



FACULTY OF LAW
Lund University

Victor Berg

Sovereignty over the Senkaku/Diaoyu islands

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Supervisor: Ulf Linderfalk

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Summary

Situated in the East China Sea lays a remotely located island group consisting of five small islands and three barren rocks. The islands sustain scarce vegetation and there is most likely no fresh water on the islands. Due to their inhospitable character, the islands have historically been considered to be of little economic value and they have since ancient times, apart from a short period during the early 20th century, been uninhabited. The island group is known in Chinese as Diaoyu and in Japanese as Senkaku and since 1971, Japan, the PRC and the ROC all claim sovereignty over the islands. The dispute arose as a consequence of a UN sponsored survey in 1968, which suggested that large oil and gas deposits might be located in the vicinity of the islands. Although the present dispute emerged as a consequence of the oil discovery, the potential economic benefits are far from the only reason why the dispute remains alive today. The main reason why tensions keep re-erupting relates to Chinese and Japanese nationalism, which continue to impede on any possible solution. Today, Japan is in de facto control over the islands, which she has been since 1972 when the US reverted the administrative powers it had acquired following the end of World War II. This control is additionally strengthened by the mutual defense treaty between the US and Japan which covers the disputed islands.

The Japanese sovereignty claim is based on occupation, which is one of the established modes of territorial acquisition. Japan claims to have discovered the islands in 1885 and after ten years of investigation regarding the status of the islands, decided to incorporate them in 1895. Japan further claims to have maintained sovereign title to the islands ever since and the islands weren't an integral part of neither the Treaty of Shimonoseki nor the declarations signed during and shortly after the end of World War II (the Wartime declarations). Treaty law is therefore irrelevant to the sovereignty issue, according to the Japanese stance. The stances by the PRC and the ROC are fundamentally the same since they share a common history. The stances deviate only in relation to events that occurred after 1949. The Chinese stance is also based on the mode of occupation, they claim to have discovered and named the islands prior or during the Ming dynasty (1368-1644) and then treated the islands in accordance with the international law requirements of occupation until the signing of the Treaty of Shimonoseki on April 17, 1895, through which the islands were ceded to Japan. According to the Chinese stance, the islands were lawfully Japanese from 1895 until 1945 when Japan formally surrendered. This document of surrender incorporated two other Wartime declarations, which obliged Japan to return sovereignty of the islands to China, according to the Chinese stance.

Should a court or tribunal ever adjudicate the present dispute, the adjudicating body would have to decide on a number of legal issues that are both case-specific and of general interest to the international law discipline.

One such issue, and arguably the most controversial feature of this paper, relates to the applicability of the international law rules of territorial acquisition in non-western parts of the world, which historically have been governed by a different system of international relations and different notions of sovereignty. Since Chinese scholars have contended that international law cannot appropriately adjudicate the present dispute since East Asia is founded on different ideas of international relations, this paper introduced an alternative framework which was analyzed parallel to the international law requirements of occupation.

Although this paper was written from a perspective similar to that of a court or tribunal, the purpose of the paper wasn't to decisively adjudicate the present dispute and determine which claimant has the better claim to sovereignty. Having stated this, the author is of the opinion that, based on the historical data presented in this paper together with the linguistic interpretations accepted in this paper, Japan appears to have a stronger claim. The strength of the Japanese claim is primarily derived from the second branch of intertemporal principle, which, in cases of territorial acquisition, favors the State that, at the critical date, fulfills the requirement of "actual, continuous and peaceful display of State functions in regard to the territory". The Japanese control during 1895-1952 appears to have been sufficient and the US administration, 1952-1972, didn't aim to affect the underlying sovereignty and therefore, Japan maintained residual sovereignty.

The Japanese claim is additionally strengthened by the fact that they appear to have the stronger argument in relation to every encompassing legal issue discussed throughout the paper. The first such issue discussed was whether China ever acquired sovereignty. The difficulty of this analysis is that the international law requirements of occupation during the relevant time haven't been sufficiently established. The author is of the opinion that a conservative approach, wherein mere visual discovery isn't enough to establish sovereign title, is more reasonable and therefore, China has a weak case under international law. However, should the political realities of East Asia be taken into account in this evaluation, China has a stronger case. The second issue discussed was through which mode Japan acquired sovereignty. Regarding this matter the author is of the opinion that it cannot be deduced from the Treaty of Shimonoseki that the disputed islands were an integral part. Moreover the Japanese process of incorporation, as deceitful as it may have been, can hardly make the incorporation invalid. The third issue discussed was whether the Wartime declarations obliged Japan to return the islands to China and therefore made them lawfully Chinese. Regarding this matter, the author is of the opinion that such a stance cannot be supported since neither of these declarations were meant to deal with sovereignty of the islands.

Sammanfattning

I Östkinesiska havet finns en avlägset belägen ögrupp bestående av fem öar och tre karga klippor. Ögruppen har en nödtorftig vegetation och det förefaller inte finnas något sötvatten. På grund av ögruppens ogästvänliga egenskaper har öarna genom historien ansetts vara av mycket litet ekonomiskt värde och de har sedan urminnes tider, bortsett från en kortare period i början av 1900-talet, varit obebodda. Denna ögrupp benämns på Kinesiska för Diaoyu och på Japanska för Senkaku och sedan 1971 gör både Japan, Folkrepubliken Kina och Republiken Kina suveränitetsanspråk på ögruppen. Denna dispyt uppstod som en följd av en FN sponsrad undersökning som genomfördes 1968 vilken uppmärksammade att stora olje- och gasfyndigheter kunde finnas i närheten av dessa öar. Även om dagens dispyt uppkom som en konsekvens av oljefyndigheterna så är de potentiella ekonomiska fördelarna långt ifrån de enda anledningarna till varför motsättningar relaterade till denna dispyt fortsätter att blossa upp idag. Den främsta anledningen till dessa motsättningar är relaterad till nationalism, från både kinesisk och japansk sida, vilket fortsätter att försvåra för en lösning på konflikten. Japan innehar idag de facto kontroll över ögruppen, vilket hon har gjort sedan 1972 då USA återlämnade den administrativa kontroll USA hade erhållit efter andra världskrigets slut. Denna kontroll är ytterligare stärkt av det ömsesidiga försvarsavtalet mellan USA och Japan vilket även omfattar de bestrida öarna.

Det Japanska suveränitetsanspråket är baserat på ockupation, vilket är en av de etablerade metoderna att förvärva territorium. Japan påstår sig ha upptäckt öarna 1885 och efter en tioårsperiod av undersökningar rörande ögruppens status, beslutat att införliva dem 1895. Japan påstår vidare att de har vidmakthållit denna suveränitet sedan dess samt att ögruppen inte var avtalsinnehåll i vare sig Shimonosekiavtalet eller någon av de deklARATIONER som undertecknades under eller strax efter andra världskrigets slut (Krigsdeklarationerna). Traktaträtten är därför irrelevant i förhållande till suveränitetsfrågan enligt den japanska argumentationen. Folkrepubliken Kina och Republiken Kinas inställningar är i grunden densamma eftersom de har ett gemensamt förflutet. Inställningarna skiljer sig åt endast i relation till händelser som inträffade efter 1949. Den kinesiska inställningen är också baserad på metoden ockupation, Kina påstår sig ha upptäckt och namngett ögruppen före eller under Ming dynastin (1368-1644) och därefter behandlat dem i enlighet med de rekvisit folkrätten kräver för ockupation fram tills undertecknandet av Shimonosekiavtalet 17 april 1895, genom vilket ögruppen avträdde till förmån för Japan. Enligt Kina så var sedan ögruppen lagligen Japansk från 1895 till 1945 då Japan formellt kapitulerade. Som avtalsinnehåll till det dokument som Japan då undertecknade var två andra krigsdeklarationer vilka förpliktade Japan att återge suveräniteten till Kina, enligt den kinesiska uppfattningen.

Om en domstol eller tribunal någonsin skulle döma i den aktuella dispyten, skulle den dömande institutionen behöva ta ställning till en rad juridiska frågor som både är fallspecifika och av generellt folkrättsligt intresse. Ett sådant fråg, vilket möjligen är den mest kontroversiella aspekten av denna uppsats, relaterar till huruvida folkrättens regelverk rörande förvärv av territorium kan appliceras i icke västerländska delar av världen vilka historiskt reglerats av andra system rörande internationella relationer samt koncept rörande suveränitet. Eftersom kinesiska akademiker har argumenterat att folkrätten inte lämpar sig till att döma i den innevarande konflikten eftersom Ostasien är uppbyggt kring andra idéer om internationella relationer, har denna uppsats inkluderat ett alternativt regelverk, vilket har analyserats parallellt med folkrättens regler rörande ockupation.

Även om denna uppsats har författats från ett perspektiv liknande en domstols eller tribunals, så har inte syftet med uppsatsen varit att slutgiltigt döma i tvisten och fastslå vilken stat som har det starkaste anspåket. Med detta sagt så är det författarens uppfattning att, baserat på den historiska data som behandlats och med de språkliga översättningar som accepterats i uppsatsen, Japan förefaller ha ett starkare anspåket. Styrkan i det japanska anspåket härrör framförallt från det andra benet av *intertemporal law*, vilket i fall rörande förvärv av territorium premierar den stat som vid den kritiska tidpunkten uppfyller rekvisiten att "faktiskt, beständigt och fredligt uppvisa statsfunktioner i relation till territoriet". Den japanska kontrollen mellan 1895-1952 förefaller uppfylla dessa krav och den amerikanska administrationen, 1952-1972, syftade inte till att påverka den underliggande suveräniteten och därför vidmakthöll Japan dess suveränitet.

Det japanska anspåket stärks ytterligare av det faktum att Japan förefaller ha starkare argumentation i förhållande till varje övergripande juridiskt fråg som uppsatsen behandlat. Det första sådana fråget som diskuterades var huruvida Kina någonsin förvärvade suveränitet. Svårigheten med denna analys bestod i att folkrättens krav rörande ockupation under den relevanta tidsperioden inte blivit tillräckligt preciserade. Författaren är av uppfattningen att en moderat ansats, där endast visuell upptäckt inte är tillräckligt för att erhålla suveränitet, är mest förnuftig and därför har Kina ett svagare folkrättsligt anspåket. Skulle däremot den politiska verklighet som historiskt präglat Ostasien tas med i bedömningen, har Kina ett starkare anspåket. Det andra fråget som diskuterades var frågan om genom vilken metod Japan förvärvade suveränitet. Rörande denna fråga är författaren av uppfattningen att det inte går att utläsa från Shimonosekiavtalet att ögruppen var avtalsinnehåll. Dessutom kan den japanska inkorporeringsprocessen, hur svekfull den än må ha varit, svårtligen göra inkorporeringen ogiltig. Det tredje fråget som diskuterades var huruvida krigsdeklarationerna förpliktade Japan att återlämna ögruppen till Kina. Rörande denna fråga är författaren av uppfattningen att ett sådant synsätt inte kan beläggas eftersom ingen av dessa deklarationer avsåg att behandla frågan om suveränitet över ögruppen.

Förord

Fem års juridikstudier går nu mot sitt slut och det är med en skräckblandad förtjusning som jag skriver dessa ord. Jag vill emellertid inte uppehålla mig vid sentimentala tankar utan väljer att konstatera att en rolig och lärorik tid är över och en annan tar sin början.

Ett tack riktas till min handledare Ulf Linderfalk för engagerande och konstruktiv handledning och ett stort tack riktas till mina kära föräldrar, Bertil och Marie, för det stöd och den uppmuntran de villkorslöst visat mig genom åren.

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Victor Berg

Abbreviations

EAWO	East Asian World Order
EEZ	Exclusive Economic Zone
OPM	Okinawa Prefecture Magistrate
ORT	Okinawa Reversion Treaty
ROC	Republic of China
PRC	Peoples Republic of China
SFPT	San Fransisco Peace Treaty
UNCLOS	United Nations Convention on the Law of the Sea
UNECAFE	United Nations Economic Commission for Asia and the Far East
USCAR No. 27	United States Civil Administration of the Ryukyus No. 27
VCLT	Vienna Convention on the Law of Treaties

1 Introduction

1.1 Origins of the dispute

Situated in the East China Sea, roughly 300 km southwest of the Japanese prefecture Okinawa, 200 km northeast of Taiwan and 400 km east of Mainland China (see Supplement) lays an island group known in Japanese as Senkaku and in Chinese as Diaoyu (this island group will, for the sake of objectivity, be referred to as the Senkaku/Diaoyu islands or the disputed islands).¹ This island group consists of five small and volcanic islands and three barren rocks and altogether they measure a surface area of 6,3 sq. km with the largest island accounting for more than half. The islands sustain scarce vegetation and most experts assert that there is no fresh water to be found on any of the islands. Historically, the islands have been considered to be of little economic value and they have since ancient times been uninhabited, apart from a short period of time during the early 20th century.²

The Senkaku/Diaoyu islands are situated on the edge of the same continental shelf as Taiwan and mainland Asia and are separated from the nearest undisputed Japanese islands by the 2270 meter deep Okinawa Trough which lays immediately to the east of the disputed islands. In comparison to the water depth of this trough, the water depth westward of the Senkaku/Diaoyu islands fall short of 200 meters. Geologically, these islands and islets share very similar features, characterized by high peaks and steep cliffs. The largest of these islands is known as Diaoyu Yu in Chinese and as Uotsuri-shima in Japanese. The second largest island is known as Huangwei Yu (J: Kuba-shima) and the fifth largest is known as Chiwei Yu (J: Kubaseki-shima) and is located furthest to the northeast, rather isolated from the rest of the group. These three islands are of primary importance since they will be expressly mentioned in the Chinese historical records. The Chinese name for the island group derives from the name of the largest island in the group, which means fishing island or platform while the Japanese name emanates from the British term “Pinnacle Island”, used during the 19th century.³

The first known reference to the disputed islands is from a famous Chinese geography book from 1221. However, through history these islands have often been considered too small to be delineated on most maps and they have mainly been used by Chinese seafarers as navigational aids and later as shelter for fishery vessels during heavy weather. Although the disputed islands have historically been considered to be of almost no economic value per se, this perception changed in 1968 when a report from UNECAFE⁴

¹ Sukanuma, Unryu., *Sovereign Rights and Territorial Space in Sino-Japanese Relations – Irredentism and the Diaoyu/Senkaku Islands*, p. 11-13.

² Shaw, Han-yi., *The Diaoyutai/Senkaku Islands Dispute: Its History and an Analysis of the Ownership Claims of the P.R.C., R.O.C., and Japan*, p. 10-11.

³ Shaw, *Supra* n. 2, p. 11-12 and Chiu, Hungdah., *An Analysis of the Sino-Japanese Dispute Over the T'iaoyutai Islets (Senkaku Gunto)*, p 2-3.

⁴ United Nations Economic Commission for Asia and the Far East.

suggested that large hydrocarbon reserves might be located in the vicinity of the islands.⁵ In the years following the publication of this report, the Peoples Republic of China (PRC henceforth), the Republic of China (ROC henceforth) and Japan all claimed sovereignty over the islands. For the sake of objectivity it needs to be stressed that these claims also coincided with the reversion of the disputed islands to Japan from the US who had been administrating the islands since the end of the Second World War. Although more than 40 years have past since the Senkaku/Diaoyu islands dispute arose, the conflict is still very much alive today and clashes between the claimants constantly re-erupt the territorial dispute, which has become one of the most politically and emotionally sensitive conflicts in Sino-Japanese relations since the end of the World War II.

Since the reversion of the islands in 1972, Japan has maintained de facto control. This control is additionally strengthened by the mutual defense treaty between Japan and the US, since the latter has, on several occasions, reiterated that the said treaty covers the disputed islands, although their official position is that they remain neutral towards the underlying sovereignty issue.

Although it is true that the Senkaku/Diaoyu island dispute originates from the UNECAFE report, the economical advantage of being able to exploit the natural resources in the seabed are far from the only reason why this dispute remains alive today. The main reason why tension keeps re-erupting is political and relates to nationalism and self-image among the people of Asia's two biggest economies and most influential States. For the Chinese in particular, the Senkaku/Diaoyu islands dispute has become a symbol that reminds them of Imperial Japan's previous military aggression and evasion of responsibility relating to this aggression. For the Japanese on the other hand, Chinese actions and assertions towards the islands reminds them of China's growing importance and possible future dominance in the region. Nationalism on both sides continue to impede on any solution, primarily a joint exploration of the natural resources, as neither the Japanese nor the Chinese are willing to put aside the sovereignty issue to reap the possible economical benefits. It is important to keep in mind that this dispute not merely consists of a game on the highest governmental level, but is also deeply rooted in national identity among ordinary citizens. The involved governments therefore have to balance their foreign policy actions keeping in mind the domestic tensions. In fact, during each of the crises that have occurred since the 1970's, the governments have tried to keep the dispute as low profile as possible in order to prevent a deterioration of the wider political relations. However, the said governments have also used the dispute as a tool for deviating attention away from domestic problems.⁶

Another dimension, apart from the economic and nationalistic, as to why sovereignty over the islands has become important relates to their strategic location. The disputed islands both lay close to strategic sea lines of

⁵ Shaw, *Supra* n.2, p 5.

⁶ Ramos-Mrosovsky, Carlos., *International Law's Unhelpful Role in the Senkaku Islands*, p. 918-922.

communication, for instance Japanese crude oil import from the Middle East pass through this area, and are important for military and security reasons.⁷ An additional aspect that undoubtedly adds to the complexity of the conflict is the unresolved political situation of Taiwan. The official stance by both the ROC and the PRC is that they are the sole legitimate representatives of all Chinese people on both sides of the Taiwan Straits. The ROC, with government in Taipei, is in de facto control over Taiwan and the PRC, with government in Beijing, is in de facto control over Mainland China. Since the 1970's, a clear majority of all States recognizes Beijing as the legitimate government, which means that they don't regard the ROC as a State under international law and as a consequence the government in Taipei cannot enter into legal contracts with these States.

Lastly, the Senkaku/Diaoyu island conflict is also related to other unresolved territorial issues throughout Asia. Japan currently has a territorial dispute with Russia over the Northern Territories and with South Korea over the Lincourt rocks. PRC on the other hand is involved in a similar dispute in the South China Sea over three different island groups; the Spratlay Islands, the Scarborough shore and the Parcel islands. These unresolved issues are to some extent interconnected with the Senkaku/Diaoyu islands dispute since both Japan and China appear to believe that by not showing sufficient strength in relation to one of these conflicts, they risk being perceived as weak in relation to the other.⁸

1.2 Purpose of the paper

The primary purpose of this paper is to describe and analyze the Senkaku/Diaoyu island conflict focusing on which of the competing States has the better claim to sovereignty under international law. Although this paper will be written from a perspective similar to that of a court or tribunal, analyzing and evaluating the facts and arguments provided by the respective claimant States, it needs to be stressed that this paper doesn't aim to provide a definitive answer to the sovereignty issue. The aim is instead to describe and analyze the critical legal issues that a court or tribunal would have to adjudicate, without necessarily taking a position on these issues. Based on the primary purpose, a secondary purpose of the paper is to analyze how this conflict, should it ever be adjudicated, could enrich and clarify the contents of international law. In a legal process before a court or tribunal, the adjudicating body would be presented with all available facts that the parties decide to present. This isn't the case in this paper; the author is limited to publically available documentation, which has been translated into, or written in, English. Therefore it would be irresponsible to claim that such a

⁷ See further regarding the strategic value of the disputed islands from a national security perspective, Kazumine, Akimoto., *The Strategic Value of Territorial Islands from the Perspective of National Security*.

⁸ See further about how these issues are interconnected in Nasu, Hitoshi and Rothwell, Donald R., *Re-Evaluating the Role of International Law in Territorial and Maritime Disputes in East Asia*, p. 55-79.

complex dispute as this could be decisively adjudicated given these limitations.

1.3 Methodology

This paper has been written using the traditional legal sources such as legislative works, treaty law, case law and jurisprudence. Legislative works are merely relevant for maritime delimitation, which isn't the focus area in this paper, and will therefore not be used to a large extent. As will be further developed under section 3.1, the scholars involved in this dispute are primarily either Chinese or Japanese and they tend to have a biased approach aimed to advance the cause of their respective States. These underlying motives affect both the linguistic translations and the legal interpretations and therefore one needs to be particularly careful in studying the jurisprudence. Since the author isn't able to critically evaluate the presented translations, a caveat needs to be stressed regarding this linguistic limitation. This paper has strived to manage this inherent problem by including the work of both Chinese and Japanese scholars in order to present a balanced and objective picture. The most important translations are the ones relating to the Chinese imperial envoys conducted throughout the Ming and Qing dynasties. These translations are derived from Chinese historian Suganuma but also critiqued by Japanese legal scholar Ozaki.

Regarding the methodology one additional aspects needs to be particularly stressed. Although this paper will be written from a *de lege lata* perspective, focusing on positive international law, it will also include a *de lege ferenda*, or critical, perspective. The reason behind this inclusion, which will be further developed under section 2.2 and 3.1, is that Chinese scholars have contended that since international law was completely unknown to East Asia until the mid 19th century, it isn't entirely reasonable to evaluate whether China acquired sovereignty solely through the lens of international law. The author is of the opinion that this Chinese critique is reasonable especially since international law, as will be further developed under section 2.2, has euro-centric roots and these rules could possibly create unjust results if they were applied without taking the regional political realities into account. Japanese legal scholar Ozaki has described an alternative framework, which in this paper will be labeled "ancient possession from time immemorial", which will be described under section 3.1 and later used in the analysis. It needs to be stressed that this alternative framework cannot be described as constituting positive international law, including regional customary international law. However, the author finds it not entirely unreasonable, should this dispute ever be adjudicated, that the Chinese side would raise the argument that the conflict needs to be understood through a framework similar to this and therefore it is relevant to also include an analysis of whether China fulfills these requirements, parallel to the analysis under contemporary international law.

1.4 Delimitations

The main delimitation has already been expressed, that this paper doesn't aim to provide a definitive adjudication to the present dispute. Other delimitations are that this paper only focuses on the sovereignty issue and not on maritime delimitation or whether there are other possible solutions to the present dispute, such as a joint exploitation of the natural resources. Although this last issue is highly interesting, it is primarily political and hence outside the scope of this paper. Lastly, legal scholars have provided a comprehensive collection of historical data relating to the present dispute. However, since this paper is limited in scope, it is necessary to assess which historical data is most relevant and to expurgate the less relevant. Of primary interest to note in this regard is that the Decree of Empress Dowager Cixi hasn't been included. The reason for this is that the authenticity of this imperial edict has been questioned and even distinguished Chinese scholars have admitted that there are several problematic components, which indicate that this document might have been forged.⁹ Among the other historical data that have been expurgated, are the imperial envoys of Li Dingyuan of 1801 and Qi Kun of 1809 and the Qing dynasty logbook, Zhinan Zhengfa.

1.5 Outline

The outline of this paper can be described as follows. After this introductory chapter follows a chapter that provides "background-information", primarily focusing on describing relevant international law that is important to keep in mind throughout the paper. The following chapters 3-5 provide a chronological expose over the events taking place through history relating to the sovereignty issue. This chapter division aims to describe and analyze, in turn, the following encompassing legal issues;

1. Were the Senkaku/Diaoyu islands to be regarded as Terra Nullius and therefore available for occupation in 1895? (Chapter 3)
2. Did Japan lawfully acquire sovereign title to the disputed islands and in such a case was it based on the mode of occupation or cession? (Chapter 4)
3. Did the wartime declarations oblige Japan to return the disputed islands to China following the end of World War II? (Chapter 5)
4. Did the eventful years following the oil discovery affect the sovereignty issue? (Chapter 5)

⁹ See further on this matter in Suganuma, *Supra* n. 1, p. 104-106 and in Shaw, *Supra* n. 2, p 61f.

2 Background

2.1 Stances by claimant States and the US

2.1.1 The Japanese claim

The Japanese official stance towards the disputed islands was first explained through a series of official statements issued by the Okinawa Prefecture during the early 1970's. This was followed, on March 8, 1972, by an official statement from the Japanese Foreign Ministry entitled "The Basic View of the Ministry of Foreign Affairs on the Senkaku Islands" (the Basic View henceforth). This section provides a description of the Japanese stance as expressed in the Basic View.¹⁰

In the Basic View Japan claims that "in the light of historical facts and based upon international law" the disputed islands are undoubtedly Japanese territory and that there exists no issue of territorial sovereignty to be resolved. Japanese politicians have reiterated this last part ever since the Basic View was published. The third paragraph of the Basic View provides the legal foundation for the Japanese stance and reads,

From 1885 on, surveys of the Senkaku Islands had been thoroughly made by the Government of Japan through the agencies of the Okinawa Prefecture and by way of other methods. Through these surveys, it was confirmed that the Senkaku Islands had been uninhabited and showed no trace of having been under the control of Qing Dynasty China. Based on this confirmation, the Government of Japan made a cabinet decision on 14 January 1895 to erect a marker on the islands to formally incorporate the Senkaku Islands into the territory of Japan.

From the quoted passage it is evident that Japan claims that the Senkaku/Diaoyu islands were terra nullius (land without sovereign) when they were incorporated in 1895 and hence that Japan acquired sovereignty over the islands through occupation, one of the established modes of territorial acquisition. It is also apparent from this passage's reference to the cabinet decision, that Japan aims to demonstrate that the incorporation process was legalized through governmental administrative procedures.

The fourth paragraph of the Basic View further states that the disputed islands "were neither part of Taiwan nor part of the Pescadores Islands, which were ceded to Japan from the Qing Dynasty China in accordance with Article 2 of the Treaty of Shimonoseki which came into effect in May of 1895". This passage aims to refute the Chinese argument that the Senkaku/Diaoyu islands were historically and administratively "appertaining or belonging" to Taiwan and were therefore ceded to Japan pursuant to Article 2 of the Treaty of Shimonoseki. This Japanese argument is derived from the perception that the disputed islands were terra nullius and as such couldn't have been islands "appertaining and belonging" to Taiwan. Additionally, since the Japanese process of incorporation was

¹⁰ Shaw, *Supra* n. 2, p. 23-24

finalized through the cabinet decision on January 14, 1895, and the Treaty of Shimonoseki signed on April 17 the same year, Japan contends that the incorporation was an act completely separate from the treaty and the disputed islands can therefore not be regarded as an integral part of the aforementioned treaty. Moreover, since the Senkaku/Diaoyu islands, according to the Japanese perception, weren't ceded pursuant to the said treaty, Japan consequently isn't obliged to return the islands pursuant to the declarations signed after World War II, which aimed at reverting the territorial boundaries to where they were before the Japanese imperial aggression.

Japan contends that the San Francisco Peace Treaty (SFPT henceforth) should be regarded as the final and decisive document relating to the disputed island. This treaty has, in relation to the present dispute, two relevant Articles. Article 2 deals with which territories Japan has to renounce its rights to and Article 3 with which territories Japan has to place under temporary US administration. It is important to remember that these two Articles have very different legal implications since Article 3 doesn't affect the sovereignty issue. Japan contends that the disputed islands aren't an integral part of Article 2 since they weren't expressly mentioned among these territories, but are an integral part of Article 3 since they are integral part of the phrase "Nansei Shoto south of 29 north latitude (including the Ryukyu and the Daito islands)".

The Basic View also addresses the issue of Chinese acquiescence towards Japanese control over the disputed islands from the conclusion of World War II until the 1970's. Article 4 expresses that, the fact that China expressed objection towards the islands being under US administration pursuant to the SFPT, "clearly indicates that China did not consider the Senkaku Islands as part of Taiwan." The fact that the disputed islands were considered as an integral part of this phrase is evident from several subsequent documents issued by the US, primarily the USCAR 27 of December 27, 1953, which further provided coordinates regarding the geographical boundaries of US administration. Hence, Japan contends that there were several instances wherein China could've protested against the handling of the disputed islands during the period following the end of the war but she never did. Official protests, from both the PRC and the ROC, were first expressed after the publication of the ECAFE-report, which indicated the possibility of large petroleum resources in the area.

2.1.2 The Chinese claim

Although both the PRC and the ROC since the 1970's have issued official statements displaying their respective stances, the position of these two claimants are fundamentally the same since they are based on shared historical facts. The stances by these respective governments only deviate in relation to events that occurred after 1949.

Between the respective Chinese governments, the ROC was first to launch an official protest against Japanese sovereignty in February 1971 and the

PRC's ditto came later, in December the same year. While the PRC's official statement of December 1971 is sufficiently detailed, the ROC's protest needs to be complemented. In September 1996, the ROC Government Information Office published the pamphlet "An objective Evaluation of the Diaoyutai Dispute" which presents a sufficiently comprehensive overview of the official claim by the ROC. Below follows a description of the common position held by these governments according to the 1971 official statement by the PRC and the 1996 pamphlet of the ROC.

The foundation of the Chinese claim is that the Senkaku/Diaoyu islands were Chinese territory prior to the Japanese "re-discovery" and incorporation process in 1885-1895 and therefore the disputed islands weren't terra nullius and couldn't be incorporated through the mode of occupation. The Chinese claim is supported by large quantities of historical records which demonstrate that the disputed islands were first discovered, named and used as navigational aids by ancient China as early as the 14th century. Large amounts of historical records and maps from China, the Ryukyu kingdom and Japan prove that, during a period of over 500 years prior to the Japanese re-discovery in 1885, the disputed islands were well-recognized as Chinese territory by all the aforementioned countries. These documents demonstrate that the national boundary between China and the Ryukyu kingdom were situated along the compass route from Fuzhou (China) to Naha (Ryukyu) and located beyond Chiwei Yu (J:Kumeshikishima), which is the most north-eastward island within the Senkaku/Diaoyu island group, but before reaching Kume-jima of the Ryukyu kingdom. The Chinese claim is further supported by the fact that the disputed islands were incorporated into the Chinese coastal defense system during the Ming Dynasty and remained an integral part of this system throughout the Qing Dynasty, during the Chinese struggle with Japanese pirates. Another fact that supports the Chinese claim is that the disputed islands were by the Qing government during the 18th century, administratively placed under the coastal defense system of Taiwan and that the Chinese naval forces therefore were patrolling around the area.

The Chinese governments contend that these historical facts demonstrate that the Senkaku/Diaoyu islands were Chinese territory and that they also had such a connection to Taiwan that they have to be regarded as islands "appertaining and belonging" to Taiwan according to the Treaty of Shimonoseki, which concluded the first Sino-Japanese war (1894-1895). Article 2 of the said treaty stipulated that China had to cede to Japan, Taiwan and her appertaining and belonging islands as a booty of war. As a consequence of this, the Chinese governments contend that the Senkaku/Diaoyu islands were acquired by Japan, through the mode of cession. The reason why it is important for China to claim that the disputed islands were acquired through cession is that the declarations following the end of the Second World War obliged Japan to revert and renounce territories it had acquired through its military aggression.

In relation to the Japanese contention that the Senkaku/Diaoyu islands were incorporated through a series domestic legal procedures, conducted prior to

the signing of the treaty of Shimonoseki, China regards these procedures as invalid or illegal. This stance is derived from the perception that the disputed islands were Chinese territory and not terra nullius and as such couldn't be unilaterally incorporated by Japan without the consent of the legal titleholder. Scholars supporting the Chinese claim have further sought to demonstrate that the said incorporation procedures were intentionally carried out in secret and only made public 60 years later, in the 1950's, and that China thus was denied information necessary in order to launch an official protest. These scholars have further contended that this secrecy, together with the correspondence among Japanese officials, clearly show that the Japanese officials in charge of the incorporation were knowledgeable about the Chinese perception of sovereignty of the islands and that this is crucial information which undermines the Japanese claim that the islands were terra nullius at the time.

Although both Chinese governments claim that Japan was obliged to return the disputed islands to China following the end of the Second World War, they base their arguments on different facts since these two governments have different stances towards events that occurred after 1949. The legal stance by the ROC is that the Senkaku/Diaoyu islands should've been returned to China according to four wartime documents; the Cairo declaration of 1943, the Potsdam Proclamation of 1945, the SFPT of 1951 and the Treaty of Taipei of 1953. The legal position by the PRC on the other hand is that it refutes the legal validity of the SFPT and the Treaty of Taipei, and therefore the Cairo and Potsdam declarations are the only two pillars the PRC's legal stance rests on. These documents, together with the official stances towards these documents, will be exhaustively dealt with under chapter 5. However, it deserves mentioning, since under 2.2.1 the Japanese argument relating to Chinese acquiescence towards the placement of the disputed islands under US administration, that PRC has always refuted the legality of the SFPT. The PRC therefore claims to have officially protested against how the islands were handled in the post-war period.

2.1.3 The US's approach to the disputed islands

Before proceeding forward, a few words have to be mentioned regarding the US's position towards the dispute. The reason why this is relevant is partly because the US has been directly involved in administering the islands between 1952 and 1972 but more importantly that both Japanese and the Chinese governments continue to invoke past US actions and rhetoric to strengthen their claims. Japan points to the US's interpretation of the SFPT where the disputed islands weren't considered to be included among the territories Japan had to renounce their claim to under Article 2, but were considered among the territories Japan had to place under US administration pursuant to Article 3. Furthermore, Japan points to the Okinawa Reversion Treaty (ORT henceforth) of 1971 as evidence supporting the Japanese claim. The Chinese governments on the other hand points to several official statements by US officials that the US government takes no position towards the sovereignty issue. The SFPT granted the US administrative

rights and the ORT merely reverted those rights. Six months before the ORT came into effect on May 15, 1972, the US Secretary of State expressed the US's position towards the disputed islands in the ORT as "This treaty does not affect the legal statuses of those islands at all. Whatever the legal situation prior to the treaty is going to be the legal situation after the treaty comes into effect".¹¹ Similar statements, expressing that the US never held sovereignty over the islands and therefore were in no position to revert such rights, have been expressed by successive US administrations. The US's position towards the ORT wasn't received with enthusiasm by any of the claimants. Both Chinese governments protested against the US's inclusion of the disputed islands under the treaty and Japan protested against the US's stance, since it was officially neutral towards the sovereignty issue.¹²

Lastly, it shall be mentioned that although the US remains officially neutral towards the sovereignty dispute, it is generally understood that the disputed islands are covered by the Treaty of Mutual Security between the US and Japan, of 1960. The legal implication of which is that the US are legally obliged to defend the Japanese de facto control should armed confrontation between China and Japan regarding the islands occur and subsequent US officials have also reiterated this stance.¹³

2.2 A comparative perspective

2.2.1 Introduction

Section 2.2 aims to describe and contrast how modern international law emerged in Europe with the traditional East Asian World Order (EAWO henceforth) which dominated East Asia from immemorial times until modern Japan emerged through the Meiji Restoration in 1868. The reason why this comparison is relevant is that scholars supporting the Chinese claim have argued that it isn't entirely sensible to strictly evaluate the present conflict under the lens of modern international law. Instead, the Senkaku/Diaoyu islands conflict needs to be understood in a broader context, taking the political realities of the EAWO into consideration. The underlying concern this section deals with is therefore whether contemporary international law, which originated in Europe and developed in accordance with its economic and political realities, can appropriately adjudicate a territorial dispute among States that historically belong under the EAWO, which was based on fundamentally different principles.¹⁴ Before proceeding further, one aspect of the *Eritrea and Yemen Arbitration* is relevant to mention since it highlights the inherent difficulties of applying contemporary international law in non-western parts of the world where this framework hasn't traditionally governed international relations. The Award acknowledged that "a problem of the sheer anachronism of attempting to

¹¹ Shaw, *Supra* n. 2, p 123.

¹² Shaw, *Supra* n. 2, p 123-127.

¹³ Manjiao, Chi., *The Unhelpfulness of Treaty Law in Solving the Sino-Japan Sovereign Dispute over the Diaoyu Islands*, p 176.

¹⁴ Shaw, *Supra* n. 2, p 64-67.

attribute to such a tribal, mountain and Muslim medieval society the modern Western concept of a sovereign title".¹⁵ Although the Tribunal ruled that difficulties with the establishment of historical facts prevented it from accepting the claim of historic title based on a different legal framework than international law, it indicated a willingness to accept such claims if only the existence of such a claim could be sufficiently proven. Therefore it could be stated that this award facilitates for a more lenient approach to the legal necessities and eases the prerequisites regarding territorial acquisition in non-western parts of the world.

2.2.2 The evolution of modern international law in Europe

Scholars of the history of international law often depict the ratification of the Westphalian Peace Treaties of 1648, which concluded the Thirty Years' War (1618-1648), as the beginning of the development of modern international law.¹⁶ The Westphalian peace established a new paradigm in international relations based on a horizontal system wherein independent States exercised sovereign authority over their respective territories and freely conducted their mutual relations on the basis of equality and in accordance with their perceived self-interest.¹⁷ The most fundamental aspect of the Westphalian system is the concept of State sovereignty based on exclusive territorial jurisdiction and from this concept, other important legal consequences are derived such as the crucial importance of defining the territorial units, which belongs under each respective State's sovereignty. Hence, the Westphalian system established rules relating to how to define the scope and character of territorial jurisdiction and how to adjudicate competing claims of territorial jurisdiction.¹⁸

The Westphalian system continues to provide the backbone of contemporary international law but the State-centered structure that the Westphalian system provides has lost some of its significance during the 20th century. Although States continue to be the primary subjects of international law, they are not its only subjects. Today, international organizations, non-governmental organizations and even individuals contribute to the development of international law.¹⁹

2.2.3 The traditional East Asian World Order

The traditional EAWO was very different to the modern international law that developed following the Westphalian system. Westphalian principles such as national independence, sovereignty and equality weren't recognized under the EAWO since they were futile to this system's perception of civilization.²⁰

¹⁵ *Eritrea and Yemen Arbitration*, Award of 3 October 1996, at para 446.

¹⁶ Fassbender, Bardo., *Westphalia, Peace of (1648)*, at para 18-22.

¹⁷ Grote, Rainer., *Westphalian System*, at para 1-7.

¹⁸ Grote, *Supra* n. 17, at para 1-7.

¹⁹ Wolfrum, Rütiger., *International Law*, at para 1

²⁰ Suganuma *Supra* n. 1, p. 101-103.

The EAWO was, contrary to modern international law, a strictly hierarchical system. The hegemonic power within this system was imperial China who instituted a framework, which governed its foreign relations that historians have characterized as an investiture-tributary relationship. Foreign nations who wished to establish contact with China were expected to formally recognize Chinese cultural and political superiority as well as the universal pre-eminence of the son of heaven (the Chinese emperor). Through conducting a ceremony of subordination, these nations became tributary States within the EAWO and the Chinese emperor granted their leader the title “king”, conducted re-current investiture missions to the kingdom and gave permission to trade with China. This hierarchical structure along with the Chinese hegemonic position affected Chinese international relations since they never had to rely on treaties or declarations to specify the rights and obligations of the respective parties. China institutionalized the EAWO and the tributary States had to abide if they wanted to maintain relations with the hegemon. This system also applied to boundary delimitations. The boundaries between China and its tributary States were sufficiently clear and customarily recognized and respected under the traditional EAWO without China having to declare sovereignty or erecting national markers to display authority or control.²¹ The East Asian world order hence deviated from the concept of State sovereignty based on exclusive territorial jurisdiction. Unlike the theoretically equal European States, the hegemonic China never had to rely on a precise territorial division.

Further, the concept of State territoriality or the conjunction between territory and sovereignty wasn't recognized under the EAWO. China, as the hegemon of this system, demanded loyalty to the person of the Chinese Emperor, his representatives and the Confucian hierarchical system of relationships. Therefore, the Chinese emperors and their officials ruled men, not territorial space.²² Hence, the power of the Emperor went only as far as Emperor-observant people could dwell and little attention was paid to places lacking human habitation. Therefore it was arguably very difficult to establish sovereignty over uninhabited islands since this was unknown to the Confucian understanding of government control.

2.2.4 The Westphalian system enters East Asia

The Westphalian system spread throughout the world by European imperialism and colonialism and came into collision with the EAWO during the mid 19th century. Qing China was naturally reluctant to embrace this paradigm, since it would force her to give up the position within the millennia old system, which she had created and benefited from. Japan on the other hand adopted a different approach to this new paradigm, especially after the Meiji Restoration of 1868. A largely contributing factor to this revolution was the Japanese realization that it had become technologically and militarily inferior to the West. The revolutionary leaders therefore set

²¹ Shaw, *Supra* n.2, p 64-69.

²² Suganuma, *Supra* n. 1, p 145.

out to strengthen Japan against the threat of Western colonial powers by establishing an enlightened rule with a combination of western technology and traditional East Asian values. It was through the Meiji Restoration that Japan emerged as a modern nation and although the revolution initially served to defend Japan against Western powers, the dramatic technological advancements it produced, gave Japan advantages over East- and South East Asian countries which it would later use during its imperialistic era.²³

The quasi Westernization that the Meiji Restoration brought about, also involved modern international law, which Japan was quick to adopt, contrary to China. Chinese scholars argue that the present conflict is a clear example of how Japan, upon learning international law, learned to use it as a tool to exploit the less formalistic, but nevertheless sufficiently defined boundaries, within the EAWO to advance its territorial boundaries during their imperialistic era, which aimed to redefine the EAWO and replace China as the hegemon.²⁴

2.3 Modes of territorial acquisition

2.3.1 Introduction

There is no general convention regarding how States acquire territory or how to assess the value of one State's claim over another's. These rules are solely governed by customary international law. The terminology surrounding territorial acquisition can be confusing because the phrases "sovereignty" and "ownership" are sometimes used interchangeably but can also denote different legal concepts. International law acknowledges that a territory can be under sovereignty of one State but under ownership of another and that both sovereignty and ownership can be transferred without the other. This paper will however only deal with sovereignty and in the case "ownership" is used, it is merely to make the language more varied. The phrase "acquisition of territory" is usually defined, as "the establishment of sovereignty over a given piece of land" and the phrase will be used according to this terminology in this paper. Another phrase that will be used is "title" which in this paper will refer to the fact(s) that creates the legal right to sovereignty.²⁵

International law has traditionally used the phrase "modes of acquiring territory" to connote the different means of acquiring territorial sovereignty and this phrase will also be used in this paper. Traditionally there are five modes of acquiring territory; occupation, prescription, cession, conquest and accretion. The last two modes are irrelevant for this paper and will not be further dealt with. Moreover, as will be described more thoroughly below, international case law of the 20th century have converged the modes of occupation and prescription giving them common prerequisites. Hence, contemporary international law has seen the emergence of a new mode of

²³ Kissinger, Henry., *On China*, p. 77-80.

²⁴ Shaw, *Supra* n. 2, p. 64-67.

²⁵ Kohen, Marcelo G and Hébié, Mamadou., *Territory, Acquisition*, at para 1-3.

territorial acquisition customarily referred to as “effective occupation”. However, since the present dispute stretches over a considerable time-span, it will nevertheless be relevant to distinguish between how these two modes evolved. Lastly, traditionally international law has organized the modes of territorial acquisition into two categories based on what kind of facts creates sovereignty; original and derivative titles. Occupation is the only original title, the others being derivative titles. This distinction has traditionally been relevant since the legitimacy of a derivative title will always depend on the legitimacy of the previous titleholders claim, while this isn’t the case with original titles.²⁶

2.3.2 Occupation

The first mode of territorial acquisition to be discussed is occupation, which is highly relevant since all claimants in this dispute contend that their sovereignty is primarily based on this mode. The legal doctrine uses somewhat different phrases to denote this original mode of territorial acquisition; another oftentimes-used phrase is “discovery” but since this expression can appear rather misleading, this paper will use “occupation”. It needs to be stressed however, that this phrase refers to a peaceful territorial acquisition and shouldn’t be confused with “conquest” or “belligerent occupation”. Occupation will in this paper be defined as “appropriation of territory by one state which is not at the time subject to the sovereignty of any other state”.²⁷ Below follows a basic chronological expose over how this mode of territorial acquisition evolved through time. The reason why it is important to provide a chronology relates to the concept of critical date and intertemporal law, which will be dealt with under section 2.4.

Rules regarding how States acquire territory through occupation first appear during the very late 15th century. From the late 15th until the late 16th century, Papal Bulls played an important role in the territorial acquisition of Christian European colonial countries. In special cases during the late 15th century these Papal Bulls alone were considered sufficient to grant sovereignty. These Papal Bulls were however rare and only granted to the Iberian countries and therefore, it is inappropriate to make any analogies from this practice. The Papal Bulls remained important during the first half of the 16th century, although during this time they weren’t sufficient by themselves to establish sovereignty, they had to be accompanied by an actual discovery of the territory falling under the realm of the grant in order to establish sovereignty. The Papal Bulls started to lose their legal validity during the second half of the 16th century and especially Queen Elisabeth I contested the authority of the Pope and the validity of the Papal Bulls in 1580. The Pope completely lost his legal authority after the Westphalian system was introduced in 1648.²⁸

²⁶ Kohen and Hébié, *Supra* n. 25, at para 1-8.

²⁷ Ozaki, Shigeyoshi., *Territorial Issues on the East China Sea A Japanese Position*, p. 152.

²⁸ Kohen, Marcelo G and Hébié, Mamadou., *Territory, Discovery*, at para 1-7.

The legal prerequisites for the mode of occupation were debated among scholars during the 17th century. This debate particularly focused on whether territories, inhabited by indigenous populations, should be considered as terra nullius and therefore available for “occupation” by the Europeans. According to both Francisco de Vitoria and Hugo Grotius, occupation couldn’t be invoked under these circumstances since the indigenous population already possessed sovereignty and hence only derivative titles were possible in these circumstances. It is however difficult to deduce any consistent State practice from the 17th until the end of the 18th century. It appears that States regarded mere visual discovery in relation to their own discoveries to be a constitutive element establishing sovereignty but didn’t consider mere visual discovery to have such an element in relation to other States’ discoveries.²⁹

Needless to say, State practice in relation to the prerequisites of occupation during this time appears to have been rather contradictory. Because of this, a conservative interpretation is reasonable and such an interpretation leads to the conclusion that mere visual discovery of for European countries previously unknown territories wasn’t enough to constitute a title. Visual apprehension only created an inchoate title, which needed to be coupled with some kind of formal acts within a reasonable time to establish sovereignty. Exactly what kind of formal acts could complete an inchoate title was never developed in customary international law. Conventional acts were for instance planting of flags or crosses on the territory or reading of a declaration upon disembarkation. To include the relevant territory in the State’s administrative records were also used and sometimes accepted as formal acts granting sovereignty.³⁰

The requirements regarding occupation increased during the 19th century when the concept of “effective occupation” emerged. It is impossible to pinpoint exactly when this concept was established in customary international law but this most likely happened during the mid 19th century and definitely before the African Conference in Berlin 1885.³¹ The prerequisites of “effective occupation” during the 19th century focused largely on taking physical possession of land by settlement or use of territory by other means and on the exclusion of other States.³²

Case law of the 20th century somewhat changed the prerequisites of effective occupation and decisively rejected the requirement that a State needed to take physical possession of a territory and shifted the emphasis to the manifestation of State functions. The legal position established by these early 20th century cases is still relevant today. Contemporary international law therefore defines effective occupation as “the actual, continuous and peaceful display of State functions in regard to the territory” and it demands both the will of the State to possess (*animus occupandi*) and effective possession (*corpus occupandi*). The “effective possession requirement”

²⁹ Kohen and Hébié, *Supra* n. 28, at para 2-7.

³⁰ Suganuma, *Supra* n. 1, p 37.

³¹ Kohen and Hébié, *Supra* n. 28, at para 1-7.

³² Ozaki, *Supra* n. 27, p. 152-155.

relates to administrative, legislative and judicial functions and the extent of the effectiveness required depends on the territory in question, its size and location, whether it is inhabited or not and whether there are other States with competing claims. Minimal levels have been required in relation to small, remote and uninhabited territories.³³ The “continuous requirement” depends on the same factors. Time-spans or interruptions can be permitted but the length of these depends on the aforementioned factors.³⁴

International law doesn’t provide a definite answer to the issue of which material acts can constitute a manifestation of State sovereignty but it is reasonable to assume that a wide range of acts may constitute such manifestations. Acts of legislation was the focus in the *Eastern Greenland Case* wherein the PCIJ stated that legislation “is one of the most striking forms of the exercise of sovereign power”.³⁵ Acts of legislation was also the focus in the *Case concerning sovereignty over Pulau Ligitan and Pulau Sipadan*. The Court awarded Malaysia sovereignty expressing that the acts of regulating turtle egg fishing, controlling the collection of turtle eggs and the establishment of a bird reserve must be seen as regulatory and administrative assertions of authority over territory.³⁶ In the *Minquiers and Ecrehos Case*, the focus was instead on judicial and administrative acts.³⁷ In the *case between Qatar and Bahrain* the court stated that although construction of lighthouses and other navigational aids do not constitute acts displaying State sovereignty per se, they can be considered as such acts depending on the circumstances and a more lenient approach was adopted in relation to small islands.³⁸ Other acts that case law has regarded as a potentially constituting a display of State sovereignty depending on the circumstances are military activities, police surveillance and naval patrols.³⁹

Before proceeding forward it shall be stressed that “actual, continuous and peaceful display of State functions in regard to the territory” are the only requirements of effective occupation. International law doesn’t stipulate any additional rules regarding the actual incorporation. *Animus occupandi* can be either explicitly or implicitly expressed and international law therefore doesn’t specifically require notification to other countries. However, the effective occupation needs to be manifested in such a way that other States are in a position to launch a formal protest (this is relevant for the analysis under chapter 4).⁴⁰

³³ Kohen and Hébié, *Supra* n. 28, at para 7.

³⁴ Ozaki, *Supra* 27, p. 152-155.

³⁵ The Legal Status of Eastern Greenland, Denmark v Norway (*Eastern Greenland Case*), Judgement of 5 September 1933 at para 48.

³⁶ *Case concerning sovereignty over Pulau Ligitan and Pulau Sipadan*, Judgement of 17 December 2002, at para 145.

³⁷ See further regarding this case under section 2.5.

³⁸ *Case concerning maritime delimitation and territorial questions between Qatar and Bahrain*, Judgement of 1 July 1994, at para 197.

³⁹ For military activities and police surveillance see *Rann of Kutch Arbitration*, Award of 19 February 1968 at para 558. For naval patrols see *Sovereignty over Pedra Branca/Pulau Batu Puteh, middle rocks and south ledge*, Judgement of 1 September 2003, at paras 240-43 wherein the court stated that since the naval patrols were only described in general terms they cannot be taken as proof of state authority.

⁴⁰ Ozaki, *Supra* n. 27, p. 166ff.

2.3.3 Acquisitive prescription

The second mode of territorial acquisition to be discussed is acquisitive prescription (prescription henceforth), which is the acquisition of title through continuous and undistributed possession coupled with acquiescence from the affected State. However, as mentioned above, early 20th century case law has interconnected the traditional modes of occupation and prescription into the concept on “effective occupation”, which requires “actual, continuous and peaceful display of State functions in regard to the territory”. Hence, under contemporary international law, prescription cannot be regarded as an independent mode of territorial acquisition.⁴¹

Traditionally, prescription has been defined as “the result of the peaceable exercise of de facto sovereignty for a very long period over territory subject to the sovereignty of another”.⁴² In comparison to the traditional requirements for occupation, it is particularly relevant to stress the “very-long requirement”, which relates to the fact that the initial titleholder has to acquiesce. This means that the de facto control has to be conducted openly in order to allow a possible reaction from the affected State. Moreover, although prescription inherently requires a certain passage of time, no general rule regarding the length of time required can be established.⁴³

Before proceeding, it needs to be stressed that the existence of prescription as a mode of territorial acquisition has been debated ever since it first emerged in international law around the late Middle Ages or early modern times. Proponents of the concept argued that acquisitive prescription was necessary since it created peace and stability among nations and that States that have maintained order and security within a territory, are reasonably more entitled to the territory than the former possessor who has neglected the territory. Opponents of the concept either criticized the applicability of the concept since it didn’t entail a fixed time limit or criticized the concept as unnecessary. Lastly, neither the PCIJ nor the ICJ has ever explicitly recognized prescription, although elements of the concept have been touched upon.⁴⁴

2.3.4 Cession

The third mode of territorial acquisition to be discussed is cession, which is relevant to discuss since according to the Chinese stance, Japan ceded the disputed islands from China pursuant to the Treaty of Shimonoseki of 1895. The cession mode is rather straightforward. It is a voluntary bilateral transaction wherein sovereignty is transferred between two sovereigns. Although international law defines cession as a “peaceful transfer” it is not

⁴¹ Ozaki *Supra* n. 27, p. 152-155.

⁴² Wouters, Jan and Verhoeven, Sten., *Prescription*, at para 3.

⁴³ Ozaki *Supra* n. 27, p. 1.

⁴⁴ See for instance *Palmas Island Arbitration*, Award of 4 April, at 839 or the *Matter of the delimitation of a certain part of the maritime boundary between Norway and Sweden (Grisbadarna case)*, Award of October 23 1909, at para 161.

uncommon that the threat of forces surrounds the cession agreement, which oftentimes is conducted through a peace treaty following the end of a war.⁴⁵

2.4 Critical date and intertemporal law

Critical date and intertemporal law are technical rules of general international law that play particularly important roles in territorial disputes since territorial claims imply a succession of events, occurring over a considerable timespan. The critical date concept aims to establish a cut-off date after which any subsequent actions undertaken by the parties become either evidentially inadmissible or substantively irrelevant.⁴⁶ Hence, this concept aspires to prevent the parties from unilaterally improving their legal position after the dispute definitely has arisen.⁴⁷ In the *Pedra Branca/Pulau Batu Puteh Case*, the Court remarked that the critical date serves to “distinguish... between those acts which should be taken into consideration for the purpose of establishing or ascertaining sovereignty and those acts occurring after such a date”.⁴⁸ The same case also established the general rule for determining the critical date as “the date when the dispute crystalized”. A dispute “crystalizes” when the parties formally oppose each other’s claim, which in cases of territorial acquisition usually is the date when one side asserts sovereignty and the other protests against this for the first time.⁴⁹ However, there are cases of territorial acquisition wherein a different critical date has been chosen and cases wherein the concept has not been elaborated on or otherwise dismissed as being of little value.⁵⁰

Intertemporal law concerns the issue of temporal applicability of legal norms and aims to determine which temporal rules should be applied in a particular case with events of legal significance taking place during a considerable timespan. This issue was briefly elaborated on in both the *Guyana-Venezuela Boarder dispute* from 1899 and in the *Grisbadarna Award* from 1909. However, the landmark case establishing what is today known as the intertemporal-principle was the famous *Palmas Island Arbitration* from 1928, adjudicated by Judge Huber.⁵¹ In this Award, Huber developed what scholars later have described as the intertemporal principle. Based on the idea that “a distinction must be made between the creation of rights and the existence of rights”⁵², this principle has been explained as consisting of two branches. The first branch states “(A) judicial fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when the dispute in regard to it arises or falls to be

⁴⁵ Ramos-Mrosovsky, *Supra* n. 6, p 915.

⁴⁶ Whether the critical date concept should be regarded as an evidential rule, which deems actions undertaken after as inadmissible or as a substantive rule, which rules the actions, undertaken after as substantively irrelevant has been debated in the legal doctrine. In the *Minquiers and Ecrehos* case it was deemed as an evidential rule and the judgment has been criticized for this holding. See further, Lowe, Vaughan and Tzanakopoulos, Antonios., *Minquiers and Ecrehos Case*, at para 7-9.

⁴⁷ Nasu and Rothwell, *Supra* n. 8, p. 67f.

⁴⁸ See Case *Pedra Branca/Pulau Batu Puteh*, *Supra* 39, at para 32.

⁴⁹ Kohen and Hébié, *Supra* n. 25, at para 50-52.

⁵⁰ Nasu and Rothwell, *Supra* n. 8, p. 67f.

⁵¹ Kotzur, Markus., *Intertemporal Law*, at para 6.

⁵² *Island of Palmas Arbitration*, *Supra* n. 44, at para 845.

settled”.⁵³ The second branch states that “The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law”.⁵⁴

The first branch of Huber’s framework has been widely accepted by the legal doctrine. The second branch however, has received criticism and opponents have contended that it causes instability and insecurity and that it merely is an exception to the first branch.⁵⁵

As stated above, intertemporal law is a principle of general international law and is therefore also relevant outside the field of territorial acquisition. Of particular interest for this paper is the field of treaty interpretation. Linderfalk stresses that the ICJ, from 1994 and onwards has used the customary international law reflected in Articles 31-33 of the Vienna Convention of the Law of the Treaties (VCLT henceforth), as an interpretive framework to evaluate legal relationships, which were created prior to this framework became customary international law. The ICJ has therefore used the law in force when the legal proceedings were instituted and not the law in force when the legal relationship was established. Therefore, the author concludes, the ICJ has implicitly used the second branch of the intertemporal law also for the purpose of treaty interpretation.⁵⁶ This method of using the customary international law reflected in Articles 31-33 of the VCLT retroactively through the second branch of intertemporal law will be used for the purpose of treaty interpretation in chapters 4 and 5 of this paper.

2.5 Case law of territorial acquisition

The section above described the modes of territorial acquisition that are relevant to the present dispute by, among other things, including case law. This section aims to describe three cases, which are particularly important since they laid the foundation regarding the legal prerequisites of contemporary “effective occupation”, which are still relevant today.

The landmark case of territorial acquisition is the *Island of Palmas Arbitration* of 1928, which has been described above in relation to the intertemporal principle, which was established through this Award and therefore doesn’t need to be restated here. In this case the US and the Netherlands both claimed sovereignty over Palmas Island, a sparsely inhabited island located roughly 40 kilometers off the southwest coast of the Philippines. The main argument by the US was that Spain had acquired an original title to the Island through their discovery and colonization in the early 16th century and that this title had remained intact until 1898 when Spain agreed to cede the Philippines to the US, a cession that included

⁵³ Island of Palmas Arbitration, *Supra* n. 44, at para 845.

⁵⁴ Island of Palmas Arbitration, *Supra* n. 44, at para 845.

⁵⁵ Kotzur, *Supra* 51, at para 6.

⁵⁶ Linderfalk, Ulf., *The Application of International Legal Norms Over Time: the Second Branch of Intertemporal Law*, p 162-165.

sovereign title to the Island of Palmas. The Netherlands refuted the US claim based on two grounds. Firstly, that Spain never acquired sovereign title since the acts undertaken by Spain merely accounted to discovery but didn't meet the requirements of occupation. Secondly, even if Spain had acquired sovereign title, this title had later been lost. Judge Huber adjudicated this Award by using the intertemporal principle and found that Spain had not been able to prove that she had exercised sovereignty in accordance with the law applicable at the critical date, which was determined to be the date of the cession agreement between the US and Spain, in 1898, since the law of 1898 required effective occupation. Because Huber settled the case based on the second branch of the intertemporal law, he never had to evaluate whether the acts undertaken by Spain was sufficient to grant it an original title during the early 16th century.

The Clipperton Island Case concerned a dispute between Mexico and France over a small, uninhabited island situated in the Pacific Ocean roughly 1000 kilometers southwest of Mexico, which had been discovered and named by an Englishman in 1705. Mexico argued that Spain had acquired an original title several hundred years ago and that they had acquired a derivative title as the legal successor of Spain, which they had maintained ever since. France argued that they had acquired title in 1858 when a French ship “re-discovered” and briefly disembarked on the island. The proclamation of French sovereignty was reported to the French consulate in Honolulu and published in a local Hawaiian newspaper. The dispute crystalized itself in 1897 but wasn't adjudicated until 1931 after the parties agreed to let Emperor Victor Emmanuel III of Italy settle the dispute. The arbitrator rejected Mexico's claim stating that “the proof of an historic right of Mexico's is not supported by any manifestation of her sovereignty over the island, a sovereignty never exercised until the expedition of 1897...”⁵⁷ The arbitrator followed the holding of Island of Palmas case and, through the second branch of the intertemporal law, ruled that effective occupation is necessary to complete an inchoate title. The French discovery coupled with the publication was on the other hand deemed sufficient to meet the requirement of effective occupation and the fact that France hadn't taken any further action to assert her sovereignty from 1859 to 1897 didn't affect her sovereignty title. The main significance of this case lies in its contribution to the prerequisites of occupation and specifically how this concept should be applied to small and uninhabited islands. With reference to this, the arbitrator expressed the following,

(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.⁵⁸

The Minquiers and Ecrehos case concerns two groups of islets and rocks situated in the British Channel between the island of Jersey and the French

⁵⁷ *Arbitral award on the subject of the difference relative to the sovereignty over Clipperton Island* (Clipperton Island Case), Award of January 28, 1931, at para 393.

⁵⁸ Clipperton Island Case, *Supra* n. 57, at 394.

coast. Both the UK and France based their claims on historic titles dating back to 1066 and 933 respectively and presented extensive documentation to support their respective claims. The ICJ however found this documentation to be of little relevance and instead focused on the evidence from the 19th century relating to effective occupation. The ICJ determined sovereignty over each of the groups of islets and rocks in turn. The Ecrehos group was awarded to the UK primarily because the local (Jersey) authorities had exercised criminal jurisdiction, had registered huts, boats and real estate contracts and erected a customs house. Furthermore, the Ecrehos group was included under the administrative limits of Jersey. The ICJ also awarded the Minquiers to the UK stating similar facts focusing on the exercise of jurisdiction, local administration and legislation. The primary holding from this case is that the ICJ, in line with the reasoning in the Island of Palmas case, dismissed the legal relevance of the historical documentation in order to focus on the effective occupation. Moreover, the ICJ didn't make any formal determination regarding critical date, a circumstance that it has received criticism for in the legal doctrine.

2.6 Accessory maritime rights

2.6.1 Introduction

The Senkaku/Diaoyu islands have previously been described as remote, small, uninhabited and throughout history been considered as economically almost worthless. The reason why these islands in recent times have been desirable has to do with the fact that contemporary international law, particularly UNCLOS, to which the PRC and Japan are parties, has vested the disputed islands with immense value.⁵⁹ The international law of the sea has divided the sea into different zones and regulates the breadth of these zones as well as the rights and obligations that these respective zones are associated with. The zones that a coastal State can exercise maritime jurisdiction over are the following; internal waters, territorial sea, contiguous zone, exclusive economic zone, continental shelf and high seas. This section will deal with these zones and the rights they are associated with. However, before describing the rules of maritime jurisdiction, the concept of “islands and rocks”, first needs to be discussed.⁶⁰

2.6.2 Islands and rocks

Although what constitutes an island might be self-evident in colloquial language, the legal prerequisites regarding islands under international law is a more complex issue. The reason why the island-definition needs to be carefully regulated is that islands can generate the same extensive maritime

⁵⁹ Manijiao, *Supra* n. 13, p. 172.

⁶⁰ Nelson, Dolliver., *Maritime Jurisdiction*, at para 1-2.

zones as land territories according to UNCLOS Article 121 (2), which also reflects customary international law.⁶¹ This Article reads,

Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this convention applicable to other land territory

Islands' ability to grant its sovereign accessory maritime rights is dependent upon being considered an island under international law. These requirements are stipulated in UNCLOS Article 121 (1), which expresses that "An island is a naturally formed area of land, surrounded by water, which is above water at high tide." This island-definition has been regarded as customary international law at least since the 1960's. The phrases "naturally formed area of land" and that islands have to be "above water at high tide" have been debated by scholars but aren't relevant for the present dispute and will therefore not be further examined.⁶²

To fully understand the island-definition it needs to be contrasted with the definition of rocks in Article 121 (3), which states "Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf." This Article adds "ability to sustain human habitation or economic life" as a prerequisites to the island-definition. This requirement is rather problematic especially since technological developments or economic changes might alter how international law perceives islands and rocks.⁶³

Whether the disputed islands are capable of sustaining human habitation or economic life is actually very doubtful. The largest of the islands, Diaoyu Yu (J: Uotsurijima) has a landmass of 4.3 sq. km and at best a very limited fresh water supply. Without constant supplies from the outside, it is hardly possible to establish a permanent abode here.⁶⁴ However, since all claimants regard them as islands under international law and since maritime delimitation isn't the focus area, this issue will not be further elaborated on.

2.6.3 Baselines, internal waters and territorial sea

Baselines are the starting-point in the division of zones since the breadth of most other zones is measured from the baseline. There are two kinds of baselines; normal and straight. Normal baselines are the general rule and they follow the natural configuration of the coast. Straight baselines are an exception that States can claim if they meet certain requirements and they are drawn completely on the basis of an artificial construction.⁶⁵ Internal waters are, according to UNCLOS Article 8 "waters on the landward side of

⁶¹ See for instance *Qatar v. Bahrain*, *Supra* n. 38, at para 186 and Territorial and Maritime dispute between Nicaragua and Honduras in the Caribbean Sea (*Nicaragua v. Honduras*), Award of 8 October 2007, at para 113.

⁶² Dipla, Haritini., *Islands*, at para 1-7.

⁶³ Dipla, *Supra* n. 62, at para 8.

⁶⁴ Lohmeyer, Martin., *The Diaoyu/Senkaku Islands Dispute – Questions of Sovereignty and Suggestions for Resolving the Dispute*, p. 19-20.

⁶⁵ Scovazzi, Tullio., *Baselines*, at para 1-9.

the baseline” and the main difference between internal waters and territorial sea is that in the former, as a general rule, the right of innocent passage doesn’t apply.⁶⁶ The territorial sea is located on the opposite side of the baseline from the internal waters and has, according to UNCLOS Article 3 a maximum breadth of 12 nautical miles. Coastal States have an extensive sovereignty within the territorial sea although it is subject to certain minor limitations, most notably the right to innocent and transit passage.⁶⁷

2.6.4 Contiguous Zone, Exclusive Economic Zone and Continental Shelf

Outside the territorial sea begins the Contiguous zone, which can extend 24 nautical miles from the baseline. Coastal States are within this zone allowed to exercise the control, as well as punish infringement, necessary to “prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea”, according to UNCLOS Article 33.

The Exclusive Economic Zone (EEZ henceforth) was introduced into the law of the sea through UNCLOS and is therefore relatively new. UNCLOS Article 55 stipulates that the maximum breadth of this area is 200 nautical miles. The aim of the EEZ regime is to ensure a balance between the rights of coastal States and the freedoms of other States. UNCLOS Article 56 (1) stipulates that this regime grants coastal States the following,

Sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non living, of the water superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds.

Further, Articles 56 (2-3) somewhat limits the rights of the coastal State. Article 56 (2) states that a coastal State “in exercising its rights and performing its duties shall have due regard to the rights and duties of other States” and article 52 (3) expresses that “the rights set out in this article with respect to the seabed and subsoil shall be exercised in accordance with Part VI”. Part VI deals with the continental shelf regime and an important implication of this reference is that the laying of submarine cables and pipelines on the seabed and subsoil are largely governed by the regime of the continental shelf. Lastly, for clarification it shall be expressed that the EEZ-regime only grants the coastal State competencies related to resources located in the seabed and subsoil and doesn’t deal with the water above.⁶⁸

⁶⁶ Scovazzi, *Supra* n. 65, at para 3-9.

⁶⁷ Nelson, *Supra* n. 60, at para 3-16.

⁶⁸ Nelson, *Supra* n. 60, at para 33-39.

3 The islands during ancient times

3.1 Introduction

The present chapter will describe and analyze the issue of whether ancient China, primarily the Ming Dynasty (1368-1644) and Qing Dynasty (1644-1912), can be said to have acquired sovereign title to the Senkaku/Diaoyu islands prior to the Japanese incorporation in 1895. As previously has been described, modern (and Euro-centric) international law was completely unknown in East Asia prior to the mid 19th century when it was introduced and accepted. Chinese scholars have therefore contended that this legal framework cannot appropriately adjudicate the issue of whether ancient China acquired sovereign title to the disputed islands. This issue needs to be understood in a broader context, taking the political realities of the EAWO into account. A more inclusive interpretation of historical facts, not merely evaluated through the lens of contemporary international law, can also find support from the *Eritrea and Yemen Arbitration*. This Award recognized the difficulties of applying Euro-centric ideas of sovereignty in non-western parts of the world and appears to have accepted the idea of a more lenient approach to different concepts of territorial acquisition should the existence of such a concept be sufficiently proven (see section 2.3). Japanese legal scholar Ozaki has described an alternative framework, which in this paper will be labeled “ancient possession from time immemorial”. Although this alternative framework cannot be described as constituting positive international law, the author finds it probable, should this dispute ever be adjudicated, that the Chinese side would raise the argument that the conflict needs to be understood through a framework similar to this and therefore it is relevant to also include an analysis of whether China fulfills these requirements, parallel to the analysis under contemporary international law. The framework presented by Ozaki centers around whether ancient China (i) considered the disputed islands as her own territory, (ii) treated them as such and (iii) if no other States have contended against such behavior. If all these requirements are met, ancient China should, according to this framework, be considered to have acquired the disputed islands without reference to any principle of international law of European origin such as occupation. In fact, the overwhelming part of the territory that now comprises Chinese territory has been established through this “ancient possession from time immemorial” notwithstanding the acceptance of international law.⁶⁹

Before beginning this discussion, a word of caution has to be expressed. Studying and evaluating the historical data provided by both sides is a very delicate task. Most scholars who have dedicated their time to studying this dispute are either Chinese or Japanese and they are seldom completely objective. Most scholars tend to twist the historical truth and interpret history to suit their interests and advance the cause of their respective States. The implication of this is that one needs to be careful, not only of

⁶⁹ Ozaki, *Supra* n. 27, p. 153-155.

how these scholars legally interpret the historical data but also of how they linguistically translate the ancient Chinese Mandarin into English. Since the author is unable to critically evaluate these linguistic translations, the only feasible method is to emphasize when certain passages or phrases have been questioned or there are alternative translations. The work of Chinese historian Suganuma will largely base the translations provided in this chapter and the works by Taiwanese legal scholar Shaw and Japanese ditto Ozaki, will also be used to evaluate and contrast Suganuma's translations and interpretations.

Lastly, in order to fully understand the Chinese imperial envoys, a few words shall be expressed regarding the Black Water Trough and the ceremony conducted there. The Black Water Trough mentioned in the imperial envoys refers to what we today call the Okinawa Trough or Okinawa Trench. We know this because modern oceanographers have stressed that the water situated above the continental shelf of Mainland Asia isn't in any place deeper than 200 meters (usually 130-170 meters) while the water above the adjacent continental shelf where Japan is situated reaches 2270 meters and it is the Okinawa Trough that divides the two. This trough isn't merely detectable through modern technology, it could also be visually detected through a change of water color, from blue to pitch black. Therefore, Chinese scholars point to the fact that this trough has historically been regarded as a natural boundary between China and the Ryukyu Kingdom.⁷⁰ This trough is situated northeast of Chiwei islands (the island within the Senkaku/Diaoyu islands situated furthest to the northeast) and its waters were believed to lodge a sea-god (a saint-king yellow-dragon white fish) according to both Chinese folklore and official documents. In order to pay respect to this sea-god and to ensure safe passage through the trench, the Chinese envoys had to perform a certain ceremonial ritual called "haishenji" (ritual to the sea-god) or "gougouji" (trench-crossing ritual) where they prayed to the sea-god and offered him sheep and pigs.⁷¹

3.2 The islands during Ming dynasty

3.2.1 Discovery and naming of the islands

The first known reference to the Diaoyu islands appear in Wang Xiangzhi's geography book *Yudi Jisheng* (History of Famous Geographical Locations in China), from 1221. It needs to be expressed however, that the location of the Diaoyu islands in *Yudi Jisheng* is not exactly the same as the location of the islands being discussed in this paper. Even though the location isn't completely accurate, the book is relevant to discuss since it highlights the provenance of the names of the respective islands and provides an explanation as to why the islands became famous in ancient China. *Yudi Jisheng* expresses that the names of the respective islands within the island

⁷⁰ Shaw, *Supra* n. 2, p 49-50.

⁷¹ Suganuma, *Supra* n. 1, p. 52.

group were taken from famous sites in the Chinese landscape. The name “Diaoyu Tai”⁷² represents a combination of “Diaoyu”, meaning fishing trip and “Tai”, meaning fishing steps. According to Yudi Jisheng, the name “Diaoyu Tai” were derived from a story of Chinese folklore where a fisherman caught carps that fell into these fishing steps and then climbed to the sky as dragons. This folklore became widely know throughout China and as a consequence, the Diaoyu islands became a famous site.⁷³ Ozaki provides a different reason behind the naming of the islands. This scholar claims that it was the Ryukyans who first named the islands and later told the Chinese who explicitly recorded them with Chinese characters. Ozaki claims that this explanation is the most reasonable considering that the Ryukyans traveled much more frequently to China than vice versa.⁷⁴

Yudi Jisheng has been largely ignored by both Chinese and Western scholars, which most likely has to do with the fact that the book, at least in its entirety, was lost for a long period of time. Suganuma expresses that the book was most likely lost during, or shortly after, 1227 and reappeared between 1772 and 1801 when another geographer, Qian Daxin, learned of its existence and included it in his work. Suganuma further expresses that according to the Chinese tradition of naming islands after Chinese landscape, this had to be recognized by the government. The author concludes that the Diaoyu islands were officially recognized and named during the Southern Song Dynasty (1127-1279) whose government most likely sent an expedition between 1221-1227 to investigate the islands. The officials from the later dynasties, primarily the Ming and Qing, continued to use these names. Unfortunately it’s impossible, from available documentation, to verify exactly when and who first discovered the islands and when and by whom they were first officially named and recognized. Most scholars however seems to believe that they were named and officially recognized prior to the Ming dynasty.⁷⁵

3.2.2 Investiture missions to the Ryukyu

The Ryukyu kingdom⁷⁶ was a relatively small an independent kingdom which, from its capital of Naha, ruled primarily the Ryukyu Islands but throughout its history also parts of the Okinawa, Anami and Sakishima islands. The Kingdom was located south of Japan, northeast of Taiwan and East of Mainland China.⁷⁷ The Ryukyans had long resisted Chinese superiority and had virtually no contact with the outside world but after the establishment of the Ming Dynasty in 1368, China started sending imperial envoys to the Ryukyu to demand that they pay tribute to China. As a result of this, the Ryukyu kingdom became a tributary State to China and this tributary relationship was maintained throughout the Ming and Qing dynasties for about five hundred years. This tributary relationship

⁷² In Chinese Mandarin the Diaoyu islands are usually referred to as Diaoyu Tai, Yu or Dao.

⁷³ Suganuma, *Supra* n. 1, p. 42-45.

⁷⁴ Ozaki, *Supra* n. 27, p 162.

⁷⁵ Suganuma, *Supra* n. 1, p. 42-45.

⁷⁶ Known in Chinese Mandarin as the Liuqiu kingdom.

⁷⁷ Lohmeyer, *Supra* n. 64, p. 46-47

consisted of frequent visits to China by the Ryukyans, the Ryukyu kingdom dispatched over 384 missions to China throughout this period, while China rarely dispatched such missions, only 16 missions during the Ming Dynasty and another 8 during the Qing Dynasty. These imperial investiture missions were called “cefeng” and its commanders were titled “Tianshi”. The Ryukyans sent envoys to pay tribute to the imperial court while China sent envoys every time the installation of a new king occurred and the heir had to pledge loyalty and await China’s consent.⁷⁸

Upon returning from their missions the “Tianshi’s” provided the imperial court with written reports, entitled “Shi Liuqiu Lu” (The Record of the Mission to the Ryukyu Kingdom), containing navigational information, which was later used by subsequent envoys. All these documents were stored in the government archives but records of the first ten missions were destroyed due to a fire in the Fujian archives. Therefore, although the first envoy embarked in 1372, the mission of Chen Khan in 1534 is the first mission with available documentation.⁷⁹ Academics supporting the Chinese claim have placed great emphasis on these reports, since they contend that they not only demonstrate that the islands were first discovered and used by the Chinese as navigational aids, but more importantly, that they contain passages indicating that the islands were regarded as Chinese territory, not only by China but also the Ryukyu Kingdom.⁸⁰

This particular tributary relationship between China and the Ryukyu kingdom materialized in such a way that Ryukyu had to adopt Chinese language, Confucianism and folk music and had to pay monetary tributes to China. In exchange however, the Ryukyu Kingdom became, with China’s blessing, a trading hub and an important channel for various other kingdoms. The relationship between imperial China and the Ryukyu kingdom was strictly hierarchical but it was nevertheless a mutually beneficial and peaceful relationship. There exist no documents indicating that there were any territorial disputes between the kingdoms nor did Ryukyu ever protest the Chinese perception that the Senkaku/Diaoyu islands belonged to China.⁸¹

3.2.2.1 Chen Khan’s mission in 1534

Because the fire in the Fujian archives destroyed all documentation, Chen Khan had to rely on information provided by local people to prepare for his voyage and on the Ryukyans to inform him of the navigational route. The customary way to travel from China to Ryukyu was the so-called compass route, which started in Fuzhou (China) and ended in Naha (capital of Ryukyu) and was so called because it required the envoys to reset their compasses in a certain way as they passed by each island, or other navigational aid, so as to reach the next one.⁸²

⁷⁸ Suganuma, *Supra* n. 1, p. 45-47.

⁷⁹ Suganuma, *Supra* n. 1, p. 45-47.

⁸⁰ Shaw, *Supra* n. 2, p. 44.

⁸¹ Lohmeyer, *Supra* n. 64, p. 46-47.

⁸² Suganuma, *Supra* n. 1, p. 47-51.

Although Kahn was accompanied by Ryukyuan sailors and despite his efforts to gather information in preparation of his trip, he lost his way along the compass route and therefore they never passed the crucial “guojiaojie” (international boundary) between China and the Ryukyu. When Khan saw the mountain Rebi Shan he enquired the Ryukyuan on-board his ship about their current location and was surprised to learn that they had already reached Ryukyu territory. The Ryukyuan further explained that if they continued further east, they would eventually pass the “guojiaojie” between the Ryukyu Kingdom and Japan.⁸³

After returning to Beijing, Khan wrote a book describing his mission and presented it to the Ming Emperor. The book consists of five parts, the second part being the most relevant for the status of the Diaoyu islands. Here Khan provides a detailed description of his voyage. After passing Taiwan on the ninth day he writes the following:

A brisk southerly wind on the tenth day of the voyage propelled the ship forward. We sailed passed Pingjia Shan {Pengjia Mountain}, then *Diaoyu Yu* {*Diaoyu Island*}, *Huangmao Yu* {*Huangwei Island*} and *Chi Yu* {*Chiwei Island*}, using only one day to cover a distance which have normally required three days. The Liuqiu boats lagged far behind due to their smaller sails. Gumi Shan {Gumi Mountain⁸⁴}, {*which therefore, belongs to the Liuqiuan*}, *naishu Liuqiu zhe*, appeared on the horizon on the evening on the eleventh day, with ecstatic Liuqiu envoys singing and dancing out of joy over at last seeing their home...⁸⁵

Ryukyu officials participating in this voyage have recorded taking the same route as the one provided by Khan, so the validity of this mission has been independently confirmed. Khan’s *Shi Liuqiu Lu* provides a number of interesting features. Firstly, the usage of the phrase “guojiaojie” (international boundary) when the mission reached Rebi Shan, referring to the boundary between Japan and the Ryukyu, clearly indicates that both Ryukyuan and Chinese officials had an understanding of approximately where these international boundaries were located. Secondly, both the Ryukyu and the Chinese officials used the Chinese names of Diaoyu, Huangwei and Chiwei Island and described them in the correct order from west to east. It is relevant to mention that Khan’s *cefeng* was the 12th and that the Ryukyuan already had dispatched over 100 of their missions to China. Hence, the fact that both Ryukyuan and Chinese officials referred to them by name and in correct order clearly indicates that this was a mutual understanding and customary practice. Thirdly, both Ryukyuan and Chinese officials noted and described that Gumi Mountain was part of Ryukyu territory. Gumi Mountain is located east of Chiwei Island (the island located furthest to the north east of the Diaoyu islands) and approximately 40 nautical miles from the center of the Ryukyu kingdom. This fact therefore provides a hint that somewhere west of Gumi Mountain

⁸³ Suganuma, *Supra* n. 1, p. 47-51.

⁸⁴ Known in Japanese as Kume Mountain or Kume Hill.

⁸⁵ Suganuma, *Supra* n. 1, p. 49.

lays a sufficiently established international boundary between China and the Ryukyu kingdom.⁸⁶

Many Chinese scholars have interpreted this passage to mean that both the Ryukyuan and the Chinese regarded all islands along the compass route prior to Gumi Mountain (Kume Hill) as Chinese territory.⁸⁷ Ozaki however, is of a different opinion and expresses that although it is evident from this passage that Kume Hill was considered Ryukyuan, the passage never expresses that the islands along the compass route prior to Kume Hill were considered as Chinese territory. It was only after Khan arrived at Kume Hill that he learnt that he was within the territory of Ryukyu and he wasn't aware of when the Chinese territory had ended. Ozaki further expresses that the happiness of the Ryukyuan sailors has nothing to do with passing an international boundary, they were merely happy to see home.⁸⁸ The said scholar concludes that the Chinese legal interpretation is strained; Khan's statement needs to be read literally.⁸⁹

3.2.2.2 Guy Rulin's mission in 1561

Khan's mission was followed by Guy Rulin's who was dispatched in 1561. Rulin utilized the same route as Khan had previously taken and writes the following after having passed Taiwan:

...we passed *Huangmao* {*Huangwei Island*}. On the first of the fifth month, vessels passed *Diaoyu Yu* {*Diaoyu Island*}. On the third, we passed *Chi Yu* {*Chiwei Island*}. *Chiyu zhe, jie Liuqiu defang shan ye* {This is Chiwei Island, where there is a boundary (*jie*) with the Liuqiu Kingdom}. One more day with the wind, we can reach Gumi Shan (Gumi Mountain).⁹⁰

The vice-chief envoy of this Chinese imperial investiture recorded a similar account as the one provided by Rulin. Of particular interest is that he used the exact same sentence; "*Chiyu zhe, jie Liuqiu defang shan ye* (This is Chiwei Island, where there is a boundary with the Liuqiu Kingdom)", in relation to the moment when he passed Chiwei Islands.⁹¹

Two features from Rulin's cefeng are particularly interesting. Firstly, the envoy reversed the order of the islands stating that he first passed Huangwei Island, and later Diaoyu Island and Chiwei Island. Traveling from eastward from Fuzhou to Naha, he should've reached Diaoyu Island before Huangwei Island. A possible explanation for this is that these two islands are located relatively close to each other and it is therefore likely that Rulin mistook himself or didn't pay enough attention to the correct order. Secondly, Rulin makes a clear reference to Chiwei Island as the location of the boundary between China and the Ryukyu kingdom, a statement that Khan never expressed. Chiwei Island is the north-eastern boundary of the Diaoyu islands and is also geographically rather isolated

⁸⁶ Sukanuma, *Supra* n. 1, p. 47-51.

⁸⁷ Shaw, *Supra* n. 2, p. 45.

⁸⁸ Ozaki, *Supra* n. 27, p. 157f.

⁸⁹ Ozaki, Shigeyoshi., *The Senkaku Islands and Japan's Territorial Rights (Part 2)*, p. 2.

⁹⁰ Sukanuma, *Supra* n. 1, p. 51.

⁹¹ Sukanuma, *Supra* n. 1, p. 51-53.

from the rest of the island group. It is also a tiny islet with a steep cliff and its appearance together with its unique geographical location makes it easily identifiable. Hence, the fact that the Chiwei Island wasn't confused with any of the other islands is logical.⁹²

Rulin's investiture mission also performed the ceremonial trench crossing ritual previously described and he wrote that after having conducted this ritual, the wind suddenly started to blow and he was able to pass into the 2000-meter depth. In this passage where he describes the trench crossing from the Diaoyu Islands into Ryukyu kingdom he uses the word "jie" (boundary), which indicates the perception that this trench crossing coincided with the international boundary between China and the Ryukyu kingdom located just beyond Chiwei Island. Sukanuma interprets Rulin's description of the trench and the trench crossing ritual together with the fact that this was the 13th investiture mission and that the Ryukyans already had dispatched over a hundred missions to China along the compass route to be indications of a mutual understanding between the Chinese and the Ryukyans that the trench coincided with the international boundary between these kingdoms.⁹³

Other Chinese legal scholars have also pointed to the above passage as an important argument that Chiwei Island was considered as the Chinese frontier, separating Chinese territory from Ryukyu.⁹⁴ Ozaki on the other hand contends that Rulin's documents only reconfirms the findings of Chen Khan, namely that beyond Chiwei Yu lays Ryukyu territory.⁹⁵ The scholar states that there's ample room for interpretation but the literal meaning is only that Chiwei Yu marks the boundary with Ryukyu, without any reference to where Chinese territory ends.⁹⁶

3.2.2.3 Xiao Chongye's mission in 1579

The 14th imperial investiture mission from China to the Ryukyu kingdom took place in 1579 when Xiao Chongye embarked on his journey. The envoy however lost its way to the Ryukyu kingdom and the heir to the Ryukyu throne had to dispatch a crew to retrieve the Chinese officials at Yebi Shan. Chongye's Shi Liuqiu Lu is somewhat different to the ones provided by previous envoys. The most important difference is that Chongye, for the first time, provided navigational maps over each of the islands that he used as navigational aids along the compass route from Fuzhou to Naha. He described the landscape of these islands as well as the sailing time between them. Chongye was clearly aware that his work was going to be used by later envoys, which is why he was so descriptive. Chongye's work indicate that navigators during this time depended heavily on the prevailing winds and the estimate of time to travel a certain distance and relied on detailed instructions of when and how to reset the compass when they reached a particular island in order to reach the next one.

⁹² Sukanuma, *Supra* n. 1, p. 52.

⁹³ Sukanuma, *Supra* n. 1, p. 52-53.

⁹⁴ Shaw, *Supra* n. 2, p. 46.

⁹⁵ Ozaki, *Supra* n. 27, p 159.

⁹⁶ Ozaki, *Supra* n. 89, p 4.

Diaoyu, Huangwei and Chiwei Island were all included as navigational aids along the compass route with maps detailing their landscape.⁹⁷

In relation to the issue of the location of the boundary between the Ryukyu and China, Chongye stated the following as he was looking for the Yebi Mountain; “On the first of the sixth month, before vessels passed the Yebi Mountain...from this compass route, it took two days for us to ruguo (enter the kingdom)”. This passage is interesting since it reveals the fact there existed an established maritime boundary around the Yebi Mountain. Suganuma suggests that the reason why Chongye (using the phrase rugou) placed the boundary near Yebi Mountain was that he actually meant Gumi Mountain and mistakenly referred to it as Yebi Mountain after the envoy had lost its way to the Ryukyu Kingdom. Suganuma further contends that this practice of referring to the boundary as being situated around Yebi Mountain, also affected later envoys that continued to make the same somewhat incorrect reference.⁹⁸

3.2.2.4 Xia Ziyang’s mission in 1606

Xia Ziyang headed the 15th cefeng in 1606. With relevance to the Diaoyu islands he recorded the following;

...In the afternoon of the twenty-seventh, we passed *Diaoyu Yu* {*Diaoyu Island*}. The next day, we sailed past *Huangwei Yu* {*Huangwei Islands*}. At night, the sea became rough and the ships shook terribly. Day after day, we sailed through an area of *shenheise* {dark blue color} water as if *zhougou* {turbid trench} water or *dianse* {dark blue color}. Alas! It is just like what is recorded in the *Shilu Buyi* {The Addendum of the record on the mission to the Liuqiu}, “*qyou cangshui ru heisjui* {(they) entered the black water from the blue water}!” On the twenty-ninth, when we saw the head of the Gumi Mountain, the Liuquans were extremely happy as if they were at home...”⁹⁹

What Ziyang expressed regarding his voyage back to China is also of relevance. During the journey back the cefeng was faced with heavy rain and the ship developed a leak and when they saw a passing ship they shouted, “There is a ship! Therefore, the distance to China is not too far. Passing from heishui (blackwater) and entering cangshui (blue water), Zhonguo zhi jie {we have crossed the boarder with China}”.¹⁰⁰

Like Chongye, Ziyang also drew navigational maps over the compass route and the Ryukyu kingdom. Ziyang’s book however, provided a more detailed description of the Fuzhou-Naha route. Like Chongye’s work, Ziyang also provided maps over the respective islands within the Diaoyu island group. Three features are of particular interest regarding the Ziyang’s book. Firstly, after having passed Huangwei Island, Ziyang observed an area of dark black color water day after day and he expressly recollected a quotation from the *Shilu Buyi* that the water color changed from dark blue to black, a fact that he verified. Secondly, during his return journey, he referred to the instance when his ship passed from the black

⁹⁷ Suganuma, *Supra* n. 1, p. 53-55.

⁹⁸ Suganuma, *Supra* n. 1, p. 53-55.

⁹⁹ Suganuma, *Supra* n. 1, p. 56.

¹⁰⁰ Suganuma, *Supra* n. 1, p. 56.

water into the blue as “we have crossed the boarder with China”. Thirdly, he expressed that this change of watercolor appeared at the same time as the ship began to cross into the 2000-meter trench, the same location as Rulin previously had expressed the international boundary between China and Ryukyu to lie. The quoted passage by Ziyang raises the question of why Ziyang didn’t mention Chiwei Island on his route to the Ryukyu kingdom. Suganuma suggests that he possibly had the names mixed up and meant Chiwei Island instead of the Huangwei Island.¹⁰¹

Ozaki contends that the voyage of Ziyang provides a strong argument against Chinese ownership. He argues that the happiness expressed by the Ryukyuan on the way the Ryukyu and the happiness expressed by the Chinese on the way back, is related to the belief that the islands were inhabited by Ryukyuan (in the case of Mt. Nan-ji Shan) and Chinese (in the case of Wen Zhou) people. Hence, Ryukyuan sovereignty extended to islands inhabited by Ryukyuan people and Chinese sovereignty extended to islands inhabited by Chinese. Since the Senkaku/Diaoyu islands were uninhabited, they cannot have been regarded as either Chinese or Ryukyuan and were therefore terra nullius.¹⁰²

3.2.3 The Shunfeng Xiangsong logbook of 1403

Shunfeng Xiangsong (May Fair Winds Accompany You) was the main navigational guidebook during the Ming Dynasty and dealt with many navigational routes. It was published in 1403 by an unknown author (or authors) and is by many scholars considered as the earliest certain reference of the Senkaku/Diaoyu islands.¹⁰³ This guidebook provided information on how navigators should navigate by using the compass and reading the stars and therefore provided information not only of navigation but also of geography. Furthermore, the book provided detailed descriptions of relevant ports, including the depth of surrounding waters and submerged reefs and which ports could be used as a refuge in case of bad weather. *Shunfeng Xiangsong* expressed the following in relation to the Diaoyu Yu (Diaoyu island); “berths with a depth of 15 tuo (a tou = 6 inches) on Diaoyu Yu {Diaoyu Island} are good for refuling wood and drinking water”¹⁰⁴. Suganuma suggests that this passage indicates that the Diaoyu Island was a major refuge as well as a port for taking on drinking water and wood for voyagers during the early modern era.¹⁰⁵

Navigation during the early modern period was a difficult task and the navigators had to rely on a variety of tools. Understanding seasons, weather fluctuations and currents of the sea was crucial and *Shunfeng Xiangsong* provided such fundamental information necessary for navigating the sea. The imperial Chinese investiture missions utilized this information, which was one of the reasons why all cefengs departed from

¹⁰¹ Sugauma, *Supra* n. 1, p. 56.

¹⁰² Ozaki, *Supra* n. 27, p. 158-159.

¹⁰³ Shaw, *Supra* n. 2, p 44.

¹⁰⁴ Sugauma, *Supra* n. 1, p. 59.

¹⁰⁵ Sugauma, *Supra* n. 1, p. 59-60.

Fuzhou in May and June and returned in October because the weather conditions was favorable. With reference to the issue of sovereignty over the Diaoyu Islands, Shunfeng Xiangsong is relevant primarily since it clearly indicates that the islands were not merely used as navigational aids, they were also used as ports of refuge during heavy weather and as refueling stations. This further also indicates that the authors of this logbook actually disembarked on the islands or at least that somebody else whose information that they trusted, did so.¹⁰⁶

Ozaki, however critiques the accuracy of the date of publication claiming that it contains references to events in Manila and Nagasaki that took place during the 15760-70' and therefore the book was most likely compiled in the 1570's.¹⁰⁷

3.2.4 Defense manuals

Imperial China had a sea defense system since immemorial times but it was only during the early Ming Dynasty (around 1388) that they established a sea defense system covering its east and southeast coast. The reason behind this establishment was that Japanese pirates had plagued the Chinese east coast, and its adjacent islands. This defense system was later improved in 1435 when the emperor established the Jiubian (the Nine Border Defense Commands) defense system.¹⁰⁸ Chinese scholars contend that the inclusion of the Senkaku/Diaoyu islands into the Chinese defense system, as well as into the defense manuals and the local gazetteers, are proof that Imperial China not only regarded the islands as Chinese territory but also that they exercised State authority over the islands through effective control.¹⁰⁹

The Chinese struggle with the Japanese pirates were intense during the 1500s and the pirates raided many Chinese coastal provinces as well as islands situated in the East China Sea. During this time, Hu Zongxian, a famous Chinese commander, was appointed governor-general and responsible for handling the situation. He, in turn, appointed Zheng Ruozeng, a specialist in military art and geography, to be his military advisor. During his time as military advisor Zheng Ruozeng was able to continue the work of his magnum opus, *Chouhai Tubian*, since his position allowed him access not only to captured Japanese pirates but also to the Ming Government archives including its otherwise confidential reports. Zheng Ruozeng finished *Chouhai Tubian* in 1561 and it became a landmark work in Chinese geographic studies mainly because the Chinese geographers and military strategist had prior to this not focused on the coastal regions. The *Chouhai Tubian* is a comprehensive work and has been praised by both Chinese and Japanese historical geographers.¹¹⁰

¹⁰⁶ Saganuma, *Supra* n. 1, p. 59-61.

¹⁰⁷ Ozaki, *Supra* n. 89, p. 29.

¹⁰⁸ Saganuma, *Supra* n. 1, p. 61-62.

¹⁰⁹ Shaw, *Supra* n. 2, p 55-57.

¹¹⁰ Saganuma, *Supra* n. 1, p. 62-63.

The Chouhai Tubian depicted how the Ming government structured its coastal defense system including certain islands in the East China Sea. The disputed islands were among these islands and were included in the Fujian garrison defense system. Diaoyu Island was placed under the jurisdiction of Luoyuan County and Huangwei Island and Chiwei Island were placed under the jurisdiction of Ningde County.¹¹¹

Chouhai Tubian consists of seven parts and the second part deals with the history of Sino-Japanese relationships. In this section Ruozeng provides another interesting feature, namely that the compass route used to travel from Fuzhou to the Ryukyu kingdom, also could be used as a first leg in the journey from China to Japan. Hence, the Diaoyu islands were not only important navigational aids for Chinese imperial envoys en route to Ryukyu but were also used when travelling between China and Japan.¹¹²

Chouhai Tubian consists of one overall map of China and 72 more detailed maps. In the overall map Taiwan wasn't included nor were the Senkaku/Diaoyu islands.¹¹³ The disputed islands were however included in the more detailed maps, namely maps 7 and 8. Japanese legal scholar Ozaki has criticized both the accuracy of Chouhai Tubian and the legal significance of this work claimed by Chinese scholars. Firstly, he contends that Chouhai Tubian is not to be regarded as a work depicting what constituted Chinese territories. This work merely provides navigational information over the area that Imperial China needed to closely watch in order to properly defend Mainland China, since this was an area commonly plagued by Japanese pirates.¹¹⁴ Secondly, Ozaki criticizes the maps 7 and 8 and the legal significance given to these maps by advocates for the Chinese claim. The scholar claims that these two maps contain geographical errors since Diaoyu Yu and Huangwei Yu are placed in the wrong order and he argues that the reason behind this isn't merely that the author got the order of the names wrong but that he was actually referring to a different island group, namely Mianhu Yu, which is located much closer to Taiwan.¹¹⁵ Ozaki also criticizes Japanese scholar Inoue, who is an advocate for the Chinese claim, who contends that maps 7 and 8 provides solid evidence that the disputed islands were Chinese territory at the time. According to Ozaki, maps 7 and 8 are completely irrelevant for the sovereignty issue since these merely focus on defense strategy.¹¹⁶ Lastly, Ozaki argues that Chouhai Tubian doesn't provide any proof that the naval power of Ming China extended into the waters around the disputed islands. This work, or any other documentation, doesn't mention any naval deployments and therefore one cannot say that the disputed islands were incorporated into China's coastal defense, although they were depicted in the area that needed to be closely watched.¹¹⁷

¹¹¹ Sukanuma, *Supra* n. 1, p. 62-65.

¹¹² Sukanuma, *Supra* n. 1, p. 65.

¹¹³ Sukanuma, *Supra* n. 1, p.103.

¹¹⁴ Ozaki, *Supra* n. 27, p. 160-161.

¹¹⁵ Ozaki, *Supra* n. 89, 9-11.

¹¹⁶ Ozaki, *Supra* n. 89, p 6-8.

¹¹⁷ Ozaki, *Supra* n. 89, p. 6-8.

Regarding Ozaki's last claim, that the disputed islands cannot be regarded as included in China's coastal defense, Taiwanese legal scholar Shaw is of a different opinion. He argues that the Senkaku/Diaoyu islands were integrated in the coastal defense already during the Ming Dynasty and refers to a treatise on military preparations published by Mao Yuanyi in 1621 in which the disputed islands were listed under the section "Atlas of the islands and shores of the coastal region of Fujian". Shaw further contends that the disputed islands remained under China's maritime defense system well into Qing Dynasty and as time went by the military strategic ties to Taiwan increased. Shaw particularly points to a historical document entitled "Records of An Inspection Tour of Taiwan" written by the imperial inspector Huang Shujing during his survey of Taiwan in 1722 as further evidence that the disputed islands were included in the Chinese naval defense system. Shaw also claims that this work proves that Chinese naval forces disembarked on the disputed islands since the following passage was expressed in the section entitled military preparation,

In the north of the ocean behind the mountain (i.e., Taiwan) there lies a mountain named Diaoyutai where ten or more ships can be anchored.¹¹⁸

Another important author for Chinese geography and military strategy was Zheng Shungong who had spent a lot of time in Japan researching Japanese geographical documents and Japanese pirates. He used this information, together with other Chinese information about Japan, to write *Riben Yijian* (A mirror of Japan) in 1565, which focuses on Japan and its surrounding territories such as the Ryukyu kingdom. *Riben Yijian* is relevant to the issue of sovereignty over the Diaoyu islands since it provides a map over the disputed islands as well as a passage regarding the compass route from China to Japan, which reads:

I discovered this route from the person who accompanied Chen Khan when he used to the Liuqiu Kingdom...Penghu is located in the sea of Quanzhou Sub-prefecture, about 160 *li* (one *li* = 0,317 miles)...and *Diaoyu Yu* {*Diaoyu island*} is *xiaodong xiaoyu ye* {part of Taiwan territories}. Passing a small islet...with south wind...at 4 *geng* (a *geng* = 18,642 miles) reached *Huangma Yu* {*Huangwei Island*} and *Chikan Yu* {*Chiwei Island*}.¹¹⁹

Of primary relevance from this section is the expression *xiaodong xiaoyu ye* which Sukanuma, and most other scholars, has been translated to mean that the Diaoyu islands are part of Taiwan's territories.¹²⁰ Chinese scholars generally put a lot of emphasis on this quote claiming that it is indisputable evidence that the disputed islands historically were perceived to belong to Taiwan (this is particularly relevant for the Chinese claim concerning interpretation of the Treaty of Shimonoseki, see section 4.3).¹²¹

Ozaki makes a different translation of this phrase and concludes, after a lengthy discussion, that "Xiaodong" in this case doesn't refer to Taiwan,

¹¹⁸ Shaw, *Supra* n. 2, p. 55-57.

¹¹⁹ Sukanuma, *Supra* n. 1, p. 65.

¹²⁰ Sukanuma, *Supra* n. 1, p. 65.

¹²¹ Shaw, *Supra* n. 2, p. 51.

as generally understood, but to the waters surrounding Taiwan. Therefore he expresses that a more correct translation of Diaoyu Island is “xiaodong xiaoyu ye” would be that Diaoyu island is situated in the waters of Taiwan, not that it is part of Taiwan territory or that it belongs to Taiwan. The scholar furthermore contends that Taiwan was annexed by China in 1684 and Chinese immigration of Taiwan had not begun by the mid 16th century when Riben Yijian was written. This is an undisputable fact but Ozaki takes it further and argues that if Taiwan wasn’t Chinese territory during the Ming Dynasty, nor could the Senkaku/Diaoyu islands have been. The scholar further argues that why would China care about whether the disputed islands geographically belonged to Taiwan if Taiwan wasn’t part of China? The only reasonable explanation to the phrase “xiaodong xiaoyu ye” is therefore that it merely provided additional navigational information, completely unrelated to the sovereignty issue.¹²²

3.2.5 Analysis

The purpose of this analysis is to evaluate whether China acquired sovereignty during the Ming dynasty (1368-1644). However, as stated in the introductory chapter, the aim isn’t to provide a definitive answer, but rather to elaborate on the strength of such an argument. The first issue this analysis needs to deal with is which framework should this issue be analyzed against. One possible framework is the international law concept of “occupation”, which was applicable in Europe during this time. The international law of the 15th and 16th centuries were, at least partly, governed by papal bulls and this institution has to be regarded as completely irrelevant to the present analysis. Even if the papal bulls are taken out of the analysis, the requirements of occupation prevailing during this time haven’t been sufficiently established. The US argued in the Island of Palmas case that Spain’s mere discovery was sufficient to establish title while the Netherlands refuted this claim contesting that discovery wasn’t enough. This issue however was never adjudicated since judge Huber determined the case based on Spain’s lacking effective occupation at the critical date of 1898. Therefore, if an international court or arbitral tribunal in the future would have to deal with the issue of whether Ming China had acquired sovereignty according the international law of the 15th, 16th and 17th century, they would first have to determine exactly what the requirements of occupation were.

Another possible framework to evaluate whether Ming China had acquired sovereignty would be to disregard the international law requirements of occupation and instead focus on the political realities of the EAWO. Through an understanding of these realities it would then be possible to determine whether China’s relationship to the disputed islands could be characterized as an “ancient possession from time immemorial”. Fulfilling this notion would require China to prove that she had (i) considered the disputed islands as her own territory, (ii) treated them as such and (iii) that no other States have contended against such behavior. The reason why it is

¹²² Ozaki, *Supra* n. 89, p. 11-20.

relevant to introduce this alternative framework is that international law was completely unknown to Ming China and hence, requiring China to conduct symbolic rituals recognized in Europe as displaying intent to occupy such as erecting a cross on the territory or reading a declaration upon disembarkation, wouldn't be entirely reasonable.

Having expressed that this alternative framework could be a reasonable tool in adjudicating whether Ming China had acquired sovereignty, a few words needs to be repeated regarding the EAWO. The EAWO was a system more similar to the system prevailing in Europe during pre-modern times wherein law wasn't necessarily separated from moral or religion. The EAWO was a strictly hierarchical system with China as the hegemon and she dictated the framework of international relations. National independence, sovereignty and equality had no place in this system and although China didn't have to rely on treaties or declarations, the parties' respective obligations were sufficiently clear. Moreover, the concept of State territoriality was alien to Ming China since the Chinese Emperor and the Chinese officials ruled men, not territorial space. Therefore, the power of the Emperor went only as far as Emperor-observant people could dwell and little attention was paid to places lacking human habitation. Hence it was impossible for Ming China to establish sovereignty over uninhabited islands in the sense of (euro-centric) international law since such control, was unknown to the Confucian understanding of government control.

With the description of these two alternative frameworks in mind, the analysis now turns to the issue of whether the actions undertaken by Ming China could be said to have met the requirements of either "occupation" or "ancient possession from time immemorial". Before proceeding with this analysis it needs to be stressed that during the Ming dynasty, Taiwan was undoubtedly not part of China and the Senkaku/Diaoyu islands are located northeast of Taiwan and hence further away from Mainland China.

The first issue to address is whether ancient China first discovered and named the disputed islands. Chinese scholars contend that this was the case, referring to Yudi Jisheng of 1221, the Shunfeng Xiangsong logbook and the Chinese folklore tale. Others have claimed that it was the Ryukyans who first discovered and named the islands and later told the Chinese who were only the first to record the names in official documents. The Ryukyans didn't have a written language at the time and therefore there is no available Ryukyuan documentation proving a discovery or naming of the islands and no available Chinese documentation indicate that the islands were actually discovered and named by the Ryukyans. Because of the lack of written Ryukyuan documentation, it will most likely be impossible to prove that they first discovered and named the islands. Whether China will be able to prove that they first discovered and named the islands, doesn't appear to be an equally impossible task. Although no available official documents prove who first discovered them and when the Imperial Court first recognized and named them, most scholars seem to agree that they were officially recognized by China before the Ming Dynasty was established and it isn't entirely unreasonable that China will be able to provide sufficient support

for this claim. If China manages to prove being first to discover and officially naming and recognizing the islands this might be considered enough to establish that China acquired sovereignty during the Ming dynasty but this would be dependent on a court or tribunal using international law and determining that mere visual discovery was sufficient to establish sovereign title.

The second issue to address is whether it can be deduced from the four imperial envoys dispatched during Ming China, together with the Shunfeng Xiangsong logbook and the defense manuals, that China acquired sovereign title under international law or “ancient possession since time immemorial” under the EAWO. From Khan’s envoy it is evident that there existed mutually recognized international boundaries (“guojiaojie”) between China, Ryukyu and Japan. It is also evident that the Rykyuans told Khan, upon inquiry, that Gumi Mountain was Ryukyuan territory. Khan’s Shilu certainly also provides a hint that somewhere west of Gumi Mountain along the compass route was Chinese territory, but his documentation read independently, doesn’t provide any information regarding the sovereignty over the Senkaku/Diaoyu islands.

The Shilu of Rulin contains more relevant information. Literally what this envoy expresses is that beyond Chiwei Island lays a boundary (jie) with the Ryukyu Kingdom. One reasonable interpretation of this boundary reference, advanced by the Chinese side, is that it refers to the boundary between China and Ryukyu. Another explanation, advanced by Ozaki among others, is that Rulin merely expresses that beyond Chiwei Island lays Ryukyu territory. In other words, the fact that the boundary with Ryukyu territory lays beyond Chiwei Island doesn’t necessarily mean that the territory west of this boundary is Chinese territory. Ozaki’s argument is that there could have existed islands that were regarded as terra nullius between China and Ryukyu since Rulin’s Shilu doesn’t mention Chinese territories or that China and Ryukyu were regarded as neighbors.

The Shilu of Chongye is probably the least interesting and relevant of the four Ming envoys described in this paper. The credibility of this Shilu is low primarily because Chongye placed the maritime boundary at Yebi Mountain and not as customary at Gumi Mountain. Regardless of whether Chongye made an honest mistake and got the names of these two mountains mixed up or whether he perceived the boundary to be located at Yebi Mountain, his Shilu doesn’t provide any directly relevant information.

The last cefeng during the Ming Dynasty one headed by Ziyang and of primary significance from this envoy is the journey back to China wherein the Shilu expresses, upon entering the Black Water Trench, “we have passed the boarder with China”. Out of the four Ming cefengs this is the only explicit reference to Chinese territory. It is important to note that this passage was expressed when the watercolor changed and the ship entered the Black Water Trench. Moreover, Ziyang’s Shilu (describing passing the boarder into China as they observed the change of watercolor) read together with Rulin’s ditto (expressing that an international boundary with Ryukyu

was located where the water changed color) provides a strong argument that China regarded the disputed islands as her territory. A reasonable interpretation of reading these two works in conjunction would lead to the conclusion that China and the Ryukyu kingdom regarded themselves as immediate neighbors and that the Black Water Trench was regarded as the international boundary between China and Ryukyu. This perception would in prolongation indicate that the Senkaku/Diaoyu islands were regarded as Chinese territory since they are located west of the Black Water Trench. It has to be stressed however that this interpretation appears rather “China friendly”. None of the described envoys expressly state anything in relation to sovereignty over the disputed islands and only Ziyang’s envoy mentions the Chinese maritime border.

Shunfeng Xiangsong, the Ming Dynasty logbook, is interesting since it mentions that the disputed islands are good for refueling wood and drinking water, which undeniably indicates that Chinese seafarers disembarked on the islands and at least during some point in time used the islands for these purposes and therefore not merely as navigational aids. This work however, doesn’t expressly state that China discovered and named the disputed island or that China regarded them as part of their territory and treated them as such. However, China could certainly make the argument that the inclusion of the disputed islands into this official logbook has legal significance and implicitly means that they regarded the islands as her territory and treated them as such since Chinese seafarers obviously disembarked on the islands prior to the publication of the logbook and most likely also after.

The defense manual Chouhai Tubian, depicted the Chinese coastal defense system during a time when China was struggling with Japanese pirates. It had a general map over China and 72 more detailed maps. The disputed island, along with Taiwan, weren’t included in the general map but they were depicted in maps 7 and 8. Chouhai Tubian illustrated the Senkaku/Diaoyu islands as included in the Fujian garrison defense system. The legal significance of the inclusion of the disputed islands into the Chinese coastal defense has been debated among scholars. The Japanese side has contended that this work doesn’t aim to depict what constituted Chinese territories; it merely provides navigational information for the Chinese navy. Further, it was important for the Chinese to have a detailed description of the area north of Taiwan since this was an area frequently visited by Japanese pirates. Chinese scholars on the other hand have contended that Chouhai Tubian is proof, not only that Ming China regarded the disputed islands as Chinese territory, but also that Ming China treated them as such. This last point has also been refuted by Japanese scholars who argue that no evidence exists of any naval deployments and therefore, the naval power of Ming China cannot be said to have extended into these waters. Chouhai Tubian is probably the strongest independent argument that Ming China both regarded and treated the disputed islands as her territory and this work also lends strength to the argument that China not merely discovered the islands but also conducted such activities necessary to meet the requirements of “occupation” under international law.

Another work that has received a lot of attention in the debate is Riben Yijian. The main contribution of this work to the present dispute is the passage Diaoyu Yu is “xiaodong xiaoyu ye” which by most scholars have been translated to mean that Diaoyu Island “belongs to Taiwan” or “is part of Taiwan territory”. Japanese scholar Ozaki has however refuted this translation claiming that a more appropriate translation would be that Diaoyu Island is situated in the waters of Taiwan. Regardless of which translation is more correct, Riben Yijian has no relevance for the issue this analysis aims to evaluate, namely whether Ming China acquired sovereignty to the disputed islands, since Taiwan undoubtedly wasn’t under Chinese sovereignty during the Ming Dynasty. While on the topic of Riben Yijian, it needs to be mentioned that this work, read together with Chouhai Tubian, creates some confusion. While the former portrays the disputed islands as belonging to Taiwan, the latter depicts them as under the Fujian Garrison defense system. These works were both written during the 1560’s and no available documentation has expressed that the disputed islands went through an administrative change during this time. This confusion however shouldn’t be stretched too far. Later, during the Qing dynasty, Taiwan was often depicted as a prefecture within the Fujian province and it seems reasonable that Riben Yijian referred to a geographical belonging rather than a military strategic, as the case was with Chouhai Tubian.

In conclusion, the issue of whether Ming China acquired sovereignty to the disputed islands could either be dealt with according to the international law framework or a different framework where the political realities of the EAWO are taken into account. Should the issue be adjudicated only through the lens of international law, the court or tribunal first has to address whether mere discovery was sufficient to confer sovereign title during this time. If mere discovery is deemed sufficient, China appears to have a strong case since, although the exact date of discovery and date of official recognition cannot be established, there exists no evidence to prove that China wasn’t first to discover and officially recognize them. If mere discovery isn’t deemed sufficient, China’s claim under international law drastically weakens. Chouhai Tubian appears to be the only document that indicates that the Chinese discovery was coupled with a formal act, in this case inclusion in the military defense system. Since it doesn’t appear to exist sufficient proof that the disputed islands were actually included in maritime patrol routes during Ming China, the Chinese claim under international law additionally weakens. Should the framework of “ancient possession from time immemorial” be used, the sovereignty issue will revolve around whether Ming China considered the disputed islands as her territory and treated them as such. Applying this framework will nevertheless be a complex task and it will revolve around an interpretation of the envoys of Chen Khan, Guy Rulin and Xia Ziyang together with Chouhai Tubian and Shunfeng Xiangsong. It appears that with a China friendly interpretation of these documents, it is possible to conclude that China regarded the islands as part of its territory and, primarily based on Chouhai Tubian, also treated them as such. However, from a literal interpretation of these documents, it is difficult to argue that they show that China even regarded the islands as her

territory. Only one envoy actually mentions the Chinese maritime boundary and it appears to be a strained interpretation of historical facts to argue that it was an established perception that China regarded the territory west of Gumi Mountain as part of China. Moreover, the legal significance of Chouhai Tubian is difficult to evaluate. The fact that the disputed islands were included in the Fujian Garrison provides a strong argument that China regarded the island as Chinese and used them as such but it is also possible to interpret this work as not depicting what constituted Chinese territories but merely provided military strategic information. A similar reasoning is relevant for Shunfeng Xiangsong; it is doubtful whether this work expresses anything in relation to Chinese sovereignty.

3.3 The islands during the Qing dynasty

3.3.1 Investiture missions to the Ryukyu

The Ming Dynasty was overthrown by the Qing Dynasty in the middle of the 17th century (officially in 1662), but the civil war that eventually led to this regime change lasted for decades, leaving China in social disorder. Imperial Japan took advantage of this situation and subdued the Ryukyu kingdom into becoming a tributary State in 1609. From thereon and lasting until modern Japan in late 19th century invaded Ryukyu, the kingdom paid tribute to two emperors. This is a major change of circumstances to keep in mind when discussing the relationship between Qing China and Ryukyu. That being said, the relationship between China and Ryukyu remained largely unchanged. Many of the customs that had been developed during the Ming Dynasty were maintained during the Qing Dynasty. The Ryukyu kingdom was however faced with great economic burdens as a consequence of the Japanese invasion and Japan gradually increased its political influence over the Ryukyu kingdom during the Qing dynasty.¹²³ Chinese investiture missions to Ryukyu continued throughout the Qing dynasty and similar to the Ming Dynasty these cefengs also recorded their journeys and provided the imperial court with Shilus. These books became more accurate and more comprehensive, with time.¹²⁴

3.3.1.1 Zhang Xueli's mission in 1663

The first envoy of Qing China to Ryukyu was dispatched in 1663, only one year after the Ming Empire was officially overthrown, and headed by Zhang Xueli. The documentation provided by this mission however contains no information regarding passing any islands or mountains along the compass route from China to the Ryukyu kingdom. The reason for this is that Xueli and his envoy lost its way. When the envoy realized they had drifted away to Beishan Island, a recognized boundary between Japan and the Ryukyu kingdom, they were overjoyed. Prior to this Xueli observed the following;

¹²³ Sukanuma, *Supra* n. 1, p. 68-71.

¹²⁴ Sukanuma, *Supra* n. 1, p. 68-71.

The color of the water began to change from blue to *dark blue*. Hey! We entered the “ocean”, shouted the captain. There is a *white water line* crossing between south and north. “Here, Therefore, is *jiezhongwai* {*the boundary between China and foreign country*},” stated the captain.¹²⁵

The fact that it is uncertain whether the above passage is a description of the area surrounding the Diaoyu islands is certainly damaging to the credibility of Xueli’s records. Ozaki for instance expresses that the area described by Xueli must be located much closer to Mainland China, just past the Taiwan Strait.¹²⁶ Regardless of this uncertainty, the passage nevertheless provides important information. Although the envoy doesn’t mention any islands or mountains, the description expresses that there existed a link between the changing watercolor and the international boundary between China and the Ryukyu kingdom. Hence, even if Xueli wasn’t able to find the disputed islands, he was looking for the trench surrounding them and expressing his perception that the changing watercolor equated the international boundary.¹²⁷

It is of relevance to note that Xueli was appointed as chief envoy in 1654, nine years prior to his actual departure. The reason for this delay was the on-going civil war in China. The envoy dispatched only one year after the Ming Dynasty had been officially ousted because it was considered a crucial task since the Ryukyans had requested it for a long time. The Qing government had however not fully organized the national archives and hence Xueli had less navigational guides at his disposal, which is probably a largely contributing factor as to why he drifted further away from the compass route than his predecessors. Still he did equate the changing watercolor with the international boundary, which indicates that this might have been an established practice.¹²⁸

3.3.1.2 Wang Ji’s mission in 1683

The next imperial mission was dispatched in June 1683 and headed by Wang Ji and his envoy dispatched the same month as China sent a large fleet to western Taiwan, seeking to annex the island. China officially annexed western Taiwan in 1684 and from then on gradually also incorporated the eastern part.¹²⁹ Ji was on his cefeng accompanied by Ryukyuan officials since the previous envoy had lost its way. Because of the navigational help provided by the Ryukyans, it only took Ji three days to reach Naha, which was much faster than any previous envoy. In his report to the Qing court, Ji expresses the following;

According to navigation maps we should see Xiaoliuqiu, Jilong Yu and Huaping Yu after passing Dongsha Shan. However, we observed Pengjia Shan {Pengjia Mountain}, but no other mountain in the early morning of the twenty-fourth. After the ships passed *Diaoyu Yu* {*Diaoyu Island*}, we sailed so fast that the ships streaked across the sky. On the twenty-fifth, we were supposed to see Huangwei Yu before Chi Yu. For some unknown reason, we arrived at *Chiwei Yu* {*Chewei Island*}

¹²⁵ Sukanuma, *Supra* n. 1, p. 72.

¹²⁶ Shigeoyoshi Ozaki, *The Senkaku Islands and Japan’s Territorial Rights (Part 3 – Final)*, p 6.

¹²⁷ Sukanuma, *Supra* n. 1, p. 70-72.

¹²⁸ Sukanuma, *Supra* n. 1, p. 70-72.

¹²⁹ Ozaki, *Supra* n. 130, p. 2-4.

without passing by *Huangwei Yu* {*Huangwei Island*}. In the evening, the ships went through the *jiao* or *guo* {trench} (to celebrate the *haishenji* {ritual to the sea god} or *gougouji* {trench-crossing ritual}. Along with rice live pigs and sheep were sacrificed to the sea god. What does *jiao* mean? Asked Wang Ji. “This means that there is a *zhongwai zhi jie* {*the boundary between China and foreign country*},” replied the captain. How do you distinguish the *jie* {*boundary*}?” asked Wang again. “I believe the *jie* is located here. But this does not mean that everyone can guess this location. Nor is my belief irresponsible,” replied the captain...¹³⁰

The most significant feature of Ji’s records is that his description of the trench and international boarder crossing is more detailed than the one provided by previous envoys, such as Khan, Rulin and Ziyang who also recorded having passed the same trench. Of particular relevance is the awareness the captain shows about the location and implication of the “*jiao*”. Firstly, Ji’s report reveals that the conversation between Ji and the captain took place when the ships had passed Chiwei Island and entered the Okinawa trench, which we know today is an accurate description. Secondly, Ji specifically asks the captain what “*jiao*” meant in this circumstance and was told it meant the boundary between China and foreign country. This clearly indicates that this was the established understanding among the seafaring Chinese and Ryukyuan at the time. Thirdly, the captain also articulates how the boundary is distinguished, expressing that not everyone can point out the exact location, it demands experience of traveling this route but that he with a reasonable confidence can locate the boundary.¹³¹

Shaw expresses that Ji’s clear description that the Black Water Trough equated the boundary between China and foreign country, makes it possibly the strongest case, among the envoys, in favor of the Chinese claim.¹³² Ozaki however is of a different opinion and he is critical of both the translation and the Chinese legal interpretation of Ji’s records, claiming that it’s too far-fetched. Firstly, he refutes the above translation “the boundary between China and foreign country” and claims that it should instead be understood as “the boundary between inner and outer” and that it doesn’t refer to a boundary in a legal sense. Secondly, this boundary passage isn’t expressed by Ji himself but by a fellow traveler and Ji merely wrote it down without adding any personal comments. Therefore Ozaki contends, this cannot be attributed to Ji nor to Qing China and further, it cannot be regarded as intent to occupy. Lastly, Ji’s boundary reference failed to catch on by later envoys, which is additional proof that China didn’t have intent to occupy, according to Ozaki.¹³³

3.3.1.3 Xu Baoguang’s mission in 1719

The next imperial mission was conducted in 1709 and headed by Xu Baoguang who punctiliously described the voyage from China to Ryukyu. In his *Shilu*, the voyage along the compass route to Ryukyu was described as follows;

¹³⁰ Suganuma, *Supra* n. 1, p. 73.

¹³¹ Suganuma, *Supra* n. 1, p. 72-74.

¹³² Shaw, *Supra* n. 2, p. 47-49.

¹³³ Ozaki, *Supra* n. 126, p. 3-11.

On the twenty-fourth, two big islets were visible...passing Jilong Shan, we did not see other islets, such as Huaping and Pengjia...On the twenty-seventh, after traveling 2 *geng* (a *geng* = 18.642 miles), we should have sighted Diaoyu Tai, Huangwei, and Chiwei Island, but we did not see any of these islands...On the twenty-eighth, “this is not Gumi; it must be Yebi Mountain, which is located in northwest of our kingdom,” stated the Liuquian minister.¹³⁴

The above passage doesn't provide any useful information regarding where the Chinese and Ryukyuan officials perceived the international boundary to lie. Even though Bauguang was accompanied by Ryukyuan who provided navigational directions, they missed many navigational aids, such as the Diaoyu islands. Bauguang's Shilu however, also contains a reference to Shinan Kogi (Broad Interpretations of navigation Guide) written by the famous Ryukyuan geographer Tei Junsoku. The compass route between Fuzhou and Naha is in the relevant sections of this work described as follows:

After traveling 10 *geng* (a *geng* = 18,642 miles), ships pass Jilongtou (Jilong Island)...then Huaping Yu, and Pengjia Shan. After sailing past 10 *geng*, vessels pass *Diaoyu Tai* (*Diaoyu Island*)... traveling 4 *geng*, and reach *Huangwei Yu* (*Huangwei Island*). After traveling 10 *geng*, ships pass *Chewei Yu* (*Chiwei Island*)...After sailing past 6 *geng*, vessels will arrive at Gumi Shan, where *Liuqiu xinangfang jieshang zhenshan* (*is located the southwest boundary between the Liuqiu Kingdom and China*). Heading Machi...ships finally reach Naha Ko (Naha Port) of the Liuqiu...¹³⁵

The most interesting feature about Bauguang's usage of this quotation is the wording immediately after the name Gumi Mountain, namely; “is located the southwest boundary between the Liuqiu Kingdom and China”. Previous envoys had expressed that Ryukyuan territories ended with Gumi Mountain but Bauguang's quote clearly states that China and Ryukyu were immediate neighbors, in other words there could not have been any terra nullius islands located between China and Ryukyu and since the Diaoyu islands were located west Gumi Mountain, beyond Ryukyuan territories they have to have been perceived as Chinese territory.

Ozaki refutes this legal interpretation. Firstly, he states that the translation is incorrect; the passage relating to Gume Mountain should instead be translated as “a guardian island, which stands as a southwestern boundary of Ryukyu”.¹³⁶ He further states that this translation only reconfirms the findings of previous envoys such as Khan and Rulin without explicitly dealing with sovereignty of the disputed islands.¹³⁷ Additionally, the scholar also expresses that the Chinese are misinterpreting Bauguang who was influenced by Ryukyuan feng shui scholars. His reference to southwestern boundary doesn't refer to an area “above the border”, as one might assume in a modern legal-oriented reading. Instead, “above” refers

¹³⁴ Saganuma, *Supra* n. 1, p. 75.

¹³⁵ Saganuma, *Supra* n. 1, p. 76.

¹³⁶ Ozaki, *Supra* n. 27, p. 159.

¹³⁷ Ozaki, *Supra* n. 27, p. 159.

to the mountain needed to protect the capital according to feng shui teachings, not a legal demarcation of boundaries.¹³⁸

When reading this passage in Bauguang's Shilu it should also be kept in mind that the person whom he was quoting, was a famous Ryukyuan geographer. Hence, for the first time a truly Ryukyuan perspective is added. It should be stressed however that doubts regarding the accuracy of the author of this quote has been raised. It has been expressed that the original Shinan Kogi didn't contain such a passage and that this passage must have been written by Tei Junsoku but in the Shilu of Bauguang. Suganuma suggests that it doesn't really matter whether it was Bauguang or Tei Junsoku who wrote this cited passage since it nevertheless provides a mutual understanding between the Chinese and Ryukyuan officials about the location of the international boundary.¹³⁹

In addition to a detailed navigational guide, Bauguang's Shilu also included a comprehensive chart over the Ryukyu kingdom. In this map he depicted the Ryukyu kingdom as comprising of 36 islands, with none of the Senkaku/Diaoyu islands included.¹⁴⁰

3.3.1.4 Zhou Huang's mission in 1756

Xu Bauguang's mission was followed by the fourth cefeng under the Qing Dynasty and was headed by Zhou Huang's in 1756. This envoy enriched the Chinese understanding of the Ryukyu kingdom with important historical, political, social and cultural knowledge and provided Qing China with the names of the Ryukyu Kingdoms' major cities. Additionally, Huang's Shilu contained maps of the compass route and described the journey to and from the Ryukyu Kingdom. The most relevant section of this description reads as follows,

{the Ryukyu Kingdom} is surrounded by sea. To the west of its surrounding sea is the black water trough, *which delimits Fujian Waters*. To set sail from Fujian to reach the Ryukyu, one must advance through the blue waters and then *cross the black waters*.¹⁴¹

When it comes to the description of Huang's own journey, the most relevant part describes reaching Diaoyu Island during the day and celebrated the "guogouji" (trench-crossing ritual) during the night. On the way back to China he celebrated the "guogouji" again, this time as he just had passed Gumi Mountain.¹⁴²

Taiwanese legal scholar Shaw interprets the block quote above to demonstrate that the Black Water Trough served as the natural boundary that divided Ryukyu territory from Chinese and since the disputed islands are located westward of the trough, they were clearly within Chinese

¹³⁸ Ozaki, *Supra* n. 126, p. 11-12.

¹³⁹ Saganuma, *Supra* n. 1, p. 74-77.

¹⁴⁰ Saganuma, *Supra* n. 1, p. 77.

¹⁴¹ Shaw, *Supra* n. 2, p. 49.

¹⁴² Saganuma, *Supra* n. 1, p. 77-78.

territory.¹⁴³ Suganuma takes a similar stance and contends that although Huang's work doesn't provide any new information regarding the ownership it is nevertheless important since it further strengthens the Chinese argument that there existed a recognized international boundary west of Gumi Mountain and east of the Diaoyu islands.¹⁴⁴ Ozaki however, refutes that Huang's work has any relevance for the sovereignty over the disputed islands. He particularly criticizes Chinese scholars who argue that the Black Water Trough should be regarded as the international boundary and expresses that this interpretation is exaggerated and that he misreads the poetic rhetoric expressed by Huang.¹⁴⁵

3.3.1.5 Zhao Xin's mission in 1866

Zhou Huang's mission was followed by Li Dingyuan's in 1801 and later by Qi Kun's in 1809. Out of the Qing Dynasty envoys, these two are the least relevant to discuss since, although they reiterated what previous envoys had expressed, provided no new information relating to the status of the disputed islands, and will therefore not be presented in this paper. After these cefengs, the next envoy dispatched in 1839 and headed by Lin Hongnian. The documentation from this envoy has however been lost but certain sections are mentioned in Zhao Xin's *Shilu* from his imperial investiture of 1866, which was the last cefeng of imperial China. Both these missions will be dealt with under this heading. Before discussing these missions, it needs to be stressed that Japan attacked the Ryukyu Kingdom in 1864 and began setting up the Okinawa Prefecture and incorporating the Ryukyu kingdom. Hence, the Japanese influence over the Ryukyu kingdom increased drastically during this period.¹⁴⁶

The following passage comes from Xin's *Shilu* but refers to Hongnian's mission of 1839 and what he expressed regarding his journey along the compass route,

On the sixth, our ships passed *Diaoyu Shan* {*Diaoyu Island*} ... heading *Jiuchang Dao* (J: Kuba Shima) {*Huangwei Island*}.... In the morning of the seventh, our vessels sailed past *Jiuchang Chidao* (J:Kuba Sekijima) {*Chiwei Island*}. On the ninth, ships entered Naha Port¹⁴⁷

A similar passage is also provided in the section that deals with Xin's own voyage and reads as follows,

On the eleventh, we passed *Diaoyu Shan*... heading toward *Jiuchang Dao* (J: Kuba Jima) {*Huangwei Island*}.... On the twelfth, our vessel sailed past *Jiuchang Chidao* (J:Kuba Sekijima) {*Chiwei Island*}... and entered Naha Port on the twenty-first.¹⁴⁸

The most interesting feature of these quoted passages is the appearance of Japanese words such as "shan". Suganuma suggests that the reason why Xin somewhat changed the names of the islands has to do with the fact that his

¹⁴³ Shaw, *Supra* n. 2, p. 49.

¹⁴⁴ Suganuma, *Supra* n. 1, p. 77-78.

¹⁴⁵ Ozaki, *Supra* n. 126, p. 13-15.

¹⁴⁶ Suganuma, *Supra* n. 1, p. 81-84.

¹⁴⁷ Suganuma, *Supra* n. 1, p. 82.

¹⁴⁸ Suganuma, *Supra* n. 1, p. 82.

records were compiled by Guo Boyin in 1882 and by that time the Ryukyu kingdom had already been completely annexed by Japan. Suganuma further suggests that since China and the EAWO was beginning to fall apart due to the arrival of western colonialism, China had started to give up its hegemonic position and abandoning its tributary States in order to focus on the events taking place in Mainland China and hence, Xin wasn't given sufficient time to prepare. As a consequence of the lacking preparations, the envoy had to ask the escorting Ryukyuan about the names of the islands and they simply answered with names influenced by Japanese.¹⁴⁹

While Suganuma only interprets the increased usage of Japanese names as a natural consequence of increased Japanese influence and gives it no legal significance, Ozaki makes a different interpretation. He argues that the Chinese usage of Japanese names is undisputable proof that China didn't consider the islands as part of Chinese territory and that China had no intention to annex them.¹⁵⁰

3.3.2 Local Gazetteers or Annals

Local Gazetteers (sometimes also referred to as annals) were written throughout the Chinese provinces especially during the Qing Dynasty. Generally speaking they were official records covering a broad variety of matters primarily focusing on the regional history and geography of the provinces. Such gazetteers were also written for Fujian Province and its subsidiary, Taiwan Prefecture. Shaw claims that a number of these Gazetteers contain descriptions that indicate the usage of the disputed islands by the Chinese naval forces. The author particularly points to "Revised Gazetteer of Taiwan Prefecture" from 1747, "Subsequent Revision of the Gazetteer of Taiwan Prefecture" from 1764, "Records of Taiwan" and "Subsequent Revision of the Gazetteer of Taiwan Prefecture" from 1764 and Revised Gazetteer of Taiwan County from 1752. Additionally Shaw points to "Revised Gazetteer of Fujian Province" by Chen Shouqi from 1871, which, he claims, went further than previous Gazetteers and indicated the precise administrative division to which the Senkaku/Diaoyu islands belonged and placed the disputed islands under the department that is today called Yilan County. Advocates for the Chinese side claim that these gazetteers demonstrates not only that China regarded the disputed islands as Chinese territory but also that they are evidence of Chinese effective control and exclusive usage.¹⁵¹

Ozaki on the other hand, has contended that there are Gazetteers from Qing China wherein the disputed islands aren't depicted. The Japanese scholar particularly points to the 1684 Fujian Tongzhi, which was compiled by the Qing Court but doesn't mention the disputed islands and the 1871 "Chongzuan Fujian tongzhi", claiming that the same holds true for this work. This last part is interesting since the 1871 "Chongzuan Fujian

¹⁴⁹ Suganuma, *Supra* n. 1, p. 81-84.

¹⁵⁰ Ozaki, *Supra* n. 126, p. 28-29.

¹⁵¹ Shaw, *Supra* n. 2, p. 57-59.

tongzhi” is the same work as the “Revised Gazetteer of Fujian Province” from 1871. Hence, Shaw and Ozaki seem to be in direct disagreement regarding whether the disputed islands were depicted in this work. Ozaki further claims that, in the first five annals of Taiwan (1696-1764) Keelung is indicated as the northern limit of Taiwan which means that not even Pengjia, Huaping and Minhua are portrayed as being Chinese territory, although they are located much closer to both Taiwan and Mainland China than the Senkaku/Diaoyu islands and these islands were also used as navigational aids along the compass route.¹⁵²

The fact that Shaw and Ozaki are in disagreement regarding the Gazetteer from 1871 is interesting but the author isn’t able to investigate this matter further and the issue will therefore not be developed further. Given that the rest of the claims put forward by Shaw and Ozaki are factually true and not merely interpretations to suit their respective interests, it appears as though some of these Gazetteers included the disputed islands, and some didn’t. Therefore it is most likely impossible to deduce an established perception or practice regarding whether Qing China regarded the disputed islands as their own territory and treated them as such, merely from these Gazetteers and Annals. It would be far-fetched to claim that the fact that they weren’t included in every Gazetteer indicates that China didn’t regard the islands as Chinese but it would be equally far-fetched to claim that the fact that they were included in some Gazetteers means that it was an established perception that China regarded the islands as Chinese. Therefore, this issue will not be further elaborated upon.

3.3.3 Chinese academic research

There are three Chinese academic works worth mentioning under this section. The first was written by Pan Xiang who was a researcher, and later a professor, at the Chinese Imperial College who mainly taught Chinese philosophy to Ryukyuan bureaucrats. In 1764, he completed *Liuqiu Ruxue Jianwen Lu* (Eyewitness Account of the Liuqiuan Studying at the Imperial College), which was based on an extensive and comprehensive research of both Chinese and Ryukyuan archives. This work provides thorough historical and geographical information about the Ryukyu Kingdom as well as on the compass route Fuzhou-Naha. This study provides the following passage relating to the meaning of the “heishuigou” between China and the Ryukyu Kingdom,

*Heishuigou {black-water trench} is the Haijie {marine boundary} between Fujian and the Liuqiu Kingdom. From Fujian to Liuqiu, ships must pass through the Heishui {black-water}, which has often been called cangming {dark blue water in the East Sea} since ancient times. Also it is called dongming {Eastern Deep}.... Nevertheless, heishuigou is Zhongwai Jieshui {the boundary water between China and foreign country}. Before crossing this gou, people must celebrate the festival.*¹⁵³

¹⁵² Ozaki, *Supra* n. 126, p. 22.

¹⁵³ Saganuma, *Supra* n. 1, p. 85.

Since this book was written using both Chinese and Ryukyuan sources it has to be considered an authoritative source, which expresses both the Chinese and the Ryukyuan perceptions. Suganuma advocates that this passage “undeniably confirms that there was an international boundary between China and the Liuqiu, which was distinguished by the heishugou, located between Chiwei Island and the Gumi Mountain”.¹⁵⁴

The second Chinese academic book is *Taihaishi Chalu* (Record on the mission to Taiwan), written by Huang Shujing in the 1720’s. This work is regarded as the best early description of Taiwan, but it also provides some information regarding the Diaoyu islands. The military section of this book describes two relevant features. Firstly, that the Senkaku/Diaoyu islands had a position within Taiwan’s maritime patrol route.¹⁵⁵ Secondly, it expresses that “There is a *shan* whose name is *Diaoyu Tai* {*Diaoyu Island*} in the north, and it can hold ten huge ships”.¹⁵⁶ Ozaki is critical of the legal relevance attributed to *Taihaishi Chalu* by Chinese scholars. He contends that eastern Taiwan wasn’t even under China’s control when this work was written and hence the argument that the disputed islands, which are located further northeast, should’ve been Chinese is very suspect. Ozaki further expresses that Huang Shujing never even travelled to eastern Taiwan nor to the Senkaku/Diaoyu islands, he only quoted other travellers in order to impress his readers and therefore the passage about ten large ships being able to anchor there is a ridiculous claim without facts behind it.¹⁵⁷

The third academic book is *Huangchao Zhongwai Yitong yu Tu* (Geographical Atlas of China and foreign Countries in the Qing Dynasty), from 1862. This work clearly marked with Chinese names all places up until Gumi Mountain, only then did the map also incorporate Japanese names.¹⁵⁸ Suganuma suggests that this means that all islands prior to the Gumi Mountain along the Fuzhou-Naha compass route belonged to China and the islands located beyond this point belonged to Ryukyu. The author further expresses that this atlas also depicts the disputed islands as part of the Chinese coastal defense system.¹⁵⁹ Ozaki makes a different interpretation and states that the inclusion of the disputed islands in this map is irrelevant for the issue of whether they were Chinese territory since the fact that they were described with Chinese characters proves nothing in this regard.¹⁶⁰

3.3.4 Non-Chinese documents

There exists a few non-Chinese works that relate to the status of the disputed islands but since this paper is limited in scope, the author has chosen only to include one such document since it is most relevant. Hayashi Shihei was a famous Japanese geographer who published *Sangoku Tsuran*

¹⁵⁴ Suganuma, *Supra* n. 1, p. 85.

¹⁵⁵ Lee, Ivy., *Competing Claims to the Diaoyu/Senkaku Islands under International Law: A Critical Evaluation*, p 50.

¹⁵⁶ Suganuma, *Supra* n. 1, p. 86.

¹⁵⁷ Ozaki, *Supra* n. 126, p. 18f.

¹⁵⁸ Chiu, *Supra* n. 3, p 15.

¹⁵⁹ Suganuma, *Supra* n. 1, p. 86.

¹⁶⁰ Ozaki, *Supra* n. 126, p. 24.

Zusetsu (An illustrated Account of the Countries) in 1785. This work is one of the earliest recordings of the disputed islands in Japanese literature and it became a very important geographical book also outside Japan. With reference to the disputed islands, this work is relevant since it contains an analysis of the Ryukyu Kingdom, depicting it as a kingdom constituting of 36 islands with none of the disputed islands included.¹⁶¹ Further, Sangoku Tsuran *Zusetsu* contained maps using latitude and longitude and the author used a four pigment coloring method to indicate to which country different territories belonged. The Senkaku/Diaoyu islands were colored red, indicating Chinese ownership. Some Japanese scholars have refuted the importance of this work by contending that Shihei "mechanically" colored the disputed islands red since he used Chinese imperial records. Chinese scholars on the other hand content that this circumstance further demonstrates the authoritativeness of these records.¹⁶² Suganuma suggests that this Japanese work "reassured and reconfirmed" the Chinese ownership of the disputed islands.¹⁶³ Shaw expresses that supporters of the Chinese claim have frequently invoked this work as evidence that the disputed islands were well recognized as Chinese territory also by the Japanese.¹⁶⁴

3.3.5 Analysis

The analysis of whether China acquired sovereignty during the Ming Dynasty was initiated by a discussion regarding which framework this issue should be evaluated against. A similar discussion is also relevant concerning Qing China but the situation during this era is somewhat different in relation to Qing China. The reason for this is that international law was introduced and accepted in East Asia during the mid 19th century and therefore, applying this framework is more reasonable during the Qing era. That being said, it should be kept in mind that Qing China and East Asia were still fundamentally influenced by the EAWO throughout the 19th century and therefore, a just and reasonable adjudication would need to take the political realities of this system into account and therefore, an analysis focusing on whether Qing China fulfills the requirements of "ancient possession since time immemorial", which focuses on whether Qing China had (i) considered the disputed islands as her own territory, (ii) treated them as such and (iii) that no other States have contended against such behavior, is still relevant. Another aspect, which deserves mentioning is that, the prerequisites of occupation are sufficiently clear during the late Qing dynasty. The concept of effective occupation, focusing on taking physical possession of land and exclusion of others, was established as customary international law around the mid-19th century and was definitely established before the Berlin African Conference of 1885.

Before beginning the analysis of whether Qing China acquired sovereignty over the islands, the Taiwan situation needs to be emphasized. Twenty years

¹⁶¹ Saganuma, *Supra* n. 1, p. 88-89.

¹⁶² Shaw, *Supra* n. 2, p. 52-55.

¹⁶³ Saganuma, *Supra* n. 1, p. 88-89.

¹⁶⁴ Shaw, *Supra* n. 2, p. 52-55.

after the Qing Dynasty was officially established, China began annexing Taiwan and soon acquired control over the western part. After this, Qing China gradually incorporated also the eastern part of Taiwan but it took China several decades to completely annex Taiwan. What the incorporation of Taiwan means regarding the sovereignty of the Senkaku/Diaoyu islands is subject to scholarly debate. Taiwanese scholar Shaw has contended that Qing China automatically acquired sovereignty over the disputed islands following the complete annexation of Taiwan. This argument is based on the idea that the disputed islands were considered as belonging to Taiwan. The only source confirming this perception is Riben Yijian and its passage that Diaoyu Island is “xiaodong xiaoyu ye” (part of Taiwan territories). Japanese scholar Ozaki has criticized both this translation and the argument made by Shaw claiming that only if it is “unequivocally established” that the Senkaku/Diaoyu islands were geographical adjuncts of Taiwan, would Shaw’s argument have any bearing.¹⁶⁵ Ozaki’s contention on this matter appears reasonable, it is far-fetched to argue that just because China acquired Taiwan, they also acquired the disputed islands. Another circumstance that needs to be stressed is that the issue of whether Qing China acquired sovereignty over the disputed islands prior to the Japanese incorporation in 1895, needs to be evaluated through an accumulation of the acts undertaken by China from time immemorial until 1895. Therefor the analysis conducted in relation to Ming China is relevant also under this section and the circumstances that strengthen the Chinese claim of sovereignty should be added to this analysis.

The first imperial envoy of Qing China was Zhang Xueli who disembarked just after the Ming Dynasty had been officially overthrown and twenty years before China began to annex Taiwan. The cefeng lost its way and didn’t report passing any of the customary navigational aids such as the Diaoyu islands but the Shilu expresses, as the envoy enters the area of changing watercolor, that they must be at “the boundary between China and foreign country”. The fact that Xueli’s location is uncertain indisputably impedes on the legal significance that can be deduced from it. However, if Xueli’s Shilu is read together with Rulin’s and Ziyang’s, it provides a strong case that it was an established perception that the change of watercolor equated a recognized international boundary between Ryukyu and China.

Wang Ji’s mission was dispatched the same months as China began annexing Taiwan. In his Shilu Ji reports that after passing Chiwei Island they passed through the “jiao” (trench) and celebrated the trench-crossing ritual. Upon crossing the trench he inquired to the captain what “jiao” meant and was told it was “the boundary between China and foreign country”. Upon being further inquired about how he could distinguish the “jie” (boundary), the captain replied that he believed it was here, not everyone could guess the location but his belief wasn’t irresponsible. Out of the cefengs analyzed so far, Ji’s provides the strongest independent argument in favor of the Chinese claim. Ji correctly describes the location of the trench

¹⁶⁵ Ozaki, *Supra* n. 126, p. 2. See also Ozaki, *Supra* n. 89, p. 22.

beyond Chiwei Island and the captain expresses that the trench equates the boundary between China and Ryukyu and that he, through his experience of travelling this route, could locate the boundary with reasonable accuracy. The only limiting feature of Ji's description is that it is the captain who informs Ji about these matters, which it indicates that this maritime boundary was recognized by the seafarers rather than by Chinese officials.

Xu Baoguang's *Shilu* contains two elements; a description of his own voyage and a reference to the Ryukyuan work *Shinan Kogi*. The records from his own journey provides no relevant information regarding the status of the disputed islands but his reference to *Shinan Kogi* reveals that at Gumi Mountain "is located the southwest boundary between the Liuqiu Kingdom and China". This passage implies that China and Ryukyu were immediate neighbors and that the disputed islands were perceived as Chinese territory. The fact that doubts have been raised regarding whether Baoguang was actually quoting *Shinan Kogi* or whether the Ryukyuan author of this work was actually writing in Baoguang's *Shilu* certainly creates some uncertainty. However, this shouldn't be stretched too far since it expresses a mutual understanding between Chinese and Ryukyuan officials.

Similar to the documentation provided by Baoguang, Zhou Huang's *Shilu* contained one section about his own journey and one general section, among others dealing with the compass route. In the section dealing with his own journey Huang describes performing the trench-crossing ritual both on the way to Ryukyu (as they had passed Diaoyu Island) and on the way back to China (as they had passed Gumi Mountain). Read independently this passage doesn't provide any relevant information regarding sovereignty but read in the light of previous envoys which had equated entering the Black Water Trench and visually recognizing the change of watercolor with the international boundary between China and Ryukyu, Huang's work additionally strengthens the Chinese claim. The general section is arguably more interesting and relevant since it explicitly states, "To the west of its {Ryukyu} surrounding sea is the black water trough which delimits Fujian Waters" which undoubtedly indicates that the disputed islands were regarded as Chinese territory.

Zhao Xin's *Shilu*, which also contains information about Lin Hongnian's voyages three decades earlier, contains no information relevant to the sovereignty issue. However, it is interesting to note that the appearance of Japanese names and language in this *Shilu*. The reason behind this is undoubtedly the increased Japanese influence over the Ryukyu kingdom. The issue of whether any legal significance regarding the status of the disputed islands can be deduced from the appearance of Japanese names is debatable. It is possible to argue that Qing China weren't so knowledgeable about the islands and perhaps that they didn't regard them as part of Chinese territory or that they didn't treat them as such. However, it also seems reasonable not to draw any far-fetched conclusions from only one *Shilu*.

The academic research by Pan Xiang from 1764 provides arguable the clearest description in favor of the Chinese claim. This work explicitly states that the Black Water Trench is the maritime boundary between China and Ryukyu and that ships passing this trench must celebrate the trench-crossing ritual. This work undeniably strengthens the Chinese argument that China regarded the disputed islands as her territory. The academic work by Huang Shujing from 1720 is also a strong case in China's favor. Firstly, this work portrays the disputed islands as being located within the maritime patrol route of Taiwan and secondly it expresses that Diaoyu Island "can hold ten huge ships". Of particular interest from Huang Shujing's work is that it strengthens the argument that China, not only regarded the disputed islands as her territory but also treated the islands as her territory, a circumstance that is undeniably difficult to deduce from the imperial envoys which doesn't focus on how China treated the islands. The last academic work described in this paper is the "Geographical Atlas of China and foreign Countries in the Qing Dynasty" from 1862. This work portrays the islands along the compass route from China to Ryukyu up until Gumi Mountain with only Chinese characters and the island in the Ryukyu kingdom with both Chinese and Japanese characters. It is difficult to deduce any legal significance from this work. As Ozaki points out, the fact that the islands were described with Chinese characters doesn't prove anything in relation to the sovereignty issue. A stronger case for Chinese ownership is the work by Japanese geographer Hayashi Shihei who drew maps over the East China Sea and used a four pigment coloring method to indicate to which country different territories belonged. The author colored the disputed islands red which means Chinese ownership. This work is particularly interesting since it indicates that also Japan perceived the islands as being under Chinese territory. The works by Pan Xiang and Huang Shujing provide very strong arguments that China not only regarded the disputed islands as her territory but also that she treated them as such. The issue therefore arises; how much weight should be given to these academic works? Clearly, they cannot be regarded as an expression of the official stance by the Qing government and they cannot be regarded as having the same weight as the official Gazetteers or the imperially endorsed *cefengs*. However, particularly the precision of Pan Xiang's work lends it a lot of credibility, especially if it is read in conjunction with the *Shilus*.

Analyzing Qing China's relationship to the disputed islands through the alternative framework of "ancient possession since time immemorial", it is quite obvious that China fulfills the first requirement of regarding the islands as her territory. This conclusion is primarily based on an accumulation of the imperial envoys conducted throughout the Ming and Qing dynasties but also supported by other documents such as Pan Xiang's academic work, which appears to, as Suganuma suggests, "undeniably confirms that there was an international boundary between China and the Liuqiu, which was distinguished by the *heishugou*, located between Chiwei Island and the Gumi Mountain". Whether China also fulfills the second requirement is less certain. If the disputed islands had been undeniably included in a clear majority of the local Gazetteers, this would have been a

very strong case in China's favor. However, since it wasn't an established practice to include the islands in these official documents, it is impossible to determine merely from the inclusion or non-inclusion, whether China treated the islands as her territory. The strongest cases portraying that China treated the disputed islands as her territory is the Ming dynasty defense manual, Chouhai Tubian, which included the disputed islands under the Fujian Garrison defense system and the academic work, Taihaishi Chalu which described the disputed islands as being situated within Taiwan's maritime patrol route. The legal significance that can be attributed to these works is however debatable since there doesn't seem to exist any documentation proving that China actually patrolled the area around the disputed islands.

The issue of whether China treated the disputed islands as her own territory also needs to be understood in the light of the particular features of the disputed islands themselves. Throughout the analyzed period, the Senkaku/Diaoyu islands have always been uninhabited and there is no evidence of any person ever disembarking on the islands, although this can be implied from a few works. One such documentation is the Taihaishi Chalu, which mentions that Diaoyu Island can hold ten huge ships and another is Shunfeng Xiangsong, which expresses that "berths with a depth of 15 tuo (a tou = 6 inches) on Diaoyu Island are good for refueling wood and drinking water". Moreover, the Senkaku/Diaoyu islands are small and remotely located. Keeping these particular features in mind, how could imperial China have treated the islands as her territory? The islands were rocky and inhospitable and considered to be of almost no economic value. Certainly, if China wanted to manifest that she treated the disputed islands as her territory she could've established a practice of including them in the local Gazetteers and perhaps disembarked on the islands or conduct surveys. However, apart from these acts, China arguably did all that reasonably could've been expected. They included the islands into the coastal defense system, used them as navigational aids and academic scholars depicted them as undeniably part of Chinese territories. Further, China never had to rely on formal treaties with their tributary States for the purpose of maritime delimitation and this particular boundary between China and Ryukyu was regarded as sufficiently clear under the EAWO. The Ryukyu kingdom never laid claim to the disputed islands and there exists no documentation indicating that China and Ryukyu ever had a maritime disagreement. Additionally, under the Confucian understanding of government control, which served as the fundament for the EAWO, the power of the Chinese Emperor went only as far as Emperor-observant people could dwell and ancient China paid little attention to places lacking human habitation. The Westphalian concept of territorial sovereignty was alien since the Chinese emperors ruled men, not territorial space. Keeping these political realities in mind, it is not surprising that China throughout the Ming and Qing dynasties didn't pay much attention to the Senkaku/Diaoyu islands but it is nevertheless sufficiently clear that they regarded these islands as part of their territory, particularly throughout the Qing dynasty.

The international law framework applicable from the mid 19th century was the concept of “effective occupation”. The mode of occupation had undergone a lengthy evolution from the 16th century, where arguably mere discovery was sufficient to acquire sovereign title, to the concept of effective occupation, with requirements that demanded more of the State seeking to acquire territory. Effective occupation demanded both the will of the State to possess (*animus occupandi*) and effective possession (*corpus occupandi*). The effective possession requirement focused primarily on taking physical possession of land by settlement or use of territory by other means and on the exclusion of other States. If Qing China’s relationship to the disputed islands were to be evaluated merely against this framework, without taking the political realities of the EAWO into consideration, China undoubtedly has a weak case. The main weakness of the Chinese claim relates to China’s lacking fulfillment of the *corpus occupandi*-requirement. There exists no evidence that imperial China ever disembarked on the islands and China only used the islands as navigational aids, similar to beacons of today. Further, no available documentation prove that China excluded other States from the territories primarily since it isn’t evident from Chouhai Tubian that China regarded the islands as her territory and would have defended them in the event of a foreign invasion. China’s claim under international law is weak even if the holdings of the Clipperton Island Case are taken into account. This case eased the prerequisites of occupation in relation to completely uninhabited territories, but even such territories needs to be “at the absolute and undisputed disposition” of the occupying State, according to the case. It is highly doubtful that China could be regarded as having been in such disposition based on the available documentation.

The last issue is whether the Chinese acts in relation to the islands could be regarded as a sufficient proof of Chinese *animus occupandi* under international law. It has to be expressed that although an accumulation of the imperial envoys arguably show that China regarded the disputed islands as her territory, this isn’t the same as showing intent to occupy under international law. The strongest argument in favor of a Chinese intent to occupy is most likely Chouhai Tubian and the inclusion of the disputed islands in a few local gazetteers. The author is of the opinion that it doesn’t appear entirely unreasonable that the Chinese acts could be regarded as sufficient to prove *animus occupandi* but based on the documentation presented in this paper, it appears more plausible that an adjudicating body wouldn’t deem the Chinese actions as sufficient to prove *animus occupandi*.

4 Japanese incorporation and the Treaty of Shimonoseki

4.1 Background to the re-discovery

As previously mentioned, from 1609 until the Japanese complete annexation in 1879, the Ryukyu kingdom was a tributary State to both China and Japan. However, during the latter half of the 19th century, Japanese influence over the Ryukyu kingdom increased drastically. Japan's gradual overtaking of Ryukyu culminated during the 1870's with the Botan tribe incident. This incident occurred when a relatively large number of Ryukyuan citizens had drifted off to Taiwan during a sea voyage and were upon reaching Taiwan, killed by Taiwanese aboriginals of the Botan tribe. The Japanese used this incident to gain acceptance from the Ryukyuan and later compelled Ryukyu to break ties with Qing China. During this time of Japanese invasion and occupation, the Ryukyu kingdom sent requests for military assistance to China but the Middle kingdom was weakened by internal disorder and unable to assist the Ryukyuan at the time. The Japanese annexation of Ryukyu meant that China lost its contact with the Ryukyuan and as a consequence, the records of activities around the disputed islands came to a standstill.¹⁶⁶

4.2 The Japanese incorporation

Koga Tatsushiro was a Japanese entrepreneur who “re-discovered” both the Diaoyu and Huangwei Islands in 1884 during a journey seeking to collect guano, albatross feathers and tortoise shells. Koga's discovery attracted the attention of the Okinawa Prefecture Magistrate (OPM henceforth) as well as the Meiji government. The following section presents the official Japanese documents that dealt with the process of incorporation. These documents consists of confidential letters among Japanese officials but also of the Cabinet Decision of January 14, 1895 and Imperial Decree No. 13 of March 5, 1896. Some scholars supporting the Chinese claim contend that these letters and documents constitute the strongest argument in favor of the Chinese stance since they reveal three features. Firstly, that the disputed islands were, by the highest level of Japanese officials, recognized as Chinese territory, which led to a ten-year postponement of the process of incorporation. Secondly, that the Cabinet Decision of January 14, 1895 which concluded the process of incorporation, was passed in total secrecy in order to avoid a Chinese protest against the incorporation. Lastly, that the said Cabinet Decision wasn't taken as a result of conducting repeated surveys on the islands (as stated in the basic view), but was only approved because of the imminent Chinese defeat in the first Sino-Japanese war (1894-95).¹⁶⁷

¹⁶⁶ Lin, Man-houng., *The Ryukyus and Taiwan in the East Asian seas: A Longue Durée Perspective*.

¹⁶⁷ Shaw, *Supra* n. 2, p 70.

The first letter dealing with the Japanese incorporation process was dated September 22, 1885 and sent by the OPM to the Home Minister of the Meiji government. The letter was entitled “Petition Regarding Investigations at Kumesekishimia and Two Outer Islands” and contained a formal request that the disputed islands be placed under the jurisdiction of the Okinawa Prefecture and also requested additional instructions regarding the placement of national markers on the islands. Without quoting this letter in its entirety, three interesting aspects of it should be stressed.¹⁶⁸ Firstly, the letter was not a petition as its header suggests, but rather a report regarding the investigation progress of the islands. Secondly, these investigations, undertaken by the OPM, wasn’t initiated by the them, they were conducted due to “secret orders” from the home minister. Thirdly, the letter expressed the following;

*...the possibility must not be ignored that they are the same islands recorded as Diaoyutai, Huangwei-yu, and Chiwei-yu in the Zhongshan Mission records. If they truly are the same islands, then it is obviously the case that the details of the islands have already been well-known to Qing envoy ships dispatched to crown the former Zhongshan Wang, and already given fixed (Chinese) names and used as navigational aids en route to the Ryukyu Islands. It is therefore worrisome regarding whether it would be appropriate to place national markers on the islands immediately after our investigation.*¹⁶⁹

From the above passage it is clear that the Japanese officials were aware that China had already named and used the disputed islands as navigational aids and therefore, it was suggested that it might be inappropriate to place national markers on them since this might create a conflict with China. Supporters of the Chinese claim have contended that this method of incorporation was chosen by the Japanese government to create an impression that the process was initiated by the local authorities and thereby decreasing the suspicions that the incorporation was motivated by military and strategic intentions.¹⁷⁰

After receiving this letter, the Home Minister decided to proceed with the process of incorporation by writing a letter to the Grad Council of State for approval but the Home Minister first sent this letter dated October 9, 1895¹⁷¹ to the Foreign Minister inquiring his opinion on the matter. In its most relevant section, the letter reads as follows,

Although the above mentioned islands are the same as those found in the Zhongshan Mission Records, they were only used to pinpoint direction during navigation, and there are no traces of evidence that the islands belong to China. Also, with respect to the names of the islands, it is merely a matter of difference of nomenclature between them (China) and us (Japan). Therefore upon completion of Okinawa Prefecture’s investigations of the said islands located in the vicinity of islands Kume, Miyako, and Yaeyama under the jurisdiction of Okinawa Prefecture, it is believed that there is no obstruction to placing national markers. I urgently request that this matter be decided.¹⁷²

¹⁶⁸ The letter is quoted in its entirety in Shaw, *Supra* n. 2, p. 71.

¹⁶⁹ Shaw, *Supra* n. 2, p 72.

¹⁷⁰ Shaw, *Supra* n. 2, p 72-73.

¹⁷¹ Sukanuma, *Supra* n. 1, p. 97.

¹⁷² Shaw, *Supra* n. 2, p 74.

The Home Ministers perception that the Senkaku/Diaoyu islands ties to China weren't close enough to grant it sovereign title wasn't necessarily shared by the Foreign Minister who responded in a letter dated October 21¹⁷³ to the Home Minister, which in its most relevant section reads,

The aforementioned islands are close to the border of China, and it has been found through surveys that the area of the islands is much smaller the previously surveyed island, Daito-jima; and in particular, China has already given names to the islands. *Most recently Chinese newspapers have been reporting rumors of our government's intention of occupying certain islands owned by China located next to Taiwan, demonstrating suspicion toward our country and consistently urging the Qing government to be aware of this matter.* In such a time, *if we were to publically place national markers on the islands, this must necessarily invite China's suspicion toward us.* Currently we should limit ourselves to investigate the islands, understanding the formations of the harbors, seeing whether or not there exists possibilities to develop the island's land and resources, which all should be made into detailed reports. In regard to the matter of placing national markers and developing the islands, *it should await a more appropriate time.* (Emphasis added).¹⁷⁴

From this letter it is obvious that the Foreign Minister was well aware about the relationship between China and the Senkaku/Diaoyu islands, which is why he advocated that the matter required caution. Supporters of the Chinese claim have taken this even further stating that the Foreign Minister was aware that the islands were regarded to be under Chinese sovereignty and this is why he not only advocated restraint and that the matter should "await a more appropriate time". Chinese scholars also claim that the only conceivable reason behind the Foreign Ministers suggestion to keep the matter confidential was to prevent legal objections from China.

In a chronological order, the next relevant letter to discuss was dated November 24 and sent by the OPM to the Home Minister as a follow up of the letter dated September 22 and reads as follows

In regard to the matter under my jurisdiction concerning the uninhabited islands, I hereby submit as an attachment paper of the mission to investigate the said islands previously ordered upon me. In regard to the construction of national markers, as I already noted to you in my previous letter of inquiry, *since this matter is not unrelated to China*, if problems do indeed arise, I would be in grave repentance for my responsibility. As I am uncertain on how to handle this matter, I await for your most urgent instructions. (Emphasis added).¹⁷⁵

The above passage clearly shows that the OPM shared a similar view as the Foreign Minister regarding the Chinese interest in the islands. It is likely that this letter, together with the letter from the Foreign Minister persuaded the Home Ministers to change his view. In a letter to the Foreign Minister, dated November 30, he writes the following,

¹⁷³ Sukanuma, *Supra* n. 1, p. 97.

¹⁷⁴ Shaw, *Supra* n. 2, p 75.

¹⁷⁵ Shaw, *Supra* n. 2, p 77.

Based on the reasons given in your (previous) letter of inquiry, please acknowledge that construction (of the national markers) shall currently not be undertaken.¹⁷⁶

The Foreign Minister gave his approval to for this decision to be sent to the OPM in a letter dated December 4. Supporters of the Chinese claim regard the above provided series of letters, especially the one dated October 21, as evidence that the Japanese officials were knowledgeable about Chinese ownership of the islands. Further, the Foreign Minister's expression that it "should await a more appropriate time" is a clear indication that the process of incorporation wasn't abandoned. Pending the arrival of a more appropriate time, the Japanese decided to keep the matter secret to avoid Chinese suspicion and therefore all these letters were classified.¹⁷⁷

This letter from the Foreign Minister was the last in the series of letters that took place during 1885 and which resulted in the decision to forego national markers. After this eventful year, the Japanese lied low for a while. This more opportune occasion had obviously not arrived in the early 1890's since the OPM sent one incorporation request in 1890 and 1893, in order to regulate fishing and other related activities around the island, but these petitions were both rejected by the Home Ministry.¹⁷⁸

The Japanese stance regarding the erection of national markers started to change during the later half of 1894. From an internal document of the Home Ministry sent to the Home Minister, dated April 14, 1894, two features are evident. Firstly, that no new information regarding the islands' status had been acquired by the Home Ministry, despite the fact that investigations had been ongoing for almost a decade, according to the official Japanese stance. Secondly, that the political circumstances had not matured enough to change the governments policy to erect national markers. The reason why Japan hadn't acquired any new information becomes apparent when studying a letter from the OPM to the Home Ministry, dated May 12 which clearly expresses that no investigations, regarding determining the status of the disputed islands, were carried out after 1885 by any agencies under the Okinawa Prefecture.¹⁷⁹ This clearly contradicts the official Japanese position as expressed in its Basic View (see 2.2.1).

From the above passage it is clear that by May 12, the awaited "appropriate time" to incorporate the islands hadn't materialized. The Japanese Cabinet Decision that formally incorporated the islands occurred on January 14, 1895. Therefore, some major event must have occurred between these two dates that convinced Japan that the "appropriate time" had finally arrived. Chinese scholars contend that this moment started to emerge as a result of the first Sino-Japanese war (1894-95), which officially broke out on August

¹⁷⁶ Shaw, *Supra* n. 2, p 78.

¹⁷⁷ Shaw, *Supra* n. 2, p 77-78.

¹⁷⁸ Sukanuma, *Supra* n. 1, p. 97-98.

¹⁷⁹ Shaw, *Supra* n. 2, p 80-84.

1, 1894, over control of the Korean peninsula.¹⁸⁰ The Japanese forces proved victorious in battle after battle on both land and sea and by the end of November, both Japan and China were convinced of Japanese victory, and China proposed a peace settlement on November 22. Japan had however already begun drafting a different peace treaty and rejected this proposal. In an internal letter of the Home Ministry addressed to the Home Minister dated December 15 the author requested the Home Ministers opinion regarding erecting national markers on the island, expressing that “the situation today is greatly different to the situation back then”¹⁸¹, referring to the letter dated April 14. This letter clearly reveals that by December 15, 1894, almost a decade after the matter was first discussed, Japan had finally begun to alter its position regarding erecting national markers. Shaw contends that what the phrase “the situation today is greatly different to the situation back then” refers to a power shift between China and Japan. China had historically been the hegemon within the EAWO but with the Meiji restoration in Japan and Japan’s imminent victory in the first Sino-Japanese war, which had become apparent already in October-November, Japan had gained the confidence it needed to challenge the Chinese position and China was no longer in a position to legally challenge the Japanese incorporation even if they would have detected the secret Japanese incorporation. Other Chinese scholars also contend that this power shift and the weakened China was the event that Japan had been waiting for. One such scholar expressed “there simply was nothing on or around the islands during the last year (between May and December 1894) which could not have been discovered during the previous nine years to help determine the status of the islands.”¹⁸² It should also be stressed in this context that although Japan was well aware that China considered the Senkaku/Diaoyu islands as Chinese, there are no documents indicating that the sovereignty issue was discussed with China.¹⁸³

The next step in the process of incorporation was a letter sent by the Home Minister to the Foreign Minister, dated December 27, 1894, requesting his opinion about submitting a request to the cabinet meeting regarding construction of national markers on the islands “considering the fact that the situation today has changed relevant to the situation back then.”¹⁸⁴ The Foreign Minister replied in a letter dated January 11, 1895, that he had no objection.¹⁸⁵

Finally, on the Japanese Cabinet Meeting of January 14, 1895, the Cabinet approved the Home Ministers request to incorporate the Senkaku/Diaoyu islands under the Okinawa Prefecture by adopting a resolution, which was one week later, on January 21, approved by the Prime Minister.¹⁸⁶

¹⁸⁰ Lee, Ivy and Ming, Fan., *Deconstructing Japan’s claim of Sovereignty over the Diaoyu/Senkaku Islands*, p 7.

¹⁸¹ Shaw, *Supra* n. 2, p 86.

¹⁸² Shaw, *Supra* n. 2, p 97.

¹⁸³ Shaw, *Supra* n. 2, p 86-88.

¹⁸⁴ Shaw, *Supra* n. 2, p 98.

¹⁸⁵ Shaw, *Supra* n. 2, p 98.

¹⁸⁶ Shaw, *Supra* n. 2, p 99.

The Japanese side has always regarded the Cabinet Decision of January 14, 1895, together with the Prime Minister's approval, as the legal basis for its claim. Chinese scholars however, have criticized this stance mainly since the whole incorporation process, which took place during over a decade, was conducted in total secrecy. These scholars further contend that the reason for this confidentiality was that the Japanese officials were knowledgeable that the islands had long been regarded as Chinese territory. This argument is further strengthened by two other facts. Firstly, that the Cabinet Decision wasn't publically disclosed until March 1952. Secondly, that national markers weren't actually erected on the islands due to the Cabinet Decision. They were first erected on May 10, 1969 in response to the modern controversy following the oil discovery. For these reasons, Chinese scholars claim that China was deprived of the opportunity to lodge a formal protest.¹⁸⁷

Another document relating to the incorporation process is the Imperial Decree No. 13 of March 5, 1896. This decree was issued a year after the Japanese government decided to erect national markers on the disputed island and introduced a new organization and formation of the Okinawa Prefecture by dividing the Prefecture into five different Counties and listing all islands appertaining under each County. The Senkaku/Diaoyu islands however, weren't enumerated or mentioned anywhere in this document. Suganuma therefore suggests that this imperial edict is irrelevant in relation to the sovereignty issue.¹⁸⁸ Shaw agrees with Suganuma's claim and further contends that since the Senkaku/Diaoyu islands geographically formed its own island group, had the Imperial Decree intended to include them, it would have listed them. The same author further argues that the decree, contrary to the Japanese stance, proves that the disputed islands were never publically proclaimed as Japanese territory in any official declarations.¹⁸⁹

According to the author, Shaw makes a reasonable argument. The fact that the disputed islands weren't mentioned in the Imperial Decree, which was issued a year after the Japanese government decided to erect national markers, certainly raises doubts about Japanese honesty and fair dealing. One possible way to interpret the omission of the disputed islands in this decree is that Japan, regardless of the Cabinet Decision, didn't consider the islands to be Japanese territory. A second interpretation is that Japan simply forgot to include the islands in the decree. A third, and arguably most likely, interpretation is that Japan chose to omit the islands because if they had enumerated them and made the decree public, China would eventually find out and would be in a position to legally challenge the Japanese sovereignty.

¹⁸⁷ Shaw, *Supra* n. 2, p 100.

¹⁸⁸ Saganuma, *Supra* n. 1, p 107. See also Shaw, *Supra* n- 2, p 100-102.

¹⁸⁹ Shaw, *Supra* n. 2, p 100-102.

4.3 The Treaty of Shimonoseki

4.3.1 Introduction

Having described the Japanese process of incorporation, we now turn to a partly simultaneous event, the end of the first Sino-Japanese war and signing of the Treaty of Shimonoseki. It needs to be recalled that China had already by November 22, 1894, proposed a peace settlement, which Japan had rejected. The imminent Japanese victory gave them a very powerful negotiation position vis-à-vis a heavily struggling China and this allowed Japan to impose harsh peace conditions, primarily forcing China to pay large indemnities and to cede the strategically important territories of Taiwan, the Pescadores islands and the Liaodong peninsula. The treaty of Shimonoseki was signed on April 17, 1895 and the Article relevant to the Senkaku/Diaoyu islands is Article 2, which in its relevant section reads,

China cedes to Japan in perpetuity and full sovereignty the following territories, together with all fortifications, arsenals and public property thereon:

b) The island of Formosa (Taiwan), together with *all islands appertaining or belonging to the said island of Formosa.*”

c) The Pescadores Group, that is to say, all islands lying between the 119th and 120th degrees of longitude east of Greenwich and 23rd and 24th degrees of north latitude. (Emphasis added)

Obviously, the Senkaku/Diaoyu islands aren't expressly mentioned in this Article nor does the wording provide much information regarding whether the islands were meant to be included. Therefore, this Article has been subject to many debates. The Chinese side argues that the islands were Chinese territory prior to the conclusion of this treaty and that they were an integral part of the treaty since they were considered as “appertaining or belonging” to Taiwan. Therefore, the Chinese side contends, Japan acquired sovereignty through the mode of cession, not through the mode of occupation. The Chinese side refutes the legal validity of the Japanese incorporation process since Japan cannot unilaterally alter the status of Chinese territory. The Japanese side on the other hand, refutes that the Senkaku/Diaoyu islands were in integral part of the Treaty of Shimonoseki since they were not considered as “appertaining or belonging” to Taiwan. Hence, the Japanese side claims that they didn't acquire the islands through the mode of cession but through the mode of occupation. Therefore, the treaty of Shimonoseki is completely irrelevant to the sovereignty issue.

Before continuing the presentation of the Treaty of Shimonoseki, it should be stressed for clarification, that the reason why it is important for China to claim that the Senkaku/Diaoyu islands were acquired through the mode of cession and conversely for Japan to claim that they were acquired through the mode of occupation, is that the post World War II agreements stipulated that Japan should revert all territory it had acquired by force throughout its imperialistic era (see further section 5.1).

The issue of whether the Senkaku/Diaoyu islands are an integral part of the treaty of Shimonoseki centers on whether they were considered as “appertaining or belonging” to Taiwan. According to the Oxford dictionary, “appertaining” means “belong as a possession or right”, therefore, it might be concluded that the parties somewhat unnecessarily used two synonyms in the same phrase.¹⁹⁰ The following description will hence only focus on the phrase “belonging”. The relevant phrase evidently refers to a set of islands but doesn’t specify which and no map was accompanied to delimit the boundaries of Taiwan and it is not known whether the drafters consulted any maps at all.¹⁹¹ Since the meaning of this passage is ambiguous, the meaning has to be evaluated through a framework of treaty interpretation.

The first question to be dealt with in this regard concerns which interpretive framework should be utilized. As previously described (see 2.5), the ICJ has used the customary international law reflected in Articles 31-33 of the VCLT, as an interpretive framework to evaluate legal relationships, which were created prior to this framework became customary international law. The ICJ has therefore implicitly used the second branch of the intertemporal law for the purpose of treaty interpretation. This method will also be used under this section. Article 31 (1) of the VCLT reads as follows;

A treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

4.3.2 Textual interpretation; ordinary meaning

Utilizing the framework provided by Article 31 (1), the first step is to evaluate the ordinary meaning of all islands “belonging” to Taiwan and specifically whether the Senkaku/Diaoyu islands were regarded as such. The meaning of “belonging” logically refers to some kind of connection or relationship without specifying which. Hence a variety of sources needs investigated. Chinese scholars have argued that the following relationships existed between Taiwan and the Senkaku/Diaoyu islands; (i) historical and administrative, (ii) geographical and geological, and (iii) social and economic. These relationships will be dealt with separately.

From a historical and administrative perspective, there are two sources that point to the existence of such a relationship (Riben Yijian will be dealt with under social relationship). The first is the academic work; Taihaishi Chalu (Record on the mission to Taiwan) from the 1720’s. The military section of this work describes the Senkaku/Diaoyu islands as having a position within Taiwan’s maritime patrol route. The second is the Qing Dynasty gazetteer “Recompiled General Annals of Fujian” from 1871 written by Chen Shouqi, which specifically listed the Senkaku/Diaoyu islands under what is today called Yilan County (north-eastern Taiwan).¹⁹²

¹⁹⁰ Oxford online dictionary, search word; “appertain”.

¹⁹¹ Lee, *Supra* n. 159, p 49.

¹⁹² Lee, *Supra* n. 159, p 50-51. See also Lee and Ming, *Supra* n. 183, p 7.

The next relationship to evaluate is the geographical and geological. A case relevant to mention in this regard is the *Kasikili/Sendude case* of 1999, wherein the ICJ expressed that “(i)n order to illuminate the meaning of words, there is nothing that prevents the Court from taking into account the present-day scientific knowledge”.¹⁹³ This indicates that it would be possible to use the continental shelf concept, which emanates from the mid 20th century, retroactively to interpret the meaning of the Treaty of Shimonoseki. However, Denk has expressed, referring to the North Sea Continental Shelf Judgment, that “the rights of States over these areas are limited to sovereign rights for the purpose of exploring the seabed and exploiting the natural resources. It is obvious that the sovereign rights enjoyed by coastal States do not, and in fact cannot, provide them with other rights, i.e., sovereignty even over the superjacent sea of these areas, let alone islands situated there”.¹⁹⁴ Denk’s argument is reasonable but although it isn’t viable to use the contemporary continental shelf concept to deduce the meaning of a treaty signed 50 years before this concept was introduced, this particular continental shelf might be used in a different way. Present-day scientific knowledge reveals that the Senkaku/Diaoyu islands are located on the same continental shelf as Taiwan and separated from Japan, including Okinawa (historically Ryukyu). The edge of this continental shelf is marked by what is today known as the Okinawa trough, which forms a sudden topographical change with a significantly increased sea depth reaching over 2300 meters.¹⁹⁵ This topographical change was visible and recognized by the Chinese imperial envoys as well as the Ryukyuan seafarers, which indicates that this particular edge of the continental shelf might have been regarded as the natural geographical boundary delimiting China from Ryukyu. Therefore, the argument that the disputed islands were regarded as belonging to Taiwan based on a natural boundary located northeast of the said islands is reasonable.

Another possible argument relating to the Senkaku/Diaoyu islands geographical appurtenance to Taiwan concerns the geographical distance between the disputed islands and the respective claimant State. The disputed islands are located approximately 170 km from Taiwan and 400 km from both Mainland China and Okinawa. Hence, the islands are relatively much closer to Taiwan. The strength of such an argument is however questionable since although they are relatively closer to Taiwan, it is not the same thing as saying that they “belonging” to Taiwan in accordance with the meaning of the treaty. Additionally, The strength of this argument is further limited by the *Island of Palmas Arbitration*, which expressed that “it is impossible to show the existence of a rule of positive international law to the effect that islands situated outside territorial waters should belong to a State from the mere fact that its territory forms the terra firma”.¹⁹⁶

¹⁹³ Case concerning Kasikili/Sendudu Island (Botswana/Namibia), Judgement of 13 December 1999, p. 1060, para 20.

¹⁹⁴ Denk, Erdem., *Interpreting a Geographical Expression in a nineteenth Century Cession Treaty and the Senkaku/Diaoyu Islands Dispute*, p. 104-105.

¹⁹⁵ Lee, *Supra* n. 155, p. 51-53.

¹⁹⁶ *Island of Palmas Arbitration*, *Supra* n. 44, at para 893.

The last relationship to evaluate is the social and economic. Of primary interest is Riben Yijian of 1565, which expresses that Diaoyu Island is “xiaodong xiaoyu ye” (part of Taiwan territories).¹⁹⁷ This passage is interesting since Riben Yijian was an authoritative work that was written during the Ming dynasty, over hundred years prior to the Chinese annexation of Taiwan. Why would this work proclaim the disputed islands to belong to Taiwan in these situations if it wasn’t a socially constructed perception? Lastly, from an economical perspective, the islands and their surrounding waters were used by Taiwanese and Chinese as a fishing ground, as shelter during heavy weather and as a source for collecting herbs throughout the late 18th and 19th centuries. It needs to be stressed in this regard however that all these expeditions were privately run and it doesn’t exist any proof that the Chinese government ever endorsed them.¹⁹⁸

4.3.3 Contextual interpretation; object and purpose

The next step according to the interpretative framework provided by Article 31 of the VCLT, is to conduct a contextual interpretation of the treaty focusing on its object and purpose. Undoubtedly, the object and purpose of the Treaty of Shimonoseki was a cession of territories to Japan. The Japanese territorial claims throughout its imperialistic era were vast and Japan was well aware of the importance of acquiring strategically important territories. During the late 19th century they particularly acquired strategic important territories such as the Liaodong region and the Korean Peninsula in the northwest. Japan was also aware of the strategic importance of being in control of the East China Sea and in particular, of being in control of Taiwan. Keeping these Japanese aims in mind is important to understand the political realities behind the Treaty of Shimonoseki.

An interesting argument raised by Japanese scholars, concerns how Article 2 (c) relates to Article 2 (b) and the phrase “appertaining and belonging”. Japanese scholars have contended that since Article 2 (c) provides a separate treatment of the Pescadores (Penghu) group, this means that this island group wasn’t considered as belonging to Taiwan and since the Senkaku/Diaoyu islands are located much further away from Taiwan, they couldn’t possibly have been regarded as belonging to Taiwan. Lee however, critiques this argument based on two reasons. Firstly, by referring to the case *Sovereignty over Pedra Branca/Pulau Batu Puteh*, he claims that distance is not a major determining factor since the ICJ in this case awarded Singapore Pedra Branca although this island was geographically closer to Malaysia. Secondly, he expresses that the Pescadores islands were strategically more important than the Senkaku/Diaoyu islands and that Japan therefore demanded a separate treatment of the former.¹⁹⁹

¹⁹⁷ Sugauma, *Supra* n. 1, p. 65.

¹⁹⁸ Denk, *Supra* n. 194, p. 107.

¹⁹⁹ Lee, *Supra* n. 155, p. 54-55.

While discussing how Article 2 (c) can be used to shed some light on the phrase “appertaining and belonging” in Article 2 (b), two other interesting features shall be mentioned. Firstly, the fact that Article 2 (c) denominates the exact coordinates of the Pescadores islands, implies that the contracting parties had a clear understanding of what constituted Chinese territories. Secondly, in comparing section 2 (b) with 2 (c) it is striking that only the latter denominates the exact coordinates while the first only mentions Taiwan along with its appertaining and belonging islands. One explanation as to why the island belonging to Taiwan didn’t need to be exactly specified while the Pescadores island group needed to be, is that the contracting parties had, or possibly thought they had, a clear understanding of which islands were included. Another explanation is that the contracting parties, or at least Japan who dominated the negotiations, purposely chose to omit specifying the area exactly, which is an argument made by some Chinese scholars. The argument continues that Japan chose to omit the Senkaku/Diaoyu islands because they intended to incorporate the islands through the discovery-occupation mode. Keeping in mind the Japanese incorporation process and specifically the uncertainty the Japanese officials showed about actually incorporating the islands and to wait for a more opportune time together with the fact that the actual decisions to incorporate the islands weren’t made public until after the Second World War, it seems likely that Japan didn’t want the Senkaku/Diaoyu islands to be an integral part of the Treaty of Shimonoseki.

4.3.4 The subsequent conduct of the parties

VCLT Article 31 (3) stipulates that “any subsequent practice” by the parties may be taken into account in order to determine the meaning of the treaty language. The subsequent practice of China with regard to the Senkaku/Diaoyu islands consisted of complete silence. From 1885, when the Chinese newspapers reported of alarming Japanese activities around the islands, until the early 1970’s, no evidence exists, that the disputed islands were ever discussed in official documents or in the media. There are at least two possible explanations for this silence. The first is that the islands were completely forgotten. They were small, remote, uninhabited and almost entirely economically worthless and since China went through a very tumultuous period with a devastating civil war, the World War II and a cultural revolution, they might have focused on dealing with these more important events. The second reason, which is favored by many Chinese scholars, is that since the islands, according to the Chinese stance, were ceded to Japan pursuant to the treaty of Shimonoseki, China was merely fulfilling the maxim of *pacta sunt servanda* vis-à-vis Japan. Hence, the Chinese side argues that Chinese subsequent practice further strengthens the argument that the disputed islands were an integral part of the treaty of Shimonoseki. This argument rests on the notion that if the disputed islands weren’t ceded pursuant to the Treaty of Shimonoseki, but incorporated as Japan claims, China would’ve protested. Hence, the lack of Chinese protest is evidence that the disputed islands were ceded.²⁰⁰

²⁰⁰ Lee, *Supra* n. 155, p 56-57.

The subsequent practice of Japan can be described as follows. Koga, the Japanese businessman who “re-discovered” the disputed islands in 1885 was, in September 1896, lent four of the islands for 30 years without rent. Koga devoted himself to developing the islands and invested large sums in building houses, wharves, reservoirs and drainage and sanitary facilities so that his employees could make a decent living on the islands. At its peak in 1909, there were 148 people living on the islands. Koga died in 1918 and his son Zenji took over the business. In 1926, after the expiration of the initial loan, the Japanese government extended the loan but started requiring rent. In 1932, after selling the islands to the Koga family, the Japanese government changed the land status from State to privately owned. Koga continued to conduct business on the islands until the emergence of World War II. Later, during the US administration of the disputed islands, the US signed a leasing contract with the Koga family in order to use the islands for military purposes.²⁰¹ Japanese scholars, frequently use these Japanese subsequent acts to make an argument that Japanese State authority extended to the disputed islands and that this authority was manifested through land administrative acts such as instituting a loan to Koga and later selling the islands to the Koga family.²⁰²

4.4 Analysis

The first section of this chapter dealt with previously classified letters between Japanese officials relating to the incorporation process. The information described in this section has primarily been collected from the work of Taiwanese scholar Shaw. It needs to be stressed that no Japanese scholar has provided any critique of this section and therefore there is a risk that this section might be rather biased in favor of the Chinese perception. If Japanese scholars had enriched the section with alternative translations, more historical data and different legal interpretations, the section would have been more balanced. That being said, Shaw’s work has to be regarded as a good attempt at objectivity and there’s no reason to mistrust its fairness.

The official Chinese stance towards the Japanese incorporation process is to refute its validity. The Chinese claim to have held sovereign title to the islands until the signing of Treaty of Shimonoseki on April 17, 1895, and since the Japanese incorporation was concluded in January 1895, it is invalid since Japan cannot unilaterally alter the status of Chinese territory. The Chinese argumentation is certainly logical and reasonable. One State cannot unilaterally incorporate another State’s territory. Even though the argumentation is logical, the strength of this claim depends on whether China held sovereign title prior to January 1895 or whether the islands were terra nullius. This discussion has been provided under chapter 3 and will not be further analyzed under this section.

²⁰¹ Shaw, *Supra* n. 2, p. 30-31.

²⁰² Shaw, *Supra* n. 2, p. 30-31.

Chinese scholars have also critiqued the Japanese process of incorporation itself, contending that it reveals three features. Firstly, that the disputed islands were recognized as Chinese territory, by the highest level of Japanese officials. Secondly, that the Cabinet Decision of January 14 was passed in total secrecy in order to avoid a Chinese protest. Lastly, that the said Cabinet Decision wasn't taken as a result of repeated surveys on the islands, as stated in the Basic View, but was approved because of the imminent Chinese defeat in the first Sino-Japanese war, which created the "appropriate time" Japan had been waiting for.

From reading the internal Japanese correspondence it appears as if the Chinese scholars have solid reason for their critique. It appears as though at least the Foreign Minister and the OPM were well aware that China regarded the disputed islands as her territory and they also managed to convince the Home Minister to adopt a more restrained approach to erecting national markers and let it await a more opportune time. Although it isn't apparent that the Japanese officials recognized Chinese sovereignty, it has to be concluded that they at least suspected that if Japan would've conducted the process of incorporation in public, this might have caused an official protest from China. Moreover, it appears evident that the reason why the Foreign Minister advocated restraint and that the matter should "await a more appropriate time" had nothing to do with any ongoing investigations regarding the status of the islands, as stated in the Basic View and claimed by Japanese scholars. On the contrary, the letter from the OPM to the Home Minister dated 12 May, 1894, clearly expresses that no investigations had been carried out after 1885. Additionally, since the "appropriate time" obviously hadn't materialized by 12 May 1894 but had materialized by December 15, according to a letter expressing that "the situation today is greatly different to the situation back then", some event must have occurred that altered the Japanese perception on the matter. The only reasonable conclusion is that this event was the imminent Japanese victory in the Sino-Japanese war together with the weakened Chinese Empire.

Three additional aspects further strengthen the Chinese contention that the process of incorporation was conducted in complete secrecy with the aim of avoiding Chinese protests. Firstly, the fact that the Cabinet Decision wasn't publically disclosed until March 1952, contrary to the usual Japanese procedure of publically disclosing cabinet decisions. Secondly, the fact that national markers weren't erected on the islands following the cabinet decision, but were first erected in 1969. Thirdly, The fact that Imperial Decree No 13 didn't enumerate the disputed islands, although this decree was issued one year after the official decision to incorporate the islands.

Even if the Chinese contention that Japan were knowledgeable that China regarded the disputed islands as her territory, and therefore deceitfully incorporated the islands into Japanese territory, during a time when China was weakened by European and Japanese colonialism, are taken as facts, the question remains, what is the legal significance of this? International law of

the time undoubtedly didn't prohibit one State from acquiring territory through conquest and international law didn't recognize a rule prohibiting one State from acquiring territory through deceitful or dishonest behaviour. Therefore, Chinese scholars seem to have a weak case in arguing that the Japanese process of incorporation, as deceitful as it may be, is relevant under international law. Having stated this, two aspects need to be emphasized. Firstly, the Japanese correspondence, particularly the letters from the Foreign Minister and the OPM, indicates that Japan perhaps even regarded the disputed islands as Chinese territory. Therefore, should the present conflict be evaluated against a framework such as the "ancient possession since time immemorial", which focuses on whether China and its immediate neighbours regarded the islands as Chinese, this Japanese perception strengthens the Chinese claim.

Secondly, although the fact that Japan deceitfully incorporated the islands might not be relevant in itself, the fact that the incorporation was conducted in secrecy might have relevance since it impacts China's ability to protest against the incorporation. The concept of effective occupation requires both *animus occupandi* and *corpus occupandi* and both these requirements need to be clearly expressed. Regarding the *animus occupandi*, this can be expressed either explicitly or implicitly. International law doesn't require States to notify other States of their intent to annex, but if this isn't done, the *animus occupandi* needs to be sufficiently expressed in other ways so that other States can learn about the intention to occupy in order to launch a protest. This might be China's best argument. China could claim that the secrecy of the Japanese incorporation affected China's ability to protest. The cabinet decision wasn't publically disclosed until March 1952 and by that time the disputed islands were placed under US trusteeship according to the SFPT, a treaty at least the PRC has rejected in its entirety. Hence China never had the ability to protest and therefore Japan never acquired sovereignty since its *animus occupandi* wasn't fulfilled according to international law. The strength of this argument is however limited since international law doesn't require notifications to other States. The fact that the Cabinet Decision wasn't publically disclosed until March 1952 doesn't independently dismiss the Japanese contention that their *animus occupandi* was sufficiently expressed from 1895 and onwards. Additionally, what has been analyzed regarding the Japanese subsequent acts following the Cabinet Decision from 1896 and onwards, that they displayed State authority over the disputed islands through land administrative acts, strengthens the argument that Japan had *animus occupandi* and that it was sufficiently expressed.

A few words also need to be expressed about the relevance of Chinese silence in relation to the Japanese incorporation and Koga's subsequent development of the islands. Japanese scholars make the argument that had China truly regarded the island as her territory, they would have protested to Japan the fact that Koga was developing the islands and having people living there. This practice took place from 1896 until the outbreak of WWII, which is a considerable period of time in these circumstances. Although China wasn't officially notified of the Japanese intentions from 1895 until

1952, they had sufficient time to become aware of Koga's development and protesting the fact that Japan was allowing it to happen. The problem with this argumentation is that according to the Chinese stance, the islands were lawfully Japanese following the Treaty of Shimonoseki until the end of the Second World War. The fact that Koga was developing the islands and Japan allowing it to happen is therefore nothing China could have protested against. Therefore, the fact that China didn't protest during the period 1895-1945 ought not damage the Chinese claim.

For clarification it needs to be stressed again that the discussion provided here has focused on the Japanese incorporation procedures itself and independently of whether the disputed islands were Chinese prior to 1895. Should an adjudicating body find that the islands were Chinese prior to the incorporation, the annexation becomes legally invalid for the reasons stipulated in the second paragraph of this analysis.

The second section of this chapter dealt with interpretation of the treaty of Shimonoseki and specifically the issue of whether the phrase "all islands appertaining or belonging to Formosa (Taiwan)" includes the Senkaku/Diaoyu islands. Through the second branch of the intertemporal principle, the customary international law reflected in art 31-33 was chosen as an interpretive framework. The first step in this framework was to conduct a textual analysis of the ordinary meaning of the relevant phrase. Both *Taihaishi Chalu* from the 1720s and "Recompiled General Annals of Fujian" from 1871 provide some support of a connection between the disputed islands and Taiwan. This connection however shouldn't be stretched too far. *Taihaishi Chalu* is merely the work by one scholar and "Recompiled General Annals of Fujian" is only one gazetteer out of many produced during the Qing Dynasty. The same has to be stated regarding *Riben Yijian* and its famous phrase Diaoyu Island is "xiaodong xiaoyu ye" (part of Taiwan territories). These works can hardly by themselves or in accumulation be said to have established a perception that the Senkaku/Diaoyu islands belonged to Taiwan. The strongest argument that the disputed islands were regarded as belonging to Taiwan appears to be, not the continental shelf concept itself, since this cannot be used retroactively, but the fact that a topographical change was visible and recognized by the Chinese and Ryukyuan seafarers indicating that this particular edge of the continental shelf was regarded as the natural geographical boundary between China from Ryukyu. This circumstance however doesn't shed any light over the issue of whether the disputed islands belonged to Taiwan, although it might support the perception that the disputed islands were regarded as being situated within Chinese territories. Lastly, the fact that the disputed islands are located comparatively closer to Taiwan than to any other major island or country cannot be taken as sufficient evidence that these islands belonged to Taiwan in the meaning is the Treaty of Shimonoseki.

Regarding the contextual analysis, the author is of the opinion that the argument put forward by the Japanese scholars concerning interpreting

Article 2 (b) in the light of Article 2 (c) appears reasonable. The fact that the Pescadores group was awarded with a separate treatment in Article 2 (c) indicates that this island group wasn't regarded as "belonging" to Taiwan since, if this would've been the case, a separate treatment would have been unnecessary. Therefore, since the disputed islands are located even further away from Taiwan, Article 2 (c) weakens the argument that these islands were regarded as belonging to Taiwan. The first leg of Lee's critique of the Japanese argument is far-fetched. The fact that the ICJ awarded Singapore Pedra Branca, although it was geographically closer to Malaysia, was a completely different situation. This case was dealing with sovereignty and in these situations international law provides the framework of effective occupation which prevails over the issue of which State is located geographically closer. The second leg of Lee's critique is more reasonable. It is realistic to assume that the main reason why the Pescadores group was awarded a special treatment is due to their strategic importance together with the fact that this island group consists of many islands that are located far from each other. This also helps explain why this island group needed to be denominated with exact coordinates. In conclusion, although the second leg of Lee's critique reasonably explains why the Pescadores were awarded a special treatment, the author is of the opinion that a contextual analysis indicates that the disputed islands weren't regarded as belonging to Taiwan.

Regarding analyzing of the subsequent conduct of the parties in order to deduce the meaning of the treaty, it has to be concluded that such an analysis provides no information regarding whether the disputed islands "belonged" to Taiwan. It is evident that Japan started treating the disputed islands as her territory shortly after the incorporation, although in secrecy. It is also evident that the Chinese subsequent conduct consisted of complete silence. From 1885 to the early 1970's there is no evidence of the island being discussed in media or official documents from either side of the Taiwan Strait. These facts however, cannot prove whether the islands "belonged" to Taiwan according to the treaty. China and Japan are in agreement that Japan lawfully acquired sovereignty to the disputed islands during the very late 19th century, but they disagree regarding which mode of territorial acquisition the sovereign title was acquired through.

Before concluding the interpretative analysis, a case relevant to mention is the Pulau Litigian and Pulau Sipidian Case which might provide a possible analogy or at least shed some light on the phrase "appertaining or belonging", since a similar wording were used in this case. The wording that was being discussed in this case was "the islets belonging thereto". With reference to this wording, the court expressed that "...this can only be interpreted as referring to the small islands lying in the immediate vicinity of the three islands which are mentioned by name, and not to the islands which are located at a distance of more then 40 nautical miles away".²⁰³ Although one needs to be careful with making an analogy between these two cases because of the particular circumstances, the author is of the

²⁰³ Pulau Litigian and Pulau Sipidian Case, *Supra* n. 36

opinion that it expresses a reasonable point. The phrases “belonging thereto” or “appertaining or belonging” are similar and realistically have to refer to islands located in the immediate vicinity, at least as a general rule. Reasonable exceptions to this general rule could for instance be if the remotely located territory were inhabited and these inhabitants have social and cultural links to the territory to which they “belong”.

To conclude the interpretative analysis, neither the textual or the contextual analysis nor the subsequent conduct of the parties can be regarded as sufficient proof that the disputed islands were or weren't regarded as “belonging” to Taiwan according to the treaty, although the contextual analysis indicates, according to the author, that they weren't. Additionally, the Pulau Litigian and Pulau Sipidian Case provides a reasonable assessment of the phrase “belonging” which might shed some light on how a similar phrase might be understood in the present dispute.

5 Wartime declarations, oil discovery and reversion

5.1 Introduction

The phrase "Wartime declarations" refers here to the documents signed during and soon after World War II had ended, namely; the Cairo declaration, the Potsdam declaration, the document of Japanese surrender signed in Tokyo bay, the San Francisco Peace Treaty and the Treaty of Taipei. These documents aimed at reverting the Japanese territories to where they were prior to the Japanese imperialistic era in the late 19th century. Section 5.2 will provide a general introduction to these Wartime declarations and section 5.3 will provide a deeper analysis of the stances by the claimant States towards these declarations. The reason for this disposition is that these Wartime declarations have to be understood as an integrated whole, and therefore they first need to be briefly described. After this, section 5.4 will describe the eventful years following the oil discovery, focusing on the changed attitude towards legitimate Chinese government and the Okinawa Reversion Agreement. However, prior to this, it's necessary to portray the political landscape that emerged after the end of the World War II since this is essential to understand the Wartime and reversion declarations.

Regarding the political landscape that emerged in the East Asia after the war, two aspects are of particular importance. Firstly, during the early phase of the post World War II period, US leadership in the pacific region was increasingly challenged by the USSR and its communist block and the superordinate aim of the US administration became to limit the spread of communism in Asia. Hence, these tensions triggered the US to develop a containment policy where they were relying on its newfound allies in Japan and the ROC. This meant that the US had to respect the political views of the Tokyo and Taipei governments, sometimes to the detriment of the government in Beijing. The second aspect concerns which government was to be regarded as the legitimate government of the Chinese people. After the fall of the Qing Dynasty, a modern and non-imperial Chinese State emerged in 1912 led by a nationalistic party, which created a State called the ROC. However, a communist movement inside China emerged soon after which in 1927 led to a civil war between the communists and nationalists. This civil war came to a standstill during the Japanese invasion and both sides cooperated to fight the Japanese invasion. After the Japanese surrender however, the Chinese civil war rekindled with the nationalist forces, which previously had been superior, heavily weakened and forced to withdraw to Taiwan in order to regroup. The nationalists set up a government in Taipei and kept referring to themselves as the ROC claiming the continued existence of the ROC as the sole legitimate Chinese government. The withdrawal of the nationalist forces ended the Chinese civil war, although the underlying conflict is very much still alive today. Meanwhile in Mainland China, the victorious Chinese Communist Party established the PRC in

October 1, 1949, declaring it to be the successor State of the ROC and therefore the legitimate government of the Chinese people (including Taiwan). The fact that both governments claimed to be the legitimate rulers of China created a problem for the Allies and the emerging UN. Since the US was focused on containing the spread of communism, they were reluctant to recognize the legitimacy of the PRC and therefore chose to recognize the ROC up until 1978. The United Kingdom on the other hand took a different stance, choosing to recognize the PRC in January 1950. The main reason behind the UK's stance were most likely related to the fact that they had colonies in China and needed to recognize the PRC in order to maintain diplomatic relations. The differences in political approaches between the US and the UK were detrimental since the victorious Allies couldn't conduct negotiations in a unified manner and since the two Chinese governments didn't recognize each other, the only viable option was to conduct separate negotiations.

5.2 The Wartime declarations

From an Asian perspective, the Second World War was initiated by the second Sino-Japanese war (1937-1945). The Japanese military was greatly successful and by 1939, they had occupied almost the entire Chinese east coast as well as the Chinese islands in the South China Sea. The Japanese military success continued for another few years until the US entered the war, after which the Japanese imperial power began to decline.²⁰⁴

On New Year's Day 1942, roughly twenty countries, among which the big four (the US, Great Britain, the USSR and the ROC), came together to sign a declaration (the New Year's Day agreement henceforth), which later became the basis for the modern United Nations. Through this declaration, the signatories pledged to cooperate with each other and not to make separate armistices with the enemies.²⁰⁵ Later, the big four, apart from the USSR, assembled in Cairo on November 27, 1943, to discuss the future of the territories that imperial Japan had seized. The leaders came to an agreement known as the *Cairo Declaration*, which reads the following in the second sentence of the second paragraph;

It is their purpose that Japan shall be stripped off all the islands of the Pacific which she has seized or occupied since the beginning of the first World War in 1914, and that all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and the Pescadores, shall be restored to the Republic of China. Japan will also be expelled from all other territories which she has taken by violence and greed.

The Cairo Declaration was agreed upon in the midst of the on-going war. One and a half years later, the war in Europe was over and the war in the Pacific was about to reach its conclusion, the same leaders convened

²⁰⁴ Saganuma, *Supra* n. 1, p. 119-120.

²⁰⁵ Lee, *Supra* n. 155, p 58.

again to sign the *Potsdam Declaration* of July 26, 1945, which in its relevant Article 8 reads as follows,

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*. (Emphasis added)

The Potsdam declaration proclaims which islands the Japanese territory shall consist of and speaks “such minor islands as we determine”. These islands were later determined in a document entitled SCAPIN-677²⁰⁶, dated January 2, 1946, which didn’t enumerate the Senkaku/Diaoyu islands among these “minor islands”. However, since the Allies were anticipating a final territorial settlement, they inserted a caveat to this document stating that “nothing in this directive shall be constructed as an indication of allied policy relating to the ultimate determination of minor islands referred to in Article 8 of the Potsdam Declaration”.²⁰⁷

After the US dropped two atomic bombs on Japan in early August 1945, Japan declared their unconditional surrender to the Allies on August 15, 1945. The instrument of Japanese surrender was signed in Tokyo Bay on September 2 and reads, “We, ... hereby accept the provisions set forth in the declaration ... issued at Potsdam”, according to its first sentence.

As can be implied from the wording of the Cairo and Potsdam declarations together with the instrument of Japanese surrender, these were only interim arrangements meant to be finally settled by the Allies at a later and more appropriate time. The final peace settlement between the Allies and Japan was agreed upon through the San Francisco Peace Treaty of 1951, which went into effect on April 28, 1952. In relation to this treaty, it is important to note that neither of the ROC, PRC or USSR were parties. The ROC and the PRC were never invited to the negotiations because of disagreement among the Allies regarding which was the legitimate Chinese government. The USSR however, participated in the negotiations but eventually refused to sign it (for reasons that are irrelevant for this paper). The SFPT states the following in relation to Japanese reversion of territories:

Art. 2 (b):

Japan renounces all rights, title and claim to Formosa and the Pescadores

Art. 3

Japan will concur in any proposal of the United States to the United Nations to place under its trusteeship system with the United States as the sole administering authority, Nansei Shoto south of 29 degree north latitude (including the Ryukyu and the Daito Islands), Nanpo Shoto south of Sofu Gan (including the Bonin Island, Rosario Island and the Volcano Islands) and Parece Vela and Marcus Island. 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.

²⁰⁶ The full title of this document reads *The Supreme Commander of the Allied Powers’ Memorandum for the Imperial Japanese Government, No 677*.

²⁰⁷ Lee and Ming, *Supra* n. 184, p 8-10.

A few features of this treaty are interesting to emphasize. Firstly, Article 2 (b) doesn't use the phrase "revert to" but instead uses the phrase "Japan renounces all rights, title and claim". The reason behind this wording is the disagreement among the Allies regarding which was the legitimate Chinese government. Secondly, compared to the Treaty of Shimonoseki and the Cairo and the Potsdam declarations, Article 2 (b) of the SFPT is much more limited in its territorial scope. This Article only mentions Formosa (Taiwan) and the Pescadores (Penghu) and not their "appertaining and belonging"²⁰⁸ islands, or "other territories which she has taken with violence and greed"²⁰⁹. Even though it appears rather clear that Article 2 (b) doesn't include the Senkaku/Diaoyu islands, Lee and Ming nevertheless makes an argument that the wording is more ambiguous than it appears. These scholars contend that it is possible that the disputed islands were meant to be an integral part of the phrase "Formosa" (Taiwan) and as a consequence, the SFPT doesn't provide a clear answer regarding the disposition of the disputed islands and therefore, Article 2 (b) needs to be subject to interpretation through the VCLT framework. The authors further contend that within this framework, drafts may be used as a supplemental means for interpretation. The first draft of the SFPT, dated March 19, 1947, defined the Japanese territorial limits as "those existing on January 1, 1894, subject to the modification set forth in art 2, 3..."²¹⁰ Had this wording become the actual treaty language, the disputed islands should've been reverted to China pursuant to this treaty, since the treaty of Shimonoseki was signed after the stipulated date, according to Lee and Ming. Japanese scholars have contested this argument based on two grounds. Firstly, that this draft in question is irrelevant since the wording of art 2 (b) of the SFPT isn't ambiguous, the Senkaku/Diaoyu islands aren't an integral part. Secondly, this draft also contains a clause, which deals with the reversion of the Treaty of Shimonoseki and provides a list of islands adjacent to Taiwan. This list doesn't include the Senkaku/Diaoyu islands and therefore, even if this draft had survived the re-drafting process, the treaty wouldn't have obliged Japan to return the islands.²¹¹

Thirdly, it's important to emphasize that Article 3 has different legal implications than Article 2 (b). While Article 2 (b) enumerates the territories Japan has to renounce its claims to, Article 3 only obliges Japan to accept the US as the trustee of the islands enumerated hereunder. Hence, the legal implications of Article 3 weren't for Japan to permanently lose any underlying rights to these territories, but for the US to become a temporary administrator, without this affecting any possible underlying rights.

Before proceeding further, Article 3 of the SFPT needs a more thorough discussion. This Article authorized the US, within stipulated boundaries, to

²⁰⁸ Which was the phrase used in the Treaty of Shimonoseki of 1895.

²⁰⁹ Which was the phrase used in the Cairo Declaration of 1943.

²¹⁰ Lee and Ming, *Supra* n. 184, p. 8.

²¹¹ Lee and Ming, *Supra* n. 184, p. 8-10.

propose to the UN, the area it should become administrator of. This proposal, which was adopted by the UN, was issued on December 25, 1953 and entitled USCAR No. 27²¹² and it included the Senkaku/Diaoyu islands. Although the PRC's official stance (see further the section below) is that they refute the validity of the SFPT, some Chinese scholars have nevertheless put forward some arguments relating to the interpretation of this treaty as well as what the actual motives behind the treaty was. Firstly, in relation to Article 3 of the SFPT, Lee and Ming have argued that the phrase "Nansei Shoto" is actually more ambiguous than it first appears since two different meanings can be attached to this phrase; one geographical or historical and one administrative. Lee and Ming expresses, through a reference to Taira Koji, that the geographical or historical term "Nansei Shoto" refers to the following groups of islands; Tokhara, Amami, Okinawa and Yaeyama, which excludes the Senkaku/Diaoyu islands. On the other hand, from an administrative perspective, the disputed islands were incorporated into the Okinawa Prefecture as a part of Nansei Shoto, but this was only done during the very late 19th century, and hence the inclusion of the disputed islands under Nansei Shoto wasn't an established practice. Lee and Ming's argument concludes that the ordinary meaning of "Nansei Shoto" ought to refer to the geographical or historical usage of the phrase. The legal implication of Lee and Ming's argument would be that the US wasn't allowed to place the disputed islands under its administration since it violates Article 3 and hence USCAR No. 27 would be invalid.²¹³ Manjiao takes a different position on the matter and concludes that the disputed islands are geographically located within "Nansei Shoto south of 29 degree north latitude", and therefore the US was allowed to include the disputed islands under its trusteeship and therefore USCAR No. 27 is legally valid.²¹⁴

As explained above, due to the political landscape that emerged after the end of World War II, it became a necessity for Japan to sign two separate treaties in order to formally conclude the war. Apart from the SFPT, which is a multilateral treaty between Japan and the Allies, Japan also had to sign a bilateral treaty with the ROC. This treaty is know as the Treaty of Taipei, and was signed on April 28, 1952, and took effect on August 5. This treaty largely corresponds with the SFPT and with reference to the Senkaku/Diaoyu islands conflict, the following two Articles are of interest;

Art 2:

It recognizes that under Art 2 of the Treaty of Peace, which Japan signed at the city of San Francisco on 8 September 1951..., Japan renounces all right, title and claim to Formosa and the Pescadores as well as the Spratly islands and the Parcel islands.

Art 4:

²¹² The full name of this document is *United States Civil Administration of the Ryukyus No 27*.

²¹³ Lee and Ming, *Supra* n. 180, p. 8-10.

²¹⁴ Manjiao, *Supra* n. 13, p. 185.

It recognizes that all treaties, conventions, and agreements concluded before 9 December 1943 between Japan and China have become null and void as a consequence of war.

In comparison to the SFPT, it is interesting to note that Article 2 of the Treaty of Taipei adds the Spratly and the Parcel islands to the list of islands Japan has to renounce its claim to. Further, similar to the SFPT, the issue of which Chinese government should be the recipient of these territories was left circumnavigated.

5.3 Stances by the claimant States towards the Wartime declarations

The PRC's official stance towards the Wartime declarations is that they refute the validity of the SFPT, claiming that it violates both the spirit and the letter of the New Year's Day agreement and the Cairo and Potsdam declarations. This stance was expressed by then Chinese Premier Zhou Enlai on August 16, 1951. This critique however, aimed at the SFPT in its entirety without mentioning the disputed islands.²¹⁵ Although the PRC protested against the signing of the SFPT, this protest was disregarded, arguably because the PRC didn't have diplomatic relations with the US or Japan at the time.²¹⁶ Since the PRC refutes the validity of the SFPT, they instead contend that the Cairo and Potsdam declarations ultimately settled all territorial issues between China and Japan, caused by Japan during its imperialistic era. The PRC claims that the Senkaku/Diaoyu islands should've been reverted to China pursuant to the Cairo and Potsdam declarations since the former expresses that Japan shall "be expelled from all other territories which she has taken by violence and greed" and the latter that "Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku and such minor islands as we determine". Hence, the PRC argues, Japan is under a legal obligation to revert the disputed islands, a circumstance that also the signatories to the Cairo and Potsdam declarations (primarily the US and the UK) are well aware of. Additionally, since the disputed islands legally became Chinese territory as a consequence of the document signed at Tokyo Bay, the SFPT is also invalid on the ground that other States cannot sign legal documents, which affect the territorial status of a third party. Furthermore, the PRC also rejects the Treaty of Taipei claiming that the PRC succeeded the ROC as the legitimate government of the Chinese people on October 1, 1949, and as a consequence, the government in Taipei cannot, enter into legal contracts.

The official stance by the ROC towards the present dispute is fundamentally the same as the PRC's, since they both share a common history. However, their stances towards the Wartime declarations deviate. Contrary to the PRC, the ROC doesn't claim that the Cairo and Potsdam declarations ultimately settled the territorial issues; they argue that the Treaty of Taipei

²¹⁵ Sugauma, *Supra* n. 1, p. 123.

²¹⁶ Lee and Ming, *Supra* n. 180, p 8-10.

should be regarded as the final arbiter since the legal implication of Article 4 of this treaty is that the Treaty of Shimonoseki becomes null and void. Since the Treaty of Shimonoseki, according to the Chinese perception, ceded the disputed island to Japan, these islands should've been reverted once this treaty became null and void.²¹⁷ The ROC's stance towards the SFPT is rather ambiguous. When the ROC ambassador to the US first learnt about the SFPT he initially objected due to the lack of reparations demanded from Japan together with the fact that the Chinese recipient wasn't mentioned. Later, when the ambassadors' demands were rejected by the US, he expressed that the ROC couldn't accept the terms but wouldn't publically remonstrate against it.²¹⁸ The ROC therefore officially took a stance of silence towards the SFPT, a stance that also applied to the subsequent US administration of the islands.²¹⁹ Another complication for the ROC is that the Treaty of Taipei, through its Article 2, recognizes Article 2 of the SFPT. This Article however, only deals with the territories that Japan has to renounce and the ROC has expressed that it doesn't consider this Article to have any relevance on the Senkaku/Diaoyu islands dispute, a reasonable stance since they aren't mentioned. Furthermore, the ROC argues that the reason why it didn't protest against US administration of the disputed islands, which was the effect of the SFPT, was that they were dependent on US military support for its existence during the post World War II period.²²⁰

The Japanese official stance is firstly, that the Cairo and Potsdam declarations are completely irrelevant to the Senkaku/Diaoyu islands issue since these declarations aimed to revert what Japan acquired through its war-aggression while the disputed islands were acquired through peaceful occupation. Secondly, Japan contends that the SFPT should be considered as the final arbiter of all the post war dispositions between China and Japan. Article 2 (b) stated that "Japan renounces all rights, title and claim to "Formosa and the Pescadores" and since the Senkaku/Diaoyu islands weren't mentioned among the islands that Japan had to renounce, they remain sovereignty. Japan further claims that although the disputed island weren't an integral part of Article 2 (b), they were an integral part of Article 3 since they are included in the phrase "Nansei Shoto south of 29 degree north latitude". Because of this inclusion, the US was allowed to place the disputed islands under its administration and hence USCAR No. 27 is legally valid. The legal implication of this stance is that Japan didn't lose her sovereignty, since the islands were only temporarily placed under US trusteeship.²²¹

5.4 The years following the oil discovery

During the period of US administration from the early 1950s until the early 1970s, the disputed islands stirred very little Chinese and Japanese interest.

²¹⁷ Lee, *Supra* n. 155, p 58-63.

²¹⁸ Lee and Ming, *Supra* n. 180, p 8-10.

²¹⁹ Saganuma, *Supra* n. 1, p 121.

²²⁰ Lee, *Supra* n. 155, p 58-63.

²²¹ Lee, *Supra* n. 155, p 58-63.

This drastically changed however towards the end of the US administration when it was learned, through a UN sponsored expert committee, that there might exist large quantities of natural resources located in the vicinity of the disputed islands. This sensational report was published in 1968 and significantly changed the political landscape.²²² The Japanese response came in May 1969 when the Okinawa Prefecture for the first time erected national markers on Diaoyu Island. This action was followed on July 17, 1970, by the delivery of a diplomatic note to the ROC in which Japan claimed sovereignty over the disputed islands. The Japanese claim wasn't received well in Taiwan. In September the same year, Taiwanese protesters hoisted a flag on the islands, which Japanese authorities removed days later. These Japanese actions triggered anti-Japanese sentiments among patriotic Chinese people worldwide, which led to the foundation of the protest movement "Safeguard the Diaoyutai". This movement gained widespread support, especially among Chinese intellectuals in Taiwan, Hong Kong and the US and reached its height just before the reversion of the disputed islands to Japanese rule on May 15, 1972.²²³ The ROC launched its official protest against Japanese sovereignty in February 1971, which was followed by the PRC's ditto, in December the same year.

The years of 1971-1972 was eventful for the Chinese people on both sides of the Taiwan Straits and turned out to be detrimental for the ROC who up until this time had been recognized as the legitimate government of the Chinese people by a majority of all States and held China's seat as a permanent member of the UN Security Council. In October 1971, the UN General Assembly adopted Resolution 2758, which not only permitted the PRC to occupy China's seat at the Security Council, but also expelled the ROC entirely from the UN. After being expelled from the UN, the ROC experienced other diplomatic setbacks in 1972. Most importantly, Japan withdrew its recognition of the ROC in order to establish diplomatic relations with the PRC in accordance with the Sino-Japanese communiqué of September 29, 1972. In order to achieve diplomatic relations, Japan had to renounce the legality of the Treaty of Taipei and in return the PRC abandoned their claim to war reparations from Japan.²²⁴ Another important event that took place during 1972 was the Shanghai Communiqué between the US and the PRC. This agreement was particularly important for the future political cooperation between China and the West and it started a process wherein a large number of States switched from recognizing the ROC to the PRC as the legitimate Chinese government. This process culminated with the US altering its position in 1978.²²⁵

The main event during 1972 with direct relevance to the present dispute was the Okinawa Reversion Treaty²²⁶ (ORT henceforth), which entered into force on May 15, 1972. Its Article 1 (1) reads the following,

²²² Shaw, *Supra* n. 2, p. 11-12.

²²³ Shaw, *Supra* n. 2, p. 13-15.

²²⁴ Shaw, *Supra* n. 2, p. 15.

²²⁵ Kissinger, *Supra* n. 23, p. 267-273.

²²⁶ The full name of this treaty is *Treaty Between Japan and the United States of America Concerning the Ryukyu Islands and the Daito Islands*

With respect to the Ryukyu Islands and the Daito Islands, as defined in paragraph 2 below, the United States of America relinquishes in favour of Japan all rights and interests under Article III of the Treaty of Peace with Japan signed at the city of San Francisco on September the 8, 1951, effective as of date of entry into force of this Agreement. Japan, as of such date, assumes full responsibility and authority for the exercise of all and any powers of administration, legislation and jurisdiction over the territory and inhabitants of the said islands.

Obviously the disputed islands aren't expressly mentioned in this Article but through the reference to Article 1.2 it becomes clear that "the Ryukyu Islands and the Daito Islands", refers to the same area that the US was awarded pursuant to Article 3 of the SFPT except for the territories already reverted pursuant to previously concluded treaties. Hence, if the Senkaku/Diaoyu islands were an integral part of Article 3 of the SFPT, they were consequently also an integral part of the ORT.

The PRC remonstrated against the ORT, understanding that it could affect the underlying sovereignty issue and this made an impact on the US who felt obliged to clarify its position. The first official US statement regarding its stance towards the ORT was expressed in October 1971, by Legal Advisor Robert Starr and the same stance has been reiterated on several occasions ever since. The first statement reads as follows,

The United States believes that a return of administrative rights over those islands to Japan, from which the rights were received, can in no way prejudice any underlying claim. The United States cannot add to the legal rights of Japan possessed before it transferred administration of the islands to us, nor can the United States, by giving back what it received, diminish the rights of other claimants. The United States has made no claim to the Senkaku Islands and considers that any conflicting claims to the islands are a matter for resolution by the parties concerned.²²⁷

5.5 Analysis

The first section of this chapter dealt with the Wartime declarations and although it is evident that all of the described treaties and declarations aimed at reverting the Japanese territorial boundaries to where they were prior to its expansionist era, none of these treaties or declarations explicitly mentioned the disputed islands. In fact, there's no information, from either the official governments or legal scholars, which indicate that the disputed islands were ever discussed during the negotiations. The Japanese stance is that the Cairo and Potsdam declarations are irrelevant in relation to the sovereignty issue since the SFPT was the final arbiter regarding the Japanese post war territories and this treaty neither explicitly nor implicitly included the territories among which Japan had to revert. The stance of the ROC is similar to that of the PRC, the only difference is that the Treaty of Taipei is binding on the ROC, which means that they first need to refute that this treaty has any relevance for the sovereignty issue. Since The Treaty of Taipei is silent in relation to the sovereignty issue, the ROC has a strong argument in claiming that this treaty is irrelevant and therefore place

²²⁷ Lee and Ming, *Supra* n. 180, p. 11.

themselves in a position similar to that of the PRC. Since the stances of the ROC and the PRC are essentially the same and since Japan's claim is that the Wartime declarations are irrelevant, the further analysis will focus on the PRC's claim.

The PRC's stance towards the Cairo, Potsdam, Tokyo Bay and Taipei agreements have already been sufficiently described and analyzed. Of primary interest is therefore its stance towards the SFPT. The official stance of the PRC is that they refute it in its entirety. Chinese scholars however, has provided a more sophisticated critique and from analyzing their work it becomes apparent that theirs stance is derived from two different arguments. The first argument can be described as the "illegality argument", which is grounded on the New Year's Day agreement, which imposes an obligation on the signatories not to conclude separate peace treaties with Japan. The second argument can be described as the "non-party argument" and rests on the principle that a State is not bound by a treaty to which it isn't party, a principle expressed in the VCLT framework as well as in case law.

The Chinese non-party argument appears to be strong. The principle that a State isn't bound by a treaty to which it isn't party is a general rule with only one exception. Two conditions must be met in order to deviate from this principle. The first is that the signatories must intend for a provision to afford a right to the third party, obligations or limitations cannot be imposed this way. The second is that the third party must consent. None of these conditions are met in the case of the PRC and the SFPT and therefore the non-party argument appears to have solid support.

The illegality argument appears comparatively weaker and according to the author, there are four reasons for this. First and primarily, it isn't certain whether the SFPT would constitute such a "separate armistice with the enemy" that the New Year's Day agreement aims to prohibit. The reason why the SFPT isn't necessarily an "armistice" relates to this word itself. According to the oxford dictionary, an armistice is "An agreement made by opposing sides in a war to stop fighting for a certain time; a truce".²²⁸ The crucial part of this definition is that an armistice refers to an agreement aimed to stop the fighting during the war. The SFPT was signed in 1951 and the World War II officially ended with the Japanese surrender in October 1945. The "armistice" in this case, between the Allies and Japan was the document signed at Tokyo Bay on October 1945. Therefore, the SFPT shouldn't be regarded as an armistice because the war had already ended and the SFPT didn't aim to stop the fighting, but to define Japan's post war territories.

Secondly, although the SFPT would be regarded as an "armistice", the discussion provided in relation to the first argument, nevertheless needs to be taken into account in order to understand the context of both the New Year's Day agreement and the SFPT. The New Year's Day agreement was signed with the aim of establishing a war alliance in order to fight the Axis

²²⁸ Oxford Online Dictionary, search word "armistice"

powers and if the signatories had signed separate armistices, this would have weakened the chances of the Allies to ultimately win the war. Therefore the New Year's Day agreement has to be understood as a treaty that primarily aimed to strengthen the Allies while the fighting was still ongoing and not to limit the signatories in dividing the territories of the Axis powers once the war was over.

Thirdly, although the SFPT would be regarded as a "separate armistice with the enemy", since it was concluded without China (both ROC and PRC), it isn't evident how far-reaching the obligations stipulated in the New Year's Day agreement really are. It would be unreasonable if the wording of the New Year's Day agreement are understood too literally, if one signatory could stop the other signatories from entering into treaties aimed at defining the post war territorial boundaries it would give that signatory an unreasonable "veto power" that the New Year's Day agreement didn't aim to provide. Lastly, although the SFPT would be considered as a violation of the New Year's Day agreement, the legal implication of this isn't necessarily to render the SFPT of its legality. The New Year's Day agreement doesn't explicitly state that all signatories needs to be present and in agreement for a subsequent armistice to be lawful. The New Year's Day agreement was signed by four States and the SFPT by 48²²⁹ and it is therefore highly doubtful, and not entirely reasonable, to conclude that the SFPT is illegal per se, merely because of the absence of China. Further, taking the political realities into consideration, with a clear majority of all States which recognized the ROC as the sole legitimate government of the Chinese people while the PRC were in de facto control over Mainland China, this strengthens the argument that Chinese absence cannot singlehandedly render the SFPT of its legality.

Another element of the illegality argument, which wasn't mentioned above, which deserves to be analyzed separately is the contention by Chinese scholars that not merely the New Year's Day agreement is the source that renders the SFPT of its legality, also the Cairo and Potsdam declarations makes SFPT illegal. This argument however also has an inherent weakness which is that both these declarations were, at least in relation to the defining the Japanese post war territories, only meant to be interim agreements intended to be finally settled after the war. The ultimate territorial settlement was the SFPT, which therefore has to be regarded as a de facto codification of these Wartime declarations. Additionally, the SFPT is also in conformity with the Cairo and Potsdam declarations because these declarations didn't mention or imply that the disputed islands should be reverted to China.

The argumentation above has concluded that the illegality argument has inherent weaknesses while the non-party argument is strong. Since the SFPT cannot be regarded as illegal per se, it is relevant to discuss its content and the author will here focus on the two arguments made by Lee and Ming. The first argument made by these authors was that Article 2 (b) is more ambiguous than it appears since the disputed islands could be perceived as

²²⁹ Manijao, *Supra* n. 13, p. 178.

an integral part of the phrase “Formosa” (Taiwan). The author is of the opinion that this argument has to be completely disregarded. Although it isn’t evident whether the disputed islands could be regarded as “appertaining and belonging” to Taiwan according to the treaty of Shimonoseki, they cannot be regarded as an integral part of the phrase “Taiwan” pursuant to the SFPT. The second argument put forward by these authors relates to Article 3 and the phrase “Nansei Shoto south of 29 degree north latitude (including the Ryukyu and the Daito Islands)” and they argue that “Nansei Shoto” has both a historical/geographical and an administrative meaning and that it is more reasonable to assume that the phrase in this circumstance refers to the historical/geographical according to the ordinary meaning of the treaty. This argument however, has limitations, since as Maijiao expresses, the disputed islands are geographically included in the second half of the phrase “south of 29 degree north latitude (including the Ryukyu and the Daito Islands)”. Therefore, regardless of which interpretation of the phrase “Nansei Shoto”, historical/geographical or administrative, is more in line with the ordinary meaning of the treaty, they were undoubtedly included in this geographically specified area and should therefore reasonably be considered as an integral part of Article 3. The legal implication of this is that the US was allowed to place these islands under its administration, which they also did pursuant to USCAR No. 27.

The argumentation above, which concluded that USCAR No. 27 has to be considered as legally valid is based on the circumstance that Japan was in a position to grant the US these administrative rights. The only way Japan could have been in such a position was if they held sovereign title to the islands prior to the conclusion of the SFPT and whether this was the case depends on factors, which have been analyzed in previous chapters.

The last section of this chapter focused on the eventful years following the oil discovery. The main focus was on the ORT and according to the author it appears evident from the wording of this treaty, and additionally strengthened by subsequent statements from the US, that the US was only reverting administrative rights to Japan and hence this treaty provides no useful information regarding the underlying sovereignty issue.

In conclusion, the focus of this analysis has been to determine whether, as China argues, the Wartime declarations created an obligation on Japan to revert the disputed islands to China. Although it is evident that all of the described treaties and declarations aimed at reverting the Japanese territorial boundaries to where they were prior to its expansionist era, it is equally evident that none of these treaties or declarations explicitly mentioned the disputed islands and making the argument that these islands were an integral part of the Cairo and Potsdam declarations is highly difficult. Therefore it has to be concluded that the Chinese stance can hardly be supported and that treaty law is most likely irrelevant for the sovereignty issue of the Senkaku/Diaoyu islands.

6 Concluding analysis

The purpose of this paper was to describe and analyze which of the competing States has the better claim to sovereignty under international law. However, since the author wasn't in a position similar to that of a judge or arbitrator, with all available data the parties chose to present and with unbiased linguistic translations at his disposal, the purpose wasn't necessarily to take a position on the critical legal issues that a court or tribunal would have to adjudicate. The present dispute is immensely complex and given these limitations, it appears unreasonable to aim at decisively adjudicating the dispute. The secondary purpose of this paper is interconnected with the primary purpose and it was to analyze how this conflict, should it ever be adjudicated, could enrich and clarify the contents of international law.

Should the present dispute ever be adjudicated, the author finds it quite likely that the first issue the court or tribunal would have to determine concerns what kind of framework the present dispute should be adjudicated against. More specifically, the adjudicating body would have to decide how the international law rules of territorial acquisition should be applied in non-western parts of the world where this system has historically been completely unknown. Should international law be inclusive towards different systems of international relations and accommodate for a special treatment wherein regional perceptions of sovereignty are taken into account? In the Eritrea and Yemen Arbitration, the Tribunal emphasized the inherent difficulties of applying the international law rules of territorial acquisition in non-western parts of the world. Although the Tribunal expressed that difficulties with the establishment of historical facts prevented it from accepting the claim of historic title based on a different legal framework than international law, it indicated a willingness to accept such claims if only the existence of such a claim could be sufficiently proven. Hence it appears not entirely unreasonable to believe that international law in the future could become more inclusive towards different systems of government control and international relations in matters of territorial acquisition. Having stated this, it needs to be clarified that the aforementioned Award didn't elaborate on how different systems could be dealt with within the international law discipline, it merely opened up for such consideration.

Arguably the most controversial aspect of this paper has been the inclusion of the alternative framework labeled "ancient possession since time immemorial". The reason behind this inclusion is derived from the critique articulated by Chinese scholars that since international law was completely unknown to East Asia until the mid 19th century, it isn't entirely reasonable to evaluate whether China acquired sovereignty solely through the lens of international law. As expressed in the introductory chapter, this framework cannot be supported by positive international law. However, the author is of the opinion that, should the present dispute ever be adjudicated, it isn't

entirely unreasonable that the PRC would raise the argument that international law cannot properly adjudicate this territorial dispute since East Asia has historically been governed by a different system of international relations. The PRC might contend that in order to reach a substantively fair adjudication, the political realities of the EAWO need to be taken into account. Therefore, the author deemed it relevant to analyze an alternative framework and the aforementioned framework was chosen because it provides reasonable and balanced prerequisites for territorial acquisition that are sufficiently clear and less euro-centric. Although the author is of the opinion that the political realities of the EAWO, from a *de lege ferenda* perspective, needs to be taken into account, the issue of how international law can accommodate different concepts within the international law discipline itself is a highly difficult matter. In this paper, the alternative framework has been analyzed parallel to the international law framework. However, the author is of the opinion that should international law develop a more inclusive approach towards different regional systems of international relations in non-western parts of the world, it appears more likely that this development would take place within the international law discipline itself, rather than dispatched from it as it has been described in this paper. From a *de lege ferenda* perspective, the international law rules of territorial acquisition needs to be reasonable and fair also towards non-western parts of the world and therefore, international law need to accommodate for regional differences, should the existence of such a system be sufficiently proven. Therefore, arguably the most interesting feature, should the present dispute ever be adjudicated, is if and how the adjudicating body would facilitate for a more inclusive approach towards non-western perceptions of territorial acquisition and sovereignty.

After choosing a framework to evaluate the sovereignty issue against; strict application of international law or accommodating for an inclusive approach towards the political realities of the EAWO within international law, the second issue the court or tribunal would be faced with is the critical date concept. The notion of a critical date within international law hasn't been sufficiently developed and the present dispute could therefore enrich and clarify the contents of international law in this regard. The critical date concept has sometimes been characterized as a matter of substantive law and sometimes as procedural law and in some cases the concept has not been elaborated on or otherwise dismissed as being of little value. The general rule however appears to be that the critical date is "the date when the dispute crystalized", which is the date when the parties formally oppose each other's claim, typically when one State asserts sovereignty and the other disputes this claim. Therefore, should this concept be utilized under the present conflict, the most reasonable conclusion would be to set the critical date at the date of the first formal protest of the PRC, which was in December 1971. The PRC would most likely argue in favor of an earlier critical date, possible October 1945 when Japan officially surrendered and the islands became lawfully Chinese or 1951 when they first protested against the SFPT. The weaknesses of both these critical dates are that it can hardly be concluded that the dispute had crystalized in either 1945 or 1951.

The weakness of arguing in favor of choosing 1945 as the critical date is that although the document of official Japanese surrender incorporated the Cairo and Potsdam declarations, neither of these documents explicitly nor implicitly referred to the dispute islands. The weakness arguing in favor of choosing 1951 as the critical date is that the protest of the PRC aimed at the SFPT in its entirety, without expressing any objection towards how the said treaty were handling of the disputed islands. Additionally, there exists no evidence that the disputed islands were ever discussed in Mainland China or Taiwan from 1895 to 1968 and therefore, the only reasonable conclusion is that the present dispute had not crystalized prior to 1971, since the Chinese protest had not been sufficiently expressed prior to this.

The third issue that a court or tribunal would have to adjudicate is how to apply the intertemporal principle to this case. The implication of the first branch of the said principle is theoretically rather straightforward. According to this branch, the issue of whether Ming China acquired sovereignty shall be evaluated against the international law prevailing during 1368-1644. Likewise, the issue of whether Qing China acquired sovereignty shall be evaluated against the law in place during 1644-1895 and lastly the issue of whether Japan acquired sovereignty shall be evaluated against the law of January 21, 1895 (given that Japan claims to have acquired sovereignty based on the Emperors ratification of the Cabinet Decision). There exists however a difficulty with the application of the first branch under the present dispute which is that the international law prerequisites of occupation, prevailing during the Ming dynasty, but also during large parts of the Qing dynasty, haven't been established.

The second branch of intertemporal law is both theoretically and practically more difficult. Theoretically, what this branch means is that the continued manifestation of occupation shall follow the evolution of the requirements of occupation. Applied to the present dispute, this means that since the requirements of occupation increased throughout the analyzed period, and specifically increased through the establishment of effective occupation, the demands of manifestation on the State holding sovereign title increased in order for this State to maintain its title.

The application of the second branch of the intertemporal principle is highly problematic under the present dispute since there are a number of unresolved legal issues that first needs to be independently adjudicated before it is possible to determine what State has the better claim to sovereignty. According to the Chinese perception, China held sovereign title from immemorial times until April 17, 1895 when the disputed islands lawfully became Japanese through the mode of cession. After this, the islands continued to be lawfully Japanese until October 1945 when the document of Japanese surrender was signed. This document incorporated the Potsdam and Cairo declarations and hence Japan became bound to these declarations through signing the document of formal surrender. With reference to the present dispute, the legal consequence of Japan signing this document was that the disputed islands became lawfully Chinese, according

to the Chinese stance. However, because of the political situation that emerged following the end of World War II, with two Chinese governments claiming to be the legitimate rulers of the same territory and States worldwide adopting different approaches regarding which government to recognize, China was largely prevented from conducting international affairs. Additionally, the geopolitical interests of the US soon after the end of the war became to contain the spread of communism and to fight the communist block, which had a detrimental effect on the newly established PRC. The PRC therefore claims to have been deprived of its legal rights and for this reason hasn't been able to fulfill the requirements of effective occupation from October 1945 until today, as demanded by the second branch of the intertemporal law, primarily by the US and Japan.

Applying the second branch of intertemporal law to Japan is relatively easier. The application of the second branch in territorial disputes means that claimant States need to fulfill the requirement of effective occupation defined as "the actual, continuous and peaceful display of State functions in regard to the territory". In this context, being peaceful means that the territory in question is not occupied by another State and that the occupation has not been disputed by another State. From the previous chapters Japan appears to have a strong argument that she acquired sovereign title in 1895 and treated the islands in accordance with the requirements of effective occupation at least until the outbreak of World War II in the Pacific and possibly also until the SFPT came into effect in 1952. During the following twenty years the islands were under US administration and Japan had no active relationship with the islands. However, from the wording of the ORT and subsequent official statements by the US it appears evident that US administration didn't affect any underlying sovereignty claims. The islands were reverted to Japan in 1972 and they have since maintained control. However, both the ROC and the PRC disputed Japanese sovereignty in 1971 and hence the "peaceful-requirement" cannot be regarded as fulfilled during the period from the fall of 1971 until today. This circumstance however isn't necessarily relevant because of the critical date analysis above concluded that the critical date reasonably must be set at December 1971.

The application of the second branch of the intertemporal principle in territorial disputes undoubtedly favors the State currently in de facto control over the territory. The present dispute however has particular circumstances consisting of the political realities which emerged after the end of World War II and therefore, if this conflict should ever be adjudicated, the present dispute could enrich and clarify the contents of international law regarding whether it is of any legal significance that one State has been deprived of its right to fulfill the requirements of effective occupation based on political and military strategic factors completely outside of its control.

Should the present dispute ever be adjudicated, the author finds it most probable that the adjudicating body would adopt a similar approach as was adopted in the Palmas Island Arbitration. In this Award, the Arbitrator decided on a critical date and then, through an application of the second

branch of the intertemporal principle, focused on whether Spain could prove that she had exercised sovereignty in accordance with the law applicable at the critical date. Since Spain couldn't prove that she had exercised sovereignty in accordance with the requirements of effective occupation prevailing at the critical date, while the Netherlands could, Spain lost the case and the arbitrator never had to decide whether Spain ever held sovereign title. If the framework provided by this case would be applied to the present dispute, the adjudicating body would most likely determine the critical date to be December 1971 and then rule that the PRC couldn't prove an exercise of sovereignty in accordance with the law applicable at this date. Japan on the other hand, would most likely be able to prove meeting the requirements of effective occupation during 1895-1952 after which they maintained residual sovereignty during the US administration. Hence, the Chinese claim would fall on the second branch of intertemporal law and the adjudicating body wouldn't have to rule on the issue of whether imperial China ever held sovereign title (the issue analyzed in chapter 3) or the issue of through which mode Japan lawfully acquired sovereign title (the issue analyzed in chapter 4) or whether the wartime declarations obliged Japan to return the islands to China (the issue analyzed in chapter 5). This perception is additionally strengthened by the *Minquiers and Ecrehos* case wherein the Court determined the historical data to be of little value and instead focused on the evidence relating to the effective occupation.

The above analysis has concluded that Japan appear to have a stronger claim under contemporary international law, based on the critical date and the intertemporal principle since the second branch of this principle undoubtedly favors the State in control over the territory at the critical date. Additionally, the author is of the opinion that the issues analyzed under chapters 3-5, appear to favor the Japanese claim. Firstly, chapter 3 dealt with the issue of whether imperial China ever acquired sovereignty. The main difficulty of this analysis relates to the fact that the international law prerequisites of occupation weren't sufficiently established prior to the concept of effective occupation emerged around the mid 19th century. If mere visual discovery were to be regarded as sufficient to create sovereign title, China undoubtedly has a strong claim but if the visual discovery needs to be coupled with formal acts, China has a weaker case. Having stated this China did incorporate the disputed islands into her coastal defense system and in some local gazetteers. Further, Chinese scholars and non-Chinese scholars depicted the islands as constituting Chinese territory and it therefore isn't entirely unreasonable that an adjudicating body would conclude that China held sovereign title prior to 1895. The author is however of the opinion that a conservative approach towards territorial acquisition appears more reasonable and therefore, China appears to have a weaker claim *vis-à-vis* Japan under international law. Having stated this, it appears rather evident from the historical data presented that both Ming and Qing China regarded the disputed islands as her territory, a perception that the Ryukyans most likely also shared, but since they were uninhabited, small and remotely located, imperial China didn't pay them much attention which probably is connected with the Confucian ideas of government

control, wherein the Emperor ruled men and not territorial space. Therefore, should the political realities of the EAWO be included in the evaluation, China appears to have a stronger claim vis-à-vis Japan.

Secondly, the analysis provided under chapter 4 also favors the Japanese stance, according to the author. Although the Japanese process of incorporation undeniably appears deceitful and dishonest, China is in a difficult position if she wants to contest the validity of the incorporation. China's strongest argumentation is to contest the validity of the Japanese incorporation is to claim that the disputed islands weren't terra nullius by January 1895 and therefore couldn't be subject to occupation. This claim would however depend on the adjudicating body deciding that the disputed islands were Chinese at this date. Another argumentation China could use if she wants to refute the legal validity of the incorporation is to claim that the Japanese animus occupandi wasn't sufficiently expressed since the Cabinet decision wasn't made public until the 1950's and erection of national markers didn't take place until the very late 1960's, which deprived China of her right to protest. The strength of such an argument is however questionable since positive international law doesn't demand notification to foreign countries in order to fulfill the animus occupandi requirement. A different legal issue concerns interpretation of the Treaty of Shimonoseki, which according to the author also favors the Japanese position since neither the textual or the contextual analysis nor the subsequent conduct of the parties can be regarded as sufficient proof that the disputed islands were regarded as "belonging" to Taiwan according to the treaty. This perception is further strengthened by case law, which has expressed that an almost identical phrase should be understood to refer to islands in the immediate vicinity of the main islands.

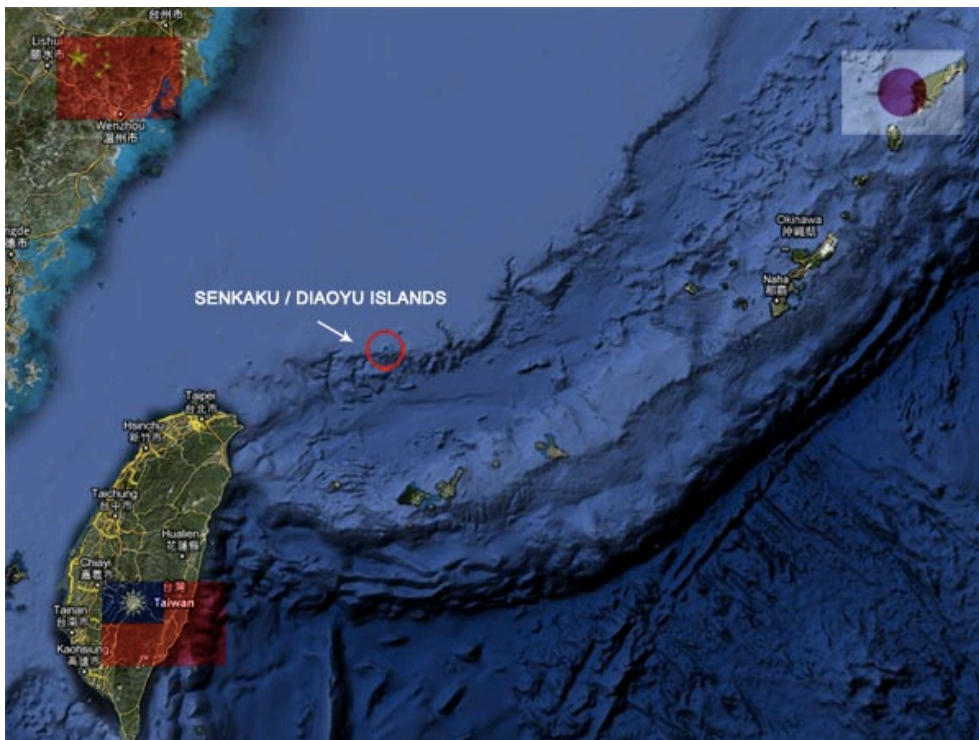
Thirdly, the analysis provided under chapter 5 also favors the Japanese stance, according to the author. The main reason behind this is that if the wartime declarations are analyzed independently, it has to be concluded that the Cairo and Potsdam declarations are merely interim agreements that didn't aim to ultimately settle the territorial issues. Instead the SFPT, which cannot be considered as illegal per se, has to be regarded as the final arbiter of the territories the Japanese military had acquired since the signatories to this treaty aimed for it to be the final arbiter.

Another factor, which strengthens the Japanese claim, relates to the lack of official Chinese protest during the period following the end of the war until 1971 (February in the case of the ROC and December in the case of the PRC). Although the PRC claims to have protested against the SFPT in 1951, this remonstrance was aimed towards the said treaty in its entirety and not towards the handling of the disputed islands and therefore the author is of the opinion that this protest doesn't constitute a sufficient protest of Japanese sovereignty. Additionally, it appears rather evident from the SFPT that the disputed islands weren't integrated in Article 2 (b) but were integrated in Article 3 which means that Japan wasn't obliged to renounce its rights and claim permanently but were obliged to temporarily accept US

administration should the US chose to include the islands under its administration. The US exercised this right through USCAR no. 27, a circumstance all claimants could learn about through the said document as well as subsequent US handling of the disputed islands. Since according to the Chinese perception, the disputed islands were lawfully Japanese until 1945 but became lawfully Chinese following the Japanese surrender, they should have protested against the legal implications of Articles 2 (b) and 3 of the SFPT together with USCAR no. 27. The legal implications of these documents were rather evidently that the disputed islands wouldn't be included in the territories Japan had to renounce and therefore Japan would remain residual sovereignty, a circumstance China should have protested. The PRC might argue that they didn't have diplomatic relationship with the US until 1978 and was therefore unable to protest and the ROC has argued that they were dependent on US military support for their survival and therefore could protest. However, the author is of the opinion that none of these excuses could be supported by international law. Even though neither the PRC nor the ROC perceived US administration as problematic, they should have protested Japanese residual sovereignty since it was fairly predictable from the SFPT that the US would eventually revert the control to Japan. The fact that Japan, the PRC and the ROC didn't claim sovereignty until they learned about the oil discovery indicates that sovereignty over the islands weren't regarded as an important matter by any of the claimants, a circumstance that is detrimental to the Chinese claim.

The discussion above has contended that the strength of the Japanese claim is derived from the fact that the critical date and the intertemporal principle is favorable towards Japan but also supported by the analysis of the three encompassing legal issues dealt with under chapters 3-5 together with the lack of Chinese official protest during 1945-1971. Having stated this, it lastly needs to be emphasized that this is a highly complex conflict and that all of these issues, which have been dealt with separately, are connected and the outcome of one issue depends on the outcome of another and therefore the conflict cannot be properly adjudicated within the limited scope of this paper.

Supplement



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