

NOTES

SHIFTING WINDS IN THE EAST: A LEGAL ANALYSIS AND CASE COMPARISON OF THE DIAOYU/SENKAKU ISLAND DISPUTE

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I. INTRODUCTION: SHIFTING WINDS IN THE EAST

In late 2012 when the Diaoyu/Senkaku Islands first became prominent in the news, the conflict over the uninhabited islands seemed melodramatic.¹ However, the dispute over the islands quickly became a metaphor for the longstanding rivalry between two of Asia's greatest powers: China and Japan.² This was also the first instance in which a belligerent China seemed willing to go to war over a few uninhabited rocks, whose mere existence in the world had no political importance until just a few years ago.³ While the islands themselves are of relatively little use, large energy deposits reside a little off their coast. These energy deposits not only exacerbated the conflict between the two countries but also exposed a potential underlying reason for China's newfound

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¹ Mira Rapp-Hooper, *An Ominous Pledge*, THE DIPLOMAT (Sept. 26, 2012), <http://thediplomat.com/2012/09/uncharted-waters-for-extended-deterrence-in-east-china-sea/>.

² In this note, the term "China" will be considered with the understanding that the mainland People's Republic of China (PRC) and Taiwan (ROC or Kuomintang) are one "China." When the PRC and Kuomintang are mentioned separately, it is to distinguish them as the two rivaling regimes and governments in history, of which it is now recognized that the PRC is the official government of China and Taiwan is a part of China.

³ See Mark McDonald, *Will China Arm Its Fishermen to Protect a 'Core Interest'?*, N.Y. TIMES: VIEW FROM ASIA (Sept. 12, 2012), <http://rendezvous.blogs.nytimes.com/2012/09/12/will-china-arm-its-fishermen-to-protect-a-core-interest/>.

aggression.⁴ This dispute has afforded China the opportunity to emphasize its newfound role as the region's hegemon, and it has also illuminated various issues that international law and public policy may not be able to address.⁵

While the region of the Diaoyu/Senkaku Islands seems like a new source of conflict between the two Asian superpowers, the many facets and dimensions of the conflict actually derive from longstanding tensions between the two countries. The history of the region and the competitive rivalry between the countries is the prelude that explains why the conflict over these particular islands and between these particular countries can have a major impact in the region and the modern world. Although both countries are on the border of the East China Sea, they each have developed independently of one another and their rivalry and divergent cultures reflect those differences. Their rivalry intensifies in the East China Sea because it is an important international trade route.⁶ Politically, the region still reflects this historical contention of power and clash of culture. Recently, there has been a shift in the region's hegemon from Japan to China and a realignment of allies within the entirety of Asia beyond the East China Sea: for example, Japan has become closer with former enemies, including Vietnam and the Philippines.⁷ Furthermore, the rise of China as a global power has made the rest of the world recognize the East as a growing power within the international sphere.⁸ While the two countries may be diverging politically, their economies continue to be codependent. China is Japan's largest trading partner, and the two, despite deep-rooted nationalist sentiments against one another, are some of the

4 COUNCIL ON FOREIGN RELATIONS, HISTORICAL CONTEXT OF CHINA'S MARITIME DISPUTE [Hereinafter HISTORICAL CONTEXT], http://www.cfr.org/asia-and-pacific/chinas-maritime-disputes/p31345#!?cid=otr-marketing_use-china_sea_InfoGuide#historical-context (last visited Jan. 29, 2016); Nicholas D. Kristof, *Behind Japan's Furor Over Tiny Isles, Gangland Fingerprints*, N.Y. TIMES (Oct. 10, 1996), <http://www.nytimes.com/1996/10/10/world/behind-japan-s-furor-over-tiny-isles-gangland-fingerprints.html>.

5 Robert E. Kelly, *What Would Chinese Hegemony Look Like?*, THE DIPLOMAT (Feb. 10, 2014), <http://thediplomat.com/2014/02/what-would-chinese-hegemony-look-like/>.

6 HISTORICAL CONTEXT, *supra* note 4; Dr. Sue Gronewald, *The Fateful Decision: The Ming Voyages*, ASIA FOR EDUCATORS, http://afe.easia.columbia.edu/special/china_1000ce_mingvoyages.htm; *see The Meiji Restoration*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/373305/Meiji-Restoration>.

7 Stephen Harner, *Japan and China: A Clash of Civilizations?*, FORBES (Feb. 25, 2013), <http://www.forbes.com/sites/stephenharner/2013/02/25/japan-and-china-a-clash-of-civilizations/>; *see* Richard Javad Heydarian, *Japan: The Philippines' New Best Friend?*, YAHOO! NEWS (Jun. 30, 2014), <https://ph.news.yahoo.com/blogs/learning-curve/japan--the-philippines--new-best-friend-103547152.html>; *see also* Carl Thayer, *Vietnam's Extensive Strategic Partnership with Japan*, THE DIPLOMAT (Oct. 14, 2014), <http://thediplomat.com/2014/10/vietnams-extensive-strategic-partnership-with-japan/>.

8 *See* Edward Wong, *Exploring a New Role: Peacemaker in Afghanistan*, N.Y. TIMES (Jan. 14, 2015), <http://www.nytimes.com/2015/01/14/world/asia/exploring-a-new-role-peacemaker-in-afghanistan.html> (China has now become influential enough to be considered a major player on the international field, even a peacemaker in conflicts where the United States was expected to lead).

largest economies in the world.⁹ China in particular is a global economic power, and China's economy surpassed Japan's in 2010 to become the world's second-largest economy.¹⁰ Finally, while the area around the Diaoyu/Senkaku Islands has been determined to have "substantial energy deposits" in the seabed from Taiwan to Japan, the islands have neither been further inhabited nor developed to harvest those energy deposits.¹¹ However, China's response in this conflict potentially reflects what the world's second-largest economy has now focused on for its continued development and rise: oil.¹²

Returning to the focus of this paper, the conflict's legal significance is a result of the complicated history and historical distrust between the countries, an issue that the international legal community cannot adequately address. Each country has their own perspective on the islands. As the old adage indicates, "history is written by the winners." But from China's perspective, China lost its territories even though it was a "winner" of World War II (WWII), because Japan did not return all of the islands that it seized from China as the post-war treaties demanded.¹³ Moreover, China often alludes to inconsistent treaties the United States negotiated on behalf of China. China believes returning of the islands will make amends for the historical errors. On the other hand, Japan points to its consistent administration of the islands after WWII as an indicator of current Japanese sovereignty as reflected in the bilateral agreements.¹⁴ Japan believes it has abided by all the terms it agreed to upon its surrender at the end of WWII, including the return of all islands that China owned. Japan also argues that the United States has repeatedly implied an affirmation of Japanese ownership of the islands, even agreeing to defend the region should it come under attack.¹⁵ Japan believes that China has begun to protest only now that it is strong enough to challenge the status quo in the region.¹⁶ This conflict begs the question: how should international law resolve disputes about

9 Malcolm Moore, *China Replaces U.S. as Japan's Biggest Trade Partner*, THE TELEGRAPH (Aug. 21, 2008), <http://www.telegraph.co.uk/finance/markets/2795096/China-replaces-US-as-Japans-biggest-trade-partner.html>.

10 *China GDP Surpasses Japan, Capping Three-Decade Rise*, BLOOMBERG NEWS (Aug. 16, 2010), <http://www.bloomberg.com/news/2010-08-16/china-economy-passes-japan-s-in-second-quarter-capping-three-decade-rise.html>.

11 HISTORICAL CONTEXT, *supra* note 4.

12 Brian Spegele, *Russia, OPEC Jostle to Meet China Oil Demand*, WALL ST. J. (Jan. 23, 2015), <http://www.wsj.com/articles/russia-opec-jostle-to-meet-china-oil-demand-1421987738>.

13 See John Price, *A Just Peace? The 1951 San Francisco Peace Treaty in Historical Perspective*, JAPAN POL'Y RES. INST., JPRI Working Paper No. 78 (June 2001), <http://www.jpri.org/publications/workingpapers/wp78.html>.

14 HISTORICAL CONTEXT, *supra* note 4.

15 Ankit Panda, *Obama: Senkakus Covered Under US-Japan Security Treaty*, THE DIPLOMAT (Apr. 24, 2014), <http://thediplomat.com/2014/04/obama-senkakus-covered-under-us-japan-security-treaty/>; HISTORICAL CONTEXT, *supra* note 4; see Treaty of Mutual Cooperation and Security between Japan and the United States of America, U.S.-Japan (Jan. 19, 1960) <http://www.state.gov/documents/organization/163490.pdf>.

16 Harner, *supra* note 7.

territory whose ownership and sovereignty has an uncertain, blemished past caused by the impact of imperialism and the inconsistent actions of former colonial and international powers?

This paper seeks to analyze the case of rightful ownership of the Diaoyu/Senkaku Islands by analyzing each country's historical and legal arguments. As the legal arguments reveal, all of the treaties, customary rules, and maritime law lack the substantive specificity and modern legality that is necessary to address this dispute. While international law theoretically may have jurisdiction, China and Japan's roles as world powers may prevent peaceful resolution as China wants to strengthen its newfound position as the region's hegemon and Japan wants to maintain its influence within the region and international community.¹⁷ Moreover, while case studies of other similar conflicts including, the Singapore Strait, Bakassi Peninsula, and Falkland Islands may provide specific examples of international law's applicability, they are ultimately limited guides because of their diverging outcomes. Rather, they are indicative of a greater potential of conflict rather than a chance of satisfactory resolution. While the United States and most of the international community have expressed a neutral stance towards ownership of the Diaoyu/Senkaku Islands, should either China or Japan instigate military action, it could drag the entire globe into a conflict over some uninhabited rocks and untapped energy deposits.¹⁸

As such, this paper will first outline the key historical events regarding the islands and use each country's historical argument for ownership of the islands to provide a factual background for each legal argument. Second, I will examine the most relevant types of international law: maritime law, international treaties, and customary laws regarding legal territorial acquisition. Maritime law lacks jurisdiction over the islands, however, due to its extremely limited application and an overall irrelevance to islands that lie outside of an exclusive economic zone. Moreover, the desire for universal applicability has ironically crippled treaties and customary rules because these laws are often too vague, unclear, and are too antiquated for modern application.

There are similar specific cases that may provide guidance as to the possible outcomes for this dispute. Therefore, I will compare the conflict over the Diaoyu/Senkaku Islands with three other territorial conflicts from other regions: 1) the Singapore Strait, which involves Singapore and Malaysia; 2) the Bakassi Peninsula, which concerns Nigeria and Cameroon; and 3) the Falkland Islands, which involve Argentina and the United Kingdom. These comparisons, however, only further expose the painful reality that such conflicts have no universal international legal solution, as two of the three cases required the use of military force. Moreover, the international power and influence of China and Japan have makes the Diaoyu/Senkaku Islands dispute unique, and it may require a

17 *Id.*

18 *See* HISTORICAL CONTEXT, *supra* note 4; Treaty of Mutual Cooperation, *supra* note 15.

special and particular solution. However, the ingénue persona of this conflict may inspire a new customary law framework regarding territorial disputes as a whole. Finally, I will briefly conclude by reviewing some of the unique aspects of the Diaoyu/Senkaku Islands dispute, and examine how they relate to its legal significance and political impact on the rest of the world.

II. KEY HISTORICAL EVENTS AND THE ISLANDS' POLITICAL SIGNIFICANCE

In order to understand the legal premises of international law related to the Diaoyu/Senkaku Islands dispute, it is important to provide a historical account of the region as well as each country's perspective on the history and ownership of the islands.

A. A GENERAL HISTORICAL UNDERSTANDING

1. *The Pre-Imperialist Era*

As far back as the fourteenth century, China has acknowledged the existence of the islands; the Chinese gathered medicinal herbs from the foliage on the islands and used the islands for navigational purposes.¹⁹ China had recorded maps of the islands since the Ming Dynasty, and according to Qing Dynasty maps, China was fully aware of the islands and administered them along with the strait of Taiwan.²⁰ The Japanese have historically acknowledged the existence of the islands, but never officially administered them until the late nineteenth century.²¹ Therefore, China most likely had discovered and made historical use of the islands, as historically recorded.

2. *The Era of Imperialism*

In this era, the rise of Japanese power was contrasted by waning Chinese power. In 1895 with the rise of Japanese imperialism following the Meiji Restoration, China, exhausted by the superior Japanese military and

19 Tao Cheng, *The Sino-Japanese Dispute Over the Tiao-yu-tai (Senkaku) Islands and the Law of Territorial Acquisition*, VA. J. INT'L. L. 253-57 (1974) ("The Chinese claim of sovereignty over the disputed islands is said to be rooted in the long history that began that began in the year of 1372 . . . the Tiao-yu-tai Islands had been used for five centuries by Chinese diplomat-navigators as navigational aids on their voyages . . . China maintains that the Tiao-yu-sai Islands have been a rare source of supply of . . . a precious Chinese medicinal herb . . .").

20 MARK E. MANYIN, CONG. RES. SERV., R42761, SENKAKU (DIAOYU/DIAOYUTAI) ISLANDS DISPUTE: U.S. TREATY OBLIGATIONS 2 (2012), <http://www.fas.org/sgp/crs/row/R42761.pdf>; see also Han-Yi Shaw, *The Inconvenient Truth Behind the Diaoyu/Senkaku Islands*, N.Y. TIMES (Sep. 19, 2012), <http://kristof.blogs.nytimes.com/2012/09/19/the-inconvenient-truth-behind-the-diaoyusenkakuislands/?emc=etal>.

21 Shannon Tiezzi, *Japan and China Spar Online Over Senkaku/Diaoyu Islands*, THE DIPLOMAT (Jan. 08, 2015), <http://thediplomat.com/2015/01/japan-and-china-spar-online-over-senkakudiaoyu-islands/>.

under the threat of further war, surrendered in the First Sino-Japanese War, in which Japan forced it to sign the armistice agreement, the Treaty of Shimonoseki.²² The treaty compelled China to cede Taiwan and all administered islands.²³ While there was explicit listing of other islands such as Taiwan and the Ryukyu Islands, nothing in the treaty mentioned the Diaoyu/Senkaku Islands.²⁴ Around the time of the First Sino-Japanese War, the Japanese confirmed the uninhabited nature of the islands and began to administer them.²⁵ After the war, a Japanese businessman bought the islands from the Japanese government, who showed little interest in them at the time.²⁶ After failed attempts to develop the islands for industrial purposes, his son would later inherit them from his father and sell the islands to an individual named Kunioki Kurihara in the late 1970s and early 80s.²⁷

In 1900, the Boxer Rebellion catalyzed the Open Door Policies, which only allowed for further exploitation of China.²⁸ After the First World War (WWI), Japan attempted to “establish a virtual Japanese protectorate over [China]” with the infamous Twenty-One Demands Treaty.²⁹ However, the United States refused to recognize this treaty, and the rest of the Western world protested such harsh measures.³⁰ As a result, Japan only had a “special interest” in the East China Sea, but the entire Eastern region was essentially under Japanese influence and control in the years before WWII.³¹ To add to the growing international tensions, the rise of the Chinese Communist Party (CCP) against the Kuomintang Nationalist Party (KMT) led to internal conflict between the two Chinese regimes and exacerbated China’s weakness as a world player in the early twentieth century.³²

3. World War Two

In between the two world wars, China had erupted into civil war between the Nationalists and Communists with national unrest caused by

22 Shaw, *supra* note 20; Treaty of Shimonoseki, USC U.S.-CHINA INSTITUTE Apr. 17, 1985, <http://china.usc.edu/treaty-shimonoseki-1895>.

23 *Id.*

24 *Id.*

25 Martin Fackler & Ian Johnson, *Sleepy Islands and a Smoldering Dispute*, N.Y. TIMES (Sept. 20, 2012), <http://www.nytimes.com/2012/09/21/world/asia/japan-china-trade-ties-complicate-island-dispute.html?pagewanted=all>.

26 Martin Fackler, *In Shark-Infested Waters, Resolve of Two Giants is Tested*, N.Y. TIMES (Sep. 22, 2012), http://www.nytimes.com/2012/09/23/world/asia/islands-dispute-tests-resolve-of-china-and-japan.html?pagewanted=1&_r=0&emc=eta1.

27 *Id.*

28 GLENN P. HASTEDT, ENCYCLOPEDIA OF AMERICAN FOREIGN POLICY 72 (Facts on File, 2004).

29 *Id.*

30 *Id.*

31 *Id.*

32 See *The Chinese Revolution of 1949*, U.S. DEP’T OF STATE: OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1945-1952/chinese-rev> (last visited Jan. 30, 2016).

the vacuum of power this conflict created.³³ Until WWII, China was largely divided among the Nationalists, the Communists, warlords, and the puppet Qing government instituted by the Japanese.³⁴ WWII had begun in China with the Japanese invasion of Manchuria and its puppet government, and ultimately the KMT and CCP came to a temporary cooperative truce.³⁵ After the Americans began the recapture of Asia and dropped the two atomic bombs, the Japanese surrendered on August 14, 1945.³⁶

Intuitively, due to the cooperation between the KMT and the CCP and the defeat of Japan, WWII could have brought about massive shifts of influence and power within the Eastern hemisphere. At the end of the war, however, China returned to the internal civil war between the CCP and KMT.³⁷ During simultaneous peace talks among the Allies, the KMT, then the formally recognized government of “China,” made repeated but weak claims to the islands and called for their return. These claims ultimately were ignored.³⁸

4. *Post-WWII Treaties*

Two important treaties after the war would complicate the future dispute regarding ownership of the islands. First, in the Treaty of San Francisco, Japan was to renounce all claims to Taiwan, but there was no mention of the Diaoyu/Senkaku Islands.³⁹ Moreover, the treaty declared that all previous agreements between Japan and China before 1941 were “null and void,” including the Treaty of Shimonoseki.⁴⁰ Second, in the Cairo Declaration, Japan was stripped of all territories it had “stolen” from China, and those were returned to China.⁴¹ These events lead China to believe, that it owns the islands today.

Japan believes that it agreed to all terms of the agreements, including the surrender of all territories that it previously took from China.⁴² Importantly, the strait of Taiwan was returned.⁴³ However, the Japanese

33 *Id.*

34 *Id.*

35 *Id.*

36 *Id.*; *World War II: Timeline*, U.S. HOLOCAUST MEMORIAL MUSEUM, <http://www.ushmm.org/wlc/en/article.php?ModuleId=10007306> (last visited on Jan. 24, 2016).

37 *See The Chinese Revolution of 1949*, U.S. DEP'T OF STATE: OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1945-1952/chinese-rev> (last visited Jan. 30, 2016).

38 HISTORICAL CONTEXT, *supra* note 4.

39 *Id.*

40 Cheng-China Huang, *Diaoyu Islands Dispute*, AMERICAN UNIVERSITY: ICE CASE STUDIES NO. 30 (Dec. 1997), <http://www1.american.edu/TED/ice/DIAOYU.HTM> (last visited Jan. 24, 2016).

41 Christopher Hughes, Victor Gao & Tetsuo Kotani, *Viewpoints: How Serious are China-Japan Tensions?*, BBC NEWS: ASIA (Feb. 8, 2013), <http://www.bbc.co.uk/news/world-asia-21290349>; Greg Austin, *Cairo Treaty: China's Moral Claim to the Diaoyu Islands*, CHINA US FOCUS (Dec. 06, 2013), <http://www.chinausfocus.com/foreign-policy/cairo-treaty-chinas-moral-claim-to-the-diaoyu-islands/>.

42 *See sources cited supra* note 41.

43 *Id.*

believe there was an additional “tacit understanding” that there would be Japanese administration of the Diaoyu/Senkaku Islands under the Okinawa Prefecture in the Treaty of San Francisco due to the “residual sovereignty” that would be given to Japan over the Ryukyu Islands.⁴⁴ Moreover, under the Treaty of Mutual Cooperation and Security, the United States “consistently asserted the treaty covered the Diaoyu/Senkaku Islands though it [had] refrained from explicitly endorsing Japan’s sovereignty claim over the islands.”⁴⁵ Thus, Japan took this as another instance of American support for their ownership and administration of the islands. The Japanese understanding was only strengthened by the American agreement in the Okinawa Reversion Treaty to defend Japanese territory should it fall under attack.⁴⁶

5. *Post-WWII through the 1980s*

By the late sixties, the CCP had beaten and driven the KMT out of mainland China. The KMT fled to Taiwan and instituted the Republic of China (ROC) there, and the People’s Republic of China (PRC) was officially formed and sovereign over mainland China.⁴⁷ Chinese maps of the era showed the Diaoyu/Senkaku Islands titled only as “Senkaku,” which would suggest Japanese ownership.⁴⁸ Around this time, the United Nations Economic Commission (UNEC) reported potential “substantial energy deposits” along the seabed near the islands.⁴⁹ In 1970, the PRC began its first round of strong public claims, which were temporarily set aside due to more pressing political issues, that were agreements between the PRC and Japan and the thawing of Japanese and Soviet relations.⁵⁰ The PRC itself began to warm towards the United States.⁵¹ Nixon, instead of explicitly stating the Diaoyu/ Senkaku Islands as Japanese territory, declared that the United States had “made no claim to the Senkaku Islands” and would remain in a neutral stance.⁵²

In 1972, the United States and China signed the “Shanghai Communiqué,” which stated “there is only one China, and that Taiwan is a part of China.”⁵³ With this formal recognition, China felt that the West,

44 *Id.*

45 *Id.*

46 *How Uninhabited Islands Soured China-Japan Ties*, BBC NEWS ASIA (Nov. 10, 2014), <http://www.bbc.com/news/world-asia-pacific-11341139>; Panda, *supra* note 15.

47 *The Chinese Revolution*, *supra* note 32.

48 Michael A. Turton, *Deconstructing China’s Claims to the Senkaku*, THE DIPLOMAT (Nov. 06, 2013), <http://thediplomat.com/2013/11/constructing-chinas-claims-to-the-senkaku/>.

49 HISTORICAL CONTEXT, *supra* note 4.

50 Jean-Marc F. Blanchard, *The U.S. Role in the Sino-Japanese Dispute over the Diaoyu (Senkaku) Islands, 1945-1971*, 161 THE CHINA QUARTERLY 95, 95-123 (2000).

51 HISTORICAL CONTEXT, *supra* note 4.

52 See MANYIN, *supra* note 20.

53 While this paper recognizes the significance of the Shanghai Communiqué in Chinese and world history, it only gets a brief mention to help set up China’s historical understanding of the islands. See HENRY KISSINGER, ON CHINA (2011).

regardless of its wariness of communism, could no longer ignore China's presence on the international field, including its demands. Following the Shanghai Communiqué, China passed the "Law on the Territorial Sea and the Contiguous Zone," laying claim to the entire South China Sea based on Pre-Imperialist era historical rule.⁵⁴ As an indicator that the PRC would not sit quietly any longer, the PRC used its status as the officially recognized "China" in hopes to regain what it believed was rightfully its territory.⁵⁵

Meanwhile, under the Okinawa Reversion Treaty, the Japanese believed that Washington thought the Diaoyu/Senkaku Islands were territories to be ultimately administered as part of Okinawa, and thus were a part of Japan.⁵⁶ While there was no explicit mention of the islands in the reversion treaty, since the Americans had administered the Diaoyu/Senkaku Islands after the war, the Japanese assumed that the islands would continue to be administered along with Okinawa under Japanese control.⁵⁷

6. The New Millennium: 2000s to Today

By the 2000s, relationships between China and Japan had deteriorated.⁵⁸ In 2009, the PRC had become the world's largest energy consumer, which made Japan more anxious about its neighbor's exponential rise towards becoming a world superpower.⁵⁹ On September 7, 2010, the spark that ignited the current conflict occurred when a Chinese fishing boat collided with two Japanese coast guard vessels, and the Japanese arrested the Chinese fishermen.⁶⁰ This caused an uproar from the Chinese, and rumors, though denied by the Chinese, suggested that the Chinese cut off Japanese access to Chinese precious minerals for months to protest this incident.⁶¹ In 2012, with the election of Xi Jinping, China shifted its military focus from the land to the sea and could better patrol the islands.⁶²

By this time, as mentioned above, the first Japanese businessman's son had sold the islands to Kunioki Kurihara, a colleague of his father's, who was soon to be in talks with a Tokyo mayor about selling the islands back

54 [Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone] (promulgated by the Standing Comm. Nat'l People's Cong., Feb. 25, 1992, effective Feb. 25, 1992), http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383846.htm.

55 HISTORICAL CONTEXT, *supra* note 4. Also from here on out, I will be using PRC and China interchangeably unless otherwise indicated by quotation marks, which should show that there were two governments. The Kuomintang, who lost the civil war, was formally recognized to be "China" by the West, which was changed by the Shanghai Communiqué.

56 MANYIN, *supra* note 20.

57 *Id.*; see also HISTORICAL CONTEXT, *supra* note 4.

58 MANYIN, *supra* note 20.

59 *Id.*

60 Sheila A. Smith, *Japan and the East China Sea Dispute*, 56 ORBIS 370, 374 (2012).

61 *Id.* at 375–76.

62 Bonnie S. Glaser, *China's Grand Strategy in Asia*, CENTER FOR STRATEGIC & INTERNATIONAL STUDIES (Mar. 13, 2014), http://csis.org/files/attachments/ts140313_glaser.pdf.

to the Japanese government.⁶³ After his election as Japan's Prime Minister in 2012, one of Shinzo Abe's first major acts was to purchase three of the five islands from Kurihara for 2 billion yen.⁶⁴ This sparked massive anti-Japanese protests in China, and parallel nationalism arose in Japan as well.⁶⁵

Following these incidents, Beijing declared sea baselines around the land, announcing Chinese administration of the Diaoyu/Senkaku Islands, increasing patrol of the areas, and submitted claims to the United Nations (UN).⁶⁶ Additionally, the Chinese began to rapidly bulk up their blue-water navy and air force, and celebrated the launch of their first aircraft carrier in September 25 of the same year.⁶⁷ In March 2013, the PRC consolidated control of its various maritime law enforcement agencies into one unified coast guard in an attempt to catch up with the Japanese, who had the largest coast guard in the world.⁶⁸ In the following November, China also declared the creation of the Air Defense Identification Zone, which demanded that non-commercial air traffic flying over the Diaoyu/Senkaku Islands submit flight plans and warned that the Chinese may use military force within the region if necessary.⁶⁹ In addition to the launch of the first Chinese aircraft carrier, China's aggressive movements in the region began to make Japan realize that its neighbor was no longer as focused on internal affairs.⁷⁰ For the first time in eleven years, Japan increased its defense budget in anticipation of a rise in Chinese aggression and belligerence in the area.⁷¹ As China continues to consolidate its maritime departments and maintain a greater military presence near the Diaoyu/Senkaku Islands, Japan must be ready to protect itself in the event military force is used.⁷² Most recently, China and Japan have resumed talks about the islands, but there has not

63 HISTORICAL CONTEXT, *supra* note 4.

64 *Id.*

65 Keith Bradsher, Martin Fackler, & Andrew Jacobs, *Anti-Japan Protests Erupt in China Over Disputed Island*, N.Y. TIMES (Aug. 19, 2012), <http://www.nytimes.com/2012/08/20/world/asia/japanese-activists-display-flag-on-disputed-island.html>.

66 HISTORICAL CONTEXT, *supra* note 4.

67 Jane Perlez, *China Launches Carrier, but Experts Doubt Its Worth*, N.Y. TIMES (Sept. 25, 2012), http://www.nytimes.com/2012/09/26/world/asia/china-shows-off-an-aircraft-carrier-but-experts-are-skeptical.html?_r=0.

68 HISTORICAL CONTEXT, *supra* note 4. Japan has the largest coast guard in the world because of its vast sea territory, and the demobilization of the Japanese military after WWII. See *Demobilization and Disarmament of the Japanese Armed Forces*, REPORTS OF GENERAL MACARTHUR, http://www.history.army.mil/html/books/013/13-4/CMH_Pub_13-4.pdf; see also *Japan Coast Guard*, GLOBALSECURITY.ORG, <http://www.globalsecurity.org/military/world/japan/jcg.htm> (last visited February 16, 2016).

69 *Id.* at 67.

70 *Id.*

71 *Id.*

72 D.MCN, *Tooling Up: Japan's Military Spending*, ECONOMIST (Sept. 1, 2014), <http://www.economist.com/blogs/banyan/2014/09/japans-military-spending>.

been a satisfactory results for either side, and a continued military build-up could lead to war.⁷³

B. CHINA AND JAPAN'S HISTORICAL PERSPECTIVES

1. *The Chinese Historical Argument and Understanding*

From its contentious history with Japan, China has made various arguments for its right to ownership of the Diaoyu/Senkaku Islands. First, based on history, China believes the islands are rightfully and originally a part of China. They believe the islands were wrongfully taken from them during Japan's imperialist expansion, and that the islands were never properly returned due to an American oversight.⁷⁴ China asserts that they merely delayed their demands for the islands' return because of the lack of the CCP's recognition and influence within the Western world.⁷⁵ Second, China believes the islands should be returned to help "right the wrong" committed against China by Japan during its imperialist expansion and WWII. In contrast to Germany, the Japanese never officially apologized for the war crimes they committed. Many Chinese feel that by keeping the islands from China, the Japanese are not upholding their post-war agreements and they feel no remorse for the atrocities they committed during imperialism and WWII.⁷⁶ Third, under the post-WWII treaties, all territories previously seized by Japan were to be returned.⁷⁷ China believed that since Taiwan and other stolen islands were returned, all islands it had previously administered with Taiwan should also be returned, and the lack of any explicit indication of whom the Diaoyu/Senkaku Islands should be returned to would suggest that the Allies believed it naturally would belong to the Chinese.⁷⁸ Fourth, other countries in Africa and Southeast Asia that were under imperialist control had their territories returned to them and even became independent countries after WWII.⁷⁹ Thus, China believes, that it too should have its territories returned to it. Fifth, the PRC, because of its unfair exclusion from peace talks after WWII due to Western anti-communist sentiments, was unable to assert their claims to the islands.⁸⁰

⁷³ *China Ships Pay First Post-Japan Summit Visit to Disputed Isles*, DAILY MAIL (Nov. 25, 2014), <http://www.dailymail.co.uk/wires/afp/article-2848369/China-ships-pay-post-Japan-summit-visit-disputed-isles.html>.

⁷⁴ Tiezzi, *supra* note 21.

⁷⁵ See MANYIN, *supra* note 20; see also HISTORICAL CONTEXT, *supra* note 4.

⁷⁶ Jennifer Lind, *The Perils of Apology: What Japan Shouldn't Learn From Germany*, 88 FOREIGN AFFAIRS 132-46 (2009), <https://www.foreignaffairs.com/articles/japan/2009-05-01/perils-apology>.⁷⁶

⁷⁷ Hughes et al., *supra* note 41.

⁷⁸ Austin, *supra* note 41.

⁷⁹ Michael Wines, *1960: Africa's Year of Freedom*, 142 N.Y. TIMES UPFRONT (Apr. 19, 2010), http://teacher.scholastic.com/scholasticnews/indepth/upfront/features/index.asp?article=f041910_africa.

⁸⁰ HISTORICAL CONTEXT, *supra* note 4. In addition, the KMT did not make very strong claims during this time as China was in the midst of a civil and ideological war that pitted democracy and communism against each other.

Further, the failure of Japan to mention the islands at the peace talks has led to Chinese suspicion that the Japanese wanted to wrongfully keep the islands.⁸¹ Now that virtually all countries formally recognize China, China believes that Japan can no longer take historic Chinese distraction and an outdated Western refusal of recognition of the Chinese communist government as excuses for not addressing the ownership of the Diaoyu/Senkaku Islands.⁸²

2. *The Japanese Historical Argument and Understanding*

Japan believes that the Diaoyu/Senkaku Islands are rightfully and originally Japan's because they were discovered as an uninhabited island in the late nineteenth century, and the islands have been in Japanese, whether public or private, control since then.⁸³ Additionally, after WWII, the Japanese ceded all territory it took from China during its imperialist era under the Cairo Declaration and the Treaty of San Francisco, with Taiwan as the pinnacle example of such behavior.⁸⁴ If the Chinese had truly wanted the small and uninhabited islands, they should have made a clear and consistent demand for their return.⁸⁵ The post-WWII treaties and the continued support and tacit understanding from the US is that Japan administer the Diaoyu/Senkaku Islands with Okinawa after the war affirmed Japan's belief of their ownership.⁸⁶ Moreover, Japan believes that this conflict is just another opportunity for China to flex its growing international influence, and that its claims of legal sovereignty and ownership of the islands are false pretenses for a strategic move to exemplify its power.⁸⁷ Perhaps the Chinese are still embittered and even vengeful towards Japan because of WWII, and the dispute over the islands provides a key opportunity to not only show Japan but also the entirety of Asia that China is the region's new hegemon.⁸⁸ Finally, the Japanese believe that the PRC's exclusion from treaties was irrelevant because the KMT was present at all peace talks. If they truly believed in Chinese ownership, then the KMT would have made a stronger protest.⁸⁹ The Japanese also believe that the large silence that followed WWII would suggest that Japan had the right to the islands after all.⁹⁰ Thus, from a

81 *Id.*

82 *See Milestones: 1977-1980, China Policy*, U.S. DEP'T OF STATE: OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1977-1980/china-policy> (last visited Jan. 25, 2016).

83 HISTORICAL CONTEXT, *supra* note 4.

84 Hughes et al., *supra* note 41; *see also* HISTORICAL CONTEXT, *supra* note 4.

85 *See The Chinese Revolution of 1949*, *supra* note 32.

86 HISTORICAL CONTEXT, *supra* note 4.

87 Eric Posner, *Why Are China and Japan Inching Toward War Over Five Tiny Islands?*, SLATE (Feb. 25, 2014), http://www.slate.com/articles/news_and_politics/view_from_chicago/2014/02/the_senkaku_or_diaoyu_islands_where_world_war_iii_could_start_because_of.html.

88 *Id.*

89 *See The Chinese Revolution of 1949*, *supra* note 32.

90 HISTORICAL CONTEXT, *supra* note 4.

historical point of view, Japan believes that it has a right to these islands, which was further affirmed by their treaties and actions since WWII, and China's recent aggression and claim to the islands is nothing more than a nationalist attempt to change the status quo of the region.⁹¹

III. THE LEGAL ANALYSIS OF THE ISLAND'S OWNERSHIP AND SOVEREIGNTY

From a historical understanding of both China and Japan's perspective, I will now shift the focus to the legal analysis to determine which country may have a stronger claim regarding ownership and sovereignty of the Diaoyu/Senkaku Islands. There are currently three valid forms of international law that can be applied to the Diaoyu/Senkaku Island dispute: maritime law, treaty law, and the customary laws regarding legal territorial acquisition.

A. MARITIME LAW

Maritime law offers some rules regarding territorial disputes; however, these laws give inadequate aid in determining rightful ownership of the Diaoyu/Senkaku Islands. The United Nations Convention on the Law of the Sea (UNCLOS) defines an Exclusive Economic Zone (EEZ) as "an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention."⁹² It cannot extend "beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured."⁹³ In the EEZ, "the coastal State has... sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources... of the water super adjacent to the seabed and of the seabed and its subsoil."⁹⁴ However, the UNCLOS also states "rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf."⁹⁵ In regards to the Diaoyu/Senkaku Islands, although there is no human habitation or much of an economic life since the Japanese factories were closed down, they are still usually considered islands with "full rights to the potentially valuable EEZ circling the islands."⁹⁶

The definition of an "EEZ" already presents a variety of problems. First, there is an issue over which "coastal State" should be considered the

91 Posner, *supra* note 87.

92 U.N. Convention on the Law of the Sea art. 55, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397, 418 (entered into force Nov. 16, 1994) [hereinafter UNCLOS].

93 UNCLOS art. 57, at 419.

94 UNCLOS art. 56, at 418.

95 *Id.*

96 R. Jade Harry, Note, *A Solution Acceptable to All? A Legal Analysis of the Senkaku-Diaoyu Island Dispute*, 46 CORNELL INT'L L.J. 653, 666 (2013).

one from which to measure the distance of 200 nautical miles. China, Taiwan, and Japan all contend that they should be the sovereign state according to the EEZ definition, and from measurements, it would appear that Taiwan is actually the closest to the islands, but all the contending states are more than 200 nautical miles away from the Diaoyu/Senkaku Islands.⁹⁷ In addition, there is another complication regarding Taiwan's role in the conflict: since the Shanghai Communiqué, Taiwan has been considered a part of China by the majority of the international community, but the Taiwanese government continues to run independent of its mainland counterparts.⁹⁸ However, since the international legal community generally considers Taiwan to be a part of China, then China may have a stronger argument for distance, but the fact that all the countries are more than 200 nautical miles from the islands may mean none of them has an EEZ.⁹⁹ Additionally, the EEZ between many economies, including China's, Japan's, and Taiwan's, often overlap within the East China Sea, as the sea itself may not be 400 nautical miles wide.¹⁰⁰ As a result, all involved states may share an EEZ to which they are sovereign; but the overlap would require them to "share" sovereignty, which defies the very core of what it means to be sovereign.¹⁰¹ In this situation, therefore, maritime law does not present a very clear understanding as to how to deal with such islands and territorial disputes.

B. PUBLIC INTERNATIONAL LAW

In addition to maritime law, the two types of public international law, the law of treaties and customary law regarding territorial acquisition, can also be defined and applied to the Diaoyu/Senkaku Island dispute.¹⁰² While customary law may be easier to apply since it is less theoretical and more practical to specific disputes, in the particular conflict of the Diaoyu/Senkaku Islands, laws regarding international treaties and customary laws of territorial acquisition seem to diverge in terms of resolutions.¹⁰³ Nevertheless, it is important to consider both types of public international law to better understand the difficulty of resolving the Diaoyu/Senkaku Islands dispute.

97 Cheng-China Huang, *supra* note 40.

98 See James Patrick Gunning, *Taiwan's Branches of Government*, CONSTITUTION SOC'Y (Nov. 1, 1997), <http://www.constitution.org/pd/gunning/taiwan/branches.htm>; see also KISSINGER, *supra* note 53.

99 Masahiko Asada, *Senkaku/Diaoyu Islands*, OXFORD PUBLIC INT'L LAW (June 2007), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e2015?rskey=WGpspE&result=3&prd=EPIL>.

100 *Id.*

101 *Id.*

102 See THOMAS BUERGENTHAL & SEAN D. MURPHY, PUBLIC INT'L LAW 20-24 (5th ed. 2013).

103 *Id.*

I. Treaties Regarding the Diaoyu/Senkaku Islands

In general, a treaty is at its most basic level “an international agreement concluded between states in written form and governed by international law.”¹⁰⁴ Furthermore, a treaty “does not create either obligations or rights for a third state without its consent.”¹⁰⁵ While treaties should have the power of absolute freedom of contract, there is an exception of *jus cogens*, which is the “peremptory norm of general international law” in which:

A norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character... such as a treaty [which would violate] the U.N. Charter’s Article 2(4) prohibition of the use of force, or to commit genocide, legalize the slave trade or engage in torture.¹⁰⁶

Thus, while most treaties are respected within the international realm, they may be subject to scrutiny and may be voided by the international community if they were to violate fundamental U.N. principles.¹⁰⁷ Furthermore, treaties of “a state absorbed into another state are terminated, while treaties of the absorbing state become applicable to the absorbed state.”¹⁰⁸ New regimes do not become part of old states’ treaties right away.¹⁰⁹ Additionally, “treaties that fix territorial boundaries remain in force for successor states or newly created entities.”¹¹⁰

From China’s perspective, there are various treaty violations that would support its ownership of the Diaoyu/Senkaku Islands. First, all post-WWII multilateral treaties were made with the then-recognized government, the KMT, which lost the Chinese Civil War and fled to Taiwan.¹¹¹ The government that controlled the mainland, the CCP, was not formally recognized by the West at the time. Therefore, it was not invited to attend any of these peace talks or treaty signings and was unable to assert its rightful claims towards the islands.¹¹² Only when the United States formally recognized the CCP as the official government of China with Taiwan as a part of China under the Shanghai Communiqué, the PRC officially became the absorbing state and treaties the KMT had made in previous post-WWII treaties were terminated.¹¹³ The PRC has signed no

104 Vienna Convention of the Law of Treaties art. 2, sec. 1(a), *opened for signature* May 23, 1969, 1155 V.C.L.T. 332, 333 (entered into force Jan. 27, 1980).

105 *Id.* art. 34, at 341.

106 Buergethal & Murphy, *supra* note 102, at 141–42.

107 *Id.*

108 *Id.* at 149.

109 *Id.*

110 *Id.* at 150.

111 *See The Chinese Revolution of 1949, supra* note 32.

112 *Id.*

113 *See KISSINGER, supra* note 53.

treaties regarding the Diaoyu/Senkaku Islands, and the KMT's treaties with the U.S. and Japan were terminated.¹¹⁴

Additionally, the original Treaty of Shimonoseki, which compelled China to cede the strait of Taiwan and the Ryukyu Islands to Japan, was voided by the post-WWII treaties that compelled the return of China's seized territories.¹¹⁵ China was not involved in any of the bilateral treaties between the United States and Japan, and didn't have a say in the decision to have the Islands administered as part of Okinawa Prefecture.¹¹⁶ China's consent should have been necessary due to its ownership of the Diaoyu/Senkaku Islands, but they were not invited to the post-WWII talks.¹¹⁷ Without Chinese consent, the Prefecture should have been voided in its entirety, and the islands not given to the Japanese.¹¹⁸ In particular, the Treaty of Peace, which involves the Diaoyu/Senkaku Islands, did not include China's opinion regarding the administration of the islands as part of the Okinawa Prefecture, forcing China to abide by a treaty which it did not consent to.¹¹⁹ Thus, China argues primarily that the previous treaties of cession were voided by post-WWII multilateral agreements, and that China is the rightful owner of the islands under international treaty law.

On the other hand, Japan argues that treaty law consistently applies in its favor, and thus, the Diaoyu/Senkaku Islands are rightfully Japan's. While post-WWII bilateral treaties between the United States and Japan do not involve China, the Japanese believe there was no need for China's involvement at all.¹²⁰ China was riddled with civil war, and the whole contention of where to "draw the line" was entirely between the United States and Japan.¹²¹ While China was also one of the winners of WWII (for which it was rewarded a permanent seat in the U.N. Security Council), its voice was completely irrelevant involving the administration of the Japanese islands, which the United States was in charge of following the war.¹²² Furthermore, multiple countries signed multilateral treaties, in which China participated.¹²³ Then-recognized Chinese government, KMT, was present at the Treaty of San Francisco as well as the Cairo Declaration, and it agreed to the terms of the treaties by signing them.¹²⁴ Moreover, they agreed to the territorial boundaries set by those treaties, which would

114 *Id.*

115 HISTORICAL CONTEXT, *supra* note 4; Cheng-China Huang, *supra* note 40; Hughes et al., *supra* note 41.

116 *How Uninhabited Islands*, *supra* note 46; *see* MANYIN, *supra* note 20.

117 *See The Chinese Revolution of 1949*, *supra* note 32; HISTORICAL CONTEXT, *supra* note 4.

118 HISTORICAL CONTEXT, *supra* note 4.

119 *Id.*

120 *How Uninhabited Islands*, *supra* note 46.

121 *Id.*; *The Chinese Revolution of 1949*, *supra* note 32.

122 *See The Chinese Revolution of 1949*, *supra* note 32; UNITED NATIONS SECURITY COUNCIL *Current Members*, <http://www.un.org/en/sc/members/> (last visited on Jan. 25, 2016).

123 HISTORICAL CONTEXT, *supra* note 4; *see* Hughes et al., *supra* note 41.

124 *Id.*

continue despite any PRC victory.¹²⁵ Thus, the treaties are not only valid, but should apply to the modern PRC as well, since it absorbed and succeeded the ROC.¹²⁶

Neither the Treaty of San Francisco nor the Cairo Declaration explicitly mentions the islands because there was a tacit understanding that the Diaoyu/Senkaku Islands belonged to the Japanese.¹²⁷ The lack of explicit discussion about the islands in treaties suggested that there was no conflict over ownership, and the international sphere recognized the rightful owner of the islands to be Japan.

From the above legal arguments for both countries, it is evident that due to the legitimacy of treaty laws, Japan has the superior ownership arguments. Most, if not all, of the treaties examined by China and Japan, with the exception of the Treaty of Shimonoseki, are considered legitimate forms of international law.¹²⁸ China cannot void such treaties like the Treaty of San Francisco or the Cairo Declaration, because they are multilateral agreements among various countries addressing agreed-upon issues far beyond the scope of the Diaoyu/Senkaku Islands.¹²⁹ Diplomats and world leaders of many countries assembled and took the time and effort to prevent another world war through diplomatic means of resolution, which included the return of all previous territories that Japan had taken from China.¹³⁰ The omission of Diaoyu/Senkaku Islands could very well suggest a “tacit understanding” among world leaders about ownership of the islands. At the very least, it suggests that this is an issue that the West felt uncomfortable or unnecessary to address.¹³¹

Even if China were to argue that it was one state that was absorbed by another or that it was a third party to treaties that it did not give consent to when KMT was removed, China has historically and actively shown consent to such treaties by its adherence to the majority of international laws and the terms of such treaties. The PRC will be hard-pressed to show that it was a third party that did not consent to its obligations within those treaties, as “China” under the KMT, since China abides by and benefits from them today.¹³² Should China be allowed to be “exempt” from such crucial post-war treaties, it would undermine the entire treaty system. China cannot pick and choose the international treaties that apply to it. As a result, its strongest argument for inapplicability of the international treaties lies with the fact that the PRC, which is the formally recognized “China” today, was unable to present its evidence regarding ownership of the

125 *Id.*

126 *The Chinese Revolution of 1949, supra* note 32.

127 HISTORICAL CONTEXT, *supra* note 4.

128 *Id.*; see Hughes et al., *supra* note 41.

129 HISTORICAL CONTEXT, *supra* note 4; Hughes et al., *supra* note 41.

130 HISTORICAL CONTEXT, *supra* note 4.

131 *Id.*

132 *Id.*; Hughes et al., *supra* note 41.

islands.¹³³ Additionally, China's arguments are less compelling because the PRC cannot be considered a state that was absorbed by another because there was not one state that absorbed the other. Rather it was one government, the CCP, which won the territory of mainland China.¹³⁴ The CCP was largely denied formal recognition as the official government of "China" by the Western World due to its communist regime until the Shanghai Communiqué; however, that does not mean that it was a state that absorbed the KMT.¹³⁵ Moreover, boundary determinations succeed the state, and it follows that the agreements regarding the Diaoyu/Senkaku Islands remain the same despite a change of government recognition from the KMT to the CCP.¹³⁶ Thus, China's arguments regarding its treaties are less compelling because treaty laws, particularly regarding the ones in which Japanese administration and ownership of islands are determined, do not clearly provide any exceptions in China's favor.

Nevertheless, as we examine both countries' positions in the dispute, there seems to be a lack of international law about the application and overall legitimacy of treaties affecting states that signed the treaties during a civil war in which the non-signing faction became the ruling government.¹³⁷ The sheer instability caused by internal conflict is already sufficient to drag a country away from an outward, international focus, yet the law provides little to no guidance or authority regarding what to do if one *government* should succeed another. While treaties do mention the absorption of states and successor states, they do not discuss what should occur with the delayed recognition of the successor government.¹³⁸

Moreover, this particular conflict over the Diaoyu/Senkaku Islands begins to tear away at the fine façade of international law to reveal another difficult question as to whether or not the international realm should even recognize the succeeding government or state.¹³⁹ In China's case, its CCP government was not recognized for over a decade solely because it was a communist regime despite its authority and sovereignty over mainland China and its people.¹⁴⁰ However, China's situation must be contrasted with other states whose government perhaps should not be recognized, so as to prevent a dictator or a radical group like the Taliban from receiving support and feeling acknowledgement for their policies from the international sphere.¹⁴¹ Thus, there seems to be no treaty laws that can be aptly applied

133 HISTORICAL CONTEXT, *supra* note 4; Hughes et al., *supra* note 41. Moreover, this may be another reason China holds so strongly that this dispute arises out of a ploy of Western preference, but that is beyond the scope of this paper.

134 *The Chinese Revolution of 1949*, *supra* note 32.

135 Gunning, *supra* note 98; see also KISSINGER, *supra* note 53.

136 *The Chinese Revolution of 1949*, *supra* note 32.

137 See generally BUERGENTHAL & MURPHY, *supra* note 102.

138 See generally *id.*

139 See generally *id.*

140 *The Chinese Revolution of 1949*, *supra* note 32; see KISSINGER, *supra* note 53.

141 See DAN CALDWELL, VORTEX OF CONFLICT: U.S. POLICY TOWARD AFGHANISTAN, PAKISTAN, AND IRAQ (2011).

regarding these questions; moreover, the definition of when a state should be considered legitimate and sovereign within international treaties when the state itself is going through a regime shift remains uncertain.

2. Customary Law Regarding Legal Territorial Acquisition

In contrast to treaties, customary laws are typically held as the higher judicial authority, and the specificity of customary law regarding legal territorial acquisitions may provide for a better understanding of the Diaoyu/Senkaku Island conflict, and lead to a more practical solution. For a custom to be valid law, it must be “deemed by states to be obligatory as a matter of law...[with] a conviction that the rule is obligatory.”¹⁴² Regarding territorial acquisitions, there are generally five ways of legal acquisition: (1) Discovery and Occupation, (2) Conquest, (3) Prescription, (4) Cession, and (5) Accretion.¹⁴³ Through analysis of China and Japan’s arguments for ownership and sovereignty through each of these five ways, I will show that there is a lack of applicable customary law regarding territorial acquisitions in this particular situation as well.

a. Discovery and Occupation

First, discovery and occupation is a two-part process that “requires both elements to be present” to be a legitimate form of territorial acquisition.¹⁴⁴ Discovery requires that the land in question be *terra nullius*, meaning “belonging to no one.”¹⁴⁵ The second element, occupation, has two sub-elements: first, that the nation exhibits the “intention to act as a sovereign,” and second, that it “exercises actual sovereign authority.”¹⁴⁶

In this case, China would have the stronger argument because it has maps and records going back to at least the fourteenth century that recognize the existence of the islands.¹⁴⁷ Thus, in terms of discovery, China has preceded Japan, which claimed to have discovered the islands in 1895, by over three centuries.¹⁴⁸ Regarding the Diaoyu/Senkaku dispute, both nations have exhibited an intention to act as a sovereign.¹⁴⁹ Japan and China have both sent in their coast guards, began aerial surveillance, and explicitly made claims to ownership.¹⁵⁰ The second part, exercising actual sovereign authority, has not been well defined; however, the commercial actions of private citizens are not sufficient to be considered an exercise of

142 BUERGENTHAL & MURPHY, *supra* note 102, at 28.

143 Harry, *supra* note 96, at 666.

144 *Id.*

145 *Id.*

146 *Id.* at 666-67; see Carlos Ramos-Mrosovsky, *International Law’s Unhelpful Role in the Senkaku Islands*, 29 U. PA. J. INT’L LAW 903, 914 (2008).

147 Cheng, *supra* note 19; see Shaw, *supra* note 20; Treaty of Shimonoseki, *supra* note 22.

148 Cheng, *supra* note 19; see Shaw, *supra* note 20; Treaty of Shimonoseki, *supra* note 22.

149 D.Z., *Who Really Owns the Senkaku Islands*, ECONOMIST (Dec. 3, 2012), <http://www.economist.com/blogs/economist-explains/2013/12/economist-explains-1>.

150 *Id.*; see Tiezzi, *supra* note 21.

actual sovereign authority.¹⁵¹ Because of the vagueness of this second element, both Japan and China can argue that they have exercised actual sovereign authority, as both countries have repeatedly sent in coast guards and more recently, but only China has sent in geographic mappers.¹⁵² Additionally, China has sent in its blue water navy to the surrounding waters to protect the island, and continues to claim its Air Defense Identification Zone Act. China may have taken this element even further by bringing the dispute to the U.N., and asking for its review.¹⁵³ Thus, China may have the clearer claim towards discovery and occupation, despite the vague concept of occupation.

b. Conquest

Second, conquest is “generally achieved when one state defeats another in a war or some other act of aggression and the defeated state voluntarily concedes to transferring the territory in question.”¹⁵⁴ However, this form of territorial acquisition has largely become antiquated and condemned in the modern world.¹⁵⁵

In this case, Japan would certainly be able to argue that it had defeated China in the First Sino-Japanese War.¹⁵⁶ The Treaty of Shimonoseki forced China to cede the strait of Taiwan, which the Chinese administered with the Diaoyu/Senkaku Islands, thereby including a cessation of the Diaoyu/Senkaku Islands as well.¹⁵⁷ Moreover, post-WWII treaties had the “tacit understanding” that Japan was the rightful owner and administrator of the islands.¹⁵⁸ While Japan was “conquered” and defeated in WWII, it voluntarily followed all treaties regarding territory, none of which mentioned the Diaoyu/Senkaku Islands.¹⁵⁹ Thus, it would suggest that the winners of the war never questioned Japanese ownership of the islands.¹⁶⁰

On the other hand, the Chinese would argue that despite the defeat in the First Sino-Japanese War, China never would have voluntarily ceded the strait of Taiwan or the Diaoyu/Senkaku Islands because there was no explicit mention of the islands.¹⁶¹ The coercion deriving from the threat of continued war that contrasts with a “voluntary” cession, as China would argue, is sufficient to indicate that this was not a legal “conquest” of territory, but rather a manipulative way for Japan to take advantage of a

151 Harry, *supra* note 96, at 667.

152 D.Z., *supra* note 149; see Tiezzi, *supra* note 21; Shaw, *supra* note 20.

153 HISTORICAL CONTEXT, *supra* note 4.

154 Harry, *supra* note 96, at 667.

155 *Id.* For instance, when Iraq “conquered” Kuwait, many larger countries, including the United States, went to war to prevent this.

156 Shaw, *supra* note 20; see Treaty of Shimonoseki, *supra* note 22.

157 Shaw, *supra* note 20; see Treaty of Shimonoseki, *supra* note 22.

158 HISTORICAL CONTEXT, *supra* note 4; see Hughes et al., *supra* note 41.

159 HISTORICAL CONTEXT, *supra* note 4; see Hughes et al., *supra* note 41.

160 HISTORICAL CONTEXT, *supra* note 4; see Hughes et al., *supra* note 41.

161 Shaw, *supra* note 20; see Treaty of Shimonoseki, *supra* note 22.

weaker country during desperate times.¹⁶² Moreover, a coerced form of conquest is no longer determined to be a valid form of territorial acquisition, and all territories that Japan seized from China were to be returned under the post-WWII multilateral treaties, voiding the Treaty of Shimonoseki.¹⁶³ As such, the Diaoyu/Senkaku Islands should be returned because conquest is no longer a recognized form of legal territorial acquisition, and China would have a stronger argument for ownership of the Diaoyu/Senkaku Islands.¹⁶⁴

c. Prescription

Third, prescription, a controversial topic within international law, refers to “title to a territory which has been in possession of some other state, lawfully or unlawfully.”¹⁶⁵ Mainly a municipal law issue, prescription presents its own difficulties when applied to international law. It is used sparingly because it would “incentivize nations to usurp other nation’s rightful territory” and it is difficult to know “precisely what an adequate protest would look like, or how much time must pass without adequate protest before sovereign territory transfers from one nation to another.”¹⁶⁶ Additionally, prescription, like conquest, has become a largely antiquated form of legal territorial acquisition and is now rarely recognized or used due to its obscure nature.¹⁶⁷

Japan would argue that it had prescribed the islands because China never consistently protested ownership since the end of the First Sino-Japanese War.¹⁶⁸ While there were scattered declarations, China has never consistently protested that the islands were its territory, and even at one time mapped the islands as “Senkaku” and not “Diaoyu.”¹⁶⁹ Because of China’s inconsistent and insipid protests, Japan would find that it had properly prescribed the islands, which would likely be affirmed by the treaties it made with the United States and the Allied Powers after the war.¹⁷⁰

On the other hand, the Chinese would argue that they had consistently protested Japanese ownership to the best of their abilities. Arguing that they were unable to protest immediately after the First Sino-Japanese War

162 *Id.*

163 Harry, *supra* note 96, at 667. Additionally, from various other examples of colonialism and oppressions of the minority natives (i.e. Belgian Congo, Australian aborigines), the uncomfortable legacy makes it difficult for any country or nation to bring up the topic of conquest and how to deal with the aftermath in the modern world.

164 HISTORICAL CONTEXT, *supra* note 4; see Hughes et al., *supra* note 41; Treaty of Shimonoseki, *supra* note 22.

165 Harry, *supra* note 96, at 668.

166 *Id.* at 668–69.

167 *Id.*

168 HISTORICAL CONTEXT, *supra* note 4.

169 See Harry, *supra* note 96, at 664.

170 HISTORICAL CONTEXT, *supra* note 4; see also Hughes et al., *supra* note 41 (especially regarding the Treaty of San Francisco, the Cairo Declaration, and the Okinawa Reversion Treaty).

because of the Open Door Policy, and due to unrest within the state itself.¹⁷¹ Moreover, China had erupted into civil war between the CCP and the KMT during the period after WWII, once again making it difficult for the Chinese to take a strong stance regarding the islands when most of their attention was focused on their internal conflict.¹⁷² Additionally, the West did not invite the CCP to the peace talks.¹⁷³ However, the CCP won the civil war in 1949, and beginning in 1968, China has made consistent demands for the return of the islands and has never officially admitted cession of the islands.¹⁷⁴ Nevertheless, because prescription is rarely used or applied today, neither country's protests seem relevant towards modern application.

d. Cession

Although antiquated and rarely used, cession concerns the "transfer of title between two sovereigns."¹⁷⁵ There are two ways to legally cede territory: first, "from the use of force against the state ceding the territory in question, in which case the treaty of cession merely formalized military coercion"; and second, "effected by sale, gift, exchange, or other voluntary transaction."¹⁷⁶

Japan would primarily argue that if the Diaoyu/Senkaku Islands were discovered by the Chinese, then they were ceded to Japan by treaty following the First Sino-Japanese War and made official through the Treaty of Shimonoseki.¹⁷⁷ Furthermore, they would argue that use of force in this case, is a common form of cession.¹⁷⁸

However, China will likely have the stronger argument because cession, especially the first form, is rarely used or acknowledged today.¹⁷⁹ The "use of force" directly seems to contradict with treaty laws that disapprove of the use of force and also the general overall principles written within the U.N. Charter regarding sovereignty and self-determination.¹⁸⁰ Furthermore, this was no voluntary transaction and China

171 Shaw, *supra* note 20; see Treaty of Shimonoseki, *supra* note 22.

172 *The Chinese Revolution of 1949*, *supra* note 32.

173 *How Uninhabited Islands*, *supra* note 46; see MANYIN, *supra* note 20.

174 *Id.*

175 Harry, *supra* note 96, at 664.

176 *Id.*

177 Shaw, *supra* note 20; see Treaty of Shimonoseki, *supra* note 22.

178 For instance, other imperialist countries, like Belgium, took over lands in Southeast Asia, Africa, and South America and claimed them as their own. While some countries were more "benevolent" users of cession, others like the Belgians, were infamous for their cruelty and use of force and military coercion to gain the land and wealth of the land that they wanted. Ultimately, many of the countries under imperialist rule had their territory returned and some even gained independence. As a result, we rarely see cession in modern society. See more in PAUL GORDON LAUREN, *POWER AND PREJUDICE: THE POLITICS AND DIPLOMACY OF RACIAL DISCRIMINATION* (2nd ed. 1996).

179 Harry, *supra* note 96, at 664.

180 See U.N. Charter ch. 1, art. 1., para. 1.

did not receive any financial benefit, as in that of a sale.¹⁸¹ The additional fact that the Treaty of Shimonoseki was voided by post-WWII multilateral agreements suggest that this previous cession itself may have been allowed after WWI, but was voided as the post-WWII treaties required the return of all of China's seized territories.¹⁸² Thus, China, if the rightful owner prior to the Treaty of Shimonoseki, will likely have the stronger argument that the territory was not ceded to Japan.

e. Accretion

Accretion, the rarest form of territorial acquisition, is the "addition of new land to the existing territory of a state by operation of nature and without the need of any formal acts on the part of the state."¹⁸³ In this case, the volcanoes on and near Diaoyu/Senkaku Islands have been dormant, if not extinct, for years.¹⁸⁴ As a result, there truly is no legal argument for either side as to the right of territorial acquisition when it comes to natural new land additions.

Therefore, from the above analysis of customary law, it is evident that of the five primary modes of legal territorial acquisition, only one can apply in the modern world: discovery and occupation. It is a nuanced outcome that China's arguments are stronger for discovery and occupation, and because the majority of the forms of territorial acquisition are no longer applicable or even legal in modern society.¹⁸⁵ The one form that may still apply depends heavily on a history that is unclear as to who first occupied the islands and what can be considered "occupation."¹⁸⁶ Moreover, the conclusion that China has stronger customary legal arguments is in direct conflict with the previous analysis of international treatise law, which concluded that Japan likely had the stronger arguments. As a result, this analysis of the customary law regarding legal territory acquisitions further illuminates the lack of a cohesive form of public international law that could adequately address disputes regarding territory, like this one.¹⁸⁷

IV. CASE COMPARISONS: THE SINGAPORE STRAIT, BAKASSI PENINSULA, AND FALKLAND ISLANDS CONFLICTS

As a result of international law's inadequacies in addressing the Diaoyu/Senkaku dispute, it may be easier to focus on past, similar cases to determine if there is a possible solution for this current conflict. The

181 *See id.*

182 Treaty of Shimonoseki, *supra* note 22.

183 Harry, *supra* note 96, at 669.

184 *Id.* at 654.

185 Shaw, *supra* note 20; Treaty of Shimonoseki, *supra* note 22; D.Z., *supra* note 149; Tiezzi, *supra* note 21.

186 Cheng, *supra* note 19, at 263; Tiezzi, *supra* note 21.

187 HISTORICAL CONTEXT, *supra* note 4; Shaw, *supra* note 20.

disputes over the Singapore Strait, the Bakassi Peninsula, and the Falkland Islands, all stem from the colonial era and are helpful in determining possible outcomes for the Diaoyu/Senkaku Islands conflict.

A. THE SINGAPORE STRAIT: SINGAPORE V. MALAYSIA

1. *Case Background and Outcome*

The Singapore Strait dispute involved three small rocks in the eastern entrance of the Singapore Strait: Pedra Branca/Pulau Batu Puteh, Middle Rocks, and the South Ledge.¹⁸⁸ As the International Court of Justice (ICJ) concluded, while Malaysia had ownership of the islands during the eighteenth and nineteenth centuries, it had essentially ceded its sovereignty and ownership to Singapore by the 1980s, when Singapore first protested a Malaysian publication that showed the disputed island, Pedra Branca/Pulau Batu Puteh, “lying within Malaysia’s territorial sea.”¹⁸⁹

Historically, Pedra Branca had some ambiguity regarding its ownership when the lands around the Singapore Strait were partitioned between the British and the Dutch. But “as of the time when the British started their preparations for the construction of the lighthouse on Pedra Branca/Pulau Batu Puteh in 1844, this island was under the sovereignty of the [new] Sultan of Johor [who was instituted and controlled by the British].”¹⁹⁰ In other words, the islands were considered to be under the British sphere of influence and administration.¹⁹¹ However, during the middle of the twentieth century, the British themselves began to question ownership of the territory. The state of Johor—which was to become the independent Malaysia and no longer British—understood that “it did not have sovereignty over [the islands] . . . and that in light of Johor’s reply, the authorities in Singapore had no reason to doubt that the United Kingdom had sovereignty over the island.”¹⁹²

In addition to historical support, Singapore’s own actions helped to show that it had sovereignty over the islands. These actions ranged from:

- A) [Singapore’s] own investigation of shipwrecks in the waters surrounding the islands,
- B) Its requirement that Malaysian officials seek and obtain permission for visits to the island,
- C) The display of the British and Singapore ensigns on the island,

188 Coalter G. Lathrop, *Sovereignty over Pedra Branca/ Pulau Batu Puteh, Middle Rocks and South Ledge*, 102 AM. J. INT’L L. 828, 828 (2008).

189 *Id.* at 829.

190 *Id.* at 830.

191 *Id.*

192 *Id.* at 832; see *Sovereignty over Pulau Ligitan and Pulau Sipadan* (Indon./Malay.), 2002 I.C.J. Rep. 625 (Dec. 17).

D) Singapore's installation of military communications equipment on the island, and

E) Its proposed land reclamation project on the island.¹⁹³

In contrast, Malaysia had taken no action on the island since 1850, and never protested any of Singapore's various acts that could well have indicated Singapore's exercise of sovereignty.¹⁹⁴

From this analysis, the ICJ determined that Singapore was now the sovereign owner of Pedra Branca/Pulau Batu Puteh.¹⁹⁵ In addition, the Court offered two modes of territorial acquisition that helped to bridge the gap between prescription and cession to create greater applicability in the modern era. First, "title might pass by tacit agreement arising from, and reflected in, the conduct of the parties;" and second, title "might pass as a result of the failure of the State which has sovereignty to respond to conduct *à titre de souverain* of the other State, with such failure amounting to behavior 'which the other party may interpret as consent.'"¹⁹⁶

2. Comparisons and Application to the Diaoyu/Senkaku Islands

The resolution of the Singapore Strait dispute allows for a comparison of these cases in order to determine whether the holding of the Strait's resolution may apply to the Diaoyu/Senkaku Islands as well.

The historical evidence from the Singapore Strait case would provide a stronger argument for Japanese ownership. Singapore's continuous administration of Pedra Branca/Pulau Batu Puteh after it gained its independence parallels Japan's continuous administration of the Diaoyu/Senkaku Islands after the Okinawa Reversion Treaty, in which the United States returned administration of all islands.¹⁹⁷ However, whereas there was a general international assumption that Pedra Branca was under Singaporean control, the United States had expressly stated its neutral position regarding ownership and sovereignty over the Diaoyu/Senkaku Islands.¹⁹⁸ In addition, China, like Malaysia, had been silent about the ownership of the islands for many decades, and just as Malaysia had maps indicating that Pedra Branca was under Singaporean territory, China also had maps in the 1950s with the Diaoyu/Senkaku Islands written as only "Senkaku," suggesting Japanese ownership.¹⁹⁹

193 Lathrop, *supra* note 188, at 832-33.

194 *Id.*

195 *Id.* at 832-34.

196 *Id.* at 834; see Sovereignty over Pulau Ligitan and Pulau Sipadan, *supra* note 192, at 56, para. 121.

197 Sovereignty over Pulau Ligitan and Pulau Sipadan, *supra* note 192, at 5; see *How Uninhabited Islands*, *supra* note 46; MANYIN, *supra* note 20; Ryan M. Scoville, *A Defense of Japanese Sovereignty Over the Senkaku/Diaoyu Islands*, 46 GEO. WASH. INT'L L. REV. 571, 593 (2014).

198 HISTORICAL CONTEXT, *supra* note 4; see MANYIN, *supra* note 20.

199 Turton, *supra* note 48.

However, the Chinese do have some rebuttals as to the Japanese arguments regarding a historical ownership of the islands. Prior to China's public outcry for the return of the islands in 2012, Japan did not have regular military patrols of the islands.²⁰⁰ Now, both China and Japan have regularly sent military and coast guard patrols.²⁰¹ Moreover, Japan did not put up flags or previously require the PRC to seek and obtain permission for island visits, had no military commissions set up on the islands, and made no reclamation or development projects on them.²⁰² As it would seem, the lack of Japan's consistent and prominent administration contrasts with the Singaporean administration of Pedra Branca, suggesting that even the Japanese were potentially uncertain about rightful ownership.²⁰³

In addition to a historical comparison, however, the Singapore Strait dispute resolution also offered two new ways to define legal acquisition of territory: first through tacit agreement, and second, through a failure of the sovereign state to respond, which would lead the acquiring state to interpret as consent for acquisition.²⁰⁴ In regards to the Diaoyu/Senkaku Islands, it is unlikely to find a tacit agreement in history or the future that would point to a clear cession of territory from China to Japan or vice versa. The Treaty of Shimonoseki has been debunked with the Cairo Declaration and the Treaty of San Francisco after WWII, and as a result, all territories that Japan had seized from China were to be returned.²⁰⁵ While the Japanese could argue that the Chinese maps in the 1950s that labeled the islands as "Senkaku" would suggest that China had passively agreed that these islands were under Japanese control and ownership, the public outcry in the 1970s and 2012 would suggest that China did not tacitly agree to cede the islands.²⁰⁶ Furthermore, Japan itself, should China be found to be the rightful owner, would still probably not tacitly agree to return the islands because the Diaoyu/Senkaku Islands symbolize the conflict between two competing superpowers, and the winner would be deemed the hegemon of the region.²⁰⁷ Japan, though waning in comparison to China, still is unwilling to lose its regional position in such a conflict, and as a result, no tacit agreement, previously or in the near future, will be easily found.²⁰⁸

In addition, the second way to acquire territory also reveals more problems in determining ownership. First, there is a question as to who is

200 Tiezzi, *supra* note 21.

201 HISTORICAL CONTEXT, *supra* note 4; MANYIN, *supra* note 20, at 1, 6.

202 HISTORICAL CONTEXT, *supra* note 4; MANYIN, *supra* note 20, at 1, 6.

203 HISTORICAL CONTEXT, *supra* note 4; MANYIN, *supra* note 20; Fackler, *supra* note 26.

204 Lathrop, *supra* note 188 at 833; *see* Sovereignty over Pulau Ligitan and Pulau Sipadan, *supra* note 192, at 56, para. 121.

205 HISTORICAL CONTEXT, *supra* note 4; *see* Hughes et al., *supra* note 41.

206 Turton, *supra* note 48; *see* Bradsher et al., *supra* note 65.

207 Harner, *supra* note 7.

208 Chris Matthews, *Forget Greece, Japan is the World's Real Economic Time Bomb*, FORTUNE (Feb. 26, 2015), <http://fortune.com/2015/02/26/japan-economic-time-bomb/>.

“sovereign” over the Diaoyu/Senkaku Islands.²⁰⁹ Both countries have made claims of ownership and sent military patrols, and China has even sent out cartographers and regular, consistent military patrols.²¹⁰ Additionally, while Japan’s purchase of the islands may suggest that it now has ownership, the physical purchase itself may suggest that prior to the purchase, Japan was not the rightful owner.²¹¹ Thus, it is difficult to determine if such a purchase was legal in the international field as previous forms of cession, including the sale of land, are rare and usually not accepted in today’s modern society.²¹² Second, if the sovereign state was determined to be China, the “failure to respond” can only be the period of silence from the end of WWII to the 1970s when China did not ask for the return of the islands.²¹³ However; during this time, the administration of the islands was under the United States, and as a result, this could be interpreted as China adhering to the Treaty of San Francisco rather than a failure to respond.²¹⁴ Moreover, with the Okinawa Reversion Treaty in 1968, Japan and China both were aware that the United States took a neutral stance regarding the ownership of the islands.²¹⁵ This would suggest that there was ambiguity regarding the ownership of the Diaoyu/Senkaku Islands, and since China began asking for the return of the islands in the 1970s, there was not really any “failure to respond” that Japan could interpret as “consent” for acquiring the islands.²¹⁶ Thus, while the rule for the Singapore Strait may have solved the issue of Pedra Branca’s ownership, it still remains murky and insufficient when applied to the Diaoyu/Senkaku Islands.

B. LAKE CHAD/ BAKASSI PENINSULA: NIGERIA VS. CAMEROON

1. Case Background and Outcome

Turning to the Lake Chad/Bakassi Peninsula dispute, the conflict also derives its history from a contentious, imperialist history. Cameroon was declared the righteous owner of the disputed territory, the Bakassi Peninsula, but because Nigerian villagers had moved onto Cameroonian territory due to the receding waters, the Nigerian government had sent in troops to protect them.²¹⁷ Ultimately, the UN and Western powers had to intervene, and Nigeria reluctantly left the territory, but not before strongly

209 Tiezzi, *supra* note 21.

210 HISTORICAL CONTEXT, *supra* note 4; see Hughes et al., *supra* note 41.

211 Fackler, *supra* note 26. However, the argument for a purchase being invalid, may not be helpful to Chinese interests as voiding Japan’s purchase of the island would also void Japan’s initial sale of the island to the aforementioned businessman and set a status quo in which Japan should have continually believed it was the rightful owner after the first voidable sale.

212 Harry, *supra* note 96, at 664.

213 HISTORICAL CONTEXT, *supra* note 4; see Shaw, *supra* note 20.

214 HISTORICAL CONTEXT, *supra* note 4; see Shaw, *supra* note 20.

215 HISTORICAL CONTEXT, *supra* note 4.

216 *Id.*

217 Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria: Eq. Guinea intervening), 2002 I.C.J. Rep. 303 (Oct. 10).

protesting the Western intervention as the strong-armed coercion and poor attempt of Western powers to address the legacy of colonialism.²¹⁸

The areas of Nigeria and Cameroon were first divided between Germany, which controlled Cameroon, and the United Kingdom, which controlled Nigeria.²¹⁹ After World War One, Cameroon was “placed successively under the mandate and trusteeship systems of the League of Nations and the United Nation respectively, leading to the international recognition of Cameroon’s boundaries.”²²⁰ Additionally, the 1919 Milner-Simon Declaration generally demarcated the region and rudimentary boundaries.²²¹

After both states achieved independence, they agreed to respect boundaries inherited from the colonial era, but beginning in the early seventies, Nigeria frequently disputed the frontier until the Maroua Declaration in June 1975.²²² The Maroua Declaration confirmed Cameroon’s title to the Bakassi Peninsula, which is within the Lake Chad region.²²³ However, the Nigerian government had not publicized the Declaration to its people and after an internal coup in 1992, the new Nigerian government published a map “which showed Bakassi as part of Nigeria, which led to subsequent protests by Cameroon.”²²⁴ Moreover, many Nigerian tribes, “economically depend on the Lake, followed the receding water and built 30 villages on Cameroonian territory,” which along with oil licensing rights, gave Nigeria an argument that it had taken the territory.²²⁵

Cameroon first responded by calling upon the Lake Chad Basin Commission (LCBC), which was formed by Nigeria, Niger, Cameroon, and Chad.²²⁶ The LCBC is the oldest basin commission in Africa, and has since added additional members and observers, including the Central African Republic and Sudan.²²⁷ However, the LCBC was unable to come to a resolution due to a lack of funding, unqualified personnel, and frequent

218 David D. Caron & Pieter H. F. Bekker, *International Decisions: Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea Intervening)*, 97 AM. J. INT’L L. 387 (David D. Caron ed., 2003).

219 Stefan Kirchner, *Water, Oil, and Blood: The Cameroon-Nigeria Boundary Dispute Regarding Bakassi Peninsula and Lake Chad and the Threat of War over Water Resources*, SOC. SCI. RES. NETWORK 3 (2001), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=757086.

220 *Id.*

221 Caron & Bekker, *supra* note 218, at 388.

222 Kirchner, *supra* note 219, at 3; *see* Caron & Bekker, *supra* note 218, at 390–91.

223 Kirchner, *supra* note 219, at 3.

224 *Id.* at 4, 18–19.

225 Florence Alessa Metz, *The Cameroonian-Nigerian Border Conflict in the Lake Chad Region: Assessment of the Resource and Conflict Management Capacities of the Lake Chad Basin Commission 2* (unpublished Ph.D paper, ETH Zurich), <http://www.aegis-eu.org/archive/ecas4/ecas-4/panels/21-40/panel-28/Metz-Warner-Brzoska-Full-paper.pdf>.

226 *Id.* at 11.

227 *Id.*

political instability inside and among the member countries.²²⁸ Subsequently, Nigeria invaded the disputed territory with its military, and Cameroon's military responded as well.²²⁹ Thereafter, Cameroon brought the dispute to the United Nations Security Council (UNSC) and the International Court of Justice (ICJ) in late 1993.²³⁰

After a long deliberation and various appeals, in 2002, the ICJ determined that first, the ICJ had jurisdiction over such territorial disputes, and second, Cameroon was the rightful owner of the disputed region of the Bakassi Peninsula.²³¹ Furthermore, Cameroon's ownership derived from legal considerations based upon the validity of the treaties among former colonial powers, and Nigeria's historical consolidation theory was rejected as being "highly controversial" and "incapable of replacing the established modes of acquisition of title to territory under international law."²³² Finally, the court used the "equitable principles or relevant circumstances" method to determine the maritime boundaries between the two main countries and Equatorial Guinea.²³³ Despite the relevant circumstance of oil deposits on the land, Nigeria's oil licensing did not constitute a cession of territory. Instead, the court's determination focused objectively on the country's proximity to the Peninsula, which the court found to be Cameroon.²³⁴ Thus, Cameroon was found to be the rightful owner.

From this determination, the ICJ formulated two main rules. First, there is a general rule that preference for ownership towards disputed territory should be given to the holder of the title; the crux for transfer depends on whether the holder had acquiesced in passing title.²³⁵ Second, the "equitable principles/relevant circumstances" method draws an equidistant line between the two countries for a maritime boundary and then considers if there are other relevant circumstances that would require alteration.²³⁶ In such a case, the existence of oil licenses by Nigeria was not a sufficient circumstance to change borders, and oil licensing does not even constitute as a cession of territory.²³⁷

2. Comparisons and Application to the Diaoyu/Senkaku Islands

The determination of the ICJ and the application of the subsequent rules that it provided may provide greater guidance regarding the Diaoyu/Senkaku Islands dispute; however, factually, the similarities and

228 *Id.*

229 *Id.*; Kirchner, *supra* note 219, at 4.

230 Kirchner, *supra* note 219, at 4.

231 See Caron & Bekker, *supra* note 218.

232 *Id.* at 389–95. Nigeria had argued that prior to colonization, its tribes lived by the Peninsula for centuries, and thus, it had sovereignty over the region due to the historical practice of its people.

233 *Id.* at 387.

234 *Id.* at 394–95.

235 *Id.* at 389.

236 *Id.* at 394.

237 *Id.* at 394–96.

differences between the countries involved in both disputes indicate greater complexity that make the rules less applicable.

As the court determined, preference should be given to the disputed territory's titleholder rather than the administering state in determining ownership. Furthermore, it is important to know whether the titleholder had acquiesced in passing title to another.²³⁸ In the case of the Diaoyu/Senkaku Islands, there is unfortunately even less clarity regarding ownership of the islands than in the Bakassi Peninsula dispute. While Cameroon could show clear evidence that the peninsula was demarcated since the Milner-Simon Declaration in 1919 and reiterated under the Maroua Declaration, in the island dispute there has never been an explicit mention of the Diaoyu/Senkaku Islands in any treaty.²³⁹ Moreover, the Treaty of Shimonoseki, in which China ceded Taiwan and other territories, was overturned after WWII, and Japan was required to return all territories it had previously seized from its neighbor.²⁴⁰ From the ICJ ruling, the Milner-Simon Declaration is valid today, and that is the basis for the demarcations of the disputed territories.²⁴¹ The Treaty of Shimonoseki, which ceded Taiwan and other territories to Japan, is no longer valid, and the Cairo Declaration and Treaty of San Francisco, which are valid today, would suggest that the Diaoyu/Senkaku Islands should be returned to China based on its original discovery, if China is found to have occupied the islands before Japan did.²⁴²

However, more difficulty arises when it comes to determining facts regarding ownership of the Diaoyu/Senkaku Islands. Because there is no explicit mention of the islands in any treaty, it is difficult to assume if they were ever passed between China to Japan.²⁴³ Moreover, Japan's purchase of the islands from a private business owner could also suggest that it did not have legal title prior to the purchase.²⁴⁴ In contrast, there was never any private ownership of the Bakassi Peninsula, and the continuous, explicit treaties from the 1919 Milner-Simon Declaration to the 1975 Maroua Declaration would clearly suggest that Cameroon always had ownership of the disputed territory and never acquiesced the title.²⁴⁵ Additionally, while Nigeria was allowed to participate in all treaties through its independence, the PRC was not invited to participate at the Treaty of San Francisco and the Cairo Declaration.²⁴⁶ Thus, while the Nigerians did have ample

238 *Id.* at 399.

239 *Id.* at 388; HISTORICAL CONTEXT, *supra* note 4; Hughes et al., *supra* note 41.

240 HISTORICAL CONTEXT, *supra* note 4; Hughes et al., *supra* note 41.

241 Caron, *supra* note 213, at 388.

242 HISTORICAL CONTEXT, *supra* note 4; Hughes et al., *supra* note 41.

243 *Id.*

244 Fackler, *supra* note 26; Fackler & Johnson, *supra* note 25.

245 Caron & Bekker, *supra* note 218, at 389; Kirchner, *supra* note 219, at 3.

246 Caron & Bekker, *supra* note 218, at 390–91; see *The Chinese Revolution of 1949*, *supra* note 32 (PRC was not invited to attend any of the peace talks, including the Treaty of San Francisco and the Cairo Declaration).

opportunity to protest any boundaries during these peace treaties and territorial demarcations, which it did not, the PRC may never have had such an opportunity.

Finally and sadly, the Nigerian reaction to the ICJ decision may be the most similar point between the two disputes and an uncomfortable harbinger of the reaction of the loser in the Diaoyu/Senkaku Island conflict. While both Nigeria and Cameroon had escalated to military occupation, already a step beyond Singapore and Malaysia, Nigeria was “unusually defiant” in the aftermath of the ICJ determination.²⁴⁷ It publicly declared that:

The French President of the Court and the English and German Judges should have disqualified themselves since the countries that they represent are, in essence, parties to the action or have substantial stakes. These judges, as citizens of the colonial powers whose actions had come under scrutiny, have acted as judges in their own cause and thereby rendered the judgment virtually null and void.²⁴⁸

Additionally, the statement also implied a “reluctance to implement the judgment,” and incidentally, the Nigerians refused to remove their military in fear of an overall collapse of law and order within the region, inciting danger to their village civilians.²⁴⁹ As a result, the United Nations had to intervene, and the region still remains contentious because Nigerian villagers still are within Cameroonian territory due to the receding waters of Lake Chad.²⁵⁰ If China and Japan are unable to reach a satisfactory resolution, then one country may react in the same way as Nigeria, but its response may trigger a far louder outcry and have a larger international ripple effect due to the economic and military sway both the PRC and Japan hold.

C. THE FALKLAND ISLANDS: ARGENTINA VS. BRITAIN

1. Case Background and Outcomes

Similar to the aforementioned case studies, the dispute over the Falkland Islands arose out of a historical context of colonialism.²⁵¹ Because the United Kingdom and Argentina were unable to resolve their dispute over the islands, they descended into war in the 1980s, in which the British

²⁴⁷ Caron & Bekker, *supra* note 218, at 397-398; see Lathrop, *supra* note 188 (for more about Singapore and Malaysia’s conflict and the lack of military occupation of the Pedra Branca islands).

²⁴⁸ Caron & Bekker, *supra* note 218, at 397.

²⁴⁹ Felicia Price, *The Bakassi Peninsula: The Border Dispute Between Nigeria and Cameroon*, AMERICAN UNIVERSITY: ICE CASE STUDIES NO. 163, (Nov. 17, 2005) <http://www1.american.edu/ted/ice/nigeria-cameroon.htm>.

²⁵⁰ John Campbell, *Guest Post: Lake Chad Shrinks, Conflict Grows*, COUNCIL ON FOREIGN REL., (May 25, 2012), <http://blogs.cfr.org/campbell/2012/05/25/guest-post-lake-chad-shrinks-conflict-grows/>.

²⁵¹ See Caron & Bekker, *supra* note 218; Lathrop, *supra* note 188.

won and maintained control of the islands.²⁵² Although negotiations have reopened, I will primarily focus on the events that led up to the Falkland Islands War in 1982.²⁵³

The discovery of the Falkland Islands is unclear, and the “controversy over who discovered the islands may never be resolved.”²⁵⁴ Known historical documents are inadequate in determining who discovered the islands, because “navigation, plotting, and cartography were crude... [and] some of the early charts of the oceans of the New World include islands later discovered not to exist.”²⁵⁵ While an overwhelming amount of evidence suggests that Amerigo Vespucci, under Spanish authority, was probably the first to discover the islands, the British still claim that they were the first discoverers.²⁵⁶ Additionally, the British were also not the first occupiers. In 1764, the Spanish insisted that the first established French colony be surrendered.²⁵⁷ At the time, it was understood that the Spanish had ownership and sovereignty of the islands, and they installed a Spanish governor under the authority of the Buenos Aires Captain-General.²⁵⁸ The British, initially unaware of the first French colony, circled the islands, took surveys, and decided to colonize the islands as well.²⁵⁹ However, by the time the British had officially taken possession of an island, they knew of the French colony’s existence.²⁶⁰ After the initial stages of colonization, the British and the Spanish fought over who had claim over the Falkland Islands, with the British temporarily vacating the islands.²⁶¹

By 1826, the Vice-Royalty of Argentina had broken away from Spain, and the new government was secure enough to establish its control over the Falkland Islands.²⁶² For instance, the government seized American ships that entered into Argentinean waters.²⁶³ After the captured ship crew was released, there were potential “indiscreet admissions [by President Jackson] that may have encouraged the British to re-enter the islands, on the assumption that the United States would neither object nor invoke the Monroe Doctrine.”²⁶⁴ As a result, the British did re-enter and by 1833, Great Britain was in control of the Falklands.²⁶⁵

252 See Caron & Bekker, *supra* note 218; Lathrop, *supra* note 188.

253 Alexandra Olsen, *UN Committee Backs Argentina Over Falkland Islands*, INDEP. (Jun. 26, 2014), <http://www.independent.co.uk/news/world/politics/un-committee-backs-argentina-over-falkland-islands-9566894.html>.

254 W. Michael Reisman, *The Struggle for the Falklands*, 93 YALE L.J. 287, 291 (1983).

255 *Id.*

256 *Id.*

257 *Id.* at 294.

258 *Id.*

259 *Id.*

260 *Id.* at 294–95.

261 *Id.* at 294–99.

262 *Id.* at 299.

263 *Id.* at 299–300.

264 *Id.*

265 *Id.* at 300.

In 1945, Britain “registered the Falkland Islands with the United Nations as a non-self-governing territory,” and in 1965, the General Assembly “recommended that the issues between Argentina and the United Kingdom be negotiated.”²⁶⁶ When negotiations began in 1966, the British Parliament genuinely considered a “transfer of sovereignty,” but inhabitants of the Falkland Islands themselves strongly protested.²⁶⁷ Talks reached a high point of a “joint statement establishing new patterns of cooperation between the Falklands and Argentina,” but soon after the relationship between Argentina and Great Britain soured.²⁶⁸ In 1981, the British recommended a freezing of the dispute.²⁶⁹ Argentina rejected this recommendation and instead made the counteroffer of making the Falklands its “most pampered region.”²⁷⁰ As the Argentines became more aggressive in their demands, the British continued to stonewall. The Argentinean Foreign Ministry responded that if they cannot reach a speedy negotiated settlement, Argentina would end the negotiations and “seek other means.”²⁷¹

The Falklands War began on April 2, 1982 when Argentineans forces invaded the islands.²⁷² While the UNSC immediately condemned the invasion and demanded the immediate withdrawal of Argentine forces, the British nuclear submarine HMS Conqueror set sail in preparation for war.²⁷³ In the course of two months, the British were able to recapture the Falkland Islands and force the Argentines to surrender on June 14, 1982.²⁷⁴ While the British have kept their sovereignty over the islands since the surrender, the U.N. recently approved a new resolution “calling on the UK and Argentina to negotiate a solution to their dispute over the Falkland Islands, essentially favoring Argentina’s stance in the long-running feud.”²⁷⁵

2. Comparisons and Application to the Diaoyu/Senkaku Islands

The dispute between the United Kingdom and Argentina reflects the most violent stage of a territorial dispute: war. Because the two states were incapable of coming to a satisfactory resolution, they ultimately resorted to armed conflict, and the British, with stronger political backing and military

266 *Id.* at 308–09.

267 *Id.* at 309.

268 *Id.* at 308–10.

269 *Id.* at 310.

270 *Id.*

271 *Id.* at 311.

272 *Id.*

273 Murray Wardrop, *The Falklands War: Timeline*, THE TELEGRAPH (April 2, 2012), <http://www.telegraph.co.uk/news/worldnews/southamerica/falklandislands/9181252/The-Falklands-War-timeline.html>.

274 *Id.*

275 Olsen, *supra* note 253.

power, won.²⁷⁶ Moreover, the British win gave rise to other countries using the slogan, “We stole it fair and square” for other territorial disputes, such as the Panama Canal.²⁷⁷ It exemplifies the colloquial phrase “might equals right” and promotes territorial conquest in the modern age, which contrasts directly with the U.N. principles of self-determination and sovereignty.

The history of the Falkland Islands dispute presents a variety of similarities and differences to the Diaoyu/Senkaku Island conflict. Although the discoverer of the Falkland Islands is difficult to ascertain due to crude, antique maps, there is a general consensus that the Spaniards discovered the islands. Similarly, there is a general consensus that China was the original discoverer of the Diaoyu/Senkaku Islands.²⁷⁸ However, whereas the Diaoyu/Senkaku Islands were never occupied or developed, the Falklands were occupied, developed, and colonized by the French and Spanish before the British arrived.²⁷⁹ Additionally, whereas Argentina was a newly liberated country when the British took the Falkland Islands, China has remained the same “country” from the islands’ discovery until today.²⁸⁰ Nevertheless, Argentina and China were both too weak to back up any protests at the time of British and Japanese occupation.²⁸¹ Perhaps the greatest historical contrast between the two disputes is that Argentina made persistent, strong declarations for the Falkland Islands’ return while China has made some scattered claims and prior to the 1970s, even had maps that labeled the islands as Senkaku, suggesting Japanese ownership.²⁸² Moreover, Argentina and the United Kingdom had formal, repeated talks specifically regarding the Falkland Islands for over a decade.²⁸³ China and Japan have had broad talks regarding overall relations between the two countries, but never any formal talks specifically regarding the islands. To make matters more complicated, they have now reverted to a silent military buildup on both sides.²⁸⁴

Because the outcome of the Falkland Islands dispute was war, there were no resulting no legal rules that may assist in resolving the Diaoyu/Senkaku Island dispute. Additionally, when the British and Argentineans went to war in 1982, the majority of the world’s most powerful players, including the United States, all supported the United Kingdom.²⁸⁵ This would suggest an implied support for the “we stole it fair

276 Editors of Encyclopedia Britannica, *Falkland Islands War*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/200775/Falkland-Islands-War/302170/The-course-of-the-conflict> (last updated Mar. 3, 2014).

277 Reisman, *supra* note 254, at 304.

278 *Id.* at 291; see Cheng, *supra* note 19, at 253; MANYIN, *supra* note 20, at 2.

279 Reisman, *supra* note 254, at 291–93.

280 *Id.* at 299–300; see MANYIN, *supra* note 20; see also KISSINGER, *supra* note 53.

281 See Reisman, *supra* note 254, at 300; HASTEDT, *supra* note 28, at 72; *The Chinese Revolution of 1949*, *supra* note 32.

282 Turton, *supra* note 48; see Bradsher et al. *supra* note 65.

283 Reisman, *supra* note 254 at 299–301.

284 HISTORICAL CONTEXT, *supra* note 4.

285 Editors of Encyclopedia Britannica, *supra* note 276.

and square” mantra when it came to Western powers, an uncomfortable, nuanced revelation that past acts of domination may be acceptable for Western powers.²⁸⁶ Finally, the fact that the United Kingdom and Argentina would go to war over the Falkland Islands in the 1980s indicates that the institutions of international law can be futile and have no effect on sovereignty. If the U.N. and other intergovernmental organizations truly did have authority, then perhaps they would not have allowed the dispute to escalate into war and ultimately, death.

Returning to the Diaoyu/Senkaku Islands dispute, the Falkland Islands War reflects the potential outcome if there is no resolution. While the United Kingdom’s power has declined since the end of WWI, the world’s other powerful countries still primarily supported them in the 1980s.²⁸⁷ However, lately, the U.N. and China both have backed Argentina over its attempt to renegotiate a solution.²⁸⁸ Perhaps China feels similar to Argentina, but whereas Argentina is gaining support, China may be losing allies, as its regional neighbors and the western world grow wary of its power.

V. CONCLUSION: A STORM BREWING?

Indeed, the Diaoyu/Senkaku Island conflict has risen in the last few years as the symbol of power struggle between China and Japan and the “shifting winds in the East.” But it has also illuminated the inadequacies of international law in regards to territorial disputes whose ownership has been ambiguous due to past colonialism divisions.²⁸⁹ While other cases like the Singapore Strait and the Bakassi Peninsula have given potential legal solutions to such disputes, they are still inadequate when addressing the Diaoyu/Senkaku Islands for the aforementioned reasons.²⁹⁰ Moreover, if the countries are unable to come to a resolution, this dispute may erupt into military action or direct warfare as the Falkland Islands did in 1982.²⁹¹ Finally, the attention on the Diaoyu/Senkaku Islands dispute has recently

286 Reisman, *supra* note 254, at 304.

287 Editors of Encyclopedia Britannica, *supra* note 276. Additionally, the support of the world’s major players, who are primarily Western powers, has such a nuanced effect in that it also ties in race and the consequences of former imperialism, but that is beyond the scope of this paper. *See also* LAUREN, *supra* note 178.

288 Olsen, *supra* note 252; Fiona Govan, *China Backs Argentina’s Position on Falkland Islands*, THE TELEGRAPH (Jun. 18, 2014), <http://www.telegraph.co.uk/news/worldnews/southamerica/falklandislands/10907986/China-backs-Argentinas-position-on-Falkland-Islands.html>.

289 Harner, *supra* note 7.

290 Lathrop, *supra* note 188, at 833; Sovereignty over Pulau Ligitan and Pulau Sipadan, *supra* note 192, at 56, para. 121; Land and Maritime Boundary, *supra* note 217.

291 *See* Wardrop, *supra* note 273.

shifted to China's artificial island construction in the South China Sea.²⁹² This focus on these instances of Chinese development in its surrounding oceans reflects the simultaneously growing wariness of the international field to China's rise in power and the shifting dynamics within China's international relationships, in particular with the United States.

Perhaps the most important consequences for the lack of legal applicability and the unlikelihood of peaceful resolution is that the Diaoyu/Senkaku Islands involve two of the world's largest economies, and as they slowly gravitate towards the possibility of war, the United States is obliged to participate in aid of Japan, which means that these islands could cause a global armed conflict.²⁹³ While disputes that involve smaller countries should certainly not be disregarded, they do not hold as much political and economic influence and cannot affect the whole world in the way a war between Japan and China could. The international legal system's inability to execute its rulings has led to an inefficient and ineffective system for resolving disputes.²⁹⁴ Smaller countries are compelled to be subject to these laws due to inadequate power, but should either China or Japan be dissatisfied with an international ruling, either may try to take the islands by force.²⁹⁵ Rather, the Diaoyu/Senkaku Islands present an opportune moment for the international legal community to reconsider its past traditional laws regarding territorial acquisitions, and to formulate a more practical solution. Otherwise, China's creeping power and development in its surrounding waters may soon make any current legal options antiquated or irrelevant, and as the winds shift to reveal the new power structure of the region, compel other international players to descend into a military conflict with the rising superpower.

292 Liselotte Odgaard, *China's Dangerous Ambiguity in the South China Sea*, N.Y. TIMES (Dec. 10, 2015), <http://www.nytimes.com/2015/12/11/opinion/chinas-dangerous-ambiguity.html>.

293 Panda, *supra* note 15.

294 Land and Maritime Boundary, *supra* note 217; Wardrop, *supra* note 273.

295 David J. Lynch, *China Challenges Obama's Asia Pivot with Rapid Military Buildup*, BLOOMBERG BUSINESS (Apr. 22, 2014), <http://www.bloomberg.com/news/articles/2014-04-23/china-defies-obama-s-slow-asia-pivot-with-rapid-military-buildup>; D.MCN, *supra* note 72.