

The Territorial Dispute over the Tiaoyu/Senkaku Islands: An Update

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This article discusses one of the most difficult disputes in the world, the territorial dispute over the Tiaoyu Islands. This dispute has defied solution for decades. The situation in the area has drastically deteriorated since the early 1990s, when the disputants began intensifying their claims. The issues involved in the dispute will be analyzed by reference to current law, as interpreted and applied by international judicial authorities.

Keywords Law of the Sea, Territorial Disputes, Tiaoyu Islands

Introduction

In the East China Sea, a tiny group of islands, known as the Tiaoyu Islands in Chinese or Senkaku in Japanese,¹ has brought China and Japan into a bitter dispute since early 1970s² when the countries made ocean claims in the East China Sea.³ The decades-long dispute has now become such a quandary that the disputants are in a stagnant confrontation, which has not only retarded regional maritime cooperation but also caused deterioration of the regional maritime ecosystem and disturbs the relationship between the countries.⁴

Recent incidents in the disputed area have reminded the countries that there are serious dangers in the indeterminate sovereignty and related matters such as the to-be-delimited Sino–Japanese maritime boundary. The situation is calling for an imperative cooperation between the disputants.

From 1999 to 2001, Chinese marine scientific survey ships were repeatedly spotted carrying out marine scientific research on the Japanese side of the median line and in the area near the Tiaoyu Islands.⁵ Tokyo alleged that China had unlawfully incurred into Japan's exclusive economic zone (EEZ), while Beijing indicated that there were unsettled maritime boundaries.⁶ In December 2001, Japan's coast guard pursued an "unidentified ship," suspected to be a spy ship from North Korea, and sank the ship in the

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Chinese EEZ.⁷ China censured Japan for the pursuit and condemned the action as a violation of China's EEZ.⁸ Although the situation calls for the states to accelerate their delimitation efforts and introduce provisional measures to avoid escalation, little progress seems to have been made due to the countries' rigid positions on the sovereignty dispute over the Islands and a fundamental divergence of view over the approach to be taken to maritime delimitation around the Islands.⁹

The Tiaoyu Islands are located approximately midway between the island of Taiwan and Yaeyama Retto, the southernmost island of the Japanese Ryukyu Islands.¹⁰ The Islands consist of eight tiny insular formations, of which five are volcanic structures with relatively large surface areas and three are rocky outcroppings.¹¹ All of these formations have permanently dry surfaces, though only the largest two possess dry areas of over 1 km².¹² The largest three formations are covered with some vegetation, such as palm trees, but the others are completely barren.¹³ None of the formations are currently inhabited or reportedly have any kind of human economic activity.

Notwithstanding these features, the Islands (Table 1) are important for their location. The Islands are on the eastern edge of the continental margin in the East China Sea, bordering the Okinawa Trough,¹⁴ which arguably is the outer reach of the natural prolongation of the continental margin adjacent to the Chinese mainland towards Japan. It is a feature that could impact upon ocean claims beyond the Trough, if the natural prolongation principle preferred by China were considered in determining the seabed delimitations between China and Japan.¹⁵ The United Nations Convention on the Law of the Sea (the LOS Convention), to which both China and Japan are parties, has codified the right of both countries to claim 200 nm maritime spaces from the coast or a qualified insular formation, regardless of the geophysical circumstance of the adjacent seabed. Such claims would overlap in the East China Sea, as the coast-to-coast distance is less than 400 nm. Under the Convention, the Tiaoyu Islands can be a factor that significantly influences the location of a maritime boundary. The importance of sovereignty over the Islands for maritime boundary purposes has made finding an acceptable solution to sovereignty more difficult.

This article focuses on the territorial aspect of the dispute. It attempts to identify all the uncertainties that are or potentially are causing conflicts as well as the governing tenets in international law. The identified problems will then be analyzed in the light of those principles.

Table 1
Tiaoyu/Senkaku Islands

Chinese name	Japanese name	Latitude(N)	Longitude(E)	Size(km ²)
1. Tiaoyutai	Uotshui-Shima	25°45'	123°29'	4.319
2. Huangwei Yu	Kuba-shima	25°58'	123°41'	1.08
3. Nanxiao Dao	Minami Kojima	25°44'	123°34'	0.463
4. Beixiao Dao	Kita Kojima	25°45'	123°33'	0.302
5. Chiwei Yu	Taisho-Kojima	25°55'	124°33'	0.154
6. Dabeixiao Dao	Okino Kitaiwa			
7. Dananxiao Dao	Okino Minamiwa			
8. Feilai Dao	Tobise			

Sources: T Okuhara, 15 *Japanese Annual of International Law* (1971): 106 and Zhongguo Diminglu [Gazetteer of China] (Beijing: Ditu(map) Publisher, 1983).

Background of the Dispute¹⁶

The dispute emerged in the early 1970s following a promising prediction of hydrocarbon deposits in the seabed around the Islands.¹⁷ Originally, the dispute was between the Republic of China (ROC) and Japan triggered by their overlapping concession zones surrounding the Islands.¹⁸ At the beginning of the conflict, the Islands were still under the administration of the United States pursuant to the UN trusteeship established under the 1951 San Francisco Peace Treaty entered into between the Allies (excluding China) and Japan. Although being specified nowhere in the 1951 Treaty, the Islands were placed under trusteeship by being enclosed in an area known as Nansei Shoto (south of 29°N).¹⁹ During the U.S. administration period, neither the ROC nor the People's Republic of China (PRC), however, had remonstrated against including the Islands in the area of the U.S. administration. The issue of sovereignty emerged when the trusteeship ended in 1972 and the United States declared its intention to return the area to Japan under the Okinawa Reversion Treaty.²⁰ Following September 1972, the dispute shifted to between the PRC and Japan, as Japan derecognized the ROC, while forging formal diplomatic relations with the PRC.

Notwithstanding the known dispute, Japan has gained a degree of control over the Islands since the "reversion" and the dispute has escalated with the repeated claiming actions and counteractions from both sides. Japan's reported intention of recognizing a lighthouse built on the Tiaoyu Island in 1978 as an "official navigation mark" caused tension.²¹ The tension, however, subsided as the relation between the two states generally ameliorated, and subsequently the dispute was shelved.²² The decade of the 1990s witnessed a resurgence of the dispute. In 1992, China asserted its claim by passing the Law on the Territorial Sea and Contiguous Zone, of which Article 2 explicitly enumerates the "Diaoyu Islands" as an appurtenance to Taiwan and as China's territory.²³ Further escalation took place in 1996 with the advent of ratification to the LOS Convention by the two countries and updating of their claims to an EEZ and continental shelf. Since 1996, clashes between Japanese right-wing groups and Chinese protesters and diplomatic rows between the governments regarding sovereignty over the Islands have been repeatedly reported. In 1996, for instance, a Japanese right-wing group built a new lighthouse on one of the isles and requested that the government recognize it.²⁴ This was met with protests from the Chinese government and public outcry from Hong Kong and Taiwan. Confrontations and physical clashes were reported between Chinese protesters and Japan's coast guard when the protesters attempted to land on the Islands, and a casualty occurred on the Chinese side.²⁵ In 1997, a Japanese legislator landed on one of the Islands. The PRC government denounced this act as "an illegal landing" and a "serious violation of China's territory sovereignty."²⁶ Japan, in return, reiterated its "fundamental position" while declaring that the government was not behind such activities and did not offer any support.²⁷ Since 1999, the Chinese government apparently has raised the level of its presence in the disputed area, shifting from mainly verbal claims to a physical presence in the disputed area by dispatching scientific research vessels to the area. In 2000, another landing by a Japanese right-wing group resulted in a shrine being built on Tiaoyu Island.²⁸ Beijing declared that "the Diaoyu Island and its adjacent islets have been an integral part of China," and China therefore "strongly demanded that Japan honours its commitment, restricts the ring-wing activists, and prevents similar incidents from recurring."²⁹ Japan replied by arguing that the Islands are Japan's territory.³⁰ Recently, in late March 2004 and for the first time, seven Chinese mainland activists landed on the Islands. The Chinese protesters were immediately taken away from the Islands

and detained by the Japanese Coast Guard. This again ended in a fruitless diplomatic row.³¹ Both sides have persistently shown their rigid positions on the troubled territory and demonstrated little wish to initiate a solution-finding process, let alone reach a more permanent solution to the problem.

China's Position

China's claim over the Islands is mainly based on two interrelated points: historical title and territorial cession. China looks back centuries to lay a basis for its *ab ovo* title to the land. It is contended that China had not only discovered but also has been peacefully using the Islands since the 14th century. Some acts it conducted are argued to be adequate to avail China of acquiring sovereignty. Some ancient documents are referred to, but few of them can establish a concrete link to the exercise of jurisdiction by China over the Islands. Some official Chinese documents and maps of the 16th–17th centuries recorded several missionaries dispatched to Ryukyu by a Chinese emperor and mentioned the Tiaoyu Island was mentioned as an adjunct to Chinese Taiwan. China has quoted these to substantiate that the Islands were taken for granted as a part of historic Chinese Taiwan.³²

Some documents show that the Islands were once included in China's coastal defence lines in the 16th century.³³ A record compiled in 1561 by a Chinese military officer responsible for defending against Japanese pirates shows that the Tiaoyutai Island was one of the five patrol areas of the Fuzhou Prefecture. In a map quoted in volume 1 of the 1561 record, three of the Islands are represented with Chinese names together with Taiwan, while in another map showing the border of Fujian province, which was drawn before Taiwan was incorporated into China, the Islands are not marked out. This is invoked to prove that the Islands were once considered as appertaining to Taiwan.³⁴ China also has mentioned that three formations of the group were granted to a Chinese herbalist by a Chinese Empress Dowager in 1893 to cultivate a kind of rare medical herb.³⁵ This event is also argued by China as sufficient ground to support its sovereignty on the Islands, as the Islands may only be used for the purpose for which they are suited.³⁶

Based on having the original title to the Islands, China imputes the loss of the control over the territory to a coerced, but renounced, territorial cession to Japan. China argues that the Islands were ceded to Japan in May 1895 as an appurtenance to Taiwan under Article 2 of the Treaty of Shimonoseki that followed China's loss in the Sino-Japanese War, 1894–1895.³⁷ Therefore, the Islands reverted to China when China resumed its sovereignty over Taiwan and its adjacent islands pursuant to either the 1951 San Francisco Peace Treaty³⁸ and/or the 1952 Sino-Japanese Peace Treaty.³⁹ Under the San Francisco Treaty, Japan had clearly renounced "all right, title and claim to Formosa and the Pescadores" and recognized that "all treaties concluded before December 9, 1941 between China and Japan have become null and void." Under the 1952 Peace Treaty, Japan simply reaffirmed its renunciation of the territories referred to in the San Francisco Treaty. Moreover, under the 1952 Treaty, Japan agreed to rescind all the pre-1941 treaties between China and Japan and this included the Treaty of Shimonoseki.

Regarding the silence as to the inclusion of the Islands in the postwar arrangement of Japan's territory and during the period between 1894 and the early 1970s when China's first claim to the Islands were publicly known, the PRC provides little facts. The ROC, however, explained that as the fate of these Islands under U.S. administration were entangled with the Cold War situation and so overshadowed by the Chinese objection to

the doctrine of “residual sovereignty” for the ultimate disposal of the whole Islands, there was no occasion or urgency for the Chinese to raise any question about them.⁴⁰ The ROC’s silence on Article 3 of the San Francisco Treaty is also linked to the fact that the ROC and the United States had entered a mutual defense treaty in 1954, under which the ROC agreed with the United States to have U.S. forces on and around the islands of Taiwan and Pescadores.⁴¹

Japan’s Position

Japan denies that any dispute over the sovereignty of the Islands exists. It argues that as the Senkaku Islands are an integral part of Japanese territory, there are no plans to negotiate the issue.⁴² Tokyo, however, has managed to strike a balance to avoid having its position jeopardize its relationship with China.⁴³

Japan has asserted that the Islands were not appertained to the territories ceded to Japan under the Shimonoseki Treaty in 1895, but were incorporated into Japan as *terra nullius* a few months before China formally ceded Taiwan to Japan under the Treaty.⁴⁴ Japan considers that it had acquired the Islands through prescription by a cabinet decision for performing a survey and erecting a marker on the Islands in January 1895⁴⁵ and its subsequent peaceful and continuous exercise of jurisdiction over the Islands without objection. Japan obviously opposes that China has historic title to the Islands.

Under the 1951 San Francisco Peace Treaty, the Islands were incontestably included into “Nansei Shoto” together with the Ryukyu Islands and placed under the trusteeship system.⁴⁶ China did not raise any objection to this arrangement until the Islands were returned to Japan, together with the Ryukyu Islands, in 1972. Japan is implicitly arguing that China did not consider the Islands as an appurtenance to Taiwan or had discarded its sovereign claim, if it had ever been previously established.⁴⁷

The Key Questions and the Law

The key questions to be answered are whether China had established title to the Islands and whether this sovereignty was maintained until Japan launched its claim in 1894, and, if China had established title, whether the Islands were ceded to Japan under the 1895 Treaty and then whether they were returned to China under the Peace Treaties of either 1951 or 1952.

It is an established principle in international law that neither discovery nor use by itself is sufficient to establish sovereignty over land territory where a rival claim is in parallel.⁴⁸ In this dispute, China is arguing that it had established sovereignty over *terra nullius* land. In international law, “occupation” is one of the means of peacefully acquiring land territory.⁴⁹ It requires the target land be *terra nullius*. As the International Court of Justice (ICJ) stated in the *Western Sahara Case*: “occupation being legally an original means of peaceably acquiring sovereignty . . . it was a cardinal condition of a valid ‘occupation’ that the territory should be *terra nullius*—a territory belonging to no one.”⁵⁰ In the *Land, Island and Maritime Frontier Dispute Case*, this difference was clearly noted and acknowledged. The Court found that the disputed islands in the Gulf of Fonseca “are not *terra nullius*, and in legal theory each island already appertained to one of the . . . States surrounding the Gulf . . . so that acquisition of territory by occupation was not possible.”⁵¹ It is also clear that a pure “discovery” by landing or spotting land is not tantamount to an effective “occupation” and therefore cannot generate valid territorial title. Judge Huber described “the sovereignty by discovery” as “inchoate title” in the

Island of Palmas case, which “must be completed within a reasonable period of ‘effective occupation’ of the region claimed to be discovered.”⁵² In the case before him, he particularly stressed the Netherlands’ continuous and peaceful display of state authority in acquiring the territory in question.⁵³ The arbitrator in the *Clipperton Island Case* rejected Spain’s claim, which was believed to be based on a simple discovery without subsequent qualified display of sovereignty. Having found that the French discovered the island when it was *terra nullius* and then had actually taken possession of it and had the intention and will of acting as its sovereign, the decision was rendered in favor of France.⁵⁴ The arbitrator added, “even admitting that the discovery had been established by Spanish subjects, it would be necessary, to establish the contention of Mexico, to prove that Spain not only had the right, as a State, to incorporate the island in her possessions, but also had effectively exercised the right.”⁵⁵ A discovery can only be, as Professor Brownlie observed, a “State activity initiating an occupation.”⁵⁶ It follows that whether China had discovered the Islands is not conclusive to the disputed sovereignty, though it may be a relevant factor, given that China’s occupation simply means “discovery” without actions as a sovereign. Actions as a sovereign of the land or such a will is needed for establishing sovereignty. The Permanent Court of Justice in the *Eastern Greenland Case* depicted the criteria for acquiring title to land as “the intention and the will to act as sovereign, and some actual exercise or display of such authority.”⁵⁷

However, “occupation” of *terra nullius* is not the only means to acquire land territory in international law. It may also be completed through “a long-continued and undisturbed possession,” which is termed as “prescription.”⁵⁸ “Prescription” is described as a concept comprehending “both a possession of which the origin is unclear or disputed, and an adverse possession, which is in origin demonstrably unlawful.”⁵⁹ In practice, if a disputed territory is involved, it is often difficult to tell the basis of claims, as conflicting claims may both be grounded on the same facts, such as occupation and control over the territory. It has been remarked that “it is not surprising, therefore, if tribunals do not always indicate very clearly on what ground they are proceeding.”⁶⁰ Where the Tiaoyu Islands dispute is concerned, “prescription” as a legal means of acquiring land territory certainly has lent strength to Japan’s position. It could render the Chinese argument of which state actually established the original title over the Islands completely unimportant.

A question that is critical to China’s historical claim is whether China has, even presupposing that its discovery and some use of the Islands are accepted, effectively and continuously exercised its jurisdiction over the Islands prior to Japan raising its claims.

Had China Established Historical Title over the Islands?

Obviously, China holds to the view that activities, such as including the Islands into its defence patrol area and granting the Islands to a Chinese national,⁶¹ displayed the intention of acting as the sovereign and are adequate for China acquiring sovereignty. If this is well founded, Japan’s claim in 1895 would not be valid since the Islands were no longer *terra nullius* at the time of Japan’s claim.⁶² But is this non-*terra nullius* argument as useful as China wishes in undermining Japan’s claim?

In practice, assessing the legal value of such activities in determining the existence of historic title and/or sovereignty has to take into account a large number of criteria, including the attributes of the island around which the activities occur.⁶³ Different requirements have been used in determining such values. A fairly high requirement for effective control was employed by the ICJ in deciding the *effectivité* of British control

over the Minquiers and Ecrehos Islands in the *Minquiers and Ecrehos Case (France/United Kingdom)*. In that case, the Court was satisfied by facts such as the Jersey Court's jurisdiction over the Ecrehos and Jersey's authority in exercising of administration on the island.⁶⁴ Clearly, it was the actual exercise of state jurisdiction over the islands that satisfied the Court in this case. This is unlikely to produce any result in the Tiaoyu dispute, as the Islands are a group of tiny, isolated, and uninhabited formations, and neither of the claimants has ever physically held the Islands nor actually exercised any physical jurisdiction or administrative power on the Islands. However, in the *Clipperton Case*, the Arbitrator stated:

If a territory, by virtue of the fact that it was completely uninhabited, is from the first moment when the occupying State makes its appearance there, at the absolute and undisputed disposition of that State, from that moment the taking of possession must be considered as accomplished, and the occupation is thereby completed.⁶⁵

Thus, in the case of an uninhabited island, very little actual exercise of state function in the belief of acting as the sovereign might be sufficient for title in the absence of a rival claim.⁶⁶

The above was adopted and developed in the *Eritrea/Yemen Arbitration* in resolving the territorial dispute over the Zuqar-Hanish Group, a group of islands bearing a similar nature to those above mentioned. The tribunal elaborated that: "there is little evidence on either side of actual or persistent activities on and around these islands. But in view of their isolated location and inhospitable character, probably little evidence will suffice."⁶⁷ The tribunal applied this guideline and considered the Red Sea lighthouses, petroleum agreements, and naval patrol and logbook to test the effective control by the parties, by which Yemen was found to have the title of the islands.⁶⁸ This standard was applied to the Jabal al-Tayr and Zubayr Group, which was also awarded to Yemen, though little evidence was found on either side of actual or persistent activities on or around these islands.⁶⁹ Clearly, as Professor Brownlie has pointed out, effective occupation does not necessarily set limits on the means of actual occupation.⁷⁰

However, the tests applied in the *Island of Palmas Case* suggest that the activities must be sufficient to offer minimum protection, under international law, from foreign states.⁷¹ In this connection, Schwarzenberger observed that normally effective occupation would manifest itself by the establishment of proper state machinery for the purpose of defence and administration of the occupied territory and the actual display of state jurisdiction, but in the case of a relinquished or uninhabited island, such as Clipperton Island, an initial display of sovereignty may suffice to maintain title.⁷²

The facts invoked by China to support its claim need to be assessed in the light of the above decisions and opinions. That the Islands were incorporated into the Chinese maritime defence system and granted to a Chinese national, if verified, may be sufficient to support China's effective occupation of the Islands, as China had exercised, to an appropriate extent, effective control over the Islands as the sovereign. If so, it should lead to the conclusion that China was the first country to establish sovereignty over the Islands.

However, it should be noted that such a claim may confront another problem since the Chinese evidence is old and its strength as a link to a sovereign claim is weak and indirect. It may not necessarily be favorable to China, when a competing claim based on contemporary practice exists.⁷³ The adverse effect may be particularly true when the

facts substantiated by the centuries-old evidence are inconsistent with or not supported by a state's own subsequent acts. The ICJ has in a recent case been reluctant to rely upon such evidence to determine territorial title. In the *Kasikili/Sedudu Island Case* (Namibia/Botswana), the Court, in examining the principles and rules of international law relating to the dispute, rejected Namibia's contentions based on map evidence and the armed clash between South Africa (the administrative power of Namibia before 1990) and Botswana in the channel area in 1984. The Court opined that Namibia, to establish entitlement over the islands, had to show "the necessary degree of precision and certainty that acts of State authority capable of providing alternative justification for prescriptive title, in accordance with the conditions set out by Namibia, were carried out by its predecessors or by itself with regard to Kasikili Sedudu Island."⁷⁴ China's centuries-old claim, if considered as inconsistent with its lack of action against Japan and of less "degree of precision and certainty" than its competitor's in the 19th century, may cast serious doubt on China's claims in justifying its historic sovereignty.

It is worth noting that China's approaches to displaying its sovereignty are all alien to western international law doctrines. It can be explained how repugnant the concept of territory acquisition in international law is to the idea of territory in the self-isolated Chinese empire in the 16th–19th centuries. This "divergent culture" factor was considered in the *Eritrea/Yemen Arbitration*, where the tribunal, in substantiating Yemen's satisfaction of the *effectivité*, observed that "western ideas of territorial sovereignty are strange to peoples brought up in the Islamic tradition and familiar with notions of territory very different from those recognized in contemporary international law."⁷⁵ The application of this dictum to the present dispute might ease China's embarrassment over its obviously ineffective display of sovereignty and may call for considering as special the Chinese ancient values on territorial sovereignty, instead of disqualifying the legal effect of those acts.

The Problems with Japan's Claim in International Law

Japan asserts that China had not established sovereignty over the Islands before Japan's 1894 claims. Even if China had established title, the sovereignty might not have been effectively maintained until the time that Japan announced its claim as evidenced by China's lack of reaction and inadequacy of displaying its sovereignty over the Islands for a long period. The core of the argument is whether China has continuously and adequately acted as the sovereign, if it had ever acquired the Islands, and therefore, if Japan bore any obligation to China when it attempted to annex the Islands in 1894. Should the critical time for sovereign determination be set between when Japan launched its first claim in 1894 and when China reasserted its claim in the early 1970s, an approximate 70-year gap would exist during which China took virtually no action to assert its sovereignty over the Islands. Japan has viewed the "time gap" either as a failure of continuously displaying title or a fact constituting China's acquiescence and estoppel to Japan's claim.

The requirement of continuity in the law of territorial acquisition, as interpreted in the judicially decided cases, has never been placed on an absolute basis. The Court seems to tolerate the existence of a time gap in the course of displaying sovereignty, as long as it is compatible with the maintenance of title in the particular circumstances.⁷⁶ In a few cases, a fairly long time gap was not considered fatal to the claim of the title by occupation. For example, in the *Clipperton Island Arbitration*, France first claimed the island in 1858, but did not exercise sovereignty until 1897, which left a vacuum of 40 years. But this fact did not affect the French sovereignty over the Island.⁷⁷ In the *Island*

of *Palmas Case*, a gap of a hundred years (1726–1825) was found in the Dutch display of state authority. Despite this, the Arbitrator ruled, “the Netherlands had satisfied the criterion of ‘peaceful and continuous display’ of State function.”⁷⁸ Hence, the fact that China had not acted as the sovereign over the Islands for 70 years may not necessarily rule out title, if it had already been established. International law seems to be that a sovereign title cannot be denied simply by the existence of a time gap in the course of displaying sovereignty, albeit it clearly requires the sovereignty to be displayed continuously. So one has to find out whether China’s silence is compatible with the circumstances of the case.

In this connection, the manner in which Japan claimed the Islands calls for particular attention. Apparently, Japan did not claim the Islands using one of the better known methods of territorial acquisition, such as planting a flag or making a public declaration, but instead adopted a cabinet decision to mark and survey the Islands. Such an approach raises the question as to why Japan asserted authority over the Islands in such an unusual way, if it believed no hostile claim existed to the Islands, and whether such activities qualify as an assertion of title. Regarding the good practices for displaying or asserting a claim, the French claim of the Clipperton Island provides some guidance. France published its claims in a Hawaii newspaper and officially notified the Government of Hawaii, which France considered as having a possible relationship to the island. In addition, the French Government in 1897 asked for an official explanation from the U.S. government, which France discovered was sending people to the island. These acts by France were found to satisfy the requirement of public notoriety of a territorial claim, and these played a large role in the arbitrator’s decision to award France sovereignty over Clipperton Island.⁷⁹ In contrast, the Japanese claim seems to lack any character of public notability. Certainly, as Professor Matsui has argued, “no rule of international law requires notification of occupation to other States as a condition of its validity,” and therefore, Japan bore no obligation to notify China of its claim.⁸⁰ It is, however, well accepted that a valid display of sovereignty must be open to public notice to the extent that it is sufficient to make states concerned aware of the claim and have the opportunity to assert a counterclaim.⁸¹ In the *Temple Case* before the ICJ, this principle was clearly acknowledged. The Court ruled that Thailand’s insufficient reaction against the disputed line on the map was a fact showing it had “accepted the frontier . . . as it was drawn on the map, irrespective of its correspondence with the watershed line.”⁸² Before reaching this conclusion, the Court, however, took efforts to identify the opportunities that Thailand had to react against the line and found that Thailand had failed to do so.⁸³ The ruling indicates that the state against which the acquiescence and estoppel is claimed must have a reasonable chance to react to such a claim. This argument would militate against Japan’s position.

Notwithstanding the above, whether this could overcome China’s lack of immediate response is another question. In the present case, the Islands are such a minor feature and were claimed in such a manner that may not reasonably have attracted the notice of China. If Japan had noted that China might have claim over the Islands, the lack of a reasonable chance to react to the claim is an arguable factor in Japan’s claim. China may argue that Japan’s acquisition of the Islands was not fully in accordance with international law and the noncompliance thereof directly affected China’s opportunities to react in a reasonable time against the claim. If Japan’s claim is found defective, the argument that silence constituted acquiescence and estoppel would be impaired.

Interestingly, the background in which Japan promulgated its 1894 claim casts further doubt on whether the claim was made in good faith. There are records suggesting that

Japan, by adopting the approach it did, was attempting to be inconspicuous. Evidence shows that Japan was fully aware in 1885 that “China not only has known these Islands . . . but also has already given a name for every one of these islands to make it convenient for their navigators to use them as navigational aids to Ryukyu.”⁸⁴ The Japanese Interior Minister was petitioned by the Okinawa Prefecture in early 1885 to erect national markers on the Islands. But this proposal was dropped due to the objection from the Japanese Foreign Minister, who said in the Diet that “the islands involved were very small, having Chinese names and very close to the Chinese coast.” Such an act “would attract the attention [of China],” and Japan “should await a more opportune time.”⁸⁵ Likely, Japan had been aware of the fact that China might have a possible claim to the Islands.

Japan’s timing was eventually chosen when victory in the Sino-Japanese War was foreseeable and probably when Japan had decided to take over Taiwan as the result of the “victory.” Having analyzed the relevant historical facts, a Japanese writer admitted, “the erection of [a] marker might provoke Chinese *suspicious*.”⁸⁶ Japan, when annexing the Islands, might have already known of China’s long usage of the Islands and perhaps be aware that China would have a potential claim to them. To avoid trouble with China on such valueless real estate, Japan opted to acquire the Islands quietly and wait until her victory in the war became certain. One writer noted that “when a decision was made, Japan’s victory in the first Sino-Japanese war was close at hand, and therefore the Japanese Government no longer needed to worry about *possible diplomatic trouble* with China.”⁸⁷ What “possible diplomatic trouble” would exist if Japan took the view that the Islands were *terra nullius*? One Japanese writer has indicated that this background “cast a shadow on Japan’s incorporation of the Senkaku Islands.”⁸⁸ It can be argued that the particular manner and time that Japan chose to claim the Island was politically based. Tao Cheng, a Chinese scholar, holds the view that “the Japanese Cabinet decision of January 14, 1895, was not a result of ‘repeatedly conducted field surveys’ but of the first Sino-Japanese war; there was nothing on or around the islands in the last year which could not have been discovered in the previous nine years to help to determine the status of the islands.”⁸⁹

Japan’s unusual manner of claiming the Islands might rebound on its claim of acquiescence and estoppel against China. The inadequate public nature of the claim could be argued by China as a justifiable ground for its insufficient reaction to Japan’s claim. In international law, the state who invokes estoppel must rely in good faith on the assumption that any acceptance of a claim by the state against which the estoppel is claimed is to be made from the perspective of the invoking state acting in good faith.⁹⁰ On the Chinese side, the silence on the disposal of the Islands under the San Francisco Treaty could be explained on the basis that, as the Islands are too small and economically valueless, its claim over the Islands was entangled with the ROC’s contention of stripping Japan of sovereignty of the entire Ryukyu Islands and the complicated shadow of the Sino-American relationship.⁹¹ Thus, China did not raise the question of restoring the Islands to Chinese sovereignty. However, this explanation seems weak respecting the ROC’s silence against Japan’s claim to the Islands and does not answer why the PRC was silent over the U.S. military’s use of the Islands after Nansei Shoto was placed under U.S. administration.⁹²

Were the Islands Ceded?

Another question is whether all the islands appertaining to or belonging to Taiwan, as provided in Article 2(b) of the Shimonoseki Treaty, including the Tiaoyu Islands, were

ceded to Japan.⁹³ No wording in the 1895 Treaty or subsequent treaties explicitly referenced the Islands, and thus there is no direct support for the transfer of the Islands to Japan. Cession would have to be considered in the historical context of the Shimonoseki Treaty. As already noted, the incorporation of the Islands by Japan was at the end of the Sino-Japanese war and only months before the cession of Taiwan and its appertained islands was agreed by treaty. China argues that in October 1894, although the Treaty had not yet been executed, Japan's victory had, however, become a matter of certainty and Japan took advantage of this situation and annexed the Islands. It is hard to explain why Japan annexed such a group of "unimportant islands" by means of prescription, while taking other significant islands like Taiwan through use of force and territorial cession. Certainly, it is hard to imagine naming such "unimportant islands" in the cession agreement, while many other larger islands around Taiwan were clearly covered by the general description "Taiwan and its appertained islands." It is possible that since the Islands were too "minor" to be mentioned, they were included in the ceded territory in the Treaty without being particularly named. The pre-1895 Treaty activities relied on by Japan as claiming the Islands might only have been a preparation for the takeover of Taiwan and the appertaining islands, rather than a specific territorial acquisition.

Conclusion

The above analysis shows that the territorial dispute over the Tiaoyu/Senkoku Islands is complicated, contains many uncertainties, and is surrounded with lots of arguable and unknown facts. At present, there is no sign that Japan is willing to enter into talks or resort to an independent third party for a solution.

General principles of international law regarding territorial jurisdiction show that where there are competing claims to title over land, the outcome may hinge on the intensity or nature of the activities taken respecting the claimed area. Moreover, state acquiescence to another state's claim may also become important.

China may, as is asserted, have shown adequate intention to be a sovereign over the Islands and therefore may be able to establish title over the Islands. However, there is no record of China contesting sovereignty over the Islands while they were under Japan's authority until the very late 1960s or early 1970s. However, the unusual manner and time in which Japan chose to annex the Islands do invite questions as to the importance of China's lack of an immediate reaction to Japanese claims. International law clearly exhibits that if a state fails to behave as though it has title to land and does not assert sovereignty, it can effectively lose its title.

Eventually, the dispute will have to be decided by comprehensively considering all the factors. To achieve a result, the principle that the state evidencing the stronger claim to the territory will be granted title will have to be applied. However simple the principle, the difficulty is in weighing the facts in an equitable manner consistent with history, the practice of states, and existing international law.

Notes

1. Tiaoyu is the Chinese name of the Islands in the Latin alphabet. It is spelled in the Wade-Giles Pin Yin system widely used in the Republic of China (ROC) and Hong Kong. Its Chinese name is spelled as "Diaoyu Dao," "Tiao-yu tai," or as "Tiao yü Tai" or "Diao yu tai" in the Han Yu Pin Yin system. The Islands in the People's Republic of China (PRC) are called "Diaoyu Tai" or "Diaoyu Dao." The ROC gives the same Chinese characters but differs in the

Pin Yin system: “Tiao Yu Tai.” Japan names the Islands “Senkaku, Senkaku Gunto” or “Sento Shosho” in Japanese.

2. The dispute arose mainly between the ROC, which has been referred to by the PRC as the Taiwan Authority, and Japan. After Japan officially terminated its diplomatic ties with the ROC and recognized the PRC in the early 1970s, the PRC officially replaced the ROC as the disputant on the Chinese side in this matter, though the ROC has neither officially withdrawn its previous claims, nor ceased its sovereignty claim against Japan over the Islands and the surrounding sea.

“China” is used throughout this article to refer to the PRC. “ROC” is used to refer to Taiwan. This author is of the view that the ROC is an integral part of China, despite its current *de facto* independent status. Regarding the historic development of the Taiwan problem, see J. Charney and J. R. V. Prescott, “Resolving Cross-Strait Relations between China and Taiwan,” 94 *Am J Int'l L* (2000), pp. 458 ff. Regarding the international legal status of Taiwan and cross-strait relations, see Jean-Marie Henckaerts (ed.), *The International Status of Taiwan in the New World Order* (Kluwer Law International, 1996).

3. The maritime boundary disputes in the East China Sea have been reviewed and discussed in numerous places. The history and basic facts of the dispute can be found in: J Greenfield, *China's Practice in the Law of the Sea* (Clarendon Press, Oxford, 1992; Choon-ho Park, *East Asia and the Law of the Sea* (National University Press, Seoul, 1983) and “Continental Shelf Issues in the Yellow Sea and the East China Sea.” Occasional Paper, No. 15, Law of the Sea Institute, University of Rhode Island (1972); Tao Cheng, “The Sino-Japanese Dispute over the Tiaoyutai (Senkaku) Islands and the Law of Territorial Acquisition,” 14 *Vir.J. Int'l L.* (1974), pp. 221 ff; and Ying-Jeou Ma, *Legal Problems of Seabed Boundary Delimitation in the East China Sea* (University of Maryland, Baltimore, 1984).

4. See: M. Valencia, “Regional Maritime Regime Building: Prospects in the Northeast and Southeast Asia,” 31 *Ocean Dev. & Int'l L.* (2000), p. 14 and M. Valencia, *A Maritime Regime for North-East Asia.* (Oxford Press, Hong Kong, 1996), pp. 88-89.

5. IBRU, *Boundary and Security Bulletin*, Vol. 7 No. 2 (1999), p. 47 and Vol. 9 No. 2 (2001), p. 55.

6. “Define Borders, China urges Japan”; *Financial Times*, London, on 14 September 2000.

7. The incident occurred in the area about 260 km outside China's territorial sea in the East China Sea: “Japan fires on ‘intruding’ boat” on the BBC News online, http://news.bbc.co.uk/hi/english/world/asia-pacific/newsid_1724000/1724913.stm (last visit 05/06/2003). See also “Coast guard sinks suspect ship in East China Sea,” *The Japan Times*, Online <http://www.intellnet.org/news/2001/12/23/8516-1.htm> (latest visited on 05/06/2003).

8. A Chinese Spokesman from the PRC's Ministry of Foreign Affairs at a Press Conference on 25 December 2001 said: “The Chinese side has expressed its serious concern over the use of force of the Japanese side in chasing the unidentified ship as well as the sinking of the ship within the exclusive economic zone of China.” Posted on the official website of the Ministry of Foreign Affairs of the People's Republic of China, <http://www.fmprc.gov.cn/eng/22811.html> (last visited on 05/06/2003).

9. See: D. Dzurek, “Effect of the Diaoyu/Senkaku Islands Dispute on Maritime Delimitation” in Martin Pratt and Janet Allison Brown (eds.), *Borderlands under Stress* (IBRU International Boundary Studies Series, Kluwer Law International, 2000), p. 412. So far the parties have conducted 12 rounds of boundary negotiations. In 2001, an agreement was reached requiring one party to “prior notify” this sort of activities in the overlapped but undelimited EEZs to the other. See: Akira Takada, “Marine scientific in the EEZ and Japan–China agreement for prior notification,” 44, *Jap. Ann. Int'l L.* (2001), pp. 134 ff. In 1997, China and Japan signed a fishery agreement in the East China Sea, which marked off a cooperation zone (Provisional Measures Zone) in which both parties have access to the fishery resources but exercise restrained jurisdiction. The Islands-affected area is left out to maintain the status quo. The English version of the Treaty can be found in 41 *Jap. Ann. Int'l L.* (1998), pp. 122–129. For comments and analyses of the arrangement, see Zou Keyuan “Sino–Japanese Joint Fishery Management in the East China Sea,” 27 *Marine Policy* (2003), pp. 132–142.

10. Park, *East Asia and the Law of the Sea*, supra note 3, p. 32. Jonathan Charney referred to the distance between the “principal island of the group” and the low-water line of the nearest point on Ryukyu Islands and that of Taiwan, which are respectively measured at 77 nm and 93 nm, and the distance from the group to the nearest mainland coast of China as roughly 182 nm. J. Charney, “The Diaoyu/Senkaku Islands Maritime and Territorial Dispute,” in *International Law Conference on the Dispute over Diaoyu/Senkaku Islands* (Taiwan, 2–3 April 1997) (Taiwan Law Society and Taiwan Institute of International Law, eds., 1997), p. 120.

11. Greenfield, supra note 3, p. 127.

12. Choon-ho Park, “Oil under Troubled Waters: The Northeast Asia Seabed Controversy” 14 *Hav. Int’l L.J.* (1973), p. 256 and Cheng, supra note 3, at pp. 257–259.

13. J. Prescott and C. Schofield, “Undelimited Maritime Boundaries of the Asian Rim in the Pacific Ocean” in *Maritime Briefing*, Vol. 3 No. 1, IBRU, Durham (2001), p. 21.

14. The Okinawa Trough borders the continental shelf in the west and the Ryukyu arc in the east. The Trough, arguably, is the most striking geophysical character of the seabed of the East China Sea in terms of its location, size and depth. The northern part of the Trough is actually a comparatively wide continental slope, though the discontinuity of the extension of the shallow seabed is obvious. The depression of the seabed in this part of the sea goes from 200 m to the depth between 500 m and 1000 m. In the south, the shelf declines more abruptly to the depth of 1000–2719 m when it meets the Okinawa Trough. The maximum depth of the sea appears in southern part of the Trough where it reaches 2719 m. Qin Yunshan, Zhao Yiyang and Chen Lirong (eds), *Geology of the East China Sea* (Science Press, Beijing, 1996), pp. 1–3.

15. Although the importance of the natural prolongation principle in bilateral boundary delimitation has diminished and the continental shelf defined by distance principle and the concept of EEZ have been adopted by the LOS Convention and been affirmatively supported since the *Libya/Malta Continental Shelf Case* [1985] *I.C.J. Reports* 13, it remains one of the valid criteria for determining the outer limit of continental shelf. The EEZ and distance principle have no impact on the continental shelf beyond 200 nm.

16. The territorial dispute has been discussed in numerous places. See: Cheng, supra note 3; H. Chiu, “An Analysis of the Sino–Japanese Dispute over the Tiaoyutai Islets (Senkaku Gunto),” 15 *Chinese Y.B. Int’l L. & Affairs* 9–31 (1996–97); Greenfield, supra note 3, pp. 127–29; V. Li, “China and Off-Shore Oil: The Tiao-yu Tai Dispute,” 10 *Stan. J. Int’l Studies* (1975), p. 151; Ma, supra note 3; T. Okuhara, “The Territorial Sovereignty over the Senkaku Islands and Problems on the Surrounding Continental Shelf,” 15 *Jap. Ann. Int’l L.* (1971), p. 97 ff; Y. Matsui, “International Law of Territorial Acquisition and the Dispute over the Senkaku (Diaoyu) Islands,” 40 *Jap. Ann. Int’l L.* (1997), p. 3 ff.; Park, supra note 12, 212; *International Law Conference on the Dispute Over Diaoyu/Senkaku Islands*, supra note 10, 1–162; P. Deans, “The Diaoyutai/Senkaku Dispute: The Unwanted Controversy,” at <http://ukc.ac.uk/politics/publications/journals/kentpapers/deans.html> (last visited 27/10/2001); and W. Heflin, “Diaoyu/Senkaku Islands Dispute: Japan and China Oceans Apart,” 18 *Asian-Pacific Law and Policy Journal* (2000), p. 1.

17. Report of the Sixth Session of the Committee for Co-ordination of Joint Prospecting for Mineral Resources in Asian Offshore Areas, U.N. Doc. E/CN.11/L.239 (1970), at 51–67; see also Park, *East Asia and the Law of the Sea*, supra note 3, pp. 248–249; and U. Suganuma, *Sovereign Rights and Territorial Space in Sino–Japanese Relations* (2000), pp. 129–31.

18. Cheng, supra note 3, p. 243.

19. Article 2 and 3 of the San Francisco Peace Treaty, 8 September 1951, 136 *U.N.T.S.* p. 45. The text is available at <http://newtaiwan.virtualave.net/sanfrancisco01.htm> (latest visited on 04/11/2001). For the history of the 1951 San Francisco Treaty and its relation to the origin of the dispute of the Tiaoyu/Senkaku Islands, see: S. Lee, “The 1951 San Francisco Peace Treaty with Japan and The Territorial Disputes in East Asia,” 11 *Pacific Rim Law & Policy Journal* (2002), pp. 123–127. For the legal background of the Treaty and territorial depositions in the Treaty, see: D.P. O’Connell, “Legal Aspects of the Peace Treaty with Japan,” 29 *Brit Y. B. Int’l L.* (1952), pp. 423–435.

20. Agreement Concerning the Ryukyu Islands and the Daito Islands (Okinawa Reversion Treaty), signed on 17 June 1971 and entered into force on 10 November 1971, reprinted in

United States Treaty and Other International Acts Vol. 23, p. 446. Article I of the Treaty provides for the United States to return to Japan “all and any powers of administration legislation and jurisdiction” over Ryukyu and Daito Islands held by the United States under Article 3 of the 1951 Peace Treaty. However, the United States took no position on the sovereignty dispute, stating that “a return of administrative rights over these islands to Japan, from which the rights were received, can in no way prejudice any underlying claims.” The declaration of the State Department of the United States concerning the territorial dispute is quoted by W. Schachte, “The United States’ Role: Thoughts on the Diaoyu/Senkaku Islands Dispute, in *International Law Conference on the Dispute over Diaoyu/Senkaku Islands*,” supra note 10, pp. 59–73.

21. See: *Kyodo News*, 29 September 1990, in FBIS, Daily Report: East Asia, 2 October, 1990, pp. 11–12.

22. In 1978 the two states achieved the Treaty of Peace and Friendship between Japan and the People’s Republic of China (12 August, 1978). The text of the Treaty can be found at <http://www.taiwandocuments.org/beijing.htm> (last visited on 22/10/2004). As part of this China and Japan agreed to shelve the dispute to the “following generation.” This Statement was reprinted in the *People’s Daily*, Beijing, 26 October 1978 (in Chinese).

23. Article 2 of the Law of the Peoples Republic of China on the Territorial Sea and Contiguous Zone (adopted on 25 February 1992), the English version is reprinted in the *United Nations Law of the Sea Bulletin*, No. 21 (August 1992).

24. C. Schofield, “Island Disputes in East Asia Escalate,” 8 *Jane’s Intelligence Rev.*, No. 11, p. 517 (1 November 1996).

25. “Japanese coast guard wins standoff with protesters”; 26 May 1997, World News Story Page of the CNN. <http://www.cnn.com/WORLD/9705/26/islands.taiwan/index.html> (last visited on 13/11/2003).

26. “Opposition Parliamentarian Lands on China-Claimed Island,” Japan Weekly of *Kyodo News* 9 May 1997. See also “Japanese legislator lands on disputed islands,” Report from CNN, 6 May 1997, <http://www.cnn.com/WORLD/9705/06/china.japan/> (last visited on 10/11/2003).

27. Press Conference by the Press Secretary (24 September 1996) at <http://www.mofa.go.jp/announce/press/1996/9/924.html> (last visited on 10/11/2003).

28. *Boundary and Security Bulletin*, Vol. 8 No. 2 (2000), IBRU, p. 49.

29. Statement made by the Spokesman of Foreign Affairs of Peoples Republic of China on 30 April 2000, see <http://www.fmprc.gov.cn/english/dhtml/find.asp?value=Diaoyu&pagenumber=2> (last visited on 10/11/2003).

30. *Boundary and Security Bulletin*, Vol. 8 No. 2 (2000), IBRU, p. 49.

31. SCMP, “Free the Diaoyus activists now, Beijing demands.” 26 March 2004. For the Chinese positions, see PRC Foreign Ministry Spokesman’s Statements on 24 March 2004, posted at <http://www.fmprc.gov.cn/chn/xfwf/fyrth/t80526.htm> (in Chinese). Japan’s stance is made clear by its chief cabinet secretary Yasuo Fukuda quoted by the CNN as stating “it is crystal clear that the Senkaku islands are our country’s indigenous territory.” Posted at <http://www.cnn.com/2004/WORLD/asiapcf/03/25/china.japan.reut/index.html> (last visited on 26/03/2004).

32. See: 15 *Beijing Review* (January 1972), p. 13; Ji Guoxing, “The Diaoyudao (Senkaku) Disputes and Prospects for Settlement,” *The Korean Journal of Defense Analysis* (1994), pp. 287–288; and Chiu, supra note 16, pp. 19–20.

33. The Statement of the Ministry of Foreign Affairs of the PRC (dated 30 December 1971), reprinted in 15 *Beijing Review* (January 1972), p. 12.

34. G. Austin, *China’s Ocean Frontier*, Allen & Unwin Australia Pty Ltd. (1998), p. 164.

35. Cheng, supra note 3, pp. 256–57. The granting document clearly mentioned the names of Diaoyutai, Huangweiyu, and Chiweiyu. The relevant parts of the document are quoted in Austin, supra note 34, p. 165.

36. More evidence in favor of China’s historical title over the Islands is referred to in Cheng, supra note 3, pp. 254–256; Chiu, supra note 6, pp. 9–29; and Heflin, supra note 16, pp. 3–5.

37. The Treaty was signed on 17 April 1895 and is reprinted in C. Parry (ed.), *The Consolidated Treaty Series*, Vol. 181 (Oceana Publications Inc., 1979), pp. 217–224. It is also available

at <http://newtaiwan.virtualave.net/shimonoseki01.htm> (last visited on 08/07/2002). Article 2 of the Treaty provided:

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* (c) The Pescadores Group, that is to say, all islands lying between the 119th and 120th degree of longitude east of Greenwich, and the 23rd and 24th degrees of north Latitude.

38. Article 2(b) of the 1951 San Francisco Peace Treaty, *supra* note 19, signed by neither China nor Taiwan, simply states, “Japan renounces all right, title and claim to Formosa and Pescadores.” Article 3 provides that:

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° N (including the Ryukyu Islands and the Daito Islands). . . . Pending the making of such a proposal and affirmative action thereon, the United States will have the right to exercise all and any powers of administration, legislation and jurisdiction over the territory and inhabitants of these islands, including their territorial waters.

The Tiaoyu Islands were in the area of Nansei Shoto.

39. China was not a party to the 1951 San Francisco Treaty because the communists took over mainland China in 1949 and the Allies held divergent views on whether the PRC or the ROC should be represent China to sign the Treaty. China, therefore, signed separate bilateral peace treaty with Japan in 1952. H. Chiu, “The International Legal Status of Taiwan” in Henckaerts, *supra* note 2, pp. 3–8. The full text of the Treaty of Peace between the Republic of China and Japan, signed at Taipei on 28 April 1952 can be found on <http://www.taiwandocuments.org/taipei01.htm> (last visited on 22/10/2004).

40. Cheng, *supra* note 3, pp. 251–252. The ROC had expressed disagreement with Article 3 of the San Francisco Treaty, though not being a party to it. The ROC took the position that Japan, according to the spirit of the Potsdam Proclamation 1945, should be totally deprived of sovereignty over the Ryukyu Islands, rather than placing the islands under the Trusteeship of the United Nations. The ROC had no intention of making a territorial claim over the Ryukyu Islands. This is recorded in a memorandum from the Chinese (ROC) Foreign Affairs to the U. S. Ambassador in Taipei, which is quoted in Cheng, *supra* note 3, footnote 102.

41. Article VII of the Mutual Defense Treaty between the United States and the Republic of China, signed in December 1954, 248 *U.N.T.S.*, pp. 213 ff.

42. Japan has reiterated this position on many occasions. For example, a Japanese spokesman said, “There does not exist any territorial issue regarding the Senkaku Islands.” Press Conference held by the MOFA on 23 July 1996, posted at <http://www.mofa.go.jp/announce/press/1996/7/723.html#2>. See also: statements made by the Spokesman of the Japanese Ministry of Foreign Affairs (MOFA) at the press conferences on 26 July 1996, 17 September 1996, 24 September 1996, 27 May 1997, etc. The record of the press conference were posted at the website of the MOFA, <http://www.mofa.go.jp>. See also Matsui, *supra* note 16, p. 4.

43. Japan’s policy remains that “residents of Japan will not be stopped from going to the Islands without legal grounds for that.” See: “The fundamental position of the Government of Japan on the Senkaku Islands,” the statement made on the Press Conference of MOFA on 24 September 1996, at <http://www.mofa.go.jp/announce/press/1996/9/924.html#2> (last visited on 13/11/2003).

Japan has noted: “Although the Government of China has a *different attitude*, we would like to strengthen our bilateral relationship, and we would hope that this will be the case in the future.” See: “Japanese policy on Senkaku Islands,” Press Conference by the Press Secretary on 10 September 1996, posted at <http://www.mofa.go.jp/announce/press/1996/9/910.html> (last visited on 13/11/2003). Similar positions are also expressed in answering the question, “If Japan regards the Senkaku Islands as sovereign territory, why not deploy armed forces on the islands?” The

Spokesman said, "We do not want to make the Senkaku Islands such a big issue that relations with neighbouring countries and regions would be jeopardized." Press Conference by the Press Secretary on 27 May 1997, posted at <http://www.mofa.go.jp/announce/press/1997/5/527.html#7> (last visited on 13/11/2003).

44. "The Basic View on the Sovereignty over the Senkaku Islands," posted on the official website of Japan's Ministry of Foreign Affairs, <http://www.mofa.go.jp/region/asia-paci/senkaku/senkaku.html> (last visit on 07/06/ 2001) (hereinafter "Basic View").

45. "Basic View," supra note 44. See also: the statement of Japanese Foreign Ministry on 8 March 1972, the official text is reprinted in J. Cohen and H. Chiu, *People's China and International Law, A Documentary Study*, Vol. 1 (Princeton, NJ, 1974), pp. 351–352. Japan's annexation of the Islands was conducted in a gradual and silent manner. The 1895 "cabinet decision" actually covered only two of the largest islands in the group: Tiaoyu tai and Huangwei Yu. Chiweiyu was not formally incorporated into Japan until 1921 and was leased to a Japanese national in 1926. The other five rocks in the group might never have been the subject of any act of territorial acquisition except expression in connection with the three main Islands. Cheng, supra note 3, p. 246.

46. See supra note 38.

47. "Basic View," supra note 44.

48. J. Merrills, "The International Court of Justice and the Adjudication of Territorial and Boundary Disputes," 13 *Lei. J. Int'l L.* (2000), pp. 882–883.

49. See: R. Jennings and A. Watts (eds.), *Oppenheim's International Law* (1992) (9th ed.), p. 687 and R. Jennings, *The Acquisition of Territory in International Law* (Manchester University Press, 1961), pp. 21–23.

50. *Western Sahara Advisory Opinion*, [1975] *I.C.J. Reports*, para. 79.

51. *Case Concerning Land, Island and Maritime Frontier Dispute*, [1992] *I.C.J. Reports*, paras. 330–368.

52. *Island of Palmas Case, R.I.A.A.* (1928), pp. 829 and 846.

53. *Ibid.*, pp. 865–866.

54. *Judicial Decisions Involving Questions of International Law, France-Mexico, Arbitral Award on the Subject of the Difference Relative to the Sovereignty over Clipperton Island*, the award was rendered by King Victor Emanuel III of Italy in January 1931, reprinted in 26 *Am. J. Int'l L.* (1932), p. 393.

55. *Ibid.*, pp. 392–393.

56. I. Brownlie, *Principles of Public International Law* (5th ed.) (Clarendon Press, Oxford, 1998), p. 144.

57. *Eastern Greenland Case, P. C.I.J. Series A/B, No. 53*, pp. 45–6.

58. Jennings and Watts, supra note 49, p. 576.

59. *Ibid.*

60. *Ibid.*

61. See text accompanying supra notes 32–36.

62. It has been suggested that whether the Islands were *terra nullius* is critical to finding if Japan's activity is valid. Professor Prescott has commented that, "Were the Diaoyu Islands in January 1895 *terra nullius*?" must be answered. "[I]f the Islands were not *terra nullius* in January 1895 (the time of Japan's annexation), and if the Islands is deemed to be part of Taiwan, then Japan has no right to annex the Islands." J. R. V. Prescott, "An Analysis of the bases of Claims by Taiwan and Japan to the Diaoyu/Senkaku Islands," in *International Law Conference on the Dispute over Diaoyu/Senkaku Islands*, supra note 10, pp. 47–57.

63. The variation and flexibility of the criteria used to demonstrate title as shown in the case law are discussed in S. Sharma, *Territorial Acquisition, Disputes and International Law* (Martinus Nijhoff Publishers, 1997), pp. 70–107.

64. *Minquiers and Ecrehos Case*, [1953] *I.C.J. Reports* pp. 53, 65–67. For the reasoning of the I.C.J. on accepting the UK's effective occupation of the Minquiers and Ecrehos islets, see also W. Bishop Jr., "Minquirers and Ecrehos Case," 48 *Am. J. Int'l L.* (1954), pp. 316–326.

65. *Clipperton Island Arbitration*, supra note 54, p. 394.
 66. See: Sharma, supra note 63, pp. 101–102.
 67. *The 1998 Eritrea-Yemen Arbitration*, Phase I, para. 523 at <http://www.pca-cpa.org>.
 68. *Ibid.*, paras. 491, 502, 503, and 507.
 69. *Ibid.*, paras. 509 and 522.
 70. Brownlie, supra note 56, p. 136.
 71. *Island of Palmas Case*, supra note 52, pp. 839 and 846.
 72. G. Schwarzenberger, “Title to Territory: Response to a Challenge,” 51 *Am. J. Int’l L.* (1957), pp. 315–316. See also: Sharma, supra note 63, pp. 102–103.
 73. *Eritrea-Yemen Arbitration*, supra note 67, para. 450; *Minquiers and Ecrechos Case*, supra note 64, para. 47; *Western Sahara Advisory Opinion*, supra note 50, para. 93; and *Case Concerning Land, Island and Maritime Frontier Dispute*, supra note 51, para 344.
 74. *Case Concerning Kasikili/Sedudu Island (Botswana/Namibia)* [1999] *I.C.J. Reports*, para. 99. See: Brownlie, supra note 56, pp. 136–142 and Jennings and Watts, supra note 49, pp. 688–696.
- The ICJ took the view that this sort of evidence depended on whether it was clear and the attitude of the parties towards its function. See: S. Akweenda, “The Legal Significance of Maps in Boundary Questions: A Reappraisal with Particular Emphasis on Namibia,” 60 *Brit. Y. B. Int’l L.* (1989), pp 212–226 and Merrills, supra note 48, pp. 887–888.
75. *Eritrea-Yemen Arbitration*, supra note 67, para. 525.
 76. Sharma, supra note 63, p. 104.
 77. *Clipperton Island Arbitration*, supra note 54, pp. 392–393.
 78. *Island of Palmas Case*, supra note 52, p. 864.
 79. See: E. Dickinson, “The Clipperton Island Case,” 27 *Am. J. Int’l L.* (1933), pp. 130–133.
 80. Y. Matsui, supra note 16, p. 18.
 81. Judge Huber opined that both doctrine and practice recognised that the territorial sovereignty should be displayed continuously and peacefully. *Island of Palmas Case*, supra note 52, pp. 839–840. The norms set in the case are revisited in Sharma, supra note 63, pp. 74–75; Nuno Sérgio Maques Antunes, *Boundary and Territory Briefing: Estoppel, Acquiescence and Recognition in Territorial and Boundary Dispute Settlement*, Vol. 2, No. 8, IBRU (2000), p. 32.
 82. *Case concerning the Temple of Preah Vihear (Cambodia v Thailand)*, [1962] *I.C.J. Reports*, p. 29.
 83. *Ibid.*, pp. 27, 28, and 30.
 84. Quoted from a report written by the magistrate of Ryukyu to the Interior Minister of Japan in 1885. It is quoted by Cheng, supra note 3, p. 248.
 85. Cited in Heflin, supra note 16, p. 18:4.
 86. Matsui, supra note 16, p. 17.
 87. *Ibid.*
 88. *Ibid.*, p. 18.
 89. Cheng, supra note 3, p. 249.
 90. Nuno Sérgio Maques Antunes, supra note 81, p. 34.
 91. Cheng, supra note 3, p. 252. See text accompanying supra note 41.
 92. See text accompanying supra notes 38, 46, and 47.
 93. See text accompanying supra note 37 and Chiu, supra note 16, pp. 24–25.