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The United States Government is aware that a dispute exists between the governments of the Republic of China and Japan regarding the sovereignty of the Senkaku Islands. The United States believes that a return of administrative rights over those islands to Japan from which those rights were received can in no way prejudice the underlying claims of the Republic of China. ***The United States cannot add to the legal rights Japan possessed before it transferred/administration of the islands to the United States nor can the United States by giving back what it received diminish the rights of the Republic of China.***[1]

1. Introduction

The on-going territorial disputes among Japan, the People's Republic of China (hereinafter 'China'), and the Republic of China (hereinafter 'Taiwan')[2] over the Pinnacle Islands/Senkaku Islands/Diao-yu-tai (or Tiao-yu-t'ai) (hereinafter 'Senkaku Islands')[3] which are controlled by Japan involves a number of significant issues, including future offshore oil development. This dispute has impeded the promotion of stability in the region of East Asia, and in particular, the bilateral relations between Japan and China, and Japan and Taiwan. The Taiwan straits issue which impacts on the bilateral relations between China and Taiwan[4] is also one of the key issues deserving attention as well as the status of the Ryukyu (also known as 'Okinawa') Islands which have significant implications for the Senkaku Islands.[5] If considered to be fully-

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1 US Department of State [hereinafter 'USDOS'] 1971a, Emphasis added; *See also*, USDOS 1972a.

2 Regarding the legal relationship between China and Taiwan, this research treats them, without prejudice to their respective claims, as separate entities.

3 Japan calls the islands 'Sento Shosho' or 'Senkaku Retto', which means 'Pinnacle Island'. China terms them 'Diao-yu-tai', and Taiwan uses the same Chinese characters in a different romanisation system as 'Tiao-yu-t'ai'. For further information on this dispute, *see*, Chao 1983; Cheng 1973-74; Chiu 1996-97; Chiu 1997; Dzurek 2000: 409-19; Greenfield 1979: 126-43; Greenfield 1992: 128-9; Harrison 1977: 146-88, 213-30; Lee 1987; Li 1975; Lo 1989: 168-74; Ma 1984: 69-105; Okuhara 1971; Park 1973; Ragland 1996; Suganuma 2000. For the official Japanese Government's view on the Senkaku Islands in dispute, *refer to* Ministry of Foreign Affairs, Japan, 1972, *available* at http://www.mofa.go.jp/region/asia-paci/senkaku/senkaku.html (last visited Nov. 10, 2000). For Internet resources, *see*, Deans, P., *The Diaoyutai/Senkaku Dispute: The Unwanted Controversy*, *available* at http://snipe.ukc.ac.uk/international/papers.dir/deans.html (last visited Jun. 18, 1999); Dzurek, D., *The Senkaku/Diaoyu Islands Dispute* (1996), *available* at http://www-ibru.dur.ac.uk/docs/senkaku.html (last visited Nov. 10, 2000); Inoue, K., *Japanese Militarism and the Diaoyu (Senkaku) Islands: A Japanese Historian's View*, *available* at http://www/io.org/~yuan/diaohist/html. (last visited Jun. 18, 1999). *Also generally refer to* the following web-sites: http://www.geocities.com/Tokyo/4381 (last visited Nov. 10, 2000); http://www.american.edu/projects/mandala/TED/ice/DIAOYU.HTM (last visited Nov. 10, 2000); http://www.geocities.com/CapitolHill/6887/diaoyu3.htm (pro-Chinese sites) (last visited Nov. 10, 2000).

4 For further details on the international legal status of Taiwan, *see* Charney & Prescott 2000, *also available* at http://www.asil.org/ChinaTai.htm (last visited Nov. 10, 2000); Chen 1996-97; Chen 1998; Reisman 1998. *Also generally refer to*, Chiu 1996:3-8; Kuijper 1996: 9-20; Hsiung 1996: 209-20; and Tsai 1996: 221-37.

5 *See*, *infra*, Section 3.4.

fledged islands under the 1982 United Nations Convention on the Law of the Sea (hereinafter 'UNCLOS'),[6] sovereignty over the Senkaku Islands could affect 20,750nm^2 of marine space,[7] and mineral resources in that area.

2. Geographical and Historical Background of the Dispute over the Senkaku Islands

The Senkaku Islands are a group of eight uninhabited islands, comprising five small volcanic islands and three rocky outcroppings,[8] with a total land area of 6.32km^2 located in the East China Sea, scattered about in the area from 25º 40′ to 26º N. latitude and from 123º 25′ to 124º 45′ E. longitude, approximately 200km northeast of Taiwan and 300km west of the Okinawa[9] (see Figure 1).

Historically, as early as the 16th century, three of the Senkaku Islands, namely, Uotsuri-shima, Kuba-shima, and Taisho-jima, were especially mentioned, by their Chinese names – Tiaoyutai, Huangweiyu, and Chihweiyu – in the travel accounts of Chinese envoys who had been sent by the Ming Dynasty to hold investiture ceremonies for the kings of the Ryukyu Islands.[10] The Chinese envoys usually proceeded to the Ryukyu Islands from Fuchou via Taiwan and the islets to the northeast of Taiwan, including Tiaoyutai, Huangweiyu, and Chihweiyu.[11] These Tiaoyutai islets were considered at that time to be the boundary separating Taiwan from the Ryukyu Islands.[12]

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6 UN 1982, *reprinted* in 21 *Int'l Leg. Mat.* 1261 (1982). The dates of ratification of UNCLOS by the disputants over the Senkaku Islands are as follows: China (June 7, 1996; with declaration), Japan (June 20, 1996). *See*, *Table Showing the Current Status of the United Nations Convention on the Law of the Sea and of the Agreement relating to the Implementation of Part XI of the Convention*, 39 *Law of the Sea Bulletin* (1999); *Also available* at http://www.un.org/Depts/los/los94st.htm (last visited Sept. 10, 2000). In particular, it is interesting to note Article 3 of China's declaration which states that "*The People's Republic of China reaffirms its sovereignty over all its archipelagos and islands as listed in article 2 of the Law of the People's Republic of China on the territorial sea and the contiguous zone, which was promulgated on 25 February 1992*", *reprinted* in UN Division for Ocean Affairs and the Law of the Sea, *The Declarations and Statements with reference to the United Nations Convention on the Law of the Sea and to the Agreement relating to the Implementation of Part XI of the Convention on the Law of the Sea of 10 December 1982* (1997): 23. *Also available* on Internet at http://www.un.org/Depts/los/los_decl.htm#China (last visited Sept. 10, 2000).

7 Pratt 1999: 35.

8 The term "*Senkaku Islands*" is the collective name for Uotsuri-shima/Tiaoyutai, Kuba-shima (or Kobi-sho)/Huangweiyu, Taisho-jima (or Akao-sho)/Chihweiyu, Kita-kojima/Beixiao Dao, Minami-kojima (or Minami-koshima)/Nanxiao Dao, Oki-no-Kita-Iwa/Dabeixiao Dao, Oki-no-Minami-Iwa/Dananxiao Dao, and Tobise/Feilai Dao. *See*, Dzurek 1996: 4; Suganuma 2000: 12, 95.

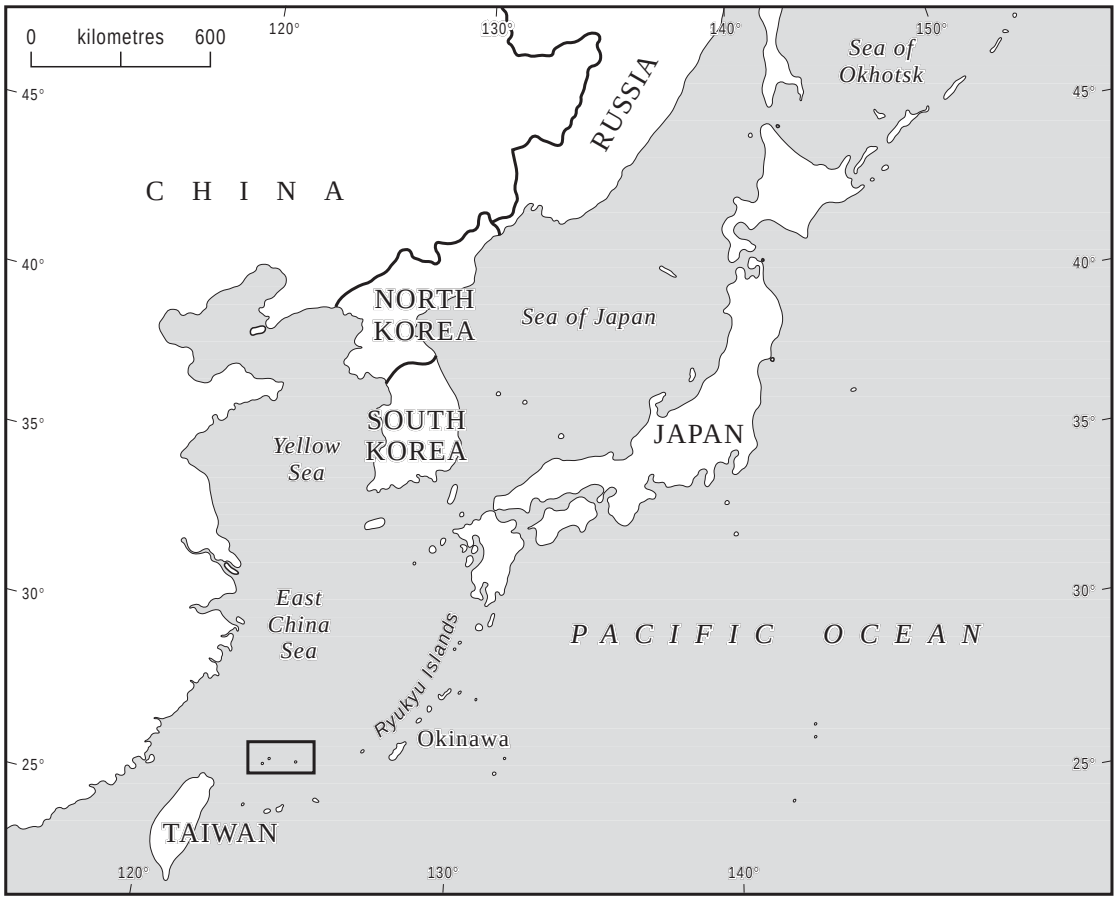
9 Suganuma 2000: 11.

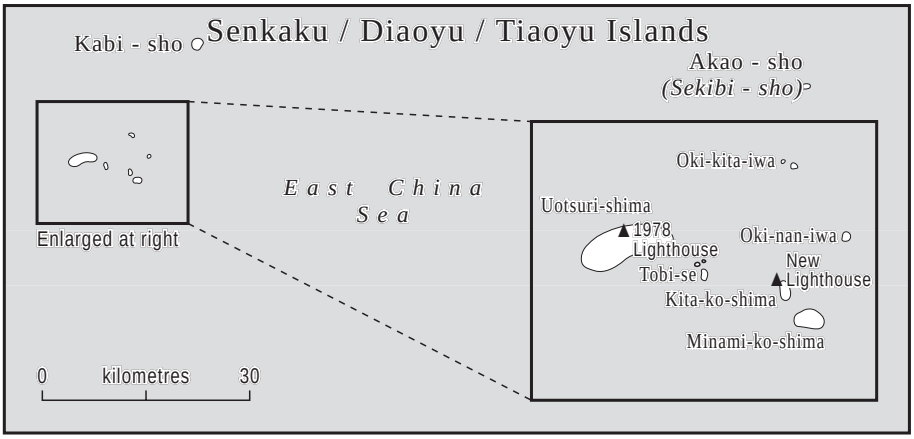
10 *Id.*, p.49.

11 For details of the Chinese investiture mission to the Ryukyu Islands during the Ming and Qing Dynasties, *see*, *id.*, pp.45-87; Taiwanese Embassy in DC 1971.

12 Suganuma 2000: 49-85.

Figure 1: The Senkaku Islands





As a result of its defeat in the Sino-Japanese War of 1894-95, China ceded Taiwan to Japan under the *Shimonoseki Treaty* in May 1895.[13] Article II of the treaty, signed on April 17, 1895, provided that "*China cedes to Japan in perpetuity and full sovereignty the following territories, ... (b) The island of Formosa together with all islands appertaining or belonging to the said island of Formosa. ...*"[14]

In the meantime, following a Japanese Cabinet Decision on January 14, 1895 to erect a marker on the Senkaku Islands, the islands were formally incorporated into Yaeyama County, Okinawa Prefecture.[15] Since 1896, they have been a part of Ishigaki City. According to the land register of Ishigaki City, the land number, land classification, land size and owners of the Senkaku Islands were, as of 1972, as follows:[16]

Table 1: The Land Register of Ishigaki City on the Senkaku Islands

Name of Island	Address	Classification	Land Size Cho/Tan/Se/Bu*	Name of Owner
Minami-kojima	#2390, Aza-Tonogi, Ishigaki City	Field	32/7/3/10	1-46 Miebashi-cho, Naha City Zenji KOGA
Kita-kojima	#2391, the same	″	26/1/0/0	″
Uotsuri-shima	#2392, the same	″	367/2/3/10	″
Kuba-shima	#2392, the same	″	88/1/3/10	″
Taisho-jima	#2394, the same	″	4/1/7/0.4	Government-owned

* Cho is approximately 10,000m^2; Tan is 1,000m^2; Se is 100m^2; and Bu is 3.3m^2

Taiwan was returned to China in 1945 at the end of World War II based upon the 1943 *Cairo Declaration* and 1945 *Potsdam Proclamation*. Japan accepted the terms in the *Cairo Declaration* to the effect that *"... all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and the Pescadores, shall be restored to the Republic of China*."[17] In the *Potsdam Declaration*, the signatories affirmed that the terms of the *Cairo Declaration* shall be carried out and limited Japanese sovereignty to the four major islands of Japan and to "*such minor islands as we determine*."[18]

Although the Allied Powers did not specifically mention dispositions of the currently disputed Senkaku Islands in the territorial clause of the *San Francisco Peace Treaty*, as was the case with some other disputed territories in this region, they decided to place the Senkaku Islands under US administration. Article 2(b) of the *San Francisco Peace Treaty*, which was not

13 181 C.T.S. 217. *Also available* at http://newtaiwan.virtualave.net/shimonoseki01.htm (last visited Dec. 21, 2000).

14 The old name of Taiwan, although sometimes 'Formosa' is used with reference to the main island of Taiwan.

15 Ministry of Foreign Affairs, Japan, 1972.

16 There are no addresses for Oki-no-Kita-Iwa, Oki-no-Minami-Iwa, and Tobise. *See*, USDOS, 1972b.

17 USDOS 1961: 448-9; USDOS 1950a: 20. Also available at http://www.yale.edu/lawweb/avalon/wwii/cairo.htm (last visited Dec. 21, 2000); http://newtaiwan.virtualave.net/ cairo.htm (last visited Dec. 21, 2000).

18 USDOS 1950a: 28-40. *Also available* at http://www.yale.edu/lawweb/avalon/decade/decade17.htm (last visited Dec. 21, 2000); http://newtaiwan.virtualave.net/potsdam.htm (last visited Dec. 21, 2000).

signed by either China or Taiwan,[19] simply stated that "*Japan renounces all right, title and claim to Formosa and Pescadores*",[20] while Article 3 provided that:

> *Japan will concur in any proposal of the United States to the United Nations to place under its trusteeship system, with the United States as the sole administering authority, Nansei Shoto south of 29 deg. north latitude (including the Ryukyu Islands and the Daito Islands), ... Pending the making of such a proposal and affirmative action thereon, the United States will have the right to exercise all and any powers of administration, legislation and jurisdiction over the territory and inhabitants of these islands, including their territorial waters.*[21]

The term "*Nansei Shoto*" was understood by the United States and Japan to include the Senkaku Islands which were being administered as a part of Okinawa Prefecture.[22] The US Civil Administration Proclamation (hereinafter 'USCAP') No. 27, December 25, 1953,[23] further defined the territorial jurisdiction of the US Civil Administration of the Ryukyu Islands and the Government of the Ryukyu Islands as "*those islands, islets, atolls and reefs as well as their territorial waters*" within specific geographic coordinates that included the Senkaku Islands.[24]

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19 *See*, *infra*, Section 4.

20 3 UST. 3169; 136 U.N.T.S. 45 [hereinafter 'SF Peace Treaty']. A full text is also available on the Internet at http://newtaiwan.virtualave.net/sanfrancisco01.htm (last visited Nov. 10, 2000).

21 SF Peace Treaty, *id.*

22 *See*, *infra*, Section 3.4.

23 USCAP No. 27, December 25, 1953, "*On the Geographical Boundary of the Ryukyu Islands*" provided that

> "*To the inhabitants of the Ryukyu Islands, I, Major General David Ogden, Deputy President of United States Civil Administration in the Ryukyu Islands acting under the authority of the President of the Civil Administration, bearing in mind the necessity, arising from the provisions of the Treaty of Peace with Japan, which was signed on 8 September 1951 and the Agreement with Japan on the Amami Islands, which enters into force on 25 December 1953, to redefine the geographical boundary of United States Civil Administration and the Government of Ryukyu, which has so far been determined by proclamations, orders and regulations of the Civil Administration, hereby proclaim as follows:*
>
> *1. The jurisdiction of United States Civil Administration in the Ryukyu Islands and the Government of Ryukyu is redefined to be limited to those islands, islets, atolls and reefs as well as their territorial waters within the following geographical boundary, which starts from 28 Degrees North, 124 Degrees 40 Minutes East; going through 24 Degrees North, 122 Degrees East; 24 Degrees North, 133 Degrees East; 27 Degrees North, 131 Degrees 50 Minutes East; 27 Degrees North, 128 Degrees 18 Minutes East; 28 Degrees North, 128 Degrees 18 Minutes East, and comes back to the starting point.*
>
> *2. Any proclamation, order, regulation, directive or any other provision of United States Civil Administration in the Ryukyu Islands, which has set up a boundary or ordered the exercise of its jurisdiction beyond the said boundary, shall be amended following the previous section.*
>
> *3. This proclamation enters into force on 2 December 1953*."

Nampo Doho Engokai ('Association to Support Colleagues in the South'), *Okinawa Fukki no Kiroku* ('*Records of the Return of Okinawa*') (Bunshodo, Tokyo) (1972), p.496 (This Japanese version of the document, USCAP No. 27 ("Geographic Boundaries of the Ryukyu Islands") was provided by Mr. John Purves (a doctoral candidate at the Graduate School of International Development, University of Nagoya, Japan, and the owner of The Contemporary Okinawa Website, http://www.niraikanai.wwma.net/index.html). Translation in English was done by Dr. Omi Hatashin (St.

The question of the disputed Senkaku Islands remained relatively dormant throughout the 1950s and 1960s, probably because these small uninhabited islands held little interest for the three claimants. The Senkaku Islands issue was not raised until the Economic Commission for Asia and the Far East (hereinafter 'ECAFE') of the United Nations Economic and Social Council suggested the possible existence of large hydrocarbon deposit in the waters off the Senkaku Islands. After extensive surveys in 1968 and 1969, it was reported that the shallow sea floor between Japan and Taiwan might contain substantial resources of petroleum, perhaps comparable to the Persian Gulf area.[25] This ECAFE survey, made by a group of scientists from Japan, Korea, Taiwan, and the United States found that the continental shelf in the Yellow and East China Seas might be one of the richest oil reserves in the world. A spokesman for the US Woods Hole Oceanographic Institution, which conducted the UN survey, also said that 80,000 mile^2 of the Taiwan basin has late Tertiary sediment which is more than 2,000 metres thick.[26] The Senkaku Islands lie in an area that holds promise of oil resources.

This development prompted vehement statements and counter-statements among the claimants. Subsequent notable developments and events relating to the status of the Senkaku Islands are represented chronologically in the following table:[27]

Table 2: Chronology of Events relating to the Status of the Senkaku Islands

Date	Developments and Events
17 July 1970	Taiwan announced that it would exercise its sovereign rights over all natural resources in the seafloor and its subsoil in the vicinity of the coast of Taiwan and beyond its territorial waters.
20 July 1970	In a note to Taiwan, Japan asserted its claims to sovereignty over the Senkaku Islands.
28 July 1970	The Taiwan-owned China Petroleum Corporation signed a contract with Gulf Oil Company for joint exploration and exploitation of an area of the continental shelf including the Senkaku Islands.
August 1970	In a statement to the Japanese Upper House of the Diet, Foreign Minister Aiichi stated that Japan has consistently claimed the Senkaku Islands as part of Nansei Shoto and, therefore, of the area over which it has residual sovereignty.
2 September 1970	A group of journalists from Taipei's *China Times* and the crewmen of their vessel planted the flag of Taiwan on Uotsuri-shima/Tiaoyutai, the largest of the Senkaku Islands. The flag was removed with US approval, by a Ryukyuan patrol a few days later.

Antony's College, University of Oxford)). *See also*, Agreed Minutes appended to the Okinawa Reversion Treaty, *infra*, note 31.

24 *Id*.

25 UN 1970: 51-67; *See also*, Park 1973: 248-9; Suganuma 2000: 129-31.

26 Li 1975: 143; *The Oil and Gas Journal*, August 10, 1970: 83.

27 USDOS 1971b; Schachte, Jr. 1997: 61-2; Suganuma 2000: 131-5.

10 September 1970	In answer to a press question, the US Department of State spokesman said that the United States intended to return the Senkaku Islands to Japanese administration under the Nixon-Sato Communiqué agreeing to Okinawan Reversion on November 21, 1969[28] (hereinafter "*Nixon-Sato Agreement*") but considered any conflicting claims to be a matter for resolution by the parties concerned.
15 September 1970	The Taiwanese Vice Foreign Minister, Shen, in an oral presentation to the US Ambassador McConaughy, rejected Japan's claim to sovereignty and urged that the United States avoid statements on this subject, but he did not assert a Taiwanese claim or raise the question of reversion.
16 September 1970	The US Assistant Secretary of State, Green, confirmed to Taiwanese Ambassador Chow Shu-kai that the United States considered the Senkaku Islands to be part of the Ryukyu Islands but took no position on the dispute between Japan and Taiwan.
12 October 1970	Taiwan ratified the 1958 *Geneva Convention on the Continental Shelf*[29] with a reservation providing that in determining the boundary of the continental shelf of the Republic of China, exposed rocks and islets should not be taken into account. In effect, Taiwan was stating that, even if Japan should claim the Senkaku Islands, sovereignty over them would not entitle Japan to a share of the shelf.[30]
October 1970	Japan informed Taiwan that the question of sovereignty over the Senkaku Islands was not negotiable.
3 December 1970	China asserted its claim to sovereignty over the Senkaku Islands, and also protested the incorporation of the Senkaku Islands into Japanese territory.
23 February 1971	Taiwan made the first public assertion for its own claim to the Senkaku Islands.
15 March 1971	In a diplomatic note, Taiwan requested the United States to exclude the Senkaku Islands from the reversion of Okinawa to Japan.
31 May 1971	Taiwanese Foreign Minister, Chow Shu-kai, on instructions from President Chiang, reiterated the Taiwanese request that the United States should withhold the Senkaku Islands when the Ryukyu Islands were returned to Japanese administration.

28 USDOS 1969: 551-9.

29 15 U.S.T. 471; 499 U.N.T.S. 311; *Also available* 52 *Am. J. Int'l L.* 858 (Supp. 1958)

30 Among the claimants only Taiwan ratified the 1958 Geneva Convention on the Continental Shelf with a reservation stating that "*With regard to the determination of the boundary of the continental shelf as provided in paragraphs 1 and 2 of article 6 of the Convention, the Government of the Republic of China considers: (1) that the boundary of the continental shelf appertaining to two or more States whose coasts are adjacent to and-or opposite each other shall be determined in accordance with the principle of the natural prolongation of their land territories; and (2) that in determining the boundary of the continental shelf of the Republic of China, exposed rocks and islets shall not be taken into account*." *Available* at: http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXI/treaty4.asp#N1 (last visited Apr. 7, 2001).

17 June 1971	The *Agreement concerning the Ryukyu Islands and Daito Islands with Related Arrangements* (so-called and hereinafter '*Okinawa Reversion Treaty*')[31] signed by the United States and Japan, which included the Senkaku Islands as part of Okinawa to be returned to Japanese rule, brought the Senkaku Islands dispute back into the limelight, with immediate challenges of Japanese rule from both China and Taiwan.
July 1978	A Japanese right-wing group erected a lighthouse on the Senkaku Islands (Uotsuri-shima/Tiaoyutai).
August 1979	Japan built a heliport on the Senkaku Islands (Uotsuri-shima/Tiaoyutai).
September 1989	The Japanese Maritime Safety Agency placed the lighthouse of 1978 on Japanese official charts of the Senkaku Islands.
October 1990	Two Taiwanese boats carried Taiwanese athletes, reporters, and television crews to the Senkaku Islands to place an Olympic torch, which was prevented by Japanese Maritime Defence Forces.
25 February 1992	China promulgated The Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone,[32] which included the Senkaku Islands.
July 1996	A Japanese right-wing group erected another lighthouse, and a month later, a Japanese flag on the Senkaku Islands.
26 September 1996	A Chinese activist from Hong Kong drowned in an attempt to swim to the Senkaku Islands.

Recently, there have been occasional skirmishes, such as provocative visits to the disputed islands by nationals of the claimants, as Table 2 indicates, though none of the claimants are yet exploiting the mineral resources of the area. Nevertheless, Japan and China sought to defuse the dispute by signing a provisional fisheries agreement in November 1997.[33] Despite Taiwan's harsh reaction to this fisheries agreement,[34] Japan and China agreed that formal delimitation of the exclusive economic zone (hereinafter 'EEZ') would be deferred, joint management of the area between 30º 40´ N and 27º N and beyond 52 nm from their coasts

31 841 U.N.T.S. 249; 23 T.I.A.S. 475. The Agreed Minutes appended to the *Okinawa Reversion Treaty* described the islands by geographic limits.

32 *See*, *infra*, note 38.

33 Agreement on Fisheries between Japan and the People's Republic of China, *reprinted* in 41 *Japanese Annual Int'l L.* 122 (1998). The waters surrounding the Senkaku Islands also hold the region's richest fisheries. According to a report by Taiwan's national fishing association, fishing vessels catch nearly 40,000 tons of fish per year, worth US$65m, from the waters around the Senkaku Islands. Schachte 1997: 61. For further information on fisheries resources around the Senkaku Islands, *generally refer to*, Morgan & Valencia 1992: 109-12; Park 1983: 53-8.

34 The Taiwanese authorities stated that "*they would not accept the fisheries accord sealed between Tokyo and Beijing that might infringe upon its sovereignty or damage the rights of its fishermen*." *Reprinted* in Pratt 1999: 103.

would be provided, and traditional fishing activities would be continued in the vicinity of the disputed islands, including setting fishing quotas in that area.[35]

3. Legal Arguments for Claiming Sovereignty over the Senkaku Islands

The key legal issues involving the dispute over the Senkaku Islands are intertwined. The claimants disagree over who first discovered and effectively occupied the Senkaku Islands, and whether they were *terra nullius* when Japan incorporated the islands in January 1895. In the same context, it is also questionable whether, as a part of Taiwan, the Senkaku Islands belonged to Japan when China ceded Taiwan to Japan under the *Shimonoseki Treaty* in May 1895 after being defeated by Japan in the Sino-Japanese War. Accordingly, as China/Taiwan have the burden of proof for proving their established sovereignty over the Senkaku Islands before 1895, Japan equally has to refute it and furthermore provide evidence that the Senkaku Islands were *terra nullius* when Japan incorporated them.

In approaching these issues, the fundamental legal arguments to be explored are as follows:

1. whether there existed at the material times legal concepts or a legal regime on territorial acquisition in East Asia, in particular China;
2. assuming that such a regime existed/exists, what role, if any, did/does, or can, it play in the resolution of the Senkaku Islands in question in contemporary times?;
3. allied to the above, even if such a regime existed/exists, what was/is the impact of subsequent factual and legal developments, particularly having regard to the fact that the areas in question have been the subject of significant factual and legal changes over the years?[36]

A further issue of relevance is the interpretation of the territorial clause of the *San Francisco Peace Treaty*, since the Allied Powers omitted to mention the Senkaku Islands in the clause on territorial disposition, but included them in the clause dealing with UN trusteeship with the United States as the sole administering authority. As to this indeterminacy of the territorial disposition, Japan has assumed its residual sovereignty over the Senkaku Islands, and, in like manner, China/Taiwan have disputed this assumption. Clarification of this issue requires a careful interpretation and clarification of how a series of drafts defined the terms of the Senkaku Islands, coupled with recourse to relevant acts and behaviour of the interested parties.

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35 Article 3 of the Agreement on Fisheries between Japan and the People's Republic of China provides that "*Each Contracting Party shall determine each year, taking into account the situation of resources in its exclusive economic zone, its capacity to harvest, the traditional fishing activities, the implementation of the mutual permission of fishing and other related factors, such operational conditions for the nationals and fishing vessels of the other Contracting Party fishing within its exclusive economic zone as the species which maybe be caught, quotas of catch and the area in which the fishing operation is permitted ...*"
and Article 11, "*1. Both Contracting Parties shall, for the purpose of achieving the objectives of this Agreement, establish the Japan-China Joint Committee on Fisheries ...*" *See*, *supra*, note 33. *Also refer to* Articles 6-7 of the Agreement on Fisheries between Japan and the People's Republic of China. *Id.*; Pratt 1999: 102-3.

36 For a discourse on 'eurocentrism and the territorial acquisition in international law', *generally refer*, McHugo 2000; McWhinney 1987: 1-19.

The legal implication of the fact that China and Taiwan are not parties to the *San Francisco Peace Treaty* is crucial in this context.

The significance of subsequent acts and behaviour of the interested parties is dependent upon the determination of the applicable critical date, which is defined as "*the date by reference to which a territorial dispute must be deemed to have crystallized*",[37] since the outcome of this dispute will be fundamentally different depending on whether the critical date is January 1895, as claimed by Chinese side, when Japan incorporated Senkaku Islands into Japanese territory, or February 1971 in the case of Taiwan, or December 1971 in the case of China, when Japan made known its official standpoint with the signing of the *Okinawa Reversion Treaty*, as claimed by Japan.[38] Additionally, the legal implication of China's/Taiwan's significant inaction over the Senkaku Islands during the material periods beyond the Japanese colonisation of Taiwan from 1895 up until 1969 when the existence of oil was prospected, need to be evaluated.

3.1 The Respective Claims to Sovereignty over the Senkaku Islands

3.1.1 The Claims of Japan to the Senkaku Islands

From a Japanese perspective,[39] the Senkaku Islands were first discovered by Japan in 1884. After 1885 the Japanese Government carried out a series of careful on-the-spot surveys of the Senkaku Islands through the offices of the Okinawa Prefectural Authorities and by other means. Having thus carefully ascertained that the islands were not only uninhabited but also showed no trace of control by China (the then Qing Dynasty), the Japanese Government took a Cabinet Decision on 14 January 1895, to set up posts on the Senkaku Islands to manifest Japan's territorial sovereignty, and thereby formally incorporated the islands into Okinawa Prefecture.

Japan has claimed that a Japanese national, named Koga Tatsujiro, leased the Senkaku Islands from the Japanese Government in 1896 for a period of 30 years, and that he later purchased the islands from the Japanese Government in 1930 and that his son, Koga Yoshitsugu, is the subsequent owner.[40] Japan has further claimed that since then the Senkaku Islands have been consistently a part of Japan's territory of Nansei Shoto. Consequently, these islands are not included in the islands of Formosa and the Pescadores, which were ceded to Japan under Article 2 of the *Shimonoseki Treaty* which entered into force in May, 1895, and therefore, the Senkaku Islands were not renounced by Japan under Article 2 of the *San Francisco Peace Treaty* but were placed under the administration of the United States together with other islands of Nansei Shoto in accordance with the provisions of Article 3. The administration of the Senkaku Islands and the other islands of Nansei Shoto was returned to Japan under the *Okinawa Reversion Treaty* signed on 17 June 1971. For Japan, all these facts testify, in the clearest possible manner, to the status of the Senkaku Islands as Japanese territory.

For a long time following the entry into force of the *San Francisco Peace Treaty* China/Taiwan raised no objection to the fact that the Senkaku Islands were included in the area placed under US administration in accordance with the provisions of Article 3 of the

37 Lauterpacht 1958: 242.
38 Matsui 1997: 25; Schachte 1997: 72-3.
39 USDOS 1972c; USDOS 1972d. *See generally*, Matsui 1997: 32-45.
40 USDOS 1970a.

treaty, and USCAP No. 27. In fact, neither China nor Taiwan had taken up the question of sovereignty over the islands until the latter half of 1970 when evidence relating to the existence of oil resources deposited in the East China Sea surfaced. All this clearly indicates that China/Taiwan had not regarded the Senkaku Islands as a part of Taiwan. Thus, for Japan, none of the alleged historical, geographical and geological arguments set forth by China/Taiwan are acceptable as valid under international law to substantiate China's territorial claim over the Senkaku Islands.[41]

Further support for Japan's claim is the fact[42] that in the *World Atlas*, Volume 1, East Asia Nations, 1st edition, published in October 1965, by the National Defense Research Academy and the China Geological Research Institute of Taiwan, and in the *People's Middle School Geography Text-Book*, 1st edition published in January, 1970, which is Taiwan's state-prescribed text-book, the Senkaku Islands are clearly treated as Japanese territory.[43] Furthermore, the *World Atlas* published in November 1958, by the Map Publishing Company of Beijing, also treats the Senkaku Islands as a Japanese territory.[44]

3.1.2 The Claims of China/Taiwan to the Senkaku Islands

A Japanese Prime Minister, Yoshida, once said that opening the question of sovereignty over the Senkaku Islands also opened the question of which "*authority*" to deal with and which is the "*real*" Chinese government.[45] Another Japanese Prime Minister, Sato, also noted that if Taiwan were the only other claimant to the Senkaku Islands, the problem might have been manageable via direct negotiations, but that China's voicing of a strong claim had complicated the matter considerably.[46] Although China and Taiwan present separate claims over the Senkaku Islands, their claims are basically very similar, deriving, as they do, from their common historical background, and, in particular, China's 'One China Policy'. As a latecomer to the dispute, China supports Taiwan's position, arguing that since Taiwan is a province of China therefore the Senkaku Islands belong to China, the sole legitimate government of China.[47] In other words, notwithstanding China and Taiwan's fierce confrontation with each other, they have consistently made the same assertions on the question of the scope of Chinese territory, derived from their shared past.[48]

In response to a question at the opening of the 47th session of Legislative Yuan on 23 February 1971, Taiwanese Foreign Minister Wei Tao-Ming claimed, for the first time in public, Taiwanese sovereignty over the Senkaku Islands. Wei said:

> *Regarding sovereign rights on Tiao-yu-tai islets, we disagree with* [the] *Japanese Government in* [the] *latter's claim that they* [are] *part of Japanese Nansei Gunto. Our disagreement* [is that] *based on ground that from historical, geographical and usage viewpoints, these islets should belong to Taiwan. Our views and position on this issue have been repeatedly communicated to* [the] *Japanese* [Government]. *What is involved in case of the Tiao-yu-tai islets is sovereign rights and we shall*

41 *See*, USDOS 1972e.
42 USDOS 1972b; *See also*, Suganuma 2000: 125-6.
43 The above-mentioned World Atlas and textbook were recalled since 1971, and a revised edition, which treated the Senkaku Islands as territory of Taiwan, has been issued. *See*, Suganuma 2000: 126.
44 USDOS 1972b; *See also*, Suganuma 2000: 126-7.
45 USDOS 1971c.
46 USDOS 1972f.
47 *See*, Choy 1997: 8.
48 USDOS 1970b.

> *not yield even inch of land or piece of rock.* [Our] *Government will not waver in its determination on this matter. As to* [the] *exploration and exploitation of the continental shelf in this maritime area, the natural boundary of our continental shelf, according to existing principles of international law and convention on continental shelf, should be Okinawa Trough. Any exposed islets or rocks within this area cannot be used as baseline for establishing rights of exploration. We, therefore, have full and unrestricted rights in* [the] *exploration and exploitation of continental shelf in this area. ...*[49]

In the meantime, China broke its silence on the Senkaku Islands, as an unequivocal *People's Daily* commentary (29 December 1970) warned the United States and Japan to cease oil survey operations in the shallow waters along the mainland coast and in the seabed around Taiwan and the islands appertaining thereto.[50] Among those islands specifically cited in this category as China's sacred territory are the Senkaku Islands, where US oil companies under the terms of a contract with the Chinese Petroleum Company in Taiwan had been conducting explorations for the past several months. Explicitly terming these operations an encroachment on Chinese sovereignty, the *People's Daily* quoted Mao Zedong in assuring that the Chinese people would defend their territory and sovereignty and absolutely would not permit encroachment by foreign governments.[51]

The United States and Japanese legislative action on the *Okinawa Reversion Treaty* further prompted China to issue its most authoritative and detailed pronouncement on the Senkaku Islands question. This was contained in a Foreign Ministry statement of 30 December 1971, which was released together with a supplementary *New China News Agency* ('NCNA') article. Both pieces detailed China's historical claims to the Senkaku Islands, adducing a 1556 Ming Dynasty military appointment, various Sino-Japanese Exchanges in the Ming and Qing Dynasties and an 1879 negotiation in which both sides reportedly agreed that the Ryukyu Islands consisted of thirty-six islands which do not include the Senkaku Islands.[52] The NCNA article reiterated Chinese attacks on Japan-Taiwan plots to shelve the dispute over the Senkaku Islands in order to facilitate "*plundering*" underwater oil resources around the islands. The statement hinted that recovery of the Senkaku Islands would be an adjunct of eventual Chinese recovery of Taiwan. This was implied by the order in which the two goals were stipulated at the end of the Foreign Ministry statement and by its characterisation of the islands as "*appertaining to Taiwan.*"[53]

The Chinese view is that China discovered the Senkaku Islands in 1372, and since then the Chinese people have been closely linked to the islands. In terms of usage, the areas surrounding the Senkaku Islands had been used as navigational aids, and they had been repeatedly referred to as part of Chinese territory since 1534.[54] In the series of logbooks of the Ming and Qing Dynasties, the names of Tiaoyutai, Huangweiyu, and Chihweiyu continued to appear as the missions to the Ryukyu Islands recorded them. These logbooks described the

49 USDOS 1971d.
50 USDOS 1970c.
51 *Id*.
52 USDOS 1972g; *See also*, Li 1975: 152.
53 *Id*.
54 Suganuma 2000: 45-58, 68-84.

Chihweiyu as the island marking the boundary of the Ryukyu Islands, the implication being that these islands did not belong to the Ryukyu Islands.[55]

In addition to evidence of Chinese imperial envoys' use of the Senkaku Islands as navigational aids since 1372, and specifically mentioning them in Chinese navigational records, China/Taiwan has further produced the following historical evidence: Chinese fishermen's storm shelters and operational bases, and the collection of medicinal herbs by Chinese pharmacists;[56] the incorporation of Senkaku Islands into the Chinese coastal defence system during the 16th century;[57] and the Chinese Empress' award of parts of the Senkaku Islands to a Chinese herbalist for collecting medicinal herbs.[58]

As to the Japanese claim of the Senkaku Islands in 1895, China/Taiwan has responded as follows: first, reference to these islands never appeared in Japanese historical texts or government documents before 1884, and, in any case, that year only marks the first "*discovery*" of the islands by a Japanese, who had already been preceded by numerous other Chinese "*discoverers*";[59] second, the Japanese Government did not include the Senkaku Islands in the Okinawa Prefecture prior to 1894, and that the said inclusion occurred only in consequence of China's cession of Taiwan and the Pescadores to Japan after the Sino-Japanese War;[60] third, after the Prefect of Okinawa learned of the 1884 "*discovery*", he applied in the following year to the Japanese Government for permission to claim these islands. The Japanese Government kept postponing the issue and it was only in 1895, when Japan's victory in the Sino-Japanese War was manifested, that the application was finally accepted in a Cabinet meeting of the Japanese Government;[61] and fourth, in the negotiations with China over the Ryukyu Islands after the Sino-Japanese War, the Senkaku Islands were not mentioned at all in a partition plan suggested by US ex-President Grant.[62]

China/Taiwan has further claimed that: in an *Atlas and Dictionary of Place Names in Japanese Territory* published by the Geographical Society of Japan in 1939, the Senkaku Islands cannot be found;[63] in atlases published by other countries, the Chinese name for these islands – Tiao-yu-tai – was used consistently until after the World War II, when the invention "*Senkaku Gunto*" began to appear;[64] and, the lease in 1896 and subsequent purchase in 1930 of the Senkaku Islands by the Koga family were merely domestic arrangements made by the Japanese Government which can not in any way alter the legal status of these islands.[65]

In addition, China/Taiwan has maintained that the geographical structure of the Senkaku Islands should exclude them from being part of the Ryukyu Islands due to facts such as the following: the Senkaku Islands do not form part of the Ryukyu chain, but rather mark the outermost limit of the continental shelf extending from mainland China. It lies 161km away from the Yaeyama-Miyako group, and about 386km from Okinawa Gunto, and is separated

55 *Id*.
56 Cheng 1973-74: 257-8.
57 Suganuma 2000: 61-8.
58 *Id*., pp.86-7, pp.104-6.
59 *Id*., pp.96-100, pp.106-8.
60 Taiwanese Embassy in DC 1971.
61 *Id*.; Suganuma 2000: 96-9.
62 Braibanti 1954; Treat 1932: 101-3.
63 Suganuma 2000: 129; *See also*, *id.*, pp.127-9 for further examples.
64 E.g., The Andreeshandatlas (4th ed, Germany)(1900): 140; 24 The Encyclopaedia Brittanica (1940): 69.
65 USDOS 1970a.

from these other island groups by a trench over 2,000 metres deep; the flow of the current in this area being northeasterly, it is much easier for Taiwan fishermen going with the current to reach the Senkaku Islands than it would have been for Ryukyu fishermen, who would have to go across the current. As a result, the fishing grounds around the Senkaku Islands had been monopolised by Taiwan fishermen for centuries; and, the geological structure of the Senkaku Islands is similar to that of the other islets appertaining or belonging to Taiwan.[66]

3.1.3 'Prior Discovery and Occupation' of Uninhabited Islands under International Law

A fundamental legal issue with respect to the territorial dispute over the Senkaku Islands is the clarification of who first discovered and occupied the Senkaku Islands. Subsequent questions, such as whether they were *terra nullius* when Japan incorporated the islands in January 1895, or whether, as a part of Taiwan, the Senkaku Islands belonged to Japan when China ceded Taiwan to Japan under the *Shimonoseki Treaty* in May 1895, substantially depend on an evaluation of Chinese claims based on prior discovery and occupation.

The general understanding of what constitutes a valid claim to territory, in particular in the case of uninhabited territories, including islands, based on discovery and occupation, has been established through notable decisions and awards by international judicial and arbitral bodies. In the *Clipperton Island Arbitration,*[67] involving the sovereignty claims of France and Mexico over an uninhabited atoll located off the coast of Mexico, the Permanent Court of Arbitration (hereinafter 'PCA') concluded that in some instances, where the territory claimed is completely uninhabited, the requirement of effective occupation may be unnecessary.[68] In awarding the island to France, the PCA stated that the French acts had been sufficient to establish sovereignty over the island, despite its relatively minimal acts of effective occupation and the absence of any 'positive and apparent act of sovereignty' on the part of France.[69] The arbitral body also stated that Spain's discovery of the island had not been proven and that Mexico had not manifested its sovereign right over the island.[70]

In awarding the islands of Meanguera and Meanguerita to El Salvador in the *El Salvador v. Honduras Case*[71] in connection with the dispute over the islands located in the Gulf of Fonseca, the International Court of Justice (hereinafter 'ICJ') reviewed both documentary and testimonial evidence regarding effective administration and control by El Salvador over Meanguera, and interpreted the relatively minimal conducts of Honduras as amounting to a form of tacit consent to the situation.[72] The ICJ also characterised Meanguerita as a dependency of Meanguera[73] due to the smallness of the island, its proximity to the larger island, and the fact that it was uninhabited.

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66 Taiwanese Embassy in DC, 1971.

67 *Clipperton Island Arbitration* (Fr. v. Mex.), 2 R.I.A.A. 1105 (1931), *reprinted* in 26 *Am. J. Int'l L.* 390 (Supp. 1932).

68 *Id*., p.394 .

69 *Id*., pp.393-4.

70 *Id.*, pp.392-3.

71 *Case concerning the Land, Island and Maritime Frontier Dispute* (El Salvador v. Honduras: Nicaragua intervening), 1992 I.C.J. 351 (Sept. 11) [hereinafter '*El Salvador v. Honduras Case*'] This case involved mainly three issues: the delimitation of six sectors of the international land frontier between the two countries, the legal status of islands in the Gulf of Fonseca, and the legal status of the related maritime spaces within and outside the Gulf of Fonseca. *See*, *id*., pp.351-3.

72 *Id.*, pp.570-9.

73 *Id.*, p.570. This is similar, in part, to the reasoning in the *Minquiers and Ecrehos Case*, where it was stated that "*the occupation of the principal islands of an archipelago must also be deemed to include the occupation of islets and rocks in the same archipelago, which have not been actually occupied by*

The view that territorial sovereignty would be displayed in different forms according to the character of the territory in question[74] has also appeared in other notable decisions and awards. The award in the *Islands of Palmas Arbitration*[75] acknowledges different forms of displays of territorial sovereignty according to conditions of time and place; the infeasibility of the exercise of sovereignty at every time on every place of a territory; and the fact that compatibility, intermittence and discontinuity with the maintenance of sovereignty depends on whether the regions involved are inhabited or uninhabited.[76] In the *Eastern Greenland Case*, it was held that the character of the territory in question must be taken into account when assessing whether the exercise of control is sufficient. The inhospitable and inaccessible nature of the uncolonised parts of Greenland made it unreasonable to look for evidence of continuous or intensive exercise of authority.[77] In the case of the *Western Sahara,*[78] the ICJ stated that even an insignificant display of sovereignty could establish title to unpopulated or barely inhabited areas.[79]

In the recent *Eritrea-Yemen Arbitration*, the tribunal, in its award, expressly stipulated the general requirement of the acquisition of territory in modern international law, as "*an intentional display of power and authority over the territory, by the exercise of jurisdiction and state functions, on a continuous and peaceful basis*."[80] It further declared that "*the latter two criteria are tempered to suit the nature of the territory and the size of its population, if any.*"[81] In order to determine the exercise of sovereignty over the islands, the tribunal considered evidence of activities on the islands as well as the surrounding water.[82] There was little evidence on either side of actual or persistent activities on and around these islands, but the tribunal held that in view of their isolated location and inhospitable character, probably

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another State." *See*, *Minquiers and Ecrehos Case* (Fr. v. U.K.), 1953 I.C.J. 47 (Nov. 17), p.99 (Levi Carneiro, J., sep. op.). *See also*, *Eritrea-Yemen Arbitration, Phase I: Territorial Sovereignty and Scope of Dispute* (1998), *available* at http://www.pca-cpa.org/ER-YEAwardTOC.htm (last visited Oct. 20, 2000) [hereinafter '*Eritrea-Yemen Arbitration*'], paras.460-6 (natural and physical unity).

74 Given that the extent of the "*effectiveness required varies with circumstances, such as the size of the territory, the extent to which it is inhabited and, as in deserts or polar regions, climatic conditions*", the degree of effective exercise of authority is directly dependent on the ecological, climatic, geographic and other natural conditions of the claimed territory. *See*, Schwarzenberger & Brown 1976: 97; Schwarzenberger 1957. The need for differentiating unpopulated or barely inhabitable territory from populated territory in assessing the exercise of sovereignty has been widely recognised by international legal scholars and international tribunals. *Generally refer* to Malanczuk 1997: 149; O'Connell 1970: 411; Shaw 1986: 411; Johnson 1955; *Legal Status of Eastern Greenland Case* (Den. v. Nor.), 1933 P.C.I.J. (Ser. A/B) No. 53 (Apr. 5) [hereinafter '*Eastern Greenland Case*']: 46; *Advisory Opinion on the Status of Western Sahara*, 1975 I.C.J. 12 (Oct. 16) [hereinafter '*Western Sahara*']: 43; *Eritrea-Yemen Arbitration*, *id.*, paras.452, 523; *Case concerning Kasikili/Sedudu Island* (Bots. v. Namib.)(1999), *available* at http://www.icj-cij.org/icjwww/idocket/ibona/ibonaJudgments/ibona_ijudgment_toc.htm (last visited Oct. 20, 2000) [hereinafter '*Kasikili/Sedudu Island Case*'], Rezek, J., diss. op., paras.13-5

75 *Islands of Palmas Arbitration* (US v. Neth.), 2 R.I.A.A. 829 (1928).

76 *Id.*, pp.839-40, p.867.

77 *Eastern Greenland Case*, *supra*, note 74: 50-1.

78 For further reference on this case, *see*, Castellino 1999; Franck 1976; Shaw 1978.

79 *Western Sahara*, *supra*, note 74: 43.

80 *Eritrea-Yemen Arbitration*, *supra*, note 73, para.239 (relying on, in particular, *the Islands of Palmas Arbitration* and *Eastern Greenland Case*).

81 *Id*.

82 The evidence includes: landing parties on the Islands; the establishment of military posts on the Islands; the construction and maintenance of facilities on the Islands; the licensing of activities on the land of the Islands; the exercise of criminal or civil jurisdiction in respect of happenings on the Islands; the construction or maintenance of lighthouses; the granting of oil concessions; and limited life and settlement on the Islands. *Id.*, para.318.

little evidence would suffice.[83] Thus, in awarding major islands to Yemen, including, notably, the Zuqar-Hanish group, the tribunal weighed the marginally relative merits of the evidence produced by both claimants as to the exercise of functions of state and governmental authority.[84]

3.1.4 Appraisal

Modern Chinese history shows that there is no essential difference between Chinese legal concepts or a legal regime and the general rule of international law with regard to the modes of acquiring and losing state territory.[85] It is debatable, however, whether claims of sovereignty based on certain activities during the material times starting from the 14th century in East Asia can be judged by norms developed in the European/Western dominated arena. This is especially so given that the general understanding of what constitutes a valid claim to territory has been established through notable decisions and awards by international judicial and arbitral bodies many centuries after the 14th and mainly from the early 20th century. Accordingly, evaluating Chinese claims of sovereignty over the Senkaku Islands based on prior discovery and occupation would depend, as pointed out earlier, on whether there existed at the material times legal concepts or a legal regime on territorial acquisition in China, and implications of such concepts/regime for the resolution of the disputes over the Senkaku Islands in contemporary times. It is also related to the issue of whether January 1895, when Japan incorporated the Senkaku Islands into Japanese territory, is the critical date, as claimed by the Chinese side.

From the Chinese point of view, the Western practice of putting everything in black and white is not all-important.[86] The Chinese view of sovereignty is, as Suganuma opined, that "[b]*ased on the long history of Chinese administrative geography, the Chinese had their own way to demarcate legitimate political space and marine space in the East China Sea. In particular, the Chinese created the Sinitic world order by networking their investiture-tributary system to demonstrate the Chinese way of hegemony during traditional periods.*"[87] To them, history, geography, and actual circumstances have combined to make their ownership of the islands a reality; likewise, for centuries Chinese fishermen had frequented these islands uninterrupted and unchallenged by any other countries.

The detailed evidence produced by the Chinese side, as set out above, coupled with the fact that the islands in question are remote, isolated, and uninhabited, place Taiwan/China in a stronger position than Japan, at least, up until January 1895, when Japan incorporated the Senkaku Islands into Japanese territory. This is the more so given that Japan has produced virtually no evidence of its sovereign activities over the Senkaku Islands, despite the fact that the probative value of the submitted Chinese historical evidence can also be questioned given its nature.

83 *Id.*, para.523.
84 *Id.*, paras.491, 509.
85 Tung 1940: 13.
86 *See*, Braibanti 1954: 975-81, for another example of the difference between traditional Chinese diplomacy and the political and juridical concepts of Western international relations.
87 Suganuma 2000: 17.

3.2 Interpretation of the Territorial Clauses of the *San Francisco Peace Treaty* regarding the Senkaku Islands

3.2.1 Territorial Arrangements for the Senkaku Islands under the San Francisco Peace Treaty

The term Senkaku Islands, or any Chinese or western name corresponding to the name conventionally used, did not appear specifically in the territorial clauses of the *San Francisco Peace Treaty*. Further, the Senkaku Islands were not mentioned specifically in any international agreement, and apparently were ignored internationally until the awakening of interests in oil explorations of the continental shelf in 1968. However, the drafts of the *San Francisco Peace Treaty* could shed some light on the issue. Of relevance to the Senkaku Islands, the territorial provisions in the *San Francisco Peace Treaty* can be categorised into two groups: one concerns the territorial limits of Japan, and the territorial disposition of Taiwan; the other relates to the UN trusteeship over the Senkaku Islands. For this purpose, this research uses the following drafts: 19 March 1947;[88] 5 August 1947;[89] 8 January 1948;[90] 13 October 1949;[91] 2 November 1949;[92] 8 December 1949;[93] 19 December 1949;[94] 29 December 1949;[95] 3 January 1950;[96] 7 August 1950;[97] 11 September 1950;[98] 12 March 1951;[99] 17 March 1951;[100] 7 April 1951;[101] 3 May 1951;[102] 14 June 1951;[103] 3 July 1951;[104] 20 July 1951;[105] and 13 August 1951.[106]

For the interpretation of the territorial clauses of the *San Francisco Peace Treaty*, some basic rules of treaty interpretation as provided for in the *Vienna Convention on the Law of Treaties*,[107] must be ascertained and applied. These include the rules on interpretation of treaties, evidential value of internal/diplomatic memoranda, and application of the treaties to third parties. From these, for convenience, only the issue of 'evidential value of internal/diplomatic memoranda' is analysed in detail below.

88 Acheson 1947.
89 USDOS 1947.
90 USDOS 1948.
91 USDOS 1949a.
92 USDOS 1949b.
93 USDOS 1949c.
94 USDOS 1949d.
95 USDOS 1949e.
96 USDOS 1950b.
97 USDOS 1950c.
98 USDOS 1950d.
99 USDOS 1951a.
100 USDOS 1951b.
101 USDOS 1951c.
102 USDOS 1951d.
103 USDOS 1951e.
104 USDOS 1951f.
105 USDOS 1951g.
106 Japanese Peace Conference, San Francisco, California, September, 1951, "*Treaty of Peace with Japan*", 1951/8/13 [USNARA/Doc. No.: N/A] (on file with author).
107 1155 U.N.T.S. 331 [hereinafter '*Vienna Convention'*]. It entered into force on January 27, 1980. For further information on the rule for interpretation of treaties, *see*, Aust 2000: 184-206; McNair 1961: 364-473; Rosenne 1970: 214-9; Sinclair 1973: 114-58; Thirlway 1991; Watts 1999: 681-97.

3.2.2 Evidential Value of Internal/Diplomatic Memoranda[108]

In the *Gulf of Maine* Case the ICJ denied the evidential value of the so-called 'Hoffman letter',[109] questioning the status of its author.[110] Similarly, the arbitral tribunal in the *Eritrea-Yemen Arbitration* further doubted the evidential value of internal/diplomatic memoranda in the following terms:

> *The former interest in these islands of Great Britain, Italy and to a lesser extent of France and the Netherlands, is an important element of the historical materials presented to the Court by the Parties, not least because they have had access to the archives of the time, and especially to early papers of the British Governments of the time. Much of this material is interesting and helpful. One general caveat needs, however, to be made. Some of this material is in the form of internal memoranda, from within the archives of the British Foreign Office, as it then was, and also sometimes of the Italian Foreign Office. The Tribunal has been mindful that these internal memoranda do not necessarily represent the view or policy of any government, and may be no more than the personal view that one civil servant felt moved to express to another particular civil servant at that moment: it is not always easy to disentangle the personality elements from what were, after all, internal, private and confidential memoranda at the time they were made.*[111]

This stern warning against blanket recognition of internal/diplomatic memoranda as evidence, however, was not maintained in a consistent manner, as the tribunal itself reached the finding of Yemen's assertions of the exercise of the functions of State authority with respect to the Zuqar-Hanish group upon the weighing of the evidence, including "*the British Foreign Office papers submitted in evidence by the Parties that these islands would ultimately return to Arab rule*."[112]

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108 This section has benefited from the response of Professor M.H. Mendelson, University College London, to the author's e-mail inquiry on Jan. 17, 2000, through the int-boundaries@mailbase.ac.uk of the IBRU. The author inquired whether para.94 of the *Eritrea-Yemen Arbitration* (*see*, *supra*, note 73) can be understood as a general practice of international judicial/arbitral bodies, and further inquired whether any case law on territorial disputes in which diplomatic/internal memoranda played a key role. Professor Mendelson questioned the suitability of confining this inquiry only to territorial disputes, since it may well be found that "*internal memoranda play an important part in other areas (e.g. international criminal responsibility, State responsibility, etc.). Prima facie,* [one cannot see] *anything unique about territorial disputes which would make precedents from other fields irrelevant*."

109 *Case concerning the Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Can. v. USA), 1984 I.C.J. 246, 307 (Oct. 12).

110 The ICJ declared that

> "[Mr. Hoffman] *was not authorized to commit the United States, only concerned the location of a median line; the use of a median line as a method of delimitation did not seem to be in issue, but there is nothing to show that that method had been adopted at government level. Mr. Hoffman … was acting within the limits of his technical responsibilities and did not seem aware that the question of principle which the subject of the correspondence might imply had not been settled, and that the technical arrangements he was to make with his Canadian correspondents should not prejudge his country's position in subsequent negotiations between governments. This situation, however, being a matter of United States internal administration, does not authorize Canada to rely on the contents of a letter from an official of the Bureau of Land Management of the Department of the Interior, which concerns a technical matter, as though it were an official declaration of the United States Government on that country's international maritime boundaries*." *Id.*, pp.307-8.

111 *Eritrea-Yemen Arbitration*, *supra*, note 73, para.94.

112 *Id.*, para.508. *See also*, para.503 for the case of the 'Eritrean Top Secret internal report'.

Likewise, in the very recent decision in *Qatar v. Bahrain,*[113] the ICJ found that Qatar has sovereignty over Janan Island including Hadd Janan, on the basis of the decision taken by the British Government in 1939 on the question of sovereignty over Janan Island, as interpreted in 1947.[114] Though in that decision the British Government concluded that the Hawar Islands belonged to Bahrain and not to Qatar, no mention was made of Janan Island, nor was it specified what was to be understood by the expression 'Hawar Islands'.[115] Qatar, for its part, referred to the letters dated 23 December 1947, drafted in identical terms and sent by the British Political Agent in Bahrain to the Rulers of Qatar and Bahrain, in which the sea-bed between the two States was delimited by the British Government.[116] In those letters Janan Island was not regarded as being included in the islands of the Hawar group.[117] Allied to the decision taken by the British Government in 1939, the ICJ considers that the British Government, in thus proceeding, provided an authoritative interpretation of the 1939 decision and of the situation resulting from it.[118]

In an analogous context, this point is made in the final report of the International Law Association Committee on Formation of Customary General International Law under the sub-heading of "*acts do not count as practice if they are not public*", namely, that purely internal memoranda which are not made public probably do not count as expressions of States' *opinio juris* or position for the purpose of the formation of customary rules.[119] However, this report also clarified:

> [An] *internal memorandum which is not communicated to others is not a claim or a response. (It is otherwise if the State publicizes the legal analysis in support of its position: it then becomes part of its claim.) If the memorandum is only afterwards made public (e.g. through the operation of laws opening national archives to the public after a certain period of time), it may be evidence of the State's subjective attitude to the issue, but is not an instance of the "objective element"*.[120]

Therefore, it is acknowledged that the evidential value of an internal/diplomatic memorandum would not be whether a case would have been decided differently without that piece of evidence, but whether such materials would be significantly important in explaining the motivation of actors and interested parties. If the latter is the case, the major consideration is whether the memorandum is confidential or its contents have been made public, and, if the latter, the context in which the contents of the memorandum have been publicised. Additionally, the following issues should be taken into consideration: first, the status of the

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113 *Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahrain)(2001), *available* at: http://www.icj-cij.org/icjwww/idocket/iqb/iqbjudgments/ijudgment_20010316/iqb_ijudgment_20010316.htm (last visited Mar. 1, 2002).

114 *Id.*, para.165.

115 *Id.*, para.157.

116 *Id.*, para.61.

117 *Id.*, para.160.

118 *Id.*, para.164.

119 International Law Association Committee on Formation of Customary General International Law, "*Statement of Principles Applicable to the Formation of General Customary International Law*", in *Report of the 69th Conference* (London, 2000): 15 [hereinafter 'the ILA Report'].

120 *Id.* For further details on the 'subjective' element in customary international law, *see*, *id.*, pp.29-42; Mendelson 1995: 177-208; Mendelson 1998. And for the 'objective' element (State practice), *see*, the ILA Report: 13-29; Mendelson 1998: 197-244.

person who prepared the memorandum; second, the purpose for which the memorandum was prepared; third, whether the memorandum was an authoritative enunciation of the position of a given State on a particular issue; fourth, whether the State in question expressed a position in public that was different from the contents of the memorandum; and finally, the nature of a case could determine the degree to which internal memorandum could be relied upon.

3.2.3. The Territorial Limits of Japan and Territorial Disposition of Taiwan, and their Implications for the Senkaku Islands

In the *San Francisco Peace Treaty*, the provision on the territorial limits of Japan, which confined Japanese territory to the four principal Japanese islands of Honshu, Kyushu, Shikoku and Hokkaido and all minor islands, was consistently maintained throughout the earlier drafts with slight modifications. The provision, which defined the territorial limits of Japan in positive style was, however, discontinued, and then, the pattern, which manifested territorial disposition of the specific territories that Japan should renounce, was further emphasised.

The distinctive draft in the first category on the territorial limits of Japan, which had certain implications on territorial disposition over the Senkaku Islands, is the first available draft of the *San Francisco Peace Treaty*, dated 19 March 1947,[121] which provided that: "*The territorial limits of Japan shall be those existing on January 1, 1894, subject to the modifications set forth in Articles 2, 3…. As such these limits shall include the four principal islands of Honshu, Kyushu, Shikoku and Hokkaido and all minor offshore islands, excluding the Kurile Islands, but including the Ryukyu Islands forming part of Kagoshima Prefecture…*"[122]

As this draft stated that the "*territorial limits of Japan shall be those existing on January 1, 1894*", and Japan claimed the Senkaku Islands by the Cabinet Decision on January 14, 1895, the drafters of the *San Francisco Peace Treaty* did not envisaged Japan, at least, as the rightful owner of the Senkaku Islands. The specific mention of the date "*January 1, 1894*", however, did not appear in subsequent drafts. This clause further provided inclusion of the Ryukyu Islands forming part of Kagoshima Prefecture, not Okinawa Prefecture, into Japanese territory.

Meanwhile, the drafts in the second category on the territorial disposition of Taiwan had provided that "*Japan renounces all right, title and claim to Formosa and the Pescadores*", with some modifications throughout the drafts. The basic format among others appeared in the drafts dated 5 August 1947, and 8 January 1948, which provided:

> *Japan hereby cedes to China in full sovereignty the island of Taiwan (Formosa) and adjacent minor islands, including Agincourt (Hoka Sho), Crag (Menka Sho), Pinnacle (Kahei Sho), Samasana (Kasho To), Botel Tobago (Koto Sho), Little Botel Tobago (Shokoto Sho), Vele Reti Rocks (Shichisei Seki), and Lambay (Ryukyu Sho); together with the Pescadores Islands (Hoko Shoto); and all other islands to which Japan had acquired title within a line beginning at a point in 26° N. latitude, 121° E. longitude and proceeding due east to 122° 30′ E. longitude, thence due south to 21° 30′ N. latitude, thence due west through the Bashi Channel to 119° E. longitude, thence due north to a point in 24° N. latitude, thence northeasterly to the point of beginning*.[123]

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121 Acheson 1947.

122 *Id.*, Chapter I. Territorial Clauses, Article 1.

123 USDOS 1947, Article 2(1); Article 2 in the draft dated January 8, 1948.

By mentioning the specific islands Japan should cede to China, and delineating Taiwan through latitude and longitude, the drafters of the *San Francisco Peace Treaty* did not include the Senkaku Islands as Chinese/Taiwanese territory. In other words, putting aside the question whether the drafters designated the Senkaku Islands as parts of the Ryukyu Islands, it is manifested that the Senkaku Islands were not envisaged as Chinese/Taiwanese territory.

3.2.4 The United Nations' Trusteeship over the Senkaku Islands, and its Implications for the Senkaku Islands

In the *San Francisco Peace Treaty*, the provision on the Senkaku Islands dealt more with the introduction of UN trusteeship over the islands than with their territorial disposition. The first available draft of the *San Francisco Peace Treaty*, dated 19 March 1947, provided that "*Japan hereby renounces all rights and titles to the Ryukyu Islands forming part of Okinawa Prefecture, and to Daito and Rasa Islands*."[124] By this draft, Japan also renounced the Senkaku Islands since the Senkaku Islands are part of the Ryukyu Islands, in particular Okinawa Prefecture.

Japanese renunciation of the Ryukyu Islands south of 29º N. latitude, which is manifestly inclusive of the currently disputed Senkaku Islands, was provided within the envisaged system of the UN trusteeship in subsequent drafts, with some modifications. In particular, the drafts dated October 13, 1949, and November 2, 1949, provided that "*Japan hereby renounces all rights and titles to the Ryukyu Islands south of 29º N. latitude. The Allied and Associated Powers undertake to support an application by the United States for the placing of these islands under trusteeship, in association with Articles 77, 79, and 85 of the Charter of the United Nations, the trusteeship agreement to provide that the United States shall be the administering authority*."[125]

The draft dated 8 December 1949, provided that "*Japan hereby cedes and renounces all territory and all mandate and concession rights, titles and claims outside the territorial area described in Article 3, and accepts the disposition of these territories that has been made or that may be made by the parties concerned, or by the United Nations in accordance with the trusteeship provisions of Articles 77, 79, and 85 of the Charter of the United Nations*."[126] The Article 3 was the provision confining Japanese territory to the four principal Japanese islands of Honshu, Kyushu, Shikoku and Hokkaido and all minor islands. The draft dated December 29, 1949, also provided for Japanese renunciation of all rights and titles to the Ryukyu Islands south of 29º N. latitude, and placed them within the UN trusteeship with the United States as the sole administering authority.[127]

Subsequent drafts, from the one dated 19 December 1949, adopted a similar format, which envisaged UN trusteeship with the United States as the sole administering authority over the Ryukyu Islands south of 29º N. latitude, as it appeared, finally, in Article 3 of the *San Francisco Peace Treaty*. However, the other key element of this provision, which specifically provided that "*Japan hereby renounces all rights and titles to the Ryukyu Islands south of 29º N. latitude"* was not mentioned in the December 19, 1949 draft and other subsequent drafts, except the draft dated December 29, 1949.

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124 Acheson 1947, Article 7.
125 USDOS 1949a, Article 6. Article 8 in the draft dated November 2, 1949, *see*, USDOS 1949b.
126 USDOS 1949c, Article 4.
127 USDOS 1949e, Article 7.

3.2.5 Appraisal

With regard to the Senkaku Islands defined in the *San Francisco Peace Treaty*, the following points should be noted: first, as mentioned earlier, the term Senkaku Islands, or any Chinese or western name corresponding to the name conventionally used, did not appear specifically in the territorial clauses of the *San Francisco Peace Treaty*; second, the Senkaku Islands were not included as either Chinese/Taiwanese or Japanese territory by the drafters of the *San Francisco Peace Treaty*; third, Article 3 of the *San Francisco Peace Treaty* did not, to the point of specificity, define the territories that were placed within the area of the UN trusteeship with the United States as the sole administering authority, due to the fact that the boundaries of the Ryukyu Islands had never been legally defined before; and further, the precise demarcation and delineation of the area of the Ryukyu Islands have also been subjected to disputes between claimants and interested parties; and fourth, throughout the drafts, in particular in the earlier drafts, there are strong assumptions that Japan renounced all rights and titles to the Ryukyu Islands south of 29ºN. latitude, an area which includes the disputed Senkaku Islands.

3.3 The Implications of China's Failure to Claim the Senkaku Islands until 1970

3.3.1 China's Failure to Claim the Senkaku Islands until 1970

Interest in the Senkaku Islands was rekindled when the United Nations Economic Commission for Asia and the Far East (hereinafter 'ECAFE') suggested the possible existence of large hydrocarbon deposits in the waters off the Senkaku Islands in 1969. Since the end of World War II islands south of 29ºN. latitude had been placed under US military occupation in accordance with Article 3 of the *San Francisco Peace Treaty*, and the Senkaku Islands were included in the same area under US occupation.

Neither China nor Taiwan challenged the area under US military occupation. What is the legal implication of the Chinese/Taiwanese inaction over the Senkaku Islands during the material periods beyond the Japanese colonisation of Taiwan from 1895, up until 1969 when the existence of oil was unearthed? Can the Chinese/Taiwanese inaction be construed as acquiescence in the Senkaku Islands being considered as part of the Ryukyu Islands? In a statement dated 20 April 1971, a spokesman of the Taiwanese Foreign Minister, Yu-Sun Wei defended Taiwanese inaction over the Senkaku Islands, and further articulated the Taiwanese position on the Senkaku Islands issue as follows:

> *China's sovereign right over Tiaoyutai does not permit any doubt historically, geographically or legally…It should be explained that when the islets were placed under the US military control after World War II, the Chinese Government regarded this as a necessary measure based on the maintenance of regional security. China and the United States have reached an agreement on the demarcation of area of patrol*.[128]

The fact that Taiwan further allowed the Senkaku Islands to be included in the US Civil Administration of the Ryukyu Islands was also predicated on the imperatives of regional security.[129] Taiwan has also emphasised the fact that, by the time of the conclusion of the *San Francisco Peace Treaty*, communist threats in the western Pacific were apparent,[130] in

128 USDOS 1971e.
129 *See*, *supra*, notes 23-4.
130 *See*, Perkins 1962: 336.

consequence of which the interests of the United States and Taiwan were common insofar as communism was their mutual concern. In a sense, the entire eastern coastal seas of mainland China had been under the protection of the US Seventh Fleet and, for Taiwan, it did not matter that the Senkaku Islands were included in the US administrative area.

The US Department of State declared that the description contained in Article 3 of the *San Francisco Peace Treaty* was intended to include the Senkaku Islands. However, it is questionable whether that intention was clearly conveyed to the Chinese side, which would have been a necessary party to such territorial arrangements. Japan's assertion of "*residual sovereignty*" over the Ryukyu Islands is also debatable since that was not manifestly stated.

Taiwan's new interpretation of the status of the Senkaku Islands, however, differs from its attitude when the issue of Taiwanese fishermen's intrusions into the Senkaku Islands was raised with the United States in 1968.[131] Taiwan then accepted the legitimacy of the US representation over the Senkaku Islands and further implemented the following acts:[132] first, it advised that the Taiwan garrison command would continue to pursue the matter; second, it stated that the crew and owners of a fishing vessel convicted of intrusion into the Ryukyu Islands had been penalised by the Kaohsiung Fishermen's Association; third, it solicited US suggestions for ways of more effectively controlling intruders and tracing offenders; and fourth, reported that the Fisheries Bureau of Taiwan Provincial Government had been instructed to stop intrusions and had established penalties for violators.

In the meantime, Japan had taken various administrative and legislative acts over the Okinawa Prefecture, including the Senkaku Islands, from January 1895, when Japan incorporated the Senkaku Islands into Japanese territory. A series of official visits by police officers, county officers of the Yaeyama County, Okinawa Prefecture, and surveys by hydrographical and technical experts have also been relied upon as relevant evidence by Japan.[133]

3.3.2 'Abandonment or Dereliction' under International Law

Abandonment does not mean simple withdrawal or failure to station troops or effectuate settlements after discovery. Abandonment requires both the physical abandonment of possession and the loss of the *animus domini*.[134] Therefore, in order for a territory to constitute *terra nullius*, it must be one which either has never been discovered hitherto, or, after being discovered and titled, has been clearly abandoned by the prior discoverer. However, international law is unsettled as to what acts and circumstances suffice to imply an abandonment. As a result, unless a state explicitly renounces its desire to possess the territory, others have to infer the loss of *animus domini* from circumstances.[135]

A key issue is the determination of what constitutes lapse of time. Since the lapse of time implies a loss of *animus*, a withdrawal accompanied by an expressed intention to return later would not prevent an inference of abandonment if a sufficiently long period elapses without the state's return.[136] The length of time varies according to the circumstances, including: the

131 USDOS 1970d.
132 *Id.*
133 *See*, Matsui 1997: 38-9, for details of Japanese activities over the Senkaku Islands during the periods after Japanese incorporation of the Senkaku Islands. *See also*, Suganuma 2000: 116-23.
134 Lindley 1926: 48.
135 *Id*.
136 *Id.*, p.50.

urgency of the need for governmental control in the area; the degree of control exercised in the area by a rival state; the difficulty of the original possessor in regaining possession or of a rival state in effectively occupying the territory; and the relations that other states have with the area.[137]

A presumption against abandonment should assist a previously dispossessed state to assert its claim to title in the territory, once the abandoning state asserts its intention to repossess the territory. On the other hand, the rebuttal of the presumption, where the abandoning state clearly and unquestionably intends to abandon the territory, works against any claim to title in the territory by a previously dispossessed state. According to O'Connell:

> *The starting point of any analysis is a presumption against reversion to the status of terra nullius, a presumption not easily rebutted because territories without a sovereign are not only rare but a challenge to legal order. Where the intention to abandon territory is established and unquestionable then the presumption is rebutted, but there are few instances indeed where this is the case.*[138]

It is, therefore, submitted that the presumption will be rebutted only if all states that have legitimate claims to certain territory clearly and unquestionably intend to abandon the territory. At the time when a state with superior title intends to abandon territory, a dispossessed state will be able to establish that it has not effectively abandoned its rights to the territory, even though it may not have continuously asserted its continuing right to title in the territory. In the *Clipperton Island Arbitration*, it was held that France had no intention of abandon territory, despite a substantial lack of interest on its part in the territory.[139]

If then, a state abandons its sovereign title to territory, but the territory does not become *terra nullius*, because other states that have valid claims to title in such territory have not abandoned their claims, title must vest in the state that has the best relative claim to the territory. International law does not provide a strict hierarchy of claims to title in territory. Therefore it is certain that each case will have to be assessed on a case-by-case basis.

3.3.3 Appraisal

What is the legal implication of the Chinese/Taiwanese virtual inaction over the Senkaku Islands during the material periods, in particular between the conclusion of World War II and 1969 when the existence of oil surfaced? Further, what is the legal implication of the Chinese/Taiwanese failure to raise the Senkaku Islands issue during the whole period of the drafting and negotiating of the *San Francisco Peace Treaty*? Can it be adjudged as abandonment? In addition to the Chinese/Taiwanese vivid physical abandonment of possession, can the circumstances be sufficient to satisfy the other requirement of abandonment, which is the loss of the *animus domini*? Or, as Taiwan has maintained, can considerations of regional security at that period justify the failure of China/Taiwan to oppose the US military occupation of the Senkaku Islands?

The Chinese/Taiwanese virtual inaction over the Senkaku Islands during the material periods might have strong implications of abandonment, considering the following facts and assumptions: first, literally no actions/activities were taken by the Chinese/Taiwanese side at

137 *Id.*, pp.51-2.
138 O'Connell 1970: 444.
139 *Clipperton Island Arbitration*, *supra*, note 67: 393-4.

the material periods, in particular during the post-World War II era, including the period of the drafting of the *San Francisco Peace Treaty*; second, considerable Japanese activities over the Senkaku Islands, which had certain manifestations of the exercise of state sovereignty; and third, it appears that only the reports on the possible existence of substantial petroleum resources over the disputed area awakened, and further reminded, the Chinese/Taiwanese side of the existence of the Senkaku Islands. This is more so that Japanese activities over the Senkaku Islands were consistently maintained during the critical periods of the territorial arrangements in the post-World War II era.

3.4 Implications of the *Okinawa Reversion Treaty*

The *Okinawa Reversion Treaty* signed by the United States and Japan on June 17, 1971, which included the Senkaku Islands as part of Okinawa to be returned to Japan, brought the Senkaku Islands dispute back to limelight, with immediate challenges by both China and Taiwan. As to the definition of the term "*Nansei Shoto*", and the status of the Senkaku Islands, the US Department of State has consistently maintained the following positions: first, the term as used in Article 3 of the *San Francisco Peace Treaty* was intended to include the Senkaku Islands. Nansei Shoto, as used in the treaty, refers to all islands south of 29º N. latitude, under Japanese administration at end of World War II, that were not otherwise specifically referred to in the treaty;[140] second, under the treaty, the United States administered the Senkaku Islands as part of Ryukyu Islands, but considered that residual sovereignty over the Ryukyu Islands remained with Japan;[141] and third, though Japan would then have full right to her territories, the US Government considered that any conflicting claims to the Senkaku Islands were a matter for resolution by the parties concerned.[142]

This US interpretation of the status of the Senkaku Islands as part of Ryukyu Islands defined in Article 3 of the *San Francisco Peace Treaty* was also supported by a court decision in Hawaii relating to the question of residual Japanese sovereignty over the Ryukyu Islands. The court decision in question was handed down in the case of *The United States v. Ushi Shiroma* by the United States District Court, District of Hawaii, on 12 August 1954.[143] The concluding portion of the decision was given as below:

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140 USDOS 1972h.

141 USDOS 1970e.

142 USDOS 1972h.

143 The summary of this case is as follows: Ushi Shiroma was born in Okinawa of Okinawan parents in 1897. In 1913 he became a permanent resident of the Territory of Hawaii. He was never naturalized and in 1940 he registered as an alien under the Alien Registration Act. In 1954, however, he neglected to notify the Attorney General in writing of his current address and furnish such additional information as is by regulations required by the Attorney General. Since all aliens were and are required by law to furnish such information to the Attorney General within 30 days following January 1, a regulation which became effective in 1954, Ushi Shiroma was charged with a misdemeanour and brought to trial. At the trial, the defendant argued that since present sovereignty, as opposed to residual sovereignty, over Okinawa had passed to the United States as the result of the *San Francisco Peace Treaty*, he had therefore become an American national and was not required to register as an alien. The court held that although the United States had acquired and still retained what might be termed a "de facto sovereignty" over Okinawa, the Ryukyu Islands had not been ceded to the United States and Japan retained residual, that is, the traditional de jure sovereignty. Since a national of a country owes allegiance to the de jure sovereign, the court found that the defendant was not a national of the United States and was guilty of violating the federal regulation noted above. *See*, 123 F. Supp. 145.

> *Under Article 3 of the Treaty of Peace, Japan which previously had full sovereignty over Okinawa transferred a part of that sovereignty, while retaining the residue. That portion of the sovereignty which gives the United States 'the right to exercise all and any powers of administration, legislation and jurisdiction' under Article 3 may be labelled 'de facto sovereignty.' The residue or 'residual sovereignty' retained by Japan is the traditional 'de jure sovereignty.' What the situation will be when the United States, under Article 3, makes a proposal to the United Nations to place Okinawa under its trusteeship system and affirmative action is taken thereon is not presently material. ... Japan, and not the United States, having 'de jure sovereignty' over Okinawa since the ratification of the Treaty of Peace...*[144]

Therefore, the United States assumed administration of all the islands in the area stipulated in the *San Francisco Peace Treaty*, including the Senkaku Islands, without reference to sovereignty questions. The general assumption that they were part of the Ryukyu Islands was not publicly challenged by Taiwan until 1970. In sum, the United States had taken no position on sovereignty over the Senkaku Islands, stated that the United States returned them to Japanese administration with the rest of the Ryukyu Islands in 1972, and reiterated that "*any dispute over sovereignty should be settled by the parties themselves, or, if they wish, by third party adjudication*."[145]

Although the United States recognised the residual sovereignty of Japan over Nansei Shoto, including the Senkaku Islands, which the United States administered pursuant to Article 3 of *San Francisco Peace Treaty*, it was also the US position, however, that the treaty alone was not necessarily the final determinant of the sovereignty issue.[146] In other words, in the event a dispute over sovereignty over the Senkaku Islands arose, neither the *San Francisco Peace Treaty* nor the *Okinawa Reversion Treaty* would be dispositive of the claim, which would have to be resolved by the claimants or, if they choose, through third party adjudication, such as by the ICJ.[147]

Due to strong objections from Taiwan regarding the inclusion of the Senkaku Islands in the *Okinawa Reversion Treaty*,[148] Walter P. McConaughy, the US Ambassador to Taiwan, advised the Department of State in the following terms:

> [If] *we are not yet fully committed to inclusion of Senkakus in Agreement, we could strike a tremendous blow in a worthy cause here by announcing a deferment of decision on the question of transfer of administrative control of the Senkakus and separate it out from the Ryukyus Reversion Agreement. Such action could be explained on a basis of the undesirability of transferring control before negotiations between the rival claimants have been arranged, and would be bolstered by the undoubted fact that geographically and historically the Japanese*

144 *Id.*, p.149; USDOS 1958.
145 USDOS 1971f.
146 USDOS 1970f. *See also*, USDOS 1971g (it is the US position that neither the *San Francisco Peace Treaty* nor the *Okinawa Reversion Treaty* is necessarily the final determinant of sovereignty over the Senkaku Islands).
147 USDOS 1970g; USDOS 1970f, *id.*
148 USDOS 1971h.

> *relationship to the Senkakus is on a different basis from its relationship to the rest of the islands covered by the Draft Agreement*.[149]

Nevertheless, the US Department of State further clarified the US position on the recognition of the Senkaku Islands as reiterating its previous position. As to the retention of US Navy gunnery ranges after the reversion of the Senkaku Islands to Japan, the United States also responded that the designation of these ranges were included in a list of sites which the United States would retain after the *Okinawa Reversion Treaty* and such retention in no way affected the US basic position on the Senkaku Islands issue as previously maintained.[150]

4. Implications of Separate Peace Treaties between Japan and China, and Japan and Taiwan

Neither China nor Taiwan was a signatory to the *San Francisco Peace Treaty*.[151] For this reason, there would appear to be no legal basis to take the position that the *San Francisco Peace Treaty* provides a mechanism for dealing with the dispute. In other words, Article 22 of the *San Francisco Peace Treaty* cannot be directly invoked *vis-à-vis* Japan, since Article 22 was intended only to provide for settlement of disputes between parties to that treaty, as it reads:

> *If in the opinion of any Party to the present Treaty there has arisen a dispute concerning the interpretation or execution of the Treaty, which is not settled by reference to a special claims tribunal or by other agreed means, the dispute shall, at the request of any party thereto, be referred for decision to the International Court of Justice. Japan and those Allied Powers which are not already parties to the Statute of the International Court of Justice will deposit with the Registrar of the Court, at the time of their respective ratifications of the present Treaty, and in conformity with the resolution of the United Nations Security Council, dated 15 October 1946, a general declaration accepting the jurisdiction, without special agreement, of the Court generally in respect to all disputes of the character referred to in this Article.*

In the *Treaty of Peace between Japan and the Republic of China* (hereinafter '*Japan-Taiwan Peace Treaty*'),[152] signed at Taipei on 28 April 1952 and which entered into force on 5 August 1952, the terms of the *San Francisco Peace Treaty* were reiterated while again there was no mention of the Senkaku Islands. It was suggested that Taiwan might have grounds for raising its claim to the Senkaku Islands under Article 11 of the *Japan-Taiwan Peace Treaty*, as it reads: "*Unless otherwise provided for in the present Treaty and the documents supplementary*

149 USDOS 1971i.

150 USDOS 1972h.

151 The reason why neither China nor Taiwan was invited to the Conference was the fact that several of the Allied Powers, most notably United Kingdom, had already recognized China and could not support Taiwan to represent 'China'. On the other hand, it was inconceivable to invite China since it was actively engaged in warfare against the UN-sponsored allied coalition in the Korean War. *See*, Berton 1992: 45.

152 138 U.N.T.S. 3, 38-44. A full text is also available at http://newtaiwan.virtualave.net/taipei01.htm (last visited Dec. 21, 2000).

thereto, any problem arising between the Republic of China and Japan as a result of the existence of a state of war shall be settled in accordance with the relevant provisions of the San Francisco Treaty."[153] Meanwhile, the *Treaty of Peace and Friendship between Japan and the People's Republic of China* (hereinafter '*Japan-China Peace Treaty*'),[154] signed at Beijing on 12 August 1978, entered into force 23 October 1978, by the exchange of the instruments of ratification at Tokyo. In the *Japan-China Peace Treaty*, the Senkaku Islands were not mentioned and, further, there was no corresponding provision with Article 11 of the *Japan-Taiwan Peace Treaty*.

It was considered that Article 11 provided a linkage to Article 22 of the *San Francisco Peace Treaty*, and that in light of these provisions there might be grounds for a positive effort to impel Japan to negotiate meaningfully and constructively with Taiwan.[155] It is of interest to note that paragraph 1(c) of the Protocol to the *Japan-Taiwan Peace Treaty*[156] provides for the exclusion of Articles 11[157] and 18[158] of the *San Francisco Peace Treaty* from the operation of Article 11 of the *Japan-Taiwan Peace Treaty*. No mention is made in the Protocol of Article 22 of the *San Francisco Peace Treaty*. Thus, Taiwan might argue that the "*relevant provisions of the San Francisco Treaty*", referred to in Article 11, may include the dispute settlement provisions of Article 22.

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153 *Id*.

154 1225 U.N.T.S. 269-70; *also available* in 17 *Int'l Leg. Mat.* 1054-5 (1978). A full text is also available at http://newtaiwan.virtualave.net/beijing.htm (last visited Dec. 21, 2000).

155 USDOS 1971j.

156 Paragraph 1(c) of the Protocol to the Japan-Taiwan Peace Treaty reads: "*1. The application of Article 11 of the present Treaty shall be subject to the following understandings: ... (c) Articles 11 and 18 of the San Francisco Treaty shall be excluded from the operation of Article 11 of the present Treaty*." 138 U.N.T.S. 44. A full text is also available at http://newtaiwan.virtualave.net/taipei02.htm (last visited Dec. 21, 2000).

157 Article 11 reads: "*Japan accepts the judgments of the International Military Tribunal for the Far East and of other Allied War Crimes Courts both within and outside Japan, and will carry out the sentences imposed thereby upon Japanese nationals imprisoned in Japan. The power to grant clemency, to reduce sentences and to parole with respect to such prisoners may not be exercised except on the decision of the Government or Governments which imposed the sentence in each instance, and on recommendation of Japan. In the case of persons sentenced by the International Military Tribunal for the Far East, such power may not be exercised except on the decision of a majority of the Governments represented on the Tribunal, and on the recommendation of Japan*." SF Peace Treaty, *supra*, note 20.

158 Article 18 reads:

> "*(a) It is recognized that the intervention of the state of war has not affected the obligation to pay pecuniary debts arising out of obligations and contracts (including those in respect of bonds) which existed and rights which were acquired before the existence of a state of war, and which are due by the Government or nationals of Japan to the Government or nationals of one of the Allied Powers, or are due by the Government or nationals of one of the Allied Powers to the Government or nationals of Japan. The intervention of a state of war shall equally not be regarded as affecting the obligation to consider on their merits claims for loss or damage to property or for personal injury or death which arose before the existence of a state of war, and which may be presented or re-presented by the Government of one of the Allied Powers to the Government of Japan, or by the Government of Japan to any of the Governments of the Allied Powers. The provisions of this paragraph are without prejudice to the rights conferred by Article 14. (b) Japan affirms its liability for the prewar external debt of the Japanese State and for debts of corporate bodies subsequently declared to be liabilities of the Japanese State, and expresses its intention to enter into negotiations at an early date with its creditors with respect to the resumption of payments on those debts; to encourage negotiations in respect to other prewar claims and obligations; and to facilitate the transfer of sums accordingly*."
>
> SF Peace Treaty, *id.*

Alternatively, Taiwan might argue that its claim to the Senkaku Islands involves a dispute with Japan within the meaning of Article 12 of the *Japan-Taiwan Peace Treaty*, and accordingly, that Japan is obliged to settle the dispute by negotiation or by other pacific means. Article 12 provides: "*Any dispute that may arise out of the interpretation or application of the present Treaty shall be settled by negotiation or other pacific means*."[159] Taiwanese claim in this regard would rest on Article 4 of the *Japan-Taiwan Peace Treaty*, which provides: "*It is recognised that all treaties, conventions, and agreements concluded before 9 December 1941 between Japan and China have become null and void as a consequence of the war*."[160] To the extent that Taiwanese legal claim to the Senkaku Islands rests on Article 4, because of the abrogation of the *Shimonoseki Treaty* of 1895 by which China ceded Formosa to Japan, as a result of which abrogation Formosa has reverted to Taiwan, Taiwan might argue that the Senkaku Islands dispute arises as a "*consequence of the war*" within the meaning of Article 4 and, accordingly, that its dispute with Japan involves the interpretation or application of Article 4.

Japan might be expected to reject the Taiwanese claim, whether based on reference to Article 22 of the *San Francisco Peace Treaty* or on the *Japan-Taiwan Peace Treaty*. Japan would presumably contend that the question of the legal status of the Senkaku Islands is not a "*problem arising between the Republic of China and Japan as a result of the existence of a state of war*" within the meaning of Article 11 of the *Japan-Taiwan Peace Treaty*. Japan might also point to the Exchange of Notes regarding the *Japan-Taiwan Peace Treaty*.[161] Exchange of Notes No.1 expressed the understanding that: "*the terms of the present Treaty shall, in respect of the Republic of China, be applicable to all the territories which are now, or which may hereafter be, under the control of its Government*."[162] On the basis of that Exchange of Notes, Japan might reject Taiwan' efforts to invoke the *San Francisco Peace Treaty* on the theory that the Senkaku Islands were not then, nor thereafter, "*under the control*" of Taiwan.

Although Taiwan may not have a persuasive legal case for raising the Senkaku Islands dispute with Japan under Article 22 of the *San Francisco Peace Treaty*, a Taiwanese claim of entitlement to negotiate with Japan in light of Articles 4 and 12 of its *Japan-Taiwan Peace Treaty* would rest on rather firmer ground. Moreover, Article 6(a) of the *Japan-Taiwan Peace Treaty* provides: "*The Republic of China and Japan will be guided by the principles of Article 2 of the Charter of the United Nations in their mutual relations*."[163] Among the principles of Article 2 of the UN Charter are the following: "*3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered*."[164] Then too, Article 33(1) of the UN Charter provides: "*1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice*."[165]

159 *Supra*, note 152.
160 *Id*.
161 138 U.N.T.S. 48. A full text is also available at http://newtaiwan.virtualave.net/taipei03.htm (last visited Dec. 21, 2000).
162 *Id*.
163 *Supra*, note 152.
164 59 Stat. 1031; T.S. 993; 3 Bevans 1153.
165 *Id*.

Thus, Taiwan is not without legal argument under its *Japan-Taiwan Peace Treaty*, or more generally in accordance with the UN Charter principle of peaceful settlement of disputes, to call upon Japan to settle the Senkaku Islands dispute by negotiation or by other pacific means including third party adjudication. It would be difficult for Taiwan, however, to make a persuasive legal case for the proposition that the Senkaku Islands dispute comes under Article 11 of the *Japan-Taiwan Peace Treaty* and, through that article by reference, under Article 22 of the *San Francisco Peace Treaty*. In addition, since Article 3 of the *San Francisco Peace Treaty* is not included in the either *Japan-Taiwan Peace Treaty* or *Japan-China Peace Treaty*, it is quite possible that Japan would again refuse to discuss with China/Taiwan an area which they claim as part of the Ryukyu Islands.

5. Conclusions

As this research has made clear above, the determination of the relevant 'critical date' is the key point for resolving the territorial disputes over the Senkaku Islands. Should it be January 1895, as claimed by the Chinese side, when Japan incorporated the Senkaku Islands into Japanese territory, or February 1971 (in the case of Taiwan) and December 1971 (in the case of China), as claimed by Japan, when Japan made known her official standpoint to both governments?

China/Taiwan has mainly relied on historical evidence, whose probative value might be in doubt. On the other hand, Japanese arguments are premised on very recent acts of the exercise of state authority, which directly relate with the disputed Senkaku Islands. Accordingly, and having regard to the various factual and legal issues explored above, one is inclined to conclude that Japan has a stronger claim to the disputed islands. In other words, the critical date in this case should be February 1971 (in the case of Taiwan) and December 1971 (in the case of China), as claimed by Japan. This is the more so that historical evidence relating to territorial disputes does not have its own value as history alone, but should be evaluated within the framework of international law on territorial acquisition and loss.

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