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# The Diaoyu/Senkaku Dispute: Bridging the Cold Divide

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## I. Introduction

In the East China Sea, a contested group of uninhabited islands lies at the confluence of several trends which characterize modern Sino-Japanese relations – strong regional rivalries, unresolved historical legacies, and booming economic relations. The islands are known in Chinese as the “Diaoyu Tai,” and in Japanese as the “Senkaku” Islands.<sup>1</sup> Although the islands themselves are of little intrinsic economic value, Sino-Japanese relations have increasingly become heated regarding ownership of the islands following a 1968 US Naval Oceanographic Office survey that concluded the seabed underneath the islands may possess large oil and gas reserves.<sup>2</sup>

This paper will first examine the geographical characteristics of the Diaoyu/Senkaku Islands in the context of the 1982 United Nations Convention on the Law of the Sea (hereinafter referred to as UNCLOS III), which China and Japan both signed in 1996.<sup>3</sup> Although it is unlikely that either China or Japan will

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1. The islands are spelled Diaoyu Tai according to Pinyin romanization, but are alternatively called the Tiao Yu Tai in the older Wade-Giles transliteration system.
2. UNRYU SUGANAMU, REVIEW OF SOVEREIGN RIGHTS AND TERRITORIAL SPACE IN SINO-JAPANESE RELATIONS: IRREDENTISM AND THE DIAOYU/SENKAKU ISLANDS 129 (2000).
3. See United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, reprinted in 21 I.L.M. 1261 [hereinafter UNCLOS III].

resolve the matter by resorting to an international court, international law may still influence the resolution of the dispute. The United Nations has said it will decide on global offshore territorial claims by May 2009. However, before this time, both countries may find it prudent to reach some degree of mutual understanding, and to protect some of their interests should the UN fail to reach a decision in accordance with their claims. Next, the paper will examine important political and economic issues that affect the future resolution of the dispute. Within this context, the paper will examine and critique the grounds for both Chinese and Japanese claims regarding the islands, highlighting their particular problems and ambiguities.<sup>4</sup> This will then be followed by a discussion of similar territorial problems facing the Association of South East Asian Nations (ASEAN), and the 2002 Declaration of Conduct of Parties in the South China which was set up to address such problems.<sup>5</sup> The paper concludes that due to problems underlying both their claims, and in the context of economic and political concerns, China and Japan should examine the possibility of either creating a bilateral agreement similar in nature to the 2002 Declaration of Conduct of Parties in the South China, or jointly exploring and developing the disputed area.

## II. Background

### A. Geography and Article 121

The United Nations Convention on the Law of the Sea (UNCLOS III) is the starting point for examination of several maritime territorial issues related to the Diaoyu/Senkaku Islands. UNCLOS III sets forth the criteria for several important issues, such as delineation of maritime borders and economic zones. Discussions to promulgate UNCLOS III were convened in 1982, with close Chinese participation and input, although China was not satisfied with several provisions, such as those pertaining to the definition of the continental shelf. Japan, by contrast, made no major contributions and even voted against UNCLOS III's establishment of the 200-mile Exclusive Economic Zone. Nonetheless, both China and Japan signed the convention in 1996.<sup>6</sup>

4. Although the islands are claimed by three parties, the People's Republic of China (China), the Republic of China (Taiwan), and Japan, this paper will only analyze the Chinese and Japanese claims.
5. See Declaration on the Conduct of Parties in the South China Sea, Nov. 4, 2002, available at <http://www.aseansec.org/13163.htm>.
6. SUGANAMU, *supra* note 2, at 29-32.

The Diaoyu/Senkakus are made up of 8 small islets that lie 120 miles northeast of Taiwan, 250 miles east of China, and 180 miles west of the Ryukyu Island Chain of Okinawa, Japan. They are all uninhabited, with an approximate total land area of 2.7 square miles and only one island has potable water and some vegetation.<sup>7</sup> One island possesses a lighthouse, built by a Japanese right-wing group.<sup>8</sup>

Exclusive Economic Zones (hereinafter referred to as EEZ) are determined by criteria as set forth by UNCLOS III.<sup>9</sup> They may be based on a 200 mile extension from the coast, or may extend further than that if based on a longer continental shelf. Japan claims the border of its EEZ lies at an equidistant point between the coasts of its southern prefecture of Okinawa and China, while China claims its EEZ extends to the edge of its continental shelf. The islands lie in-between the disputed EEZs claimed by both countries.<sup>10</sup> Sovereignty over them may potentially affect 125 square miles of surrounding area,<sup>11</sup> and up to 200 billion cubic meters of natural gas reserves.<sup>12</sup>

Whether or not the Diaoyu/Senkaku Islands will bestow an advantageous economic zone depends on their classification under the *Regime of Islands* pursuant to Article 121(3) of the UNCLOS III.<sup>13</sup> Article 121(3) specifically states that a rock which is unable to either sustain "human habitation" or "economic life," may not be used to create an EEZ or continental shelf. If the feature is capable of sustaining human life, or is capable of having an economic life of its own at the time of the claim, then it will not fall within Article 121(3).<sup>14</sup> The requirement of human habitation does not require permanent human settlement, and the requirement for economic life does not require that human life be sustained

7. Daniel Dzurek, *The Senkaku/Diaoyu Islands Dispute*, Oct. 18, 1996, <http://www-ibru.dur.ac.uk/resources/docs/senkaku.html>.
8. SUGANAMU, *supra* note 2, at 11-13.
9. See UNCLOS III, *supra* note 3. Islands under UNCLOS may set the extent of territorial seas, contiguous zones, and EEZs. The criteria for setting EEZs are specifically set forth in arts. 56-58.
10. See Kosuke Takahashi, *Gas and Oil Rivalry in the East China Sea*, ASIA TIMES (H.K.), Dec. 24, 2004, available at <http://www.atimes.com/atimes/Japan/FG27Dh03.html>.
11. Dzurek, *supra* note 7.
12. J. Sean Curtin, *Stakes Rise in Japan, China Gas Dispute*, ASIA TIMES (H.K.), Oct. 19, 2005, available at <http://www.atimes.com/atimes/Japan/GJ19Dh01.html>.
13. See UNCLOS III, *supra* note 3. Article 121(3) states "[r]ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf."
14. See Jonathan I. Charney, *Rocks That Cannot Sustain Human Habitation*, 93 AM. J. INT'L. L. 863, 868 (1999).

throughout an entire year.<sup>15</sup> Since one of the islands possesses potable water, there may be sufficient basis for sustaining human habitation on an infrequent basis. Additionally, the economic life requirement may be satisfied either by the existence of rich fishing waters, or by the existence of oil and gas deposits.<sup>16</sup> Because the Diaoyu/Senkaku Islands have the potential to satisfy the criteria of Article 121(3), China and Japan have sufficient reason to believe that possession of the islands will widen their respective EEZ claims to some degree.<sup>17</sup>

### ***B. Contentious Politics***

At present, ties between China and Japan have frequently been described as hot economically and cold politically.<sup>18</sup> Economic ties have grown to exceptional levels, yet their bilateral political relationship is frigid. The legacy of World War II casts a pall on how Sino-Japanese relations are often viewed. Chinese discontent over the perceived failure of Japan to fully address its invasion of China is a pervading factor in how disputes are resolved, and how each country views the other's intentions. Japan in turn has increasingly come to view China's growth as both an economic opportunity and a potential military threat. In recent years, there has been a dramatic downward turn in relations, and increasingly both governments have taken a hostile tone towards the other. The present political situation is of great importance in understanding how any future resolution of the Diaoyu/Senkaku dispute will, or must, be resolved.

Following the founding of the People's Republic of China in 1949, Japan and China had no direct contact until relations were normalized in 1972. Sino-Japanese relations were officially cemented by the five articles of the Treaty of Peace and Friendship, signed in 1978.<sup>19</sup> Article One's main points are an emphasis on mutual respect for sovereignty and territory, mutual non-aggression, equality and mutual benefit, and settling of all disputes by peaceful means and refraining from use or threat of force. Article Three emphasizes development of economic and cultural relations.<sup>20</sup>

15. *Id.*

16. *Id.* at 870.

17. This is not without a caveat. The International Court of Justice has consistently held that islands, particularly small ones, do not generate full EEZs. *See infra* Part V.d.

18. *See* J Sean Curtin, *Submarine Puts Japan-China Ties into a Dive*, ASIA TIMES (H.K.), Nov. 17, 2004, available at <http://www.atimes.com/atimes/Japan/FK17Dh01.html>.

19. Treaty of Peace and Friendship Between Japan and the People's Republic of China, P.R.C.-Japan, Aug. 12, 1978, available at <http://www.mofa.go.jp/region/asia-paci/china/treaty78.html>.

20. *Id.*

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Additionally, China has interpreted the treaty to embody four major concepts.<sup>21</sup> The first concept is that Japanese rapprochement is based on remorse for its past aggression. The second concept is Japan's commitment to several policies: Article 8 of the Potsdam Proclamation, recognition that the People's Republic of China is the sole legal government of China, and in regards to Taiwan, an adherence to the one-China policy. Third is the establishment of relations based on the treaty's five principles of mutual respect for sovereignty and territorial integrity, mutual nonaggression, noninterference in each other's internal affairs, equality and mutual benefit, and peaceful coexistence. The fourth term is that neither Japan nor China would seek hegemony in the Asia-Pacific region.

Although bilateral relations were relatively amicable after re-establishment of diplomatic ties in 1972, one early irritant was Japanese Prime Minister Yasuhiro Nakasone's 1985 call for a "total settlement of postwar accounts" and his official visit to Yasukuni Shrine, a place associated with Japan's militarist past, and where several Class A war criminals are buried.<sup>22</sup> Relations began to sour in the 1990s, more noticeably under the tenure of Chinese President Jiang Zemin. A series of events, such as the 1989 Tiananmen Massacre, China's nuclear tests, China's increasing promotion of more patriotic education in 1990s, issues concerning interpretation of World War II matters such as the Rape of Nanking, comfort women, and whitewashing of Japanese textbooks began to complicate relations.<sup>23</sup>

In recent years, increasing anti-Japanese sentiment in China has come to present a potential problem in that it may severely restrict what compromises are deemed acceptable. A series of recent anti-Japanese events demonstrate that this sentiment simmers beneath the surface of Chinese perceptions of Japan, remaining unpredictable. In April of 2005, unprecedented anti-Japanese riots occurred throughout China, in reaction to Japan having approved a controversial junior-high

21. See Wang Yi, *Trends in Sino-Japanese Relations and the Challenges Ahead for Asia*, ISD ELECTRONIC J., May 1998,

<http://www.georgetown.edu/sfs/programs/isd/files/wangcon.htm>.

22. The Yasukuni Shrine was built in 1869 to commemorate Japan's war dead beginning from 1853 to 1945. Its primary controversy is the fact that 14 Class A war criminals were buried there in secret in 1978. For basic information, see CNN.com, *Where War Criminals Are Venerated*, Jan. 14, 2003, <http://edition.cnn.com/2001/WORLD/asiapcf/east/08/13/japan.shrine>. It has had historic ties to Japan's ultra-nationalists, and is still associated with such groups. The shrine has its own website, *Yasukuni Shrine Home Page*, <http://www.yasukuni.or.jp/english/index.html> (last visited Dec. 10, 2006).

23. See Tomoyuki Kojima, *Both Sides to Blame for Cool Japan-China Ties*, ASAHI SHIMBUN ENGLISH EDITION (Japan), Oct. 28, 2004, available at <http://www.asahi.com/english/opinion/TKY200410280138.html>.

history textbook, which sparsely addressed Japan's brutality in World War II. Protestors targeted anything associated with Japan, and at times were violent.<sup>24</sup> Such sentiment also boiled to the surface during the summer of 2004, during the soccer Asia Cup in China, when the Japanese soccer team was the object of protests, harassment, and violence. A year before, in 2003, huge riots in the northwestern city of Xi'an followed a gaudy Japanese student skit misinterpreted as being anti-Chinese; these riots also indicated widespread anti-Japanese sentiment among China's youth.<sup>25</sup> Some have attributed rising anti-Japanese sentiment to China's system of patriotic education, which allegedly emphasizes Japan's crimes in World War II, as well as Chinese media bias, which focuses almost exclusively on negative stories concerning Japan.<sup>26</sup>

Japan's greatest contribution to the downward spiral of Sino-Japanese relations began when the government of Japanese Prime Minister Koizumi took power in 2001. A major problem has been his repeated visits to the controversial Yasukuni shrine, where fourteen Class A war criminals are enshrined. The shrine allegedly whitewashes Japan's wartime brutality. In Japan, the constitutional legality of his visits has been contested with mixed results.<sup>27</sup> China has increasingly made it clear that such visits are a major impediment to improving bilateral relations, going so far as to suspend a traditional trilateral meeting between China, Japan, and South Korea.<sup>28</sup> Denial of Japan's crimes during World War II by ultranationalist groups, such as the refusal to acknowledge the Rape of Nanking, has deeply affected bilateral relations and provided fuel to Chinese resentment.<sup>29</sup>

Within this context of simmering bilateral tensions, the dispute over the Diaoyu/Senkaku Islands has been a feature of more recent controversies. On February 9, 2005, Japan placed control over a lighthouse built on one of the islands under its Coast Guard.<sup>30</sup> Months before, a Chinese nuclear submarine was

24. The Observer, *Violence Flares as the Chinese Rage at Japan*, THE GUARDIAN (U.K.), Apr. 17, 2005, available at <http://www.guardian.co.uk/china/story/0,7369,1461761,00.html>.
25. See J. Sean Curtin, *Japan 3, China 1 - But Both Are Losers*, ASIA TIMES (H.K.), Aug. 10, 2004, available at <http://www.atimes.com/atimes/Japan/FH10Dh01.html>.
26. See Kojima, *supra* note 23.
27. Editorial, *Winning Doesn't Make Him Right*, JAPAN TIMES (Japan), Oct. 3, 2005, available at <http://search.japantimes.co.jp/cgi-in/ed20051003a1.html>.
28. Frank Ching, *Sino-Japanese Strains Bode Ill for EAS*, JAPAN TIMES (Japan), Dec. 26, 2005, available at <http://search.japantimes.co.jp/cgi-bin/ed20051226fc.html>.
29. *Fury at Nanking "Lie" Claim*, BBC NEWS (U.K.), July 13, 2003, available at <http://news.bbc.co.uk/1/hi/world/asia-pacific/3062141.stm>.
30. Robert Marquand, *Japan-China Tensions Rise Over Tiny Islands*, CHRISTIAN SCI. MONITOR, Feb. 11, 2005, available at <http://www.csmonitor.com/2005/0211/p01s03-woap.html>.

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suspected to have intruded into Japan's territorial waters, in violation of international law.<sup>31</sup> The submarine was found to be near the disputed Diaoyu/Senkaku Islands, and subsequently a Japanese minister went so far as to link the incident to China's natural gas exploration near the islands.<sup>32</sup> Additionally, a paper by Japan's Defense Agency highlighted three possible scenarios for an attack on Japan by China.<sup>33</sup> In the first scenario, Japan could possibly be attacked by China in a conflict between mainland China and Taiwan. The second scenario listed involves China seizing the Diaoyu/Senkaku Islands to rally domestic public support if the public becomes overly hostile to Chinese Communist Party rule. The third scenario involves China illegally securing its interests in the East China Sea if it deems that Japan has not taken appropriate measures over development of the area.

For China and Japan, the past is a lens through which modern bilateral relations are viewed. History plays a key role in China and Japan's modern legal claims to the Diaoyu/Senkaku Islands, so, in proceeding to conduct legal analysis of their respective claims and possible solutions, the past needs to be taken into consideration.

### C. Economics, Oil, and the Islands

Sino-Japanese trade has progressed at a remarkable rate since ties were first established. Bilateral trade hit a record 24.949 trillion yen in 2005, a 12.4% increase from 2004 figures, for the second consecutive year.<sup>34</sup> Despite a cool political relationship, bilateral trade is the tie that binds the two countries together.

China and Japan are highly dependent upon foreign oil, and scarcity along with rising oil prices threaten to curtail economic growth. Both governments are also highly sensitive to potential sources of oil. For example, in the third quarter of 2004, high oil prices were partly attributed to Japan's low industrial production growth of 0.1%, a 0.2% decrease from the forecasted increase of 0.3%.<sup>35</sup> In the

31. Under Article 20 of UNCLOS, submarines are required to surface and show their flags when navigating in the territorial waters of another country. UNCLOS III, *supra* note 3, art. 20. For more information on the incident, see Curtin, *supra* note 18.
32. *Japanese Minister Links Sub Intrusion with China's Gas Project*, AGENCE FR. PRESSE (Fr.), Nov. 13, 2004, available at [http://www.channelnewsasia.com/stories/afp\\_asiapacific/view/117052/1/.html](http://www.channelnewsasia.com/stories/afp_asiapacific/view/117052/1/.html).
33. *Defense Strategists Look to China's Attack Threat*, JAPAN TIMES (Japan), Nov. 9, 2004, available at <http://www.japantimes.co.jp/cgi-bin/getarticle.pl5?nn20041109f3.htm>.
34. *China Again Top Japan Trade Partner*, JAPAN TIMES (Japan), Jan. 27, 2006, available at <http://www.japantimes.co.jp/cgi-bin/getarticle.pl5?nn20060127a5.htm>.
35. *Japanese Growth Grinds to a Halt*, BBC NEWS (U.K.), Nov. 12, 2005, available at <http://news.bbc.co.uk/2/hi/business/4005455.stm>.

past, the global oil crisis of 1973 caused Japan's gross domestic product to shrink from 5.1% growth to -0.5%.<sup>36</sup> Demand for oil has increased tension between the two countries, especially since China's fast growing economy has increasingly become dependent on foreign oil. In 2004 its economy accounted for 6% of world consumption, and this number is forecasted to increase by more than 9% by 2020. To cope with rising demand for oil, it has formulated a "go-out" strategy to secure oil reserves, and plans to cooperate with twenty-seven countries for oil exploration.<sup>37</sup> Competition between the two countries is further highlighted by attempts to secure an oil pipeline which will be built in Russia's Far East, as well as China's plans to become the number one importer of Iranian oil, taking Japan's current place.<sup>38</sup>

Within the context of recent economic growth, the need for oil is a key issue in the contentious Diaoyu/Senkaku Island dispute. In August of 2003, China negotiated several contracts worth billions of dollars with oil development companies for exploration and production gas projects in the East China Sea. Recently in areas close to the Diaoyu/Senkaku Islands, China began drilling in three separate undisputed areas close to Japan's claimed EEZ. This development has concerned Japan, because two of the sites are potentially connected at the subterranean level to gas fields located on the Japanese side of what Japan recognizes as its EEZ. Japan fears that any exploitation of oil or gas reserves by China in its areas near this EEZ may end up siphoning off reserves from Japan's side of the EEZ.<sup>39</sup>

Worries over resource development near the Diaoyu/Senkaku Islands have worsened relations. As Japan increasingly became worried at China's moves to develop the Chunxiao gas field, Chinese Foreign Minister Li Zhaoxing proposed joint cooperation in exploring the potential reserves in the East China Sea on June 22, 2004. Initially Japan did not accept the offer, and instead requested that China provide all the details regarding its plans. This request was not answered by China.<sup>40</sup> Japan has amended its previous position and proposed joint development of the disputed area. However China has only proposed joint exploration of the disputed area on Japan's side of the median line, contending that its claims extend

36. Richard Giragosian, *Energy Security in East Asia*, INST. FOR ANALYSIS GLOBAL SECURITY, Aug. 13, 2004, available at <http://www.iags.org/n0813042.htm>.

37. Don Lee, *China Barrels Ahead in Oil Market*, L.A. TIMES, Nov. 14, 2004, available at <http://www.energybulletin.net/3152.html>.

38. *Id.*

39. J. Sean Curtin, *Stakes Rise in Japan, China Gas Dispute*, ASIA TIMES (H.K.), Oct. 19, 2005, available at <http://www.atimes.com/atimes/Japan/GJ19Dh01.html>.

40. See Takahashi, *supra* note 10.

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to the continental shelf which includes Taiwan.<sup>41</sup> Three previous rounds of negotiations concerning the subject have not resulted in any breakthroughs.<sup>42</sup> At present, the Diaoyu/Senkaku Islands dispute involves much more than just who owns the islands: the dispute lies at the convergence of many other contentious political and economic issues.

### III. Chinese and Japanese Claims

#### A. *Facts Supporting China's Claims to the Diaoyu/Senkaku Islands*

China's claims to the Diaoyu/Senkaku Islands are primarily irredentist in nature, and rests on a number of legal theories, which take the form of two basic approaches. The first approach incorporates two traditional legal theories, prior discovery and use, to present a historical case for Chinese sovereignty. The second approach seeks to weaken Japan's claims by depicting two points – (1) Japan's prior acknowledgement of Chinese sovereignty, and (2) cession of any Japanese claim to Chinese territory at the end of World War II.

China's primary claim rests upon the theory of occupation, based upon the legal theories of discovery and prior use. Discovery is the oldest method by which territory is acquired.<sup>43</sup> A state that discovers territory that is *terra nullius*, or land that does not belong to any other state, may claim the land. This claim may be substantiated by evidence of prior occupation or use. Occupation is based upon a physical presence coupled with continuous and peaceful display of territorial sovereignty over territory belonging to no state. China asserts four bases for its claim of prior use. First, China claims that various historical records demonstrate that the islands were used by China. As early as 1373, the islands were used as navigational guides by envoys for tributary voyages to the Ryukyu Islands (Okinawa).<sup>44</sup> The use of some of the islands as navigational aids by tributary envoys from the Ryukyu Kingdom, especially during the fifteenth and sixteenth centuries during Ming Dynasty was described in various Chinese sources.<sup>45</sup> Additionally, the islands were also described in records dating from around the eighteenth century as navigational aids used by Chinese and Ryukyu envoys

41. Mayumi Negishi, *Japan Proposes Joint Use of Deposits in East China Sea Fields*, JAPAN TIMES (Japan), Oct. 2, 2005, available at <http://search.japantimes.co.jp/cgi-bin/nn20051002a1.html>.

42. See Curtin, *supra* note 39.

43. GERHARD VON GLAHN, *LAW AMONG NATIONS* 367, 368 (6th ed.1992).

44. SUGANAMU, *supra* note 2, at 45. See also Dzurek, *supra* note 7.

45. *Id.*

during the Qing dynasty. Some of these Qing records suggest that the Qing government regarded the islands as belonging to the Qing, and not to the Ryukyu Kingdom.<sup>46</sup> Second, China asserts that the islands were incorporated into Ming dynasty coastal defenses during the sixteenth century.<sup>47</sup> Third, due to China's inclusion of the island of Taiwan as a part of China during the Qing dynasty, use of the area by Taiwanese fishermen constitutes a historical use of the islands by China.<sup>48</sup> Fourth, China asserts that the islands were granted by the Qing government to a private Chinese citizen, to be used as a source of a Chinese medicinal herb. In 1893 the Qing dynasty Dowager Empress Cixi issued an imperial edict granting three of the islets to Sheng Xuanhuai, who collected herbs from the islands to treat her illness.<sup>49</sup> Taken together, China claims these acts constitute an effective exercise of sovereignty.

China's secondary approach is based around countering Japan's more modern claims to the island. China first asserts that in the past, Japan had tacitly acknowledged Chinese sovereignty over the islands up until the late nineteenth century. It points to Japanese maps, which do not include the islands as a part of the Ryukyu Kingdom, which was annexed by Japan. In the *Sangoku Tsuran Zusetsu*, a collection of geographical maps produced by Hayashi Shihei in 1785 during the Tokugawa Shogunate, the islands were not included as a part of the Ryukyu Kingdom.<sup>50</sup> Additionally, the Japanese government issued two official maps in 1874 and 1877 respectively, which did not include the disputed islands.<sup>51</sup>

China asserts that Japan only attempted to claim sovereignty over the islands in the lead up to the Sino-Japanese War of 1894 (which ended in 1895). In early 1894, the Japanese Interior Minister requested that Okinawa Prefecture erect national markets on the islands, a request the Foreign Minister refused to do, citing concern for attracting China's attention.<sup>52</sup> After Japan's victory in the Sino-Japanese war of 1895, the Treaty of Shimonoseki – which concluded hostilities – conceded Chinese territory to Japan. Article II, Section (b) ceded Formosa [Taiwan], “together with all islands appertaining or belonging to the said Island of

46. *Id.* at 74-81.

47. *Id.* at 62. See also Dzurek, *supra* note 7.

48. Cheng-China Huang, *ICE Case Studies: Diaoyu Islands Dispute*, Dec. 1997, <http://www.american.edu/projects/mandala/TED/ice/DIAOYU.HTM>.

49. SUGANAMU, *supra* note 2, at 86-7. See also Dzurek, *supra* note 7.

50. *Id.* at 88-9.

51. *Id.* at 99. See also William B. Heflin, *Diaoyu/Senkaku Islands Dispute: Japan and China, Oceans Apart*, 1 ASIAN-PAC. L. & POL'Y J. 18 (2000).

52. SUGANAMU, *supra* note 2, at 96.

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Formosa,” to Japan.<sup>53</sup> China claims that the islands were ceded to Japan as a *part* of Taiwan, and contends that, taken together, these acts show that the islands were regarded as a part of imperial China, or were regarded as being a part of Taiwanese Island chain.

China believes that the Diaoyu/Senkaku Islands were returned to it at the end of World War II, and cites two treaties to prove its case: the 1951 San Francisco Treaty of Peace, and the 1952 Treaty of Peace signed between the Republic of China and Japan. Article 2 of the 1951 San Francisco Treaty required Japan to renounce rights to many of its imperial territories, including Formosa (Taiwan). A potential problem emerges however because neither the People’s Republic of China nor the Republic of China (Taiwan) was present at the signing of the San Francisco Treaty, and neither party signed the Treaty.<sup>54</sup> However, the United States administered the islands along with the Okinawan Islands under Article 3 of the San Francisco Treaty and transferred them to Japan in 1971.<sup>55</sup> While the US action does not change the legal sovereignty of the islands, it does bolster Japan’s case that the islands were considered a part of Okinawa. China also cites the 1952 Treaty of Peace signed between the Republic of China and Japan. Article IV of the treaty states that “all treaties, special accords, agreements concluded prior before December 9, 1941, between Japan and China have become null and void . . . .”<sup>56</sup> Additionally, the 1952 Sino-Japanese treaty cites Article 2 of the 1951 San Francisco Peace Treaty. However Article 2, subsections (b) and (f) of the 1951 San Francisco Treaty only state that Japan renounces all right, title and claim to Formosa (Taiwan), the Pescadores, the Spratly Islands and the Paracel Islands.<sup>57</sup> It does not specifically mention the Diaoyu/Senkaku Islands. To resolve this

53. See Treaty of Shimonoseki, P.R.C.-Japan, May 8, 1895, *available at* <http://www.taiwandocuments.org/shimonoseki01.htm> (stating that China cedes to Japan in perpetuity and full sovereignty the following territory, together with all fortifications, arsenals, and public property thereon: (b) The island of Formosa [Taiwan], together with all islands appertaining or belonging to the said Island of Formosa.).
54. The People’s Republic of China was founded in 1949, and governs mainland China. The Republic of China is the official name of Taiwan. It was formerly ruled by the Guomintang (KMT), which governed Mainland China, but the KMT fled to Taiwan at the end of the Chinese Civil War in 1948 and 1949. Taiwan is now a democracy, although the People’s Republic of China considers the Republic of China a “renegade province.”
55. See Dzurek, *supra* note 7.
56. Treaty of Peace between the Republic of China and Japan, P.R.C.-Japan, art. IV, Apr. 28, 1952, 138 U.N.T.S. 3, *available at* <http://www.taiwandocuments.org/taipei01.htm>.
57. San Francisco Peace Treaty, art. 2, Sept. 8, 1951, 3 U.S.T. 3169. Art. 2 subsec. (b) reads, in relevant part, “Japan renounces all right, title and claim to Formosa and the Pescadores.” Subsec. (f) reads, “Japan renounces all right, title and claim to the Spratly Islands and to the Paracel Islands.”

problem, the historical evidence aforementioned is used by China to argue that the islands were included as a part of Taiwan, citing examples of Japan's historical acknowledgment of China's sovereignty over the islands as a part of imperial China and as a part of Taiwan.

China's first approach colors its claim to the Diaoyu/Senkaku Islands in historical terms by establishing historical discovery and prior use. China's second approach seeks to dislodge Japan's colonial claims to the islands. China claims Japan historically acknowledged that the islands were either a part of imperial China or Taiwan. Due to this, the islands and Taiwan were part of the same unit, which was ceded to Japan via the Treaty of Shimonoseki. A country may acquire another's territory through conquest in war, which is coupled with effective occupation of the territory.<sup>58</sup> Japan did so by defeating China in 1895 at the end of the Sino-Japanese War, and through developing Taiwan as a colony. However, although Japan gained the islands through conquest and occupation, China asserts that Japan relinquished its sovereignty to them through two different treaties: the 1951 San Francisco Peace Treaty and the 1952 Treaty between the Republic of China and Japan. Thus, China argues that Japan cannot use the theories of cession and conquest to bolster its claims.

### ***B. Facts Supporting Japan's Claims to the Diaoyu/Senkaku Islands***

Unlike China, Japan's claims to Diaoyu/Senkaku Islands are relatively recent. Japan claims that, despite China's claims of discovery and prior use, Japan made the first legal claim to the islands through various acts prior to World War II. From the late nineteenth century onwards, Japan exercised affirmative acts of sovereignty over the islands. Only when potential oil/gas was discovered did China assert its ownership of the islands. These facts underlie Japan's claims to the islands through three supporting arguments. Japan claims that the facts show it first exercised a claim to the islands, and therefore they belong to Japan. Second, Japan claims that it treated the islands and Taiwan as separate entities. Since it did not consider the islands to be a part of Taiwan, they were never returned to China at the end of World War II. Lastly, because Japan effectively exercised control over the islands for more than a century, Japan's legal possession has been established through prescription or consolidation.

Japan's first approach attempts to counter China's claim of prior discovery and use. According to Japan's Ministry of Foreign Affairs, Japan gained legal

58. SHARON D. KORMAN, *THE RIGHT OF CONQUEST: THE ACQUISITION OF TERRITORY BY FORCE IN INTERNATIONAL LAW AND PRACTICE* 112 (1996).

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possession over the islands beginning in 1885 when it began to conduct various surveys of the islands. Based on these surveys the Japanese government concluded that the islands possessed no sign of habitation or evidence of Chinese control or ownership.<sup>59</sup> Concluding that the islands were *terra nullius*, the Cabinet made the decision on January 14, 1895 to erect markers on the islands to incorporate them into Japanese territory.<sup>60</sup> Since this time, Japan considered the islands a part of the Nansei Shoto Islands, a territory of Japan.<sup>61</sup>

Japan's second approach claims that since the Diaoyu/Senkaku Islands were separately incorporated into the Nansei Shoto Islands, they were never a part of Taiwan. Additionally, they were not a part of Taiwan or the Pescadores Islands ceded to Japan pursuant to Article II of the Treaty of Shimonoseki which concluded the Sino-Japanese War in 1895. Thus, the islands were not covered by the 1951 San Francisco Peace Treaty which required Japan to return its imperial possessions after the end of World War II.

Japan's third approach seeks to illustrate that Japan has exercised sovereignty over the Diaoyu/Senkaku Islands for over a century, and therefore possesses them through the theory of prescription or consolidation. Prescription is the acquisition of title through long, continued and undisturbed possession, despite a claim of previous ownership from another country. It is similar in some respects to the theory of adverse possession, although there is no general rule to satisfy the necessary length of time required to perfect title.<sup>62</sup> Likewise, consolidation requires proof of long use, and is similar to prescription. After Japan proclaimed that the islands were a part of Japan in 1895, it points to the fact that it leased the islands to a private citizen, Tatsuhiko Koga, in 1896, for thirty years with charge.<sup>63</sup> Koga had been exploiting some of the islands' resources, such as shells, guano, and feathers, since 1884. He subsequently invested large amounts of capital into developing the islands. His diverse activities included the building of houses, reservoirs, wharves, piers, drainage systems, and the planting of trees. During this period, Japanese immigrated to the islands and the total population reached its peak in 1909 with 99 families and a total of 248 people. After he died in 1918, his son Zenji Koga carried on the business until he gained title after expiration of the

59. See Ministry of Foreign Affairs of Japan, *The Basic View on the Sovereignty Over the Senkaku Islands*, <http://www.mofa.go.jp/region/asia-paci/senkaku/senkaku.html> (last visited Dec. 10, 2006) [hereinafter *Sovereignty Over Senkaku*].

60. *Id.*

61. *Id.*

62. LASSA OPPENHEIM, OPPENHEIM'S INTERNATIONAL LAW 706 (Robert Y. Jennings & Arthur Watts eds., 9th ed. 1992).

63. SUGANAMU, *supra* note 2, at 96-8, 118-19.

lease in 1926. In 1932, the islands became private property when Zenji Koga purchased four of the islands of the Diaoyu/Senkaku group from the Japanese government.<sup>64</sup> The business was discontinued in the beginning of World War II. After the war, and beginning in 1958, the American Civil Administration of the Ryukyu Islands entered into a Basic Leasing Contract with Zenji Koga for military use of the islands.<sup>65</sup> Various other minor events concerning the islands occurred prior to and during World War II such as land surveys by various Japanese government agencies.<sup>66</sup> The United States administered the islands along with the Okinawan Islands under Article 3 of the 1951 San Francisco Peace Treaty.<sup>67</sup> In 1971, the United States transferred the islands to Japanese administration. Since then Japan has continued to exercise sovereignty over the islands with its Self-Defense forces, regularly patrolling the area.<sup>68</sup> Under the theory of prescription, title arises from the acquiescence of the dispossessed state, and emphatic protests from it will disrupt the prescriptive claim.<sup>69</sup> Japan points out that China did not express any official objections or reservations about Japan's actions concerning the islands prior to, during and after World War II, nor did China object to the United States administration of them. Japan alleges that only when the potential for oil/gas in the vicinity of the islands was discovered in the late sixties and early seventies did China raise questions concerning their ownership. Japan thus asserts that it has effectively exerted its sovereignty over the Diaoyu/Senkaku Islands for over a century, and therefore should have title to them.

Additionally, Japan may point out that although it renounced "all right, title and claim to Formosa and the Pescadores" in the 1951 San Francisco Peace Treaty,<sup>70</sup> that treaty did not specifically mention or include the Diaoyu/Senkaku Islands. That treaty also did not name any party as the recipient of these former territories. Rather, Article 4(b) of the San Francisco Peace Treaty recognizes the "validity of dispositions of property of Japan and Japanese nationals pursuant to directives of the United States Military Government in any of the areas referred to in Articles 2 and 3." Japan may thus allege that if the Diaoyu/Senkaku Islands were covered by the San Francisco Peace Treaty then, under the same treaty, only the United States can legally transfer title to the Diaoyu/Senkaku Islands. This would lead to two

64. *Id.*

65. *Id.* at 122.

66. *Id.* at 130-31.

67. San Francisco Peace Treaty, *supra* note 57, art. 3.

68. *See* Dzurek, *supra* note 7.

69. *See* Seokwoo Lee, *Continuing Relevance of Traditional Modes of Territorial Acquisition in International Law and a Modest Proposal*, 16 CONN. J. INT'L L. 1, 13 (2000).

70. San Francisco Peace Treaty, *supra* note 57.

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potential arguments. First, Japan may allege that the United States transferred the Diaoyu/Senkaku Islands along with the Okinawan Islands. Second, if the United States did not transfer the islands along with the Okinawan Islands, it also did not include it with any other territory, and in place of such ambiguity, other legal theories such as prescription should be applied.

In summary, Japan bases its claim to the Diaoyu/Senkaku Islands primarily on the basis that it has exercised control over the islands, through various acts, for over a century. Drawn from these collective acts are four arguments. First, Japan legally declared the islands a part of its own territory after concluding that they were *terra nullius*. Secondly, because Japan legally possessed the islands, and considered the islands a part of Japan, and not Taiwan, they were not ceded to Japan per the 1895 Treaty of Shimonoseki. Thus, the 1951 San Francisco Peace Treaty did not mandate their return at the end of World War II. Third, Japan has exercised sovereignty over the islands for such a long period of time that it is now their legal sovereign territory. Fourth, the San Francisco Peace Treaty did not specifically include the Diaoyu/Senkaku Islands, and did not name any recipient for Japan's relinquished territories. The San Francisco Peace Treaty gave the United States legally binding authority to dispense with the islands, and the Diaoyu/Senkaku Islands were either included with Okinawa when the United States transferred it to Japanese control or the islands were never transferred to any country, necessitating the application of legal theories such as prescription.

#### **IV. Modern International Case Law**

Modern international case law may serve to determine the merits of Chinese and Japanese claims to the Diaoyu/Senkaku Islands. In the modern era, the International Court of Justice (ICJ) has been used to resolve civil disputes between nations. The court has used past resolutions of territorial disputes in its own rulings, and its decisions reflect prevailing international law. If the United Nations were to resolve any such territorial dispute, it may likely refer to case law established under the ICJ. Although neither China nor Japan may likely resort to the ICJ, case law may influence how each country chooses to resolve the matter.

There are six particular cases that shed light on how the Diaoyu/Senkaku Islands dispute would be resolved under international law.

**A. *Island of Palmas Case (United States v. The Netherlands)***<sup>71</sup>

*Island of Palmas* is the seminal case regarding island territory disputes. It involved an island off the coast of the Philippines, which was first discovered by Spain. The United States based its claim to the island on two grounds: prior discovery and contiguity (a claim to land based on its proximity to another territory). The island was originally discovered by Spain in the sixteenth century, an era during which discovery of land that was *terra nullius* often conferred title.<sup>72</sup> Since Spain discovered the island, it possessed title. Title was then passed on to the United States, along with the Philippines, following Spain's defeat in the Spanish-American War. The Netherlands, however, based its claim to the island on systemic and continued assertion of authority over the island. The Netherlands claimed that the island was a tributary of native princes, who were also vassals of the government of the Netherlands in Indonesia, its colonial possession. Both countries submitted its case to an arbitrator.

The arbitrator ruled in favor of the Netherlands. The United States was found to have gained inchoate title to the island from Spain's discovery. Despite this however, discovery alone without any accompanying acts that display sovereignty provides a weak basis for title. The arbitrator ruled that inchoate title from discovery does not prevail in the face of another country's peaceful and continuous display of sovereignty.<sup>73</sup> In this case, neither Spain nor any other country contested the exercise of territorial rights by the Netherlands from 1700 to 1906. Furthermore, the arbitrator found no basis in international law for the United States' claim based on contiguity. The *Island of Palmas* case set forth the rule that peaceful and continuous displays of authority provide a stronger basis for title than mere discovery alone.

**B. *Clipperton Island Case***<sup>74</sup>

The *Clipperton Island Case* involved a dispute between France and Mexico over an uninhabited island lying approximately 670 miles off the southwest coast of Mexico.<sup>75</sup> France claimed the island based upon a French naval officer sailing to the island in 1858, making detailed notes of it, and landing a few of his crewmen

71. *Island of Palmas (Neth. v. U.S.)*, 2 R. Int'l Arb. Awards 829 (Perm. Ct. Arb. 1928).

72. *See id.* at 837.

73. *See id.* at 845-46.

74. *Sovereignty Over Clipperton Island (Mex. v. Fr.)*, 2 R. Int'l Arb. Awards 1105, 26 A.J.I.L. 390 (1931).

75. *See id.*

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on it. This officer then notified French and Hawaiian officials regarding his discovery, and published a declaration of French sovereignty in a Honolulu journal.<sup>76</sup> France undertook no other action until 1897 when it protested to the United States about the presence of three Americans on the island. In 1898, the United States responded by disavowing any claims to the island. In 1897, however, Mexico sent a gunboat to the island, claiming that it possessed title since Spanish colonial times due to Spanish discovery.<sup>77</sup> Mexico held that French claims from 1858 to 1897 were ineffective, and that the island was *terra nullius* in 1897. Both sides eventually submitted to arbitration in 1909.

The arbitrator ruled that Spanish discovery had not been proven, and thus the island was capable of appropriation in 1858. Based on this date, Mexico only showed an interest and laid claim to the island in 1897.<sup>78</sup> Although it claimed to possess title much earlier, it had previously ignored French claims to the island dating back to 1858. Furthermore, effective and exclusive authority, shown by the establishment of an administration that can secure the sovereign's rights, need not be required in the case of uninhabited territory.<sup>79</sup>

The *Clipperton Island* case laid out a more specific framework regarding island disputes while still adhering to the *Island of Palmas* rule. First, a country claiming title to an island must actively challenge other hostile claims. Mexico did not do this when France declared title to the island in 1858. Secondly, reflecting the *Island of Palmas case*, active displays of sovereignty are given greater weight than mere declarations of prior possession of title.<sup>80</sup> Again, although Mexico claimed that the island was its territory since Spanish colonial times, it made no active representation of its sovereignty until 1897.

### C. *Minquiers and Ecrehos Case*<sup>81</sup>

The *Minquiers and Ecrehos* case involved a dispute between France and the United Kingdom regarding two groups of islands situated in the English Channel.<sup>82</sup> In formulating its ruling, the International Court of Justice made two distinctions. First, both countries substantiated the bulk of their claims with evidence of prior possession, dating to the Norman Conquest of England of 1066. The Court,

76. *See id.*

77. *See id.*

78. *See id.* at 393.

79. *See id.* at 394.

80. *See Sovereignty Over Senkaku, supra* note 59.

81. *Minquiers and Ecrehos Case* (Fr. v. U.K.), 1953 I.C.J. 47 (Nov. 17).

82. *Id.*

however, found such ancient evidence both inconclusive and unimportant, and subsequently gave little weight to such evidence.<sup>83</sup> It instead focused its attention upon more recent displays of sovereignty through *possession*, stating that what was determinative was “not indirect presumptions deduced from events in the Middle Ages, but evidence which relates directly to the possession of the Ecrehos and Minquiers groups.”<sup>84</sup> The United Kingdom substantiated its claims to the islands by presenting evidence that its courts exerted jurisdiction over the islands. It showed that in the nineteenth and twentieth centuries, its courts on the island of Jersey exercised jurisdiction over criminal matters, as well as the collection of taxes and deeds over the islets.<sup>85</sup> Officials from the nearby island of Jersey also visited the island of Ecrehos to build maritime facilities, collect census data, and so forth. Because of its effective displays of sovereignty, the Court awarded the islets to the United Kingdom.<sup>86</sup> Claims of ancient title were of little determinative value. In line with the previous two cases, the International Court of Justice reiterated the importance of possession reflected by actual displays of continued and peaceful sovereignty.

***D. Case Concerning Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua Intervening)***<sup>87</sup>

The *Land, Island and Maritime Frontier Dispute* case involved a dispute between El Salvador and Honduras regarding specific boundaries between the two countries and a few uninhabited islands lying near the borders of El Salvador, Honduras, and Nicaragua.<sup>88</sup> The region was formerly ruled by Spain as a colonial territory, and achieved independence in 1821 with the birth of the Federal Republic of Central America. Arising from the former Republic’s disintegration in 1839 was Honduras, El Salvador, Guatemala, Nicaragua, and Costa Rica.<sup>89</sup> There was no *terra nullius* territory involved, because each of the countries inherited their

83. *Id.* at 56-57. The court did not regard ancient claims with high regard. It noted that even if France once had ancient title, “[t]o revive its legal force today by attributing legal effects to it after an interval of more than seven centuries seems to lead far beyond any reasonable application of legal considerations.”

84. *Id.* at 57.

85. *See id.* at 65-66.

86. *Id.* at 67.

87. *Land, Island and Maritime Frontier (El Sal. v. Hond)*, 1992 I.C.J. 351 (Sept. 11), available at [http://www.icj-cij.org/icjwww/icas/ish/ish\\_ judgments/ish\\_ judgment\\_19920911.pdf](http://www.icj-cij.org/icjwww/icas/ish/ish_ judgments/ish_ judgment_19920911.pdf).

88. *Id.* at 356. The dispute involved the delineation of boundaries that reflected those set during the days of the Spanish Empire.

89. *Id.* at 380-81.

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claims and territory from the Spanish Empire.<sup>90</sup> The International Court of Justice turned its attention to specific acts that would constitute an exercise of sovereignty, and most importantly, whether a country acquiesced to such acts.<sup>91</sup> The Court accordingly awarded one island to Honduras because it occupied the island for over a century; a period during which El Salvador voiced no opposition. The Court then awarded two other islands to El Salvador because of the country's occupation and control over them, as well as Honduras' lack of effective opposition to such acts. In line with past case law reflected in the *Island of Palmas* case, the Court focused on displays of actual authority, such as actual occupation and effective control. Quoting from the *Island of Palmas* case, the Court reiterated that "continuous and peaceful display of territorial sovereignty (peaceful in relation to other states) is as good as title."<sup>92</sup> In reaching its decisions, the Court relied upon occupation, coupled with acts constituting acquiescence<sup>93</sup>—whether a country with a competing claim expressly or impliedly acquiesced to another country's hostile claim.

***E. Case Concerning Kasikili/Sedudu Island (Botswana/Namibia)***<sup>94</sup>

In the dispute over Kasikili/Sedudu Island, Botswana's claim centered on the interpretation of an 1890 treaty signed by Botswana's and Namibia's colonial predecessors, Germany and Britain. Namibia, however, asserted the theory of prescription to underlie its case, and set forth four criteria that must be fulfilled for possession to mature into prescriptive title.<sup>95</sup> First, the possession must be exercised as a function of state authority. Second, the possession must be peaceful and uninterrupted. Third, such a claim must be public. Fourth, the possession must endure for a specified period of time. Namibia argued that it held prescriptive title to the disputed territory through the control and use of the islands by the Masubia tribes.<sup>96</sup> Namibia asserted that the Masubia occupied the island unopposed for agricultural purposes.<sup>97</sup>

Closely scrutinizing the acts of the Masubia, the Court rejected Namibia's

90. *Id.* at 564.

91. *Id.* at 567-78.

92. *Land, Island and Maritime Frontier*, 1992 I.C.J. at 563.

93. *Id.* at 566.

94. *Kasikili/Sedudu Island (Bots. v. Namib.)*, 1999 I.C.J. 1045 (Dec. 13) *reprinted in* 39 I.L.M. 310 (2000), *available at* <http://www.icj-cij.org/icjwww/idocket/ibona/ibonaJudgments/ibonaijudgment19991213.htm>.

95. *Id.* at 347-48.

96. *Id.* at 349.

97. *Id.* at 350.

prescriptive claim. Although the Masubia used the island for a long period of time, and were unopposed by Botswana, their private acts could not be used to general title. The Court held that the Masubia used the island in a private capacity, and that they did not exercise the functions of state authority on behalf of such authorities. Thus, because the government of Namibia was not involved in sanctioning such private activities, its claim based on prescription failed.<sup>98</sup>

***F. Concerning Sovereignty Over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)***<sup>99</sup>

The case *Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan* involved the issue of sovereignty over two islands, Ligitan and Sipidan, between Indonesia and Malaysia. Among the various arguments made, both countries argued that they held title to the islands based upon different interpretations of a colonial convention between Great Britain and the Netherlands.<sup>100</sup> The Court determined that the prior convention did not create an allocation line determining sovereignty over the islands,<sup>101</sup> and further held that neither country obtained title by succession from its successor.<sup>102</sup>

The Court then considered whether Indonesia or Malaysia could hold title through activities evidencing actual, continued exercise of authority over the islands (*effectivités*). Indonesia produced evidence that the waters around the islands were traditionally used by its fishermen.<sup>103</sup> Similar to how it treated Namibia's evidence of traditional use by the Masubia in the *Case Concerning Kasikili/Sedudu Island*,<sup>104</sup> the Court stated "activities by private persons cannot be seen as *effectivités* if they do not take place on the basis of official regulations or under government authority."<sup>105</sup> In contrast, Malaysia cited evidence of official acts authorized by local government authorities. First, Malaysia showed that North Borneo authorities took measures to regulate significant economic activity on the two islands, specifically the trade and collection of turtle eggs. It pointed to the exercise of effective administration over the islands, in the form of the Turtle Preservation Ordinance of 1917, which was applied up until the 1950s.<sup>106</sup>

98. *Id.*

99. *Sovereignty Over Pulau Ligitan and Pulau Sipadan (Indon. v. Malay.)*, 2002 I.C.J. 102 (Dec. 17), available at [http://www.icj-cij.org/icjwww/idocket/iinma/iinmajudgment/iinma\\_ijudgment\\_20021217.PDF](http://www.icj-cij.org/icjwww/idocket/iinma/iinmajudgment/iinma_ijudgment_20021217.PDF).

100. *Id.* at paras. 32-33

101. *Id.* at para. 52.

102. *Id.* at paras. 94, 96, 124.

103. *Id.* at para. 130.

104. *Id.* at para. 71.

105. *Id.* at para. 140.

106. *Id.* at paras. 132, 143.

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Additionally, Malaysia showed that the authorities of the colony of North Borneo constructed two lighthouses: one on Sipadan in 1962 and another on Ligitan in 1963. Both of these lighthouses are still maintained by the government of Malaysia.<sup>107</sup> The Court ultimately ruled in favor of Malaysia, holding that although such activities

“are modest in number . . . they are diverse in character and include legislative, administrative and quasi-judicial acts. They cover a considerable period of time and show a pattern revealing an intention to exercise State functions in respect of the two islands in the context of the administration of a wider range of islands.”<sup>108</sup>

Additionally, the Court noted “at the time when these activities were carried out, neither Indonesia nor its predecessor, the Netherlands, ever expressed its disagreement or protest.”<sup>109</sup>

In reaching its decision, the Court focused upon two significant factors. First, in rejecting Indonesia’s use of private acts to justify title, the Court reiterated a point made earlier in *Kasikili/Sedudu Island* that private acts must be rooted in official acts or government authority to support a prescriptive title. Secondly, in ruling for Malaysia, the Court focused on qualitative rather than quantitative differences. Even a “modest” number of acts may grant title if such acts are diverse in scope (legislative, administrative, judicial, etc.), cover a considerably long period of time, and reveal an intention to exercise sovereignty over the disputed territory. Of note, the Court will pay attention to whether the disputing party ever expressed disagreement or protest during the relevant period of time.

## V. Summary of Modern Case Law

Under modern case law concerning island territorial disputes, five basic points emerge. First, inchoate title, such as gained through discovery, does not confer an absolute title. The discovery of land that is *terra nullius* provides only a weak claim of title. Second, a state with inchoate title must substantiate its claim by the exercise of effective control grounded in peaceful and continuous sovereignty. Third, a state must protest any hostile claim to its territory, or risk this being taken as implied acquiescence to another state’s claim. Fourth, ancient claims of title are likely to be viewed with some degree of skepticism when they are not backed by acts evidencing long periods of continuous and peaceful sovereignty. Fifth, the acts of private parties may not generate prescriptive title if they are not carried out with state authority. It is under these five points that Chinese and Japanese claims

107. *Id.* at paras. 132, 143, 146.

108. *Id.* at para. 148.

109. *Id.*

would most likely be interpreted.

## VI. Status of the Islands Under International Law

### A. Chinese Claims

China's claims to the Diaoyu/Senkaku Islands may be divided into two approaches: one which relies upon historical discovery and prior use, and another which focuses upon the status of the islands after World War II according to various treaties. Its first approach, based upon historical discovery and prior use, is weak in light of modern international law and the skepticism inherent in upholding old historical claims—particularly claims which stretch back several centuries.<sup>110</sup> Historical claims regarding the use of the islands as a navigational guide during the Ming dynasty and occasional use by fishermen are not evidence of effective control.<sup>111</sup> Occasional private use by fisherman also does not evidence the involvement of state authority. Likewise, Qing dynasty use of the islands is sporadic. The islands were used to gather medicinal plants, and were conferred by the Qing government to an individual.<sup>112</sup> Any private individual acts may be grounded in such an act expressing state authority. Evidence that the islands were not featured on Japanese maps as a part of Japan is helpful to China's case, though such evidence is not entirely conclusive.<sup>113</sup> At best, historical evidence may prove that China had a preexisting claim to the islands; they do not, however, show continuous and peaceful displays of sovereignty.

Historical evidence does not show that China exerted continuous control of the islands by objecting to hostile claims. The Qing government did not protest Japanese official surveys of the islands around 1885, or a Japanese cabinet decision in 1895 to erect markers on the islands in order to incorporate them into Japan.<sup>114</sup> Although historical evidence clearly shows China did consider the islands a part of its territory, such evidence fails to show that it exercised continuous control because China failed to protest Japan's hostile claims. By grounding its claims in historical discovery, China relies on a traditional rule of international law that has largely been unrecognized in the twentieth century.<sup>115</sup> As is reflected in

110. See *Minquiers and Ecrehos (Fr. v. U.K.)*, 1953 I.C.J. 47 (Nov. 17).

111. See SUGANAMU, *supra* note 2, at 45-63, 74-81; see also Dzurek, *supra* note 7; Cheng-China Huang, *supra* note 48.

112. See SUGANAMU, *supra* note 2, at 86-87. See also Dzurek, *supra* note 7.

113. See SUGANAMU, *supra* note 2, at 89, 99.

114. See *Sovereignty Over Senkaku*, *supra* note 59.

115. See Lee, *supra* note 69, at 13.

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the *Minquiers and Ecrehos* case, modern international law regarding island territorial disputes focuses upon the continuous effective exercise of authority. Even if China can establish discovery, its title is inchoate because its historical case is grounded upon various intermittent and isolated cases of use, which, taken together, do not constitute continuous effective control.

China's second approach seeks to show that the Diaoyu/Senkaku Islands were returned to it after World War II. In 1895 the Sino-Japanese War was concluded with the signing of the Treaty of Shimonoseki; the treaty ceded the island of Taiwan and its appurtenant islands to Japan.<sup>116</sup> China's historical claims may be enough to prove that the islands were not *terra nullius*. Likewise, China may make a case that the Diaoyu/Senkaku Islands were appurtenant to Taiwan and should have been returned to it because of both the San Francisco Peace Treaty of 1951 and the 1952 Treaty of Peace signed between the Republic of China and Japan. Overall, China's strongest claim would be that the islands were ceded as a part of Taiwan to Japan, and should have been returned to it.

### ***B. Japanese Claims***

In contrast to Chinese claims, Japan rests its case for the Diaoyu/Senkaku Islands on more recent events. First, Japan can claim that it incorporated the islands into Japanese territory as part of the Nansei Shoto Islands before the 1895 Treaty of Shimonoseki.<sup>117</sup> This would prove that the islands were not considered a part of Taiwan, and, thus, they were not required to be handed back to China after World War II. This claim however, is not uncontested, in light of evidence supporting China's historical claims to the islands. The fact that China did not object to various Japanese activities, such as official surveys of the islands, and a Japanese cabinet decision to erect markers on the islands, does not mean China fully acquiesced to Japan's claims.

Japan's strongest claim is that the islands belong to it by the theory of prescription. Japan's claim, in contrast to China's historical discovery claim, may be grounded in modern international law. Japan can show that it has exercised effective continuous authority over the islands for over a century. This claim begins at the very least in 1895, and is independent of whether Japan gained the islands on its own or through the Treaty of Shimonoseki. Japan can also show acts which evidence early instances of control, such as commercial activities on the

116. See SUGANAMU, *supra* note 2, at 98.

117. See *Sovereignty Over Senkaku*, *supra* note 59.

islands by Tatsuhiro Koga beginning in 1896 lasting until World War II began.<sup>118</sup> In line with *Kasikili/Sedudu Island* and *Sovereignty over Pulau Ligitan and Pulau Sipadan*, such private acts involved and were carried out under the authorization of Japan and the United States Military.

Article 4(b) of the San Francisco Treaty gave the United States legal binding authority to dispense with the islands.<sup>119</sup> Japan may argue that the Diaoyu/Senkaku Islands were included with Okinawa when the United States transferred it to Japanese control. Even if they were not, they were never expressly handed over to any government, and Japan may argue that various acts prior to and during World War II, such as land surveys and investigations, also constitute acts of authority over the islands.<sup>120</sup> After World War II, the islands were administered by the United States as part of Okinawa under the provisional government of Japan.<sup>121</sup> In 1971, the United States transferred the islands to Japan.<sup>122</sup> Japan has since then exclusively exercised sovereignty over the islands. Japan's strongest claim is that these various acts, stretching from at least 1895 until today, collectively show that Japan has exercised continuous effective control over the islands.

### ***C. Chinese and Japanese Claims Contrasted Under International Law***

When contrasted with one another under international law, various common issues emerge from China's claims and Japan's claims. Neither China nor Japan disputes the fact that Japan exercised control of the islands since 1895. The main differences in their claims lie in whether or not the islands were *terra nullius* prior to 1895, as Japan claims, or a part of Chinese territory, as China claims. They also differ in whether or not the islands were ceded to Japan via the 1895 Treaty of Shimonoseki. If they were, they may have been required to be returned to China after World War II. Thus the two countries differ as to the effect of the 1951 San Francisco Peace Treaty and the 1952 Peace Treaty signed between the Republic of China and Japan.

China's claims rest upon two grounds: first, that the islands belong to China via historical discovery and prior use, and second, that various treaties require that the islands be returned to China. China's claims suffer from several weaknesses.

118. See SUGANAMU, *supra* note 2, at 96-98, 118-19, 122.

119. San Francisco Peace Treaty, *supra* note 57, at art. 4(b).

120. See *Sovereignty Over Senkaku*, *supra* note 59.

121. SUGANAMU, *supra* note 2, at 116-17.

122. *Id.* at 134.

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First, its discovery claim relies upon much older conceptions of international law. Modern international law is focused upon the display of continuous effective authority. However, for China, there is a distinct lack of evidence to show continuous effective control. Second, prior to 1895, China did not object to Japan's hostile claims — a fact Japan may use to support its claims that the islands were *terra nullius*.<sup>123</sup> China's strongest point lies in its claim that Japan was required by various treaties to return the islands along with Taiwan. However, it may be significant that the People's Republic of China is not a signatory of either the 1951 San Francisco Treaty, or the 1952 Treaty of Peace which was between the Republic of China (Taiwan) and Japan. Additionally, the language of San Francisco Peace Treaty in Articles 2, 3, and 4(b) may be interpreted to have actually given the United States the power to dispose of Japan's imperial territories.<sup>124</sup> Thus, resting a case on the technicalities of treaty language may present further problems.

Japan's first approach rests upon its claim that the Diaoyu/Senkaku Islands were *terra nullius*. Thus, Japan discovered the islands and incorporated them into the Nansei Shoto Islands prior to 1895. This claim, however, competes with Chinese historical evidence that proves it had valid title to the islands. Japan's strongest claim is that it exercised continuous and effective control over the islands for over a century via the theory of prescription. Under this theory, title may have been gained by effective occupation and use, where the dispossessed state voices no objection to the hostile claim.<sup>125</sup> As reflected in the *Clipperton Island Case*, more significant is the fact China did not actively challenge Japan's hostile claims. China did not express any objections about Japan's actions regarding the islands prior to 1895 and during World War II. After World War II, China did not object to the United States' administration of the islands. It only objected to Japan's claims after the potential for oil and gas was discovered near the islands in 1968.<sup>126</sup> Furthermore, lack of such objections prior to 1968 may constitute acquiescence to Japan's claims.

Under modern international law, Japan may have a case for prescriptive title to the Diaoyu/Senkaku Islands. A series of international cases<sup>127</sup> have expressed the

123. See *Sovereignty Over Senkaku*, *supra* note 59.

124. San Francisco Peace Treaty, *supra* note 57, at arts. 2, 3, 4(b).

125. See OPPENHEIM, *supra* note 62, at 706.

126. SUGANAMU, *supra* note 2, at 131.

127. See *Island of Palmas (Neth. v. U.S.)*, 2 R. Int'l Arb. Awards 829 (Perm. Ct. Arb. 1928); *Sovereignty Over Clipperton Island (Fr. v. Mex.)*, 2 R. Int'l Arb. Awards 1105, 26 A.J.I.L. 390 (1931); *Minquiers and Ecrehos Case (Fr. v. U.K.)*, 1953 I.C.J. 47 (Nov. 17); *Land, Island and Maritime Frontier Dispute (El Sal. v. Hond)*, 1992 I.C.J., 351; *Kasikili/Sedudu*

general rule that effective control, characterized by acts that constitute continuous and peaceful authority, will triumph over inchoate claims of title through discovery. Much of China's claim rests upon its inchoate title, gained through historical discovery. Yet it has not substantiated its claim through effective, continuous and peaceful control over the islands, both before 1895 and after World War II. It also failed to repeatedly protest Japanese claims to the islands before 1895. Only when the potential for oil/gas in the vicinity of the islands was discovered in the late sixties and early seventies did China raise questions concerning their ownership. Additionally, even if the islands were a part of Taiwan and were required to be returned to it, Japan still exercised control over the islands while China did not. Japan has exercised effective control over the islands for over a century. Under the precedents established in modern international law, as reflected in the seminal *Island of Palmas*, Japan has a competent claim to the Diaoyu/Senkaku Islands.

#### **D. Smaller Islands Do Not Generate Full Economic Zones**

The Diaoyu/Senkaku Islands possess little intrinsic value in and of themselves. Their main value appears to be the extent to which they may generate economic zones covering nearby natural resources.<sup>128</sup> Under prevailing international law, Japan appears to have a slightly stronger claim to the Diaoyu/Senkaku Islands than China. However, this assessment is tempered by the fact that under modern international law, when pitted against continental land masses, smaller islands usually do not generate full zones, such as the 200-mile economic zones allotted to coasts under UNCLOS III.<sup>129</sup>

A string of cases decided by the Court has established that when balanced against larger continental landmasses or larger islands, smaller islands usually will not be allotted full zones.<sup>130</sup> In the *Continental Shelf Case of Tunisia and Libya*,

Island (Bots. v. Namib.), 1999 I.C.J. 1045 (Dec. 13); Sovereignty Over Pulau Ligitan and Pulau Sipadan (Indon. v. Malay.), 2002 I.C.J. 102 (Dec. 17).

128. Curtin, *supra* note 12.

129. UNCLOS III, *supra* note 3, at art. 57.

130. See *Continental Shelf (Tunis. v. Libya)*, 1982 I.C.J. 18 (Feb. 24), available at [http://www.icj-cij.org/icjwww/icas/ilm/ilm\\_ijudgments/ilm\\_ijudgment\\_19850603.pdf](http://www.icj-cij.org/icjwww/icas/ilm/ilm_ijudgments/ilm_ijudgment_19850603.pdf); *Gulf of Maine (Can. v. U.S.)*, 1984 I.C.J. 246 (Oct. 12), available at [http://www.icj-cij.org/icjwww/icas/icigm/icigm\\_ijudgment/icigm\\_ijudgment\\_19841012.pdf](http://www.icj-cij.org/icjwww/icas/icigm/icigm_ijudgment/icigm_ijudgment_19841012.pdf); *Continental Shelf (Libya v. Malta)*, 1985 I.C.J. 13 (June 3), available at [http://www.icj-cij.org/icjwww/icas/ilm/ilm\\_ijudgments/ilmijudgment\\_19850603.pdf](http://www.icj-cij.org/icjwww/icas/ilm/ilm_ijudgments/ilmijudgment_19850603.pdf); *Maritime Delimitation in the Area Between Greenland and Jan Mayan (Den. v. Nor.)*, 1993 I.C.J. 38 (June 14), available at [http://www.icj-cij.org/icjwww/icas/igjm/igjm\\_ijudgments/igjm\\_ijudgment\\_19930614.pdf](http://www.icj-cij.org/icjwww/icas/igjm/igjm_ijudgments/igjm_ijudgment_19930614.pdf).

the Court delimited the area of continental shelf appertaining to Tunisia and Libya in a contested coastal region. Although the main island of the Kerkennah Islands (Tunisia) is 69 square miles and had a population of over 15,000, the Court gave only “half-effect” to its ability to generate a full zone in relation to the neighboring Libyan mainland.<sup>131</sup> Similarly, in the *Gulf of Maine* between Canada and the United States, the Court concluded that it should only give partial effect to Canada’s Seal Island. The Island occupies a commanding position in the entryway of the Gulf area disputed by Canada and the United States. Although “it is some two-and-a-half miles long, rises some 50 feet above sea level, and is inhabited all the year round,” the Court reasoned that it would be “excessive to consider the coastline of [mainland peninsular] Nova Scotia [displaced] . . . by the entire distance between Seal Island and that coast. . . .”<sup>132</sup> In the *Continental Shelf Case of Libya and Malta*, the Court disregarded the effect of a small uninhabited island belonging to Malta, and also gave the main island of Malta only partial effect due to its small size in relation to Libya’s longer continental coast. The Court stated that relative landmass was not a factor, and that “[l]andmass has never been regarded as a basis of entitlement to continental shelf rights. . . .”<sup>133</sup> Furthermore, the Court stated that, “[t]he capacity to engender continental shelf rights derives not from landmass, but from sovereignty over the landmass; and it is by means of the maritime front of this landmass . . . that this territorial sovereignty brings its continental shelf rights into effect.”<sup>134</sup> In line with this reasoning, the Court did not take into consideration Malta’s Filfla Island in delimitation, reasoning that such a small island should not have a disproportionate effect on limiting the extent of the much broader Libyan coast.<sup>135</sup> In addition, the Court also limited the extent of Malta’s main island in delimitating the median line between Malta and Libya. The Court took into consideration the relative disparity between the lengths of Malta’s coast in comparison to Libya’s longer coast and determined that “there is a considerable disparity between their lengths, to a degree which . . . constitutes a relevant circumstance which should be reflected in the drawing of the delimitation line.”<sup>136</sup> The Court concluded that this circumstance warranted an adjustment of

131. *Continental Shelf (Tunis v. Libya)*, 1982 I.C.J. para. 79.

132. *See Gulf of Maine*, 1984 I.C.J. para. 222.

133. *Continental Shelf (Libya v. Malta)*, 1985 I.C.J. para. 49.

134. *Id.*

135. “[T]he Court explains that it finds it equitable not to take account of the uninhabited Maltese island of Filfla in the calculation of the provisional median line between Malta and Libya” in order to eliminate the disproportionate effect which it might have on the course of this line. *Id.* at para. 64.

136. *Id.* at para. 68.

the median line to attribute a greater area of shelf to Libya.<sup>137</sup> Generally, the Court seemed to believe that smaller coastal areas do not have the ability to generate full or extensive maritime zones when pitted against landmasses with broader coastal lengths. The Court in *Greenland and Jan Mayen*<sup>138</sup> reached a similar conclusion with respect to the limited zone generating ability of smaller islands. The large disparity regarding the length of coast between the smaller Jan Mayan Island and the long coast of Greenland led the court to give Jan Mayan a reduced zone.<sup>139</sup>

Although Japan may possess a slightly stronger claim to the Diaoyu/Senkaku Islands under modern international law, the potential for exploiting the value of the islands may be substantially limited by other international cases that curtail the extent to which smaller islands generate full economic zones. In the Diaoyu/Senkaku territorial dispute between China and Japan, both countries must take into consideration relative gains and losses. However, the relative gains may lose much of their appeal to whichever party the islands will be awarded if its economic zones become substantially curtailed. Although Japan's claim may rest on firmer ground, it may nonetheless be prudent for it to consider alternative resolutions to the dispute.

## VII. China and the ASEAN Approach

Many of the problems that plague the Sino-Japanese relationship are reflected in China's relations with the ASEAN countries. In particular, China has had a number of territorial disputes with various ASEAN countries over a number of islands in the South China Sea.<sup>140</sup> While China has insisted in the past that it wished to resolve such problems on a bilateral country-to-country basis, in recent years it has moved to work with ASEAN multilaterally. This approach culminated in the 2002 Declaration on the Conduct of Parties in the South China Sea, a multilateral agreement signed by eleven countries (*hereinafter* Declaration).<sup>141</sup> The Declaration, although non-binding, declared that each country would avoid activities that would raise tension in the area.

### A. ASEAN

The interests and machinations of several large powers come together in East

137. *See id.* at paras. 67-73.

138. *Maritime Delimitation in the Area Between Greenland and Jan Mayen*, 1993 I.C.J. at 38.

139. *See id.* at paras. 61-71.

140. The primary territorial dispute involves the Spratly Islands.

141. Declaration on the Conduct of Parties in the South China Sea, *supra* note 5.

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Asia. The influence of the United States, China, Japan, India, and Russia converge in Asia, much to the worry of the smaller Southeast Asian countries. To address the potential for conflict, whether economic or military, the Association of Southeast Asian Nations (ASEAN) was created in 1967.<sup>142</sup> The goals of ASEAN are delineated in the 1967 Bangkok Declaration. Among its objectives are goals to promote economic, social and cultural development, and stability, to provide a forum for regional dispute resolution, and, in general, to promote greater dialogue in the region.<sup>143</sup>

ASEAN has steadily grown in importance and scope. In November of 2004, ASEAN proposed the creation of an East Asian Community.<sup>144</sup> ASEAN has steadily been enlarging the scope of its activities; since 1999 it has hosted its annual meetings alongside three other countries: China, Japan, and South Korea. These ASEAN+3 meetings have promoted greater dialogue on economic and regional security issues. Some experts believe the move to create a greater East Asian Community coincides with increased tensions in the region, particularly in the Korean Peninsula and between China and Japan.<sup>145</sup> It is hypothesized that this trend towards greater economic cooperation and integration is a major reason behind the move towards an East Asian Community.<sup>146</sup> Notwithstanding the United Nations' activities and given ASEAN's current and future role, it would be a potential forum or model for potential dispute resolution between China and Japan.

### ***B. The Spratly Islands and China's Claim***

Of all the territorial problems confronting the nations of Southeast Asia, perhaps one of the most complicated involves the Spratly Islands. The Spratly Islands are located in the South China Sea and are located more than 500 miles southwest of China.<sup>147</sup> The island chain is composed of more than 500 islands,

142. The original five founding nations were Indonesia, Malaysia, the Philippines, Thailand, and Singapore. Today ASEAN is composed of ten member states: Indonesia, Malaysia, the Philippines, Thailand, Singapore, Brunei, Cambodia, Laos, Vietnam, and Myanmar (Burma).

143. See The ASEAN Declaration (Bangkok Declaration), Aug. 8, 1967, available at <http://www.aseansec.org/1212.htm>.

144. See Chairman's Statement of the 8th ASEAN + 3 Summit, Nov. 24, 2004, available at <http://www.aseansec.org/16847.htm>.

145. See Linda Sieg, *East Asian Community: an idea whose time has come?*, REUTERS, Nov. 30, 2004, available at <http://in.news.yahoo.com/041130/137/216q9.html>.

146. See *id.*

147. Michael Bennet, *The People's Republic of China and the Use of International Law in the Spratly Islands Dispute*, 28 STAN. J. INT'L L. 425, 429 (1992).

islets, and rocks, stretching some 500 miles north to south, and 400 miles east to west.<sup>148</sup> The islands themselves are uninhabited, and only occasionally used by fishermen. Possession of the islands however, confers a large swath of territorial sea, and would extend the Exclusive Economic Zone of the owner into the expansive South China Sea. Furthermore, large oil/gas reserves are believed to lie underneath the large area that the Spratly Islands cover.

Sovereignty over the Spratly Islands is contested by several countries. China occupies several outposts and eight islands; Vietnam is thought to occupy nineteen islands; the Philippines occupies eight islands; Malaysia occupies four islands; and Taiwan occupies the largest island, Taiping Island. In addition, Brunei claims some of the islands as its territory.<sup>149</sup> China has had numerous disputes with the Philippines over the islands. In particular, however, China's disputes with Vietnam have resulted in armed conflict on four occasions.<sup>150</sup>

China lays claim to all of the Spratly Islands. Its claims are based upon historical discovery. China claims it discovered the islands at the time of the Han dynasty, and that since then, Chinese have settled and developed the islands.<sup>151</sup> This claim, however, has been criticized by some scholars who instead propose that Chinese discovery occurred during the Yuan dynasty.<sup>152</sup> China nevertheless contends that China has maintained a continuous presence on the island chain, and since Ming and Qing times its Qiongzhou Prefecture exercised jurisdiction over the islands.<sup>153</sup> China's claim, however, is mainly substantiated by the fact that Chinese fishermen periodically used the islands as shelter, to fish, and to collect natural resources.<sup>154</sup>

China's claim to the Spratly Islands has been subject to scrutiny under international law. In particular, *Island of Palmas* and *Clipperton Island* have been used to challenge China's case. Vietnam has challenged China's claims—stating that even if the Chinese had discovered the islands first, China has failed to prove it ever established effective, continuous, and peaceful control over the islands.<sup>155</sup> China's claims extend into the EEZ and continental shelf of Indonesia as well as

148. *Id.* at 430.

149. *Id.* at 434.

150. Jeffrey Robertson, *China's Power Hunger Trumps Japan Diplomacy*, ASIATIMES (H.K.), Nov. 2, 2004, available at <http://www.atimes.com/atimes/China/FK02Ad01.html>.

151. The Han Dynasty lasted from 206 B.C. to 220 A.D.

152. See Bennet, *supra* note 147 at 434. The Yuan (or Mongol) Dynasty lasted from 1279 to 1368 A.D.

153. *Id.* The Ming Dynasty lasted from 1368 to 1644 A.D. The Qing Dynasty lasted from 1644 to 1911 A.D.

154. *Id.* at 435.

155. See *id.* at 436.

Vietnam. However, many of the countries involved, particularly Brunei and Vietnam, base their claims on UNCLOS III's<sup>156</sup> continental shelf principle.<sup>157</sup> In the case of the Diaoyu/Senkaku Islands, China partly bases its claim on the same continental shelf principle. Application of this principle would produce several different results in the case of the Diaoyu/Senkaku and the Spratly Islands.

China's claim to the Spratly Islands is subject to modern international law, as are its claims to the Diaoyu/Senkaku Islands. Primarily its claims are grounded to a substantial degree on older notions of international law, such as title by discovery. Such reliance weakens China's case. Unlike with Japan however, China has taken a different course of action with regards to its claims on the Spratly Islands.

### ***C. 2002 Declaration on the Conduct of Parties in the South China Sea***<sup>158</sup>

The 2002 Declaration on the Conduct of Parties in the South China Sea was concluded by the ten ASEAN nations and China on November 2, 2002. Although not binding on the parties, it set forth a framework for conflict resolution through dialogue and peaceful means.<sup>159</sup> It commits its parties to refrain from contentious acts but allows them to undertake various other actions, such as marine research.<sup>160</sup>

Since the Declaration was created in 2002, some view tensions in Southeast Asia as having decreased. However, recent events raise questions regarding the effectiveness of the agreement. The Philippines held military exercises with the United States near the islands. Vietnam has ferried several tourists to some of the islands, provoking fears that Vietnam will soon use the islands as a tourist destination. Several Taiwanese individuals have built a "bird-watching" structure on one of the islands. Additionally, China has sent several research and military ships there.<sup>161</sup> Despite these problems, the Declaration has generally functioned to modify the behavior of the various countries. They now act with greater restraint and generally adhere to the declaration, cooperate with each other, and promote greater dialogue.<sup>162</sup> Although these countries have not given up their claims, the

156. See UNCLOS III, *supra* note 3, at art. 76.

157. GlobalSecurity.org, Territorial Claims in the Spratly and Paracel Islands, <http://www.globalsecurity.org/military/world/war/spratly-claims.htm> (last visited Apr. 15, 2006).

158. See Declaration on the Conduct of Parties in the South China Sea, *supra* note 5.

159. See Robertson, *supra* note 150.

160. Declaration of Conduct of Parties in the South China Sea, *supra* note 5, at sec. 6(b).

161. See Ronald A Rodriguez, *So Much for the Spratly Islands Accord*, ASIATIMES (H.K.), Jun. 26, 2004, available at [http://www.atimes.com/atimes/Southeast\\_Asia/FF26Ae02.html](http://www.atimes.com/atimes/Southeast_Asia/FF26Ae02.html).

162. *Id.*

Declaration has provided a communal basis for mutual cooperation by pushing aside the direct question of sovereignty.

In the years following the agreement, several countries entered into regional joint projects. In September of 2004, the Philippines and China agreed to jointly study oil deposits in the South China Sea.<sup>163</sup> Additionally, the national oil companies of China, the Philippines, and Vietnam have agreed to conduct three years of joint exploratory research in a disputed Spratly area that all three countries claim.<sup>164</sup> These cooperative projects call for multiparty exploration and each country seems to have shelved the issue of territorial sovereignty, perhaps evincing a greater interest in economic exploitation of the area's natural resources. Although the ultimate issue of sovereignty has not been addressed, these interregional projects may intertwine the domestic interests of the countries involved and ultimately decrease regional tensions by providing a common starting point for agreement.

## VIII. Resolution and Conclusion

### *A. Political and Economic Realities Call for Greater Mutual Cooperation*

Any possible resolution regarding the Diaoyu/Senkaku Islands must take into consideration the contentious political and economic issues that lie at the heart of current Sino-Japanese relations. Considering that China's claims to the Diaoyu/Senkaku Islands appear to be weaker than Japan's claims under international law, China has reason to promote mutual cooperation. Notwithstanding Japan's stronger claim under international law, it too has a lot to gain in political and economic capital from mutual cooperation.

A focus on the growth and strength of bilateral economic ties should ground the framework of mutual cooperation. In this regard, Japan should view the island dispute as an opportunity to create greater interdependence between the two countries. China should also reiterate its proposal for mutual cooperation for exploration of the East China Sea.<sup>165</sup> As it stands many believe that if tensions were reduced, the two countries' already strong economic ties would continue to

163. See Alan Boyd, *Oil Worries Lubricate South China Sea Pact*, ASIATIMES (H.K.), Sept. 4, 2004, available at <http://www.atimes.com/atimes/China/FI04Ad04.html>.

164. *Chinese Firm Wins Deal to Explore for Oil and Gas in Disputed Waters*, AGENCE FR. PRESSE (Fr.), Aug. 28, 2005, available at [http://www.gulf-times.com/site/topics/article.asp?cu\\_no=2&item\\_no=50419&version=1&template\\_id=48&parent\\_id=28](http://www.gulf-times.com/site/topics/article.asp?cu_no=2&item_no=50419&version=1&template_id=48&parent_id=28).

165. See Takahashi, *supra* note 10.

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grow.<sup>166</sup> Because both countries are so dependent on oil imports, the oil issue should serve as a basis for mutual cooperation. Some Japanese and Chinese observers believe that a more united position in regards to their energy concerns would be a win-win situation.<sup>167</sup> Japan should also take a more conciliatory position in the oil dispute between the two countries since there are problems regarding development of the resources near the Diaoyu/Senkaku Islands. Because of the high expenses involved in liquefaction of natural gas and its transportation, the Japan Petroleum Development Association has concluded that it is more realistic to sell any gas to China because it is closer to the gas fields than Japan.<sup>168</sup> Additionally, even if the Diaoyu/Senkaku Islands were conferred to Japan, there is a possibility that the economic zone of the islands would be limited. Thus possessing the islands may not allow Japan to exploit the valuable natural resources in adjoining areas.<sup>169</sup>

As reflected in concerns over China's increasing military role, and the corresponding possible threat stemming from their interest in the East China Sea and Diaoyu/Senkaku Islands, it is perhaps prudent for Japan to seek alternative avenues of cooperation.<sup>170</sup> A leading Japanese expert in the Council on Foreign Relations has concluded that: "[f]rom Japan's perspective, funding for pipelines inside China or [an] international co-development scheme for the Spratly or Senkaku Islands increase[s] interdependence and decrease[s] the prospects that China will embark on a dangerous program of naval modernization to protect sea lanes of communication that are so vital to Japan."<sup>171</sup>

Politically ties between China and Japan have been exacerbated by what China perceives as insensitivity regarding Japan's invasion of China during World War II. Visits to the Yasukuni Shrine by Japanese leaders and other matters related to World War II have virtually controlled the development of bilateral political relations.<sup>172</sup> Japan also has increasingly viewed China as a threat, and domestic opinion regarding China has likewise turned increasingly negative. However both countries should pay deference to the 1978 Treaty of Peace and

166. *Friction Grows Between Japan and China*, ASSOCIATED PRESS, Nov. 16, 2004, available at [http://www.usatoday.com/news/world/2004-11-16-japan-china-disputes\\_x.htm](http://www.usatoday.com/news/world/2004-11-16-japan-china-disputes_x.htm).

167. *Oil Fuels Asian Giants' Tension*, BBC, Nov. 16, 2004 (U.K.), available at <http://news.bbc.co.uk/2/hi/asia-pacific/4016059.stm>.

168. Ryohei Takeda, *Government Lacks Strategy in Dealing With China*, KYODO NEWS (Japan), Oct. 26, 2004.

169. See *supra* Part V.d.

170. See *Defense Strategists Look to China's Attack Threat*, *supra* note 33.

171. See Boyd, *supra* note 163.

172. See *Japanese Minister Links Sub Intrusion with China's Gas Project*, *supra* note 32.

Friendship which, among other things, committed the two countries to the establishment of relations based on five principles: (1) principles of mutual respect for sovereignty and territorial integrity; (2) principles of mutual nonaggression; (3) principles of noninterference in each other's internal affairs; (4) principles of equality and mutual benefit; and (5) principles of peaceful coexistence.<sup>173</sup> In keeping with this, both countries should work to forge a mutually beneficial relationship—confined not simply to a hot economic relationship, but they should also forge a warm political relationship based upon cooperation.

***B. Conclusion: ASEAN 2002 Declaration on the Conduct of Parties as an Example of Cooperation***

It would be prudent for China and Japan to modeling any future bilateral agreement along the lines of the 2002 Declaration on the Conduct of Parties in the South China. In the spirit of ASEAN (of which both countries are dialogue partners) and in the spirit of their 1978 Treaty of Peace and Friendship, such a model should be seriously discussed and pursued. Given the increasing movement towards an East Asian Community and the fact that the increasing tensions between China and Japan have partly driven this trend, both countries must look to alternative means to mollify hazards to their increasingly interdependent economies.

China should have great reason to explore the idea of an agreement with Japan regarding the Diaoyu/Senkaku Islands. Its claim to the islands relies heavily upon older concepts of international law, such as historical discovery. Even if the islands may be regarded as part of Taiwan, which would require their return to China via various treaties, China's position is not safeguarded. Modern international law seems to favor Japan's claims, since Japan has exercised effective control of the islands for more than a century. Furthermore, the United Nations has said it will decide on global offshore territorial claims by May 2009. Given these facts, it would be advantageous for China to secure as great an interest in the islands as it can through a mutually cooperative agreement with Japan. Likewise, given Japan's dependence upon China economically and its frigid political ties with China, it may be advantageous to Japan to provide some leeway in regards to the issue even if its claims are more favorable under international law. Japan's business community favors greater rapprochement, fearing that cold political ties will narrow the scope of Japanese business dealings with China; they also fear that

173. See Treaty of Peace and Friendship Between Japan and the People's Republic of China, *supra* note 19.

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the cold political trend will eventually dampen economic relations.<sup>174</sup>

The 2002 Declaration on the Conduct of Parties in the South China Sea, despite its potential shortcomings, has decreased the level of tension between China and the ASEAN nations. It has acted as a restraint on how the various countries deal with one another regarding their conflicting claims, and it has also provided a basis for mutual exploration and cooperation. As of now, China and Japan do not possess any other method for cooperation despite record bilateral trade in 2005.<sup>175</sup> The ambiguity inherent in an ASEAN-modeled declaration would allow for a great degree of flexibility. First, it would placate extreme domestic nationalism by not explicitly relinquishing sovereign claims to the Diaoyu/Senkaku Islands. Second, the main value of the islands seem to lie in their access to nearby natural resources,<sup>176</sup> and any such agreement creates room for bilateral cooperation revolving around joint-exploitation of such resources—much like what has occurred with respect to China, the Philippines, and Vietnam.<sup>177</sup> Third, joint projects entered into under such an ASEAN-modeled declaration may allow a country to exploit the resources of the area even if the same country is not forced to relinquish its claim on the islands. Ultimately, a bilateral agreement between the two countries, which commits both parties to cooperation and avoidance of tension raising acts, would provide a basis for future political rapprochement and better economic ties.

174. See J. Sean Curtin, *Japan Inc. Opposes Koizumi's China Policy*, ASIATIMES (H.K.), Dec. 11, 2004, available at <http://www.atimes.com/atimes/Japan/FL11Dh01.html>.

175. See *China Again Top Japan Trade Partner*, *supra* note 34.

176. Curtin, *supra* note 12.

177. See Boyd, *supra* note 163; *Oil Firm in Spratlys Deal*, *supra* note 164.