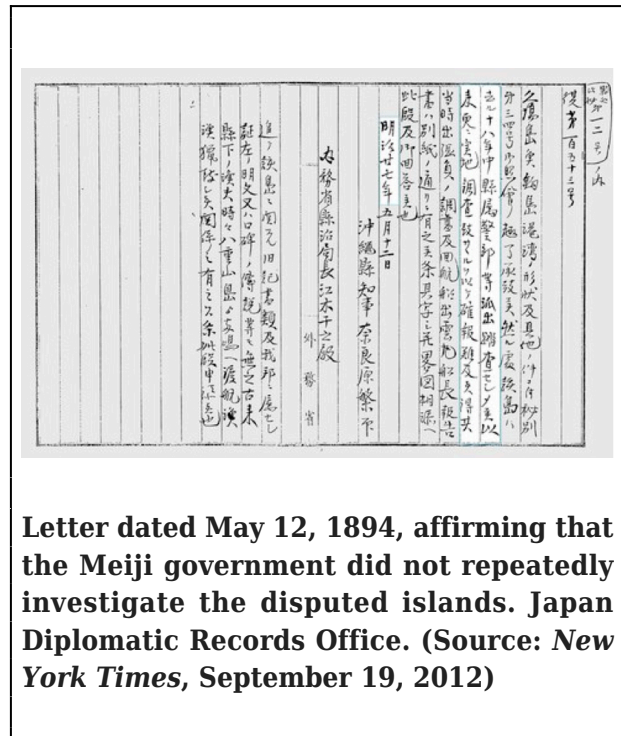
navigation, and there are no traces of evidence that the islands belong to China...”²⁹

However, when the Foreign Minister was asked for his opinion on the proposed project, he noted that Chinese newspapers were already abuzz with reports of Tokyo’s activities on the islands and of its probable intent to occupy these islands that China owned. Accordingly, he cautioned that placing national markers on the islands would only arouse China’s suspicion toward Japan and that “...it should await a more appropriate time.” He further urged the Home Minister to refrain from publishing the investigative activities on the islands in the Official Gazette or newspapers.³⁰ A copy of the September 6, 1885, *Shen Bao*, carrying an account of Japanese activities on the islands has been found by Chinese scholars.³¹

For 10 years, Japan’s decision to tread carefully with respect to the islands held. During that time, declassified documents show two different Governors of Okinawa Prefecture requested that the central government place the islands under the jurisdiction of Okinawa Prefecture so as to regulate marine products and fishing activities around them. All these requests were denied.

When the opportune moment came to proceed with incorporating the islands, it was not from having more surveys conducted as MOFA alleged, but rather from assurance of Japanese victory in the first Sino-Japanese War. No survey was performed following the initial investigation of 1885 as evidenced in an exchange between the Director of Prefectural Administration of the Ministry of Home Affairs and the Governor of Okinawa in the early part of 1894. In addition, the former explicitly acknowledged in said exchange the issue of placing national markers was tied to “negotiation with Qing China.”³² Later in the same year, however, in a December 1894

document addressed to the Home Minister, the Director of Prefectural Administration inquired whether the Minister had reconsidered the matter of placing national markers as “the situation today is greatly different than the situation back then.”³³



Letter dated May 12, 1894, affirming that the Meiji government did not repeatedly investigate the disputed islands. Japan Diplomatic Records Office. (Source: *New York Times*, September 19, 2012)

The situation had indeed changed as of late November 1894. The Japanese government was assured of victory after Japanese forces seized Port Arthur (Lüshun) in the first Sino-Japanese War. By then China was eagerly seeking a peace settlement.

Other internal documents of late 1894, such as the aforementioned Director’s summary of the so-called “investigations” of the islands and the December letter sent by the Home Minister to the Foreign Minister for endorsement of the project of installing markers, all point ineluctably to the same reason for Japan’s final decision to proceed with the project. Japan no longer feared incurring the wrath of Qing China for encroaching on its territory. No repeated surveys were done *prior* to the incorporation with the express purpose of ensuring the islands were *terra nullius*.

Instead, Okinawa Prefecture conducted the first detailed land survey of some of the islands in 1901.³⁴

Thus, on January 14, 1895, the Japanese Cabinet passed a resolution to annex the islands, a few months before the Shimonoseki Treaty which ended the first Sino-Japanese War was signed, in April 1895. Interestingly, in spite of the claim that repeated surveys were carried out, the Cabinet annexed only two of the three islands initially surveyed in 1885, Kuba-jima and Uotsuri-jima; the Taisho-jima islet was not annexed until 1921.³⁵ As with all the aforementioned documents, the Cabinet Decision was kept secret until declassified in 1952.³⁶ The actual placing of the physical marker did not take place until May 10, 1969, in the midst of a heated sovereignty dispute.³⁷

Prior to 1972, the Japanese government referred to an official 1970 Ryukyu Civil Government statement, which referenced Imperial Edict No. 13 dated March 15, 1896, as further confirmation of Japan's claim to title. This Imperial Edict presumably constituted an official proclamation of the incorporation act of January 14, 1895. However, the decree did not name the two islands.³⁸ Neither were the islands recorded in a subsequent Okinawa official publication of districts placed under its administration pursuant to Imperial Edict No 13.

This point of ratification by Imperial Edict No. 13 was eliminated in the description of the 1972 Basic View later published on the MOFA website. However, regardless of whether MOFA references Imperial Edict No. 13 today or not, under the Meiji Constitution the emperor had the ultimate power over all legislation. A Cabinet act must be ratified by imperial edict to take effect. "Consequently, the decision of the Japanese cabinet to give permission to build a national landmark on April 1, 1896, cannot be considered a formal or valid law enacted by the state."³⁹

A comparison with Japan's incorporation of other islands that it regarded as *terra nullius* at about the same time shows distinct differences in procedures between these cases and that of Kuba-jima and Uotsuri-jima. In these, every effort was made to follow the prevailing international standards: specifying the investigative surveys of the islands, the proclamation by Imperial Edicts and the public announcement in the Official Gazette, and expressly naming the islands and the administrative prefecture to which they belong.⁴⁰

Thus the lack of diligent investigation, the postponement until the arrival of the "appropriate" moment, the irregularities in adhering to the customary practice of incorporating *terra nullius*, the lack of official sanction by the emperor, and the attendant secrecy before and after the incorporation all militate against the claim that Japan determined the Senkakus to be *terra nullius* in 1895. In fact, the present-day name of the Senkakus was bestowed on the island group by Kuroiwa Hisashi five years after its incorporation in a 1900 article he wrote for a geography journal.⁴¹ MOFA's assertion that the Senkakus was confirmed to show "no trace of having been under the control of Qing Dynasty of China" directly contradicts the declassified documents discussed above. These documents repeatedly and specifically mentioned "Qing China" and conveyed Japan's initial concern about arousing China's suspicion. Such is the foundation on which Japan chooses to stake its claim to the islands.

Acquisition Through Occupation

Under international law, territories can be acquired through a mode known as occupation when certain conditions are met. The territory, to begin with, must be *terra nullius*. The acquisition of title over *terra nullius* must be consolidated through effective occupation, exhibiting both *animus* and *corpus occupandi*,

that is, the intention to occupy, followed by the actual exercise of sovereign functions.⁴²

In *animus occupandi* a state shows its intention to occupy through a formal announcement or some other recognizable act/symbol of sovereignty such as planting of a flag.⁴³ An official Cabinet Decision to install a national marker for example would qualify as *animus occupandi* were the island truly *terra nullius*. But, as previously discussed, the Cabinet incorporation act cannot be considered official without formal confirmation from the emperor. Imperial Edict No. 13 and the attendant Okinawa publication cannot be counted as imperial approval and official notification when the islands were not specifically named. Further, the Cabinet Act was kept secret for years. Thus whether a secret and possibly unofficial Cabinet resolution is considered sufficient evidence of *animus occupandi* is open to question. That the Japanese government acted in bad faith seems clear. Certainly, the secretive implementation of *animus occupandi* deprived China of constructive knowledge and a chance to lodge a formal protest against Japan's action.

MOFA cites in its English-language Questions and Answers section on the Senkaku Islands webpage (Q & A) a number of instances that allegedly fulfill the requirement of *corpus occupandi*. The "discovery" of Uotsuri-jima (Diaoyu Dao), the largest of the islands, was accredited to Koga Tatsushiro from Fukuoka in 1884. When Koga applied to Okinawa Prefecture for a lease of the islands in 1894, the prefecture turned him down, stating it did not know whether the islands were Japanese territory or not. Koga persisted. He filed another application on June 10, 1895, six days after Japan officially occupied Taiwan (Formosa), which China ceded to Japan in the Shimonoseki Treaty after the first Sino-Japanese War. Koga's timing should be noted. As pointed out in a biography, he attributed Japan's possession of the islands to "the gallant

military victory of our Imperial forces."⁴⁴ The Ministry of Home Affairs finally approved this application in September of 1896.

Koga was given a 30-year lease without rent to four islands, Uotsuri-jima (Diaoyu Dao), Kuba-jima (Huangwei Yu), Minami-Kojima (Nanxiaodao Dao) and Kita-Kojima (Beixiao Dao). He spent large sums of his own money to develop the islands, and brought over workers from Okinawa to gather albatross feathers and to operate a bonito processing plant on Uotsuri-jima. At its peak, there were more than 100 people working on the islands. In 1926, when the lease expired, the Japanese government sold the four islands to the Koga family for a nominal sum and they became privately owned land. No official record, however, could be found to show that Koga paid property tax on the islands; nor was there a building registration for the bonito processing plant.⁴⁵ With growing China-Japan tensions, Koga closed his business in the islands in the 1930s. In 1978, the islands were sold for a nominal price of 30 yen per 2.3 square meters to the Kurihara family.⁴⁶

The Q & A maintains, "[t]he fact that the Meiji Government gave approval concerning the use of the Senkaku Islands to an individual, who in turn was able to openly run these businesses mentioned above based on the approval, demonstrates Japan's valid control over the Islands."⁴⁷ This example of Japan's "valid control" provides the proper context to view its recent purchase of three Senkaku islands from a private owner: the purchase could later be adduced as another display of Japan's "valid control." The purchase, however, is a provocative act under international law in the sense that it requires a vigorous response from a China who does not administer these islands if it wishes to maintain its claim. Otherwise China would appear to or be presumed to have acquiesced to Japan's occupation. Thus China's recent series of actions, i.e., diplomatic protest, filing China's maritime chart with the UN and

so on, probably constitute no more than is required to keep alive its claim to title.

Acquisition through Prescription

As can be seen from the preceding section, Japan may not have satisfied the initial requirement of *terra nullius*; nor has it fully met the condition of *animus occupandi*. Recognizing the claim of title by occupation may not stand however, some Japanese and American scholars and commentators have contended that Japan could have acquired sovereignty under the modality of prescription.

Prescription comes into play when the territory is of unknown, uncertain or questionable ownership. It consists of two distinct requirements. First, the state must show “immemorial possession” of the territory in question to justify the present status quo, i.e., its current occupation or possession.⁴⁸ Japan certainly fails this bar. Even according to Koga’s claim, the “discovery” of the islands occurred in 1884 while Chinese records of the islands date back to the Ming dynasty in the 14th century. The difference in alleged “possession” time from thereon is great between Japan and China.

The second requirement for prescription shown to be the more important in arbitral and judicial decisions, refers to a process of acquisition akin to adverse possession in civil property law. It involves, on the one hand, a period of continuous, peaceful and public display of sovereignty by the adverse possessor state to legitimize a doubtful title. It demands, on the other hand, acquiescence by other interested or affected states, either in the form of a failure to protest or actual recognition of the change of title.⁴⁹

It is unclear whether the Japanese government adopts this line of reasoning but elements of the argument appear in MOFA’s Q & A webpage. For example, it maintains that “...the contents of these documents (Chinese historical

documents) are completely insufficient as evidence to support China’s assertion (of sovereignty) when those original documents are examined,”⁵⁰ implying that China’s claim to ownership of the Senkakus’ is uncertain. MOFA’s Basic View further states, “[t]he Government of China and the Taiwanese authorities only began making their own assertions on territorial sovereignty over the Senkaku Islands in the 1970s, when the islands attracted attention after a United Nations agency conducted an academic survey in the autumn of 1968, which indicated the possibility of the existence of petroleum resources in the East China Sea.”⁵¹ This last purportedly shows China’s prior acquiescence, simultaneously raising questions of motivation for current non-acquiescence.

Conceptually, occupation and prescription, the two modes of acquiring territory, may be distinct but operationally the two overlap and can be applied to the same set of data.⁵² As modern-day territorial disputes are adjudicated on the merits of competing claims with sovereignty going to the better right to title, Heflin, among others, concludes Japan has the more colorable (plausible) claim.⁵³

That Japan’s claim is more colorable is debatable. In civil law, the legal doctrine of adverse possession is highly problematic for a system based presumably on equity and justice. Defined as the acquisition of a legitimate title to land actually owned by another, it requires certain stringent conditions to be met and for the length of time as determined by the statute of limitations.⁵⁴ Otherwise few rationales could justify a wrongful possession ripening into a legitimate one and a legal transfer of land from owners to non-owners without consent of the former. Therefore, to lessen the chance of a possible miscarriage of justice, the possession must be actual, hostile, open and notorious, exclusive, and continuous for the period of the statute of limitations.⁵⁵ The requirement of “open and notorious,” for example, calls for the

possession to be carried out visibly to the owner and others, thus serving notice of the adverse possessor's intent while "actual" possession provides the true owner with legal recourse for trespassing within a period of time. Still, the principle's mere existence may work as an incentive to theft, requiring constant monitoring by the true land owner and for this reason may be unfair.⁵⁶

As for the principle of prescription, though widely recognized by scholars and included in textbooks as one of the modes of territorial acquisition, it too is of "very doubtful juridical status."⁵⁷ Nonetheless, Japan's possible acquisition of the Senkakus through prescription will be evaluated next.

The first question to consider is whether Japan has satisfied the condition of a long, uninterrupted and peaceful display of sovereignty. Only the period between 1895 and 1945 can be counted as one of peaceful display of Japan's sovereignty unchallenged by China. A plausible explanation for China's silence will be considered in the later section on treaties relevant to the dispute. Regardless, the period is probably too short to validate an adverse claim. Japan resumed direct control of the islands again from 1972 to the present, but during this period it has been repeatedly confronted by China whenever attempts were made to exercise acts of sovereignty. Despite considerable efforts, Japan could not persuade the US in 1972 to turn over sovereignty to Japan. For reasons of its reasons, the US government's position was and continues to be that only administrative control of the islands was transferred under the Okinawa Reversion Treaty.

As to the condition of acquiescence, Japan claims that by failing to protest at critical moments, China showed acquiescence. However, MacGibbon points out that "[r]ights which have been acquired in clear conformity with existing law have no need of the doctrine

of acquiescence to confirm their validity."⁵⁸ Only where rights are suspect does the doctrine come into play. Accordingly, "acquiescence should be interpreted restrictively."⁵⁹ It should be applied to cases where the acquiescing state has constructive knowledge of the prescriptive state's claim. Given the secrecy surrounding Japan's incorporation process, China was denied that constructive knowledge.

MacGibbon discusses another situation where acquiescence cannot be assumed, one in which "the question (of the claim) has been left open by the disputing parties."⁶⁰ China's tacit agreement with Japan to "shelve" the issue of the Diaoyu Dao/Senkakus falls into such a category. The first recorded instance of this agreement occurred in 1972 during normalization talks between the two countries. Pressed by Tanaka Kakuei, Prime Minister of Japan, on the island issue, Zhou Enlai, Premier of the PRC, said he did not wish to talk about the issue at the time because it posed an obstacle to normalization of relations. According to Chinese records, Tanaka agreed, saying he had to raise the issue because the Japanese public expected it.⁶¹ Then in 1978, PRC Vice Premier Deng Xiaoping again talked about shelving the issue, commenting that "[o]ur generation is not wise enough to find a common language on this question. Our next generation will certainly be wiser. They will find a solution acceptable for all."⁶²

In an interview published in October 2012, Professor Yabuki Susumu charged MOFA with excising the minutes of the Zhou-Tanaka exchange from the MOFA website along with Tanaka's solemn apology for Japanese aggression in the Asia-Pacific War.⁶³ But MOFA denies that such an agreement ever existed: "...it is not true that there was an agreement with the Chinese side about 'shelving' or 'maintaining the status quo' regarding the Senkaku Islands." As of December 2012, a translation of the conversations between Zhou

and Tanaka and between Deng and Prime Minister Fukuda Takeo was posted on its Q & A webpage presumably to substantiate MOFA's point.⁶⁴ Assuming the MOFA posting to be a full disclosure, note in the first conversation that it was Tanaka who brought up the subject of Senkakus with Zhou. Were there no controversial issue and no possible dispute, why would Prime Minister Tanaka raise the issue at all? And did not the silence (lack of response) from Fukuda in the 1978 conversation indicate assent or acquiescence? And would Fukuda not have protested immediately if Deng was not summarizing the situation correctly per Japan's reasoning? The tacit agreement to shelve the sovereignty question is surely not a figment of China's imagination. The Deng statement is something scholars have written about approvingly and has been extensively covered in the global media.

Prior to September 2012, both China and Japan had engaged in active dispute management.⁶⁵ For instance, both governments attempted to limit activists' access to the islands. Japan had not only enacted measures to restrict access but had also not developed or made use of the islands to any great extent. Japan had not, for example, erected any military installation on the islands, a move that would consolidate its control but would surely provoke Chinese countermeasures.⁶⁶ China, too, had done its part: it "refused to support private sector [the Baodiao or "Defend Diaoyutai" movement] activities." Nor did China condone "fishermen who traveled to Diaoyu Island waters to catch fish," and it also "refrained from conducting maritime surveillance."⁶⁷ Although the American media and politicians repeatedly blamed Beijing for mobilizing Chinese opinion against Japan on the island dispute, in actuality, for many years, China had officially or unofficially tried to minimize media coverage of the conflict. Further, as Fravel points out, "the Chinese government ha[d] restricted the number, scope and duration of protests against

Japan over this issue."⁶⁸

Thus Japan and China had both abided by this informal agreement until recently, leading the Japan Times to observe that "[p]revious governments under the LDP, which was ousted from power by the DPJ in the 2009 general election, had respected (this) tacit agreement Tokyo allegedly reached with Beijing in the 1970s."⁶⁹ One consequence of Japan's current repudiation of the tacit agreement to shelve the Senkaku/Diaoyu Dao issue has been to alert China of the need to match Japan's exercise of state functions, i.e., to conduct regular patrols of the disputed areas to sustain China's claim. Unfortunately, the regular patrolling now is seen by much of the American media and public as evidence of the rise of a more "assertive" or "belligerent" China.

Although Japan does not officially claim the Senkakus under prescription, a closer look into the practical requirements of this mode may provide an explanation for Japan's curious statement that there is no territorial dispute. According to Sharma, the prescribing state which is in control "should not...by its own conduct admit the rival claim of sovereignty of any other state; otherwise it will be precluded or barred from claiming the prescriptive title to sovereignty."⁷⁰ Admitting China's competing claim may be an obstacle to acquisition by prescription and may, in addition to Japan's unshakable confidence in the righteousness of its own claim based on international law, serve as an impetus to Japan's denial.

To sum up, Japan's claim to sovereignty of the Senkakus is less firmly grounded in international law than it maintains. Nor are international courts necessarily the appropriate venue for resolving a territorial dispute as entangled as that of the Diaoyu Dao/Senkakus. International law demands displays of sovereignty to consolidate a title; further it penalizes the state that appears to acquiesce. Japan's rationalization of its claim on the basis

of international law not only provides it with a powerful rhetoric for its assertions, but also with an incentive to make assertions of sovereignty. This could provoke a response in kind from China in a cycle of escalation, leading possibly to armed confrontations in the region.

Aware of this danger, China had in the past made offers of joint development of the area when tensions subsided after a flare-up of the dispute or in a more relaxed atmosphere in which it would not be seen as conceding. Clearly then, China's position is not all about making a unilateral claim to the oil and gas reserves in the seas surrounding Diaoyu Dao.⁷¹ It is unfortunate that Japan repeatedly refused such offers for the PRC has an enviable record of settling most of China's fractious border disputes derived from a legacy of Western colonialism. China has even accepted unfavorable agreements for the sake of peaceful neighborly relations.⁷² Japan probably thinks it has such firm backing from international law that it can ignore China's proactive gestures. But certain precepts of international law seem to have encouraged Japan's bizarre insistence that there is no territorial dispute regarding the Senkakus and its denial of the existence of a tacit agreement with China to shelve the issue.

III Treaties that Japan Claims Govern the Diaoyu Dao/Senkakus Dispute

As evidence to support its claim of sovereignty over the Senkakus, Japan invokes the 1951 San Francisco Peace Treaty (SFPT) which stipulates disposition of its acquired and annexed territories. Japan rejects the Chinese assertion that the Senkakus were ceded to it in the 1895 Shimonoseki Treaty. Finally it points to the 1971 Okinawa Reversion Treaty for the return of the Senkakus into the sovereign fold of territories that had been temporarily placed under US administration. Together these treaties presumably substantiate Japanese

claim to title. Yet none of these specifically addresses the issue. All demand a "treaty interpretation" giving rise to the disputants' claims and counter-claims. Treaties that may be relevant to the dispute will be examined next.

The Treaty of Shimonoseki

In August 1894 the first Sino-Japanese War broke out over control of Korea. A militarily modernizing Japan, seeking to detach Korea from Chinese suzerainty as a tributary state, embarked on its first war of expansion. After defeating China's naval fleet, Japan invaded China in late October of the same year. By November China sued for peace after Japan won a decisive victory at Port Arthur. The war was formally concluded with the Treaty of Shimonoseki, signed on April 17, 1895. According to Japan:

“. . . the Senkaku Islands were neither part of Taiwan nor part of the Pescadores Islands which were ceded to Japan from the Qing Dynasty of China in accordance with Article 2 of the Treaty of Shimonoseki which came into effect in May of 1895..."⁷³

The pertinent portion of Article 2 of the Shimonoseki Treaty states:

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

(b) The island of Formosa, together with all islands appertaining or belonging to the said island of Formosa.⁷⁴

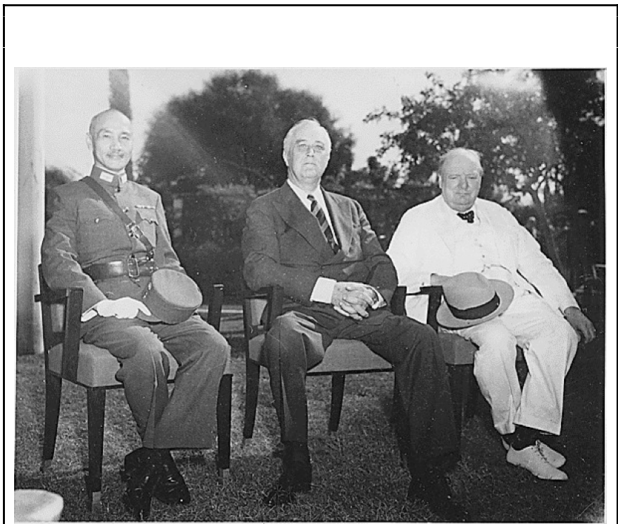
As there is no specific mention of Diaoyu Dao in

Diaoyu Dao was not expressly mentioned in the Shimonoseki Treaty, the Pescadores Group was, with specific geographic boundaries in Article II of the same treaty: “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 24th degrees of north latitude.”⁸⁰ To be sure, Diaoyu Dao cannot be compared with the Pescadores in terms of size or strategic importance to China, and might not have merited a specific mention in 1895. It was, at the time in question, an insignificant group of islands, uninhabited and of limited economic value other than providing rich fishing grounds for the locals’ livelihood.

China also maintains that when the Shimonoseki Treaty is considered and interpreted as an integrated whole with other relevant written legal agreements, then Diaoyu Dao should have been returned to China after World War II. The Cairo Declaration states that “...all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and The Pescadores, shall be restored to the Republic of China.”⁸¹ Note that this provision is not particularly careful in outlining specifics; Formosa was written with the controversial “appertaining islands” while the geographical co-ordinates of the Pescadores were not given. Nonetheless the intention to revert the territorial concessions of the Shimonoseki Treaty to China is clear.

The instrument of surrender that Japan signed in 1945 pledges to accept the provisions of the Potsdam Proclamation. This latter not only affirms the terms of the Cairo Declaration but is more specific as to the territorial delimitation of Japan to “the islands of Honshu, Hokkaido, Kyushu, Shikoku and such minor islands as we determine.”⁸² These “minor islands” were listed in the Supreme Commander for the Allied Powers’ Memorandum for the Imperial Japanese Government, No. 677 (SCAPIN-677), dated January 29, 1946. Diaoyu Dao/Senkakus was not on this list of Japanese “minor islands.”

However, in anticipation of a peace treaty, SCAPIN-677 did insert a caveat stating that “[n]othing in this directive shall be construed as an indication of Allied policy relating to the ultimate determination of the minor islands referred to in Article 8 of the Potsdam Declaration.”⁸³



Chiang, Roosevelt, and Churchill at the Cairo Conference, Egypt, November 1943
(Source:
http://ww2db.com/battle_spec.php?battle_id=68**)**

The San Francisco Peace Treaty: Article II

Japan relies on the San Francisco Peace Treaty (SFPT) as the final arbiter on postwar settlement of its claims and disposition of its acquired and annexed territories. This treaty, it holds, bolsters Japanese claims since:

“...the Senkaku Islands are not included in the territory which Japan renounced under Article II of the San Francisco Peace Treaty which came into effect in April 1952 and legally demarcated Japan's territory after World War II.”⁸⁴

The Senkaku islands are indeed not mentioned in Article II (b) which stipulates:

“Japan renounces all right, title and claim to Formosa and the Pescadores.”⁸⁵

The intent in the early drafts of the San Francisco Peace Treaty might have been to define the postwar territory of Japan and to codify principles expressed in such prewar agreements as the Cairo Declaration and the Potsdam Proclamation. Article II would then have specified the reversion of territories to China which were ceded to Japan through the Shimonoseki Treaty. But the Article as stated omitted the controversial phrase “together with all islands appertaining or belonging to the said island of Formosa (Taiwan).” The careful geographic delineation of the Pescadores group was also missing. Finally, the recipient of those renounced territories, China, was not named and left intentionally unspecified. Why?

In 1949, China’s civil war ended with the People’s Republic of China (PRC) establishing firm control over mainland China and the Republic of China (ROC) retreating to Taiwan and its outlying islands. Nations were divided in their recognition of the legitimate representative government of China. The United Kingdom (UK) established diplomatic relations with the PRC in January of 1950 while the US and many of its allies stood by the ROC at that time.

Japanese Surrender Document (Source: http://www.archives.gov/exhibits/featured_documents/japanese_surrender_document/)



Oil painting by Chen Jian. Surrender Ceremony in Nanjing. Japanese representatives offer the surrender document and their swords to the Chinese representative, September 9, 1949 (Source: <http://news.sina.com.cn/c/2005-05-28/19126776619.shtml>)

Also by 1949, the US with UK backing began to assume control and eventually came to monopolize the preparation of the peace treaty. When Wellington Koo, the ROC’s ambassador to Washington, learned of the SFPT terms, he strenuously objected to the fact that no reparations were demanded of Japan. More importantly, he insisted that Taiwan should be ceded back to China, as the ROC at the time was recognized by the UN as representing all of China, rather than leaving its sovereignty status indeterminate.⁸⁶ John Foster Dulles, who oversaw the drafting and the passage of the SFPT, rejected Koo’s demand. Dulles reasoned that with the Korean War in progress from June 1950 and the dispatch of the US Seventh Fleet to Taiwan, the use of the fleet in the area might then “constitute an interference in China’s internal problems.”⁸⁷ Koo indicated that the ROC could not accept the terms, but would not publicly remonstrate against the treaty. Neither the ROC nor the PRC was represented at the conference, and neither was among the signatories of the SFPT.



When a treaty itself gives no indication as to the disposition of a contested territory, its drafts may be used as a supplemental means for interpretation per the Vienna Convention of the Law of Treaties (VCLT).⁸⁸ In the first available draft of the SFPT dated March 19, 1947, the territorial limits of Japan were defined as “those existing on January 1, 1894, subject to the modifications set forth in Articles 2, 3...”⁸⁹ Had the phrasing survived the re-drafting process, the implication for the disposition of Diaoyu Dao/Senkakus would be clear since the Cabinet Decision to incorporate took place on January 14, 1895. In the same draft, however, a clause reversing the Shimonoseki Treaty provided a list of adjacent minor islands to Taiwan and the Pescadores without naming Diaoyu Dao/Senkakus.⁹⁰ Accordingly, some scholars conclude on examination of this draft that the US had not intended to return Diaoyu Dao to China.

However, if the aforementioned SCAPIN-677 is taken into account, this view is not necessarily borne out because Diaoyu Dao/Senkakus was not on the list of islands SCAP considered to be under Japanese sovereignty. Alternatively, the ambiguity and conflict in the two provisions of the same draft may be attributed to the drafters’ lack of knowledge about the geography of the area and the insignificance of the Diaoyu Dao/Senkakus at the time, as well as ignorance of the Chinese historical claim and Japan’s secret incorporation of the Senkakus. Thus nothing conclusive can be gathered from this draft. In later drafts Japanese territory was delimited to the four main islands and other unspecified minor islands as expressed in the Potsdam Proclamation, but again, none of those provisions survived with the changing geopolitical climate and the onset of the Cold War.

The San Francisco Peace Treaty: Article III

Japan also refers to Article III of the San

Francisco Peace Treaty which stipulates:

“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 deg. north latitude (including the Ryukyu Islands and the Daito Islands), Nanpo Shoto south of Sofu Gan (including the Bonin Islands, Rosario Island and the Volcano Islands) and Parece Vela and Marcus Island. Pending the making of such a proposal and affirmative action thereon, the United States will have the right to exercise all and any powers of administration, legislation and jurisdiction over the territory and inhabitants of these islands, including their territorial waters.”⁹¹

Consequently Japan concludes:

“...[t]he Senkaku Islands were placed under the administration of the United States of America as part of the Nansei Shoto Islands, in accordance with Article III of the said treaty...”⁹²

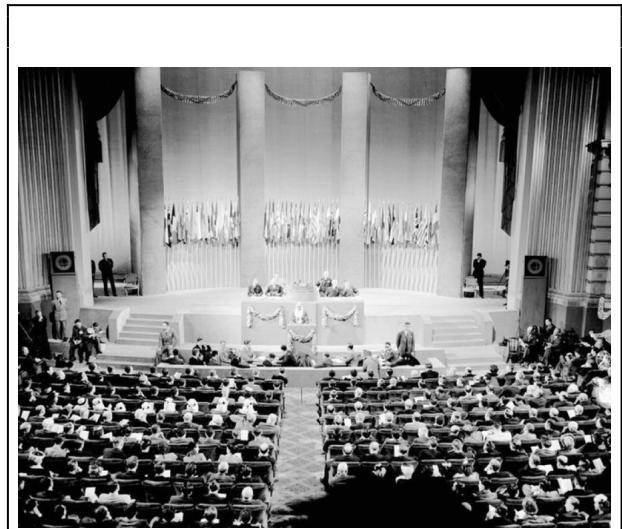
Like Article II, Article III is silent on the Diaoyu Dao/Senkakus. Ambiguity also surrounds the interpretation of the phrase “Nansei Shoto (including the Ryukyu Islands and the Daito Islands).” Taira Koji observes that two possible meanings can be attached to the usage of the above-mentioned phrase. Geographically, and historically, “Nansei Shoto” refers to island groups such as the Tokara, the Amami, the Okinawa and the Yaeyama, but does not

include the Diaoyu Dao/Senkakus or the Daito Islands. Administratively, the islands were attached to Okinawa Prefecture shortly after incorporation. Therefore “[t]he absence of mention of the Senkaku Islands in the Treaty definition of Nansei Shoto is a geographically correct usage of the term.”⁹³ Thus the application of the “ordinary meaning” to this phrase per Article 31 (1) of the VCLT arguably implies Diaoyu Dao/Senkakus is not part of the territory to be placed under US administration.

However, Article 31 (3a) of the VCLT also permits “any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions” to be taken into account. The subsequent agreement in this case is the proclamation of the United States Civil Administration of the Ryukyus (USCAR) No. 27 issued on December 25, 1953. It defines the geographic boundaries of the area under US administration per Article III of the SFPT, with Diaoyu Dao/Senkakus located within the defined area of US control.⁹⁴ Thus USCAR 27 could be said to have clarified the phrase of “Nansei Shoto (including the Ryukyu Islands and the Daito Islands),” indicating it should be interpreted in an administrative sense. However, being a declaration drawn subsequent to the treaty, it does not have the same weight as a treaty provision, especially when the reason or motivation for the inclusion of Diaoyu Dao/Senkakus by the USCAR 27 is challenged. It follows that the “administrative” interpretation of Article 3 is by no means definitive.

While the terms of the treaty were generous to Japan, the SFPT was drafted so as to reflect the geopolitical and strategic interests of the US with little attention devoted to the problem of settling territorial disputes of rival claimants in Asia. Therefore a review of the treaty shows that none of its provisions includes an explicit reference to Diaoyu Dao/Senkakus. Despite Japan’s statement that “[t]he facts outlined herein (Articles II & III in SFPT) clearly

indicate the status of the Senkaku Islands being part of the territory of Japan,” these clauses have no implication for the sovereignty of the islands. Apart from considerations of whether the treaty was just,⁹⁵ and whether it “served as a sweetener for the less equitable [US-Japan] security treaty” that followed,⁹⁶ the SFPT, in essence, sowed the seeds of Japan’s postwar territorial disputes, roiling relations with its neighbors and jeopardizing the peace and security of the region.



The San Francisco Peace Treaty, 1951, signed by 48 nations. China was not one of the signatories. (Source: http://cdn.dipity.com/uploads/events/7d7968b16dd64715e1d08893f2fd90f6_1M.png)

Finally, Japan’s treaty interpretation is clearly inconsistent and self-serving. First, it asserts that as an administrative territory of Nansei Shoto Islands, the Senkakus should be understood to be included in Article III of the SFPT while denying that Diaoyu Dao, administered by Taiwan, should be recognized as a territory ceded in the phrase “islands appertaining to Formosa” of the Shimonoseki Treaty. Second, it argues for opposing conclusions based on the same fact, i.e., non-inclusion of Diaoyu Dao/Senkakus in treaty

language. Without being mentioned, Diaoyu Dao is not ceded to Japan per the Shimonoseki Treaty; at the same time without express inclusion, the Senkakus' sovereignty is validated through the SFPT.

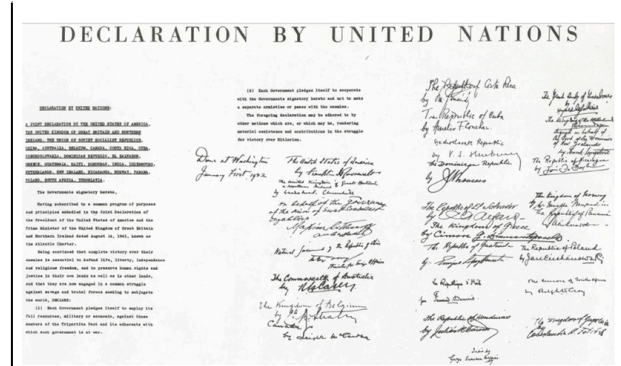
Protest from Beijing and Taipei

In the Basic View, Japan goes on to say:

“The fact that China expressed no objection to the status of the Islands being under the administration of the United States under Article III of the San Francisco Peace Treaty clearly indicates that China did not consider the Senkaku Islands as part of Taiwan.”⁹⁷

The statement is flawed, first, because neither the PRC nor the ROC was a signatory to the Treaty, and second, the SFPT was silent on the status of Diaoyu Dao/Senkakus. On both counts it is unreasonable to expect either Beijing or Taipei to raise a specific objection as to the island group's disposal.

In fact Zhou Enlai, Premier of the PRC, objected to the whole treaty. In a statement published on August 16, 1951, he declared that the SFPT violated the spirit and letter of the United Nations Declaration of January 1, 1942, which states, “[e]ach Government pledges itself to cooperate with the Governments signatory hereto and not to make a separate armistice or peace with the enemies.”⁹⁸ “China,” Zhou stated, “reserves [the] right to demand reparations from Japan and would refuse to recognize the treaty.”⁹⁹ But the PRC did not have diplomatic relations with either the US or Japan at the time, and it was locked in combat with the US in the Korean War. Its protest went unheeded.



The United Nations Declaration, January 1, 1942, stating “Each Government pledges itself to cooperate with the Governments signatory hereto and not to make a separate armistice or peace with the enemies.” (Source: <http://www.un.org/en/aboutun/charter/history/declaration.shtml>)

As noted in the aforementioned Koo-Dulles exchange, the ROC kept silent about its rejection of the SFPT, being dependent at the time on the US for diplomatic recognition and economic and military assistance. In addition, while it may have recognized the SFPT in the 1952 Sino-Japanese Peace Treaty, Taipei did not consider the SFPT to have any bearing on the question of sovereignty of either Diaoyu Dao or any of the islands placed under US administration pursuant to Article III of the SFPT. When it realized too late this mistake in November 1953, Taipei raised diplomatic objections to the American decision to “return” the Amami islands to Japan.¹⁰⁰ However, over Taipei's objections, the US returned these islands as a “Christmas present” in December 1953.

The Okinawa Reversion Treaty

Japan goes on to state in the Basic View that:

“...[the Senkaku Islands] were included in the areas whose

administrative rights were reverted to Japan in accordance with the Agreement between Japan and the United States of America Concerning the Ryukyu Islands and the Daito Islands, which came into force in May 1972.”¹⁰¹

Again, the Senkakus is not explicitly named in the Okinawa Reversion Treaty. Instead the treaty refers to the “Ryukyu Islands and the Daito Islands,”¹⁰² although at the signing of this treaty a number of US officials affirmed that the Senkakus were included in the territories reverted.

Under the UN international trusteeship system, the Senkakus and other island groups of Article III, SFPT, fall into the UN Article 77 (1b) category of territories detached from Japan after World War II. The status of such territories is not altered under trusteeship per UN Article 80(1).¹⁰³ This means that whatever legal status the Senkakus has at the beginning of the trusteeship, it retains the same status upon reversion.

Indeed, this is what Secretary of State William Rogers affirmed at the Okinawa Reversion Treaty Hearing in Congress, while Acting Assistant Legal Adviser Robert Starr explained in greater detail:

“The United States believes that a return of administrative rights over those islands to Japan, from which the rights were received, can in no way prejudice any underlying claims. The United States cannot add to the legal rights 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.”¹⁰⁴

Contrary to what Japan desires, the US then and since has maintained neutrality with regard to the sovereignty issue and declares that it transferred only administrative rights in the Okinawa Reversion Treaty. However, the US State Department simultaneously assures Japan that the Senkaku islands are protected by Article 5 of the US-Japan Mutual Security Treaty of 1960, which obliges the US to come to its aid if territories under Japanese administration are attacked.¹⁰⁵

The US arrived at this convoluted position following backroom pressure from both China and Japan. On the surface the US remains neutral. Nevertheless, the US position guarantees that “Japan enjoys - albeit circumscribed - effective control over the islands, which China could only overturn with the use of force.”¹⁰⁶ This obvious tilt to Japan did not pass unnoticed. State Department documents show that on April 12, 1971, Chow Shu-kai, the then-departing ROC ambassador, raised the issue of the impending reversion of the Diaoyu Dao/Senkakus with President Richard Nixon and Henry Kissinger, the National Security Advisor. Chow asserted that for the Chinese, the return of the islands was “a matter of nationalism,” pointing to the groundswell of anger from the intellectuals and people on the street in Taipei and Hong Kong, as well as the educated Chinese Diaspora in the US.¹⁰⁷

Kissinger promised to look into the matter and asked the State Department to report back to him on the issue. When the report came back the next day with a statement of the US Department of State’s convoluted position, Kissinger wrote in the margin, “[b]ut that is

nonsense since it gives islands to Japan. How can we get a more neutral position?"¹⁰⁸ The more "neutral position" that Kissinger asked for did not materialize although his concern was explored. For in another message on June 8, 1971, the President's Assistant for International Economic Affairs told the US Ambassador to the ROC in Taipei that "[a]fter lengthy discussion, the President's decision on the Islands (Senkakus) is that the deal (of reverting back to Japan) has gone too far and too many commitments made to back off now."¹⁰⁹



Ethnic Chinese of the Baodiao Movement rallying against the Okinawa Reversion Treaty in Washington, D.C., in 1971. (Source: <http://www.dushi.ca/tor/news/bencandy.php/aid11/lgngbk/aid27036>)

The strategic ambiguity the US maintains with regard to the Diaoyu Dao/Senkakus apparently worked for decades. But after Japan announced its intention to "buy" and nationalize three of the islands, the US State Department was repeatedly questioned about its position on the issue. Finally a report was ordered by the US Congress during the escalation of the dispute to clarify US treaty obligations. The September 25, 2012, report re-validated the position of US neutrality on the question of sovereignty and

US protection of the Senkakus under Article 5.¹¹⁰ Additionally, the Webb Amendment reaffirming the commitment to Japan under Article 5 of the US-Japan Mutual Security Treaty was for the first time attached to a bill, the National Defense Authorization Act for Fiscal Year 2013, and officially approved by the Senate on November 29, 2012.¹¹¹

However, the inherent contradictions posed by this US position became much more apparent after Japan's purchase. If the purchase is legal, and the US recognizes the islands' protection to be required under the US-Japan Mutual Security Treaty itself, as with other territories of Japan, this would contradict the historical US stance of neutrality it has carefully maintained all these years. But, if, as the US still affirms, the Senkakus remains merely under the extended deterrence of Article 5, this means the US does not recognize the actuality and legality of the purchase, since Article 5 covers only "territories under the administration of Japan." Thus the US is in danger of reducing Japan's acquisition to a "farce,"¹¹² a word the PRC uses now to describe the purchase or the nationalization act.

The Question of Residual Sovereignty

Despite the fact that this Treaty does not resolve the sovereignty issue, Japan believes it retains "residual sovereignty" over the Senkakus, a view that was seemingly corroborated by Dulles during the SFPT negotiations. Dulles, of course, did not talk about residual sovereignty of the Senkakus in particular so much as that of "Nansei Shoto" as a whole. Rogers at the Okinawa Reversion Treaty Hearing in 1971 sought to explicate what Dulles meant: the term "residual sovereignty" referred to the US intention and policy of returning all territories that it administered to Japan pursuant to Article 3 of the SFPT.¹¹³ Rogers' explication was not necessarily an *ex post facto* rationalization. Even before the congressional hearing and the

reversion, it was the US position that “the treaty alone is not necessarily the final determinant of the sovereignty issue.”¹¹⁴ Therefore, if residual sovereignty pertaining to the Senkakus exists, Japan needed to have had indisputable title over the islands at the beginning of the trusteeship in 1952. As Japan has not definitively established it ever had sovereignty over the Senkakus, it must be concluded that the island group’s status remained indeterminate at the transfer of administrative control.

IV Effective Possession/Control Revisited

As the preceding discussion demonstrates, Japan cannot firmly establish grounds for the claim to the Senkakus based on modalities of territorial acquisition or principles of treaty interpretation in international law. In fact, while it declares international law to be on its side, there is much to show that Japan does not adhere to the bedrock principle of applying international law in good faith, tailoring, instead, the interpretation of legal concepts and doctrines to fit its needs and to bolster its position. In this section, pertinent cases of adjudicated international territorial disputes will be analyzed to determine whether Japan’s claim has stronger support from case law.¹¹⁵

Justifications for territorial claims before the International Court of Justice (ICJ) can generally be grouped into categories, with “effective control” being one Sumner finds in an overview to be highly determinative in judicial decisions.¹¹⁶ Most scholars too believe effective control to be “...the shibboleth - indeed, the *sine qua non* - of a strong territorial claim.”¹¹⁷ Analyzing island disputes only, Heflin arrives at a similar conclusion, i.e. that effective control is not only determinative but may be dispositive in these cases.¹¹⁸ As the concept coincides with and is indistinguishable from the previously discussed concepts of effective occupation and effective possession, the terms effective control, possession and

occupation will be used interchangeably in this section.

Japan’s claim to “valid control” of the Senkakus begins at the incorporation date of January 14, 1895. This is the date it has chosen to mark the origin of the claim and therefore of the dispute. Whether the ICJ would focus on this “critical date” in a legal sense, in which acts occurring subsequent to the date “will normally be held as devoid of any legal significance,”¹¹⁹ is uncertain. The date, however, conveniently divides the dispute into two distinct periods, namely, pre- and post-January 14, 1895, and an examination of one without the other would be incomplete.

The Permanent Court of International Justice’s (PCIJ) decision in a 1933 case most resembling the island dispute in the period leading up to the date of January 14, 1895, is the *Eastern Greenland Case*.¹²⁰ Although the case does not involve uninhabited islands, Greenland falls into a class of territories that are barren, inhospitable and not conducive to settlement, in this respect similar to the Diaoyu Dao/Senkakus or the Arctic and Polar regions. In such disputes, much less is required to demonstrate intent to occupy and exercise effective control/possession.

In this Case, both Norway and Denmark claimed sovereignty over Eastern Greenland. Norway occupied the territory following a royal proclamation on July 10, 1931, asserting the territory was *terra nullius*. It argued that Eastern Greenland lay outside the boundaries of Denmark’s other occupied colonies in Greenland. Denmark, on the other hand, maintained it had sovereignty over all of Greenland and that Norway’s proclamation was invalid because it violated the legal status quo. Denmark contended that its title up to 1931 was “founded on the peaceful and continuous display of State authority over the island,” uncontested by any other state.¹²¹

The Court in its deliberations notably

established a “critical date” which was determined to be the date of Norway’s royal proclamation. At this critical date, the dispute was *not* one of competing sovereignty claims. Rather as Sharma points out “[i]t was a case where one party was insisting upon a claim to sovereignty over the territory in question, whereas the other party was contending that the disputed territory had always remained ‘no man’s land’.”¹²²

The PCIJ ruled in favor of Denmark. In essence, the Court concluded that Denmark’s demonstration of sovereignty over *Greenland as a whole* for the period preceding the critical date in 1931 was sufficient to establish its valid title to *Eastern Greenland*.¹²³ In other words, in sparsely settled land sovereignty need not be displayed in every nook and corner of the territory so much as over the territory as a whole. Thus the criterion of effective possession/control was applied and was not set aside by the Court in this case so much as adapted to the conditions of a different environment and circumstance. In inaccessible Greenland, effective occupation was essential but very little display and exercise of state authority was required to satisfy this principle.

Norway’s claim that the land was *terra nullius* did not convince the Court since Norway had made little effort to claim Eastern Greenland prior to the critical date. And although Denmark might not have been in actual and effective control of Eastern Greenland or even Greenland as a whole, Norway had shown even less control, having hardly any activity through different historical periods.¹²⁴ In the absence of any competing claims up to 1931, one scholar commented that Denmark “succeeded largely by default.”¹²⁵

Scholars examining arbitral and judicial decisions pertaining to island disputes generally consider the Diaoyu Dao/Senkakus controversy to be a case of competing sovereignty claims. The question follows as to

whether this characterization of competing claims is appropriate or whether, like the *Eastern Greenland Case*, the characterization of the dispute to be a claim of sovereignty versus one of *terra nullius* is more appropriate. If the latter, then perhaps China has the more colorable claim. For China can furnish evidence of the exercise of state authority over Taiwan, which administered Diaoyu Dao during the pre-January 14, 1895, period; the islands’ being administered by Taiwan in turn was arguably established in the aforementioned historical documents of gazetteers/annals. The Diaoyu Dao/Senkakus dispute, however, was not submitted for arbitration shortly after the dispute arose as in the *Eastern Greenland Case*. The succeeding period from 1895 on, during which Japan has had *de facto* control of the Senkakus, would have to be evaluated as well for applicable judicial rulings that may provide a better guide for analyzing the dispute.

According to most scholars the most authoritative case law on title creation and preservation can be found in the 1928 *Island of Palmas Case*.¹²⁶ In this Case the US and the Netherlands each laid claim to a sparsely inhabited island off the coast of the Philippines. The US claimed it had acquired a historical title through Spain’s cession of the island and the Philippines in a treaty after US victory in the Spanish-American War of 1898. Spain, in turn, had discovered the island in the 16th century. The Netherlands, on the other hand, claimed the island on the basis of effective possession and exercises of state functions beginning in 1677 or even earlier.

The Netherlands was awarded the title, with the Permanent Court of Arbitration stressing that not only must title be acquired, it must also be sustained through effective possession/control according to standards developed since the acquisition of title. This means “[t]he existence of a right must be determined based on the law at the time of the

creation of the right and the international law applicable to the continued existence of that right.”¹²⁷ The contemporary standards of effective possession, derived from this Case and embossed in later rulings, regard the “continuous and peaceful display of territorial sovereignty (peaceful in relation to other states)” as crucial to title acquisition and preservation.¹²⁸ This principle may have more weight in judicial and arbitral decisions on sovereignty claims than a title that was previously acquired. Some scholars, however, find the principle questionable, opining, “[e]very state would constantly be under the necessity of examining its title to each portion of its territory in order to determine whether a change in the law had necessitated, as it were, a reacquisition.”¹²⁹

A crucial difference exists when comparing this case to that of the Diaoyu Dao/Senkakus. Beginning in 1677, the Netherlands had exhibited over a century of state functions up to 1906 when the dispute arose, while the US had not. Japan had not exercised sovereignty over the Senkakus until its supposed incorporation in 1895, and its control of the Senkakus thereon was not continuous but was interrupted by the US administration of the islands between 1945 and 1972. Japan claims to have had “direct” control only from 1895 to 1945 and then again from 1972 to the present.¹³⁰ That initial period would probably not be considered long enough to acquire title given that Japan displayed little or no activity before the incorporation date. However, according to the Court in the *Island of Palmas Case*, stipulating the exact length of time is less important than ensuring it should be long enough for a rival claimant to realize “the existence of a state of things contrary to its real or alleged rights.”¹³¹ In theory and in case law, then, the importance of the claimant having constructive knowledge of a rival claim converges. Thus Japan’s secrecy which helped facilitate initial annexation of the islands might actually work against it in court.

The period 1972 to the present is even shorter. The question then becomes one of whether Japan exercises effective control/possession and whether the exercise is peaceful, without protest from China during this time. In order to answer this question, the activities which comprise administrative versus effective control/possession must first be explored. An analysis reveals that the definition of effective control/possession in international law overlaps considerably with the concept of the administration of a territory. For example, in the case of *Sovereignty over Pulau Ligitan and Pulau Sipadan*, Indonesia and Malaysia presented competing claims to the islands of Ligitan and Sipadan based on a number of factors such as history, treaty law and so on.¹³² The International Court of Justice found Malaysia’s exercise of effective control which consisted of “legislative, administrative or quasi-judicial acts” sufficient to award it the title.¹³³ Thus, effective control may be said to include administrative acts and a range of other activities, while the exercise of administrative functions comprises part of effective control/possession/occupation. As a result of this overlap, the two, i.e., administrative and effective control, may appear on the surface to be interchangeable. But they are *qualitatively* different in the Diaoyu Dao/Senkakus dispute. In effect, the type of administrative control Japan has over the Senkakus cannot be equated with the type of effective control judicial courts used in the past to award sovereignty in other territorial disputes, as can be seen from the analysis below.

In the question on concrete examples of Japan’s “valid control” over the Senkaku Islands in the Q & A webpage of MOFA, Japan admits it “...could not exercise direct control over the Islands until the administrative rights were reverted to Japan in 1972.”¹³⁴ Therefore in Japan’s view, its “direct control” is derived from its administrative control. Japan, however, did not establish and maintain administrative

control from 1972 to the present on its own. The administrative rights were transferred to it. The status quo of administrative control is maintained thereon not by Japan's efforts alone so much as by the US standing firmly behind Japan with Article 5 of the 1960 US-Japan Mutual Security Treaty. The trilateral nature of the conflict is obvious for whenever tension erupts, Japan calls on the US to reaffirm the latter's commitment to the alliance. Observers have commented on how difficult if not impossible it is, given this situation, for a contender like China to effect any real changes to the status quo other than through the use of force.¹³⁵ Article 5 may have a deterrent effect, preventing the dispute from spiraling into an armed confrontation, but US preservation of Japan's *de facto* administrative control, despite its avowal of neutrality, reinforces Japan's dependence on US power as well as perpetuating the dispute.

In this sense, the so-called "valid control" Japan claims to exercise can hardly be said to fall under the purview of "effective control" as the term is generally understood and has been previously used in international arbitrations and adjudications. In no other dispute is there a similar instance of this so-called "valid control" enabled by an administrative control which is transferred and then backed by the strength of the world's only Superpower. The anomaly of this case makes it difficult to assess how it would be adjudicated were it submitted to the ICJ. At worst, the administrative control Japan acquires over the Senkakus may be viewed as a product of its territorial expansionism and imperialism, that is, a seizure of land by a state backed by a stronger state. At best, Japan may be said to exercise "circumscribed" control.¹³⁶

Within this circumscribed control, occasional confrontations have arisen in addition to the initial strong protest from China at the reversion of the islands. Except for the present situation, however, none of these confrontations has escalated to the point of no

return. Accordingly Japan's exercise of "valid control" is by no means peaceful although the situation appears to be relatively stable due to active dispute management, as previously discussed, by both Japan and China prior to September 2012. This dispute management can in turn be traced to the implicit agreement both countries arrived at to "shelve" the issue. However, with Japan's "purchase" of the islands it may have crossed the line China drew in the sand to avoid confrontation. By so doing Japan may have qualitatively "transformed the nature of the issue."¹³⁷

An evaluation of case law leads to the conclusion that there is no precedent governing this particular dispute, particularly in the post-January 14, 1895, period. Japan's administrative control of the islands can hardly be equated with effective control/possession, a factor that has been found to be determinative in a number of other internationally adjudicated cases. Therefore case law does not provide Japan with a superior claim to title. Nor does international law furnish any helpful guidelines to rival claimants for reaching a mutually acceptable resolution.

V Conclusion

Politicians and most media, legal and scholarly commentators in Japan as well as the US and the Anglophone world appear convinced that Japan's claim to the Senkakus is soundly based on international law. They are seemingly unaware of the irony and inconsistency of Japan's stance on this dispute as opposed to its dispute with South Korea over the Takeshima/Dokto islets. In the latter dispute, Japan, in a complete role reversal, denounces South Korea's control over the islets as illegal occupation, while South Korea maintains Dokto is clearly part of its territory. Although Japan has asked South Korea to submit the Takeshima/Dokto dispute to the ICJ, Seoul has refused, claiming that Dokto belongs to Korea under international law. In the dispute with

China, however, Japan has not moved to settle the Senkakus/Diaoyu Dao dispute within the ambit of international law. As recently as October 2012, Prime Minister Noda confirmed that Japan has no intention of so doing, insisting that there is no territorial dispute.¹³⁸

Yet the preceding careful dissection of Japan's claim shows it to have dubious legal standing. Japan's contention that the Senkakus were *terra nullius* is disingenuous, if not in violation of the cardinal principle of good faith in applying and observing international law. China's silence from 1895 to 1945 cannot be construed to be acquiescence to Japanese ownership, due to its not having constructive knowledge of the Cabinet Decision and the subsequent belief China had ceded the territory in the Shimonoseki Treaty. Further, the concept of acquiescence from 1972 to the present simply does not apply when in addition to strong protests from China, evidence points to the existence of an implicit agreement on both sides in 1972 and again in 1978 to shelve the issue to a later day, despite Japan's current denial of this agreement.

The SFPT has no implication for the disposition of the islands; the US remains neutral as to their sovereignty status. Japan would have retained residual sovereignty when the island group reverted to its administration only if it had acquired legitimate title before reversion. Although the ICJ has shown effective control to be determinative in a number of its rulings, a close scrutiny of Japan's so-called "valid control" reveals it to be no more than transferred administrative control, sustained with the efforts of a third party thus bearing scant resemblance to the concept of effective possession/control in other adjudicated cases. Article 5 of the US-Japan Mutual Security Treaty may have the manifest function of deterring China from the use of force to gain control of the islands. But it also has the latent function of encouraging a disregard for the goals of a secure and stable regional and global

order by prolonging the dispute.

Japan may find to its consternation that it is easier to make a claim than to back away from one. China has shown Japan a way out of the imperative to resolve the dispute immediately by offering joint development of the resources in the seas around the Diaoyu Dao/Senkakus. Japan has repeatedly refused. Instead it has chosen to stake its claim on international law, one which this analysis has shown to be based on shaky legal grounds. Moreover, international law concerning territorial disputes does not, as Japan seems to think, provide a predictable or satisfactory framework for resolving the controversy. Case law is too vague to be of help for "there are simply too few cases and too many uncertain variables for the result of any adjudication of sovereignty over the Senkakus to be reliably predicted."¹³⁹ International law merely prepares Japan to ground its claims "in colorable legal arguments"¹⁴⁰; it neither points the way to a viable solution nor fosters a negotiated settlement. Japan's emphatic denial that a dispute ever exists precludes any serious negotiations with China and contradicts its stated commitment to resolve the dispute peacefully.

Reliance on US might to bolster Japan's claim and support its *de facto* administrative control of the islands is also problematic. Japan seems unaware that its current territorial disputes with China and other countries such as Korea stem mainly from the SFPT, a treaty which encapsulates US postwar hegemonic ambitions in the region with little or no regard for the Asian countries which suffered most from Imperial Japan's militarism. For all its apparent efforts to mediate the current flare-up, the US may actually wish to keep controversy alive. Perpetuating and even stoking the conflict could divert China's attention and energy from its modernization efforts, disrupting its "peaceful" rise to emerge as the main competitor to the US. Confrontation could also

assure that Japan remains securely in the US camp, more keenly aware of the need to have a major US military presence on its soil, especially in Okinawa, where most local residents are otherwise opposed to the massive American footprint.

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APPENDIX

Accessed December 4, 2012. [PDF version](#) of the appendix is available.

NOTE: Both articles below are from the Japan Ministry of Foreign Affairs (MOFA) website and were on accessed on December 4, 2012.

The Basic View on the Sovereignty over the Senkaku Islands

[provisional translation by MOFA] November 2012

http://www.mofa.go.jp/region/asia-paci/senkaku/basic_view.html

There is no doubt that the Senkaku Islands are clearly an inherent part of the territory of Japan, in light of historical facts and based upon international law. Indeed, the Senkaku

Islands are under the valid control of Japan. There exists no issue of territorial sovereignty to be resolved concerning the Senkaku Islands.

The Senkaku Islands are not included in the territory which Japan renounced under Article II of the San Francisco Peace Treaty, which came into effect in April 1952 and legally demarcated Japan's territory after World War II. They were placed under the administration of the United States of America as part of the Nansei Shoto Islands, in accordance with Article III of the said treaty, and were included in the areas whose administrative rights were reverted to Japan in accordance with the Agreement Between Japan and the United States of America Concerning the Ryukyu Islands and the Daito Islands, which came into force in May 1972. The facts outlined herein clearly indicate the status of the Senkaku Islands as being part of the territory of Japan.

Historically, the Senkaku Islands have continuously been an integral part of the Nansei Shoto Islands, which are the territory of Japan. From 1885 on, surveys of the Senkaku Islands were thoroughly carried out by the Government of Japan through the agencies of Okinawa Prefecture and by way of other methods. Through these surveys, it was confirmed that the Senkaku Islands had been uninhabited and showed no trace of having been under the control of the Qing Dynasty of China. Based on this confirmation, the Government of Japan made a Cabinet Decision on 14 January 1895 to erect a marker on the Islands to formally incorporate the Senkaku Islands into the territory of Japan.

Moreover, the Senkaku Islands were neither part of Taiwan nor part of the Pescadores Islands, which were ceded to Japan from the Qing Dynasty of China in accordance with Article 2 of the Treaty of Peace signed at Shimonoseki, which came into effect in May of 1895. The fact that China expressed no objection to the status of the Islands being

under the administration of the United States under Article III of the San Francisco Peace Treaty clearly indicates that China did not consider the Senkaku Islands as part of Taiwan. The Republic of China (Taiwan) recognized the San Francisco Peace Treaty in the Sino-Japanese Peace Treaty, which came into effect in August 1952.

The Government of China and the Taiwanese authorities only began making their own assertions on territorial sovereignty over the Senkaku Islands in the 1970s, when the islands attracted attention after a United Nations agency conducted an academic survey in the autumn of 1968, which indicated the possibility of the existence of petroleum resources in the East China Sea. None of the arguments that the Chinese government or Taiwanese authorities have presented on historical, geographic or geological grounds is valid evidence under international law to support China's own assertions of its territorial sovereignty over the Senkaku Islands.

Q&A on the Senkaku Islands

http://www.mofa.go.jp/region/asia-paci/senkaku/qa_1010.html

Q1: What is the basic view of the Government of Japan on the Senkaku Islands? A1: There is no doubt that the Senkaku Islands are clearly an inherent territory of Japan, in light of historical facts and based upon international law. Indeed, the Senkaku Islands are under the valid control of Japan. There exists no issue of territorial sovereignty to be resolved concerning the Senkaku Islands.

Q2: What are the grounds for Japan's territorial sovereignty over the Senkaku Islands? A2: 1.The Senkaku Islands were not included in the territory which Japan renounced under Article 2 of the

San Francisco Peace Treaty of 1951 that legally defined the territory of Japan after World War

II. Under Article 3 of the treaty, the islands were placed under the administration of the United States as part of the Nansei Shoto Islands. The Senkaku Islands are included in the areas whose administrative rights were reverted to Japan in accordance with the Agreement between Japan and the United States of America Concerning the Ryukyu Islands and the Daito Islands that entered into force in 1972.

2.The Senkaku Islands have historically and consistently been part of the Nansei Shoto Islands which have been part of the territory of Japan. From 1885, surveys of the Senkaku Islands had been thoroughly conducted by the Government of Japan through the agencies of Okinawa Prefecture and through other means. Through these surveys, it was confirmed that the Senkaku Islands had been not only uninhabited but also showed no trace of having been under the control of the Qing Dynasty of China. Based on this confirmation, the Government of Japan made a Cabinet Decision on January 14, 1895, to erect markers on the islands to formally incorporate the Senkaku Islands into the territory of Japan. These measures were carried out in accordance with the internationally accepted means of duly acquiring territorial sovereignty under international law (occupation of terra nullius). The Senkaku Islands are not part of Formosa (Taiwan) and the Pescadores Islands that were ceded to Japan from the Qing Dynasty in accordance with Article II of the Treaty of Shimonoseki, concluded in April 1895.

[Reference: Article 2 of the San Francisco Peace Treaty]

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

[Reference: Article 3 of the San Francisco Peace Treaty]

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° north latitude (including the Ryukyu Islands and the Daito Islands), Nanpo Shoto south of Sofu Gan (including the Bonin Islands, Rosario Island and the Volcano Islands) and Parece Vela and Marcus Island. Pending the making of such a proposal and affirmative action thereon, the United States will have the right to exercise all and any powers of administration, legislation and jurisdiction over the territory and inhabitants of these islands, including their territorial waters. [Reference: Article I of the Agreement between Japan and the United States of America Concerning the Ryukyu Islands and the Daito Islands] 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 of administration, legislation and jurisdiction was accorded to the United States of America under Article 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 concerning the Amami Islands and the Agreement concerning Nanpo Shoto and Other Islands signed between Japan and the United States of America, respectively on December 24, 1953 and April 5, 1968. [Reference: Article II of the Agreement between Japan and the United States of America Concerning the Ryukyu Islands and the Daito Islands] It is confirmed that treaties, conventions and other agreements concluded between Japan and the United States of America, including, but without limitation, the Treaty of Mutual Cooperation and Security between Japan and the United States of America signed at Washington on January 19, 1960 and its related arrangements and the Treaty of Friendship, Commerce and Navigation between Japan and the United States of America signed at Tokyo on April 2, 1953, become applicable to the Ryukyu Islands and the Daito Islands as of the date of entry

into force of this Agreement. [Reference: Agreement between Japan and the United States of America concerning the Ryukyu Islands and the Daito Islands (Agreed Minutes)] Regarding Article I: The territories defined in paragraph 2 of Article I are the territories under the administration of the United States of America under Article 3 of the Treaty of Peace with Japan, and are, as designated under Civil Administration Proclamation Number 27 of December 25, 1953, all of those islands, islets, atolls and rocks situated in an area bounded by the straight lines connecting the following coordinates in the listed order:

North latitude 28 degrees 24 degrees 24 degrees

27 degrees 27 degrees 28 degrees 28 degrees

East Longitude 124 degrees 40 minutes 122 degrees 133 degrees 131 degrees 50 minutes 128 degrees 18 minutes 128 degrees 18 minutes 124 degrees 40minutes

Q3: What are the concrete examples of Japan's valid control over the Senkaku Islands? A3: 1.A resident of Okinawa Prefecture who had been engaging in activities such as fishery around the

Senkaku Islands since around 1884 made an application for the lease of the islands, and approval was granted by the Meiji Government in 1896. After this approval, he sent workers to those islands and ran the following businesses: collecting bird feathers, manufacturing dried bonito, collecting coral, raising cattle, manufacturing canned goods and collecting mineral phosphate guano (bird manure for fuel use). The fact that the Meiji Government gave approval concerning the use of the Senkaku Islands to an individual, who in turn was able to openly run these businesses mentioned above based on the approval, demonstrates Japan's valid control over the Islands.

2.Before World War II, the Central Government

and the Government of Okinawa Prefecture conducted activities such as field surveys on the Senkaku Islands.

3. After World War II, as the Senkaku Islands had been placed under the administration of the United States as part of Nansei Shoto in accordance with Article 3 of the San Francisco Peace Treaty, Japan could not exercise direct control over the Islands until the administrative rights were reverted to Japan on May 15, 1972. However, even during this period, the Islands remained as part of the territory of Japan, and this legal status of the Islands, which was that no foreign state had rights over them, with the only exception of the administrative rights which the United States was authorized to exercise over the Islands under the San Francisco Peace Treaty, was ensured through the valid control by the United States Civil Administration of the Ryukyu Islands and the Government of the Ryukyu Islands.

4. The following are some examples of valid control after the reversion to Japan of the administrative rights over Okinawa including the Senkaku Islands. (1) Patrol and law enforcement. (e.g. law enforcement on illegal fishing by foreign fishing boats) (2) Levying taxes on the owners of the Islands under private ownership. (in Kuba Island.)

(3) Management as state-owned land (in Taisho Island, Uotsuri Island, etc.) (4) As for Kuba Island and Taisho Island, the Government of Japan has offered them to the United

States since 1972 as facilities/districts in Japan under the Japan-U.S. Status of Forces

Agreement. (5) Researches by the Central Government and the Government of Okinawa Prefecture (e.g.

Utilization and development research by Okinawa Development Agency (construction of temporary heliport, etc.) (1979), Fishery research by the Okinawa Prefecture (1981),

Research on albatrosses commissioned by the Environment Agency (1994).).

The views of the Japanese Government on China's (and Taiwan's) assertions

Q4: What is the view of the Government of Japan on China's (and Taiwan's) assertions on territorial sovereignty over the Senkaku Islands? A4: 1. None of the points raised by the Government of China and the Taiwanese authorities as historical,

geographical or geological evidences provide valid grounds in light of international law to support

their sovereignty over the Islands. 2. Moreover, it is only since the 1970s that the Government of China and the Taiwanese Authorities

began making their own assertions about the Senkaku Islands, which was after a survey conducted by an agency of the United Nations in autumn of 1968 had indicated the possibility of the existence of petroleum resources on the East China Sea, and attention was focused on the Senkaku Islands. Until then, they had never expressed any objections, including to the fact that the Islands were included in the area over which the United States exercised the administrative rights in accordance with Article 3 of the San Francisco Peace Treaty. China has never explained why it had not expressed objections.

3. There is a description of "the Senkaku Islands, Yaeyama District, Okinawa Prefecture, Empire of Japan" in the letter of appreciation dated May 1920 sent from the then consul of the Republic of China in Nagasaki concerning the distress which involved Chinese fishermen from Fujian Province around the Senkaku Islands. In addition, an article in the People's Daily dated January 8, 1953, under the title of "Battle of people in the Ryukyu Islands against the U.S. occupation", made clear that the Ryukyu Islands consist of 7 groups of islands

including the Senkaku Islands. Moreover, in a world atlas collection published in 1958 by a Chinese map-publishing company (reprinted in 1960), there is a clear description of the Senkaku Islands as the “Senkaku Group of Islands” and it treats them as part of Okinawa. Furthermore, from the 1950s onward, the U.S. military used some of the Senkaku Islands (Taisho Island and Kuba Island) as firing/bombing ranges while the islands were under the administration of the United States, but there is no record of China ever having protested it during that period.

[Reference: Background of China's (and Taiwan's) assertions]

In the autumn of 1968, an academic survey conducted by experts of Japan, Taiwan and Korea with the cooperation of the United Nations Economic Commission for Asia and the Far East (ECAFE) indicated the possibility of the existence of petroleum resources on the East China Sea, and attention was focused on the Senkaku Islands.

[Reference: Letter of appreciation from the consul of the Republic of China in Nagasaki] (provisional translation) In the winter of the 8th year (1919) of the Republic of China, 31 fishermen from Hui'an Country, Fujian Province were lost due to the stormy wind and were washed ashore on the Wayo Island, of the Senkaku Islands, Yaeyama District, Okinawa Prefecture, Empire of Japan. Thanks to the enthusiastic rescue work by the people of Ishigaki village, Yaeyama District, Empire of Japan, they were able to safely return to their homeland. With a deep response and admiration toward the people of the village who were willing and generous in the rescue operation, I express my gratitude by this letter.

Consul of the Republic of China in Nagasaki 馮冕 20 May, the 9th year (1920) of the Republic of China *[Reference: The article on the People's Daily titled "Battle of people in the Ryukyu Islands against the U.S. occupation", dated 8*

January 1953] (Excerpt, provisional translation)

"The Ryukyu Islands lie scattered on the sea between the Northeast of Taiwan of our State (note: China; same in the following text) and the Southwest of Kyushu, Japan. They consist of 7 groups of islands; the Senkaku Islands, the Sakishima Islands, the Daito Islands, the Okinawa Islands, the Oshima Islands, the Tokara Islands and the Osumi Islands. Each of them consists of a lot of small and large islands and there are more than 50 islands with names and about 400 islands without names. Overall they cover 4,670 square kilometers. The largest of them is the Okinawa Island in the Okinawa Islands, which covers 1,211 square kilometers. The second largest is the Amami Oshima Island in the Oshima Islands (the Amami Islands), which covers 730 square kilometers. The Ryukyu Islands stretch over 1,000 kilometers, inside of which is our East China Sea (the East Sea in Chinese) and outside of which is the high seas of the Pacific Ocean."

[Reference: "World Atlas Collection" (1958 (reprinted in 1960))]

This was published by a Chinese map-publishing company in 1958. It clearly identifies the Senkaku Islands as “the Senkaku Group of Islands” and treats them as part of Okinawa. China claims that this atlas collection has a note saying that “part of the national border with China is based on an atlas made before the anti-Japanese war (that is, when Taiwan was a Japanese colony)” and that the content of this atlas published in 1958 does not support the argument that the Chinese government at the time recognized Japanese control of Senkaku Islands. However, the original text of the note only states that “the national border of China in this atlas was drawn based on an atlas of the Shen Bao daily (Chinese newspaper in those days) before the liberation from Japanese occupation (Chinese text: 本图集中国部分的国界线根据解放前申报地 图绘制).” It is not clear which part specifically

is the portion before the liberation. In this atlas, Taiwan is identified as part of the “People’s Republic of China” whereas the Senkaku Islands are identified as “the Senkaku Group of Islands”. It is unnatural that China remained to use the expression from the period when Taiwan was a colony of Japan only for the Senkaku Islands which China argues it belongs to Taiwan.

Q5: The Chinese government asserts that the Senkaku Islands had not been terra nullius (“land belonging to no state”) as Japan claims, but that they have been an inherent part of the territory of China from ancient times; that they had been discovered, named and used by the Chinese nationals before anyone else, according to historical documents; that Chinese fishermen had engaged in fishing and other productive activities in this area; and that people along China’s southeast coast had been using Uotsuri Island as a navigation beacon. It also asserts that during the Ming Dynasty, the islands were already discovered and recognized by imperial envoys of China and that these islets belonged to Taiwan, which was included in China’s maritime defense zone. What is the view of the Japanese government?

A5: 1. Japan incorporated the Islands into Okinawa Prefecture after conducting thorough surveys from

1885, while ascertaining carefully that these islands had not only been uninhabited but also showed

no trace of having been under a control of any state including China. 2. None of the arguments that the Chinese government or Taiwanese authorities have presented as

historical, geographic or geological grounds is valid evidence under international law to support the Chinese assertion of its territorial sovereignty over the Senkaku Islands. Under international law, for example, the discovery of an island or geographical proximity alone does

not evidence the assertion of territorial sovereignty. Recently, China has been asserting that it has historically owned the Senkaku Islands (meaning that it has not been terra nullius) based on many historical documents and maps existing in China. However, the contents of these documents, are completely insufficient as evidence to support China's assertion when those original documents are examined. Specifically, (i) China asserts as follows: The Records of the Imperial Title-Conferring Envoys to Ryukyu (Shi Liu Qiu Lu) (1534) written by Chen Kan, an imperial title-conferring envoy from the Ming Court, clearly states that “the ship has passed Diaoyu Dao, Huangmao Yu, Chi Yu...Then Gumi Mountain comes into sight, that is where the land of Ryukyu begins” and, since “Gumi Mountain” is the present Kume Island, it means that the Senkaku Islands, located west of Kume Island, were the territory of China. China also asserts that in his book Records of Messages from Chong-shan (Zhong Shan Chuan Xin Lu) (1719), Xu Baoguang states that “姑米島琉球西南方界上鎮山” (Note: Mt. Gumi is the mountain guarding the southwest border of Ryukyu) and that this is also the ground for its assertion that the area west of Kume Island had belonged to China. However, although these documents showed that Kume Island belonged to Ryukyu, they did not have any reference that the Senkaku Islands, located to the west of Kume Island, belonged to the Ming or Qing Dynasty of China.

(ii) China also asserts that An Illustrated Compendium on Maritime Security (Chou Hai Tu Bian) (1561) compiled by Hu Zongxian included the Senkaku Islands on the “Map of Coastal Mountains and Sands” (Yan Hai Shan Sha Tu) and that these groups of islands were incorporated into the jurisdiction of the coastal defense of the Ming Court. The book, however, is not clear regarding whether these groups of islands were within the coastal defense of the Ming Court. The mere fact that the Senkaku Islands were printed on that map does not

mean that they were generally regarded as territory of China at that time.

3. Rather, investigations in Japan have confirmed the presence of examples showing that since the 20th century, even through the 1950s and 1960s, China has recognized the Senkaku Islands as Japanese territory. Examples: (i) From the 1950s onward, the U.S. military used part of the Senkaku Islands (Taisho Island and Kuba Island) for firing/bombing ranges while the islands were under the administration of the United States, but there is no record of China ever having protested it during that period.

(ii) There is a description of "the Senkaku Islands, Yaeyama District, Okinawa Prefecture, Empire of Japan" in a letter of appreciation dated May 1920 and sent from the then consul of the Republic of China in Nagasaki concerning the distress around the Senkaku Islands that involved Chinese fishermen from Fujian Province.

(iii) An article in the People's Daily dated January 8, 1953, under the title of "Battle of People in Ryukyu Islands against U.S. Occupation," wrote that the Ryukyu Islands consisted of seven groups of islands including the Senkaku Islands. (iv) Moreover, the "World Atlas Collection" published by a Chinese map-publishing company in 1958 (reprinted in 1960) clearly identified the Senkaku Islands as "the Senkaku Group of Islands" and treated them as part of Okinawa.

Q6: The Chinese government asserts that maps compiled in China or in foreign countries, including Japan, before the 1800s show that the Senkaku Islands belonged to China. What is the view of the Japanese government? A6

1. Intended purposes of maps and compilers of maps vary and the existence of a map in itself does not evidence the assertion of territorial sovereignty. From 1885, the Government of Japan thoroughly conducted surveys of the

Senkaku Islands through the agencies of Okinawa Prefecture and by way of other methods. Through these surveys, it was confirmed that the Senkaku Islands had been not only uninhabited but showed no trace of having been under the control of the Qing Dynasty of China. Based on this confirmation, the Government of Japan made a Cabinet Decision on January 14, 1895, to erect markers on the islands to formally incorporate the Senkaku Islands into the territory of Japan. Meanwhile, no valid ground under international law has been shown to support that China had established sovereignty over the Senkaku Islands before Japan incorporated them into its territory in 1895. It is only since the 1970s that the Chinese government began to make its own assertions over the Senkaku Islands.

2. The map in the Illustrated Outline of the Three Countries (1785) by Hayashi Shihei, which China cites as one of examples supporting its assertion, is not clear as to whether it was intended to draw the recognition of territories of that time. To begin with, it does not evidence accurate knowledge as shown by the fact, for instance, the size of Taiwan in the map is only about one-third of that of Okinawa's main island.

Q7: The Chinese government claims that Japan stole the Senkaku Islands during the Sino-Japanese War. The Chinese government also asserts that Taiwan, all the islands appertaining to it and the Pescadores were later ceded to Japan under an unequal treaty, "the Treaty of Shimonoseki," after the Sino-Japanese War, and were incorporated into the territory of Japan. What is the view of the Japanese government? A7:

1. Although the Treaty of Shimonoseki does not clearly define the geographical limits of the island of Formosa and the islands appertaining or belonging to Formosa ceded to Japan by the Qing Dynasty of China, nothing in the negotiation history (or otherwise) supports the

interpretation that the Senkaku Islands are included in the island of Formosa and the islands appertaining or belonging to it in Article 2b of the Treaty.

2. Furthermore, Japan had already undertaken preparation, from 1885, even before the Sino-Japanese War, to formally incorporate the Senkaku Islands into the territory of Japan while carefully ascertaining that no state including the Qing Dynasty of China had control over the Islands. Following the Cabinet Decision in January 1895, which was made before the concluding of the Treaty of Shimonoseki, the Government of Japan incorporated the Senkaku Islands into Okinawa Prefecture and consistently treated the Islands as part of Okinawa Prefecture, not as an area under the jurisdiction of the Governor-General of Taiwan which was ceded to Japan after the Sino-Japanese War. These facts make it clear that, both before and after the Sino-Japanese War, the Government of Japan has never regarded or treated the Senkaku Islands as part of the island of Taiwan or islands appertaining or belonging to the island of Taiwan, which had been part of the Qing Dynasty of China. Thus, it is evident that the Senkaku Islands could never have been part of the cession made under the Treaty of Shimonoseki.

Moreover, it was recognized in the Sino-Japanese Peace Treaty of 1952 that Japan renounced all right, title and claim to Taiwan, the Pescadores and other islands under Article 2 of the San Francisco Peace Treaty. Against the above background, however, there was absolutely no discussion on territorial sovereignty over the Senkaku Islands in the process of negotiations for the Sino-Japanese Peace Treaty. What this means is that it was considered as the rightful premise that the Senkaku Islands were the territory of Japan from before that time.

Q8: The Chinese government, referring to a

letter sent in 1885 by the then Japanese foreign minister to the then interior minister, claims that the Meiji government acknowledged the Senkaku Islands were the territory of China before being incorporated into Okinawa Prefecture. What view does the Japanese government have?

A8 1. The foreign minister's letter in 1885 does constitute one document of the process up to the

incorporation of the islands and it is true that it referred to the attitude of the Qing Dynasty. However, it is impossible to interpret it as the acknowledgement by the Government of Japan that the Qing Dynasty held the Senkaku Islands as its territory. Rather, the document shows how Japan proceeded with the process of incorporation carefully and cautiously on the premise that the Senkakus did not belong to Qing Dynasty. The fact that the foreign minister in his letter supported an on-site survey clearly shows that Japan did not consider the Senkaku Islands as the territory of the Qing Dynasty.

2. Moreover, in his letter to the foreign minister in 1885, the interior minister said to the effect that the Senkaku Islands showed no trace of having been under the control of the Qing Dynasty. [*Reference 1: A letter dated October 21, 1885, sent by Foreign Minister Inoue to Interior Minister Yamagata*]

"Concerning the aforementioned islands (note: Senkaku Islands), they are in proximity to the national border with the Qing Dynasty, their circumferences appear smaller than those of the Daito Islands after our on-site survey and in particular, their names are being attached by the Qing Dynasty. There are rumors recently circulated by Qing newspapers and others, including one that say our government is going to occupy the islands in the vicinity of Taiwan that belong to the Qing Dynasty, which are arousing their suspicions towards our country and frequently alerting the Qing government for caution. If we took measures such as

publicly erecting national markers, it would result in making the Qing Dynasty suspicious. Therefore, we should have the islands surveyed and details ? such as the configuration of harbors and the prospect of land development and local production ? reported and stop there. We should deal with the erection of national markers, land development and other undertakings some other day." [Reference: A letter dated October 9, 1885, by Interior Minister Yamagata to Foreign Minister Inoue] "(Preliminary portion omitted) Draft report to the Grand Council of State Concerning investigation into the uninhabited Kumeakashima and two other islands dotted between Okinawa Prefecture and Fuzhou of the Qing Dynasty, the prefectural governor submitted a report as per the document attached (note: a report submitted by the governor of Okinawa to Interior Minister Yamagata on September 22, 1885, Appendix 2). The aforementioned islands appear to be identical with the islands reported in the Records of Messages from Chong-shan, but they were mentioned as a mere direction in the course of voyage and showed no particular trace of having been under the control of the Qing Dynasty while the islands' names were different between them and us. They belong to the uninhabited islands near Miyako, Yaeyama and others under the control of Okinawa and, therefore, there should be no problem with the prefecture surveying them and erecting national markers on them."

Q9: In incorporating the Senkaku Islands in 1895, did Japan make a thorough survey? A9 From 1885, surveys of the Senkaku Islands had been thoroughly made by the Government of Japan through the agencies of Okinawa Prefecture and by way of other methods. Through these surveys, it was confirmed that the Senkaku Islands had not only been uninhabited but showed no trace of having been under the control of the Qing Dynasty of China. Based on this confirmation, the Government of Japan made a Cabinet Decision

on January 14, 1895, to erect markers on the islands to formally incorporate the Senkaku Islands into the territory of Japan. These measures were carried out in accordance with the ways of duly acquiring territorial sovereignty under international law (occupation of terra nullius). (Reference) Other key facts concerning Japan's preparations for the territorial incorporation prior to the Sino-Japanese War include: (1) according to reports submitted on September 22 and November 5, 1885, by the governor of Okinawa Prefecture to the interior minister, surveys of the Senkaku Islands were conducted by Okinawa Prefecture on the order of the Interior Ministry, including an investigation by patrol boat in late October 1885 aboard the Izumo Maru chartered from Nippon Yusen and a report was subsequently submitted to the central government, and (2) according to the departure and arrival records of the warship "Kongo" in 1887, the ship sailed from Naha in June that year toward the Sakishima Group of Islands (in the direction of the Senkaku Islands) with Navy Lieutenant Kato, chief of a survey team in the Waterways Department, aboard. "Nihon Suiro Shi" (Japan Waterways Journal) (published in 1894) and other publications carry outlines of Uotsuri Island and others as based on Lieutenant Kato's writings on experiments (records based on on-site surveys) in 1887 and 1888.

Q10: The Japanese government never made public the Cabinet Decision made in 1895, keeping it secret, didn't it? A10 It is true that the Cabinet Decision of 1895 was not made public, but it is understood that so were Cabinet decisions in general at that time. After the aforementioned Cabinet Decision, Japan openly exercised its sovereignty over the Senkaku Islands, including the issuance of permits to petitions for land tenancy and field surveys by the central government and the government of Okinawa Prefecture, making it externally known that Japan had an intention to possess the sovereignty of the islands. Under international law, there is no obligation to

notify other countries of a government intention to occupy terra nullius.

Q11: The Chinese government asserts that as a result of Japan's acceptance of the "Cairo Declaration" of 1943 and the subsequent "Potsdam Declaration" of 1945, the Senkaku Islands, as islands appertaining to Taiwan, reverted to China along with Taiwan. It also asserts that the Nansei Shoto Islands which had been placed under the administration of the United States under the terms of the San Francisco Peace Treaty, which was concluded while excluding China, had not included the Senkaku Islands, that the Government of the United States in December 1953 announced the "geographic boundaries of the Ryukyu Islands" and unilaterally expanded the scope of jurisdiction of the United States, that when it reverted the rights of administration of Okinawa to Japan in 1971, it included the Senkaku Islands in the territory to be reverted to Japan, and that the Chinese government has never recognized the Senkaku Islands as territory of Japan. What is the view of the Japanese government?

A11 1.The Cairo Declaration and the Potsdam Declaration were documents that stipulated the basic

postwar settlement policy of the Allied powers. There is no evidence that shows that the Allied powers, including the Republic of China, recognized that the Senkaku Islands were included among "the islands appertaining to Formosa (Taiwan)" as stated in the Cairo Declaration in these declarations.

2.In any event, the disposition of territories as a result of a war is ultimately settled by international agreements such as peace treaties. In the case of World War II, the San Francisco Peace Treaty legally defined the territory of Japan after the war. Neither the Cairo Declaration nor the Potsdam Declaration had the ultimate legal validity on the treatment of Japan's territory.

3.In accordance with Article 2 (b) of the San Francisco Peace Treaty, Japan renounced territorial sovereignty over Formosa (Taiwan) and the Pescadores, which had been ceded by China after the Sino-Japanese War. However, the Senkaku Islands were not included in "Formosa and the Pescadores" as stated in the treaty. It is because under Article 3 of the San Francisco Peace Treaty, the United States actually exercised the rights of administration on the Senkaku Islands as part of the Nansei Shoto Islands. They are also explicitly included in the area whose administrative rights were reverted to Japan when Okinawa was reverted to Japan in 1972.

4.When the San Francisco Peace Treaty was concluded, the Senkaku Islands were left as territory of Japan. However, none of the major Allied powers concerned ? the United States, the United Kingdom, France and China (the Republic of China and the People's Republic of China) ? raised objections.. Rather, in a People's Daily article headlined "Battle of People in Ryukyu Islands against U.S. Occupation," dated January 8, 1953, China criticized the United States for occupying the Ryukyu Islands which were not decided in either the Cairo Declaration or the Potsdam Declaration to be put under trusteeship, against the will of the local people. The article stated that the Ryukyu Islands comprised of seven groups of islands, including the Senkaku Islands, which recognizes that the Senkaku Islands were part of the Ryukyu Islands. Although China was not a signatory to the San Francisco Peace Treaty, Japan signed the Sino-Japanese Peace Treaty with the Republic of China (Taiwan), which Japan then recognized as the government of China. The Sino-Japanese Peace Treaty approved that Japan had renounced all right, title and claim to Taiwan, the Pescadores, etc., in accordance with Article 2 of the San Francisco Peace Treaty, but during the process of negotiations for this treaty, the Senkaku Islands, whose status as Japanese territory was left untouched, were never taken

up for discussion. What this means is that it was considered to be the rightful premise that the Senkaku Islands were the territory of Japan from before that time.

5. As a result of a survey conducted in the autumn of 1968 by an agency of the United Nations that indicated the possibility of the existence of petroleum resources in the East China Sea, attention was focused on the Senkaku Islands. It was only in the 1970s that the Chinese government and the authorities in Taiwan began to make their own assertions. Prior to that, they had never objected the fact that the Senkaku Islands were included in the area that was placed under the administration of the United States in accordance with Article 3 of the San Francisco Peace Treaty. The Chinese government has never clearly explained why it did not lodge objections to this fact.

Q12: Taiwan (the Republic of China) aside, wasn't China (the People's Republic of China) against the treatment of the Senkaku Islands in the San Francisco Peace Treaty? A12

The treatment of the Sankaku Islands after the conclusion of the San Francisco Peace Treaty was public knowledge internationally, and the People's Republic of China can in no way claim that it did not know this at the time. In fact, an article dated January 8, 1953, in the People's Daily, which is an organ of the Communist Party of China, under the headline "Battle of People in Ryukyu Islands against U.S. Occupation," explicitly included the Senkaku Islands among the Ryukyu Islands, which

were under the administration of the United States. Subsequently, the People's Republic of China did not make any objections until the 1970s to the fact that the area placed under the U.S. administration in accordance with Article 3 of the San Francisco Peace Treaty included the Senkaku Islands. China has not explained at all why it did not object.

[Reference: Relevant portions of the Cairo Declaration (1943)]

The objectives of the participating countries (note: the United States of America, the United Kingdom and the Republic of China) are to strip Japan of all islands she has seized or occupied in the Pacific since the beginning of World War I in 1914 and to restore to the Republic of China all the territories Japan has stolen from the Qing Dynasty of China such as Manchuria, Formosa (Taiwan) and the Pescadores. *[Reference: Article 8 of the Potsdam Declaration (1945)]* 8. The Cairo Declaration shall be implemented and Japanese sovereignty shall be limited to the islands of Honshu, Kyushu, Shikoku, and such minor islands as we determine. *[Reference: Article 2 of the San Francisco Peace Treaty]* (b) Japan renounces all right, title and claim to Formosa and the Pescadores. *[Reference: Article 3 of the San Francisco Peace Treaty]* 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° north latitude (including the Ryukyu Islands and the Daito Islands), Nanpo Shoto south of Sofu Gan (including the Bonin Islands, Rosario Island and the Volcano Islands) and Parece Vela and Marcus Island. Pending the making of such a proposal and affirmative action thereon, the United States will have the right to exercise all and any powers of administration, legislation and jurisdiction over the territory and inhabitants of these islands, including their territorial waters. *[Reference: Article I of the Agreement between Japan and the United States of America Concerning the Ryukyu Islands and the Daito Islands]* 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 of administration, legislation and jurisdiction was accorded to the United States of America under Article 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 concerning the Amami Islands and the Agreement concerning Nanpo Shoto and Other Islands signed between Japan and the United States of America, respectively on December 24, 1953 and April 5, 1968. [Reference: Agreement between Japan and the United States of America concerning the Ryukyu Islands and the Daito Islands (Agreed Minutes)] Regarding Article I: The territories defined in paragraph 2 of Article I are the territories under the administration of the United States of America under Article 3 of the Treaty of Peace with Japan, and are, as designated under Civil Administration Proclamation Number 27 of December 25, 1953, all of those islands, islets, atolls and rocks situated in an area bounded by the straight lines connecting the following coordinates in the listed order:

North latitude 28 degrees 24 degrees 24 degrees

27 degrees 27 degrees 28 degrees 28 degrees

East Longitude 124 degrees 40 minutes 122 degrees 133 degrees 131 degrees 50 minutes 128 degrees 18 minutes 128 degrees 18 minutes 124 degrees 40 minutes

Q13: The Chinese government claims that Japan's stance and approach on the Senkaku islands constitutes outright denial of victorious World War II outcomes against fascism and poses a grave challenge to postwar international order and the purposes and principles of the U.N. Charter. How does the Japanese government respond to that? A13 1. Japan's acquisition of sovereignty over the Senkaku Islands has nothing to do with World War II.

The San Francisco Peace Treaty and related treaties, which legally defined Japan's territory after World War II, did so on the premise that

the Senkaku Islands were part of Japanese territory. Before the decision was made based on the San Francisco Peace Treaty, neither China nor Taiwan had claimed sovereignty over the Senkaku Islands.

2. However, as the Senkaku Islands began to draw attention following an academic survey in the fall of 1968 which indicated the possibility of the existence of petroleum resources in the East China Sea, the Chinese government and Taiwan authorities began to make their own assertions about territorial sovereignty over the Senkaku Islands in the 1970s. Moreover, in an attempt to justify its own assertion, China abruptly began to argue about "the outcomes of the World War II" as if Japan was distorting the international framework after World War II. It is Chinese actions, however, that pose a grave challenge to the post-war international order by objecting the decisions based on the San Francisco Peace Treaty, the very international framework that decided the outcomes of World War II concerning Japan.

3. Moreover, the attitude to easily attribute the difference of opinions to the past war is an act of evasion from the essence of the issue. We view that such attitude is not just unconvincing, but it is also very counterproductive. In fact, the Chinese side, in the Japan-China Joint Statement signed in May 2008 by the leaders of Japan and China, expressed its "positive evaluation of Japan's consistent pursuit of the path of a peaceful country and Japan's contribution to the peace and stability of the world through peaceful means over more than 60 years since World War."

4. China can never deny the justifiable claim of Japan, which has spent half a century after the war as a peace-loving country, by just arguing about "the outcomes of World War II" nor justify its own assertion concerning the Senkaku Islands.

Q14: The Chinese government claims that in the process of negotiations leading up to the

normalization of Japan-China relations in 1972 and the concluding of the bilateral Treaty of Peace and Friendship in 1978, “the leaders of the two reached an important understanding and mutual recognition about shelving the issue of the Senkaku Islands and leaving it for solution in future.” How does the Japanese government respond to that?

A14 1. There is no doubt, in light of historical facts and based upon international law, that the Senkaku

Islands are an inherent part of the territory of Japan. Indeed, the Senkaku Islands are under the valid control of Japan. To begin with, there exists no issue of territorial sovereignty to be resolved concerning the Senkaku Islands.

2. Japan's position as stated above has been consistent and it is not true that there was an agreement with the Chinese side about "shelving" or "maintaining the status quo" regarding the Senkaku Islands. This is clearly shown in the published record of the Japan-China Summit Meeting held on the occasion of the normalization of bilateral diplomatic relations. Japan has pointed out its position to the Chinese side clearly and time and again.

[Reference: The Japan-China Summit Meeting between Prime Minister Kakuei Tanaka and Premier Zhou Enlai on September 27, 1972 (already published as a diplomatic record)](provisional translation)

- Prime Minister Tanaka: What is your view on the Senkaku Islands? Some people say things about them to me.
- Premier Zhou: I do not want to talk about the Senkaku Islands this time. It is not good to discuss this now. It became an issue because of the oil out there. If there wasn't oil, neither Taiwan nor the United States would make this an issue. *[Reference: The Japan-China Summit Meeting between Prime Minister Takeo Fukuda and Vice Premier Deng Xiaoping*

on October 25, 1978, at the time of negotiations for the conclusion of the Treaty of Peace and Friendship between Japan and the People's Republic of China (already published as a diplomatic record)] (provisional translation)

- Vice Premier Deng: (As though something had just come to his mind) There was one more thing I wanted to say. There exist a variety of issues between our two countries; for example there is the issue of what is called the Diaoyu in China, and the Senkaku Islands in Japan. At this time, there's no need to raise subjects like this at a meeting like this. As I expressed this to Minister for Foreign Affairs Sonoda in Beijing, there's probably insufficient wisdom to resolve the issue in our generation, but with the next generation likely to be savvier than us, they will probably be able to find some resolution to the issue. It is essential to look at this issue with a broad perspective. (There was no response from Prime Minister Fukuda.)]

[Reference: A press conference by Deputy Premier Deng on the day he met with Prime Minister Fukuda on October 25, 1978, as shown above](provisional translation)

- Reporter: The Senkaku Islands are Japan's inherent territory, and I feel the recent trouble is a matter for regret. What is the view of the Deputy Premier?
- Vice Premier Deng: We refer to the Senkaku Islands as the Diaoyu. Even our nomenclature is different. Certainly there are differences of opinion between us on this issue but when we normalized diplomatic relations between our two countries, both parties promised to leave the issue aside. At this time of negotiation on Treaty of Peace and Friendship, we agreed to leave the issue aside in much the same way. Based on Chinese wisdom, this is the only idea we

have. If we delve into the subject, it becomes difficult to say something clearly. Certainly there are some people that want to use this issue to throw cold water onto China-Japan relations. Therefore, I think it is better to avoid

the issue when our countries have negotiations. Even if this means the issue is temporarily shelved, I don't think I mind. I don't mind if it's shelved for ten years. The people of our generation don't have sufficient wisdom to settle this discussion, but the people of the next generation will probably be wiser than us. At that time, a solution that everyone can agree on will probably be found.

Position of the United States Government on the Senkaku Islands

Q15: What has been the position of the United States Government on the Senkaku Islands? A 15 1. Since the end of World War II, the Senkaku Islands were placed under the administration of the

United States of America as part of the Nansei Shoto Islands in accordance with Article 3 of the San Francisco Peace Treaty. With the entry into force in 1972 of the Agreement between Japan and the United States of America Concerning the Ryukyu Islands and the Daito Islands (the Okinawa Reversion Agreement), the administrative rights over the Senkaku Islands were reverted to Japan. As is clearly expressed in a statement issued by Secretary of State Dulles at the San Francisco Peace Conference and in the Joint Communiqué of Japanese Prime Minister Kishi and U.S. President Eisenhower issued on Jun 21, 1957, the U.S. Government did recognize Japan's "residual sovereignty" over the Nansei Shoto Islands.

2. Furthermore, in connection with the application of Article 5 of the Treaty of Mutual Cooperation and Security between Japan and the United States of America (the Japan-U.S. Security Treaty), the U.S. government has

made it clear that the Senkaku Islands have been under the administration of the Government of Japan since their reversion to Japan as part of the Okinawa reversion in 1972 and that the Japan-U.S. Security Treaty applies to the Senkaku Islands.

3. Regarding Kuba Island and Taisho Island, which are both part of the Senkaku Islands, even though China had already started claiming its sovereignty over the Senkaku Islands, about the Senkaku islands there has been no change in the status of the two islands as facilities and areas within Japan which have been offered to the United States by Japan under the Japan-U.S. Status of Forces Agreement since the Okinawa Reversion Agreement entered into force in 1972.

4. In addition to the above, the following facts can be pointed out: (1) Since fishermen from Taiwan frequently intruded into territorial waters around the Senkaku Islands and made unlawful landing thereon, the Ministry of Foreign Affairs of Japan sent a Note Verbale to Ambassador of the United States of America to Japan on August 3, 1968, requesting the U.S. Government to take necessary steps to control and regulate the intruders and to prevent any recurrence of intrusions. The U.S. side replied that expulsion of intruders and other measures had been taken. (2) A secret intelligence report produced by the Central Intelligence Agency in 1971, which was approved for release in 2007, stated that the Senkakus are commonly considered as part of the large Ryukyu Island chain", and that "the Japanese claim to sovereignty over the Senkakus is strong, and the burden of proof of ownership would seem to fall on the Chinese." Note 1: The statement made by Secretary of State John Foster Dulles, chief U.S. delegate, at the San Francisco Peace Conference in 1951 said in part: "Article 3 deals with the Ryukyu and other islands to the south and southeast of Japan. These, since the surrender, have been under the sole administration of the United States. Several of

the Allied Powers urged that the treaty should require Japan to renounce its sovereignty over these islands in favor of United States sovereignty. Others 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 United Nations trusteeship system, with the United States as administering authority.” Note 2: The Joint Communique of Prime Minister Nobusuke Kishi and President Dwight D.

Eisenhower in 1957 said in part: “The Prime Minister emphasized the strong desire of the Japanese people for the return of administrative control over the Ryukyu and Bonin Islands to Japan. The President reaffirmed the United States position that Japan possesses residual sovereignty over these islands.”.

Transfer of ownership of three Senkaku islands to Government of Japan

Q16: China is strongly objecting to the Japanese government’s acquisition of the ownership of three Senkaku islands in September 2012. How does the Japanese government view such objection?

A 16 1. There is no doubt whatsoever that the Senkaku Islands are an inherent part of the territory of Japan in light of historical facts and based upon international law. Indeed, those islands are under the valid control of the Government of Japan. There exists no issue of territorial sovereignty to be resolved concerning the Senkaku Islands. The Government of Japan’s acquisition of the ownership of the three Senkaku islands will not give rise to any problem with another country or region.

2. On the other hand, it is true that the Chinese government is making its own assertions on the

Senkaku Islands. While Japan does not accede to such assertions, the Government of Japan has been explaining to the Chinese government from a broad perspective that the recent ownership transfer was aimed at maintaining and managing the Senkaku Islands peacefully and stably on a long-term basis and that the transfer is nothing more than returning the ownership from a private citizen to the Government, with which the ownership rested until 1932. The Government of Japan, as a country sharing responsibility for the peace and stability of East Asia, will continue to call upon the Chinese side to behave calmly without losing sight of the overall relationship between the two countries.

3. It is a matter for deep regret that violent anti-Japanese demonstrations took place in various parts of China, with some people throwing rocks and debris at Japanese diplomatic missions, physically injuring Japanese citizens, and setting fire on, damaging and looting facilities of Japanese business establishments. Regardless of reasons, violent acts must never be tolerated, and any dissatisfaction resulting from difference in views must be expressed in a peaceful manner. Japan is asking China to ensure the safety of Japanese citizens and businesses and to compensate properly the damage incurred by Japanese businesses.

NOTES

¹ Gavan McCormack, “Small Islands - Big Problem: Senkaku/Diaoyu and the Weight of History and Geography in China-Japan Relations,” *The Asia-Pacific Journal* Vol 9, Issue 1 No 1, January 3, 2011; <http://www.japanfocus.org/-Gavan-McCormack/3464>

² Tao Cheng, “The Sino-Japanese Dispute Over the Tiao-yu-tai (Senkaku) Islands and the Law of Territorial Acquisition”, 14 *Virginia Journal of International Law* 221, 221 (1973)

³ Ministry of Foreign Affairs, Japan, website

“The Basic View on the Sovereignty over the Senkaku Islands,”; http://www.mofa.go.jp/region/asia-paci/senkaku/basic_view.html

⁴ Diaoyutai is spelled using the Han Yu Pinyin system; using a Wade-Giles Pinyin system it becomes: Tiao-yu-tai.

--For simplicity, Diaoyu Dao is used throughout this article when discussing China’s claim/evidence. The term Senkakus is used when discussing Japanese claim/evidence. And Diaoyu Dao/Senkakus or Senkakus/Diaoyu Dao is used when referring to the competing claims from both Japan and China.

--Both Diaoyu Dao and Senkakus are used in this paper as a group noun denoting the archipelago or the group of five islets and three outcroppings

--The authors are of the view that there is only one China and that Taiwan and mainland China are integral parts of this one China. Therefore, in this article, the authors use China to refer to both the officially recognized government, the People’s Republic of China (PRC), and this one China, unless a distinct reference is called for, in which case the Republic of China (ROC) or Taipei is used to refer to Taiwan.

⁵ The Japan Times online, “Tokyo nixed joint Senkaku exploitation,” Oct. 22, 2010; <http://www.japantimes.co.jp/text/nn20101022a1.html>

⁶ For details of this agreement on joint development, see The National Bureau of Asian Research, “Disputed Claims in the East China Sea: An Interview with James Manicom by Chris Acheson,” July 25, 2011 available at <http://www.nbr.org/research/activity.aspx?id=159>

⁷ The Asahi Shimbun, “Central government plans to buy Senkaku Islands,” July 7, 2012; http://ajw.asahi.com/article/behind_news/politic

s/AJ201207070062

--Needless to say, the Chinese, Chinese Diaspora and Chinese media noticed the date of July 7, a day in which 75 years ago on the pretext of the Marco Polo Bridge Incident, Japan began her comprehensive invasion of China in the Asia-Pacific War.

⁸ The Japan Times online, “Noda speaks with China, South Korea leaders, seeks to view disputes from 'broad viewpoints',” September 10, 2012; <http://www.japantimes.co.jp/text/nn20120910a1.html>

⁹ Linus Hagström, “China-Japan tensions over Senkaku purchase an orchestrated affair,” *East Asia Forum*, September 17, 2012; <http://www.eastasiaforum.org/2012/09/17/china-japan-tensions-over-senkaku-purchase-an-orchestrated-affair/>

¹⁰ Communist Party of China website, “Full text of Statement of the Ministry of Foreign Affairs of the People's Republic of China,”; <http://english.cpc.people.com.cn/66102/7944368.html>

¹¹ Ministry of Foreign Affairs of the People’s Republic of China website, “Remarks by Assistant Foreign Minister Le Yucheng at the Symposium on the Issue of Diaoyu Dao,” September 14, 2012; <http://www.fmprc.gov.cn/eng/zxxx/t969558.htm> ;

Global Times, “Japan opposes China's Diaoyu map bid at UN,” September 25, 2012; <http://www.globaltimes.cn/content/735206.shtml>

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- ³¹ Shaw, *supra* 76
- ³² *Id.*, 80-84; Shaw's interpretation of documents he received from Prof. Chang Chi-hsiung
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- ³⁷ *Id.*
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- ⁴⁷ Ministry of Foreign Affairs, Japan, "Q&A on the Senkaku Islands," Q3; www.mofa.go.jp/region/asia-paci/senkaku/qa_1010.html
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⁷⁵ "White Paper," *supra*

⁷⁶ "Summary of historical facts concerning Japan's secret and illegal occupation of the Diaoyutai Islands," *supra*

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⁷⁸ *Id.*, 112

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⁸¹ Cairo Declaration, Dec. 1, 1943, 3 U.S.T. 858, available at <http://avalon.law.yale.edu/wwii/cairo.asp>

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¹⁰⁶ O'Shea, *supra* 4

¹⁰⁷ Document 113: Memorandum of Conversation, available at <http://history.state.gov/historicaldocuments/frus1969-76v17/d113>; Source: National Archives, Nixon Presidential Materials, NSC Files, Box 1025, President/HAK Memcons, Memcon—the President, Kissinger, and Amb. Chow Apr. 12, 1971. Top Secret; Sensitive; Eyes Only. The President's Daily Diary indicates that Chow met with the President from 11:31 a.m. to 12:05 p.m. and that Emil Mosbacher, Chief of Protocol for the Department of State, was also present. (Ibid., White House Central Files) The conversation was recorded by the White House taping system. The statements in quotations marks are actually paraphrases. (Ibid., White House Tapes, Recording of conversation between Nixon and Kissinger, April 12, 1971, 11:28 a.m.-12:41 p.m., Oval Office, Conversation No. 477-3)

--Id. Footnote 6 "Chow gave a 4-page *aidemémoire* to Green on September 16, 1970, outlining the ROC's objections to Japanese sovereignty over these islands. (National Archives, RG 59, EA/ROC Files: Lot 75 D 61, Subject Files, Petroleum-Senkakus, January-September 1970)"

--Document 114: Conversation between Chow and Kissinger, available at <http://history.state.gov/historicaldocuments/frus1969-76v17/d114>; Source: National Archives, Nixon Presidential Materials, NSC Files, Country Files, Far East, China, Vol. VI. Confidential. Sent for information. Drafted on April 14. The meeting was held in Kissinger's office. In an April 14 covering memorandum, Holdridge suggested that no further distribution be made. Kissinger initialed his approval. (Ibid.) Kissinger and Chow met from 3:31 to 3:47 p.m. (Library of Congress, Manuscript Division. Kissinger Papers, Box 480, Miscellany, 1968-1976, Record of Schedule)

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¹¹² Kevin Voight, "Dangerous Waters: Behind the Islands Dispute," CNN September 24, 2012; <http://www.cnn.com/2012/09/24/world/asia/chi-na-japan-dispute-explainer/index.html>

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¹¹⁴ Seokwoo Lee, "Territorial Disputes in East Asia, the San Francisco Peace Treaty of 1951, and the Legacy of US Security Interest in East Asia," note 51 at 58, based on Telegram regarding Senkaku Islands, US NARA/Doc. No.: Pol 32-6 Senkaku Is; XR Pol 33 China Sea (Sept. 4, 1970); Telegram Regarding Senkaku Islands, *id.*, (September 14, 1970) in Seokwoo Lee & Hee Eun Lee, Ed., *Dokdo: Historical Appraisal and International Justice*, (2011). In fact, Price in his "A Just Peace?" wrote US really wanted to leave Japan with only an illusory residual sovereignty: "As the Cold War escalated, the United States government and military turned Okinawa into a major military center, with major construction beginning in October 1949 with a \$58 million appropriation. In subsequent discussions, the military made it very clear that it wanted absolute control over Okinawa and thus in the SFPT the US left Japan with only an illusory "residual sovereignty" over Okinawa."

¹¹⁵ Case law refers to "[t]he law based on judicial opinions (including decisions that

interpret statutes), as opposed to law based on statutes, regulations, or other sources. Also refers to the collection of reported judicial decisions within a particular jurisdiction dealing with a specific issue or topic." Definition provided by Cornell University Law School, Legal Information Institute at http://www.law.cornell.edu/wex/case_law

¹¹⁶ Brian Taylor Sumner, "Territorial Disputes at the International Court of Justice," 53 *Duke Law Journal*, 1779-1812 (2004)

¹¹⁷ *Id.*, 1787

¹¹⁸ Heflin, *supra*

¹¹⁹ Yehuda Z. Blum, *Historic Titles in International Law*, (The Hague: Martinus Nijhoff, 1965), 208.

¹²⁰ 1933 P.C.I.J. (Ser. A/B) No 53, at 22

¹²¹ *Id.*

¹²² Sharma, *supra* 77

¹²³ *Id.*, 56

¹²⁴ Oscar Svarlien, *The Eastern Greenland Case in Historical Perspective*, University of Florida Monograph, Social Science, No. 21, 69-74 (1964)

¹²⁵ Grieg, *supra* note 2 at 162 140 cited in Sharma, *supra* 81-82

¹²⁶ *The Island of Palmas Case*, 2 R.I.A.A. 829 (Perm Ct. Arb. 1928); see also Sharma, *supra* 98-99

¹²⁷ "Intertemporal Law", International Law: Law and Interpretation, USLegal.com

¹²⁸ *The Island of Palmas Case*, *supra* 839, quoted in Sharma, *supra* 71-72

¹²⁹ Phillip C. Jessup, "The Palmas Island Arbitration," 22 *Am. J. Int'l L.* 735, 740 (1928)

¹³⁰ "Q & A on the Senkaku Islands", *supra* A3

¹³¹ *The Island of Palmas Case*, *supra* 867

¹³² *Sovereignty over Pulau Ligitan and Pulau Sipadan*, 2002 I.C.J. 625, 630

¹³³ Press Release, ICF/605, "[International Court Finds that Sovereignty over Islands of Ligitan and Sipadan belongs to Malaysia](#)," December 17, 2002.

¹³⁴ "Q & A on the Senkaku Islands," *supra*, A3

¹³⁵ O'Shea, *supra*, 4; Fravel, *supra* 150

¹³⁶ O'Shea, *supra* 4

¹³⁷ China Times editorial, *supra*

¹³⁸ Julian Ku, "[Why Won't Korea Accept Japan's Invitation to Go to the ICJ?](#)," *Opinio Juris*, August 20, 2012. "[Noda Reshuffles Cabinet Again](#)" China Daily, October 2, 2012.

¹³⁹ Carlos Ramos-Mrosovsky, "The International Laws Unhelpful Role in The Senkaku Islands", 29 *U. PA J. Int'l L.* 903, 937 (2008)

¹⁴⁰ *Id.*