

# **‘EFFECTIVITÉS’: AN IMPERATIVE LEGAL PRINCIPLE IN RESOLVING THE SENKAKU/DIAOYU ISLANDS DISPUTE**

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## **Abstract**

Since 1971, China, Taiwan and Japan have been claiming sovereignty on Senkaku/Diaoyu Islands in the East China Sea. These islands have been the subject matters of dispute due to the existence of oil deposits underneath and also being strategic location for exploitation of oil and gas resources in the region. China claims historic title over the Diaoyu Islands, as these have been inherent part of it since ancient times. It further contends that islands were seized by Japan during the 1895 Sino-Japan War. On the other hand, Japan concedes that it had occupied the Senkaku Islands since 1895 while these islands were *terra nullius* and totally uninhabited prior to that time. Besides, China had never challenged Japanese exercise of sovereignty over these islands until 1971 in which the United Nations reported to have substantial oil and gas reserves in the area. As far as contemporary international adjudication is concerned, a state has immense prospect of having title over the territory if it can prove the exercise of state sovereignty and ‘effective control’ (*effectivités*) over the disputed territory. This is because international courts and tribunals, in practice, predominantly draw attention solely on the element of effective control in deciding the territorial and boundary disputes in spite of having various modes and concepts of acquisition of territory under international law. Accordingly, this paper analyses critically the judicial interpretation and application of the principle of ‘*effectivités*’ by the international courts and tribunals in resolving inter-state territorial and boundary disputes. Additionally, it applies the principle to the Senkaku/Diaoyu Islands dispute, and finally offers some amicable solutions to address the dispute among the parties in peaceful manners under the purview of international law.

## **I INTRODUCTION**

Since 1971, China, Taiwan and Japan have disputed over claiming sovereignty to the Senkaku/Diaoyu Islands in the East China Sea. These islands have been the subject matters of dispute mainly due to the existence of oil and gas deposits underneath and around. This archipelago consists of five uninhabited islands and three barren rocks with approximate total surface area of 6.3 km<sup>2</sup> situated in the East China Sea.<sup>1</sup> These

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1 Steven Wei Su, “The Territorial Dispute over the Tiaoyu/Senkaku Islands: An Update,” 36 *Ocean Development & International Law* 46 (2005).

islands are roughly located 170 km from the Japanese Ishigaki Island, 370 km from the mainland China and 180 km from the coast of Taiwan.<sup>2</sup> Each island has its own name both in Japanese and Chinese as follows: Kuba-shima, Kobi Sho or Huangwei Yu (Lat: 25° 58'/Long: 123° 41'); Taisho-jima, Akao-sho or Chiwei Yu (Lat: 25° 55'/Long: 124° 33'); Uotshuri-shima or Diaoyu Dao (Lat: 25° 45'/Long: 123° 29'); Kita Kojima or Beixiao Dao (Lat: 25° 45'/Long: 123° 33') and Minami Kojima, Minami-ko-shima or Nanxiao Dao (Lat: 25° 44'/Long: 123° 34'). Three rocks are also named in both languages as Okino Kitaiwa or Dabeixiao Dao; Okino Minamiwa or Dananxiao Dao and Tobise or Feilai Dao respectively.<sup>3</sup>

Nevertheless, in Chinese, the whole group of islands is generally called as Diaoyu Islands, which originates from the biggest island among them. Taiwan prefers to name these islands as “Diaoyutai” against “Diaoyu-dao” as called by the mainland China. Both the terminologies share more or less the same meaning: “Diaoyu-dao” means “fishing island”; whereas, “Diaoyutai” means “fishing platform”. In 1843, British explored the islands and named the group as the “Pinnacle Islands”. In 1900, the Japanese explorer Tsune Kuroiwa renamed the islands as “Sento Shoto” in Japanese language by following the British translation of the “Pinnacle Islands”. The word “Senkaku” and “Sento” share the same meaning in Japanese language. These mean the “sharp point” or “peak”, as in case of the English word “Pinnacle” means the “top of a mountain” or “peak”.<sup>4</sup>

Dispute concerning the sovereignty over the Senkaku/Diaoyu Islands between China, Taiwan and Japan arose mainly due to the existence of oil deposits underneath and around. China as well as Taiwan claim historic title over the Diaoyu Islands, as these have been integral parts of China since ancient times. Furthermore, it is contended that islands were seized by Japan in the 1895 Sino-Japanese War. On the other hand, Japan concedes that it had occupied the Senkaku Islands since 1895 while these islands were *terra nullius* and totally uninhabited prior to that time. Besides, China and Taiwan had never challenged Japanese sovereignty over these islands until 1971, which was after the United Nations reported to have substantial oil and gas reserves in the area.

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2 Alfred Soons and Nico Schrijver, “What does international law say about the China-Japan dispute over the diaoyu/senkaku islands?” (Briefing paper, The Hague: Institute for Global Justice, December 3, 2012)

3 Daniel Dzurek, “The Senkaku/Diaoyu Islands Dispute,” *available at* <http://www-ibru.dur.ac.uk/resources/docs/senkaku.html> (last accessed on April 03, 2013).

4 See Martin Lohmeyer, “The Diaoyu / Senkaku Islands Dispute: Questions of Sovereignty and Suggestions for Resolving the Dispute” 15-16 (Master Thesis., the Faculty of Law, University of Canterbury, 2008); See also, Steven Wei Su, “The Tiaoyu Islands and Their Possible Effect on the Maritime Boundary Delimitation between China and Japan,” *3 Chinese Journal International Law* 385 (2004).

As far as contemporary international adjudication on the matter is concerned, a State has immense prospect of having title over the territory if it can prove the exercise of State sovereignty and 'effective control' (*effectivités*) over the disputed territory. Although there are several modes and legal principles governing acquisition of territory under international law, in practice, the international territorial dispute arbitration, the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ) mainly focused on the element of 'effective control' in deciding territorial and boundary disputes.<sup>5</sup> It can be seen from decisions of the international courts and tribunals in the following cases, namely, *Island of Palmas*;<sup>6</sup> *Clipperton Island Arbitration*;<sup>7</sup> *Legal Status of Eastern Greenland*;<sup>8</sup> *Minquiers and Ecrebos*;<sup>9</sup> *Frontier Dispute Case*;<sup>10</sup> *Land, Island and Maritime Frontier Dispute*;<sup>11</sup> *Land and Maritime Boundary Case*;<sup>12</sup> *Pulau Ligitan and Palau Sipadan*;<sup>13</sup> and, *Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge*.<sup>14</sup> Accordingly, this paper intends to analyse critically the judicial interpretation and application of the principle of '*effectivités*' by the international courts and tribunals in resolving inter-state territorial and boundary disputes. Furthermore, it applies the said principle to the Senkaku/Diaoyu Islands dispute and finally offers some feasible solutions to address the dispute among the parties in peaceful manners in accordance with international law.

## II HISTORICAL BACKGROUND OF THE SENKAKU/DIAOYU ISLANDS

The islands were first recorded in China since 1221 AD<sup>15</sup> although Chinese claims to the Diaoyu Islands dated back to 1372 AD. During the reign of Ming Dynasty (1368-

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5 See Malcolm Shaw, *Title to Territory: the Library of Essay in International Law* xix (Routledge, London, 2005).

6 *Island of Palmas Case (Netherlands v. USA)* (1928) 2 R.I.A.A. 829.

7 *Clipperton Island Arbitration (France v. Mexico)* (1931) 2 RIAA 1105; (1932) 26 AJIL 390; (1932) 6 ILR.

8 *Legal Status of Eastern Greenland Case (Norway v. Denmark)* PCIJ Rep Ser. A/B (1933), No. 53.

9 *Minquiers and Ecrebos Case* (1953) ICJ Rep. 47.

10 *Frontier Dispute Case (Burkina Faso v. Mali)* (1986) ICJ Rep 554.

11 *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras: Nicaragua Intervening)* (1992) ICJ Rep 351.

12 *Land and Maritime Boundary Case (Cameroon v. Nigeria: Equatorial Guinea Intervening)* (2002) ICJ Rep 303.

13 *Sovereignty over Pulau Ligitan and Palau Sipadan Case (Indonesia v. Malaysia)* 2002 ICJ Rep 625.

14 *Sovereignty over Pedra Branca / Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v. Singapore)* General List No. 130, available at <http://www.icj-cij.org/docket/files/130/14492.pdf> (last accessed on April 03, 2013)

15 Unryu Suganumu, *Sovereign Rights and Territorial Space in Sino-Japanese Relations: Irredentism and the Diaoyu/Senkaku Islands* 42 (Hawaii University Press, Hawaii, 2000).

1644), the Ryukyu kingdom, of which territory includes from Amami to the Yaeyama islands, was tributary to the Chinese Emperor. Such tributary relations with China continued throughout the Ming and Qing Dynasty (1644-1912).<sup>16</sup> The Chinese Emperors sent approximately twenty-four investiture missions to the Ryukyu kingdom during 1372-1879.<sup>17</sup> In 1874, the last mission was dispatched to the vassal state which was two years after the Japanese annexation of the kingdom.

In 1372, the first imperial envoy named Yang Zai was despatched followed by a total of ten before the mission of Chen Kan in 1532. However, all these records were lost due to a fire in the Fujian archives and thus Chen Khan records to the Ryukyu kingdom became the oldest ever existed to prove Chinese claims to the Diaoyu Islands.<sup>18</sup> In the records, Chen Kan used the name “Diaoyu Yu” by stating that Kume Hill was under the reign of the Ryukyu Kingdom. The boundary of the Ryukyu Kingdom end at the Kume Hill and therefore the Diaoyu Islands located within the vicinity of China.<sup>19</sup> In 1403, the Shunfeng Xiangsong Guide Book detailed that the Diaoyu Islands could be used for refuelling wood and drinking water.

In 1561, Guo Rulin led an investiture mission to the vassal state. It was recorded that the boundary beyond Kume Hill was under the rule of Ryukyu Kingdom and the Diaoyu Islands - including Chiwei Island - were considered to be part of China.<sup>20</sup> In the 16<sup>th</sup> Century, Diaoyu Tu and Chi Yu were used as part of China’s coastal defence system.<sup>21</sup> In 1561, Zheng Ruozheng mentioned in his defence manual that the Diaoyu Islands were appurtenant to the Fujian garrison.<sup>22</sup> In 1576, Xiao Chong recorded on his mission to the Ryukyu Kingdom that it took days to enter into Chinese territory after passing the Kume Hill.<sup>23</sup> Thus, it is obvious that Xiao Chong regarded the area after passing the Kume Hill was under Chinese rule.

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16 M. Lohmeyer, *The Diaoyu / Senkaku Islands Dispute: Questions of Sovereignty and Suggestions for Resolving the Dispute*, 48 (2008) (Master Thesis, the Faculty of Law, University of Canterbury.)

17 Han-yi Shaw, “The Diaoyutai/Senkaku Islands Dispute: Its History and An Analysis of the Ownership Claims of the P.R.C., R.O.C., and Japan” (Occasional Papers/Reprinted Series in Contemporary Asian Studies, Number 3, 1999): 43.

18 Kiyoshi Inoue, “Japanese Militarism & Diaoyutai (Senkaku) Island – A Japanese Historian’s view,” available at <http://www.skycitygallery.com/japan/diaohist.html> (last accessed on July 28, 2017)

19 *Supra* note 16 at 54.

20 *Supra* note 17.2

21 *Id.* at 56.

22 Tao Cheng, “The Sino-Japanese Dispute Over the Tiao-yu-tai (Senkaku) Islands and the Law of Territorial Acquisition,” *VJIL* 14 (1974): 256.

23 *Supra* note 15 at 54.

In 1606, Xia Ziyang explicitly expressed in his record to the vassal state that the Diaoyu Islands drew the boundary line between China and the Ryukyu Kingdom.<sup>24</sup> In 1663, Zhang Xueli led the first investiture mission to the Ryukyu Kingdom during the Qing Dynasty. Zhang Xueli's records did not entail any information about the Diaoyu Islands as he himself lost the way to the vassal state.<sup>25</sup> In 1683, Wang Chi who executed the Ryukyu's request for an investiture mission recorded that in the evening after their arrival to the Chiwei Island, they celebrated ritual to the sea god by scarifying rice, live pigs and sheep in which they believe the boundary between China and another country. Thus, this record appears to recognise the area near Chiwei Island which is one of the disputed Islands to be the boundary limit between China and the Ryukyu Kingdom.

In 1709, Xu Baoguang also recorded upon return from his mission that Kume Hill was regarded as the southwest boundary between China and the Ryukyu Kingdom.<sup>26</sup> In 1719, Xu Baoguang published a map of the Ryukyu Kingdom depicting all its thirty-six islands without any of the Diaoyu islands. In 1755, Zhou Huang recorded the Diaoyu Islands as practical navigational aids on his mission to the Ryukyu Kingdom.<sup>27</sup>

In the 18<sup>th</sup> Century, most of the Japanese scholars believed that the Senkaku Islands belonged to China.<sup>28</sup> In 1708, Cheng Shuntse stated in his booklet titled General Guide Book for Navigation that the Kume Hill is the western boundary of the Ryukyu Kingdom.<sup>29</sup> Similarly, Hayashi Shifei, a Japanese geographer, expressed that the Ryukyu Kingdom was composed of thirty-six islands without including the Diaoyu Islands. In 1785, Lin Tzu Ping, a Japanese cartographer, drew a map of the Ryukyu Kingdom in which the Diaoyu Islands were considered as part of Chinese territory.

In the Japanese context, the Ryukyu Kingdom became its tributary starting from year 1609 following the Japanese subjugation to the vassal state during the waning of the power of Ming Dynasty. Since then, the Ryukyu Kingdom was a tributary state to both countries, i.e., China and Japan.<sup>30</sup> In 1872, the Japanese government completely occupied the Ryukyu Kingdom under the jurisdiction of the Foreign Ministry and forced it to cut off tributary relationships with the Chinese Emperor. In 1876, the jurisdiction of the former Ryukyu independent kingdom was delegated to the Japanese

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24 *Supra* note 16 at 50.

25 *Supra* note 15 at 71.

26 *Id.* at 76.

27 *Supra* note 16 at 56.

28 *Ibid.*

29 *Supra* note 22.

30 *Supra* note 16 at 53-57.

Home Secretary.<sup>31</sup> In 1881, after the mediation held by Ulysses S. Grant, the former President of the United States (US), China agreed to the Japanese proposal in which from the Okinawa Islands to the all northern territories to be Japanese and all the territories belonging to Miyako-Yaeyama islands to be Chinese. The Diaoyu Islands were not even the subject matter of that negotiation and they were considered as Chinese territory *per se*.<sup>32</sup>

In 1884, Koga Tatsushiro, a native of Fukuoka Prefecture, discovered the Senkaku Islands for Japan and tried to lease the islands from the government of Okinawa prefecture, the Ministry of Home Affairs, the Ministry of Agriculture and Commerce. The application was refused on the ground that it was not clear whether the islands belonged to the Japanese Empire. Hence, at that time, the title of the islands was uncertain for Japan.<sup>33</sup> The Governor of the Okinawa Prefecture requested to annex the Senkaku Islands as part of his administration to the central government in 1885, 1890 and 1893 respectively.<sup>34</sup> On the other hand, in 1893, the Chinese Empress Dowager Cixi granted the Diaoyu Islands to Sheng Xuanhuai who was the Chief Minister of the Court of Imperial sacrifices and also a businessman in the pharmaceutical sector of that time.<sup>35</sup>

On 1<sup>st</sup> August 1894, the Sino-Japanese War broke out and China lost its territory in Taiwan as well as on the Liaodong peninsula as the Chinese military was defeated by the Japanese.<sup>36</sup> In the same year, the central government reacted to the third submission and conferred the islands to the Okinawa Prefecture. On 14<sup>th</sup> January 1895, the Japanese government eventually instructed the prefecture to erect landmarks on the islands.<sup>37</sup> Nonetheless, the Cabinet decision did not mention anything about the Chiwei Island.<sup>38</sup> On 17<sup>th</sup> April 1895, China and Japan signed a peace treaty titled “Treaty of Shimonoseki”

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31 Man-houng Lin, “The Ryukyu and Taiwan in the East Asian Seas: A Longue Durée Perspective,” available at <http://www.japanfocus.org/products/toppdf/2258> (last accessed on April 07, 2013).

32 *Supra* note 18.

33 *Supra* note 20 at 30.

34 Toshio Okuhara, “The Territorial Sovereignty over the Senkaku Islands and Problems on the Surrounding Continental Shelf,” *Japan Annual of International Law* 11 (1967): 98.

35 *Supra* note 20 at 60-62.

36 Ian Nish “An Overview of Relations between China and Japan, 1895-1945” in Christopher Howe (ed.) *China and Japan: history, trends, and prospects* 23 (Oxford University Press, Oxford, 1995).

37 Ministry of Foreign Affairs of Japan, “The Basic View on the Sovereignty over the Senkaku Islands,” available at [http://www.mofa.go.jp/region/asia-paci/senkaku/basic\\_view.html](http://www.mofa.go.jp/region/asia-paci/senkaku/basic_view.html) (last accessed on July 29, 2017); See also *Supra* note 34

38 *Supra* note 16.

in which Taiwan was transferred to Japan together with all islands belonging to it.<sup>39</sup> Nevertheless, no precise word mentioned in the said peace treaty pertaining to the Senkaku/Diaoyu Islands.<sup>40</sup>

In 1896, Koga Tatsushiro rented the islands (Uotshuri-shima, Kuba-shima, Kita Kojima and Minami Kojima) for thirty years from the Japanese government. He invested in the development of these islands and built houses, wharves, reservoirs, drainage, sanitary facilities, etc. In 1909, the islands already had a population of 248 people forming 99 families altogether.<sup>41</sup> After his death in 1918, his son Zenji Koga bought Uotshuri-shima with the price of 1.825 Yen, Kuba-shima with 247 Yen, Minami Kojima with 47 Yen and Kita Kojima with 31.5 Yen.<sup>42</sup>

In 1919, a Chinese vessel carrying thirty-one fishermen and their families suffered breakdown and the incident compelled them to take refuge on the main Diaoyu Island. Later, they were rescued by the Japanese from Ishigaki Village.<sup>43</sup> On 20<sup>th</sup> May 1920, Feng Mian, the Consul of the Republic of China (Taiwan) in Nagasaki issued a letter of appreciation to the Japanese officials for the rescue efforts.<sup>44</sup> These islands were under private ownership until 1941 marking the last Japanese activity on the islands.

In 1943, the "Cairo Declaration" was issued and it mentioned that Japan shall return all territories occupied since the beginning of the World War I to the Republic of China (Taiwan).<sup>45</sup> Nonetheless, the declaration does not specifically spell out anything about the Diaoyu Islands. In 1945, the three victorious nations in the World War II convened the Potsdam Conference which declared that:

"The terms of the Cairo Declaration shall be carried out and Japanese Sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku and such minor islands as we determine".<sup>46</sup>

After the Japanese unconditional surrender in the WWII on 2<sup>nd</sup> September 1945, the Japanese signed the instrument of surrender at Tokyo Bay and accepted the provisions set forth in the declaration issued at Potsdam. In this way, both the Cairo Declaration

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39 Choon-Ho Park, "Oil under Troubled Waters: The Northeast Asia Sea-Bed Controversy," 14 *Harvard International Law Journal* 250 (1973).

40 *Supra* note 16 at 67.

41 Dai Tan, "The Diaoyu/Senkaku Dispute: Bridging the Cold Divide," 5 *Santa Clara J. Int'l L.* 146 (2006).

42 *Supra* note 15 at 119; *Supra* n. 16 at 70.

43 *Supra* note 34 at 100.

44 *Supra* note 17 at 32-33.

45 National Diet Library, "Cairo Declaration," 2003 available at [www.ndl.go.jp/constitution/e/etc/c03.html](http://www.ndl.go.jp/constitution/e/etc/c03.html) (last accessed on April 03, 2013)

46 Caleb Wan, "Security Flashpoint: International Law and the Islands Dispute in the Far East," 2 *The New Zealand Postgraduate Law E-Journal* 42 (2005)

and the Potsdam Declaration became part of the conditions for the Japanese surrender. On 29<sup>th</sup> January 1946, the UN confined Japanese territory in Decree 667 to the five major islands including the Ryukyu Islands north of 30° degree of north latitude which excluded the Senkaku/Diaoyu Islands from being part of the Japanese territory.<sup>47</sup>

During the US occupation from 1945-1951, the Supreme Commander of the Allied Powers (SCAP) was the sole governing authority over Japan.<sup>48</sup> In April 1947, the US State Department published the book “Atlas and Gazetteer” in which the Senkaku Islands were described as part of Yaeyama County in Okinawa prefecture. In the same year, on the other hand, the SCAP published a map which included the Senkaku Islands as an integral part of Taiwan.<sup>49</sup> The US included the Senkaku Islands as part of the administration of the Yaeyama Islands under Article 1(d) Ordinance No. 22.<sup>50</sup> The final peace agreement with Japan could not settle until 1951 due to the separate governments claiming for China, i.e., the People’s Republic of China (mainland China) and the Republic of China (Taiwan).<sup>51</sup> In 1952, the San Francisco Peace Treaty, signed between Japan and 48 allied signatories, in which Japan agreed that: “Japan will concur in any proposal of the United States to the United Nations to place under its trusteeship system with the United States as the sole administering authority... Pending the making of such a proposal and affirmative action thereon, the United States will have the right to exercise all and any powers of administration, legislation and jurisdiction over the territory and inhabitants of these islands, including their territorial waters.”<sup>52</sup> Accordingly, the islands were placed under the US administrative control and trusteeship. Although the San Francisco Peace Treaty does not expressly include the Senkaku/Diaoyu Islands, in 1953, the proclamation of the SCAP describes the islands as being controlled by the US<sup>53</sup> and the US air-force used two of the islands for training.<sup>54</sup> The US Navy and Japanese Maritime Self-Defence Forces jointly patrolled the waters around the islands. Furthermore, the US Navy made an annual rental payment of \$11,000 to Zenji Koga, the Japanese private owner of the Uotshuri-shima Island, as compensation for using the island until 1978.<sup>55</sup>

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47 *Supra* note 16 at 73.

48 Robert E. Ward, “The Legacy of Occupation,” in Herbert Passin (ed.) *The United States and Japan* 31 (Columbia Books, Inc., U.S., 1975).

49 Jean-Marc Blanchard, “The US Role in the Sino-Japanese Dispute over the Diaoyu (Senkaku) Islands, 1945-1971,” 161 *The China Quarterly* 103 (2000).

50 *Supra* note 34 at 100.

51 *Supra* note 45.

52 The San Francisco Treaty 1951, Article 3; Also see *Supra* note 16 at 76.

53 Seokwoo Lee, “Territorial Disputes among Japan, China and Taiwan Concerning the Senkaku Islands,” 3 *Boundary and Territory Briefing* 11 (2002).

54 *Supra* note 34 at 101.

55 *Supra* note 49.

### III EMERGENCE OF THE SENKAKU/DIAOYU ISLANDS DISPUTE

Before the discovery of oil reserve underneath, these uninhabited islands have less economic value except some fishing and feather collecting activities<sup>56</sup> with some military significance as a strategic location in terms of national security.<sup>57</sup> In 1969, geologists from the Republic of Korea and the Philippines formed a Committee for Joint Prospecting for Mineral Resources in Asian Offshore Areas (CCOP) under the sponsorship of the UN Economic Commission for Asia and the Far East (ECAFE). The outcome of the survey conducted by the aforesaid committee revealed that the continental shelf between Taiwan and Japan may be one of the most prolific oil reservoirs in the world.<sup>58</sup> A 200,000 sq km next to the Senkaku/Diaoyu Islands was predicted to be the vital part of the oil reservoirs.<sup>59</sup> This discovery triggered the dispute concerning the sovereignty over the islands among three claimants, i.e., China, Taiwan and Japan.<sup>60</sup>

#### Chinese Claims

Chinese claims to the Islands are mainly based on the historic title.<sup>61</sup> It asserts undisputed sovereignty over the Diaoyu Islands as its historical records of the ownership of the islands dated back to 1372 AD.<sup>62</sup> Geographically, the islands situate on the Chinese continental shelf and accordingly Chinese fishermen exploited waters surrounding the islands since time immemorial.<sup>63</sup> It has been exercising sovereignty over the islands until those were annexed by the Japanese together with the island of Taiwan (Formosa) under the Treaty of Shimonoseki. After the WWII, Japan returned all occupied territories and islands to China except the Diaoyu Islands which the US arbitrarily and wrongfully annexed under the Nansei Islands in accordance with San Francisco Treaty in which China was not a party. In 1972, the US transferred its administrative powers over the islands to Japan. China has consistently been protesting against such transfer together with the Taiwanese authorities.<sup>64</sup>

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56 Yoshiro Matsui, "International Law Of Territorial Acquisition And The Dispute Over The Senkaku (Diaoyu) Islands," 40 *The Japanese Annual of International Law* 3 (1997).

57 Helena Legarda Herranz, "Diaoyu or Senkaku? Strained Relations in the East China Sea," *European Institute for Asian Studies – ELAS* 1 (2012).

58 See *Supra* note 16 at 84; Also see *Supra* note 17 at 13-15.

59 H. Li Victor, "China and Offshore Oil: The Diaoyu/Tai Dispute," 10 *Stanford Journal of International Studies* 143 (1975).

60 See *Supra* note 16 at 84; See also, Carlos Ramos-Mrosovsky, "International Law's Unhelpful Role In The Senkaku Islands," 29 *U. Pa. J. Int'l L.* 917-918 (2008).

61 *Supra* note 41 at 142.

62 *Supra* note 1 at 48.

63 M.E. Manyin, Senkaku (Diaoyu/Diaoyutai) Islands Dispute: U.S. Treaty Obligations. *Congressional Research Service* (2013).

64 *Supra* note 2 at 4.

### Taiwanese Claims

Taiwanese claims are essentially similar to that of China. It claims that the Diaoyu Islands belonged to the island group of Taiwan historically.<sup>65</sup> The islands were annexed by the Japanese together with the island of Taiwan (Formosa) under the Treaty of Shimonoseki.<sup>66</sup> After the WWII, according to the Peace Treaty of 1952 between Japan and Taiwan, all treaties and agreements concluded before December 1941 were regarded as null and void. The Treaty of Shimonoseki concluded in 1895 was void and therefore the Diaoyu Islands were necessary to be transferred to Taiwan same as other occupied territories.<sup>67</sup>

### Japanese Claims

Japan claims sovereignty over the Senkaku Islands which had become part of Okinawa prefecture since their formal prescription on 14<sup>th</sup> January 1895. It asserts that the islands were totally uninhabited and thus were *terra nullius* at that time of its occupation on the basis of repeated surveys of these islands between 1885 and 1895. Accordingly, occupation of *terra nullius* was lawful at that point of time.<sup>68</sup> Furthermore, it has been exercising sovereignty over the Islands since 1895 which was not interrupted and protected neither by China nor Taiwan until 1971 which was after some reports revealed oil reservoir in the region.<sup>69</sup> Thus, after the WWII, the Senkaku Islands were regarded as part of the Nansei Shoto Islands by the US which transferred the administrative rights to Japan in 1972.<sup>70</sup> Since then, it continues to exercise of its sovereignty over the Senkaku Islands.<sup>71</sup>

## IV THE JUDICIAL INTERPRETATION AND APPLICATION OF THE PRINCIPLE OF 'EFFECTIVITÉS'

Before discussing further into the interpretation and application of the principle of 'effectivités' in the cases decided by the international territorial dispute arbitration, the PCIJ and the ICJ, it is worthwhile to discuss a little bit on the modes of acquisition of territory under international law.

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65 See S.W. Su, 'The Territorial Dispute over the Tiaoyu/Senkaku Islands: An Update,' 36(1) *Ocean Development & International Law*, 45-61 (2005).

66 *Supra* note 63.

67 *Supra* note 41 at 145.

68 Jon Lunn, "The territorial dispute over the Senkaku/Diaoyu Islands," *International Affairs and Defence Section 4* (2012).

69 *Supra* note 41 at 145.

70 *Supra* note 2.

71 *Supra* note 17 at 22-28; See also Yasushi Kudo, "Japan, China Need to Manage and Contain Dispute over Senkaku (Diaoyu) Islands" (paper presented at the Council of Councils Asia Regional Conference, October 31, 2012).

### Modes of Acquisition of Territory under International Law

In the past, there was, of course, no unanimous agreement in the international community pertaining to the modes of acquisition of territory. In most part of the world, state territory was merely regarded as the private property of monarch. Therefore, it is not surprising to see that Grotius and his follower even went on to the application of the concept of acquisition of private property to the acquisition of territory by states.<sup>72</sup> Afterward, the concept had alerted gradually and the acquisition of territory has been considered as the acquisition of the supreme sovereign authority over the territory by a state.<sup>73</sup>

Traditionally, there were five<sup>74</sup> modes of acquisition of territory under international law, i.e., occupation; prescription; subjugation, conquest or annexation; cession; and, accretion. These were the concepts of the acquisition of territory developed during the time when European powers attempted to expand their territories across the world. In view of that, acquisition of territory by way of subjugation, conquest or annexation was considered lawful then.<sup>75</sup>

In the middle of 20<sup>th</sup> Century, the principle of self-determination was introduced by the UN and, as a result, colonial powers needed to grant independence statehoods to most of the states that were under their subjugation. Accordingly, acquisition of territory by way of subjugation, conquest or annexation was outlawed ever since.<sup>76</sup>

Hence, at present, there are only three essential legal concepts in which a State can acquire territory, i.e., occupation, prescription and cession. Besides, accretion is also still a legal mode of acquisition of territory derived due to the geographical changes but not on the basis of any legal notion. Furthermore, there are a few more legal principles upon which the territorial acquisition by a State can be derived, namely, acquiescence, recognition, estoppel, continuity, contiguity, *uti possidesti* and self-determination.<sup>77</sup>

Albeit there are several modes and legal principles of acquisition of territory under international law, in practice, the international territorial dispute arbitration, the PCIJ

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72 *Supra* note 5 at xiii.

73 Robert Jennings and Arthur Watts (eds.), *Oppenheim's International Law* (Oxford University Press, Oxford, 1996).

74 See Hersch Lauterpacht, *Private Law Sources and Analogies of International Law: With Special Reference to International Arbitration* 107 (Archon Books, 1927).

75 *Supra* note 5 at xiv-xvi.

76 See Peter Malanczuk, *Akehurst's Modern Introduction to International Law* 152 (Routledge Publishers, London, 1997).

77 Abdul Ghafur Hamid @ Khin Maung Sein, *Public International Law: A Practical Approach* 101-123 (Sweet & Maxwell Asia, 2011).

and the ICJ mainly focused on the element of ‘effective control’ in adjudicating territorial and boundary disputes.<sup>78</sup> It can be seen from decisions of the international courts and tribunals in the following leading cases.

### **International Territorial Dispute Arbitration**

In the early 20<sup>th</sup> Century, it was necessary for a State to exercise effective sovereign authority over the territory claiming jurisdiction even under the concept of occupation in which state normally could claim jurisdiction over a territory by mere discovery and intention to act as sovereign.

In 1928, this notion was propounded by Max Huber, the sole arbitrator, in the case of *Island of Palmas*<sup>79</sup> by saying that:

“[D]iscovery alone, without any subsequent act, cannot, at the present time suffice to prove sovereignty over the Island of Palmas... It is moreover an island permanently inhabited, occupied by a population sufficiently numerous for it to be impossible that acts of administration could be lacking for very long periods... The inability in such a case to indicate any acts of public administration makes it difficult to imagine the actual display of sovereignty...”<sup>80</sup>

In this case, the arbitrator emphasised that discovery alone can only confer inchoate title over the territory and, thus, there must be subsequent exercise of effective sovereignty authority over the territory.

In addition, such exercise of effective sovereignty authority over the occupied territory must also be continuous as well as peaceful and must not be challenged by any other state until the critical date. The arbitrator opined that:

“The Netherlands found their claim to sovereignty on the title of peaceful and continuous display of state authority over the Island...”<sup>81</sup>

Therefore, the Netherlands was given territorial sovereignty over the Island of Palmas as it was exercising effective sovereign authority over the territory peacefully and continuously.

Nonetheless, it is not crucial for a State to exercise effective sovereign authority as intention alone is sufficient to occupy if the territory is totally uninhabited. In 1931-1932, it was observed in the arbitral award of the *Clipperton Island Arbitration*,<sup>82</sup> that:

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78 *Supra* note 5 at xix.

79 *Supra* note 6.

80 *Ibid.*

81 *Supra* note 6.

82 *Supra* note 7

“[I]f a territory, by virtue of the fact that it was completely uninhabited, is, from the first moment when the occupying state makes its appearance there, at the absolute and undisputed disposition of that state, from that moment the taking of possession must be considered as accomplished and the occupation is thereby completed”.<sup>83</sup>

It can be seen that the requirement for exercising effective sovereign authority over the territory is much depended on the types of such territory, i.e., whether it is inhabited or uninhabited.<sup>84</sup>

### The Permanent Court of International Justice (PCIJ)

In 1933, in the case of *Legal Status of Eastern Greenland*,<sup>85</sup> the PCIJ pointed out that:

“[A] claim to sovereignty . . . , involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise and display of such authority”.<sup>86</sup>

Thus, there are two separate requirements to be fulfilled for a State that claims jurisdiction over territory, i.e., the definite intention to act as sovereign over the occupied territory and the actual exercise of the state sovereignty over that territory.

The Court found, in this case, that Denmark was sufficiently exercising effective sovereign authority over Eastern Greenland and stated that:

“The result of all the documents connected with the grant of the [trading, hunting and mining] concession is to show that . . . the King of Denmark was in position to grant a valid monopoly on the East coast . . . The concession granted for the erection of telegraph lines and the legislation fixing the limits of territorial waters in 1905 are also manifestation of the exercise of sovereign authority. In view of the above facts and the absence of all claims to sovereignty over Greenland by any other Power, Denmark must be regarded as having displayed during this period of 1814 to 1915 her authority . . . to a degree sufficient to confer a valid title to the sovereignty”.<sup>87</sup>

It can be observed that the PCIJ applied the principle of ‘*effectivités*’ as an essential criterion in deciding the legal status of Eastern Greenland.<sup>88</sup>

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83 *Ibid.*

84 *Supra* note 77.

85 *Supra* note 8.

86 *Ibid.*; Ian Brownlie, *Principles of Public International Law* 134 (Oxford University Press, Oxford, 2003).

87 *Supra* note 8.

88 *Supra* note 77 at 115-116.

### The International Court of Justice (ICJ)

In the case of *Minquiers and Ecrehos*,<sup>89</sup> the ICJ observed that:

“...[T]he British authorities during the greater part of the nineteenth century and in the twentieth century have exercised state functions in respect of the group... In such circumstances it must be concluded that the sovereignty over the Ecrehos belongs to the United Kingdom”.<sup>90</sup>

The Court regarded that the United Kingdom displayed its actual exercise of state sovereignty over the Ecrehos group and therefore it acquired the territorial sovereignty over those islands.

In *Frontier Dispute Case*,<sup>91</sup> the boundary dispute between Burkina Faso and Mali, the parties' claims for the jurisdiction of the disputed territory were based on the treaty and effective control. In this case, the ICJ acknowledged that the exercise of 'effective control' by the colonial State can support an existing title to the successor State.<sup>92</sup> In the same vein, in *Land, Island and Maritime Frontier Dispute*,<sup>93</sup> the boundary delimitation dispute between El Salvador and Honduras, the parties made claims based on treaties and effective control, *inter alia*. In this case, the ICJ focused solely on the exercise of 'effective control' by the former colonial state as evidence of having sovereignty over the disputed territory and awarded the islands to whichever party had exercised postcolonial effective control.<sup>94</sup> Again, in *Land and Maritime Boundary Case*,<sup>95</sup> the boundary dispute between Cameroon and Nigeria for the Bakassi Peninsula and the Lake Chad region, the parties' claims to the territory were based on treaties, history and effective control, *inter alia*. The ICJ, after rejecting Nigerian's arguments on historical title, held that it reaffirmed the view in *Frontier Dispute Case* and awarded the territory to Cameroon.<sup>96</sup>

Furthermore, in the case of *Pulau Ligitan and Pulau Sipadan*,<sup>97</sup> the Court observed that:

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89 *Supra* note 9

90 *Ibid.*

91 *Supra* note 10.

92 *Ibid.*

93 *Supra* note 11.

94 *Ibid.*

95 *Supra* note 12.

96 *Ibid.*; further see, Brian Taylor Sumner, "Territorial Disputes at the International Court of Justice," 53 *Duke Law Journal* 1779 (2004).

97 *Supra* note 13.

“Given the circumstances of the case, and in particular in view of the evidence furnished by the Parties, the Court concludes that Malaysia has title to Ligitan and Sipadan on the basis of the *effectivites* referred to above”.<sup>98</sup>

In correspondent to the case of *Minquiers and Ecrebos*, the Court gave title to Malaysia on the basic of having effective control over Pulau Ligitan and Sipadan. In the same fashion, the ICJ treated Singapore as a State exercising ‘effective control’ over the Pulau Batu Puteh and awarded the territorial sovereignty from Malaysia to Singapore in the case of *Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge*.<sup>99</sup>

It is observed from the aforementioned decided cases before the international territorial dispute arbitration, the PCIJ and the ICJ that the principle of ‘*effectivités*’ is an imperative legal principle in resolving inter-state territorial and boundary disputes. The state that can prove the actual exercise effective sovereign authority over the territory claiming jurisdiction has massive potential of having title to that territory.

#### V THE APPLICATION OF THE PRINCIPLE OF ‘EFFECTIVITÉS’ IN THE SENKAKU/DIAOYU ISLANDS DISPUTE

The Chinese and Taiwanese claims for sovereignty over the Senkaku/Diaoyu Islands are similar<sup>100</sup> as both based their claims mainly on historical facts.<sup>101</sup> It is undeniable that the islands were *terra nullius* and totally uninhabited before Chinese discovery. A number of records made by Chinese investiture missions to the Ryukyu kingdom during 1372-1879 showed these islands as part of Chinese territory.<sup>102</sup> Moreover, the Ryukyu Kingdom had never objected or challenged the fact that the Diaoyu Islands belonged to China.<sup>103</sup> Until 1893, China had clearly expressed its intention to occupy these islands (*animus occupandi*) and the actual exercise of the state sovereignty over the territory (*corpus occupandi*) by issuing the Imperial Decree of the Chinese Empress Dowager Cixi which granted the Diaoyu Islands to Sheng Xuanhuai.<sup>104</sup> This is what led some researchers to opine that the Diaoyu islands were integral part of Chinese territory until 1893.<sup>105</sup>

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98 *Ibid.*

99 *Supra* note 14.

100 Larry A. Niksch, “Senkaku (Diaoyu) Islands Dispute: The U.S. Legal Relationship and Obligations,” 3 *Congressional Research Service* (1996).

101 *Supra* note 16 at 46.

102 *Supra* note 17 at 43.

103 *Supra* note 18.

104 *Supra* note 41 at 143.

105 See Barbara Demick, “The specks of land at the center of Japan-China islands dispute,” *LA Times*, (September 24, 2012).

On the other hand, the Japanese conducted survey throughout 1885-1895 to confirm the status of the Senkaku Islands. The Japanese government incorporated the islands by the cabinet decision on 14<sup>th</sup> January 1895, which was prior to the “Treaty of Shimonoseki”.<sup>106</sup> Furthermore, none of these islands was the subject matter of the said treaty<sup>107</sup> and it was perhaps by mistake that the Chinese assumed that Japan had annexed the said islands under the general wordings of such treaty.<sup>108</sup> Consequently, China acquiesced to the exercise of Japanese sovereignty over the islands and failed to conduct any form of protest against it.

Starting from 1896 until 1941, these islands were under Japanese private ownership. In 1909, the islands already had a small population of 248 people.<sup>109</sup> In 1919, Japanese authorities rescued some Chinese fishermen who suffered breakdown and compelled to take refuge on the main Island.<sup>110</sup> In response to this incident, the Consul of the Republic of China in Nagasaki issued a letter of appreciation on 20<sup>th</sup> May 1920. This situation clearly shows the Chinese recognition of the Japanese sovereignty over the islands.<sup>111</sup>

During the US administration period, the Senkaku Islands were regarded as part of Yaeyama Islands under Article 1(d) Ordinance No. 22.<sup>112</sup> Accordingly, the islands were placed under the US administrative control and trusteeship. In 1953, the proclamation of the SCAP describes the islands as being controlled by the US<sup>113</sup> and the US air-force used two of the islands for training purposes.<sup>114</sup> The US Navy and Japanese Maritime Self-Defence Forces jointly patrolled the waters around the islands. Furthermore, the US Navy made an annual rental payment of \$11,000 to Zenji Koga, the Japanese private owner of the Uotshuri-shima Island, as compensation for using the island until 1978.<sup>115</sup>

If the general interpretation of the Treaty of Shimonoseki were to include disputed islands within its subject matter, then Japanese effective control over the islands, during

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106 *Supra* note 46 at 21-22.

107 See Jing Zhao, “The Japanese Communist Party and the June 4th Incident of 1989,” *US-Japan-China Comparative Policy Research Institute*, <http://chinajapan.org/articles/12.1/12.1jingzhao25-32.pdf> (last accessed on 29, July, 2017) ; Also see Peter N. Upton, “International Law and the Sino-Japanese Controversy over the Territorial Sovereignty of the Senkaku Islands,” 52 *Boston University Law Review* 776 (Fall 1972).

108 *Supra* note 65 at 54-55; *Supra* note 17 at 25.

109 *Supra* note 41 at 146.

110 *Supra* note 34 at 100.

111 *Supra* note 17 at 32-33.

112 *Supra* note 34 at 100.

113 *Supra* note 53 at 11.

114 *Supra* note 34 at 101.

115 *Supra* note 49 ; *Supra* note 22 at 247.

1895-1945, would have been immaterial and Japan had to transfer the islands back to China. However, China continued to acquiesce to the exercise of US administration over the islands between the periods of 1945 to 1972<sup>116</sup> and failed to conduct any forms of protest against it. China was also completely silent when the islands were put under the US trusteeship instead transferring them back to China during the post-WWII arrangement of Japan's territory.<sup>117</sup> Besides, the "ROC Yearbook" issued in 1962, 1963 and 1968, did not count the islands as falling under the sovereignty of Taiwan.<sup>118</sup> Again in 1965, the book titled "The outline of Local-Self Government in Taiwan Province" impliedly stated that the Tiaoyu-Tai Islands were not under the Chinese jurisdiction.<sup>119</sup> Furthermore, in 1961, the two Taiwanese logbooks stated the Islands as part of the Senkaku Gunto.<sup>120</sup> It, therefore, seems that both China and Taiwan did not raise the question of restoring the Islands to their sovereignty up to this point.<sup>121</sup> Almost 30 years of effective control over the islands exercised by the US without any challenge from China and Taiwan, somehow, validated Japanese claims to the Senkaku Islands.<sup>122</sup> Although the islands under the US administration from 1945-1972 could not also be regarded as Japanese control over the islands,<sup>123</sup> the US did recognise Japanese residual sovereignty over the islands.<sup>124</sup> Due to such recognition, the US would not transfer its sovereign powers to any other state other than Japan.<sup>125</sup>

On 12<sup>th</sup> August 1968, forty-five Taiwanese workers, who had been dismantling a wrecked ship on Minami-kojima Island, were deported by the Japanese officials on the pretext that they did not carry either passports or immigration permits from the Ryukyu government. The workers later applied for the Japanese permission and continued their job in the following year. In May 1969, Japanese erected a national marker on the main island of Diaoyu to prove its claim to the island. On 17<sup>th</sup> July 1970, Japan delivered a diplomatic note to the Chinese government with the intention to claim the sovereignty

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116 Yves Tiberghien, "The Diaoyu/Senkaku Dispute: Analyzing the Chinese Perspective," 30 *Asia Pacific Foundation* 5 (2012).

117 *Supra* note 17 at 121.

118 *Supra* note 16 at 81-82.

119 *Supra* note 15 at 125; *Supra* note 34 at 103.

120 *Supra* note 16 at 82.

121 *Supra* note 65 at 54.

122 *Supra* note 49.

123 *Supra* note 46 at 38.

124 *Supra* note 49.

125 See International and Civil Affairs Directorate, Office of the Deputy Chief of Staff for Military Operations, Department of the Army, "Okinawa Reversion: A Study of the Administrative Aspects," (secret) (April 1, 1969): 1-2, RG 260 (USCAR), Records of the HCRI, HICOM Administrative Files 1969-1972, Reversion Agreements to Pre Comm 1971-72, Box 2, National Archives-College Park. As cited in *Supra* note 49.

over the islands.<sup>126</sup> In September 1970, Taiwanese private individuals hoisted a flag on the island and Japanese authorities removed it on the following day.<sup>127</sup> Later, the Japanese foreign ministry announced that Japan has the inherent sovereignty over the Senkaku Islands and thus there is no necessity to negotiate the status of these Islands with any State. Following to this announcement, series of anti-Japanese protest movements were launched by the Chinese nationals.<sup>128</sup> In 1970, another group of Taiwanese ship-dismantling workers were found in Kuba-shima and they were ordered to leave the place by the Japanese officials.<sup>129</sup> Again, none of these official activities exercised by Japan were challenged either by China or Taiwan.

It can be seen that from 1895 to 1971, there was no objection to Japanese effective control over the islands and thus Japan has maintained 'peaceful and continuous exercise of sovereignty' over the islands.<sup>130</sup> Starting from September 1970, the Taiwanese government asserted that Japan has no right to explore on the Chinese continental shelf and the reversion of the islands from the US to Japan would be a unilateral decision that would never affect her claims.<sup>131</sup> In 1971, China challenged Japanese sovereignty over the islands after discovering that the disputed area is rich in mineral and oil resources.<sup>132</sup> Taiwan first officially claimed sovereignty over the islands in February 1971 followed by the Chinese official claim for the ownership of the islands on 31<sup>st</sup> December of the same year.<sup>133</sup> Accordingly, in this case, the critical date is therefore set to be in 1971. If the concept of acquiescence under international law were to be applied to this case, it becomes too late for both China and Taiwan to start protest in 1971. The timely protest should have started as early as in 1895 or, at least, during the post-WWII arrangement of Japan's territory.<sup>134</sup>

On 15<sup>th</sup> May 1972, Japan regained sovereignty over the Okinawa Islands under the Okinawa Reversion Treaty in which the US relinquished the Ryukyu Islands and the Daito Islands to Japan by virtue of Article 3 of the San Francisco Peace Treaty.<sup>135</sup> In response to this, China contended that Diaoyu and the other islands have been its territory since ancient times and thus it is absurd that the US transfer part of Chinese

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126 *Supra* note 17 at 11.

127 *Supra* note 16 at 85.

128 *Supra* note 126.

129 *Supra* note 17 at 34.

130 *Supra* note 22 at 242; Also see *Supra* note 16 at 86.

131 *Supra* note 22 at 243.

132 *Supra* note 46 at 32; Also see *Supra* note 49.

133 *Supra* note 17 at 37.

134 Mroso Carlos Ramos-Mrosovsky, "International Law's Unhelpful Role In The Senkaku Islands," 29 *U. Pa. J. Int'l L.* 917-918 (2008).

135 *Supra* note 63 at 4.

territory to Japan.<sup>136</sup> On the other hand, the US declared that it returned administrative rights over those islands to Japan as it received them from Japan. Nevertheless, it does not diminish the rights of other claimants and thus any conflicting claims to the islands are a matter to be resolved among the parties concerned. The U.S. Foreign Relations Committee declared that Japan only has administrative rights and not that of sovereignty over the islands under the Okinawa Reversion Treaty.<sup>137</sup> This treaty, therefore, did not determine the status of the islands between China and Japan. However, it is important to note here is that the US recognised Japanese residual sovereignty over the islands during the administration of the Okinawa Islands from 1945-1972.<sup>138</sup> At that juncture, although the US left the dispute in limbo between China and Japan, on the other hand, it awkwardly found itself obliged to defend the islands under the 1960 US-Japan Security Treaty in which the US agrees to protect the areas under the Japanese administration.<sup>139</sup>

In accordance with the Sino-Japanese Communiqué 1972, China and Japan established diplomatic relations<sup>140</sup> and consequently Japan announced that all treaties with Taiwan were invalid. Since then, both nations did not formally recognise Taiwan as a state which can claim sovereignty over the islands.<sup>141</sup>

In 1972, then Japanese Prime Minister Kakuei Tanaka and Chinese Prime Minister Zhou Enlai agreed to shelve the dispute for the future.<sup>142</sup> Before the conclusion of the Peace and Friendship Treaty in 1978 between China and Japan, Chinese anti-treaty Diet members recommended the Japanese government to determine the status of these islands in the upcoming treaty. In April 1978, a hundred armed Chinese fishing boats were dispatched to the islands. However, the Chinese Vice-Premier Keng Piao shortly declared that the incident was neither intentional nor deliberate.<sup>143</sup> The incident gave some favours to the Japanese claim and since then Japan acquired at least the de-facto ownership of the islands.<sup>144</sup>

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136 Beijing Review, "Tiaoyu and other Islands have been Chinese Territory since Ancient Times," 13-14 (January 7, 1972)

137 *Supra* note 100 at 4-6.

138 *Supra* note 49.

139 *Supra* note 63 at 1; Jason Collins, "China and Japan's claims to sovereignty over the Diaoyu/Senkaku islands," *New Zealand Online Journal of Interdisciplinary Studies* 1 (2012): 3.

140 Vincent Wei-cheng Wang, "Can Taiwan Join the United Nations?," in *The International Status of Taiwan in the New World Order*, ed. Jean-Marie Henckaerts. (Martinus Nijhoff Publishers, 1996), 93.

141 *Supra* note 17 at 13.

142 Robert H Wade, "China-Japan Island Dispute: The Other Side of the Story," *Economic & Political Weekly* 47 (9 March 2013): 28.

143 *Supra* note 16 at 89-90.

144 *Supra* note 17 at 16-17.

Yet again, the Senkaku/Diaoyu Islands dispute was left out from the content of the Peace and Friendship Treaty which was concluded on 23<sup>th</sup> August 1978 between China and Japan. Moreover, on 22<sup>nd</sup> October 1978, then Chinese Vice Premier Deng Xiaoping paid an official good-will visit to Japan in which he confirmed the omission of dispute concerning the sovereignty over the islands.<sup>145</sup> Later on Japanese Prime Minister Yasuhiro Nakasone agreed to postpone the dispute for the future. It can be observed that China failed to challenge the territorial sovereignty over the islands timely and left the islands under the control of Japan uncontested even after launching of its formal protests since 1971.

Meanwhile, since 1972, the Japanese private youth organisation called “Japanese Qingnianshi” established the beacon on the islands. In 1979, they constructed a helicopter landing-pad on the Islands<sup>146</sup> and proclaimed the islands on behalf of Japan.<sup>147</sup> In 1990, the Japanese Maritime Safety State agency officially regarded the lighthouse on Senkaku Islands. When some Taiwanese students hoisted a Taiwanese flag, the Japanese officials immediately removed it from the islands.<sup>148</sup>

Since 1990s, China has raised the degree of activities to prove the sovereignty over the islands with some physical presence in the disputed area against Japanese control over the islands.<sup>149</sup> In 1992, China enacted the Law on the Territorial Sea and Contiguous Zone which expresses the “Diaoyu Islands” as an appurtenance to Taiwan that is considered as Chinese territory.<sup>150</sup> In 1996, it took initiative with Japan to conduct a joint exploration of the oil field by accepting the condition that Japan recognises China’s sovereignty whereas Japan declined the proposal.<sup>151</sup> In July, the Japanese Youth Organisation returned to repair the lighthouse on one of the islands flying the Japanese flag and erected two memorials.<sup>152</sup> Accordingly, series of demonstrations took place in Hong Kong and Taiwan.<sup>153</sup> Since then, several civil and political groups from all three claiming States have been regularly visiting the islands to demonstrate the sovereignty of their domestic government.<sup>154</sup> Japanese officials used to expel the activists from the

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145 M. Taylor Fravel, “Explaining Stability in the Senkaku (Diaoyu) Islands Dispute,” in *Getting the Triangle Straight: Managing China-Japan-US Relations*, ed. Gerald L. Curtis et al. (Tokyo: Japan Center for International Exchange, 2010), 157.

146 *Supra* note 53 at 8.

147 *Supra* note 16 at 90-91.

148 *Supra* note 15 at 139.

149 *Supra* note 17 at 17-21.

150 *Supra* note 65 at 47; see also *Supra* note 134.

151 *Supra* note 16 at 91.

152 *Supra* note 100 at 2.

153 Alan Dupont, “The Environment and Security in Pacific Asia”, 34 *Adelphi Papers* 319 (2008).

154 *Supra* note 17 at 18-19.

islands. On the other hand, the Chinese government, instead of claiming Japanese violation of its sovereignty, remained silent over the issue of expelling activists from the islands by the Japanese officials.<sup>155</sup>

In February 2001, China and Japan concluded a mutual agreement in which each party is required to give prior notification to the other before entering the waters of an area around the disputed islands.<sup>156</sup> In 2004 seven Chinese activists landed on the islands and they were later deported back to China by the Japanese officials.<sup>157</sup> In 2005, Japan published marine maps that include the Japanese lighthouse on the islands and later it was recognised as an official beacon.<sup>158</sup> Since 2006, private ships from China and Taiwan entered into waters surrounding the islands serially claiming these islands as part of its exclusive economic zone. In 2006, members of the Action Committee for Defending the Senkaku Islands attempted to land over the islands and later the Japanese Coast Guard prevented them before landing.<sup>159</sup> In 2007, disputing countries installed a 24/7 telephone hotline in the disputed areas.<sup>160</sup>

Again in 2008, some Taiwanese activists were escorted by Chinese Coast Guard vessels approached near to the main island with the intention to assert the sovereignty over the islands.<sup>161</sup> In the same year, a Japanese patrol vessel collided with a Taiwanese fishing boat and detained the captain for three days.<sup>162</sup> Later, Japanese officials apologised for the incident and paid compensation to the owner of the boat.<sup>163</sup> In July 2010, nine Japanese fishing boats carried out fishing activities near the islands with the intention to assert Japanese sovereignty over the islands.<sup>164</sup> None of these activities were

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155 *Supra* note 16 at 91-92.

156 *Id.* at 92-93.

157 Paul O'Shea, "Sovereignty and the Senkaku/Diaoyu Territorial Dispute," *EIJS* (Stockholm School of Economics, Working Paper 240, September 2012).

158 *Supra* note at 158.

159 Associated Press, "Activist ship from Hong Kong briefly enters Japan's waters in protest over islands," *International Herald Tribune*, October 26, 2006, available at <http://global.nytimes.com/?iht>. (last accessed on April 07, 2013)

160 *Supra* note 63 at 1.

161 Shih Hsiu-Chuan and Flora Wang, "Officials drop plan to visit Diaoyutais," *Taipei Times*, June 18, 2008 available at <http://www.taipeitimes.com/News/taiwan/archives/2008/06/18/2003415043> (last accessed on July 29, 2017).

162 Ralph Jennings, "Taiwan protests as Japan holds fishing boat captain," *Reuters*, June 12, 2008, available at <http://uk.reuters.com/article/2008/06/12/taiwan-japan-idUKPEK35756320080612> (last accessed on July 29, 2017).

163 Kosuke Takahashi, "China signals V for victory," *Asia Times*, October 05, 2010, available at <http://www.atimes.com/atimes/Japan/LJ05Dh01.html> (last accessed on July 29, 2017)

164 Yoko Nishikawa, "China presses Japan over sea row as Tokyo voices concern," *Reuters*, July 04, 2011, available at <http://uk.reuters.com/article/2011/07/04/china-japan-idUKL3E7140YO20110704> (last accessed on July 29, 2017).

challenged by neither Chinese nor Taiwanese officials. In September, two Japanese Coast Guard patrol boats ordered a Chinese fishing trawler to leave the area near the islands. Upon failure to comply with the order, two coast boats collided with the fishing trawler and arrested the captain.<sup>165</sup>

In 2011, a fishing boat carrying some activists was blocked by Japanese Coast Guard vessels and a helicopter while it was navigating within 23 nautical miles of the islands. In response to this event, the Taiwanese Coast Guard Agency despatched five patrol vessels which later returned to Taiwanese territory.<sup>166</sup> In July 2012, a Taiwanese coastguard vessel escorting activists in the area collided with Japan coastguard vessel. On 15<sup>th</sup> August 2012, some activists from China managed to swim ashore.<sup>167</sup> On 17<sup>th</sup> August 2012, fourteen activists were deported for illegal entry into the Japanese territory by the Japanese officials.<sup>168</sup> In the same month, four private Japanese vessels carrying Japanese activists travelled to the islands.<sup>169</sup> All these activities were challenged by neither Chinese nor Taiwanese officials, and it was the Japanese officials who denied the groups the right to land.<sup>170</sup> On 11<sup>th</sup> September 2012, Japanese government purchased Minami-kojima, Kita-kojima, and Uotshuri-shima islands from Japanese private owner in order to diffuse territorial tensions in the region.<sup>171</sup> In the same month, the most serious conflicts occurred between the disputants when seventy five Taiwanese fishing vessels were escorted by ten Taiwanese Coast Guard vessels to the area. Japanese Coast Guard ships and the Taiwanese Coast Guard ships fought with water cannons by announcing their respective claims to the islands.<sup>172</sup> In the same year, series of maritime and aerial

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165 See Sheila A. Smith, "Japan and the East China Sea Dispute," *The Foreign Policy Research Institute* 374 (Summer 2012).

166 CNA, "Taiwan fishing boat repelled by Japanese ships near Diaoyutai," *Want China Times (Taiwan)*, June 30, 2011, available at <http://www.wantchinatimes.com/news-subclass-cnt.aspx?cid=1101&MainCatID=&cid=20110630000117> (last accessed on April 07, 2017).

167 Sheila A. Smith, "Why Japan, South Korea, and China Are So Riled Up Over a Few Tiny Islands," *The Atlantic*, August 16, 2012, available at <http://www.theatlantic.com/international/archive/2012/08/why-japan-south-korea-and-china-are-so-riled-up-over-a-few-tiny-islands/261224/> (last accessed on July 29, 2017).

168 Katherine Tseng Hui-Yi, "*The Diaoyu Islands Contretemps and Nationalism in China*," EAI Background Brief No. 757, I (October 04, 2012).

169 Al Jazeera, "Japanese activists arrive at disputed islands," August 19, 2012, available at <http://www.aljazeera.com/news/asia-pacific/2012/08/2012818133556135779.html> (last accessed on July 29, 2017).

170 BBC, "Japan activists land on disputed islands amid China row," *BBC News*, August 19, 2012, available at <http://www.bbc.co.uk/news/world-asia-china-19303931> (last accessed on July 29, 2017).

171 *Supra* note 68.

172 Enru Lin, "Local, Japan vessels clash off Diaoyutais," *The China Post*, September 26, 2012, available at <http://chinapost.com.tw/taiwan/national/national-news/2012/09/26/355552/Local-Japan.htm> (last accessed on July 29, 2017).

incursions to the disputed areas occurred and the Japanese government made formal diplomatic protests to China.<sup>173</sup>

In January 2013, a boat carrying Taiwanese activists was intercepted and prevented from landing on the islands by Japanese patrols with the use of water cannons.<sup>174</sup> In February 2013, a Chinese marine surveillance vessel sailed in the contiguous zone next to Japanese territorial waters surrounding the islands.<sup>175</sup> In response to this, the Japan Coast Guard deployed Maritime Self-Defense Force (MSDF) destroyers to bolster patrols around the disputed Senkaku Islands.<sup>176</sup> The situation became more aggressive compared to previous years because China and Japan started monitoring the area by sending fighter airplanes which may trigger a war with the region at any time.<sup>177</sup> On 30<sup>th</sup> March 2013, Taiwan intends to discard its claims to the Senkaku Islands while negotiating a fisheries agreement with Japan. President Ma Ying-jeou is eager to secure fishing rights in waters north of the Yaeyama Islands, where Japan intends to give concessions to Taiwan, than in the Senkakus.<sup>178</sup>

However, on 31<sup>st</sup> March 2013, a Taiwanese vessel equipped with machine guns and water cannons was commissioned to patrol around the disputed islands. At the same time, President Ma Ying-jeou urged parties to jointly develop the rich natural resources in the area. China simply ignored the offer as it considers Taiwan as part of its own territory.<sup>179</sup> Chinese public criticised the government for not being forceful enough against Japan as protests alone were not sufficient enough to prevent the Japanese exercise of effective sovereign authority over the islands.<sup>180</sup>

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173 *Supra* note 63 at 1.

174 Zhang Yunbi, "Senior officials urge calm over islands dispute," *China Daily*, January 25, 2013, available at [http://africa.chinadaily.com.cn/china/2013-01/25/content\\_16172578.htm](http://africa.chinadaily.com.cn/china/2013-01/25/content_16172578.htm) (last accessed on July 29, 2017)

175 Nanae Kurashige, "China sending helicopter-carrying ships in Senkakus dispute," *Asahi Shimbun*, March 04, 2013, available at <http://ajw.asahi.com/article/asia/china/AJ201303040005> (last accessed on April 03, 2013)

176 Asahi Shimbun, "Coast guard to deploy retired MSDF ships to counter Chinese incursions," March 05, 2013, available at <http://ajw.asahi.com/article/asia/china/AJ201303050086> (last accessed on April 03, 2013)

177 Reuters, "China navy seeks to 'wear out' Japanese ships in disputed waters," *Asahi Shimbun*, March 07, 2013, available at <http://ajw.asahi.com/article/asia/china/AJ201303070111> (last accessed on July 29, 2017)

178 Takio Murakami, "Taiwan to skip Senkakus claims in fisheries talks with Japan," *Asahi Shimbun*, March 30, 2013, available at <http://ajw.asahi.com/article/asia/china/AJ201303300056> (last accessed on July 29, 2017)

179 Associated Press, "Taiwan vows to step up patrols in East China Sea," *Taiwan News*, March 30, 2013, available at <http://www.taiwannews.com.tw/en/news/2185158> (last accessed on July 29, 2017)

180 *Supra* note 158.

It is clear from the above that, historically, China did consider the islands as an integral part of its territory but later acquiesced to Japanese effective control over the islands during 1895-1945 and the US administration over the islands during 1945-1971.<sup>181</sup> Even after 1971, protests made by China were not powerful enough to prevent Japan from exercising effective sovereign authority over the islands. Only after 1900s, both China and Taiwan have increased their activities to prove the sovereignty over the islands in the disputed area. On the other hand, Japan has stronger chance of getting the title due to its exercise of effective sovereign authority over the islands if it is adjudicated before an international court or a tribunal in accordance with contemporary international law.

## VI CONCLUSION

In recent years, the tension among China, Taiwan and Japan over activities in and around the Senkaku/Diaoyu Islands has become more subtle and sensitive.<sup>182</sup> It is likely to continue unless the dispute concerning the sovereignty over the islands resolved in one way or another. Of course, any armed confrontation among the disputants is not desirable as it would entail grave repercussions to the international peace and security, *inter alia*.<sup>183</sup> Under the auspices of the UN, members are required to resolve disputes among them in peaceful manners as prescribe in Article 2 (3) and Article 33 of the UN Charter.

It should also be noted that Taiwan cannot be treated as a separate State under contemporary international law and thus it could not make a separate claim from that of China as it has no *locus standi* before the ICJ as a member of the UN and the Statute of the ICJ.<sup>184</sup> Therefore, China and Japan - being the members of the UN - may seek for all available peaceful means in order to solve this dispute. The suggested solutions would be, first, the negotiation between the disputants for the joint exploitation of natural resources in the areas of the disputed islands,<sup>185</sup> or, second, the judicial settlement before the ICJ<sup>186</sup> or an *ad hoc* international territorial arbitration.

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181 *Supra* note 41 at 155.

182 *Supra* note 166 at 380.

183 *Supra* note 63 at 1.

184 See Sigrid Winkler, "Taiwan's UN Dilemma: To Be or Not To Be," *Taiwan-U.S. Quarterly Analysis* (The Brookings Institution, June 20, 2012); Further see *Supra* note 17 at 128; *Supra* note 2.

185 See also *Supra* note 17 at 129-133.

186 *Supra* note 144 at 1-4.