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# A DEFENSE OF JAPANESE SOVEREIGNTY OVER THE SENKAKU/DIAOYU ISLANDS

RYAN M. SCOVILLE\*

Legal analyses on the sovereignty dispute over the Senkaku/Diaoyu Islands have been unfavorable to Japan. The literature is populated primarily with works by commentators who either argue in favor of the Chinese claim<sup>1</sup> or conclude that the applicable law is simply too indeterminate to support either party.<sup>2</sup> Analyses supporting the Japanese position are rare and call for further explication.<sup>3</sup> This is a surprising state of affairs, given that Japan has the better argument. This Article explains why. Part I simplifies the sovereignty debate by identifying a number of commonly raised issues that are immaterial as a matter of law. Part II organizes the debate by identifying and evaluating the legal questions that matter: (1) whether the Islands were unoccupied territory when Japan annexed them in 1895, (2) whether Japan ever acquired title under the doctrine of acquisitive prescription, and (3) whether the

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1. See, e.g., Han-yi Shaw, *Revisiting the Diaoyutai/Senkaku Islands Dispute: Examining Legal Claims and New Historical Evidence Under International Law and the Traditional East Asian World Order*, 26 CHINESE (TAIWAN) Y.B. INT'L L. & AFF. 95, 156 (2008); Hungdah Chiu, *An Analysis of the Sino-Japanese Dispute over T'iao-yutai Islets (Senkaku Gunto)*, 15 CHINESE (TAIWAN) Y.B. INT'L L. & AFF. 9, 19–21 (1996); Victor H. Li, *China and Off-Shore Oil: The Tiao-yü Tai Dispute*, 10 STAN. J. INT'L STUD. 143, 150–51 (1975); see also Tao Cheng, *The Sino-Japanese Dispute over the Tiao-yu-tai (Senkaku) Islands and the Law of Territorial Acquisition*, 14 VA. J. INT'L L. 221, 262–63 (1974) (implying that China has a stronger claim).

2. See, e.g., Chi Manjiao, *The Unhelpfulness of Treaty Law in Solving the Sino-Japan Sovereign Dispute over the Diaoyu Islands*, 6 U. PA. E. ASIA L. REV. 163, 187–88 (2011); see also Carlos Ramos-Mrosovsky, *International Law's Unhelpful Role in the Senkaku Islands*, 29 U. PA. J. INT'L L. 903, 937–40 (2008) (explaining how legal indeterminacy complicates the task of achieving a resolution).

3. Reinhard Drifte, *The Senkaku/Diaoyu Islands Territorial Dispute Between Japan and China: Between the Materialization of the "China Threat" and Japan "Reversing the Outcome of World War II"?*, UNISCI DISCUSSION PAPERS, May 2013, at 9, 58; William B. Heflin, *Diaoyu/Senkaku Islands Dispute: Japan and China, Oceans Apart*, 1 ASIAN-PAC. L. & POL'Y J. 18 (2000); Seokwoo Lee, *Territorial Disputes Among Japan, China and Taiwan Concerning the Senkaku Islands*, 3 BOUNDARY & TERRITORY BRIEFING, no. 7, 2002, at 1.

Allies made a lawful determination in favor of Japanese title after World War II in accordance with the Potsdam Declaration and Instrument of Surrender. Part III explains that Japan likely has sovereignty due to the doctrine of acquisitive prescription, which is no more indeterminate than the doctrine of occupation on which China relies, and which trumps China's original occupation as a later-in-time source of title. Pre-war acquisitive prescription from 1895 to 1937 confirms that the Cairo and Potsdam Declarations did not transfer sovereignty to China and establishes that the 1951 San Francisco Peace Treaty's allocation of sovereignty to Japan was lawful. Post-war acquisitive prescription from 1951 to 1970 forms a second, freestanding basis for the Japanese claim.

## I. RED HERRING IN THE EAST CHINA SEA

At the center of the dispute over the Senkaku/Diaoyu Islands is the question of sovereignty: to which state do the Islands belong? Because the parties have collected a range of historical evidence, relied upon a variety of treaties and official declarations, and asserted multiple alternative theories of title, the question has an air of complexity. Upon close inspection, however, many of the common arguments are legally irrelevant. This Part simplifies the dispute by identifying and clearing away the clutter of issues that cannot affect title to the Islands.

### A. *The Treaty of Shimonoseki*

Signed at the conclusion of the First Sino-Japanese War in April 1895, the Treaty of Shimonoseki provided in part that China "cedes to Japan in perpetuity and full sovereignty . . . [t]he island of Formosa, together with all islands appertaining or belonging to the said Island of Formosa."<sup>4</sup> The parties disagree on whether this language encompassed the Senkaku/Diaoyu. Under the Japanese view, the language did not, the Treaty is inapplicable, and sovereignty hinges on other issues.<sup>5</sup> Under the Chinese view, the Treaty transferred sovereignty over the Islands to Japan, and China reacquired sovereignty through the Treaty's subsequent invalidation.<sup>6</sup> To support the latter part of this argument, the Republic of China

4. Treaty of Peace, China-Japan, art. 2(b), Apr. 17, 1895, 181 Consol. TS 217.

5. *The Basic View on the Sovereignty over the Senkaku Islands*, MINISTRY FOREIGN AFF. JAPAN (May 8, 2013), [http://www.mofa.go.jp/region/asia-paci/senkaku/basic\\_view.html](http://www.mofa.go.jp/region/asia-paci/senkaku/basic_view.html).

6. State Council Info. Office of China, *Diaoyu Dao, an Inherent Territory of China*, AMBASSADE DE LA RÉPUBLIQUE POPULAIRE DE CHINE AU MAROC (Oct. 23, 2012), <http://ma.china-embassy.org/fra/xwtdt/t981801.htm>.

(ROC or Taiwan) relies upon the ROC-Japan Peace Treaty of 1952 (Treaty of Taipei), in which the parties “recognize[d] that all treaties, conventions and agreements concluded before December 9, 1941, between China and Japan have become null and void as a consequence of [World War II].”<sup>7</sup> According to Taiwan, this language invalidated the Treaty of Shimonoseki and in doing so reversed the original cession to Japan.<sup>8</sup> The People’s Republic of China (PRC) makes a similar argument based on China’s 1941 declaration of war, which stated, “all treaties, conventions, agreements, and contracts regarding relations between China and Japan are and remain null and void.”<sup>9</sup> The PRC further asserts that the Treaty of Shimonoseki was of no effect because Japan achieved its terms through military conquest.<sup>10</sup> In short, the Chinese contention is that China gave sovereignty to Japan in the Treaty of Shimonoseki and either Japan gave it back in the Treaty of Taipei, Shimonoseki was invalid to begin with, or China unilaterally nullified the original transfer in 1941. Ultimately, the Chinese arguments are unpersuasive because they do not comport with Shimonoseki’s text, context, or drafting history. Thus, neither that treaty, the 1941 declaration, nor the Treaty of Taipei matters.

The analysis begins with several background points. First, “appertain” does not appear to carry a meaning materially different from “belong.” Common usage suggests that they are functionally identical,<sup>11</sup> and the Treaty of Shimonoseki lacks any definitional provisions to suggest non-ordinary meaning. Second, to “appertain[ ] or belong[ ]” holds a natural geographic, rather than a political, orientation. The text supports this view by including within the cession of territory all islands that appertain or belong to the “Island of Formosa,”<sup>12</sup> rather than, for example, the “Province of Taiwan.” If the Treaty had used the latter phrasing, one might reasonably determine the amount of territory ceded by looking simply to the boundaries of the province in 1895 and concluding that the Treaty transferred to Japan only those islands

7. Treaty of Peace, Taiwan-Japan, art. 4, Apr. 28, 1952, 138 U.N.T.S. 3.

8. Ministry of the Interior of Taiwan, *The Diaoyutai Islands: An Inherent Part of the Territory of the Republic of China (Taiwan)*, MAR. INFO. SERVICE CENTER (Apr. 9, 2012), <http://maritimeinfo.moi.gov.tw/marineweb/LayFromE0.aspx?icase=TO2&pid=0000000516>.

9. China’s Declaration of War on Japan, Dec. 9, 1941, *reprinted in CHINA AND THE QUESTION OF TAIWAN: DOCUMENTS AND ANALYSIS* 204 (Hungdah Chiu ed., 1973).

10. State Council Info. Office of China, *supra* note 6.

11. *Appertain*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/9625?> (last visited Mar. 16, 2014) (“To belong as parts to the whole, or as members to a family or class, and hence, to the head of the family; to be related, akin *to.*”).

12. Treaty of Peace, China-Japan, *supra* note 4, art. 2(b).

belonging to the same political unit. By focusing instead on natural geography, the text suggests a different analysis that hinges on the physical relationship between Formosa and any surrounding islands. A separate provision in the Treaty confirms this reading by requiring China to cede "all islands appertaining or belonging to the *Province* of Fêng-Tien."<sup>13</sup> If the Treaty of Shimonoseki is to mean what it says, one must assume that the use of natural geographic terminology with respect to Formosa, together with political terminology elsewhere, was purposeful. Finally, the only plausible criteria for determining the natural geographic relationship between islands are distance and seabed topography. Of these, the first seems more likely, given the extremely limited state of knowledge about seabed topography in the late nineteenth century.<sup>14</sup>

There are several conceivable ways of applying the distance and topography criteria. For distance, one method would hold that an island or island group appertains or belongs to Formosa only if it is closer to Formosa than to any other land features, however minor in size. Another would hold that an island or island group appertains or belongs to Formosa as long as it is closer to Formosa than to either of the other major land features in the region: the island of Okinawa and the Chinese mainland. Yet another would hold that islands appertain or belong to Formosa only if they are within a fixed distance of its shoreline—100 nautical miles, for example. I will call these the *all-features*, *major-features*, and *absolute-distance* tests, respectively. For seabed topography, one possibility would maintain that islands appertain or belong to Formosa if they share the same continental shelf. Another would maintain instead that islands must come from the same rise out of the continental shelf as Formosa. These are the *continental-shelf* and *seafloor-rise* tests.

Given these options, Japan has the stronger position in arguing that the Treaty of Shimonoseki did not transfer sovereignty over the Senkaku/Diaoyu. First, the Islands do not even arguably

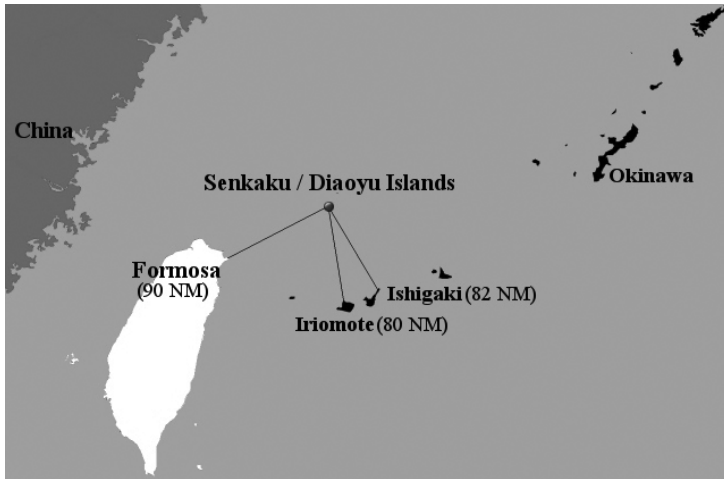
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13. *Id.* art. 2(a) (emphasis added).

14. See ROBERT KUNZIG, MAPPING THE DEEP: THE EXTRAORDINARY STORY OF OCEAN SCIENCE 32–39 (2000). In theory, one might also define the physical relationship between islands according to marine geology or geomorphology, but it seems implausible that the drafters of the Treaty of Shimonoseki envisioned either approach, given that neither of these fields appears to have produced information about the East China Sea by 1895. Cf. David R. Oldroyd & Rodney H. Grapes, *Contributions to the History of Geomorphology and Quaternary Geology: An Introduction*, in HISTORY OF GEOMORPHOLOGY AND QUATERNARY GEOLOGY 1, 39 (Geological Soc'y, Special Publ'n No. 301, R.H. Grapes et al. eds., 2008) (summarizing the history of the discipline).

appertain or belong to Formosa under two of the possible approaches. Under the all-features test, the Islands would fall outside the scope of the Treaty because they are approximately ten nautical miles closer to the Japanese islands of Ishigaki and Iriomote than to Formosa (see Figure 1).<sup>15</sup> Likewise, under the seafloor-rise test, the Islands are beyond the scope of the Treaty because their only topographical commonality with Formosa is their location on China's continental shelf.<sup>16</sup>

#### ALL FEATURES TEST (FIGURE 1)



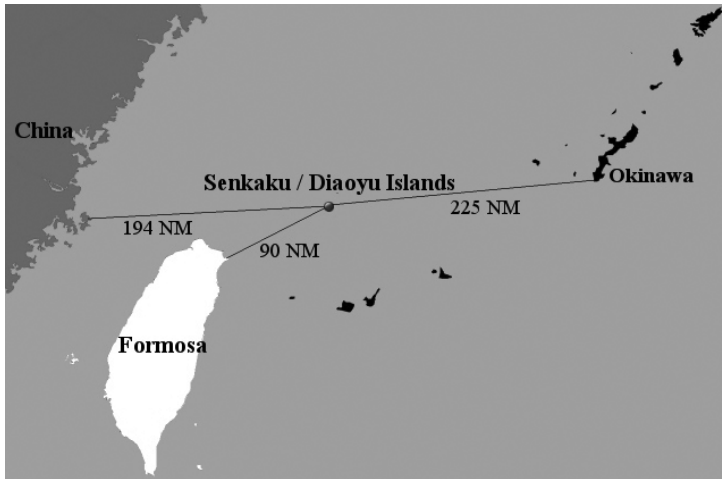
Second, all of the metrics under which the Islands would appertain or belong to Formosa are overinclusive. Under the major-features test, the Treaty would have transferred sovereignty over the Senkaku/Diaoyu because they are substantially closer to Formosa than to the other major land features in the area (see Figure 2).<sup>17</sup> Yet parts of the Yaeyama Islands, such as Iriomote and Yonaguni, are also closer to Formosa than to the other major alternatives and were undisputedly Japanese territory well before Shimonoseki

15. See Distance Measurement Tool, GOOGLE, <https://maps.google.com/maps?t=m&ll=38.892553,-77.0526715&z=14&output=classic&dg=opt> (click Maps Labs hyperlink; select Enable to turn on Distance Measurement Tool; click ruler icon; follow I'm Feeling Geeky hyperlink to select nautical miles) (last visited Mar. 16, 2014).

16. See GENERAL BATHYMETRIC CHART OF THE OCEANS (GEBCO), WORLD MAP (2014), available at [http://www.gebco.net/data\\_and\\_products/gebco\\_world\\_map/documents/gebco\\_map\\_2013.pdf](http://www.gebco.net/data_and_products/gebco_world_map/documents/gebco_map_2013.pdf).

17. The distance to Formosa is about 90 nautical miles, while the distances to the island of Okinawa and the Chinese mainland are approximately 225 and 194 nautical miles, respectively. Distance Measurement Tool, *supra* note 15.

## MAJOR FEATURES TEST: SENKAKU/DIAOYU (FIGURE 2)



(see Figures 3 and 4).<sup>18</sup> Thus, relative proximity to Formosa cannot be determinative. Similarly, under the absolute-distance test, the Treaty would have transferred sovereignty over the Senkaku/Diaoyu if the text encompassed all islands at least as far from Formosa as Kubajima/Huangwei Yu, which is the northernmost part of the Senkaku/Diaoyu group and about 106 nautical miles away.<sup>19</sup> But that approach would also encompass parts of the Yaeyama Islands.<sup>20</sup> Yonaguni, for instance, is only fifty-nine nautical miles from Formosa (see Figure 5).<sup>21</sup> Thus, for one of these approaches to reflect the meaning of the Treaty, the Qing Dynasty must have either purported to cede a number of islands over which it clearly had no sovereignty to begin with, or agreed upon an exception for Japanese islands that appertained or belonged to Formosa under the intended meaning of those terms. The former scenario is implausible, and there is no textual evidence of the latter.<sup>22</sup> If distance is the criterion, the only way to avoid the problem of overinclusiveness is to adopt an interpretation under which no part of the Yaeyama Islands appertains or belongs to Formosa. Such an interpretation will necessarily exclude the Senkaku/Diaoyu Islands.

18. *Id.*; see Gavan McCormack, *Yonaguni: Dilemmas of a Frontier Island in the East China Sea*, ASIA-PAC. J.: JAPAN FOCUS (Oct. 1, 2012), <http://japanfocus.org/-Gavan-McCormack/3837> (explaining that Japan incorporated the Yaeyama Islands into the modern Japanese State in 1879).

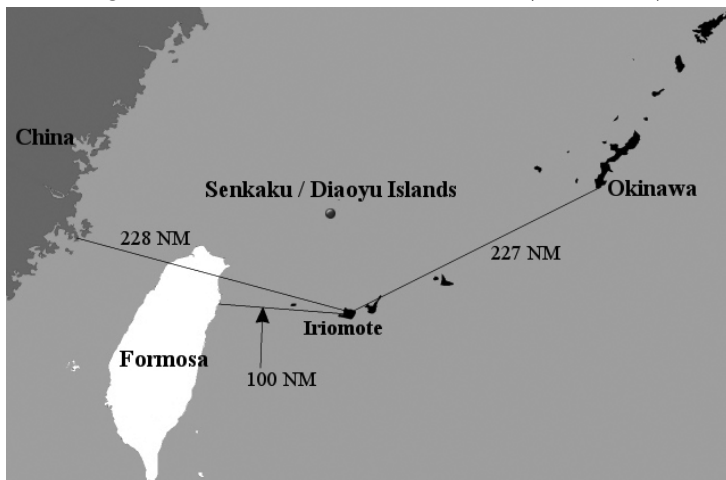
19. Distance Measurement Tool, *supra* note 15.

20. *Id.*

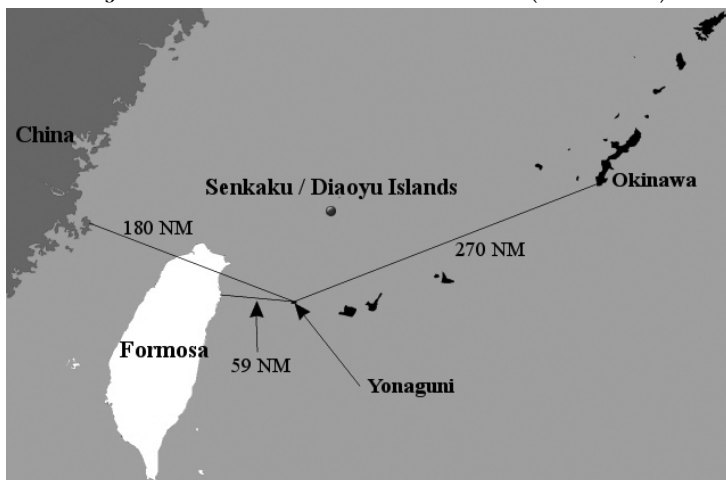
21. *Id.*

22. See generally Treaty of Peace, China-Japan, *supra* note 4.

## MAJOR FEATURES TEST: IRIOMOTE (FIGURE 3)



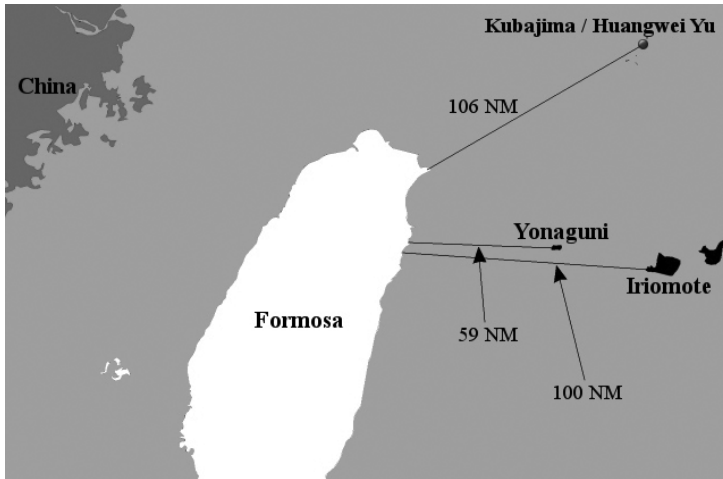
## MAJOR FEATURES TEST: YONAGUNI (FIGURE 4)



The continental-shelf test also would be overinclusive, but in a different way. Taken to its logical conclusion, that approach would mean that the Treaty accomplished, with modest language, the transfer of sovereignty over not just the Senkaku/Diaoyu but all other small islands on the entire continental shelf, including numerous islands immediately off the coast of mainland China, regardless of distance from Formosa. This territory would include everything from the island of Beishi, near Hainan; to the Pratas Islands; a swath of islands in Fujian Province; and a series of islands



## ABSOLUTE DISTANCE TEST (FIGURE 5)



near Shanghai, among numerous others.<sup>23</sup> Yet no one acted as if such transfers occurred.<sup>24</sup> That they did not suggests that this test fails to reflect the intended meaning of the text.

Also problematic is that the Chinese position renders redundant a separate Treaty provision that transferred sovereignty over the Pescadores Islands. At twenty-four nautical miles west of Formosa, the Pescadores are substantially closer to Formosa than the Senkaku/Diaoyu, much closer to Formosa than either the island of Okinawa or the Chinese mainland, and on the same continental shelf as Formosa (see Figure 6).<sup>25</sup> Given this geography, the Pescadores appertain or belong to Formosa under all of the tests that would include the Senkaku/Diaoyu in the ceded territory. And yet the drafters found it necessary to transfer the Pescadores explicitly and in an entirely separate provision.<sup>26</sup> This might suggest that the parties did not envision any of the relatively expansive tests. Put differently, the only way to avoid rendering the language on the Pescadores redundant is to interpret “islands appertaining or belonging to the . . . Island of Formosa”<sup>27</sup> as referring exclusively to islands that are closer to Formosa than the Pescadores or that share

23. GEBCO, *supra* note 16.

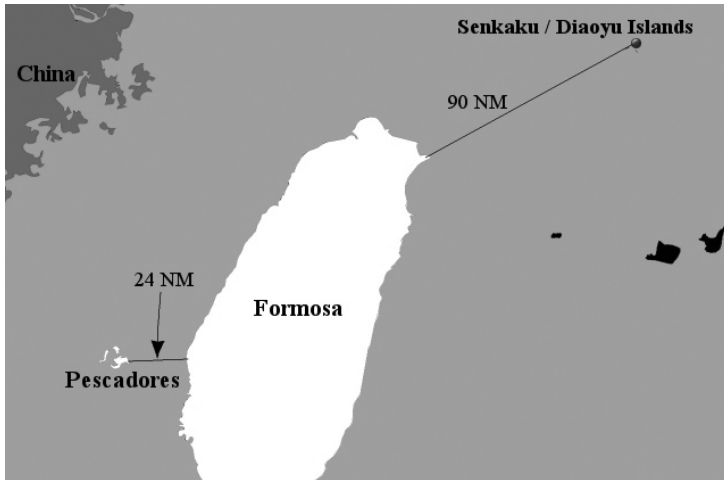
24. See MUTSU MUNEMITSU, *KENKENROKU: A DIPLOMATIC RECORD OF THE SINO-JAPANESE WAR, 1894–95*, at 164–255 (Gordon Mark Berger ed. & trans., The Japan Found. 1982) (1923) (providing a first-hand account of the treaty negotiations and subsequent “triple intervention” by Russia, Germany, and France).

25. Distance Measurement Tool, *supra* note 15; GEBCO, *supra* note 16.

26. Treaty of Peace, China-Japan, *supra* note 4, art. 2(c).

27. *Id.* art. 2(b).

## THE PESCADORES (FIGURE 6)



a topographical relationship greater than location on the same continental shelf. Once again, those interpretations necessarily exclude the Senkaku/Diaoyu.

Finally, the Chinese position is less persuasive because of chronology: Japan unilaterally annexed the Islands in January 1895, over three months before the parties signed the Treaty of Shimonoseki.<sup>28</sup> Given that act, it is questionable that Japan understood the Treaty as the source of its sovereignty. To negotiate for the transfer of the Islands only months after annexing them would have been bizarre; the Japanese government would have had to believe that its own action was an insufficient basis for title or otherwise problematic. I am not aware of any evidence that it did.<sup>29</sup>

28. Koji Taira, *The China-Japan Clash over the Diaoyu/Senkaku Islands*, ASIAN AFF., no. 23, 2004, at 5, 6, available at <http://www.asian-affairs.com/Resources/AA23.pdf>.

29. Shaw interprets certain historical records as demonstrating that high-level Japanese officials postponed incorporation from 1885 until the end of the Sino-Japanese war because the officials “recognized the islands’ Chinese ownership under the traditional East Asian World Order.” Han-yi Shaw, *supra* note 1, at 114. I disagree with that interpretation. If anything, the records show precisely the opposite. They reflect, for example, an official Japanese understanding that “there [were] no traces of evidence that the islands belong to China,” that the Islands were “under no specific jurisdiction” prior to incorporation, and that Okinawans had frequently visited the Islands before 1895 and used non-Chinese names for them “since ancient times.” *Id.* at 115–16, 120, 122. The best evidence in favor of Shaw’s interpretation is a letter in which the Japanese Foreign Minister explained his opposition to an October 1885 proposal for placing markers on the Islands. In relevant part, the letter stated:

Most recently, Chinese newspapers have been reporting rumors of our government’s intention of occupying certain islands belonging to China located next to Taiwan, demonstrating suspicion toward our country and consistently urging the Qing government to be aware of this matter. At this time, if we were to publicly

I do not mean to suggest that these arguments are entirely conclusive. China might challenge them in two ways. First, while the Chinese position renders the provision on the Pescadores redundant, it does not necessarily render it superfluous. Because of their strategic location and harbor, regional powers historically viewed the Pescadores as key to the capture of Formosa, and the Pescadores played an important role in the First Sino-Japanese War.<sup>30</sup> It is possible, therefore, that Japan demanded a separate provision on those islands simply out of an abundance of caution. In other words, the negotiating parties may have understood that the language regarding Formosa was broad enough to encompass the Pescadores but added the separate provision to make the transfer of sovereignty over them indisputably clear.

Second, the chronology argument presupposes that it is permissible to consider context in ascertaining the meaning of the text. There is no authority, however, on how to interpret the Treaty. While modern international law supplies codified rules of interpretation,<sup>31</sup> that law entered into force in 1980 and is nonretroactive,<sup>32</sup> and the customary practices that the modern rules codified had not yet developed in the late nineteenth century.<sup>33</sup> The result is that there is no clear legal basis for considering context as an indicator of meaning or for following any other rule of interpretation, and meaning necessarily remains somewhat unsettled.

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place national markers on the islands, this must necessarily invite China's suspicion toward us.

*Id.* at 117. Read alone, it is not out of the question that this statement reflected an official understanding in favor of Chinese title. But that is far from the only possible reading, and it is not even the best one. The Foreign Minister described the Islands as "belonging to China," but it is most sensible to interpret that description as, in effect, a quotation of the Chinese media rather than a reflection of the Japanese view. *See id.* The reason for the Foreign Minister's caution was not a belief in Chinese sovereignty but reluctance to further complicate any already strained bilateral relationship with new evidence of Japanese expansionism. This conclusion best aligns with the series of contemporaneous statements in which Japanese officials explicitly described the territory as *terra nullius*, *id.* at 115–16, 120, 122, and with the broader historical context, which included tension over Taiwan, the Ryukyu Islands, and Korea. *See* Katherine G. Burns, *China and Japan: Economic Partnership to Political Ends*, in *ECONOMIC CONFIDENCE-BUILDING AND REGIONAL SECURITY* 27, 31 (Report No. 36) (Michael Krepon & Chris Gagné eds., 2000), *available at*: <http://www.stimson.org/images/uploads/research-pdfs/burnspdf.pdf>.

30. JAMES W. DAVIDSON, *THE ISLAND OF FORMOSA, PAST AND PRESENT: HISTORY, PEOPLE, RESOURCES AND COMMERCIAL PROSPECTS* 266–68 (1903).

31. Vienna Convention on the Law of Treaties arts. 31–33, May 23, 1969, 1155 U.N.T.S. 331.

32. *Id.* art. 4.

33. *See* I LASSA OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 582 (2d ed. 1912).

Neither of these challenges, however, seems to do more than keep the Chinese position on life support. While an expansive interpretation of the Formosa provision might not make the provision on the Pescadores superfluous, China's position does not enjoy any affirmative textual support. The Treaty, after all, never says a word about the Senkaku/Diaoyu and there is no evidence that the parties discussed the Islands during negotiations.<sup>34</sup> Moreover, just as there is no applicable rule of treaty interpretation that permits reliance upon context, neither is there a rule against it. All of this is important because international tribunals have declined in several cases to rule on the basis of a treaty that did not clearly apply to a disputed territory. Examples of this practice occurred in *The Minquiers and Ecrehos Case (France v. United Kingdom)*<sup>35</sup> and *Territorial and Maritime Dispute (Nicaragua v. Colombia)*.<sup>36</sup> The foregoing analysis suggests that an international court would do the same with the Treaty of Shimonoseki.

In summary, only relatively restrictive interpretations of the Treaty of Shimonoseki can avoid the problems of overinclusiveness, redundancy, and chronology. One such interpretation is a limited version of the absolute-distance test, which would hold that islands appertain or belong to Formosa only if they are closer to Formosa than the Pescadores are. Islands that satisfy this requirement include Keelung, Green, Guishan, and Lamay, all of which are within approximately twenty nautical miles of Formosa's shoreline (see Figure 7).<sup>37</sup> The other remaining interpretation is that islands appertain or belong to Formosa only if they rise together with Formosa out of the continental shelf. Because both of these easily exclude the Senkaku/Diaoyu, the Treaty is irrelevant to the sovereignty debate. This in turn means that the 1941 declaration of war and the 1952 Treaty of Taipei are also irrelevant; if the Treaty of Shimonoseki did not transfer sovereignty over the Senkaku/Diaoyu Islands to Japan, neither of the other documents could have transferred sovereignty back to China by invalidating Shimonoseki.

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34. See MUNEMITSU, *supra* note 24 at 164–202 (providing a first-hand account of the negotiations).

35. *Minquiers and Ecrehos (Fr./U.K.)*, 1953 I.C.J. 47, 54 (Nov. 17).

36. *Territorial and Maritime Dispute (Nicar. v. Colom.)*, 2012 I.C.J. 624, paras. 40–56 (Nov. 19).

37. Distance Measurement Tool, *supra* note 15.

## MINOR ISLANDS (FIGURE 7)

B. *Geography*

Some assert that the location of the Senkaku/Diaoyu Islands favors Chinese sovereignty. The Taiwanese Ministry of the Interior, for example, cites as supporting evidence the Islands' location on China's continental shelf, where they are easy to reach from Taiwan because of favorable air and water currents.<sup>38</sup> However, international law is clear that location per se is inconsequential.<sup>39</sup> In the *Island of Palmas Case*, the Permanent Court of Arbitration explained, "it is impossible to show the existence of a rule of positive international law to the effect that islands situated outside territorial waters should belong to a State from the mere fact that its territory forms the *terra firma* (nearest continent or island of considerable size)."<sup>40</sup> Not only would such a rule be "wholly lacking in precision," its application would "lead to arbitrary results" and contradict well-established doctrines that emphasize effective control as a critical determinant of title.<sup>41</sup> The result is that the location of the Islands on China's continental shelf, in comparative proximity to the Chinese mainland, is in itself insignificant.

38. Ministry of the Interior of Taiwan, *supra* note 8.

39. See MONIQUE CHEMILLIER-GENDREAU, SOVEREIGNTY OVER THE PARACEL AND SPRATLY ISLANDS 27-29 (H.L. Sutcliffe & M. McDonald trans., Kluwer Law Int'l 2000) (1996).

40. *Island of Palmas* (Neth./U.S.), 2 R.I.A.A. 829, 854 (Perm. Ct. Arb. 1928).

41. *Id.* at 854-55.

### C. Acts of Private Individuals

Commentators and official state publications also have pointed to the conduct of private individuals as evidence of sovereignty. The Taiwanese Ministry of the Interior emphasizes that the Senkaku/Diaoyu were “popular among [Chinese] fishermen who sought shelter on the[ ] islands during storms and repaired boats and equipment on their shores” and that the Chinese also used the Islands as a place to gather medicinal herbs and dismantle salvaged boats.<sup>42</sup> Other publications discuss how Japanese citizens built a lighthouse on the Islands in the 1980s.<sup>43</sup> Yet such acts are generally irrelevant. In *The Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia)*, for example, Indonesia argued that the traditional use of waters surrounding certain disputed islands by Indonesian fishermen supported its claim to sovereignty,<sup>44</sup> but the International Court of Justice (ICJ) rejected that argument and explained that the “activities by private persons cannot be seen as [evidence of sovereignty] if they do not take place on the basis of official regulations or under governmental authority.”<sup>45</sup> The basic contours of this rule have been in place since at least the nineteenth century.<sup>46</sup>

### D. Most Official Acts After 1970

Most of the official conduct by the Japanese and Chinese governments over the last forty-five years is also immaterial to the analysis. Once a sovereignty dispute crystallizes, a development marked by the so-called “critical date,” the law discounts the relevance of all subsequent acts that either party undertakes to improve its legal position.<sup>47</sup> The goal of this doctrine is twofold. First, it aims to

42. Ministry of the Interior of Taiwan, *supra* note 8.

43. See Hirose Hajime, *Japan's Effective Control of the Senkaku Islands*, REV. ISLAND STUD. 21 (June 10, 2013), <http://islandstudies.oprf-info.org/wp/wp-content/uploads/2013/06/a00005.pdf>.

44. Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon./Malay.), 2002 I.C.J. 625, para. 140 (Dec. 17).

45. *Id.*; see also Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hond.), 2007 I.C.J. 661, 717 (Oct. 8) (quoting *Sovereignty over Pulau Ligitan and Pulau Sipadan*); Kasikili/Sedudu Island (Bots./Namib.), 1999 I.C.J. 1045, 1103–06 (Dec. 13) (applying similar “private person” analysis in a dispute between Botswana and Namibia).

46. See 1 ROBERT PHILLIMORE, COMMENTARIES UPON INTERNATIONAL LAW 198 (1854).

47. R.Y. JENNINGS, THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW 28–33 (1963). For examples of the application of this doctrine, see *Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea*, 2007 I.C.J. at 697–98; *Sovereignty over Pulau Ligitan and Pulau Sipadan*, 2002 I.C.J. at 692; *Minquiers and Ecrehos (Fr. v. U.K.)*, 1953 I.C.J. 47, 59–60 (Nov. 17).

reduce the risk of military or other conflicts that might arise from simultaneous acts of sovereignty by the competing parties.<sup>48</sup> By deeming most subsequent acts irrelevant, the law reduces the incentive for a party to disturb the status quo. Second, the doctrine aims to protect the quality of the evidence on which sovereignty may depend by eliminating the incentive for parties to create new facts in support of their claims once a dispute has arisen.<sup>49</sup> Underlying this particular goal is the assumption that official acts that occur prior to the crystallization of a dispute are more genuine indicia of sovereignty or its absence because parties undertake such acts without an eye toward the response of other parties or international tribunals.

For the dispute over the Senkaku/Diaoyu, the most likely critical date is approximately 1970, shortly after the U.N. Economic Commission for Asia and the Far East reported a high probability of massive deposits of oil and natural gas underneath the waters surrounding the Islands.<sup>50</sup> This is the point at which the parties understood the economic stakes of sovereignty and began to assert competing claims. In July 1970, the Japanese Ambassador to Taiwan communicated Japan's claim to the PRC,<sup>51</sup> and in December 1970, Taiwan declared the Islands to be Chinese territory.<sup>52</sup> As a result, the overwhelming majority of official acts that have occurred in the decades since are inconsequential. It is generally of no moment, for example, that the Japanese government purchased some of the Islands in 2012,<sup>53</sup> that Chinese vessels have vis-

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48. Cf. L.F.E. Goldie, *The Critical Date*, 12 INT'L & COMP. L.Q. 1251, 1253 (1968) ("[O]ne object of the critical date is to prevent one of the parties from unilaterally improving its position by means of some step taken after the issue has been definitely joined.") (quoting Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951-4: Points of Substantive Law. Part II*, 32 BRIT. Y.B. INT'L L. 20, 24-25 (1955-56)).

49. W. Michael Reisman, *The Government of the State of Eritrea and the Government of the Republic of Yemen: Award of the Arbitral Tribunal in the First Stage of the Proceedings (Territorial Sovereignty and Scope of the Dispute)*, 93 AM. J. INT'L L. 668, 678 (1999).

50. See COMM. FOR CO-ORDINATION OF JOINT PROSPECTING FOR MINERAL RES. IN ASIAN OFFSHORE AREAS, TECH. BULL. VOL. 2, GEOLOGICAL STRUCTURE AND SOME WATER CHARACTERISTICS OF THE EAST CHINA SEA AND THE YELLOW SEA 39-41 (1969).

51. Han-yi Shaw, *The Diaoyutai/Senkaku Islands Dispute: Its History and an Analysis of the Ownership Claims of the P.R.C., R.O.C., and Japan*, 152 OCCASIONAL PAPERS/REPRINT SERIES IN CONTEMPOR. ASIAN STUD., no. 3, 1999, at 2, 11.

52. LINUS HAGSTRÖM, JAPAN'S CHINA POLICY: A RELATIONAL POWER ANALYSIS 120 (2005); see also Lee, *supra* note 3, at 6.

53. Julian Ryall, *Japan Agrees to Buy Disputed Senkaku Islands*, TELEGRAPH (Sept. 5, 2012, 7:26 AM), <http://www.telegraph.co.uk/news/worldnews/asia/japan/9521793/Japan-agrees-to-buy-disputed-Senkaku-islands.html>.

ited the surrounding waters with frequency in recent years,<sup>54</sup> or even that the United States supported Japanese sovereignty in 1971 by signing the Okinawa Reversion Agreement.<sup>55</sup> At most, such acts demonstrate only that neither party has acquiesced in the sovereignty claim of the other; they cannot support title as evidence of effective control.

Some have suggested instead that the critical date is 1895, when Japan both annexed the Islands and allegedly acquired them from China through the Treaty of Shimonoseki.<sup>56</sup> This view rests on the assumption that the critical date is the point at which one state begins to act in any way inconsistent with the title of another.<sup>57</sup> The law, however, does not support that assumption.<sup>58</sup> International tribunals have explained that the critical date is the point at which the parties contest title.<sup>59</sup> Under this precedent, 1895 cannot be the critical date because no contest occurred if China ceded the Islands to Japan, and I am aware of no evidence of a Chinese objection to Japanese annexation and control in the late nineteenth or early twentieth century.<sup>60</sup> Finally, a critical date of 1895 would operate in tension with the doctrine of acquisitive prescription, which holds that one state can obtain title over part of the territory of another by asserting effective control in a peaceful and public manner, without interruption, for a sufficient period.<sup>61</sup> If the first attempt to exercise control over another state's territory marked the critical date, acquisitive prescription would become virtually impossible because the law would bar consideration of nearly

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54. *Eight Chinese Vessels Enter Senkaku Area*, JAPAN TIMES, (Apr. 24, 2013), <http://www.japantimes.co.jp/news/2013/04/24/national/eight-chinese-vessels-enter-senkaku-area>.

55. Reversion to Japan of the Ryukyu and Daito Islands, U.S.-Japan, art. 1.1, June 17, 1971, 23 U.S.T. 446, 841 U.N.T.S. 275.

56. Han-yi Shaw, *supra* note 1, at 156.

57. *See id.*

58. *See* Goldie, *supra* note 48, at 1255 (explaining that the critical date occurs “when both parties to a legal dispute submit distinct sets of facts and series of events, and distinct theories of the case for the characterisation or definition of the issues”).

59. *See, e.g.*, Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon./Malay.), 2002 I.C.J. 625, para. 135 (Dec. 17) (explaining that the critical date is the “date on which the dispute between the Parties crystallized”); Kasikili/Sedudu Island (Bots./Namib.), 1999 I.C.J. 1045 (Dec. 13); Minquiers and Ecrehos (Fr./U.K.), 1953 I.C.J. 47, 59 (Nov. 17) (rejecting a suggested critical date because “no dispute as to . . . sovereignty . . . had yet arisen” at that point).

60. Indeed, the evidence suggests precisely the opposite. *See infra* text accompanying notes 76–77, 113–18.

61. JENNINGS, *supra* note 47, at 20–23; D.H.N. Johnson, *Acquisitive Prescription in International Law*, 27 BRIT. Y.B. INT’L L. 332, 344–47 (1950).



all evidence of the acquiring state's effective control.<sup>62</sup> That international law generally recognizes such evidence demonstrates that an attempt to establish effective control does not itself set the critical date.

## II. THREE KEY QUESTIONS

Part I identified commonly discussed topics that do not matter. This Part argues that there are only three issues on which sovereignty depends: (1) whether the Islands were unoccupied *terra nullius* when Japan annexed them in 1895; (2) whether Japan ever acquired title under the doctrine of acquisitive prescription; and (3) whether the Allies made a lawful determination in favor of Japanese title after World War II in accordance with the Potsdam Declaration and Instrument of Surrender.

### A. *Whether the Islands Were Terra Nullius in 1895*

The first critical part of the sovereignty debate concerns the status of the Islands at the time of Japanese annexation in 1895. Relying upon a variety of historical evidence, China contends that the Islands were Chinese territory in 1895 and had been for centuries.<sup>63</sup> Japan responds that the Islands were unoccupied territory, or "*terra nullius*," as revealed by official surveys prior to annexation.<sup>64</sup> For China, title in 1895 is a prerequisite to a valid claim today; if the Islands were *terra nullius*, there is no plausible theory under which the Islands can now belong to China. If the Islands were Chinese, however, Japan might still have valid title today if China subsequently acquiesced to Japan's effective control in accordance with the doctrine of acquisitive prescription, as discussed below in Section B.

Whether the Islands were *terra nullius* depends upon the doctrines of occupation and intertemporality. The former holds that a state can appropriate unclaimed territory by occupying and possessing it.<sup>65</sup> The latter holds that one must judge the legality of events in light of the law contemporaneous with their occurrence, rather than with the law in force at the time the dispute is ultimately resolved.<sup>66</sup> In other words, lawful annexation by Japan requires that China had not already engaged in acts sufficient to

62. See Fitzmaurice, *supra* note 48, at 32, 34.

63. State Council Info. Office of China, *supra* note 6.

64. *The Basic View on the Sovereignty over the Senkaku Islands*, *supra* note 5.

65. JENNINGS, *supra* note 47, at 20.

66. See *Island of Palmas (Neth. v. U.S.)*, 2 R.I.A.A. 829, 845. (Perm. Ct. Arb. 1928).

appropriate the Islands under the law of occupation that existed up to 1895.

Given these rules, China likely possessed original sovereignty over the Islands from the fourteenth to at least the eighteenth century. Early international law held that discovery could form the basis for occupation,<sup>67</sup> and the earliest historical records appear to point exclusively to discovery by China. From 1372 to the mid-1800s, for example, Chinese emperors sent over twenty investiture missions to Okinawa to confer titles of authority on successive rulers of the Ryukyu Islands, and notes from some of those missions reportedly suggest a Chinese understanding that the Senkaku/Diaoyu were Chinese territory.<sup>68</sup> Moreover, there appears to be an absence of competing evidence of earlier discovery by Japan.<sup>69</sup> In addition, even if it is anachronistic to apply European legal doctrines to conduct in East Asia during this period, East Asia's Sino-centric order likely favored Chinese authority over proximate lands not claimed by other regimes.<sup>70</sup>

The harder question, however, is whether China lost sovereignty in the nineteenth century, once the law evolved from supporting occupation by discovery to supporting occupation only upon effective possession and administration.<sup>71</sup> The new doctrine prioritized the quality and volume of sovereign acts—or “*effectivités*”—undertaken with respect to a territory and posited that the holder of original title could lose sovereignty by failing to maintain effective control.<sup>72</sup> As an example of this law, one nineteenth century treatise noted that while the Dutch were the first Europeans to discover and name New Zealand, Tasmania, and eastern Australia, they also “allowed long years to pass away without forming settlements or making any effective occupation” of those lands, which enabled England to acquire title later through effective occupation.<sup>73</sup> Simi-

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67. OPPENHEIM, *supra* note 33, at 294; *see also* *Island of Palmas*, 2 R.I.A.A. at 846 (explaining that discovery alone has been an inadequate basis for sovereignty “since the 19th century”).

68. Han-yi Shaw, *supra* note 1, at 104; *see also* UNRYU SUGANUMA, SOVEREIGN RIGHTS AND TERRITORIAL SPACE IN SINO-JAPANESE RELATIONS 42–87 (2000) (describing historical documents that show early Chinese contacts with the islands).

69. *See* SUGANUMA, *supra* note 68, at 87–100 (describing the earliest Japanese contacts with the islands).

70. *See* John K. Fairbank, *A Preliminary Framework*, in *THE CHINESE WORLD ORDER* 1, 8–10 (John K. Fairbank ed., 1968); *see also* SUGANUMA, *supra* note 68, at 111 (arguing that even Japan accepted the Sino-centric world order during the Ming Empire).

71. *See generally* OPPENHEIM, *supra* note 33, at 292–94.

72. *See* PHILLIMORE, *supra* note 46, at 201–02.

73. EDWARD SHEPHERD CRESSY, *FIRST PLATFORM OF INTERNATIONAL LAW* 216 (1876).

larly, in the famous *Island of Palmas Case*, the arbitrator held that while Spain may have acquired original title through discovery in the sixteenth century, Spain failed to develop an effective occupation once the law evolved to require more than discovery and thus lost its claim.<sup>74</sup> This failure enabled the Netherlands to acquire sovereignty later through effective occupation.<sup>75</sup>

For Japan, the best argument seems to be that China lost its original title by failing to update its conduct to occupy the Islands within the meaning of the new doctrine.<sup>76</sup> On this reasoning, pre-nineteenth century acts by China are generally beside the point, and acts of possession and administration in the decades leading up to 1895 were insufficient. An apparent paucity of Chinese *effectivités* in the nineteenth century supports this view. For example, an official PRC White Paper on the dispute mentions only an investiture mission that sailed by the Islands en route to Okinawa in 1866, an official gazetteer from 1871 that referenced the Islands, and a series of five maps, four of which were not official publications.<sup>77</sup> Scholars have also found little evidence of Chinese control.<sup>78</sup> *Effectivités* that modern international tribunals have found sufficient to establish sovereignty by occupation generally have been more substantial in quality and volume. In the *Legal Status of Eastern Greenland*, the Permanent Court of International Justice concluded that Denmark had effectively occupied certain *terra nullius* by: (1) entering into a series of international conventions that implied a Danish power to govern the territory; (2) granting exclusive rights for trading, hunting, mining, and the erection of telegraph lines on the land; and (3) passing legislation that fixed limits on surrounding territorial waters.<sup>79</sup> Recent cases analyzing effective control over disputed islands also have involved more substantial governmental acts. In the *Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan*, the ICJ held that Malaysia possessed sov-

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74. *Island of Palmas (Neth. v. U.S.)*, 2 R.I.A.A. 829, 844–46, 850–52, 855–56. (Perm. Ct. Arb. 1928).

75. *Id.* at 867.

76. Cf. JOHN O'BRIEN, *INTERNATIONAL LAW* 208 (2001) (explaining that territory may be *terra nullius* "either because there was no sovereign or because of abandonment by the previous sovereign"); CREASY, *supra* note 73, at 216 ("When the Discoverers of a new country take no measures to perfect their title by use and occupation, the country becomes derelict; and the members of another state may occupy it, and may acquire lawful possession and property.").

77. State Council Info. Office of China, *supra* note 6.

78. GREG AUSTIN, *CHINA'S OCEAN FRONTIER* 164–67 (1998).

79. *Legal Status of Eastern Greenland (Den. v. Nor.)*, 1933 P.C.I.J. (ser. A/B) No. 53, at 35–36 (Apr. 5).

ereignty because it had issued licenses for and settled disputes pertaining to the collection of turtle eggs, established a bird sanctuary pursuant to an official land ordinance, and constructed an official lighthouse on the islands.<sup>80</sup> In the *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, the ICJ held that Colombia possessed sovereignty because its government had passed laws regulating the extraction of guano and collection of coconuts, inspected and maintained lighthouses, dispatched law enforcement, and conducted several search and rescue operations on the islands, among other acts.<sup>81</sup>

It is difficult, however, to predict how a court would resolve Japan's argument. First, a scarcity of authority renders the precise contours of the doctrine of occupation circa 1895 unclear. Prominent treatises of the time offered only general descriptions of its requirements,<sup>82</sup> and there were no international tribunals to offer further guidance.<sup>83</sup> While modern international courts have applied the doctrine in a number of cases, such precedent is unhelpful to the extent that it reflects understandings that had not yet developed by 1895. Without knowing the specific contours of the doctrine, it is hard to know whether the Chinese acts were sufficient.

Second, even if the nineteenth century doctrine of occupation is identical to its twentieth and twenty-first century counterparts, it can be risky to draw lessons from precedent. Because *stare decisis* does not apply to ICJ decisions,<sup>84</sup> the court would not have to follow even its own prior opinions in deciding sovereignty over the Senkaku/Diaoyu. Additionally, the analysis on whether a particular volume of *effectivités* is sufficient to create an effective occupa-

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80. Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon./Malay.), 2002 I.C.J. 625, 683–85 (Dec. 17).

81. Territorial and Maritime Dispute (Nicar. v. Colom.), 2012 I.C.J. 624, paras. 82–84 (Nov. 19).

82. See, e.g., WILLIAM EDWARD HALL, INTERNATIONAL LAW 89 (1880) (explaining that inchoate title “must either be converted into a definitive title within reasonable time by planting settlements or military posts, or it must at least be kept alive by repeated local acts showing an intention of continual claim”); CREASY, *supra* note 73, at 216 (explaining that inchoate title through discovery must be followed by use and occupancy to create sovereignty).

83. See *The Court: History*, INT’L CT. JUST., <http://www.icj-cij.org/court/index.php?p1=1&p2=1> (last visited Jan. 18, 2014) (summarizing the history of the international judicial system, including the creation of the Permanent Court of Arbitration in 1899, several years after Japan annexed the Senkakus).

84. Statute of the International Court of Justice art. 59, June 26, 1945, 59 Stat. 1055.

tion is so highly contextualized that even minor variations in the facts can make a difference in the outcome.<sup>85</sup>

Finally, even insofar as it is safe to seek guidance from precedent, some international tribunals have suggested that very little may be necessary to establish sovereignty over small, uninhabited islands.<sup>86</sup> Perhaps the most robust illustration of this point comes from *The Clipperton Island Case*, where the arbitrator held that France had effectively occupied an otherwise unclaimed island merely by sending a French naval officer who landed there and publicly proclaimed French sovereignty.<sup>87</sup> Based on this precedent, China probably did enough even in the nineteenth century. Moreover, given the size of the Senkaku/Diaoyu, the argument that China could not have done much more carries some appeal. Together, these sources of uncertainty suggest that neither side's position on the status of the Islands in 1895 is full-proof.

#### B. *Whether Japan Acquired Title Under the Doctrine of Acquisitive Prescription*

The second critical debate concerns whether Japan acquired title to the Senkaku/Diaoyu Islands by exercising effective control over them. As explained earlier, the doctrine of acquisitive prescription enables one state to obtain title over part of the territory of another by asserting effective control in a peaceful and public manner, without interruption, for a sufficient period.<sup>88</sup> Here, there probably cannot be a single period of control spanning from 1895 to 1970. Instead, there appears to be two distinct periods during which Japan may have acquired sovereignty under the doctrine: from 1895 to 1937, and from 1951 to 1970. The gap between them reflects two historical facts. First, Japan was at war with China from 1937 to 1945.<sup>89</sup> The state of war makes it difficult to conclude that Japan's control was peaceful—even though the parties did not fight a battle specifically over the Senkaku/Diaoyu, aggression toward China during the period facilitated Japan's effective control

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85. See Peter N. Upton, *International Law and the Sino-Japanese Controversy over Territorial Sovereignty of the Senkaku Islands*, 52 B.U. L. REV. 763, 769 (1972).

86. E.g., *Legal Status of Eastern Greenland* (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53, at 28 (Apr. 5) (“[T]he tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries.”).

87. *Clipperton Island* (Fr. v. Mex.), 2 R.I.A.A. 1105 (1932).

88. *Supra* text accompanying notes 61–62.

89. Diana Lary, *China and Japan at War: Suffering and Survival, 1937–1945*, ASIA-PAC. J.: JAPAN FOCUS (Nov. 29, 2010), <http://www.japanfocus.org/-Diana-Lary/3449>.

over the Islands by distracting China with more pressing security matters and virtually eliminating the possibility of a Chinese challenge.<sup>90</sup> I will assume, therefore, that Japan's *effectivités* during the war years cannot count toward Japanese title. Second, as discussed below in Section C, Japan's acceptance of the Potsdam Declaration in the 1945 Instrument of Surrender dictates that there was an interregnum during which Japanese sovereignty, if it existed, depended upon a supporting, post-war determination from the Allies.<sup>91</sup> The years from 1945 to 1951 were a period of limbo, during which Japan had agreed that its sovereignty over the Senkaku/Diaoyu would depend upon Allied support, but no Allied decision had been made.<sup>92</sup>

The absence of clear doctrinal contours complicates the analysis of whether Japan satisfied the requirements for acquisitive prescription during either of the two periods. For example, "there is a complete lack of agreement as to the time required for the establishment of a prescriptive title."<sup>93</sup> Hugo Grotius favored a requirement of more than 100 years,<sup>94</sup> while Dudley Field argued for 50 years.<sup>95</sup> Meanwhile, cases from international tribunals suggest that states might accomplish acquisitive prescription in a much shorter period. The *Island of Palmas Case* explained that possession must simply last "long enough to enable any Power who might have considered herself as possessing sovereignty over the island . . . to have, according to local conditions, a reasonable possibility for ascertaining the existence of a state of things contrary to her real or alleged rights."<sup>96</sup> In *The Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, the ICJ held that Singapore acquired title from Malaysia over certain disputed rocks largely because of a combination of Singaporean effective control and Malaysiaian acquiescence over a period of

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90. See Erza F. Vogel, *Preface: Regional Patterns in the China War, 1937–1945*, in CHINA AT WAR: REGIONS OF CHINA, 1937–1945, at xi, xi (MacKinnon et al. eds., 2007) ("The China War brought the conflict to all major regions of the country over a long period of time and resulted in tens of millions of casualties. During the China War, death and destruction were on a scale beyond anything the Chinese had ever experienced . . .").

91. *Infra* text accompanying notes 119–21.

92. *Infra* text accompanying notes 119–21.

93. Johnson, *supra* note 61, at 347.

94. HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 113 (A.C. Campbell trans., M. Walter Dunne 1901) (1625).

95. DAVID DUDLEY FIELD, OUTLINES OF AN INTERNATIONAL CODE 22 (2d ed. 1876).

96. *Island of Palmas (Neth./U.S.)*, 2 R.I.A.A. 829, 867 (Perm. Ct. Arb. 1928).

slightly less than thirty years.<sup>97</sup> There is simply no established rule on duration.

The law is also unclear about the volume of *effectivités* necessary to support prescriptive title. Like the doctrine of occupation, acquisitive prescription calls for an analysis that considers the totality of the circumstances in each case.<sup>98</sup> The result is that small changes in the facts can make a difference in the outcome, and the precedent is generally less helpful. Adding to the uncertainty, only a few international decisions have actually applied the doctrine. The most recent is *The Case Concerning Sovereignty over Pedra Branca*, where the ICJ found that, given rather clear Malaysian acquiescence, Singapore had acquired title from Malaysia by investigating and reporting on maritime hazards and shipwrecks in the waters surrounding a disputed island, exercising exclusive control over visits, installing radio communications equipment for use by its naval forces, and soliciting bids from private entities to reclaim areas around the island.<sup>99</sup> In contrast, *The Case Concerning Kasikili/Sedudu Island (Botswana/Namibia)* held that one military patrol in a disputed territory, publication of certain maps, and conduct of private individuals were insufficient to create prescriptive title for Namibia.<sup>100</sup> In *The Case Concerning Sovereignty over Certain Frontier Land (Belgium/Netherlands)*, the ICJ concluded that the Netherlands failed to acquire prescriptive title from Belgium by collecting taxes from the disputed plots of land; adjudicating a dispute over a proposed sale of land that included the plots; and selling, applying its rent laws to, and granting a railway concession that traversed part of the land.<sup>101</sup> These acts were insufficient to displace Belgian sovereignty in part because they were “largely of a routine and administrative character.”<sup>102</sup> Other cases have rejected claims to

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97. *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (Malay./Sing.), 2008 I.C.J. 14, 87–88, 96 (May 23).

98. MALCOLM NATHAN SHAW, *INTERNATIONAL LAW* 426–28 (2003).

99. 2008 I.C.J. at 82–88; *see also* Coalter G. Lathrop, *International Decisions: Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge*, 102 AM. J. INT'L L. 828, 834 n.14 (2008) (explaining that the court did not mention “acquisitive prescription, it is difficult to see the difference between the Court’s ‘conduct/acquiescence’ formulation and garden variety prescription: acquiescence requires publicity, and persistence of conduct seems to be implied. In any event, the three modes (tacit agreement, acquiescence, and prescription) are quite similar”).

100. *Kasikili/Sedudu Island (Bots./Namib.)*, 1999 I.C.J. 1045, 1103–06 (Dec. 13).

101. *Sovereignty over Certain Frontier Land (Belg./Neth.)*, 1959 I.C.J. 209, 227–30 (June 20).

102. *Id.* at 229.

prescriptive title without addressing the sufficiency of a party's administrative acts.<sup>103</sup>

Despite these uncertainties, Japan has a good argument for prescriptive title, both from 1895 to 1937 and from 1951 to 1970. For starters, the periods of Japan's effective control meet multiple variants of the durational requirement. If, as *The Island of Palmas Case* suggests, effective control is sufficient where it lasts long enough simply to provide the opposing party with an adequate opportunity to recognize it,<sup>104</sup> then the periods of 1895 to 1937 and 1951 to 1970 were both more than enough. Indeed, China not only had ample opportunity to identify Japan's effective control, China was in fact aware of Japan's control of the Islands for decades.<sup>105</sup> If, on the other hand, the law requires that the control exceeds a certain minimum number of years, then there is still reason to believe that the duration of Japanese control was sufficient. Spanning over forty years, Japan's control from 1895 to 1937 lasted longer than Singapore's control over the disputed rocks in *The Case Concerning Sovereignty over Pedra Branca* by more than a decade.<sup>106</sup> And there does not seem to be a meaningful difference between the period found sufficient in the *Pedra Branca* case<sup>107</sup> and the approximately nineteen years of Japan's control from 1951 to 1970. On balance, international case law suggests that the duration of Japan's control was enough for each period.

There is also a good argument that Japan's *effectivités* were sufficient in both quality and volume during each period. Between 1895 and 1937, the Japanese government officially claimed several of the Islands; conducted detailed surveys and entered the Islands into official land registries; leased most of the Islands to Koga Tatsushiro, a Japanese citizen, for thirty years; granted an official award to Mr. Koga for developing the Islands; and then sold most

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103. See, e.g., *Land and Maritime Boundary Between Cameroon and Nigeria* (Cameroon/Nigeria), 2002 I.C.J. 303, 412–16 (Oct. 10) (rejecting a Nigerian claim to prescriptive title because Nigeria did not consider itself to have title during the relevant period and Cameroon had not acquiesced); *Chamizal* (Mex./U.S.), 11 R.I.A.A. 309, 328–29 (1911) (rejecting a claim of prescriptive title because possession by the United States had been interrupted repeatedly by challenges from Mexican diplomatic agents).

104. *Island of Palmas* (Neth./U.S.), 2 R.I.A.A. 829, 867 (Perm. Ct. Arb. 1928).

105. See *infra* notes 113–115 and accompanying text (describing Chinese knowledge of and acquiescence to sovereign acts by Japan at the Islands).

106. See *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (Malay./Sing.), 2008 I.C.J. 14, 88 (May 23) (assuming that Singapore's proposal for reclamation around the island in 1978 is the start of its control until the case was submitted to the ICJ in 2008).

107. See Lathrop, *supra* note 99, at 832–33 (finding effective control over a period of twenty-seven years sufficient to establish sovereignty).



of the Islands to the Koga family.<sup>108</sup> Later, between 1951 and 1970, Japan required Taiwanese workers to leave the Senkaku/Diaoyu on two occasions upon finding that they did not have passports or immigration permits, placed on the Islands a marker that identified them as Japanese territory, and authorized payments of compensation to families of victims attacked by two unidentified vessels in the surrounding waters.<sup>109</sup> Additionally, acting on the premise of Japan's residual sovereignty, the United States used the Islands for military purposes starting in the 1950s.<sup>110</sup> These acts appear more similar in quality and volume to those that supported Singapore's successful claim to prescriptive title in the *Pedra Branca* case<sup>111</sup> than to those that failed to establish title with Namibia in the *Kasikili/Sedudu Island* case.<sup>112</sup>

Equally significant is that China apparently did nothing to exert effective control over the Islands or even protest Japanese control during the periods in question.<sup>113</sup> In fact, China affirmatively endorsed Japanese sovereignty on multiple occasions. In 1920, the Chinese consul in Nagasaki issued a letter expressing appreciation to a Japanese citizen for rescuing a number of Chinese fishermen who had been stranded on the Islands after a storm and in doing so referred to the Senkaku/Diaoyu as part of "Yaeyama District, Okinawa Prefecture, Empire of Japan."<sup>114</sup> Later, in 1953, the People's Daily, the official newspaper of the Communist Party of China, published an article defining the Senkaku/Diaoyu as part of the Ryukyu Islands and urging the United States to return them to Japan.<sup>115</sup> China also acknowledged Japanese sovereignty in offi-

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108. Gavan McCormack, *Much Ado over Small Islands: The Sino-Japanese Confrontation over the Senkaku/Diaoyu*, ASIA-PAC. J.: JAPAN FOCUS (May 27, 2013), [http://www.japanfocus.org/site/make\\_pdf/3947](http://www.japanfocus.org/site/make_pdf/3947); Han-yi Shaw, *supra* note 51, at 32; Tao Cheng, *supra* note 1, at 247.

109. Han-yi Shaw, *supra* note 51, at 13, 34; Tao Cheng, *supra* note 1, at 246–47.

110. LARRY A. NIKSCH, CONG. RESEARCH SERV., CRS-96-798, SENKAKU (DIAOYU) ISLANDS DISPUTE: THE U.S. LEGAL RELATIONSHIP AND OBLIGATIONS 3 (1996).

111. See *supra* text accompanying note 99.

112. See *supra* text accompanying note 100.

113. The following explains:

Not until the discovery of oil around the Diaoyu Islands in 1969 did both the Nationalist Chinese regime in Taiwan and the Communist Chinese Regime on the mainland officially claim ownership of the Diaoyu Islands. . . . [T]he Chinese conducted no activities in the East China Sea, including the Diaoyu Islands, after the [Ryukyu] Kingdom was annexed by the Japanese in 1879, except with regard to Taiwan, which was ceded to Japan after 1895.

See SUGANUMA, *supra* note 68, at 116, 119.

114. Han-yi Shaw, *supra* note 51, at 33.

115. See Takayuki Nishi, *The Diaoyu/Senkaku Islands: A Japanese Scholar Responds*, N.Y. TIMES, Oct. 4, 2012, <http://kristof.blogs.nytimes.com/2012/10/04/the-diaoyusenkaku-islands-a-japanese-scholar-responds>.

cial maps and textbooks for decades<sup>116</sup> and did not enact a law including the Islands in Chinese territory until 1992.<sup>117</sup> Cumulatively, these acts demonstrate Chinese acquiescence to Japanese sovereignty at least as clearly as others that international courts have found sufficient to support prescriptive title in comparable cases.<sup>118</sup> Acquisitive prescription thus provides a basis for resolving the case in favor of Japan.

*C. Whether the Allies Made a Determination in Favor of Japanese Title After World War II*

The final critical debate concerns whether the Allies ever made a determination in favor of Japanese title over the Senkaku/Diaoyu Islands in accordance with the 1945 Potsdam Declaration and Instrument of Surrender. At Potsdam, the United States, China, and the United Kingdom proclaimed in part, “Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku and such other minor islands as we determine.”<sup>119</sup> This declaration became binding upon Japan when Japan “accept[ed]” its provisions and “undert[ook] . . . to carry [them] out . . . in good faith” in the Instrument of Surrender.<sup>120</sup>

The parties have raised a number of arguments about these texts. China argues that the Allies never made the necessary determination in favor of Japan and instead favored Chinese sovereignty by issuing the 1943 Cairo Declaration and the 1945 Potsdam Declaration.<sup>121</sup> The former proclaimed that “all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and the Pes-

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116. See Shinya Murase, *Japan Chair Platform: The Senkaku Islands and International Law*, CSIS (May 22, 2013), <http://csis.org/publication/japan-chair-platform-senkaku-islands-and-international-law>; see also SUGANUMA, *supra* note 68, at 125–27 (describing a number of official Chinese publications that omitted the Senkaku/Diaoyu in delimiting Chinese territory).

117. Asahi Shimbun, *Until Now: Tensions Start to Rise When China Enacts Law Claiming Islands*, ASIA & JAPAN WATCH (Dec. 26, 2012), [http://ajw.asahi.com/article/special/senkaku\\_history/AJ201212260105](http://ajw.asahi.com/article/special/senkaku_history/AJ201212260105).

118. Cf. Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malay./Sing.), 2008 I.C.J. 14, 82–88 (May 23).

119. Proclamation Defining Terms for Japanese Surrender, 13 DEP’T ST. BULL. 137, para. 8 (1945) [hereinafter Potsdam Declaration].

120. Instrument of Surrender of Japan, at 1251–52, Sept. 2, 1945, 59 Stat. 1733; see also YUTAKA ARAI-TAKAHASHI, *THE LAW OF OCCUPATION: CONTINUITY AND CHANGE OF INTERNATIONAL HUMANITARIAN LAW, AND ITS INTERACTION WITH INTERNATIONAL HUMAN RIGHTS LAW* 35–36 (2009) (noting that the instrument of surrender incorporated the Potsdam Declaration).

121. See State Council Info. Office of China, *supra* note 6.

cadores, shall be restored to the Republic of China,"<sup>122</sup> while the latter provided that the Cairo Declaration "shall be carried out."<sup>123</sup> Japan responds that the Cairo Declaration does not apply because the Islands were unoccupied *terra nullius* at the time of annexation and thus never "stolen" from China.<sup>124</sup> Further, Japan contends that the Allies made the necessary determination in favor of Japanese sovereignty in the 1951 San Francisco Peace Treaty, which provided that "Japan will concur in any proposal of the United States to the United Nations to place under its trusteeship system . . . Nansei Shoto south of 29 deg. north latitude (including the Ryukyu Islands . . .),"<sup>125</sup> and required Japan to renounce sovereignty over islands such as Formosa, the Spratly Islands, and the Paracel Islands.<sup>126</sup> Japan asserts that the Treaty embodied the necessary Allied determination because the Senkaku/Diaoyu are part of "Nansei Shoto south of 29 deg. north latitude (including the Ryukyu Islands . . .)"; the Treaty required the concurrence of Japan, rather than China, in any proposal to place the Ryukyu Islands under U.N. trusteeship; and the Treaty required a renunciation of Japanese sovereignty over a number of specific islands while conspicuously omitting any requirement of a renunciation of sovereignty over the Senkaku/Diaoyu.<sup>127</sup> China replies that the San Francisco Treaty did not place the Islands under U.S. trusteeship and therefore did not favor Japanese sovereignty and that the Treaty is illegal even if it purported to grant the Islands to Japan, given that China did not participate in its negotiation or adoption.<sup>128</sup>

The most important point about these texts is that their relevance is conditional. Start with the Cairo Declaration. The purpose of that document was to announce the Allies' intention to simply undo Japan's military conquests by ordering the return of territories stolen from China rather than to punish Japan by taking away territories that rightfully belonged to it. The Allies stated explicitly that they "covet[ed] no gain for themselves and ha[d] no thought of territorial expansion."<sup>129</sup> Thus, to say that the Cairo

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122. Conference of President Roosevelt, Generalissimo Chiang Kai-shek and Prime Minister Churchill in North Africa, 9 DEP'T ST. BULL. 393, 393 (1943) [hereinafter Cairo Declaration].

123. Potsdam Declaration, *supra* note 119, art. 8.

124. See *The Basic View on the Sovereignty over the Senkaku Islands*, *supra* note 5.

125. Treaty of Peace with Japan art. 3, Sept. 8, 1951, 3 U.S.T. 3169, 136 U.N.T.S. 145.

126. *Id.* art. 2.

127. *Id.* art. 2.

128. State Council Info. Office of China, *supra* note 6.

129. Cairo Declaration, *supra* note 122, at 393.

Declaration supports the Chinese claim is to presuppose that the Senkaku/Diaoyu belonged to China up until the time of Japanese annexation in 1895, that Japan's annexation was therefore illegal, and that Japan did not acquire title under the doctrine of acquisitive prescription from 1895 to 1937. Put differently, if China did not have title in 1895, or if China acquiesced to Japanese control before World War II, then Japan did not steal the Islands and Cairo simply does not apply. Indeed, under this latter scenario, a Chinese claim to the Islands in 1943 would have contradicted the Allies' express disavowal of territorial expansion.<sup>130</sup> The Cairo Declaration, therefore, cannot operate as a freestanding basis for Chinese sovereignty. The same is true of the Potsdam Declaration, which did not affirmatively support Chinese sovereignty over any territory other than by calling for the enforcement of the Cairo Declaration.<sup>131</sup> To treat Potsdam as affirmative evidence of Chinese title is again to presuppose that the Senkaku/Diaoyu belonged to China in 1895, that Japan's annexation was unlawful, and that Japan did not acquire prescriptive title prior to Cairo.

The San Francisco Treaty also holds only conditional relevance. To understand why, first consider the Treaty's plain meaning. Several inferences can be drawn from the text. First, because "Nansei Shoto" translates to "Southwest Archipelago," "Nansei Shoto south of 29 deg. north latitude" refers simply to that portion of the archipelago that is south of twenty-nine degrees North latitude—essentially everything below Takarajima Island, which is approximately 140 nautical miles southwest of Kagoshima Prefecture (see Figure 8).<sup>132</sup> Second, whether the Senkaku/Diaoyu are part of "Nansei Shoto south of 29 deg. north latitude" hinges on natural geography. The text supports this conclusion by referring to a line of latitude and an island chain rather than, for example, "Okinawa Prefecture" or some other political unit.<sup>133</sup> In this way, the San Francisco Treaty is reminiscent of the natural geographic orientation of the Treaty of Shimonoseki's language on Formosa. Third, the use of the Japanese term, "Nansei Shoto," rather than its English translation, in the midst of an English text suggests that Japanese meaning and usage determine the scope of the archipelago.

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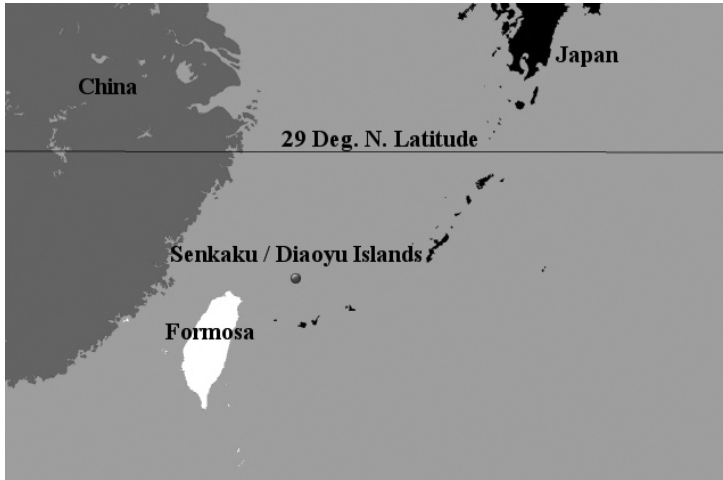
130. *Id.*

131. Treaty of Peace with Japan, *supra* note 125, art. 8.

132. Distance Measurement Tool, *supra* note 15.

133. Treaty of Peace with Japan, *supra* note 125, art. 3.

FIGURE 8



Given these observations, it seems indisputable that the San Francisco Treaty at least purported to allocate sovereignty to Japan, as long as Japanese usage in 1951 defined “Nansei Shoto” as including the Senkaku/Diaoyu. Because the Islands are at twenty-five degrees North latitude, they satisfy the text’s latitudinal requirement.<sup>134</sup> Moreover, it would be strange to require only the concurrence of Japan in U.N. trusteeship over the southern part of Nansei Shoto if there were an understanding that the PRC or ROC had sovereignty over some portion of the archipelago. Finally, under the widely utilized *expressio unius* canon, the provisions requiring Japan to renounce sovereignty only over islands such as Formosa, the Spratly Islands, and the Paracel Islands imply that Japan did not have to renounce sovereignty over islands not mentioned, such as the Senkaku/Diaoyu.

Subsequent conduct of the United States corroborates this interpretation.<sup>135</sup> The official U.S. position immediately after San Francisco was that while the Treaty gave to the United States administrative authority over the southern part of Nansei Shoto, Japan retained “residual sovereignty.”<sup>136</sup> Moreover, U.S. actions left no doubt that U.S. administrative authority covered the dis-

134. *Id.*

135. *Cf.* Vienna Convention on the Law of Treaties, *supra* note 31, art. 31.3(b) (providing that treaty interpretation shall take into account “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”).

136. *See* Okinawa Reversion Treaty, S. EXEC. REP. NO. 92-10, at 1 (1971) (explaining that this position “was reaffirmed by all subsequent Administrations”); Office of Ne. Asian

puted islands. In 1953, the U.S. Army issued Civil Administration Proclamation (USCAR) Number 27, which provided that the “territorial Jurisdiction of the United States Civil Administration of the Ryukyu Islands, and the Government of the Ryukyu Islands are redesignated as all of those islands, islets, atolls and rocks and territorial waters within” geographic boundaries that plainly encircled the Senkaku/Diaoyu.<sup>137</sup> Significantly, this proclamation came only a year and a half after the San Francisco Treaty entered into force and implemented U.S. trusteeship “in conformity with” the Treaty.<sup>138</sup> And the U.S. Navy used the Islands as bombing ranges starting in the 1950s.<sup>139</sup> As long as U.S. administration was coterminous with Japan’s residual sovereignty, the obvious implication of the American conduct is that the United States, a key participant in the drafting process, understood the Treaty to leave Japan with residual sovereignty over the disputed islands.

China might contend that the Allies violated the Potsdam Declaration by affirming Japanese sovereignty over the Islands in the San Francisco Treaty without first obtaining Chinese consent. This argument seems unpersuasive, however. One reason is that the Declaration was extremely vague about process; it did not specify when, where, or how the Allies envisioned making their determinations.<sup>140</sup> The text does not state, for example, whether the Allies planned to determine sovereignty over minor islands by unanimous agreement or something less. Given this vagueness, it is hard to say that the determination reflected in the San Francisco Treaty violated Potsdam. Further, even if Potsdam had been clear about process, the Declaration was in itself nonbinding because it was not a treaty.<sup>141</sup> While Japan’s acceptance of Potsdam created a legal

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Affairs, Dep’t of State, *United States Relations with Japan, 1945–1952*, in JAPAN AND AMERICA TODAY 33, 49–50 (1953).

137. U.S. Civil Admin. of the Ryukyu Islands, *Civil Administration Proclamation No. 27: Geographical Boundaries of the Ryukyu Islands*, RYUKYU-OKINAWA HISTORY & CULTURE WEBSITE art. 1 (Dec. 25, 1953), <http://www.niraikanai.wvma.net/pages/archive/caproc27.html>.

138. *Id.*

139. NIKSCH, *supra* note 110, at 4.

140. Potsdam Declaration, *supra* note 119, art. 8.

141. See, e.g., Lung-chu Chen & W.M. Reisman, *Who Owns Taiwan: A Search for International Title*, 81 YALE L.J. 599, 635 (1972) (“The Cairo Declaration is not, in the formal sense, a ‘legal’ document. It was not ratified and, indeed, the missions of the three declarants probably did not have authorizations to conclude a policy revision of such scope.”); E. Lauterpacht, *The Contemporary Practice of the United Kingdom in the Field of International Law—Survey and Comment*, 8 INT’L & COMP. L.Q. 146, 186–87 (1959) (explaining that the Cairo Declaration is “not couched in the form of a legal instrument,” and that it is “doubtful” that the Potsdam Declaration was intended to create binding obligations between the signatories); Statement by Prime Minister Winston Churchill, 536 PARL. DEB., H.C. (5th ser.)

relationship between Japan and the Allies, the Allies had no legal obligations to one another to adhere to the Declaration's terms.<sup>142</sup> Even if China understood the Declaration to require the Allies to agree unanimously in determining Japanese sovereignty over any minor islands, that document did not impose upon the United States and the United Kingdom a legal obligation to honor that understanding.<sup>143</sup> Thus, if the Senkaku/Diaoyu did not belong to China, the United States and the United Kingdom remained free to support Japanese title to those islands even over a Chinese objection, including in the San Francisco Treaty.

China also contends, however, that the Allies violated the fundamental principles of sovereign equality and independence by granting Japanese sovereignty over the Islands in the San Francisco Treaty without Chinese approval.<sup>144</sup> The U.N. Charter codified those principles several years before San Francisco<sup>145</sup> and, in doing so, barred states from taking territory away from a third-party state without that party's consent.<sup>146</sup> Because of these principles, the legality of the Treaty's treatment of the Senkaku/Diaoyu must assume either that China consented to Japanese title over the Islands or that Chinese consent was unnecessary because the Islands were not Chinese territory in 1951.

Addressing these assumptions in order, China probably did not consent to the relevant part of the Treaty. On the one hand, the ROC explicitly recognized the legality of at least parts of the San Francisco Treaty in several provisions of the Treaty of Taipei. Specifically, the ROC "recognized that under Article 2 of the [San Francisco Treaty], Japan . . . renounced all right, title, and claim to Taiwan . . . and [the Pescadores] as well as the Spratly Islands and the Paracel Islands"; "recognized that under the provisions of Article 10 of the San Francisco Treaty, Japan has renounced all special rights and its interests in China"; and agreed that, unless otherwise provided, "any problem arising between the Republic of China and

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(1955) 900-2 (U.K.) (explaining that the declaration was nonbinding and "contained merely a statement of common purpose").

142. Cf. Chen & Reisman, *supra* note 141, at 635; Lauterpacht, *supra* note 141, at 186-87; Statement by Prime Minister Winston Churchill, *supra* note 141.

143. Chen & Reisman, *supra* note 141, at 635; Lauterpacht, *supra* note 141, at 186-87; Statement by Prime Minister Winston Churchill, *supra* note 141.

144. State Council Info. Office of China, *supra* note 6.

145. U.N. Charter art. 2, para. 1.

146. Cf. Vienna Convention on the Law of Treaties, *supra* note 31, art. 35 ("An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing.").

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.”<sup>147</sup> If these provisions reflect a general acceptance of San Francisco by the ROC, and if the ROC was the legitimate government of China at the time, then they cure the absence of Chinese participation in San Francisco’s negotiation and adoption. On the other hand, neither the PRC nor the ROC consented through the usual means of signature; the ROC’s historical capacity to act for China is itself a notoriously intractable question; and the Treaty of Taipei neither categorically recognizes San Francisco’s legality nor specifically recognizes the legality of San Francisco’s key provision on the Ryukyu Islands.<sup>148</sup>

The remaining question, then, is whether the absence of Chinese consent matters. Once again, the answer depends on the laws of occupation and acquisitive prescription. If China updated its control over the Islands in the nineteenth century to satisfy the new and more demanding requirements for effective occupation, and if Japan failed to acquire title through acquisitive prescription prior to 1951, then the Islands belonged to China at the time of San Francisco, and the Treaty is unlawful for purporting to grant title to Japan without Chinese consent.<sup>149</sup> If China did not update its control over the Islands to satisfy the new requirements for occupation, or if Japan acquired title through prescription before 1951, then Chinese consent was unnecessary and San Francisco embodies a valid Allied determination in favor of Japanese sovereignty in accordance with the Potsdam Declaration and Instrument of Surrender. Just as the Cairo and Potsdam Declarations favor Chinese sovereignty only if we assume that China prevails on the questions of early occupation and prewar acquisitive prescription, the San Francisco Treaty favors Japanese sovereignty only if we assume that Japan prevails on those same questions. The only difference is that Japan does not need to prevail on *both* questions in

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147. Treaty of Peace, Taiwan-Japan, *supra* note 7, arts. 2, 5, 11.

148. For the Treaty of Taipei to reflect a general acceptance of San Francisco’s territorial settlements, one would have to conclude that, by agreeing in Article 11 to resolve problems arising between the ROC and Japan “as a result of the existence of a state of war” in accordance with the “relevant” provisions of the San Francisco Treaty, the ROC agreed to settle the Senkaku/Diaoyu dispute in accordance with the Ryukyu Islands provision in San Francisco’s Article 3. But Japan is unlikely to assert that the source of the islands dispute was war, and interpreting Article 11 as a general ROC recognition of San Francisco’s legality would mean that the ROC’s specific recognition of Articles 2 and 10 was redundant.

149. See U.N. Charter art. 2, para.1.



order for the Treaty to favor the Japanese claim—either will suffice.

In summary, we know from the Instrument of Surrender that Japan agreed its sovereignty over the Senkaku/Diaoyu Islands would depend upon the occurrence of a supporting determination from the Allies after World War II. However, whether a valid determination was made hinges on one's resolution of the arguments on occupation and acquisitive prescription. Given the preceding conclusions on acquisitive prescription in Section B, this framework suggests that the San Francisco Treaty was lawful—because China acquiesced to Japan's effective control over the Islands from 1895 to 1937, title shifted to Japan prior to San Francisco, and Chinese consent to the Treaty was unnecessary.<sup>150</sup> This conclusion follows regardless of one's view on the question of nineteenth century occupation.

### III. IMPLICATIONS

Upon close inspection, the legal analysis on the sovereignty dispute over the Senkaku/Diaoyu Islands is not terribly complicated. Many of the issues that have arisen in the debates simply do not matter from a legal standpoint. These include the Treaty of Shimonoseki, China's 1941 declaration of war, geography, acts of private individuals, and most official acts after 1970. The only important questions are (1) whether the Islands were *terra nullius* in 1895, (2) whether Japan acquired title through acquisitive prescription, and (3) whether the Allies ever made a valid determination in favor of Japanese sovereignty after World War II, in satisfaction of the Potsdam Declaration and Instrument of Surrender. Of these, the first two questions are the most important because they dictate the resolution of the third.

Framing the dispute in this manner helps to impose conceptual order on a legal debate that has, at times, suffered from a certain level of analytical chaos. The essential predicates for the contemporary Chinese claim are original Chinese occupation and the absence of Japanese prescriptive title. If the Senkaku/Diaoyu Islands were Chinese territory in 1895 and Japan did not acquire title by prescription from 1895 to 1937, then: (1) Japan "stole[ ]" the Islands within the meaning of the Cairo Declaration and later accepted a legal obligation to return them to China by signing the Instrument of Surrender; (2) the San Francisco Treaty could not

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150. See *supra* notes 104–14 and accompanying text.

have granted sovereignty to Japan because Chinese consent was necessary but never obtained; and (3) Japan has title today only if it satisfied the requirements for acquisitive prescription between 1951 and 1970. If, on the other hand, the Islands were not Chinese territory in 1895, or if Japan acquired prescriptive title from 1895 to 1937, then Japan did not steal the Islands within the meaning of the Cairo Declaration or accept an obligation to return them by signing the Instrument of Surrender, and the San Francisco Treaty's affirmation of Japanese sovereignty was lawful regardless of Chinese consent. It is that simple.

For Japan, the Potsdam Declaration and Instrument of Surrender loom large. Recall that in accepting Potsdam, Japan agreed that its title to any "minor islands"—including the Senkaku/Diaoyu—would depend on the occurrence of a supporting, Allied determination following World War II.<sup>151</sup> The result of that agreement is that Japan's prewar title, even if originally valid, cannot be the foundation for Japanese sovereignty today. If Japan has sovereignty now, it must be because of something that happened after the Instrument of Surrender. This means that Japan's incentive for arguing that the Islands were *terra nullius* in 1895 is not to prove that prewar occupation itself establishes a contemporary Japanese title, but rather to undermine China's claim and thus set up the argument that Chinese consent to the San Francisco Treaty was unnecessary. The same is true of the argument that Japan acquired prescriptive title from 1895 to 1937. Just as the nineteenth century occupation is indispensable for China, either post-war acquisitive prescription or a lawful San Francisco settlement is essential for Japan.

Operating under this analytical structure in turn clarifies that Japan has the better argument. One reason is that Japan simply has more doctrinal options. China has title only if it establishes the nineteenth century Chinese occupation and the absence of prescriptive title for Japan.<sup>152</sup> Japan, by contrast, can prevail if it establishes *either* that China lost or never had prewar title and the San Francisco Treaty conferred sovereignty on Japan, or that Japanese effective control satisfied the requirements for acquisitive prescription from 1951 to 1970.<sup>153</sup> In part, this is because, as a later-in-time source of title, acquisitive prescription trumps original occupation—the doctrine in fact assumes an original Chinese sovereignty.

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151. See *supra* text accompanying note 127.

152. See *supra* text accompanying notes 67–68.

153. See *supra* text accompanying note 76, 103–07; *supra* Part II.C.

In part, it is also because the law rewards effective control, which Japan exercised exclusively throughout the twentieth century.<sup>154</sup>

Japan also has the better argument because its effective control satisfied the requirements for acquisitive prescription at least as clearly as China's nineteenth century *effectivités* satisfied the requirements for occupation. The evidence of Japan's effective control is simply more substantial; the various evidence of affirmative Chinese acquiescence to and even support for that control is damning; and while there is a certain amount of indeterminacy in the doctrine of acquisitive prescription, this indeterminacy is no greater than that associated with the historical law of occupation. Those who manage to find a nineteenth-century Chinese occupation of the Islands notwithstanding substantial indeterminacy demonstrate a tolerance for rule uncertainty that disqualifies them from arguing that indeterminacy precludes a finding of prescriptive title for Japan. The absence of clear rules, moreover, does not justify the avoidance of ultimate conclusions. After all, international tribunals have resolved numerous disputes of a similar nature based on the very same doctrines.<sup>155</sup> The question is not whether there is a clear answer, but whether there is a best answer. And here there is: sovereignty belongs to Japan.

A final implication of the analysis is that additional historical research might help reduce some of the legal indeterminacy. For example, evidence of the date of the first bathymetric surveys of the East China Sea could help to confirm whether the Senkaku/Diaoyu appertained or belonged to Formosa<sup>156</sup> within the meaning of the Treaty of Shimonoseki. If no surveys occurred prior to 1895, then the parties could not have possessed detailed knowledge of seabed topography and it is implausible that they envisioned seabed features as the criterion by which to determine the scope of the ceded territory. Eliminating the possibility of this criterion would in turn establish that distance—the only plausible, remaining natural geographic option—determines whether the Senkaku/Diaoyu appertain or belong to Formosa under the Treaty of Shimonoseki. Additionally, evidence of the meaning of “Nansei Shoto” within Japanese usage circa 1951 would help to clarify the meaning of the San Francisco Treaty. If standard usage of that term encom-

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154. See, e.g., *Island of Palmas* (Neth./U.S.), 2 R.I.A.A. 829, 854 (Perm. Ct. Arb. 1928); see generally Hajime, *supra* note 43.

155. See *supra* text accompanying notes 73–74, 106.

156. *Treaty of Peace, China-Japan*, *supra* note 4, art. 2(b).

passed the disputed Islands, there can be no debate that the Treaty purported to establish Japanese sovereignty.

#### IV. CONCLUSION

The Sino-Japanese dispute over the Senkaku/Diaoyu Islands has generated heated debate from officials and observers on both sides. A number of works in the recent American legal literature, however, have raised irrelevant issues and elided important doctrinal details in siding with the Chinese claim. This Article is meant as a counterpoint to those analyses. The argument is that, fundamentally, the dispute hinges on the doctrines of occupation and acquisitive prescription and that Japan has a more persuasive claim because Japan has more doctrinal options in pressing its case—the argument for acquisitive prescription is at least as powerful as the argument for original Chinese occupation, and acquisitive prescription trumps occupation as a later-in-time source of title.

